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COMMENTS

A Review of Sentencing in Missouri: The Need for Re-evaluation and Change

A penal philosophy which would integrate the various legal and societal goals would demand reappraisal of the power to sentence. Because the great majority of defendants plead guilty,[1] the stature of the criminal court is measured largely by the exercise of its penal power. The twentieth century trend in penology has been aimed at the individualization of the sentence. Correctional treatment rather than punishment is emphasized.[2] However, these rehabilitative ideals must be balanced by the community's interest in the prevention of crime. Unfortunately, the haphazard legislation in the states reflects little consensus and establishes few guidelines for effecting a balanced penal philosophy.[3]

While some Missouri statutes reflect widely adopted penal rules,[4] other provisions differ substantially from those in the majority of jurisdictions. In cases other than those in which capital punishment is invoked, Missouri is one of only twelve states which require that the jury sentence the guilty offender.[5] Whether the jury is qualified to sentence is questionable; but further problems are encountered when this duty is left solely to judicial discretion. Therefore, present and proposed statutory policies should be given a critical analysis in light of Missouri's sentencing needs.

JURY SENTENCING

The Jury's Role

In Missouri, the role of the jury encompasses a broader spectrum

1. Jones, *The Trial Judge—Role Analysis and Profile* in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 139 (1965). In the city of St. Louis, *e.g.*, 10,717 felony and misdemeanor cases were disposed of from the year 1961 through 1965. Of this number, 9,131 cases were on pleas of guilty. This latter figure represents 85.2% of the total cases disposed.
2. See Burns v. United States, 287 U.S. 216, 220 (1932).
3. Jones, *supra* note 1, at 140.
4. See MO. REV. STAT. § 556.280 (1959). This is Missouri's habitual criminal act which provides that the judge may impose a greater penalty on the recidivist.
5. MO. REV. STAT. § 546.410 (1959). In addition, seven other states allow jury sentencing for all crimes. See ARK. STAT. ANN. § 43-2145 (1947); GA. CODE ANN. § 27-2502 (1953), as amended (Supp. 1965); MONT. REV. CODE ANN. § 94-7411 (1947); OKLA. STAT. ANN. tit. 22, § 926 (1958); TENN. CODE ANN. §§ 40-2704—07 (1955); TEX. CODE CRIM. PROC. ANN. art. 693 (1941); VA. CODE ANN. § 19.1-291 (Supp. 1960). Three states allow jury sentencing to a limited extent. See N.D. REV. CODE §§ 12-06-06 (1960) (homicide); ALA. CODE tit. 14, §§ 318, 322, 344, 355, 409 (1959) (various specified offenses); IND. ANN. STAT. § 9-1819 (1956) (offenses where the indeterminate sentence does not apply). Kentucky allows the jury to assess the limits of the sentence only. See KY. REV. STAT. § 431.130 (1963), as amended (Supp. 1966).

of responsibility than is found in the great majority of states. Like most jurisdictions, Missouri permits the jury to assess capital punishment under certain circumstances.[6] But in Missouri jury sentencing is also allowed in all other cases where the defendant pleads not guilty[7] and does not waive his rights to a jury trial[8] or come within the application of the habitual criminal statute.[9] Should the jury fail to agree upon a penalty, the court is instructed to render an appropriate sentence.[10] The judge is likewise provided with the power to review and reduce the jury sentence.[11] However, even with these safeguards against erroneous or arbitrary jury sentencing, the Missouri supreme court has been reluctant to reduce the sentence unless it was obviously rendered with passion and prejudice against the defendant.[12] Through its sentencing power, the jury effectuates the rules of criminal law for good or evil with little probability that its judgment will be reversed.

Jury's Emphasis on Deterrence

It has been said that an advantage of jury sentencing is that it reflects the community's interest in controlling rising crime rates. A survey taken in the city of St. Louis indicates that juries presently render much stricter sentences than do judges.[13] Yet the number of all cases handled by these courts is rapidly increasing.[14] Although a jury may feel that strict sentences for convicted criminals will serve as a deterrent to crime, reality has not proved this notion to be true. Although the sincerity of a jury's intent to deter crime is not doubted, the propriety of allowing a jury so motivated to sentence criminals is in question. It has been held that most penologists agree that certainty of punishment is a more persuasive weapon to deter crime than an overly harsh sentence.[15] But punishment itself is worthless if no example is set to replace the offender's criminal tendencies. The rationale behind strict jury sentencing is a mixture of vengeance and ignorance of the meaningful goals of a successful penal philosophy.[16] A juror's personal aversion to a particular crime should not restrict his consideration of the criminal. The "deterrence approach" can only be justified when applied to individual offenders who have developed some sense of moral responsibility and repentance for their crimes.[17] This breed of criminal is in the minority. Unless some limitation is put upon the jury's authority, the large number of persons preferring to plead guilty may be partially explained by their fear of a harsh penalty. Society will benefit when the criminal not merely is punished but also is rehabilitated.[18] Therefore the use of the power to sentence the criminal as a tool for reforming him should be of utmost concern.

