Finally, the Federal Judicial Center has been given the responsibility of conducting training programs for both full-time and part-time magistrates.[17] This section requires that an introductory training program must be held for new magistrates within one year after their initial appointment.

As can be seen, The Federal Magistrate Act has been designed to relieve the pressure of the workload which is presently burdening judges of the United States district courts. Taking part of the workload off these individuals extends both to criminal and civil actions. It is hoped that by this method, the individual judges will be able to concentrate more of their time to actual trial sessions, and leave much of the pretrial preparation in the hands of the magistrate.

17. *Id.* at § 637.

Sentencing Felons to Imprisonment Under the Kansas Criminal Code: The Need For a Consistent Sentencing Policy

I. Introduction

The whole criminal adjudication process culminates with the sentencing decision. Its importance to the entire judicial-correctional system cannot be understated. It has been traditionally neglected in favor of other more visible aspects of the system. However, recent events have evoked renewed interest in all facets of the judicial-correctional system, including sentencing. Currently, there is a greater awareness of the importance of the sentencing decision as well as a realization of its complexity.

The basic purpose of the criminal adjudication process may be quite simply stated: to protect society.[1] Implementation of this purpose via a sentencing structure is not as simple. Protection of the public can be accomplished according to several, often conflicting theories. Thus a sentence may prescribe punishment; provide a foundation for an attempt to rehabilitate the offender; and serve as a deterrent to future crimes.[2]

Unfortunately, owing to a lack of unanimity as to what goal is to be pursued and a dearth of information as to the needs and characteristics of the individual defendant, many sentences amount to no more than a reflection of the judge's prejudices or his prediction as to the defendant's future behavior. This type of sentencing falls far short of its intended purpose of protecting the public. Rather, the result is to embitter defendants who have been prejudicially dealt with and to engender a lack of respect for the judiciary.

In many jurisdictions, there is an immediate need for a modernization of sentencing structures and procedures to better portray the needs of both society and the offender. Recently, Kansas radically revised its sentencing structure to promote individualization and rehabilitation instead of deterrence as the primary end of sentencing. How well the structure adopted by the legislature serves this goal will be the focus of this article.

1. Jayne, *The Purpose of the Sentence*, 2 N.P.P.A.J. 315 (1956).
2. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 141 (1967).

II. Theories of Punishment

No proper assessment of any sentencing structure can be undertaken without first scrutinizing the theories of punishment upon which most sentencing provisions are founded.[3] With some variation the traditional theories of criminal punishment have been retribution, reformation, deterrence, and incapacitation.[4]

Retribution is a relic of the most ancient end of punishment. It is a remnant of the Mosaic Law of an eye for an eye and a tooth for a tooth.[5] Theoretically, it serves as an emotional placation for the community by allowing it to vent its anger through vengeance.[6] Retribution, as a theoretical justification for punishment, has been condemned as "unjustifiable vengeance; a destructive and short-sighted emotional basis for dealing with the problem of crime; legalization of primitive and infantile reactions."[7] Regardless, many sentences especially those imposed for so-called atrocities reek of retribution, and its influence on the sentencing decision cannot be minimized.[8]

Deterrence has often been advanced as a theoretical justification for punishment. Under this concept the purpose of punishment is to discourage the offender from repeating his criminal behavior and also to dissuade potential wrongdoers.[9] Whether incarceration effectively deters criminal depredations has long been a source of conflict among authorities. There has been a growing realization that fear of detection and the accompanying moral condemnation better advance the end of deterrence than does imprisonment.[10] Accordingly, improved methods of detection and modernization of judicial procedures have been advocated as a better means of accomplishing deterrence.[11] Incarceration has little, if any, deterrent effect upon the habitual or professional criminal. Many of these individuals are incapable of learning from the experience of punishment. Fear of punishment does not necessarily deter further criminal behavior; instead, it may actually increase criminality.[12] The prospect of punishment, for

