AUTHORIZED DISPOSITIONS OF OFFENDERS UNDER THE NEW KENTUCKY PENAL CODE

There has recently been a growing public concern over the manner in which convicted criminals are treated in our society. Numerous newspaper stories, magazine articles and television specials have probed, examined, and criticized the present system that, to varying degrees, seeks to rehabilitate, punish and deter those who have committed serious offenses against society. The prison riots of late, the high rate of recidivism among convicted criminals,[1] and the expense of keeping a man in prison[2] are convincing arguments that penal reform is needed. A number of states, including Kentucky, have responded by enacting revised criminal statutes which incorporate modern theories of penology.

The new Kentucky Penal Code makes several important changes in the laws pertaining to the authorized penalties for offenders. Accordingly, the purpose of this article is to give the reader a working grasp of the law of sentencing. It is important that practicing attorneys and trial judges understand the interrelationship of the various sections and the wide range of sanctions available under the new law. Indeed, since the drafters of the Kentucky Penal Code stress the importance of flexibility in the alternatives available to the sentencing authority,[3] it would seem that a necessary prerequisite to enlightened sentencing practices is a thorough familiarity with the provisions of the new law.

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

[1] *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE THE CHALLENGE OF CRIME IN A FREE SOCIETY 45 (1967) [hereinafter cited as PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME].

[2] Statistics indicate that it costs on an annual national average, $1966 to imprison a felon, $1046 for inmates of local institutions, and $3613 for every juvenile. KENTUCKY COMMISSION ON LAW ENFORCEMENT AND CRIME PREVENTION, KENTUCKY JAILS 2 (1969). In Kentucky, the annual average cost of keeping a person confined in a local jail is $1116.90. *Id.* at 30.

[3] *See* KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE §§ 3405-3625, Commentary (Final Draft 1971) [hereinafter cited as LRC] wherein the term flexibility is repeatedly used by the drafters in describing the significance of the various sections of the new code.

rehabilitation is more effective and more economical.[4] It is hoped that, by reforming the criminal and turning him into a useful, law-abiding member of society, the wasting of human resources can be avoided and real progress can be made towards reducing crime.[5]

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

Jury Sentencing vs. Judge Sentencing

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

[4] LRC § 3505, Commentary. *See generally* Palmore, *Sentencing and Correction: The Black Sheep of Criminal Law*, 26 FED. PROBATION Dec. 1972, at 6-7 [hereinafter cited as Palmore, *Sentencing and Correction*] and Note, *Sentencing: The Good, The Bad and The Enlightened*, 57 KY. L.J. 456, 458-59 (1969).

[5] Palmore, *Sentencing and Correction*, *supra* note 4, at 6-7.

[6] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.1(b) (Tentative Draft 1967) [hereinafter cited as ABA, SENTENCING ALTERNATIVES] states:

> The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.

[7] ABA, SENTENCING ALTERNATIVES *supra* note 6, at § 2.1, Commentary *b-e* at 50-55.

[8] "Wise and fair sentencing requires intuition, insight, and imagination; at present it is less a science than an art. In the final analysis good sentencing depends on good judges." PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 141.

[9] For a study of the present state of our correctional institutions and recommendations for improvements in the area of corrections, see PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 158-85.

[10] KY. ACTS. ch. 385 § 265 (1972) [ch. 385 is hereinafter cited as KYPC], *Proposed* KY. REV. STAT. § 435A.1-060 [hereinafter cited as [KRS]]; LRC & 3430, Commentary; KY. R. CRIM. P. 9.84.

and indeed recent opinion has been nearly unanimous that jury sentencing should be abolished in non-capital cases.

There are several persuasive arguments against jury sentencing in non-capital cases. Most often cited is the fact that juries lack the expertise in sentencing, and thus are not capable of consistently prescribing the penalty which will be most effective. While a judge brings with him to every trial a wealth of knowledge and experience in the treatment of criminals, a jury is composed of laymen most of whom have no experience whatsoever. Further, the constantly changing membership of juries creates a greater chance of disparity in sentencing from case to case involving the same type of crime.[12]

Besides the general lack of expertise, a jury does not have before it all the information about the defendant which it needs to make a truly informed decision. Though the jurors may be able to gain some insight into the character of the defendant during the trial, the rules of evidence preclude them from receiving all information relevant to sentencing. Certainly, the jury has no equivalent to the presentence report available to the trial judge.[13] A possible solution would be to have a separate sentencing trial at which all relevant data would be admissible. This suggestion, however, has been rejected as both too time-consuming and too costly.[14]

It is also claimed by critics of jury sentencing that jurors are more likely to be influenced by passion or prejudice. Thus, one defendant might receive a stiffer penalty than another solely because of the jury's attitude toward the defendant, or perhaps his attorney. Although these allegations are difficult to substantiate, certainly such factors as the defendant's race, appearance, and conduct must to some extent enter into the sentencing decision as well as the decision of guilt or innocence.[15]

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

[11] ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 1.1, Commentary *a-b* at 43-47; PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 145; Note, *Sentencing: The Good, The Bad and The Enlightened*, *supra* note 4, at 473-80.

[12] *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 1.1, Commentary *b* at 44-47; Palmore, *Sentencing and Correction*, *supra* note 4, at 718.

[13] *Id.*

[14] See text accompanying notes 44-50 *infra*.

[15] *See* Note, *Sentencing: The Good, The Bad and The Enlightened*, *supra* note 4, at 473-76.

to compromise on a defendant's guilt in return for a lighter sentence.[16] The seriousness of such practice is apparent. An accused may be denied his right to be convicted only by a unanimous verdict because of a jury's desire to expedite a decision.

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

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

[16] ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 1.1, Commentary *b* at 46.

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

[18] *See* note 12 *supra*.

[19] *See* LRC § 3430, Commentary; Palmore, *Sentencing and Correction*, *supra* note 4, at 9-10; Note, *Sentencing: The Good, The Bad and The Enlightened*, *supra* note 4, at 469-72.

[20] Note, *Sentencing: The Good, The Bad and The Enlightened*, *supra* note 4, at 480.

sentencing in that the Authority has more relevant information before it than does a jury; has more time to consider such information and to consider a proper punishment; and has developed an expertise and uniform policy of sentencing which the lay jury lacks.[21]

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

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

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

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

[22] *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 1.1, Commentary *b* at 44; Moreland, *Model Penal Code: Sentencing, Probation and Parole*, 57 KY. L.J. 51, 56-57 (1968) [hereinafter cited as Moreland, *Model Penal Code*].

[23] ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 1.1, Commentary *c* at 47-48.

[24] LRC § 3430, Commentary.

[25] *Id.*

term of imprisonment which, though within the statutory limits, is deemed too harsh, the trial judge is empowered under *Kentucky Penal Code* § 266 [hereinafter cited as KYPC], *Proposed Ky. Rev. Stat.* § 435A.1-070 [hereinafter cited as [KRS]], to modify the jury's sentence and to fix a different maximum sentence. Moreover, if the judge is convinced that imprisonment would be inappropriate, he may grant probation or conditional discharge in lieu of imposing the jury's sentence.[26] Finally, since all sentences for felonies are indeterminate, the parole authorities are empowered to release the offender at any time after he is turned over to the Department of Corrections regardless of the maximum term set by the jury.[27]

The only error which cannot be cured is where the jury returns a sentence which is too lenient.[28] Neither the trial court nor the parole board can increase the maximum term of imprisonment set by the jury. Yet, despite this flaw, the drafters of the Code have determined that the advantages of jury sentencing outweigh the disadvantages.

Authorized Dispositions: Generally

A major improvement made in the new penal code is the classification of all felonies and misdemeanors.[29] Under the existing law each criminal statute prescribes the sanction to be imposed. The problem inherent in such a system is that one offender can be punished more severely than another who has engaged in substantially the same type of conduct in terms of harm done.[30] The fact that, at present, one who steals up to ninety-nine dollars in cash or property is subject to imprisonment for a maximum of twelve months while one who takes a two dollar chicken is liable to serve up to five years,[31] may be a source of amusement to some, but it is certainly not indicative of a modern system of criminal justice. By classifying all felonies and misdemeanors according to their seriousness, the Code achieves a more uniform, rational, and equitable sentencing structure.[32]

All felonies defined within the Code are placed in one of four classes: A, B, C, or D felonies.[33] There are three classes of mis-

[26] KYPC § 264 [KRS § 435A.1-040].

[27] *See* note 17 *supra*.

[28] LRC § 3430, Commentary.

[29] KYPC § 261 [KRS § 435A.1-010].

[30] *See* Lawson, *Criminal Law Revision in Kentucky: Part I—Homicide and Assault*, 58 KY. L.J. 242, 244 (1970).

[31] *Compare* KY. REV. STAT. § 433.230 (1973) [hereinafter cited as KRS] *with* KRS § 433.250; *see* Note, *Classification and Degrees of Offenses—An Approach to Modernity*, 57 KY. L.J. 491 (1969).

[32] *See* LRC § 3405, Commentary.

[33] KYPC § 261 [KRS § 435A.1-010].

riage were bad enough. But same-sex sex acts (which would include the homosexual side of bisexuality) and sex with animals were outright perversions of the God-ordained natural order of things. American and English jurisprudence sought to enshrine the laws of their understanding of this natural order and work out the implications. The result in respect to sexual relations was a blanket condemnation of non-heterosexual sex acts.

Consider Sir William Blackstone, for example. He was an eighteenth-century English jurist who was highly respected and influential throughout England and the colonies. In 1775, Blackstone published his multivolume authoritative work entitled *Commentaries on the Laws of England*, where he gave the background to English law in general and to its particular manifestations. This law, he argued, was based on the common law, which is nothing else but the universal natural law revealed by God. Stated Blackstone:

> As man depends absolutely upon his Maker for everything, it is necessary that he should, in all points conform to his Maker's will. This will of his Maker is called the law of nature.... This law of nature being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all of their force and all of their authority mediately or immediately from this original.[1]

A few years earlier, American patriot James Otis argued for this natural-law position in his tract "Rights of the British Colonies." He declared that parliaments should always seek to establish laws that are good for all peoples under their jurisdiction. This good, however, is not dependent on the declarations of parliaments but on "a higher authority, viz. GOD." Otis went on to say that "should an act of parliament be against any of *his* [God's] natural laws, which are *immutably* true, *their* declaration would be contrary to eternal truth, equity and justice, and consequently void."[2] Alexander Hamilton, who played a key role in the development of the U.S. Constitution, said that "no tribunal, no codes, no systems can repeal or impair this law of God, for by his eternal laws it is inherent in the nature of things."[3]

In regard to homosexuality and bestiality, the British and Americans shared the same understanding: natural law opposes both practices as disordered appetites. Using the word *sodomy* to cover same-sex, bi-sex, and human-with-animal sexual activities, English law and its American successor enacted laws against their practice. In his *Commentaries*, Blackstone summed up the state of the issue this way: sodomy is "the infamous crime against nature, committed either with man or beast ... the very mention of which is a disgrace to human nature."[4] All the nations of Western Europe, England, the American colonies, the first thirteen U.S. States, and all states added to the Union outlawed sodomy and prosecuted and punished offenders. In the United States, sodomy remained an illegal activity until the early '60s, at which time individual states began quietly repealing these laws. Today nearly half the states in the Union have decriminalized sodomy. Several of these states, as well as county and local municipalities, are considering, or have already passed, legislation providing protections for bisexuals and homosexuals due to their alleged sexual orientation.[5]

Sodomy is considered less and less a transgression of God's established order. The long-held view of sodomy as an unnatural, disordered appetite is being replaced by the view that sodomy is a natural, immutable condition every bit as healthy and good as heterosexuality. Thousands of years of Jewish and Christian condemnation and 450 years of English and American criminalization are quickly coming to an end. Alfred Kinsey and his followers have played one of the most critical roles in bringing about this moral and legal shift. Here's a sketch of how they did it.