Lack of Information to Prescribe a Rehabilitative Sentence

The sentence pronounced should be weighed according to the individual's requirements as determined by a study of his character, his criminal record, his social history, and possibly by the recommendations of persons skilled in the study of human behavior. In Missouri the jury must consider all of the facts in evidence at the trial.[19] Evidence that would be irrelevant to the crime may be pertinent to the sentence. But much of this evidence is inadmissible. For example, it is improper to allow evidence of the defendant's prominence in the community.[20] The same rationale applies where the defendant's previous criminal record is introduced,[21] for this evidence may tend to prejudice the verdict of the jury. In addition, the probation

6. Mo. Rev. Stat. §§ 195.200 (narcotics), 557.020 (perjury), 559.030 (murder), 559.260 (rape), 560.135 (armed robbery) (1959).
7. Mo. Rev. Stat. § 546.410 (1959); Mo. Sup. Ct. R. 27.02 (1959).
8. Mo. Sup. Ct. R. 27.02 (1959).
9. Mo. Rev. Stat. § 556.280 (1959).
10. Mo. Rev. Stat. § 546.440 (1959); Mo. Sup. Ct. R. 27.02 (1959); see State v. Hurtt, 338 S.W.2d 876 (Mo. 1960).
11. Mo. Sup. Ct. R. 27.04 (1959); see State v. Caffey, 365 S.W.2d 607, 610 (Mo. 1963).
12. See State v. Gillespie, 336 S.W.2d 677 (Mo. 1960); State v. Laster, 365 Mo. 1076, 293 S.W.2d 300 (1956).
13. Four offenses—second degree murder, rape, armed robbery, and second degree burglary and stealing—were selected for the survey encompassing the period from January 1, 1962 to July 1, 1966. The penalties of death and life imprisonment have not been considered because no accurate numerical value can be attached to either. One jury sentence of 99 years for armed robbery was also omitted because it was wholly disproportionate to the normal jury sentence and was rendered due to extenuating circumstances. The statistics established that 76 defendants were convicted by juries for all four offenses, and 942.5 years were assessed by juries in their sentences, averaging 12.4 years per defendant. Circuit judges in the city of St. Louis dealt with 1,087 defendants who pleaded guilty in the same categories of crime and assessed 4,856.2 years of imprisonment, averaging 4.47 years per defendant. A simple statistical test was used to determine whether there is a real difference between these seemingly incompatible averages. See generally, Hoel, Introduction to Mathematical Statistics 244-47, 401 (3rd ed. 1962). This test is the X^2 test which determines an expected value from one set of figures and compares these values with another set of observed figures. Here $X^2 = 592.7$. Reference to a standard mathematical table designed to numerically establish a point of comparison disclosed that a vastly significant difference may be observed in the sentencing policies of judges and juries. Based on this test, it is possible to say with a 99% level of confidence that juries in St. Louis grant significantly heavier sentences than do judges.
14. During the year 1965 the circuit courts of the city of St. Louis disposed of 1,565 more cases than during the previous year.
15. See, *e.g.*, Garnholz, *Need for an Indeterminate Sentence Law in Missouri*, 13 J. Mo. B. 57 (1957).
16. See Webster, *Jury Sentencing—Grab Bag Justice*, 14 Sw. L.J. 221, 225-7 (1960).
17. Campbell, *Developing Systematic Sentencing Procedures*, Fed. Prob., Sept., 1954, p. 6.
18. Bergan, *The Sentencing Power in Criminal Cases*, 13 Albany L. Rev. 1, 3 (1949).
19. See, *e.g.*, State v. Meadows, 330 Mo. 1020, 51 S.W.2d 1033 (1932).
20. State v. Spencer, 307 S.W.2d 440, 446 (Mo. 1957).
21. See State v. Mobley, 369 S.W.2d 576 (Mo. 1963). Such evidence is admissible only to establish the credibility of the defendant as a witness.

officer's presentence report is only available to the judge when he is authorized to sentence.[22] This report furnishes a helpful account of the defendant's previous offenses and social characteristics. However, even if this information were to be presented to the jury after the verdict, two additional points of concern would arise. First, the information in the report would take some weeks to gather, thus prolonging the trial and greatly inconveniencing the jurors. Secondly, if the information were gathered during the trial, an acquittal would render its formulation a waste of the probation officer's time.[23] While the Missouri rule wisely protects the defendant from a verdict prejudiced by irrelevant factors, it leaves the jury without an understanding of the defendant's background and correctional needs. The jury actually bases its sentence upon whatever evidence of the defendant's character it perceives at the trial. For this reason the punishment is usually determined more by the jury's estimate of the crime than its perception of the criminal's needs.