3. Comment, *Reflections on Some Theories of Punishment*, 59 J. Crim. L. & P.S. 595 (1968), states that society should recognize and understand the goals of punishment so that it can dedicate itself to those methods which will attain the desired goals.
4. DeGrazia, *Crime Without Punishment: A Psychiatric Conundrum*, 52 Colum. L. Rev. 746 (1952).
5. DeGrazia, *supra* note 4.
6. Comment, *supra*, note 3, at 596.
7. DeGrazia, *supra* note 4.
8. Bennett, *Operation: Assize*, 53 J. Am. Jud. Soc'y 104 (1954). "Personal revenge we have renounced, but official legalized revenge we can still enjoy. Once someone has been labeled an offender and proved guilty of an offense he is fair game, and our feelings come out in the form of a conviction that a hurt to society should be 'repaid'." K. Menninger, The Crime of Punishment, 190 (1966).
9. Comment, *supra* note 3, at 596.
10. *Id.*
11. Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949 (1966). *See* Burger, The State of the Judiciary—1970, 56 A.B.A.J. 929, 931 (1970). And *see*, K. Menninger, *supra* note 8, at 208.
12. S. Rubin *et al*, The Law of Criminal Correction 658 (1963).

example, may cause the criminal to shoot an arresting officer to avoid apprehension. Even though modernization of the judicial-correctional system to promote individualization would better accomplish deterrence, deterrence through incarceration remains viable as a theoretical justification for punishment.[13]

Incapacitation as a basis for punishment proceeds upon the theory that while the offender is incarcerated, society is free of his depredations. However, this theory ignores the obvious fact that eventually the offender will be released,[14] and unless incarceration has accomplished some rehabilitation, society will have been only briefly protected. Incapacitation only temporarily alleviates rather than extinguishes the threat posed to society.[15]

In recent years there has been recognition that society can best be protected from repeated criminal acts by rehabilitating the offender and restoring him to the community as a law-abiding productive citizen. Rehabilitation focuses on the individual rather than upon the offense. Accordingly, punishment is determined upon consideration of the individual's background, personality, education, and other factors rather than upon his offense.[16]

Frequently, rehabilitation conflicts with the other theories of punishment. To prevent a contravention of the legislative policy, the courts must apprise themselves of the circumstances of the offender and his offense in order to be able to balance the need for deterrence and retribution against the announced policy of rehabilitation. When the sentencing decision incorporates deterrence and retribution, the resulting sentence will be inconsistent with the legislative policy unless their inclusion is compatible with the requirements of individualization.

III. Evolution of a Philosophy of Punishment

Historically, the emphasis in Kansas has been on deterrence as the aim of punishment.[17] Whenever deterrence, incapacitation, or retribution served as a foundation for a sentencing structure, the focus was on the offense

13. *See* Ohlin and Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 Law & Contemp. Prob. 495, 497 (1958).
14. It is estimated that at least 95% of all prisoners ultimately return to society, National Council on Crime and Delinquency, Guides for Sentencing, 2 (1957). [Hereinafter cited as Guides for Sentencing].
15. Ohlin and Remington, *supra* note 13, points out that the difficulty with relying on incapacitation as a theory of punishment is that it imposes upon the court the very complex problem of balancing the need for prolonged incarceration against its destructive consequences.
16. Comment, *supra* note 3, at 597. Since rehabilitation is necessarily an individualistic approach, there will be unequal treatment for similar offenses; whereas, punishment imposed under the preceding theories should be substantially the same for similar offenses. *Id.*
17. *See* Directors and Warden of the Kansas Penitentiary, 1st Biennial Report of the Directors and Warden of the Kansas State Penitentiary to the Governor of Kansas 17 (1878).

rather than the individual. The Territorial Legislature, when it enacted the first statutes governing the disposition of offenders,[18] specified punishment for each offense. For each offense or group of related offenses, punishment could be prescribed for a minimum number of years;[19] for both a minimum and a maximum number of years;[20] or for a maximum of years.[21] Initially, the sentencing decision was made by the jury which was permitted to assess punishment within the alternatives provided by law.[22] Later, jury sentencing was abolished and authority to impose sentence was vested in the judge.[23]

Prior to 1903, the courts imposed definite sentences, that is, sentences were for a definite term of years. In 1903, the Kansas Legislature enacted the Indeterminate Sentence Act.[24] This statute provided that the court in imposing sentence would employ an indefinite term, that is, the sentence imposed would be no more than the maximum nor less than the minimum provided by law.[25] Utilization of the indeterminate sentence represented a partial shift from deterrence to rehabilitation as the end of punishment. The theory of an indeterminate sentence holds that the determination of when a prisoner has been rehabilitated cannot be made beforehand; consequently, the exact term of imprisonment should be determined by an impartial body which would be able to judge when the prisoner was ready for release.[26] For this reason the legislature provided for the creation of a prison board and empowered it to adopt rules and regulations pursuant to parole.[27]

18. KAN. TERRITORIAL STAT. ch. 129 (1855). A sentencing structure of this type was an adaption of the "fitting the punishment to the crime theory" first proposed by the Italian criminologist Beccaria, BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (2d ed. English transl. 1769).