Kinsey's Kinks

Kinsey was a Darwinian evolutionist, a eugenicist, and possibly a homosexual,[6] who grew up fascinated with botany and the diversity he found there. He liked all sorts of animals, especially snakes, but early in his career he became particularly interested in insects. Gall wasps really struck his fancy. According to one of his biographers, Kinsey's attraction to the gall wasp had to do with the insect's reproductive quirks: the gall wasps' "curious life history sometimes includes alternating generations, a rather rare biological phenomenon, in which offspring do not resemble their parents. One generation may be agamic—that is, able to reproduce without sexual union."[7]

Kinsey claimed that in 1938 he was approached to teach a noncredit course on marriage at Indiana University. His biographers report that when he researched the subject, he was "appalled by the lack of 'scientific' material on sexuality," so he set out to conduct some research of his own and began collecting sex histories.[8]

Dr. Judith Reisman disputes this official version of Kinsey's venture into the study of human sexuality. Reisman is the president of the Insti-

demeanors: Class A, Class B, or Violations.[34] Since the Code has retained jury sentencing the drafters decided that a four-tier classification of felonies was necessary in order to limit the jury's range in fixing maximum sentences. This same reason prompted the drafters to divide non-felonies into three categories.[35]

The authorized punishments for those convicted of Class A felonies are death, life imprisonment, imprisonment for some other indeterminate period not less than twenty years, or a fine.[36] Additionally, in one specific case, the sentence of life imprisonment without privilege of parole is authorized. This punishment may only be prescribed in first degree rape convictions in which the victim was under twelve years of age or in which the victim received serious physical injuries.[37] Originally, the final draft of the code had provided that life without parole would be an authorized punishment in *all* Class A felony cases.[38] The legislators, however, opted to limit the application of this sentence to the one particular crime.

As enacted, this provision authorizing life imprisonment without parole departs from existing law very little. Under present criminal statutes in Kentucky, such a sentence is authorized for but one crime, the rape of a girl *over* twelve.[39] Thus, as the law now reads, one convicted of raping a girl *over* twelve is subject to being imprisoned for life without the possibility of parole, while one convicted for the rape of a girl under twelve cannot be denied parole.[40] The Code cures this discrepancy by prescribing the more severe penalty, life imprisonment without parole, for the more serious offense, rape of a girl *under* twelve.

It should also be noted that the sentence of life imprisonment without privilege of parole cannot be imposed on juveniles, even when tried as adults. In two recent cases, *Anderson v. Commonwealth*,[41] and *Workman v. Commonwealth*,[42] the Court of Appeals held that this sentence, as applied to juveniles, is unconstitutional as a form of

[34] *Id.*
[35] LRC § 3405, Commentary. *See also* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 2.1, Commentary at 52. Some states have established five classifications of felonies, and others three degrees of felonies. Likewise, some jurisdictions have two types of misdemeanors while others have three types.
[36] KYPC § 263 [KRS § 435A.1-030].
[37] KYPC § 263 [KRS § 435A.1-030]; KYPC § 264 [KRS § 435A.1-040]. The question whether the Parole Board is bound by such a sentence is seemingly answered in KRS § 439.340 which empowers the board to release on parole such persons *as are eligible for parole.*
[38] LRC § 3415.
[39] KRS § 435.090.
[40] *Compare* KRS § 435.090 *with* KRS § 435.080.
[41] 465 S.W.2d 70 (Ky. 1971).
[42] 429 S.W.2d 374 (Ky. 1968).

cruel and unusual punishment. The Court reasoned that, since the objective of this sentence is to isolate from society the dangerous and incorrigible criminals, such a penalty is improper for juveniles, incorrigibility being inconsistent with youth.[43]

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

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

[43] *Id.* at 378.
[44] LRC § 3440. *See* MODEL PENAL CODE § 201.6, Comments 5-6 at 74-79 (Tent. Draft No. 9, 1959).
[45] *Id.; see* Note, *Bifurcating Florida's Capital Trials: Two Steps are Better Than One*, 24 U. FLA. L. REV. 127, 146-51 (1971) and Comment, *The Constitutionality and Desirability of Bifurcated Trials and Sentencing Standards*, 2 SETON HALL L. REV. 427, 428-29 (1971).
[46] Note, *Bifurcating Florida's Capital Trials: Two Steps are Better Than One*, *supra* note 45, at 147.
[47] Only six states have adopted the separate sentencing trial procedures: California, Connecticut, Georgia, New York, Pennsylvania and Texas.
[48] *See* Frady v. United States, 348 F.2d 84, 113-16 (D.C. Cir. 1965) (Burger, J., concurring in part and dissenting in part), *cert. denied*, 382 U.S. 909 (1965).

result? These are several questions which would have to be resolved if the split verdict procedure were implemented.[49]

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

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

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

[49] *Id.*

[50] *See* Comment, *The Constitutionality and Desirability of Bifurcated Trials and Sentencing Standards*, *supra* note 45, at 429-31.

[51] KYPC § 265 [KRS § 435A.1-060].

five years. Since all felony sentences are indeterminate, the sentencing authority can only designate the maximum number of years which may be served. Neither the judge nor the jury can set a mandatory minimum sentence.[52] Once the offender is turned over to the Department of Corrections, the amount of time that he actually serves is determined by the parole authorities. Thus, although the sentencer must levy a maximum term of between ten and twenty years for one convicted of a Class B felony, the amount of time served could be much less than ten years. This is consistent with the Code's objective of reforming and rehabilitating the criminal. If rehabilitation is the primary goal, the actual length of imprisonment, up to the maximum set by the sentencer, should be determined by those who supervise and continually re-evaluate the offender's case long after the jury is dismissed.[53]

The Code provides that the maximum sentence of imprisonment shall be twelve months for Class A misdemeanors and nine months for Class B misdemeanors.[54] In misdemeanor cases the jury or trial judge sentences the offender to a definite term of imprisonment in the city or county jail or in a regional correctional institution.[55] This, however, does not mean that misdemeanants must serve the entire sentence. Under existing statutes, which will not be superseded by the adoption of the Code, misdemeanants may be granted parole, generally by the county judge.[56] Nevertheless, while it is hoped that felons can be rehabilitated or reformed by serving a sentence in prison, the drafters of the Code readily acknowledge that, due to minimal opportunity to individualize punishment or treatment in local jails, imprisonment for misdemeanor convictions can only be justified as a deterrent. Indeed, the most notable achievement the Code makes

[52] LRC § 3420, Commentary.

[53] The MODEL PENAL CODE §§ 6.06, 6.07, Comment at 24-26 (Tent. Draft No. 2, 1954) sets a minimum sentence which the court shall impose for felony convictions. The minimum is raised for sentencing of those who are sentenced to extended terms as being dangerous or persistent felons. The argument in favor of allowing the court to designate a minimum sentence is two-fold. In the first place, minimum sentences are aimed at reassuring the public that dangerous criminals will be removed from society. Second, it is thought that the legislature and the courts should retain some control over the actual release of the offender. *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 3.2, Commentary *a-g* at 143-60.

Nevertheless, beyond the limited minimum sentence, both the Model Penal Code and the ABA Project support the concept of indeterminate sentences for felony convictions. *See* MODEL PENAL CODE §§ 6.06, 6.07, Comment at 24-26 (Tent. Draft No. 2, 1954) and ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 3.2, Commentary *b* at 144.

[54] KYPC § 268 [KRS § 435A.1-090].

[55] KYPC § 269 [KRS § 435A.1-100].

[56] KRS § 439.175 and KRS § 439.177.

with regard to the sentencing of misdemeanants is that it divides all misdemeanors into two classes, which restricts the jury's discretion in sentencing and should ensure that the punishment matches the offense.[57]

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

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

The sentence which may be imposed pursuant to the persistent

[57] *See* LRC § 3405, Commentary.

[58] *See* MODEL PENAL CODE § 7.03, Comment at 38-44 (Tent. Draft No. 2, 1954).

[59] Existing law requires that the two prior offenses be committed progressively. Thus, the felon must have committed the second offense after he has been convicted and has served his sentence for the first offense. Ross v. Commonwealth, 384 S.W.2d 324 (Ky. 1964); Cobb v. Commonwealth, 101 S.W.2d 418 (Ky. 1936).

[60] LRC § 3445, Commentary. *See generally* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 3.3, Commentary *a-g* at 162-71.

[61] LRC § 3445, Commentary.

[62] *Id.*

felony statute depends upon the classification of the felony for which the defendant presently stands convicted.[63] Thus, if the offender is convicted of a Class B felony, his sentence shall be an indeterminate term of imprisonment or not less than twenty years, nor more than life imprisonment. The effect of this is that the persistent felon who committed a Class B offense will be sentenced as if he had committed a Class A felony, with the one exception that he cannot be sentenced to death. If the offender is convicted of either a Class C or a Class D felony, he can be sentenced to not less than ten years, nor more than twenty years in prison, the normal penalty for convictions of Class B felonies.

This method of computing the extended sentence for an habitual offender is an improvement over the existing law. At present, KRS § 431.190 provides that a person convicted of a *second* felony shall be imprisoned for not less than double the time of the sentence under the first conviction and that a person convicted of a third felony shall be sentenced to life imprisonment. The Code, on the other hand, does not permit greater penalties for the conviction of a second felony. The drafters of the Code did not feel that a second felony conviction is sufficient evidence that the offender is an habitual criminal.[64] Moreover, by dividing the possible extended sentences according to the seriousness of the present offense, the Code achieves a more fair and rational approach to punishing the individual offender. The present habitual criminal statute does not consider the seriousness of the necessary three felonies. Having been convicted of two prior felonies, an offender convicted of a crime that would be a Class D felony in the Code is subject to a sentence of life imprisonment. In fact, all three convictions could be for relatively minor felonies and the penalty would still be twenty years to life imprisonment. The persistent felony offender section of the Code prevents such inequitable treatment by relating the additional sentence to the degree of the latest, or present, felony.

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

[63] KYPC § 267(4) [KRS § 435.1-080(4)].

[64] LRC § 3445, Commentary. *Accord*, ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 3.3(b)(i).

fendant in that evidence of past convictions might be used to convict him on the present charges.[65] Indeed, the final draft of the Code required a separate hearing to determine the applicability of the persistent felony sanctions after the defendant is found guilty and sentenced for the present crime.[66] Yet, just as it rejected the proposal for separate sentencing proceedings where the death penalty or life imprisonment without parole are possible,[67] the General Assembly apparently concluded that the present method for invoking the persistent felony statute is adequate and thus deleted from the Code the provision for a separate hearing. Furthermore, the Court of Appeals has defended the present procedure and has resisted pleas to install by judicial decree the method suggested by the drafters of the Code.[68]

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

To fulfill this role, trial judges must be willing to utilize the sentencing alternatives which they have at their disposal. A determination of the proper disposition for an offender requires that full and accurate information about that offender be made available to the court. Since there is little opportunity at trial to gather all the information relevant to sentencing the defendant, the presentence report is an indispensable source of information for the trial judge.[69] According

[65] *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 5.5, Commentary *a-c* at 258-66. This procedure, nevertheless, has been upheld by the Supreme Court in Spencer v. Texas, 385 U.S. 554 (1967).

[66] LRC § 3445(1).

[67] See text accompanying note 44 *supra*.

[68] *See* Cole v. Commonwealth, 405 S.W.2d 753 (Ky. 1966); Wilson v. Commonwealth, 403 S.W.2d 705 (Ky. 1966).

[69] The MODEL PENAL CODE § 7.07, Comment at 53 (Tent. Draft No. 2, 1954) states: "The use and full development of this device appear to us to offer greatest hope for the improvement of judicial sentencing." *See also* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 4.1, Commentary *a-d* at 201-08; PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 144.

to KYPC § 265 [KRS § 435A.1-050], before imposing sentence for conviction of a felony, the court must order a presentence investigation and must give due consideration to the written report of such investigation.[70] This report is prepared by a probation officer and includes information relevant to the sentencing decision, such as the defendant's history of delinquency or criminality, family background, physical and mental condition, education, and occupation.[71] This section also empowers the court to order the defendant to submit to psychiatric examination and observation for a period not to exceed sixty days.[72] With data supplied by the presentence report, and perhaps a psychiatric report, the trial judge should be able to make an informed decision as to the proper disposition of the offender.

Controversy surrounds the issue of whether the contents of the presentence report should be disclosed to the defendant. Those who oppose disclosure argue that confidential sources of information would dry up, that the working relationship between the offender and the probation officer would be disrupted, that individuals and social agencies would be less willing to cooperate with probation authorities, and that the sentencing process would be prolonged.[73] On the other hand, the proponents of disclosure claim that fundamental fairness requires that defendants be given the opportunity to refute damaging information which may be based entirely on hearsay.[74] Moreover, they assert that by disclosing the information which forms the basis for the sentence and allowing the defendant to participate in the process of setting his penalty, the offender will better understand the court's action, the first step toward rehabilitation.[75] Both sides of this debate contain merit. Most jurisdictions and the federal courts,[76] leave the decision of disclosure to the discretion of the court, while only a

[70] The present statute, KRS § 439.280, only requires a presentence report when the defendant is to be placed on probation. The drafters have concluded that such a report is necessary in all felony convictions. This is basically in accord with MODEL PENAL CODE § 7.07 (Proposed Official Draft 1962). Some authorities suggest that a presentence report should be supplied in all cases. *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 4.1; PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 144.