Jury Speculation

Further problems arise from the jury's uninformed speculation as to the proper length of the sentence. One great danger lies in the jury's inability to separate the verdict from the sentence. It is widely held that when the judge must assess the penalty he should not indicate to the jury what penalty will be given if they should render a guilty verdict.[24] Such an indication could easily convey the idea that the judge believes that the defendant is guilty and desires a similar finding from the jury. Should there be a hint of leniency in the judge's indication of the penalty, then the juror might be tempted to resolve his doubts as to the defendant's guilt by settling for a conviction with a light sentence. In this way the court has acted contrary to the rule that the defendant is entitled to an acquittal if there is a reasonable doubt as to his guilt. In reality, a light penalty can never compensate for the deprivation of the possibility of a verdict of not guilty. The same idea applies to the sentencing jury. Due to the persuasive tactics of other jurors voting for conviction, the doubtful juror may ease his conscience and change his vote of not guilty to one of conviction of the defendant provided that the other jurors agree to a light sentence.[25]

Another important factor is the jury's speculation as to the length of incarceration. Missouri allows the parole board to grant parole to any prisoner even before the usual statutory minimum term of one third of his sentence is served.[26] While it is contended that the jury

22. Mo. Sup. Ct. R. 27.07 (1959).
23. See Note, 60 Colum. L. Rev. 1134, 1156-7 (1960).
24. Miller v. United States, 37 App. D.C. 138 (1911); People v. Sherman, [illegible] App. Div. 274, 35 N.Y.S.2d 171 (1942).
25. Comment, 17 U. Chi. L. Rev. 400, 405-6 (1949).
26. Mo. Rev. Stat. § 549.261 (1959).

deserves to know of the possibility of parole,[27] Missouri law forbids the court to give an instruction to that effect.[28] This rule is totally defensible when the court's instruction is instrumental in the assessment of an inordinately long sentence designed to discourage an early parole. Such jury action impedes the purpose of the parole statutes and is prejudicial to the defendant. Such dangerous jury speculation can be avoided by eliminating jury sentencing entirely.

The Possibility of Prejudice

The conscious or subconscious influence of personal bias may affect the juror's determination of the sentence. Irrelevant considerations of race, religion, the defendant's nonresidency, or the degree of urbanization of the geographical area perhaps may be influential upon the jury's sentence.[29] Considerations of the defendant's race or social status have drawn pointed criticism.[30] A survey taken in the state of Texas[31] determined that Negro offenders receive lighter penalties from juries for "intraracial" crimes than for "interracial" crimes.[32] The conclusion is that, assuming juries to be predominately white, the sentence is aimed at the basic protection of the white community and reflects a tolerance of conditions within the Negro community. Nevertheless, the validity of this conclusion must be tested in other social environments. A survey of jury sentencing in the city of St. Louis indicates that white and Negro defendants were treated no differently in each of four categories encompassing "intraracial" and "interracial" crimes.[33] A general accusation of ra-

27. Comment, *supra* note 25, at 406.
28. State v. Cornett, 381 S.W.2d 878 (Mo. 1964).
29. Garnholz, *supra* note 15, at 75; Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. Crim. L., C. & P.S. 411 (1961).
30. *E.g.*, "white collar" criminals—traditionally those from the upper socio-economic strata of the white population—are usually given different sentences because of the disunited public resentment toward their offenses. Embezzlement is an example of "white collar" crime. See Sutherland, White Collar Crime 9, 48-9 (1st ed. 1949).
31. Bullock, *supra* note 29.
32. *Id.* at 416. "Intraracial" crimes are offenses commonly committed by the criminal against those of the same race. "Interracial" crimes are those more commonly committed against persons of another race.
33. The "intraracial" crimes of rape and second degree murder were chosen with the "interracial" crimes of armed robbery and second degree burglary and stealing. The survey encompassed the period from January 1, 1962 to July 1, 1966. These figures exclude the death penalty, life imprisonment, and one 99 year sentence.