19. *See, e.g.*, KAN. TERRITORIAL STAT. ch. 48 § 23 (1855) which prescribed a minimum term of 5 years for manslaughter in the first degree.

20. *Id.*, the same statute further prescribed a term of not less than 3 years nor more than 5 years for manslaughter in the second degree.

21. *See, e.g.*, KAN. TERRITORIAL STAT. ch. 49 § 23 (1855) which prescribed a term not exceeding 5 years for burglary in the third degree.

22. KAN. TERRITORIAL STAT. ch. 129 § 3 (1855). However, the jury's power to impose sentence was so constricted that for practical purposes the power to impose sentence lay with the court. The court was authorized by the legislature to disregard any assessment not within the statutory limits; to impose sentence where the jury failed to assess punishment, assessed a punishment not authorized by law, or where a guilty plea was entered; finally, the court was empowered to reduce the punishment where, in the court's opinion, the punishment was greater than warranted by the circumstances of the case. *Id.*, §§ 4 to 7.

23. Ch. 52 [1865] KAN. SESS. LAWS 129.

24. Ch. 375 § 1 [1903] KAN. SESS. LAWS 571. The Kansas statute was modeled after a New York statute enacted in 1877 which provided for an indeterminate sentence; a system of grading the inmates; compulsory education; and a careful system of selection for parole. C. GIARDINI, THE PAROLE PROCESS, 11 (1959). Adoption of an indeterminate sentence was first urged by Warden Henry Hopkins in 1878 as a method of reformation whereby a man's own destiny would be placed in his hands. DIRECTORS AND WARDEN OF THE KANSAS STATE PENITENTIARY, *supra* note 17, at 18.

25. Ch. 375 § 1 [1903] KAN. SESS. LAWS 571.

26. *See* Comment, *The Indeterminate Sentence Laws--The Adolescence of Penno-Correctional Legislation*, 50 HARV. L. REV. 677 (1937).

27. Ch. 375 § 5 [1903] KAN. SESS. LAWS 572. The statute withstood several challenges as to its constitutionality. State v. Stephenson, 69 Kan. 405, 76 P. 905 (1904) upheld the act against contentions that it encroached upon judicial and executive powers reserved by the Kansas Constitution to the court and governor respectively. *In re Mote*, 98 Kan. 804, 160 P. 223 (1916), held that an indeterminate sentence imposed under the act was not void for uncertainty. Similar acts have been held valid against contentions that such sentences constitute cruel and unusual punishment. Comment, *supra* note 26, at 678 n. 5. *See generally*, KANSAS BOARD OF PROBATION AND PAROLE, THE HISTORY OF PAROLE IN KANSAS (1970).

The Intermediate Sentence Act was repealed in 1957 in favor of a more liberalized provision which retained the principle of the indeterminate sentence,[28] but permitted the court to select among several alternatives in imposing sentence.[29] Enactment of this new provision further shifted the balance towards rehabilitation as the primary goal of sentencing. This shift was completed in 1969 with the adoption of the Kansas Criminal Code.[30]

As a necessary prerequisite to a correctional program aimed at rehabilitating the offender, it is essential that the sentence be tailored to the offender. Individualization of sentence requires the offender be dealt with "in accordance with his individual characteristics, circumstances, needs and potentialities. . . ."[31] Kansas has adopted the concept of individualization as the basis for the sentencing provisions of the Code.[32] Implementation of the individualization principle requires a departure from the traditional pattern of equating sanctions with the crime.[33] By classifying crimes of like gravity within a single category and providing a penalty for each, the legislature has attempted to achieve a "rational and consistent system of penalties,"[34] thereby avoiding the disparities which had resulted from the multitude of sanctions previously imposed.[35] The new sentencing structure makes provision for five classes of felonies and prescribes a term of

28. Ch. 331 [1957] KAN. SESS. LAWS 724. The provision attempted to broaden the court's discretion in determining the term of incarceration by permitting the court in its discretion to "fix a minimum term provided that the minimum did not exceed that prescribed by law or one-third of the maximum term, or seven years whichever was least." *Id.*, § 14 at 728. Soon thereafter the provision was found to be so vague and contradictory as to be judicially unadministrative and was declared void. State v. O'Connor, 186 Kan. 718, 353 P.2d 214 (1960). In 1963, the provision was repealed. Ch. 311 [1963] KAN. SESS. LAWS 761.