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

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

[73] *See* F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS 21 (1969); Zastrow, *Disclosure of the Presentence Investigation Report*, 35 FED. PROBATION, Dec. 1971, at 20, 21.

[74] PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 144; ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 4.4.

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

[76] FED. R. CRIM. P. 32(c)(2).

small number of states require that the presentence report be turned over to the defendant.[77]

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

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

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

[77] *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 4.3, Commentary *a* at 211-12. *See also* Annot., 40 A.L.R.3d 681 (1971).

[78] This is the approach adopted by the MODEL PENAL CODE § 7.07(5) (Proposed Official Draft 1962). *See also* Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, 28 FED. PROBATION, March 1964, at 8.

[79] LRC § 3460, Commentary.

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

[81] This section of the new Code follows substantially MODEL PENAL CODE § 7.06 (Proposed Official Draft 1962).

[82] LRC § 3460, Commentary. *See* MODEL PENAL CODE § 7.06, Comment at 50 (Tent. Draft No. 2, 1954).

exceed one year. Since deterrence is the only justification for confinement in a local jail, one year in such an institution should accomplish that result.[83] The third exception applies to convictions for multiple felony offenses. The aggregate of indeterminate terms cannot exceed the maximum sentence which the offender could have received under the persistent felony statute for the most serious crime for which he stands convicted. For example, if the offender is convicted of three felonies, the most serious of which is a Class C felony, the aggregate of consecutive sentences cannot be more than twenty years. These limitations on the aggregation of consecutive terms do not apply where one commits a crime while in prison, during an escape from prison, or while waiting to serve a sentence. The Code specifically provides that under such circumstances any sentence may be added to the offender's present term. This avoids the possibility that an individual would have nothing to lose by commission of another offense.

One other major change in the existing law is made by this section. When the trial court fails to indicate whether multiple sentences should run concurrently or consecutively, the present rule is that they should be served consecutively.[84] The Code, however, reverses this approach. Unless the court specifically rules to the contrary, all sentences run concurrently.[85] If the more severe penalty of consecutive sentences is to be imposed, the trial judge must clearly indicate that this is his intent.[86]

The trial judge may, within limitations, modify a sentence of imprisonment for a felony.[87] Once the jury has designated the maximum sentence, the judge has the options of granting probation or conditional discharge or reducing the maximum sentence. If the judge determines that imprisonment is warranted but that the maximum term fixed by the jury is too harsh, he may modify the sentence, imposing some lesser maximum term within the statutory limits for the particular crime. If, for example, the jury sentences an individual convicted of a Class B felony to the maximum twenty years in prison, the trial court may reduce this sentence to some other term not less than ten years. Further, the trial court has the power to reduce the sentence for a Class D felony conviction to a term of one year or less in a local penal institution. The importance of this section is that the

[83] LRC § 3460, Commentary.

[84] Beasley v. Wingo, 432 S.W.2d 413 (Ky. 1968); Russell v. Commonwealth, 405 S.W.2d 683 (Ky. 1966).

[85] KYPC § 270(2) [KRS § 435A.1-110(2)].

[86] *See* LRC § 3460, Commentary.

[87] KYPC § 266 [KRS § 435A.1-070]. This power in the Court is also recognized in MODEL PENAL CODE § 6.12 (Proposed Official Draft 1962) and in ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 3.7.

increased alternatives prevent the judge from having to make an all or nothing choice between imposing the jury's sentence or granting probation where neither is appropriate.[88]

Probation and Conditional Discharge

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

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

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

[88] LRC § 3435, Commentary.

[89] *See* ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION 1 (Approved Draft, 1970) [hereinafter cited as ABA, STANDARDS RELATING TO PROBATION]; NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING 13 (1957).

[90] *See* ABA, STANDARDS RELATING TO PROBATION, *supra* note 89, at 1-2.

[91] *Id.*; PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 165; Moreland, *Model Penal Code*, *supra* note 22, at 70.

[92] *See* ABA, STANDARDS RELATING TO PROBATION, *supra* note 89, at 1-2; PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME, *supra* note 1, at 159, 165.

particularly debilitating for young offenders and supports the argument that they should be granted probation whenever possible. Moreover, the effects of a prison sentence remain with a man long after he is released, for it is a stigma which he will carry for the rest of his life.[93] Further, the price of keeping a man in prison is high, both in terms of economic cost and waste of human resources. It is expensive to house, feed, and guard the inmates of these institutions.[94] Then there is the less obvious, but no less real, cost to society when the head of a household is imprisoned and unable to support his family. A well organized and properly staffed probation system would require the expenditure of a considerable amount of public funds, but not as much as is spent in keeping the offender imprisoned; and, at least while on probation the individual can support himself and his dependants.[95]

The legislature implicitly recognized the serious effect that imprisonment has on an individual by enacting the controversial "shock probation" law.[96] This statute, which will remain in force after the Code becomes effective, empowers the trial judge to grant probation to an offender after he has served at least thirty days in jail or prison. The theory underlying this statute is that for many people a brief stay in a penal institution will operate as a sufficient deterrent. Once the offender has been exposed to prison, he is released on probation to be rehabilitated within the community. This is a very useful correctional tool since it enables the trial court to place the offender in prison without forfeiting the power to grant probation if it is later determined that the individual has learned a lesson and will not benefit from further confinement. Under former law, the trial court could not grant probation after the offender had been turned over to the Department of Corrections.[97] The one foreseeable danger which "shock probation" entails is that trial courts might too readily sentence an offender to prison with the intention of subsequently granting probation when *any* length of imprisonment for that particular person would be inappropriate.

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

[93] Moreland, *Model Penal Code*, *supra* note 22, at 70.

[94] *See* note 2 *supra*; *See also* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 2.3, Commentary *e* at 73.

[95] ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 2.3, Commentary *e* at 73; ABA, STANDARDS RELATING TO PROBATION, *supra* note 89, at § 1.2, Commentary at 29-30.

[96] KRS § 439.265.

[97] *See* Commonwealth v. Fanelli, 445 S.W.2d 126 (Ky. 1969); Woll v. Commonwealth, 146 S.W.2d 59 (Ky. 1940).

quently utilized in sentencing. KYPC § 272 [KRS § 435A.2-010] provides that anyone convicted of a crime who is not sentenced to death or life imprisonment without privilege of parole may be granted probation or conditional discharge. Thus, probation is an authorized alternative to imprisonment for even the most serious crimes. This section does not suggest that dangerous criminals be let loose on society, but merely that there may be circumstances where one convicted of even a Class A felony should not be sentenced to prison.[98]

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

[98] *See* LRC § 3505, Commentary.

[99] KYPC § 272 [KRS § 435A.2-010]; *See* ABA, STANDARDS RELATING TO PROBATION, *supra* note 89, at § 1.3(a)(i)-(iii).

[100] *See* King v. Commonwealth, 471 S.W.2d 297, 298 (Ky. 1971), wherein the Court stated:

> Whether probation should be granted in any particular case is a question addressing itself to the discretion of the trial court. When granted, it is a matter of grace and not of right.

[101] In Wyatt v. Ropke, 407 S.W.2d 410 (Ky. 1966), the trial judge was ordered to vacate the bench where he had stated that under no circumstances would he suspend or probate the sentence of one convicted of armed robbery. The Court of Appeals, while recognizing that the trial judge is vested with discretion in the decision whether to probate, stated that in any case the judge must at least exercise such discretion by considering the possibility of probation.

(Continued on next page)

When the court determines that imprisonment is inappropriate, it must either place the offender on probation or sentence him to conditional discharge, attaching whatever conditions are deemed necessary to help the defendant lead a law-abiding life. Probation shall be imposed when the individual is in need of supervision, guidance, or assistance.[102] Conditional discharge should be the sentence when probationary supervision is considered unnecessary.[103] Prior to the expiration of the term of probation or conditional discharge, which may not exceed five years in the case of felonies or two years for misdemeanors, the court may modify or enlarge the conditions or may revoke the sentence upon commission of another offense or upon a violation of the terms of the sentence.[104] Upon revocation of probation or conditional discharge, for whatever reason, the defendant shall be imprisoned.[105]

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

(Footnote continued from preceding page)

A classic example of a situation where the trial court refused to probate an offender who clearly qualified for probation can be found in Jordan v. Commonwealth, 371 S.W.2d 632 (Ky. 1963).

[102] KYPC § 273(1) [KRS § 435A.2-020(1)].

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

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

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

KYPC § 276(2) [KRS § 435A.2-050(2)] establishes the procedure which the court must follow in revoking or modifying a sentence of probation or conditional discharge. The offender must be given written notice of the grounds for revocation or modification, and a hearing must be held at which the defendant must be represented by counsel. These steps satisfy minimum due process requirements. LRC § 3525, Commentary. *See generally* ABA, STANDARDS RELATING TO PROBATION, *supra* note 89, at § 5.4, Commentary at 65-71.

discharge must contain the explicit condition that the defendant not commit another offense during the term of such sentence.[106]

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

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

Fines

The use of fines as a criminal sanction is very common, especially for less serious offenses. Penologically, a fine is an effective deterrent, at least for those who can afford to pay, and is an economical substitute for imprisonment.[109] For these reasons courts have long resorted to this form of punishment. However, much of the law regarding the imposition of monetary penalties has had to be rewritten as a result of recent Supreme Court decisions. The Code makes several changes in the existing law to reflect the new constitutional imperatives but nevertheless retains the use of fines as a sentencing alternative for both misdemeanors and felonies.

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

[107] *See* LRC § 3515, Commentary. *See generally* Annot., 39 A.L.R.2d 985 (1955).

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

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

[109] Note, *Imprisonment of Indigents for Non-payment of Fines or Court Costs; The Need for Legislation that will Provide Protection to the Poor*, 48 N.D.L. REV. 109 (1971).

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

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

[110] 401 U.S. 395 (1971).

[111] 399 U.S. 235 (1970).

[112] The Kentucky Court of Appeals has followed the decisions in *Tate v. Short* and *Williams v. Illinois* in the case of Spurlock v. Noe, 467 S.W.2d 320 (Ky. 1971).

[113] *See* ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 2.7, Commentary *b* at 120-21.

defendant willfully refuses to pay.[114] The decisions in *Tate* and *Williams* do not preclude imprisonment of a defendant who, though able, does not pay his fine.

These Supreme Court decisions do not mean that the states may not enforce the payment of fines; indeed, in both opinions the Court suggested alternative methods for collecting fines from indigents.[115] The Kentucky Penal Code includes several alternatives. KYPC § 273 [KRS § 435A.3-020] authorizes the court to allow payment within a specified period of time or in specified installments.[116] This affords the court enough flexibility to accommodate even the poorest man's budget. This method of enforcing fines not only increases the amount of revenue that will be collected, but also maximizes the deterrent effect.[117] This section also prohibits the court from fixing an alternative, contingent sentence of imprisonment in case the fine is not paid at the same time the fine is imposed. Thus, the "$30 or 30 days" sentence which was ruled unconstitutional, at least when applied to indigents, is no longer permitted.[118]

In accordance with the decision in *Tate v. Short*, the Code includes a procedure for sanctioning those who fail or refuse to pay their fines which is fair to those who are unable to pay but which penalizes those who merely refuse to pay. KYPC § 282 [KRS § 435A.3-060] states that when a defendant defaults in payment of a fine or any installment, the court on its own motion or that of the prosecutor may order the defendant to show cause why he should not be imprisoned for nonpayment. If the court finds that the defendant's default is attributable to an intentional refusal to obey or to a lack of good faith in his effort to obtain the necessary funds, he may be imprisoned for a term not exceeding: (1) six months, if fine was for a felony; (2) one-third of the maximum authorized term of imprisonment for the offense committed, if the fine was for a misdemeanor; or (3) ten days, if the fine was for a violation. On the other hand, if the default is deemed excusable, the court may extend the time for payment, reduce the amount of the installments, or otherwise modify the manner of payment. Further, if the defendant's default was innocent, the court may under certain conditions, compel the defendant to work for a department of local government and order that up to forty percent of his compensation be paid toward his fine. This provision should maximize the deterrent and rehabilitative effect of fines.[119]

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

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

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

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[114] *See* Note, *Imprisonment of Indigents for Non-payment of Fines or Court Costs; The Need for Legislation that will Provide Protection to the Poor, supra* note 109, at 129.