	White			Negro		
Crimes	Defendants	Years	Average Sentence	Defendants	Years	Average Sentence
Rape and Murder	3	57	19	18	319	17.7
Robbery and Burglary	22	238	10.8	33	328.5	9.9

Applying X^2 test, *supra* note 13, to all of these statistics, $X^2 = 1$ indicating no significant differences.

cial prejudice in jury sentencing is inappropriate. But just as the racial trend in St. Louis differs from that in Texas, so it may differ from the racial trend in other Missouri counties. The possibility that some isolated defendants will be sentenced by socially biased juries is not unforseeable. This possibility could arise from the trial of a spectacular, much-publicized crime. This hazard alone should caution the advocate of jury sentencing. A properly instructed jury should arrive at a completely impartial verdict; unfortunately, this jury is not instructed to exercise the same careful discretion in its sentence. The sentencing process is not bound by the trial's strict rules of evidence nor a rigid application of the due process requirement of the fourteenth amendment.[34] Actual prejudice would be very difficult to prove to an appellate court. Yet its influence upon the layman is a very real possibility.

Thus, from most viewpoints the jury is ill-equipped to discover and weigh all of the elements essential to an objective sentence. The jury is not allowed to go beyond the record of the trial in its deliberations. Should this rule be changed, the danger would exist that the defendant may be prejudiced by the sentence. The better solution would be to grant exclusive sentencing powers to an authority oriented in the legal, sociological and ethical considerations important to a reasonable and impartial assessment of the penalty.

Judicial Sentencing

The Judge's Role

According to the common law, the judge was solely responsible for sentencing the criminal.[35] Because most defendants plead guilty, Missouri judges more often exercise the power to sentence than do juries.[36] In addition, the Missouri statutes recognize that the judge is better qualified to act in the more difficult situations,[37] that is, those situations which require exercise of the judge's superior qualifications. Because he sentences in the majority of cases, the judge should have developed some degree of penal expertise. He deals with persons convicted of similar crimes and those habitually guilty of the same crimes. From his vantage point he should recognize the differences in the character, attitude, and environment of each offender. The similarity of crimes and the variations in criminals are constant reminders that the sentence should be founded upon a carefully-weighed assimilation of factors. In contrast, the jury deals once

34. Williams v. New York, 337 U.S. 241, 247 (1949). While it is beyond the scope of this comment to pursue the constitutional questions which may arise in sentencing procedure, it should be noted that the *Williams* rule has received some solid criticism. See Silving, *"Rule of Law" in Criminal Justice* in Essays in Criminal Science 77 (1st ed. 1961).

See People v. Davis, 1 Ill.2d 597, 116 N.E.2d 372 (1953).

See statistics note 1 *supra*.

See statutes cited notes 7-11 *supra*, and accompanying text.

with a single offense. The juror cannot become a penal expert through his experience with one isolated case. In addition to his lack of experience the layman also lacks access to important background information about the defendant. The judge may utilize the reports of probation officers to the extent deemed necessary to inform him of the criminal's correctional needs.

Judicial sentencing should be employed not only with convictions by guilty plea, but in all cases where the judge or the jury determine a defendant's guilt. However, judicial sentencing is not a simple answer to all sentencing problems. Preferential treatment for the individual pleading guilty could become attractive to judges with busy dockets. In addition, judges have also been criticized for the inconsistency in their sentences. But these problems can be remedied. Attempting to correct such factors in judicial sentencing is more feasible than relying upon the untrained and unprepared laymen who compose the jury.

The Guilty Plea and the Judge's Sentence

The use of the guilty plea expedites the disposal of the majority of criminal cases. Yet if they are to remain beyond reproach, judicial sentencing policies must avoid preferential treatment of the guilty plea.

Because a guilty plea amounts to a conviction,[38] it should not be used by the defendant without the realization that he is waiving certain rights. Unfortunately, the offender often expects a reward for his time-saving plea.[39] The inducement to the plea is usually made by either the reduction of the charge or by a request by the prosecutor for leniency. The danger lies in letting the convenience of the plea persuade the overworked judge to give its use preferential treatment. Certainly, "bargaining" for the sentence is a practice unbefitting the integrity of the court.[40] Lighter sentences for guilty pleas may not be due to judicial favoritism,[41] but perhaps may reflect the independent fact of heavy jury sentences. Lighter judicial sentences may also be explained by the absence of the trial proceedings; the judge can more easily consider rehabilitative factors when not confronted with the emotional nature of the testimony and arguments of the trial. The jury should be more concerned with the recounting of the crime. Consequently, its sentence reflects its desire to deter similar offenses