29. Ch. 331 [1957] KAN. SESS. LAWS 724. In addition to committing a defendant to an institution, the court was permitted to grant probation; suspend the sentence or execution of sentence; impose a fine; or any combination thereof.

30. Ch. 180 § 21-4601 [1969] KAN. SESS. LAWS 496.

31. MODEL SENTENCING ACT § 1 (1963). "The philosophy of the Act is that the rehabilitation of all offenders should be the primary purpose of the correctional system. . . ." Flood, *The Model Sentencing Act*, 9 CRIM. & DELIQ. 371, 372 (1963).

32. KAN. STAT. ANN. § 21-4601 (Supp. 1970). Adopts verbatim § 1 of the MODEL SENTENCING ACT, KAN. STAT. ANN. § 21-4601, Comment (Supp. 1970).

33. MODEL PENAL. CODE § 6.01, Comment (Tent. Draft No. 2, 1956); ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.1(b), Commentary (Approved Draft, 1968).

34. PROPOSED KAN. CRIM. CODE § 21-1503, KAN. JUDICIAL COUNCIL BULL. 128 (April, 1968); KAN. STAT. ANN. § 21-4503, Comment (Supp. 1970).

35. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.1(a), Commentary (Approved Draft, 1968), notes that most sanctions are utterly without any rational basis and examines several examples of such provisions.

imprisonment for each class.[36] To assist the court in pronouncing a minimum term, the Code sets forth criteria to be considered in assessing the minimum term.[37] Contrary to the Kansas Judicial Council's recommendation,[38] the legislature also retained the Habitual Criminal Act which imposes a severe limitation on attempts to individualize punishment.[39]

Even though primarily directed towards promoting rehabilitation as the end of punishment, the Code also contemplates retribution, incapacitation, and deterrence as incidental aims. For example, retention of the Habitual Criminal Act may be partially explained in terms of its alleged deterrent value.[40] The assignment of apparently high maximum and minimum terms to some felony classifications may presumably be explained in terms of deterrence, incapacitation, and, quite possibly, retribution. Consequently, the sentencing structure which emerges from a consideration of the various provisions of the Code embraces "a somewhat dubious mixture of heterogeneous elements. . . ."[41]

The problem confronting the court in individualizing a sentence consists of weighing the relative influence of each theory against the needs and characteristics of the individual offender.[42] This balancing prerequisite is rendered more arduous in that individualization frequently conflicts with the requirements of deterrence and retribution.[43] As a consequence of this conflict, the problem of disparity arises.[44]

IV. Disparity

Disparity, as the term is applied to individualized sentencing, means that a defendant's sentence cannot be accounted for in light of his nature, needs, and offense. The consequences of disparate sentences permeate every segment of the judicial-correctional system.

36. KAN. STAT. ANN. § 21-4501 (Supp. 1970).
Class A.—Death or Imprisonment for life.
Class B—5-15 to life.
Class C—1-5 to 20.
Class D—1-3 to 10.
Class E—1-5.

37. KAN. STAT. ANN. § 21-4606 (Supp. 1970). Under this provision the court is to take into consideration the nature and circumstances of the crime, the background and character of the defendant, and the requirements of public safety.

38. PROPOSED KAN. CRIM. CODE, KAN. JUDICIAL COUNCIL BULL. 19 (April, 1968). The reason given for not retaining the Habitual Criminal Law was that the court is given discretion in fixing the minimum term and that the criteria suggested as appropriate to making the decision permits consideration of the defendant's history of prior criminal activity. PROPOSED KAN. CRIM. CODE § 21-1503, KAN. JUDICIAL COUNCIL BULL. 125 (April, 1968).

39. KAN. STAT. ANN. § 21-4504 (Supp. 1970).

40. *See* Topeka Daily Capital, Jan. 29, 1969, at 8, col. 5.