[115] *See* Tate v. Short, 401 U.S. 395, 400 (1971); Williams v. Illinois, 399 U.S. 235, 244-45 (1970).

[116] The installment payment method for collecting fines has been adopted in MODEL PENAL CODE § 302.1 (Proposed Official Draft 1962) and in ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 2.7(b). *See also* Comment, *Installment Payments: A Solution to the Problem of Fining Indigents*, 24 U. FLA. L. REV. 166 (1971).

[117] *See* Note, *Imprisonment of Indigents for Non-payment of Fines or Court Costs; The Need for Legislation that will Provide Protection to the Poor, supra* note 109, at 125.

[118] *See* LRC § 3605, Commentary. *See also* ABA, SENTENCING ALTERNATIVES, *supra* note 6 at § 2.7, Commentary *f* at 127.

[119] KYPC § 3625, Commentary. *See also* MODEL PENAL CODE § 302.2 (Proposed Official Draft 1962).

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

[121] *See* LRC § 3610, Commentary.

[122] KYPC § 279(3) [KRS § 435A.3-030(3)]. These factors are also stated in MODEL PENAL CODE § 7.02 (Proposed Official Draft 1962) and in ABA, SENTENCING ALTERNATIVES, *supra* note 6, at § 2.7(c).

exhausts the defendant's resources, deprive the defendant's victim of compensation for any loss incurred. Moreover, the court should always consider what gain an offender may have derived from his crime. Fines are most appropriate where the individual has profited from commission of the offense. Indeed, it has been suggested that this is the *only* situation where the sentence of a fine for felony convictions is proper.[123]

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

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

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[123] *See* note 119, *supra.*

[124] LRC § 3615, Commentary.

[125] *Id.*

[126] KYPC § 279(1) [KRS § 435A.3-030(1)]. It is not clear why this addition to the original Code draft, concerning the use of fines in misdemeanors, has been inserted in the section dealing with fines in felony cases.

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

[127] *See generally* MODEL PENAL CODE §§ 2.07, 6.04 (Proposed Official Draft 1962); Hamilton, *Corporate Criminal Liability in Texas*, 47 TEXAS L. REV. 60 (1968); 19 AM. JUR.2d *Corporations* §§ 1434-40 (1965).

Conclusion

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

Gregory M. Bartlett

CLASSIFICATION OF OFFENSES AND DISPOSITION OF OFFENDERS

I. CLASSIFICATION OF OFFENSES

A. *Introduction*

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

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

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

[1] KY. REV. STAT. § 431.060 (1969) [hereinafter cited as KRS].
[2] KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 3405, Commentary (Final Draft 1971) [hereinafter cited as LRC].
[3] KRS § 431.070. (1) No crime shall be punished with death unless directed by statute. (2) A common law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed.
[4] KRS § 431.075.
[5] KY. ACTS ch. 385, 261 (1972) [chapter 385 is hereinafter cited as KYPC]. PROPOSED KY. REV. STAT. § 435A.1-010 [hereinafter cited as [KRS]].
[6] LRC § 3405, Commentary.
[7] LRC § 3405, Commentary.

upon the character or circumstances of the offender and reduces the influence of jury bias by imposing sentencing guidelines.

B. *Sentencing Philosophy*

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

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

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

Kentucky was previously one of thirteen jurisdictions where the maximum period of imprisonment was determined by the jury within statutory limits. However, the trial judge retained a potentially prominent role due to his power of probation over the convicted offender, which permitted an alternative to imprisonment subject to judicially imposed conditions.[8] The offender's failure to conform to probation conditions[9] could result in the judicial imposition of any sentence which the jury originally has power to mete out.[10]

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

[8] KRS § 439.260(1).
[9] KRS § 439.280.
[10] KRS § 439.300(1).

over the offender for a period not to exceed the maximum sentence set by the jury. The Parole Board ultimately decided whether he was to be paroled prior to serving the full sentence.[11] The only guideline for the exercise of the Parole Board's discretion was its promulgation of a schedule for parole eligibility.[12] The prisoner was interviewed by the Board and a hearing was conducted after which parole could be denied, recommended with stipulation, or deferred for later review.

"In Kentucky we have had an indeterminate sentence with a maximum term fixed by the jury and no minimum term."[13] Therefore, a convicted offender could not be forced to serve a sentence exceeding that originally set by the jury. This was true even where the offender had been probated or paroled with a subsequent violation of probation or parole conditions causing him to be recommitted to prison. The concept of "no minimum term" meant that once a prisoner was incarcerated the Parole Board could grant parole immediately. Pre-Code law therefore sought to wrest complete control over the disposition of the offender from the jury by guaranteeing that the trial judge and/or Parole Board share in the decision-making. Despite criticism that jurors may lack appropriate training and education, the jury was believed essential because it assured a defendant that the ultimate issue of guilt or innocence would be equitably decided by the collective common sense of twelve of his peers.

In 1969, following an evaluation of Kentucky's criminal law by the *Kentucky Law Journal*,[14] it was suggested that the Parole Board be given responsibility for determining the maximum time to be served by an offender, historically a jury function. It was thought that the jury often failed to set sentences of sufficient duration to ensure successful rehabilitation. Further, the shift of responsibility from jury to Parole Board would benefit the offender by allowing his initial sentence to be determined with reference to a complete presentence report encompassing valuable psychological and psychiatric data. Implementation of this procedure would have resulted in a sentence designed to maximize the opportunity for rehabilitation; however, the General Assembly rejected the change and the jury currently continues to establish maximum terms for offenders.

D. *Kentucky's New Penal Code*

By separating offenses into degrees, the new Penal Code provides

[11] KRS § 439.340.
[12] Kentucky Parole Board Regulation DC-Rg-6 (1966).
[13] LRC § 3430, Commentary.
[14] *Student Criminal Law Symposium*, 57 KY. L.J. 454 (1969).

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

Section 261 of the Kentucky Penal Code [KRS § 435A.1-010] establishes four classes of felonies: A, B, C, and D. The sanctions imposed for commission of crimes within these respective categories are twenty years to life imprisonment, ten to twenty years, five to ten years, and one to five years. The maximum sanction at each level beginning with "A" and ending at "D" decreases in severity with one year of imprisonment as the minimum sentence for commission of a felonious offense.[15] Any crime which specifies a sentence of months, even if twelve months, constitutes a misdemeanor under the new Code. Misdemeanors are classified as "A," "B," or "violations." The maximum sanction for "A" misdemeanors is imprisonment in a local institution for a period not to exceed twelve months while a "B" misdemeanor provides a definite term of imprisonment not to exceed ninety days.[16] The Code provides two classes of misdemeanor offenses because there is a recognized need for greater restriction on sentencing power where definite terms of imprisonment are involved. While local penal institutions cannot individualize punishment or treatment for these offenders, the drafters felt that exposure to incarceration would provide the necessary deterrence to prevent misdemeanants from becoming felons. "Violations" include those offenses for which the offender may be sentenced to pay a fine. The rationale is special and general deterrence but, since "violations" usually involve no risk of physical harm to others, there is little reason to impose a jail sentence upon the violator.

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

[15] LRC § 3430, Commentary.
[16] KYPC § 268 [KRS § 435A.1-090].

by the actor.[17] Moral fault, sometimes considered a fourth factor for measuring culpability, is used by the judge or jury in fixing a particular sentence within discretionary limits.[18] The jury continues to determine the maximum sentence for all offenders within boundaries imposed by the classification system. On the other hand, the trial judge plays an expanded role under the new law which grants him the right to modify the jury's sentence within certain limits.[19]

Generally, the judge may never reduce the maximum length of an indeterminate sentence below the minimum established by the Code for the category into which that offense falls. For example, if a jury sentences an offender to life imprisonment for the commission of an "A" felony, the judge may not reduce the sentence below the twenty year minimum for class "A" felonies. The rationale for creating this "middle alternative" is based on the unsatisfactory alternatives formerly available to the judge of either granting probation or imposing the jury's sentence. However, in the case of a class "D" felony the trial judge may commit the offender to a "local institution for a definite term of imprisonment not to exceed one year."[20] This provision allows individualization of justice in special situations such as that of the young offender whose past record is such that neither probation nor confinement in the state penitentiary is entirely suitable. The probation alternative may not be sufficiently severe, especially where the offender has violated previous conditions of probation. On the other hand, the state penitentiary experience is often too harsh given the young offender's vulnerability as a target for sexual abuse and counter-productive to the goals of sentencing in that he will be exposed to more sophisticated techniques and levels of crime.

II. THE DEATH PENALTY AND LIFE WITHOUT PRIVILEGE OF PAROLE

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

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

[17] *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966).
[18] *Id.*
[19] KYPC § 266(1) [KRS § 435A.1-070(1)].
[20] KYPC § 266(2) [KRS § 435A.1-070(2)].

England there were eight major capital crimes. By 1688 there were nearly fifty and as late as 1819 one could be put to death for any of 223 capital crimes."[21] These included offenses against the state, persons, property, and the public peace. The mode of execution ranged from hanging to the inhuman torture of drawing, hanging, disemboweling, and beheading, followed by quartering.[22] Early English capital crimes were all considered felonies with mandatory death penalties and the convicted person could escape death only by intercession of the Crown. Frequently, those who thus avoided execution were punished by banishment to the colonies to begin a desolate new life. The seeming severity of English law was mild, however, compared to the criminal codes of other European nations during the same period.

America's first capital statutes date to 1636 when the Massachusetts Bay Colony listed thirteen capital offenses under the title of "The Capitall Lawes of New-England."[23] By the War of Independence most colonies had comparable statutes with nine offenses and death by hanging. In 1794, Dr. Benjamin Rush, the father of the movement to abolish capital punishment in the United States, along with Benjamin Franklin and Pennsylvania Attorney General William Bradford, led the crusade which resulted in that state's repeal of the death penalty for all crimes except "first degree" murder. The 1830's witnessed strong abolitionist movements in several states although no more than one-fourth of the states have ever abolished the death penalty at any one time. The result of partially successful abolition movements includes reduction of the number of capital crimes, replacement of mandatory death sentences with jury discretion to grant imprisonment, development of more humane methods of conducting executions, and the elimination of public executions. However, the number and variety of capital statutes evidence belief that the death penalty is still an effective deterrent and appropriate punishment.

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

[21] Bedau, *Introduction* to THE DEATH PENALTY IN AMERICA at 1 (H.A. Bedau ed. 1967).
[22] 4 W. BLACKSTONE, COMMENTARIES *92.
[23] Haskins, *The Capitall Lawes of New-England*, 7 HARV. LAW SCHOOL BULL. 10, 10-11 (Feb. 1956).

The "cruel and unusual punishment" clause of the Bill of Rights was not interpreted by the Supreme Court of the United States until almost a century after its enactment. The Court, in *Wilkerson v. Utah*,[24] upheld capital punishment for premeditated murder and execution by public shooting. Twelve years later, Chief Justice Fuller, writing for a unanimous Court, said electrocution was a permissible mode of imposing death.[25] The Court found that New York's legislature intended to minimize pain for the executed, thereby establishing a humane purpose in their selection of electrocution. However, this early case held that the eighth amendment was inapplicable to the states.

In *O'Neil v. Vermont*[26] the Court reaffirmed the inapplicability of the eighth amendment to the states. The petitioner argued that a $6,500 fine for 307 counts of selling liquor with a potential 54 years imprisonment at hard labor for nonpayment violated the "cruel and unusual punishment" clause. Although the Court upheld the conviction, the minority would have protected individuals against all punishments which by their excessive length or severity were greatly disproportionate to the offenses charged, with Justice Field noting "the whole inhibition is against that which is excessive . . . ."[27] The minority asserted that the nature of the crime, the purpose of the law, and the length of sentence imposed should be adopted as factors to be considered in deciding whether the eighth amendment's "cruel and unusual punishment" clause is violated in future cases.

Eighteen years after *O'Neil* the Supreme Court for the first time invalidated a penalty prescribed by a state legislature.[28] In *Weems v. United States* the petitioner was convicted of falsifying public documents and sentenced to fifteen years imprisonment at hard labor in ankle chains, loss of civil rights, and perpetual surveillance. Indicating that the Constitution was a progressive document whose language is to be interpreted according to present and future rather than past standards, the Court found this punishment excessive.[29]

In *Louisiana ex rel. Francis v. Resweber*[30] a condemned man sought to prevent a second electrocution where, due to a mechanical failure, the first attempt did not cause his death. Although now willing to apply the eighth amendment to the states, the Court, in a 5-4 decision,

[24] 99 U.S. 130 (1878).
[25] *In re* Kemmler, 136 U.S. 436 (1890).
[26] 144 U.S. 323 (1892).
[27] *Id.* at 340.
[28] Weems v. United States, 217 U.S. 349 (1910).
[29] *Id.* at 373.
[30] 329 U.S. 459 (1947).

nevertheless upheld the legislature's adoption of electrocution as a humane method of execution in spite of the suffering in this particular case. As in *Weems*, the Court used the *O'Neil* factor test to analyze the "cruel and unusual punishment" question.