38. Kercheval v. United States, 274 U.S. 220, 223 (1927).

39. Note, 66 Yale L.J. 204, 205 (1956).

40. See Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. Crim. L., C. & P.S. 780 (1955).

41. *E.g.*, a survey taken in the city of St. Louis for the year 1965 indicated that where the defendant waived the jury and allowed the judge alone to try the case, convictions for the crime of armed robbery netted an average of 5 years imprisonment. But where the defendant pleaded guilty to the same offense, the average sentence was 7.73 years.

rather than to reform the offender.[42] The modern judge should recognize the equality of the reformative ideal with the deterrent aspects of sentencing. He should be aware that the extensive use of the parole system indicates that rehabilitation rarely requires the inordinate amount of time allocated by juries.[43] While we may speculate that the guilty plea might sometimes be motivated by a hope for a lenient treatment, sometimes it reflects the defendant's desire to accept the responsibility for his wrongdoing. This realization alone is the first step toward rehabilitation.[44]

These factors indicate that the convenience of the guilty plea is not necessarily the basis for lighter judicial sentences. No defendant should have to face the possibility of a compromise for his right to a fair trial. But until substantial proof of "bargain justice" can be found, it is best to leave the disposal of admittedly guilty criminals to the courts, unless other reasons demand limitations on judicial sentencing.

Sentencing Disparities

The courts have often been criticized for sentence disparities between different judges.[45] The common misconception of the disparity problem is that the sentence imposed will be more or less severe according to the judge's usual or occasional temperaments or health.[46] The disparities actually depend more upon the different facts of each case[47] and the different sentencing attitudes of the judges.[48]

Mathematical uniformity is a possible solution to disparities in judicial sentencing. However, the equalization of prison terms has been declared a disparate practice in itself,[49] for the judge could simply rubber stamp a statutory penalty on the unrealistic premise that every crime and every criminal is equally harmful to society. This type of rigid procedure is also incongruent with the rehabilitative trend in penology. The better solution to the disparity problem is judicial consistency rather than mechanical uniformity. Therefore, the important question to be answered is whether the individualization of the sentence should be implemented by the limited or unlimited use of judicial discretion.

42. See statistics note 13 *supra*.
43. See Smith, *Sentencing Alternatives Available to Courts*, FED. PROB., June 1962, p. 3. *E.g.*, the recommended period for probation is never more than three years. Sentencing experts generally advocate the use of a parole system that gives the prisoner an early chance to prove his reformation and obtain parole.
44. Note, *supra* note 39, at 209.
45. Celler, *Legislative Views as to the Value of the Institute*, 30 F.R.D. 231 (1961).
46. Goodman, *Would a System Where Sentences are Fixed by a Board of Experts be Preferable?*, 30 F.R.D. 319 (1961).
47. *Id.* at 320.
48. [illegible]ler, *supra* note 45, at 234.
49. [illegible]es, *Setting the Maximum and Minimum*, 30 F.R.D. 280, 282 (1961).

The use of the indeterminate sentence is a common proposal for individualizing each penalty.[50] By this method judicial discretion is limited according to the boundary of the term that the judge may prescribe. Jurisdictional variations allow the judge to grant a maximum term of imprisonment, the maximum and the minimum term, or merely an undefined term within a set of statutory boundaries.[51] Thereafter the parole board determines, within the limits of the term, when the prisoner has been sufficiently rehabilitated to return to society. In this way the judge's determinations are replaced by the discretion of the parole authorities. The Model Penal Code of the American Law Institute has adopted a similar process without overtly discouraging judicial discretion. The Code supplies the judge with the criteria for determining minimum terms for ordinary offenses[52] and extended minimum terms for aggravated offenses.[53] The Code wisely leaves examination of the criteria for imposing extended sentences[54] or granting probation[55] to the judge's discretion. The Code also provides for parole based on good behavior once the offender is imprisoned.[56]

While the Code reflects one of the latest approaches to indefinite imprisonment and conditional release, its total effect differs from current practices only in its definitive guidelines for judicial action. Where the judge may prescribe the minimum sentence within the Code's limits, he is given more sentencing power than allowed by most indeterminate sentence plans. However, the Code provides other subtle limitations that reflect some distrust of judicial discretion. For example, the Code contains a rule allowing the defendant to challenge the facts used in the mandatory presentence report[57] which, combined with the provision that delays the finality of all sentences for one year,[58] constitutes a severe questioning of the judge's ability. It is not inconceivable that judges will seek to avoid the Code's complex procedures by tendering lenient penalties for guilty pleas.[59] It is realistic to conclude that overly complicated procedures reflect an inherent lack of confidence in the court's judgment.