41. Mannheim, *Some Aspects of Judicial Sentencing Policy*, 67 YALE L.J. 961, 971 (1958).

42. Bennett, *The Sentence—Its Relation to Crime and Rehabilitation*, 1960 U. ILL. L. FORUM 500, 503 (1960).

43. Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257 (1952).

44. George, *Comparative Sentencing Techniques*, 23 FED. PROB. 27 (March 1959).

> The very ideal of justice is offended by seriously unequal penalties for substantially similar crimes, and the most immediate of its practical purposes are obstructed. Grievous inequalities in sentences are ruinous to prison discipline. And they destroy the prisoner's sense of having been justly dealt with, which is the first prerequisite of his personal reformation.[45]

Moreover, unreasonably disparate sentences clash with the basic requirement of equal treatment embodied in the fifth and fourteenth amendments.[46] Whenever distinctions in treatment are not supported by factual differences but can be attributed only to arbitrary and unreasonable castigation, the defendant has been denied his constitutional rights to due process and equal protection under the law. In *Caldwell v. Texas*,[47] the United States Supreme Court concluded that due process is fulfilled when the law acts on all alike, and the individual is not subjected to an arbitrary or capricious exercise of state power. The Constitution does not require rigid equality; instead, it requires uniformity with variances related to significant factual dissimilarities which bear substantial relation to legitimate governmental purposes.[48]

Primary responsibility for disparity in those jurisdsictions, which vest the court with substantial discretion in passing sentence, has been attributed to differences among judges regarding the ends of punishment.[49] An exhaustive survey of disparity among trial courts in New Jersey confirmed that individual differences underlie much of the disparity uncovered by the study.[50] Kansas has not been plagued by this sort of disparity although the provisions of the Code introduce the possibility of such disparity.

Some of the sentencing disparity prevalent in Kansas may be attributed to plea bargaining whereby a defendant agrees to plead guilty and receives in return a reduction of the charges pending against him.[51] Facilitating

45. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 439 (1958). The effect of disparity within the Kansas correctional system has been to engender a *spirit of bitterness* and *feeling of injustice* which has made reaching the prisoner who has been unjustly dealt with extremely hard. DIRECTORS AND WARDEN OF THE KANSAS STATE PENITENTIARY, 6TH BIENNIAL REPORT OF THE DIRECTORS AND WARDEN OF THE KANSAS STATE PENITENTIARY TO THE GOVERNOR OF KANSAS 6 (1888). (Emphasis added.)

46. Comment, *Sentencing Disparity: Causes and Cures*, 60 J. CRIM. L. & P.S. 182, 183 (1969).

47. 137 U.S. 692 (1890).

48. Comment, *supra* note 46. *See* Nebbia v. New York, 291 U.S. 502 (1933), due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

49. Glueck, *The Sentencing Problem*, 20 FED. PROB. 15 (Dec. 1956) cites numerous examples of disparity attributable to individual differences among judges. *See also* Bennett, *supra* note 42, at 502; Rubin, *The Model Sentencing Act*, 39 N.Y.U.L.R. 251, 260 (1964).

50. Gaudet, Harris and St. John, *Individual Differences in Sentencing Tendencies of Judges*, 23 J. CRIM. L.&C. 811, 814 (1933).

51. *See generally* Note, *Plea Bargaining—Justice Off the Record*, 9 WASHBURN L.J. 430 (1970).

this mode of disparity was the former sentencing structure which required imposition of a legislatively predetermined sentence. Theoretically, imposition of a legislatively fixed sentence invests complete discretion as to the length of incarceration in the parole authority which presumably is better able to determine when the offender is ready for release on parole.[52] In practice the result has been to shift discretion away from the court to the prosecutor instead of the parole authority.[53] Due to this displacement, there results some inconsistency between the offense for which persons are convicted and their actual conduct.[54]

A further instance of disparity occasioned by plea bargaining concerns the treatment afforded to habitual and marginal offenders, respectively. Experienced recidivists who are familiar with the plea bargaining system may be dealt with leniently; whereas, a marginal offender who declines to plead may be dealt with oppressively.[55] In either case the outcome is deleterious to the judicial-correctional system. The recidivist who escapes lengthy incarceration loses respect for the entire system, while the marginal offender feels that he has been unjustly imprisoned and his chances for successful rehabilitation are substantially diminished.