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

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

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

[31] 356 U.S. 86 (1958).
[32] *Id.* at 101.
[33] 370 U.S. 660 (1962).
[34] *See also* Powell v. Texas, 392 U.S. 514 (1968).
[35] Robinson v. California, 370 U.S. 660, 666 (1962).
[36] 391 U.S. 510 (1968).
[37] 402 U.S. 1883 (1971).

The general pre-Code statutory death penalty provision in Kentucky provided that "no crime shall be punished with death unless directed by statute."[38] Under pre-Code law death was an alternate punishment for twelve criminal offenses.

Kentucky's Proposed Penal Code § 3440, not enacted by the General Assembly, retained death as a possible sanction for one convicted of an offense categorized as a Class "A" felony.[39] Alternate sanctions under this section included life imprisonment without privilege of parole and an indeterminate sentence of imprisonment.[40] Under § 3440, Class "A" felons must be provided bifurcated proceedings with a determination of innocence or guilt in the first stage and, if the defendant is found guilty, the imposition of sentence in the second stage. Bifurcated trials are designed to allow maximum flexibility in the rules governing admissibility of evidence pertinent to disposition of these often dangerous offenders. For example, in a bifurcated proceeding the sentencing stage may feature introduction of the defendant's prior criminal record and any other relevant evidence that would possibly be prejudicial in a single stage trial. Now, "evidence may be presented by either party on any matter relevant to sentencing . . . ."[41] However, the jury must reach a unanimous agreement before death or life without privilege of parole may be imposed and failure to reach such an agreement is cause for a new jury to be impaneled. The decision to impanel a new jury is solely within the discretion of the trial judge; he may instead impose an indeterminate sentence within limits set out in § 3440. This means that the judge's sentence could not be less than the minimum or exceed the maximum sanction established for a particular grade of offense. For instance, one convicted of committing a Class "A" felony could receive a sentence of 20 years to life from the judge. When an offender pleads guilty, the judge impanels a jury which decides the sentence according to the same rules embodied in the penalty stage of a contested case.[42]

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

[38] KRS § 431.070(1).
[39] LRC § 3440. The new Code authorizes death as a sanction for anyone causing death or a serious physical injury in the course of an abortion, murder, or rape of a child under 12 years of age; for sodomy; and for kidnapping unless the defendant releases the victim alive, substantially unharmed, and in a safe place prior to trial.
[40] LRC § 3440, Commentary.
[41] LRC § 3440(3)(a).
[42] LRC § 3440(5).

in traditional trial proceedings. Even though the Commentary expresses skepticism as to the value of the death penalty as a deterrent, it was retained as an alternate sanction with protection of society as its rationale.

The drafters of § 3440 also realized that life imprisonment without privilege of parole can be employed to protect society from dangerous offenders without resorting to putting these men to death. This sanction recognizes a particular offender's inability to be rehabilitated and become a useful member of society. Life without parole was recognized under pre-Code law only for the rape of a female over twelve years of age.[43] This resulted in an anomalous situation because of the incongruity between it and the penalty for rape of a child under twelve,[44] clearly a more heinous crime. In both instances a convicted offender could receive the death penalty, but, if death was not imposed in the case of rape of a female under 12, the felon was eligible for parole after serving part of his life sentence. Despite the need for a more enlightened process for imposing sanctions and the need to remedy the above anomaly the 1972 General Assembly omitted § 3440 when enacting the Kentucky Penal Code. The omission demonstrates a lack of understanding of the values of the provision. It is recommended that the provision, absent the death penalty alternative, be reconsidered for inclusion in the law before the bill's effective date of July 1, 1974. Section 3440, a cornerstone of the Penal Code's scheme of disposition of offenders, provides the flexibility required for administering the criminal justice system in Kentucky. Its exclusion leaves the Commonwealth with a progressive Penal Code made incomplete by this legislative omission. This is especially true in light of the revolutionary legal developments in 1972 following the General Assembly's evaluation of the Kentucky Penal Code.

The legal revolution began in February, 1972, with the California Supreme Court's decision in *People v. Anderson*.[45] Influenced by the fact that 104 men, among them Charles Manson and Sirhan Sirhan, awaited execution on death row, the court felt that the constitutional question of whether the death penalty violated the eighth amendment could no longer be avoided or deferred to any other branch of government. By a 6-1 decision the court held capital punishment violative of the eighth amendment's "cruel and unusual punishment" clause. While several arguments were advanced by the majority as rationale

[43] KRS § 435.090.
[44] KRS § 435.080. This statute notes alternate sanctions of death or life imprisonment with possibility of parole.
[45] 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

for their holding, the California court was concerned primarily with the fact that any execution which ultimately follows pronouncement of the death sentence has in fact become "lingering death" for the convicted.[46] Citing *Weems*, the court said the "cruel and unusual punishment" clause was "progressive, not being fastened to obsolete standards and acquiring meaning as public opinion became enlightened by a humane justice."[47] Related to the "lingering death" concept, the psychological impact of the punishment was characterized as "impending" with the fear and distress that accompanies that state of mind. The court also cited a world-wide trend toward abolition of the death penalty noting that where the sanction is retained, application is exceptional and frequently executive authority pardons the condemned person.[48] Finally, while indicating that offenders deserve no sympathy, they also reasoned that society cannot be deemed enlightened if human life is taken for purposes of vengeance.

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

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

[46] *Id.* at 892, 100 Cal. Rptr. at 154.
[47] Weems v. United States, 217 U.S. 349, 378 (1910).
[48] *See* U.N. ECOSOC, Note by the Secretary General, Capital Punishment 3, U.N. Doc. E/4947 (1971).
[49] 403 U.S. 952 (1971).
[50] Branch v. State, 447 S.W.2d 932 (Tex. Ct. Crim. App. 1969), *cert. granted*, 403 U.S. 952 (1971).
[51] Furman v. Georgia, 403 U.S. 952 (1971).
[52] Furman v. Georgia, 408 U.S. 238 (1972).

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

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

Justice Douglas concentrated his attack on the death penalty by noting that society refuses to apply this sanction uniformly. Application inevitably focuses on the poor, minority group members, and other outcasts of society whose relatively small numbers allow them

no countervailing political clout. Further, their poverty makes it nearly impossible to obtain first-rate legal counsel, probably the most crucial factor in the disposition of the convicted offender.[53] Finally, Justice Douglas found these capital punishment statutes unconstitutional as violative of the eighth and fourteenth amendments because of the unlimited discretion of the juries and judges charged with imposing sanctions on the convicted offenders. "Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."[54]

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

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

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

Applying principle three, he asserts that moral debate has caused a progressive decline in the infliction of death. Rather than exerting a moralizing influence upon community values, death lowers our respect for life and brutalizes our values. Finally, Justice Brennan finds statistical data inconclusive to establish that death is a greater deterrent than imprisonment or that the overall objective of punishment, including protection of society, is served more effectively by death than imprisonment. Death is characterized as unjustifiable retribution when an offender can be adequately neutralized by incarceration. "Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists."[61]

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

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

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

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

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

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[53] *See* The Courier-Journal & Times (Louisville), August 13, 1972, § E, at 5. Don Reid, editor of the *Hountsville Texas Item*, notes that of the 189 executed men whom he knew, only three or four had enough money to hire a good lawyer. The process of discovering new evidence can go on indefinitely, however, the money supply cannot. Mr. Reid is hopeful that the Supreme Court's decision in *Furman v. Georgia* will stand after having personally viewed all 189 of these Texas executions.

[54] Furman v. Georgia, 408 U.S. 238, 253 (1972).

[55] *Id.* at 267.

[56] *Id.* at 271.

[57] Id. at 274.

[58] *Id.* at 277.

[59] *Id.* at 279.

[60] *Id.* at 293.

[61] *Id.* at 304.

[62] *Id.* at 305.

[63] *Id.* at 309-10.

[64] *Id.* at 310.

[65] *Id.* at 313.

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

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

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

[66] *See id.* at 361 n.145 where Justice Marshall terms it imperative for constitutional purposes to learn the opinion of an *informed* electorate.

[67] Sellin, *The Negro Criminal*, THE ANNALS (Nov. 1928).

[68] Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1793 (1969-70). *See also* Boykin v. Alabama, 395 U.S. 238 (1969). In this case Alabama imposed the death penalty on a Negro for simple robbery and the Supreme Court reversed on procedural grounds. However, in reversing, the court did not mention that an economic crime simply does not merit death; obviously the sanction was not in proportion to the crime.

[69] NATIONAL PRISONER STATISTICS No. 45, CAPITAL PUNISHMENT 1930-1968, at 28 (Aug. 1969).

[70] MacNamara, *Statement Against Capital Punishment*, in THE DEATH PENALTY IN AMERICA 188 (H.A. Bedau ed. 1967). For a vivid example of how these

(Continued on next page)

This portrays the inhuman side of capital punishment in America as seen by the court majority in *Furman*.

The minority opinions written by the four dissenting justices appointed since 1968 by President Nixon argue that the state is justified in taking the life of one of its citizens for certain criminal offenses after a trial and conviction. Common to the opinions of Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist is the idea that abolition of execution is a legislative function rather than a judicial task.[71] Their advocacy of judicial self-restraint is influenced by what they consider to be the greater fact-finding expertise of the legislature when it comes to the questions of administering the death penalty and its psychological effects upon those awaiting execution.

Chief Justice Burger's interpretation of the eighth amendment's "cruel and unusual punishment" clause would not prohibit punishment by death as long as the states prove it to be necessary for the deterrence or control of crime. Rather than adopting the *Furman* majority's interpretation that jury discretion in sentencing criminal offenders is a "haphazard process," he quotes from *Witherspoon* which characterized the jury system as an "articulate expression of the community conscience on life and death."[72] Chief Justice Burger denies that the system of discretionary sentencing in capital cases has failed to produce even-handed justice. He considers it an element of "fortuity" that some people are sentenced to death while others committing the same offense in another jurisdiction or tried before another jury escape that sanction. Finally, he hints that legislatures may comply with *Furman* by establishing standards for judges and juries to follow in determining the sentence in capital crimes or by narrowing the number of crimes that would carry a mandatory death penalty.

Justice Blackmun notes:

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

(Footnote continued from preceding page)
factors operate, see Bob Dylan's ballad entitled "The Lonesome Death of Hattie Carroll" which appears on his album "The Times Are A-Changing." The ballad tells of the cold-blooded murder of a black woman who, while cleaning up a restaurant table, spilled a drink on a very wealthy Maryland landowner. The incident took place in a downtown Baltimore Hotel as an entire room of patrons were dining. Mr. William Zanzinger, the defendant, beat Hattie Carroll to death with his cane and received a six month sentence—which was never even fully served!

[71] *See* Goldberg & Dershowitz, *supra* note 69, at 1798, 1806. The authors hint that the Supreme Court's avoidance of a decision such as that ultimately rendered in *Furman* is based upon the peculiar institutional position of the Court. However, it is also their contention that the legislative and executive branches of government are not absolved of responsibility to guard constitutional rights when the Supreme Court has declined to require them to do so. Instead, they have an even greater burden to interpret and apply the constitution.

[72] Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

> expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.[73]

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

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

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

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[73] Furman v. Georgia, 408 U.S. 238, 406 (1972).
[74] 402 U.S. 183 (1971).
[75] *Id.* at 208.
[76] People v. Anderson, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
[77] Furman v. Georgia, 408 U.S. 238, 414 (1972).
[78] *But see* Goldberg & Dershowitz, *supra* note 69, at 1794. The authors state that if the choice is between imperfect administration of capital punishment and abolition of capital punishment, constitutional values are heavily weighted in favor of the latter.
[79] *See* The Courier-Journal (Louisville), June 30, 1972, § A, at 24.
[80] Furman v. Georgia, 408 U.S. 238, 468 (1972).