The concepts of parole and the indeterminate sentence, though

50. See Note, 7 DUKE L.J. 65 (1957); Arado, *Sentencing by Judge or Parole Board*, 29 A.B.A.J. 386 (1943); Garnholz, *supra* note 15.
51. For a discussion of the use of the indeterminate sentence, see Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 531-38 (1958).
52. MODEL PENAL CODE §§ 6.06, 6.08 (1962).
53. *Id.* §§ 6.07, 6.09, 7.03, 7.04.
54. *Id.* § 7.03.
55. *Id.* § 7.01.
56. *Id.* § 305.1.
57. *Id.* § 7.07(5).
58. *Id.* § 7.08(2).
59. See Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. REV. 608, 629 (1963).

distinct approaches, produce similar effects.[60] The state of Missouri subscribes to the "fixed term" sentence. Yet by the operation of Missouri's parole statute,[61] the offender faces an indeterminate period of imprisonment up to the "fixed term." This effect is produced by the possibility of conditional release at any time by the parole board's recommendation.[62] The adoption of an indeterminate sentence approach would only replace judicial sentencing with the assessment of maximum and/or minimum terms by the legislature. If judicial discretion is untrustworthy, the indeterminate sentence should be adopted. Otherwise the operation of present parole policies serves as an adequate check upon the judge's disposition of the offender.

Another measure that would severely limit, if not eliminate the court's authority is the use of a sentencing board. By this proposal, a board of social workers, psychiatrists, sociologists and prison officials would fix each offender's penalty. While the goal is a combined expert determination of the criminal's needs, the practice falls short of the ideal. Board members may differ as to the defendant's correctional needs. A prison official might emphasize the need for self-discipline;[63] a psychiatrist might treat each criminal as a patient suffering from a mental disorder.[64] In California an administrative board, the Adult Authority, has traditionally assessed all criminal sentences.[65] The board is composed of separate panels which have at times shown disparities in sentencing.[66] There is no justifiable basis for asserting that board members are more immune to the influence of personal prejudices or theories than are judges. Additional objections to the expense and to the danger of political appointments to such a board can be mustered. The old adage that "a camel is a horse made up by a committee" has a certain degree of relevance to the use of a sentencing panel.

The various proposals to remedy sentencing disparities present difficulties that consistent judicial practices can avoid. Judges should be given procedural criteria that are free from stifling complexity and distrust of their abilities. Training and experience should prepare

60. Tappan, *supra* note 51, at 530.
61. Mo. Rev. Stat. § 549.261 (1959).
62. § 549.261 provides for parole eligibility when one-third of a sentence is served. However the parole board may grant a parole before this minimum period has been served.
63. Macleod, *If a Penologist Was the Sentencing Judge*, 9 Can. B.J. 24, 27 (1966).
64. See Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 Law & Contemp. Prob. 650 (1958), which urges that the unreliability of diagnostic approaches to criminal behavior render them useless for correctional purposes. A better solution may be to utilize the advice of a pyschiatrist whenever a defendant displays a mental disorder. But employing psychiatrists on sentencing boards or even in clinics attached to the courts would be an expensive and not entirely reliable practice.
65. See Cal. Pen. Code Ann. §§ 1168, 3020 (1960), as amended §§ 1168, 3020 (Supp. 1965).
66. See Goodman, *supra* note 46, at 321.

them to make difficult decisions. If thereafter the judges can rely on the same sources of expert advice and can look to a more highly developed body of sentencing case law, they should be able to minimize disparities without restricting the exercise of their discretion.

The Steps to Reform

The Presentence Report

The first step toward consistency should be to organize the means of assistance available to the sentencing judge. Of greatest importance in this area is the use of the presentence report. In Missouri the courts are given discretion to use the presentence investigation.[67] However, it has been suggested that the statutes impliedly require the presentence analysis.[68] There is evidence that the use of this report is gaining greater adherence.[69] The classic Supreme Court decision of *Williams v. New York*[70] paved the way to the use of the presentence report by advocating that the trial judge use "the fullest information possible concerning the defendant's life and characteristics."[71] *Williams* not only affirmed the constitutionality of the report, but also warned that the "sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[72] This reasoning develops two important ideas. First, the judge is entitled to and should use every means available to individualize each sentence. Secondly, judicial discretion is enhanced by unrestricted use of the report. The judge may depend on the report entirely or not at all as the needs of each case direct.