Preceding any reformation of a sentencing structure to promote rehabilitation is the indispensability of achieving a balance between the ends of individualization and uniformity so as to minimize, if not eliminate, disparity. Absolute uniformity would dictate a return to a structure under which punishment is determined by legislative fiat for each offense. Conversely, individualization requires that the defendant be dealt with in respect to his individual characteristics and needs. Uniformity and individualization are then incompatible in theory. If uniformity be defined in terms of equality of treatment based on individual variances, it would require that offenders be dealt with in accordance with their differences even though they have committed the same offense. When the defendant is dealt with objectively and made to understand that his sentence is based upon his needs, then the aims of individualization and uniformity can be attained without the pernicious consequences of disparity. The policy which derives from a consideration of the requirements of uniformity and individualization demands that sentences be consistent. Each offender's sentence should be consistent with an objective evaluation of his individual characteristics, circumstances, needs, and potentialities.[56] Whenever a sentence evidences subjective bias or fails to analyze the offender's needs and traits, it is contrary to the policy of individualization. Ergo, since the preamble to the sentencing provisions enunciates individualization, it follows that sentences imposed under the provisions of the Code should be consistent.

52. Comment, *supra* note 26.
53. Ohlin and Remington, *supra* note 13, at 505. *See* R. Dawson, Sentencing—The Decision as to Type, Length and Conditions of Sentence, 191 (1969).
54. Ohlin and Remington, *supra* note 13, at 505; Remington and Newman, *The Highland Park Institute on Sentence Disparity*, 26 Fed. Prob. 3 (March, 1962).
55. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 11 (1967); Ohlin and Remington, *supra* note 13, at 505.
56. For a discussion of the problems involved in resolving the apparent conflict between individualization and uniformity *see*, Guides For Sentencing, *supra* note 14, at 3-5; Rubin, *Sentencing Goals Real and Ideal*, 21 Fed. Prob. 51 (June, 1957).

A. *Sentencing Structure*

In affixing a penalty for each class of felony, the Judicial Council adopted the scheme propounded by the Model Penal Code.[57] It makes provision for a legislatively fixed maximum and requires the imposition of a minimum for each class but gives the court some discretion as to its length.[58] On the other hand, the Model Sentencing Act authorizes the judge to prescribe a maximum term but does not provide for a minimum.[59] This conflict signifies the basic area of disagreement among those concerned with sentencing problems. It involves distribution of authority between the courts and other organs of correction.[60] The debate revolves around one basic question, namely what powers and responsibilities should be delegated to the various agencies.[61]

As regards the maximum term provision, the framers of the Model Penal Code resolved the debate in favor of the parole authorities.[62] In their opinion the parole authorities are better equipped to determine the period required for optimum rehabilitation than the courts.[63] The Model Sentencing Act provides the court may exercise its discretion in fixing the maximum within a statutory limit of five years. One reason advanced in favor of judicial discretion is that predetermined maximums deprive the court of the opportunity to individualize the maximum sentence.[64] To deny him this authority would deprive the parole authorities of the benefit of his evaluation.[65] The discretionary provision was also included in order to effect a reduction of actual time served which in the opinion of the framers was excessive.[66]

The controversy which debate over the maximum term arouses pales in comparison to the furor which the minimum term provision has provoked.

57. Proposed Kansas Criminal Code § 21-1503, Kan. Judicial Council Bull. 124 (April, 1968).
58. Model Penal Code § 6.06 (Tent. Draft No. 2, 1956).
59. Model Sentencing Act § 9 (1963).
60. Wechsler, *Sentencing Correction and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 479 (1961); *see also* Model Penal Code § 6.07, Comment (Tent. Draft No. 2, 1956).
61. Wechsler, *supra* note 60.
62. *Id.*, at 478.
63. *Id.*, at 478. *See* Gaudet, Harris and St. John, *supra* note 50; Clueck, *supra* note 49.
64. Rubin, *Sentencing and Correctional Treatment Under the Law Institute's Model Penal Code*, 46 A.B.A.J. 994 (1960); Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 L. & Contemp. Prob. 544, 546 (1958).
65. *Supra* note 64.
66. Flood, *supra* note 31; Rubin, *Allocation of Authority In the Sentencing—Correction Decision*, 45 Tex. L. Rev. 455 (1967).