The immediate question upon reading *Furman* is what are the ramifications of this holding and how will the states and federal government react to this dramatic change in the criminal justice system. Apparently the Supreme Court's declaration that present capital punishment statutes are unconstitutional means that over 600 convicted offenders throughout the country have an unconditional reprieve from death. Even if future capital punishment statutes are enacted and held constitutional, they cannot be applied retroactively to these individuals. One must speculate that a period of uncertainty will follow before the future of capital punishment in the United States will be finally decided; however, reading the nine opinions indicates that death might not be considered too harsh a penalty for some crimes if it were administered to all persons found guilty of those crimes.

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

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

To determine whether the basic assumptions underlying *Furman* can be substantiated by the Kentucky experience we need to examine the statistics relevant to the imposition of the death penalty. Since Kentucky installed its electric chair at Eddyville in 1911, 79 whites and 88 blacks have been executed. Since 1930 all seven men executed for rape have been black. The educational background of the 99 persons electrocuted since 1930 reveals:

> Fourteen were illiterates;

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[81] *See* The Courier-Journal (Louisville), July 17, 1972, § A, at 11.
[82] *See* The Courier-Journal (Louisville), July 21, 1972, § A, at 9.

Twenty-five never went beyond the Fourth Grade;
Thirty-seven did not complete the Eighth Grade;
Sixteen attended high school, but didn't graduate;
Only seven were high school graduates and none had attended college.[83]

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

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

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

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

[83] Mills, *Society Has No Moral Right* . . . , The Courier-Journal (Louisville), July 23, 1972, § E, at 3.

[84] Yet, the more frequent imposition of the death penalty for criminal offenders characterized as poor, black, and uneducated has been partially explained by the composition of the jury—if the jury belongs to the dominant or "in group" and the defendant and his witnesses belong to an "out group"—as they frequently do—the defendant's evidence is often discounted to zero. Ehrmann, *The Death Penalty and the Administration of Justice*, in THE DEATH PENALTY IN AMERICA 421-22 (H. A. Bedau ed. 1967).

[85] Mills, *Society Has No Moral Right* . . . , The Courier-Journal (Louisville), July 23, 1972, § E, at 3.

[86] The author would like to thank Superintendent Henry E. Cowan of the Kentucky State Penitentiary at Eddyville who furnished some of this data about the men on "death row" and several recent University of Kentucky College of Law graduates who provided information on some of the 24 men, including the nature of crimes and victims.

demonstrated a lack of education.[87] The criminal offenses for which the whites were convicted ranged from rape of a girl over 12 to willful murder in the course of an armed robbery. The only policeman killed by whites was attempting to thwart an escape by four men after an armed robbery. The average age of these four whites was 32½ years.

The most striking aspect of many of these savage crimes is the senselessness of the killing, which often occurred in the course of committing lesser crimes such as petty robberies. These men seem to have been acting impulsively, their crimes generally not dictated by economic need. "They will act psychopathically. Their tendencies and acts will be anti-social, egotistic, disruptive, and outright criminal."[88]

On November 17, 1972, the Kentucky Court of Appeals decided the first case involving a defendant who had been sentenced to death prior to the *Furman* decision. The Court upheld the murder conviction of Warren Caldwell; however, it suspended the death penalty imposed by the Christian County Circuit Court. They remanded the case to the lower court for the purpose of reducing Caldwell's sentence to life imprisonment, citing *Furman* as declaring the death penalty unconstitutional as presently imposed.[89]

On March 15, 1973, the Kentucky Court of Appeals, speaking through Chief Justice John S. Palmore, formally announced the invalidation of the Commonwealth's death penalty and required modification of the sentences of the remaining 23 men on death row. The Court said these men should be sentenced to the "next highest penalty the law sets for the crime."[90] The judges of the circuit courts will

[87] These blacks in a ghetto environment suffer from residential and general cultural isolation from the community. They become part of a subculture of violence where participation in criminal homicide is common. *See* Wolfang, *A Sociological Analysis of Criminal Homicide*, in THE DEATH PENALTY IN AMERICA 79 (H.A. Bedau ed. 1967).

[88] Batt, *The New Outlaw: A Psychological Footnote to the Criminal Law*, 52 KY. L.J. 497, 498 (1964). The author's thesis is that the ever increasing crimes of violence are linked to widespread psychopathy in our complex society especially among people under 25 years of age. The psychopathic offender may commit 25 to 100 criminal offenses varying in degree of severity in a lifetime. His aberrant behavior is based upon a defective super-ego which fails to internalize society's moral codes. Psychopaths hate authority; people in authority are persons to exploit and manipulate without remorse. Professor Batt explains the vulnerability of blacks to the above conditions by noting their lack of personality development based upon the instability of family relationships.

[89] The Courier-Journal (Louisville), November 18, 1972, § B, at 1. *But see* Weber v. Commonwealth, 196 S.W.2d 465, 469 (Ky. 1946), where the Kentucky Court of Appeals held that judicial invalidation was reserved only for a punishment "so proportioned to the offense committed that it shocks the moral sense of all reasonable men."

[90] *See* The Courier-Journal (Louisville), March 16, 1973, § A, at 1.

modify the sentences by order, thereby avoiding costly resentencing procedures. In theory, these men are eligible for a parole hearing after serving six years. Three formerly condemned prisoners have already served this six year period.

Mrs. Lucile Robuck, chairman of the state's Parole Board, anticipating public outcry at the possibility that men who faced the electric chair for murder might now be freed, stressed that "being eligible for parole is not at all the same as actually being paroled."[91] Mrs. Robuck explained that the men will receive parole hearings but emphasized that when the Board deals with someone who has taken a life, decisions to grant parole are made very carefully. Psychiatric evaluations of each man will be studied to determine whether he has reached the point where he can be safely released into society. Some are psychotic and therefore will never be released; others may be eventually paroled under strict conditions and the watchful supervision of a parole officer.

An analysis of the crimes for which the majority of the 24 previously condemned men stand convicted might prompt the Kentucky General Assembly to consider enacting mandatory death penalty statutes for the murder of policemen[92] or for the commission of a murder in the course of another felony. It seems likely that the present Supreme Court will uphold such enactments providing capital punishment is applied automatically to all those convicted of the particular offense. In some respects this does not seem too harsh for heinous crimes. However, such a course cannot benefit our society. Institutionalized violence in the form of legal killing is self-indulgent, self-destructive, and incompatible with the vast progress of this century. The perpetration of violence on fellow human beings, far too common and almost casually accepted, is not inevitable in a civilized society.

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

[91] *See* The Courier-Journal (Louisville), April 2, 1973, § A, at 1.

[92] Sellin, *Capital Punishment*, 8 CRIM. L.Q. 36, 46-49 (1965-1966). The author demonstrates that policemen are no safer in jurisdictions where the death penalty exists as a sanction for their murder than in jurisdictions where no death penalty exists. Furthermore, Sellin undercuts the often stated argument that life sentences for murderers risk homicides in jails. He notes that murders in prison are committed by persons serving life sentences for crimes such as robbery and forgery rather than for murder.

the anomalous situation we are presently facing where all men serving sentences of life imprisonment must be accorded parole hearings after six years in the penitentiary.

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

The California referendum has the effect of a state constitutional amendment. However, California voters can re-establish capital punishment only to the extent permitted under *Furman*. In other words, the referendum vote could restore capital punishment only for those crimes that carried a mandatory death penalty prior to *Anderson*[94] or for crimes that the California legislature subsequently makes mandatorily punishable by death. Further, this type of legislative action seems to preclude judicial review because the referendum's Proposition 17 states that capital punishment "shall not be deemed" to violate any part of the California Constitution. This raises a serious separation of powers question. In effect, Proposition 17 means that Californians have overruled their state Supreme Court's interpretation of the Bill of Rights and have attempted to limit judicial review of future legislative action. The role of the judiciary as arbiters of the Constitution could be severely undercut by such legislative action.

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

[93] 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

[94] These four rather obscure crimes are killing a prison guard, train wrecking, treason against California, and perjury leading to execution of an innocent person.

[95] TIME, November 20, 1972, at 74.

The Nixon administration on January 4, 1973 announced that "Congress will be asked to enact a mandatory death penalty for several categories of cold-blooded, premeditated federal crimes."[96] Attorney General Kleindienst indicated that the death penalty would be sought for "kidnapping, assassination of a public official, sky-jacking, killing a prison guard, or bombing a public building."[97] However, this proposal has drawn criticism and an alternate bill has been introduced in Congress by Senator McClellan of Arkansas. The McClellan bill, the result of years of study and legislative hearings, calls for the death penalty only where a defendant in the course of a serious criminal act intentionally takes another's life. It also includes a provision for bifurcated trials with one proceeding to decide the issue of guilt followed by a separate proceeding to determine punishment if the offender is found guilty. The McClellan bill is the more realistic proposal and seems more likely to pass than the administration's proposal.

While the ultimate solution for the disposition of serious criminal offenders has yet to be reached, the states and federal government must be realistic in their interpretation of *Furman*. Attorneys General, legislators, and law enforcement officials must be willing to take Camus's "civilizing step," the abolition of the death penalty. Although the Supreme Court did not prohibit capital punishment under all circumstances, the thrust of their holding represents its death knell in view of the belief that the mandatory death penalty is inflexible and undercuts the role of the jury in our criminal justice system. Chief Justice Burger states in *Furman*, ". . . mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, may be so arbitrary and doctrinaire that they violate the Constitution."[98] Most importantly, reintroduction of the mandatory death penalty would represent a step backward in the slow progress of penal reform.

III. PERSISTENT FELONY OFFENDERS

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

[96] The Courier-Journal (Louisville), January 5, 1973, § A, at 1.
[97] *Id.*
[98] Furman v. Georgia, 408 U.S. 238, 402 (1972).

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

A. *Habitual Criminal Statutes—A Backward Glance*

Most states have habitual criminals statutes. However, according to Wechsler, "[t]he consensus is that habitual criminals statutes are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice."[99] Operating to sweep up persistent social nuisances while more dangerous and serious offenders remain free, these statutes are most often invoked against narcotic addicts, prostitutes, alcoholics, vagrants, petty offenders, and some professional criminals. Even sexual psychopath laws which exist in most jurisdictions fail to distinguish the dangerous and brutal offenders from those who are merely inadequate and aberrant. The contribution of these laws to the problem of controlling dangerous criminal offenders is minimal.[100] Wechsler points out four defects generally found in habitual offender laws:

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

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

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

[99] Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 483 (1961).
[100] Swanson, *Sexual Psychopath Statutes Summary and Analysis*, 51 J. CRIM. L.C. & P.S. 215, 226 (1960).
[101] *See* Wechsler, *supra* note 99, at 483.

including those of the Advisory Council of Judges of the National Council on Crime and Delinquency and the American Law Institute. The Advisory Council's Model Sentencing Act defines "dangerous offenders" as those who have committed or attempted certain crimes of physical violence and who are found by the court to be "suffering from a severe personality disorder indicating a propensity toward criminal activity."[102] The Act provides that "dangerous offenders" may be sentenced to 30 years imprisonment and recommends, but does not require, psychiatric substantiation of the defendant's criminal propensities. Under the American Law Institute's Model Penal Code a convicted felon could have his term of imprisonment extended beyond the maximum provided for that category of felony when "the defendant is a dangerous, mentally abnormal person whose commitment for an extended term is justifiable for protection of the public."[103] As a prerequisite to judicial imposition of the extended sentence there must be a psychiatric examination

> [r]esulting in the conclusion that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.[104]

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

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

B. *Kentucky Pre-Code Habitual Offender Law*

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

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102 ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §§ 5(a), 5(b) (1963).

103 MODEL PENAL CODE § 7.03(3) (Prop. Final Draft No. 1, 1961).

104 *Id.*

Persons previously convicted of two or more felonies were automatically given life imprisonment.[105] Rarely were they given psychiatric examinations to determine the propriety of the sentence.[106] The law operated mechanically and often unfairly due to a complete lack of distinction between types of criminal acts. An individual who was convicted of three felonies, regardless of whether they involved violence or resulted in injury to others, was automatically sentenced to life imprisonment.[107] For this reason alone the statute seeems unjustifiable and could probably have been challenged on constitutional grounds. Isolation and deterrence are valid penal objectives; however, statutory language imposing an automatic life sentence on thrice-convicted felons violates prevailing principles of excessiveness and proportionality.

C. *Persistent Felony Offenders Under the Kentucky Penal Code*

Influenced by the American Law Institute's Model Penal Code and the penal codes of New York and Michigan, Kentucky adopted an approach to persistent felony offenders[108] consistent with the Code's classification of crimes approach.[109] Mindful of the need to protect from habitual criminals, the General Assembly nevertheless recognized that not all deserved the same sanction.