The purposes of the presentence report are obvious. It is a sentencing aid to the court and a reference for the prison authorities who later deal with the criminal or for the parole officer if the defendant is paroled.[73] The report should contain information on the educational, military, employment and family background of the defendant, an analysis of his general social behavior, and a psychological examination if he displays any signs of a mental disorder.[74] Presently some states require sentencing judges to read the presentence report.[75] The importance of the report is gradually becoming recognized; this requirement is neither unwise nor restrictive of judicial discretion.

Other factors must also be considered by each judge before he

67. Mo. Rev. Stat. § 549.245 (1959); Mo. Sup. Ct. R. 27.07 (1959).
68. Note, 1964 Wash. U.L.Q. 396, 397 (1964).
69. *Id.* at 404.
70. 337 U.S. 241 (1949).
71. *Id.* at 247.
72. *Ibid.*
73. Sharp, *The Presentence Report*, 30 F.R.D. 242, 244 (1961).
74. See Note, *supra* note 68, at 400-01.
75. See, *e.g.*, Colo. Rev. Stat. Ann. § 39-16-2 (1963); N.Y. Code Crim. Proc. § 485-a (1958).

makes his final decision. Any character traits which the judge may discover in a personal interview may be helpful.[76] The nature of the crime must be considered, for society demands that a certain quantum of punishment attend each offense. With the aid of these criteria and the required use of the presentence report, the courts may initiate a consistent penal philosophy.

Appellate Review

The idea has been postulated that the disposition of criminals is a purely intuitive function.[77] This concept implies that the judge need not, and often cannot, explain his reasons for assessing a particular sentence. However, current appraisals of judicial sentencing policies deny the validity of this assumption.[78] Critics suggest that a broader scope of appellate review is the most effective means toward judicial consistency.[79] The appellate courts of Missouri may review only the record of the trial to determine whether the sentence should be nullified by evidence of passion or prejudice.[80] However, a system of active appellate review is scarcely enhanced by such limited authority. To be better informed, the appellate tribunal should review the presentence report used by the trial judge as well as the record of the trial. A more enlightened process would require the trial judge to submit written reasons for the disputed sentence.[81] The Missouri supreme court has approved by implication this latter procedure.[82] After these materials have been studied, the appellate court should be empowered to act by either affirming or reducing the sentence. The purpose of these changes will be reflected in the articulation of appellate criteria.[83] Each sentence appealed should be thoroughly discussed in the opinion of the court rather than affirmed or dismissed with a mere generalization of its merits.[84] In this way standards for sentencing judges are made. The appellate courts should not become catch basins for an overflow of unsound appeals. A system of clear appellate precedents could prevent this possibility by predicting the

76. See Edwards, *Society's Stake in the Criminal Sentence*, 22 TEX. B.J. 426, 430 (1959).
77. See Note, 69 YALE L.J. 1453, 1454 (1960).
78. *Id.* at 1455.
79. See Sobeloff, *The Sentence of the Court: Should There be Appellate Review?*, 41 A.B.A.J. 13 (1955). Some states have established special tribunals to evaluate and, if necessary, reduce or increase sentences on appeal. See, *e.g.*, CONN. GEN. STAT. §§ 51-194 —197 (1958), as amended (Supp. 1959). MASS. ANN. LAWS ch. 278 §§ 28A-D (1956).
80. State v. Rizor, 353 Mo. 368, 182 S.W.2d 525 (1944).
81. ORFIELD, CRIMINAL APPEALS IN AMERICA 112 (1st ed. 1939).
82. In State v. Wolfe, 343 S.W.2d 10, 15-16 (Mo. 1961), the court declared that "while technically not a part of the record, nevertheless there has been incorporated in the transcript on appeal the trial court's 'memorandum of the court's grounds for decision as to assessment of punishment,' and because it so clearly and forcefully elucidates the considerations which seemed to the court to [illegible]el the infliction of the particular penalty assessed, we set it forth."
83. Note, *supra* note 77, at 1466.
84. Id. at 1462.

success of future appeals and by guiding judicial discretion.

If the scope of appellate review is to be expanded, two important questions must first be answered. The first concerns the higher court's power to change the sentence. Will appellate courts be empowered to increase unduly lenient sentences? The constitutional implications of this question suggest that only the original trier of fact is entitled to prescribe the maximum penalty.[85] Because a lenient sentence would rarely be appealed, appellate courts should only be empowered to remand inordinately light sentences. The second question is whether appellate review will hamper the use of jealously guarded judicial discretion. On the contrary, the use of appellate review will only interfere with abused discretion. Presumably, most judges possess the fairness to avoid arbitrary decisions. It is unnecessary for judges to fear appellate review unless there is something obviously questionable about their decisions.