Imposition of a minimum term has been denounced as the primary cause of "irrational" commitments.[67] It has been advocated as necessary to protect the best interests of the defendant, his family, and the community.[68] A minimum term provision was excluded from the Model Sentencing Act since it limited parole flexibility.[69] In the opinion of one supporter of the Model Sentencing Act, any obstacle to the power of the parole board to release the offender whenever his adjustment seems to warrant it, is sheer retribution.[70] The Model Penal Code, conversely, prescribes a minimum term essentially for deterrent purposes.[71] However, a minimum term in excess of one year is to be imposed only where necessary to assure a sufficient period of treatment and as a matter of general deterrence.[72]

In assessing the effect of the mandatory maximum and minimum terms upon the legislative policy, the minimum term provisions are the most significant.[73] Provision for minimums, although discretionary within limits, presents several possibilities for disparity and consequent inconsistency. It is the minimum term rather than the maximum which actually determines the length of time the offender will serve since parole eligibility is computed from the minimum term.[74]

Thus, the offender will be concerned primarily with insuring that he will receive the lowest possible minimum term, resulting in a furtherance of the plea bargaining process to the detriment of a consistent sentencing policy. And, since the minimum is not imposed objectively in accordance with the recommended criteria,[75] an element of subjective bias is introduced into the sentencing structure, further frustrating any attempt to attain consistency. Imposition of a minimum term restricts the authority of the parole authorities; consequently, they are not in a position to ameliorate the effects of an unreasonable minimum term,[76] nor will they in most cases be able to grant parole at the optimum time. The consequence of such a situation on the quest for rehabilitation is obvious.

67. Rubin, *supra* note 56, at 53.
68. Thompson, *Sentencing the Dangerous Offender*, 32 Fed. Prob. 3-4 (March, 1968).
69. Model Sentencing Act § 9, Comment (1963).
70. Tumbladh, *supra* note 64, at 548.
71. Model Penal Code § 6.07, Comment (Tent. Draft No. 2, 1956).
72. P. Tappan, Crime, Justice and Correction, 470 (1960).
73. The rentention of the legislatively fixed maximums will be conducive to plea bargaining as previously discussed, *supra*. And the sentences which are imposed as a result of a bargained-for plea and not as a result of an assessment of the offender's characteristics and needs will, of course, be inconsistent with the legislative policy.
74. Kan. Stat. Ann. § 22-3717(2)(c) (Supp. 1970), provides for parole eligibility upon completion of the minimum term less accumulated institutional and incentive good-time credits.
75. Kan. Stat. Ann. § 21-4606 (Supp. 1970). An objective evaluation of these criteria would seem to require that a presentence investigation be conducted. However, in Kansas for fiscal year 1970, a presentence investigation was conducted after less than ½ of the felony convictions.
76. The parole board may recommend to the sentencing court that an offender's minimum term be reduced, Kan. Stat. Ann. § 21-4605 (Supp. 1970); however, this authority has been sparingly used.

A final consequence of the minimum term provisions is more speculative than the above-mentioned possibilities. With the exception of class E felonies, there is provision for a minimum term of three or more years for each class. Under current parole regulations a minimum sentence of three years requires the offender to serve two years before becoming eligible for parole.[77] There is some authority for the theory that if rehabilitation is to be accomplished it will be accomplished within two years and that imprisonment in excess of two years results in the onset of institutionalization.[78] It is doubtful that prolonged incarceration effectively deters future criminal acts.[79] Since a lengthy minimum may be inimical to rehabilitation, its imposition unless warranted as a deterrent measure would contradict the legislative policy.

B. Presentence Investigation

As was noted in the previous discussion, individualization demands that the defendant's needs and characteristics be evaluated objectively. In order to conform to the individualization concept enunciated in § 1, the Model Sentencing Act directs that a presentence investigation be conducted prior to sentencing.[80] The Model Penal Code likewise requires a presentence report.[81]

To successfully accomplish individualization, the court must have complete information concerning the defendant.[82] Unfortunately, the Kansas Legislature chose to ignore the Judicial Council's recommendation[83] and failed to provide for a mandatory presentence investigation.[84] This failure to insure that the defendant's individual needs and characteristics will be determined objectively may have two possible effects on the legislative sentencing policy. First, it will permit subjective bias and individual prejudice to control the sentencing decision and thereby promote irrational disparity to the detriment of consistency. When there is a paucity of information regarding the offender, the sentencing decision is merely the judge's "hunch" which mirrors his individual philosophy nad preconceived notions.[85] A presentence investigation report which consolidates, organizes,