The Kentucky Penal Code does not provide for extended terms of imprisonment for an individual convicted of a Class "A" felony because adequate sentencing alternatives exist without regard to the offender's past criminal record.[110] However, the legislature recognized a need for extended terms applicable to habitual felons convicted of a Class "B," "C" or "D" felony. Class "B" felons are most likely to pose a serious threat to the public, since they include those convicted of crimes involving violence to persons and often have a high degree of recidivism.

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

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

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

108 KYPC § 267 [KRS § 435A.1-080].

109 KYPC § 265 [KRS § 435A.1-060].

110 KYPC § 265(2)(a) [KRS § 435A.1-060(2)(a)].

Section 3445 of the Proposed Kentucky Penal Code as presented to the General Assembly provided that when a persistent felony offender charge is brought, the jury acts in a bifurcated proceeding to determine whether the accused is guilty of the felony charge. If found guilty, the jury fixes sentence for that offense.[111] The same jury then considers whether the accused qualifies as a persistent offender. An affirmative verdict requires a unanimous vote.[112] If this occurs, the extended term replaces the ordinary sentence fixed by the prior jury deliberation. This procedure was designed to afford full protection to the accused on the issue of guilt or innocence, yet provide leeway in the penalty stage for consideration of all information relevant to sentencing. This bifurcated proceeding resolves the conflict between the need to introduce proof of prior convictions and the evidentiary safeguard that an accused should not be convicted of an alleged present crime merely because of past criminal conduct. However, when § 3445 was enacted, the General Assembly eliminated the language in subsection (1) providing for a bifurcated proceeding. This effectively destroys the contemplated scheme and it is urged that the legislature reconsider its action and enact the proposed section in its entirety.

Perhaps the most important feature of the section dealing with persistent offenders concerns the requirements which must be satisfied before an individual can be convicted. The Code requires the persistent felony offender (1) to be more than twenty-one years of age, (2) to stand presently convicted of a felony, and (3) to have been previously convicted of at least two felonies.[113] The previous felony convictions may have taken place in Kentucky or in another jurisdiction so long as the defendant was over eighteen years of age at the time the first offense was committed, a sentence of at least one year of imprisonment was imposed for each felony, and the defendant was imprisoned under sentence for both convictions prior to commission of the present felony.[114]

Because protection of society through incarceration of the dangerous individual rather than rehabilitation of the offender is the objective, "care must be taken to avoid a classification of an individual as an habitual offender."[115] The strict age limitations are necessary "to

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

restrict application of the extended terms of imprisonment to individuals who have achieved relative maturity."[116]

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

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

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

Section 267[118] of the Penal Code operates in the following manner to assess the time to be served in an extended term by the persistent felony offender. If the defendant's most recent offense was a Class "B" felony, the jury is limited to consideration of an indeterminate term with a maximum sentence of from twenty years to life. In other words, the persistent felon is treated exactly as a Class "A" felon convicted of committing a single Class "A" offense under the general classification scheme of the Code.[119] Those individuals categorized as persistent offenders whose most recent offense was a Class "C" or "D" felony may be sentenced to extended terms[120] double the ordinary term provided for the conviction of a single Class "C" felony.[121] "This ap-

[116] *Id.*
[117] KYPC § 267(3) [KRS § 435A.1-080(3)].
[118] [KRS § 435A.1-080].
[119] KYPC § 260 [KRS § 435A.1-010].
[120] KYPC § 267(4)(b) [KRS § 435A.1-080(4)(b)].
[121] KYPC § 265(2)(c) [KRS § 435A.1-060(2)(c)].

proach to the question of duration of the term imprisonment for a habitual criminal is consistent with the approach proposed in the Model Penal Code."[122]

The extended term provision of the Kentucky Penal Code is a more flexible and reasonable legislative pronouncement than that represented by the old statute.[123] No longer is it possible for an offender to receive an extended term of imprisonment after only two felony convictions. The requirement that one be adjudged an habitual offender only after committing three felonies goes a long way toward establishing the felon's incapacity for rehabilitation through normal terms of imprisonment.

D. *Concurrent and Consecutive Terms of Imprisonment*

Section 270[124] of the Kentucky Penal Code was enacted to augment Section 267.[125] The section deals with the length of the term which may be imposed on a defendant and how these terms are to be served. Even with the imposition of consecutive indeterminate terms, the maximum term which can be accumulated by a defendant can be no greater than the maximum term that can be imposed on a persistent felony offender.[126]

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

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[122] LRC § 3445, Commentary.
[123] KRS § 431.190.
[124] [KRS § 435A.1-110].
[125] [KRS § 435A.1-080].
[126] KYPC § 270(1)(c) [KRS § 435A.1-110(1)(c)].
[127] LRC § 3460, Commentary.
[128] KYPC § 270 [KRS § 435A.1-110].
[129] *See* Beasley v. Wingo, 432 S.W.2d 413 (Ky. 1968).

DOUBLE JEOPARDY AND THE NEW KENTUCKY PENAL CODE

INTRODUCTION

Double jeopardy, a complicated and often confusing constitutional principle which has produced extensive litigation and numerous commentaries, resists easy categorization or precise definition, and attempts to codify it could easily create more problems than it solves. However, in spite of the inherent precariousness of the task, the drafters of the new Kentucky Penal Code[1] have codified the law of double jeopardy.[2] These new statutory provisions represent the General Assembly's first attempt to deal with double jeopardy.

In the past Kentucky, like most jurisdictions, protected defendants from being twice placed in jeopardy for the same offense through constitutional provisions[3] and common law doctrine.[4] The constitutional principle expressed in very broad and general terms, necessarily required judicial interpretation. Consequently, the Kentucky Court of Appeals has heard numerous cases involving double jeopardy issues. Unfortunately, the Court has often taken inconsistent positions upon the issues while treating the cases as if there were no conflict between them.[5] Such inconsistencies are not easily resolved, and resulted in much confusion concerning the precise scope of the constitutional prohibition.[6] Hopefully, the new statutory approach will resolve some of the conflict.

In addition to the difficult task of reducing the double jeopardy principle to a legislative enactment, the General Assembly was faced with a difficult constitutional problem. When the legislature enacts provisions affecting a constitutional principle, the legislation must be flexible enough to endure possible judicial extensions of that principle or it will be vulnerable to future constitutional attacks.[7] Therefore,

[1] The KENTUCKY PENAL CODE enacted by the 1972 General Assembly becomes effective July 1, 1974.
[2] KY. ACTS ch. 385 §§ 45, 46, 47, 48, 49 (1972) [chapter 385 is hereinafter cited as KYPC] [PROPOSED KY. REV. STAT. §§ 433C.3-020 to 433C.3-060] [hereinafter cited as [KRS]].
[3] Kentucky was the second state to adopt a constitutional provision nearly identical to the federal clause. *See* J. SIGLER, DOUBLE JEOPARDY 78-83 (1969) [hereinafter cited as SIGLER].
[4] *Id.* at 16-27.
[5] *See* notes 135-43 *infra* and accompanying text.
[6] SIGLER, *supra* note 3, at 100.
[7] The risk of a successful constitutional attack diminishes with the use of broader statutory language. A narrow statutory provision runs a greater risk due to the fact that the court's interpretation of the double jeopardy provision has never been predictable. *Id.*

CLEARING THE PATH FOR AN ENTRAPMENT DEFENSE

The defense of entrapment, one of several affirmative defenses upon which a criminally accused can presently rely to assert his innocence, was not recognized at the common law.[1] Prior to 1932 the concept of the defense of avoidance centered around the idea of "inducement."[2] It was not until *Sorrells v. United States*[3] that the United States Supreme Court established a theory for the modern defense of entrapment. In *Sorrells* the defendant was repeatedly asked by a government agent to purchase a quantity of liquor in violation of Amendment XVIII of the Constitution. The defendant was found guilty of the illicit purchase and his conviction was affirmed by the United States Court of Appeals for the Fourth Circuit.[4] The case reached the Supreme Court upon writ of certiorari and subsequently the grounds for a valid entrapment defense were promulgated.[5] At the close of his opinion Mr. Chief Justice Hughes pointed out that the government, in its brief, assumed that in utilizing the defense of entrapment the accused was not denying his guilt, but was alleging special facts upon which he could rely regardless of his guilt or innocence of the crime charged. This, the Court noted, was a misconception. The defense of entrapment is available to preclude the government from contending that the defendant is guilty of a crime where government officials have been the instigators of the accused's conduct.[6] The position of the federal courts, then, is that in such circumstances the defendant is *not guilty.*

Since the *Sorrells* decision entrapment has come to be defined as "[t]he act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him."[7] Although the defense, accepted as defined, is available in most state courts and is firmly established in the federal courts,[8] it enjoys no judicially affirmed constitutional basis.[9] In both *Sorrells* and *Sherman v. United States*[10] the Supreme Court ruled that the defense of entrapment was based on the fact that Congress, in the statutes involved, did not intend to punish

[1] State v. Good, 165 N.E.2d 28, 38 (Ohio 1960); *see* 21 AM. JUR. 2d *Criminal Law* § 143 (1965).
[2] Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915).
[3] 287 U.S. 435 (1932).
[4] Sorrells v. United States, 57 F.2d 973 (4th Cir. 1932).
[5] Sorrells v. United States, 287 U.S. 435 (1932).
[6] *Id.* at 452.
[7] BLACK'S LAW DICTIONARY 627 (4th ed. 1968).
[8] Sherman v. United States, 356 U.S. 369 (1958).
[9] Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 53.
[10] 356 U.S. 369 (1958).

entrapped defendants. The concurring Justices in these cases expressed the view that regardless of Congressional intent, the courts, as a matter of public policy which does not countenance such impermissible police conduct, could not convict entrapped defendants.[11] It is not necessarily true, therefore, that an entrapment defense could not be omitted in a criminal prosecution under state law.

Beyond the general questions of what is the basis for the defense of entrapment and what factors must be present to invoke the defense, there lies a more specific issue which recently was raised in *United States v. Shameia*:[12] Can an accused raise the defense of entrapment without admitting commission of the alleged crime? This question is hardly a new one. The Sixth Circuit Court of Appeals alluded to the issue as long ago as 1925—prior to any definitive formulation of a schema of the entrapment defense— in *Scriber v. United States.*[13] The majority noted in *Scriber* that, in deciding on the utilization of any type of avoidance defense, the defendant might enjoy the benefit of that defense despite the existence of an apparent inconsistency. Since the *Scriber* decision, the Sixth Circuit has been unpredictable in its holdings on this issue. For example, in *United States v. Baker*[14] Judge Edwards expressed the opinion that the apparent inconsistency between an accused's defenses of denying the commission of the crime and also assuming the position that any of his actions, if criminal, occurred as a result of entrapment, does not necessarily preclude submission of both defenses to the jury.[15] In *Shameia* the defendant, a grocery store owner and operator, was convicted of violating the Food Stamp Act.[16] Evidence introduced by the prosecution revealed that government agents went to the defendant's store on several occasions and received nonfood items or cash in exchange for food stamps in violation of the Act. The defendant denied any transactions with government agents and at the close of evidence submitted to the court proposed instructions on entrapment. The trial court refused to charge the jury in accordance with the defendant's instructions. On appeal the Sixth Circuit held that if a defendant denies commission of the alleged crime he is precluded from asserting the defense of entrapment.

[11] Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, Brennan, Douglas & Harlan, JJ., concurring); Sorrells v. United States, 287 U.S. 435 (1932) (Roberts, Brandeis & Stone, JJ., concurring); *see* Comment, 1964 ILL. L.F. 821.
[12] 464 F.2d 629 (6th Cir.), cert. denied, — U.S. — (1972).
[13] 4 F.2d 97, 98 (6th Cir. 1925).
[14] 373 F.2d 28 (6th Cir. 1967).
[15] *Id.* at 30.
[16] 7 U.S.C. § 2011 (1970).