CONCLUSION

A comparison of the ability, the experience, and the channels of information open to the judge and to the jury leaves little doubt that the judge is better qualified to sentence. Penalizing the criminal is neither a guessing game nor an opportunity for society to "strike back" at crime. Blind revenge should not inspire the punishment following conviction. The use of experts in the behavioral sciences may promote the common goal of rehabilitation, but these persons lack the training of judges.[86] In addition, the traditional independence of the judge better immunizes him from political pressures.[87] His experience on the bench constantly reminds him to remain emotionally detached from each case. The judge's credentials are complete if he realizes the importance of balancing the ideals of rehabilitation and deterrence in each sentence. This goal can be achieved without burdening judges with the whole responsibility of discovering each offender's needs. Judicial expertise should be augmented by the required use of the presentence investigation report and an effective system of appellate review.

Whatever reasons once prompted legislators to give the awesome responsibility of sentencing to juries are no longer important. What is important is the promotion of the public welfare by a consistent

85. See Kaufman, *Sentencing: The Judge's Problem*, FED. PROB., Mar. 1960, p. 9. The author suggests that allowing an appellate court to increase a sentence could violate a defendant's constitutional rights. It may be argued that to subject the convicted criminal to the possibility of an increased sentence places him in double jeopardy at least as far as his punishment is concerned. But whether the protection against double jeopardy in the fifth amendment of the United States Constitution applies to the sentence is not certain.
86. Macleod, *supra* note 63, at 25.
87. See Kaufman, *supra* note 85.

correctional philosophy. Even the deterrence-oriented use of the death penalty for capital offenses should be stripped from the jury's uninformed discretion and reduced to a mere jury recommendation.[88] The jury system should not be disparaged. Yet the role of the juror should be confined to the task of rendering a verdict. The need for reform is urgent if Missouri is to emerge from the confusion of its present practice.

ROBERT E. REITER

88. See Knowlton, *Problems of Jury Discretion in Capital Cases*, 1 PA. L. REV. 1099, 1130-33 (1953).

Deductibility of Business Expenses—the "Away from Home" Clause

When is a taxpayer entitled to a deduction for his business traveling expenses? The Internal Revenue Code is explicit: he may deduct them when they are incurred while he is "away from home."[1] The difficulty comes in determining just when he is "away from home" within the meaning of the Code. The problem is most acute in regard to expenses incurred on short business trips but is by no means limited to that.[2]

Many definitions and tests have been suggested for the meaning of "away from home" but none have received universal acceptance.[3] The Internal Revenue Service (IRS) would like to read "away from home" as meaning "away from home *overnight*."[4] The courts, though they do not agree with this IRS interpretation,[5] have had little success themselves in arriving at an acceptable definition. The taxpayer, then, is understandably perplexed about whether his travel expenses are deductable.

LEGISLATIVE HISTORY

The legislative history of "away from home" does not aid much in defining it. In the early Internal Revenue Acts, the "away from

1. Section 62, INT. REV. CODE OF 1954, provides:
[T]he term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions . . . (2) Trade and business deductions of employees.— . . . (B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while *away from home*, paid or incurred by the taxpayer in connection with the performance by him of services as an employee. (Emphasis supplied.)
Section 162, INT. REV. CODE OF 1954, provides:
There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . (2) traveling expenses (including amounts expended for meals and lodging other than amounts expended which are lavish or extravagant under the circumstances) while *away from home* in pursuit of a trade or business . . . . (Emphasis supplied.)
2. For example, there has been a great deal of controversy where the taxpayer is employed a fairly long time, far from his home base of employment. See Peurifoy v. Commissioner, 358 U.S. 59 (1958), and Harvey v. Commissioner, 283 F.2d 491 (9th Cir. 1960).
3. See, *e.g.*, Hanson v. Commissioner, 298 F.2d 391, n.3 (8th Cir. 1962), which lists the following tests: the "distance" test, the "widely separated locations" test, the "need for rest" test, the "clear words of the statute" test, the "travel away from home" test, the "daily routine" test, and the "traveling in *connection with* the performance of his services as an employee and not solely in the performance of such services" test.
4. Rev. Rul. 239, 1963-2 CUM. BULL. 87.
5. See, *e.g.*, Hanson v. Commissioner, 298 F.2d 391 (8th Cir. 1962), and William A. Bagley, 46 T.C. No. 15 (1966).