The *Shameia* decision serves to exemplify one aspect of the inconsistency among the circuits of the United States Courts of Appeal on this question.[17] Basically, three positions have been assumed by the courts. The first is clearly stated in *Ortega v. United States*:[18] "To utilize the entrapment defense, an accused must admit he committed acts which constitute a crime. . . ."[19] The second position finds no inconsistency where an accused denies commission of the alleged crimes but nevertheless urges that any acts which he did commit were induced by law enforcement officials.[20] Finally, a number of decisions have been rendered which permit assertion of the entrapment defense where evidence of entrapment is introduced by the testimony of government witnesses, notwithstanding a denial of commission of the crime by the accused.[21]

Any attempt to rectify this inconsistency within the federal court system must look to the rationale behind the entrapment defense. Justice Frankfurter stated the reasoning well in *Sherman v. United States*[22] where he noted that the fundamental public policy underlying the defense of entrapment is the protection of "public confidence in the fair and honorable administration of justice" which may well be threatened if the courts permit "enforcement of the law by lawless means."[23] In order to mitigate the effect of unlawful police practice, therefore, an accused is permitted to choose as his shield the defense of entrapment.[24] Overlooking the issue of alternative defenses for

[17] *See* United States v. Johnson, 426 F.2d 112 (7th Cir. 1970); Harris v. United States, 400 F.2d 264 (5th Cir. 1968); Martinez v. United States, 373 F.2d 810 (10th Cir. 1967); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965); Sylvia v. United States, 312 F.2d 145 (1st Cir. 1963). *But see* Rider v. United States, 391 F.2d 260 (5th Cir.), *cert. denied*, 393 U.S. 1040 (1968); United States v. Ramsey, 374 F.2d 192 (2d Cir. 1967); United States v. Alford, 373 F.2d 508 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); Sears v. United States, 343 F.2d 139 (5th Cir. 1965); Redfield v. United States, 328 F.2d 532 (D.C. Cir.), *cert. denied*, 377 U.S. 972 (1964); Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1964); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Crisp v. United States, 262 F.2d 320 (4th Cir. 1954).

[18] 348 F.2d 874 (9th Cir. 1965).

[19] *Id.* at 876.

[20] *See* Rider v. United States, 391 F.2d 260 (5th Cir.), *cert. denied*, 393 U.S. 1040 (1968); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Crisp v. United States, 262 F.2d 320 (4th Cir. 1954); People v. Perez, 62 Cal.2d 769, 401 P.2d 934 (1965); 70 HARV. L. REV. 1302, 1303 (1957).

[21] *See* United States v. Ramsey, 374 F.2d 192 (2d Cir. 1967); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); Sears v. United States, 343 F.2d 139 (5th Cir. 1965); Corin v. United States, 313 F.2d 641, n.10 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1964).

[22] 356 U.S. 369 (1958) (Frankfurter, J., concurring).

[23] *Id.* at 380.

[24] *Cf.* People v. Perez, 62 Cal.2d 769, 401 P.2d 934, 938 (1965), where Chief Justice Traynor observes that entrapment is recognized as a defense of the public

(Continued on next page)

the moment, on whom does the burden of proof rest once the entrapment defense has been chosen? In *State v. Good*[25] the majority states: "[e]ntrapment is an affirmative or positive defense, and one that the defendant must prove."[26] The federal courts, however, seem to take a different view. In *Notaro v. United States*[27] the Court of Appeals for the Ninth Circuit noted that when the entrapment issue has arisen and the appropriate instruction has been submitted to the jury, it should not be phrased in terms of any burden whatsoever on the defendant. It is the prosecutor's burden to establish guilt beyond a reasonable doubt and this must be accomplished by proving that the defendant was not wrongfully entrapped.[28]

The Ninth Circuit rationale thus leaves the burden of proof with the prosecution, but does it leave the defendant in an equitable position if he has been compelled to choose between defenses? When the entrapment defense has been relied upon at the cost of foregoing all denials of commission of the alleged crime, the burden of proof on the government has surely been mitigated; it is no longer necessary for the prosecution to prove commission of the crime at all. The burden which remains with the prosecution is undoubtedly alleviated since evidence of the defendant's predisposition, which can include criminal convictions, prior criminal activity notwithstanding conviction and general character evidence, can be introduced as proof.[29] Compelled to make this choice, the accused is placed in a precarious situation.

As mentioned earlier the defense of entrapment has not been established on an affirmative constitutional basis.[30] Despite this shortcoming, when an accused is compelled to choose between denial of commission of a crime and reliance upon the entrapment defense, he is confronted with a choice between two judically affirmed rights.[31] The United States Supreme Court considered a somewhat analagous

(Footnote continued from preceding page)
against unlawful police schemes or actions, which are designed to promote rather than prevent crime. He asks how a rule designed to deter any such unlawful conduct could fairly be limited by compelling a defendant to incriminate himself as a condition precedent to invoking that rule. Such compulsion of incrimination and admission, he contends, would result in the defendant's relieving the prosecution of its burden of proving his guilt beyond a reasonable doubt, and at the same time risking not being able to meet his own burden of establishing entrapment.

[25] 165 N.E.2d 28 (Ohio 1960).

[26] *Id.* at 38.

[27] 363 F.2d 169 (9th Cir. 1966).

[28] *Id.* at 175.

[29] Orfield, *supra* note 9, at 59-61.

[30] *Id.* at 53.

[31] *See* Comment, 56 IOWA L. REV. 686, 690 (1971), for a discussion of the significance of this same choice if it is presumed that the defense of entrapment finds its roots in the Constitution.

situation in *Simmons v. United States*,[32] a case which involved the compulsion of a defendant to choose between his fifth amendment right against self-incrimination and his fourth amendment right against unreasonable search and seizure. In holding that self-incriminating testimony given to establish standing in support of a motion to suppress evidence on fourth amendment grounds could not be admitted against the defendant at trial on the issue of guilt, the Court pointed out that this involved a choice between two constitutionally protected rights. There appears to be no logical reason why this rationale should not extend to the situation where one judicially recognized defense must be capitulated in order to assert another.[33]

Besides being deprived of the protection against a mandatory choice of defenses as awarded in *Simmons*, because the right to an entrapment defense is not founded on a constitutional guarantee, the fate of an accused who attempts to invoke the defense of entrapment might well depend upon the judicial circuit in which the alleged unlawful act was committed. The three aforementioned positions which have been taken on this issue of the availability of alternative defenses are expressed in decisions of the various circuits. Both the Tenth Circuit and the Seventh Circuit have consistently held that the defense of entrapment cannot be applied to a particular case unless commission of the crime charged is admitted by the accused.[34] The decisions of the Ninth Circuit unfailingly assume a like position with the exception of *Notaro v. United States*,[35] in which the majority implies that where evidence of entrapment is introduced by the testimony of government witnesses, a defendant might utilize the entrapment defense despite his denial of the unlawful activity.[36]

The only circuit which—given the opportunity—has failed to rule out the basic right of a defendant to submit to a jury the alternative defenses of denial and entrapment is the Fourth.[37] On several occasions the Fifth Circuit has ruled that a defendant must choose between denying wrongful acts and invoking an entrapment defense.[38] However, there are notable ambiguities and inconsistencies among

[32] 390 U.S. 377 (1968).
[33] *See* 56 IOWA L. REV., *supra* note 31, at 691.
[34] *See* United States v. Gibson, 446 F.2d 719 (10th Cir. 1971); United States v. Johnston, 426 F.2d 112 (7th Cir. 1970); Munroe v. United States, 424 F.2d 243 (10th Cir. 1970); Rowlette v. United States, 392 F.2d 437 (10th Cir. 1968); United States v. Roviaro, 379 F.2d 911 (7th Cir. 1967); Martinez v. United States, 373 F.2d 810 (10th Cir. 1967).
[35] 363 F.2d 169, 174 (9th Cir. 1966) (dictum).
[36] *Id.* at 175.
[37] Crisp v. United States, 262 F.2d 320 (4th Cir. 1954) (dictum).
[38] *See* Harris v. United States, 400 F.2d 264 (5th Cir. 1968); McCarty v. United States, 379 F.2d 285 (5th Cir.), *cert. denied*, 389 U.S. 929 (1967); Rodriguez v. United States, 227 F.2d 912 (5th Cir. 1955).

various decisions of the Fifth Circuit.[39] This is especially evident in *Sears v. United States*[40] where the court notes that if the government injects evidence of entrapment into a trial, the defendant is entitled to an instruction that if the jury finds that he committed the alleged acts, it must further consider whether he was entrapped into committing them.[41]

The decisions of both the First and the Second Circuits also lack finality on the question of these alternative defenses of denial and entrapment.[42] In *United States v. Alford*[43] the majority indicated that if the trial court is to consider whether a defendant has a right not only to deny the alleged offense but also to rely on the defense of entrapment, the evidence must merely be of a nature which would have entitled the accused to a charge on entrapment were it not for his denial.[44] It is also interesting to note that in this same case the court admitted that a final decision has not been made on the issue of the alternative defenses.[45]

The Court of Appeals for the District of Columbia established in *Hansford v. United States*[46] that it was possible—and consistent with the defendant's denial of the alleged transaction in this case—for the accused to argue that if the jury believed that the unlawful transaction did occur, the prosecution's evidence as to how it occurred could indicate entrapment and require an equivalent instruction.[47] This position was either modified or reversed two years later when the same court noted that where a defendant's evidence fails to establish the defense of entrapment, he is not entitled to submission to the jury of an entrapment instruction.[48]

Keeping in mind the diverse positions of the Circuit Courts of

[39] *See* Rider v. United States, 391 F.2d 260 (5th Cir. 1968), where the court approved a district court instruction that an accused is entitled to any and all defenses he might desire, regardless of their consistency, and Siglar v. United States, 208 F.2d 865 (5th Cir.), *cert. denied*, 347 U.S. 991 (1954), where the court implied that if the issue of entrapment was raised by the defendant himself or through the testimony of witnesses, the defense might be entitled to an instruction on that issue.
[40] 343 F.2d 139 (5th Cir. 1965).
[41] *Id.* at 143. The court adds that what might be a valid defense should not be forfeited by an accused nor should improper conduct of law enforcement officers be ignored by the court merely because the defendant elected to put the government to its proof.
[42] *See* United States v. Ramsey, 374 F.2d 192 (2d Cir. 1967); United States v. Alford, 373 F.2d 508 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967); Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1964).
[43] 373 F.2d 508 (2d Cir. 1967).
[44] *Id.* at 509.
[45] *Id.*
[46] 303 F.2d 219 (D.C. Cir. 1962).
[47] *Id.* at 221.
[48] Redfield v. United States, 328 F.2d 532 (D.C. Cir.), *cert. denied*, 377 U.S. 972 (1964).

Appeals, and remembering that in many situations an accussed is compelled to choose between two judicially recognized and affirmed defenses, the question of what can be done to clear the path for the equitable vindication of a defendant's rights inevitably arises. The Supreme Court consistently has declined to rule on the issue of whether an accused can deny the commission of a crime and yet retain the right to have an entrapment instruction submitted to the jury.[49] It appears that in *Shameia* the Sixth Circuit majority merely counted decisions and concluded that there was a greater number of cases which denied the alternative defenses than which permitted the practice. Regardless of what approach was used in reaching the *Shameia* holding, it seems clear that the issue awaits resolution. Several commentators have made suggestions,[50] but the question remains.

CONCLUSION

By refusing to grant a writ of certiorari in *Shameia*, the United States Supreme Court has implied that the inconsistencies among the holdings of the Circuit Courts of Appeals are not so formidable as to threaten the rights of criminal defendants. As the situation now exists, however, an individual's right to liberty is jeopardized in a circuit where the right to alternative jury instructions on the defenses of denial and entrapment is prohibited. The fact that a defendant is compelled irrevocably to choose one defense at the cost of relinquishing another only in certain circuits borders on denial of both equal protection and due process as guaranteed by the Constitution.

The power to rectify the inequities discussed rests with the United States Supreme Court. In this era of concern over law and order it is quite possible that governmental agents can become overzealous in performing their law enforcement duties. When evidence of such action is brought out during the course of a criminal proceeding, there seems to be no cogent reason why the jury should not be instructed

[49] See United States v. Shameia, 464 F.2d 629 (6th Cir.), *cert. denied*, — U.S. — (1972); United States v. Alford, 373 F.2d 508 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967); Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1964); Siglar v. United States, 208 F.2d 865 (5th Cir.), *cert. denied*, 347 U.S. 991 (1954).

[50] *See* Orfield, *supra* note 9, at 65, in which the author posits that the *Shameia* rule is a receding one and in need of change; Note, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 950 (1965), which draws an analogy between entrapment and coerced confessions and points out that the basic objectives of interrogation and solicitation are similar, *i.e.*, to induce the accused to supply evidence of his guilt; 56 IOWA L. REV., *supra* note 31, which indicates the factors which make a change from the *Shameia* rule imperative.

by the court that the question of entrapment may be considered even though the defendant has denied commission of the crime. Such a uniform practice, which adds to the discretion of the trial court by allowing the judge to decide whether the issue of entrapment has been raised by the evidence, would eradicate the present inconsistencies among the circuits and contribute to clearing the path for an effective entrapment defense.

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