77. Kansas Board of Probation and Parole, Reg. 45-1-2 (July, 1970).
78. Rubin, *Long Prison Terms and the Form of Sentence*, 2 N.P.P.A.J. 337 (1956); *cf.* Remington and Newman, *supra* note 54.
79. 12 Crimes of Violence 576 (D. Mulvihill, M. Tumin, L. Curtis ed. 1969) [Staff Report to the National Commission on the Causes and Prevention of Violence], the report concludes that other than retributive gratifications, incarceration serves neither long-term deterrent nor rehabilitative consequences. The same difficulties plaguing the American correctional system are likewise extant in Europe, *see* Dunning, *Prison Problems in Europe, Too*, The Kansas City Times, Jan. 27, 1971, § B, at 12, col. 3.
80. Model Sentencing Act § 2 (1963).
81. Model Penal Code § 7.07(1) (Tent. Draft No. 2, 1956).
82. Bennett, *supra* note 8 at 109.
83. Proposed Kansas Criminal Code § 21-1604, Kan. Judicial Council Bull. 128 (April, 1968).
84. Kan. Stat. Ann. § 21-4604 (Supp. 1970).
85. Guides For Sentencing, *supra* note 14, at 251. Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 58 (1966).

and analyzes the defendant's history furnishes the judge with the information essential to achieving objectivity.[86] Consistency can best be achieved by providing the judge with factual data upon which he can base a human understanding of the defendant and a human understanding of his own attitudes towards him.[87]

Second, should a sentencing decision fail to take into account the needs and characteristics of the defendant, but instead reflect the judge's bias and prejudice, there is ample foundation for arguing the defendant has been deprived of his right to due process and equal protection. As previously discussed, the decision in *Caldwell v. Texas*[88] established as a constitutional requirement that any distinction in treatment afforded an individual under state law must be related to significant factual differences.[89] Hence, it is the basis for the distinction in treatment rather than lack of equality which is subject to scrutiny. Individualization contemplates defendants will be treated differently. But, in order to comply with the requirements of due process and equal protection, individualization must be founded upon "significant factual distinctions." The procedures necessitated by this mandate require at least a presentence investigation.[90] It is clear that to implement individualization and to achieve consistency a mandatory presentence investigation is essential if not, in fact, commanded by the Constitution.

C. *The Habitual Criminal Act*

As originally proposed, the Criminal Code would have repealed the Habitual Criminal Act in favor of a provision for enhanced minimum terms.[91] By enacting the Criminal Code into law, the legislature yielded to the plea that the "Habitual" was needed as a deterrent measure[92] and incorporated it in the Code.[93] It is difficult, if not impossible, to reconcile the "Habitual" with an announced policy of individualization and rehabilitation.[94] Deterrence and retribution are most often cited as the theories underlying such statutes.[95] There is little emphasis upon rehabilitation of

86. GUIDES FOR SENTENCING, *supra* note 14, at 26.
87. Rubin, *supra* note 56, at 56.
88. 137 U.S. 692, 697 (1890); *see* Nebbia v. New York, 291 U.S. 502 (1933).
89. Comment, *supra* note 46.
90. Rubin, *supra* note 85, at 72.
91. PROPOSED KANSAS CRIMINAL CODE § 21-1503, KAN. JUDICIAL COUNCIL BULL. 125 (April, 1968). *See generally* S. RUBIN *et al*, *supra* note 12 at 391; note, *The Kansas Habitual Criminal Act*, 9 WASHBURN L.J. 244 (1970).
92. Topeka Daily Capital, Jan. 29, 1969, at 8, col. 5.
93. KAN. STAT. ANN. § 21-4504 (Supp. 1970).
94. KAN. LEGISLATIVE COUNCIL, THE KANSAS PENAL SYSTEM, 8 (December 21, 1966), the *Habitual Criminal Act* is inconsistent with current social and economic conditions, and its application has a deleterious effect on eligibility for parole and impedes efforts towards rehabilitation.
95. M. ELLIOTT, *Conflicting Penal Theories in Statutory Criminal Law*, 186 (1931); Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. BAR REV. 640 (1945).

the prisoner.[96] Aside from being contrary to the announced end of rehabilitation, the "Habitual" is conducive to other forms of inconsistency.

First, since harsh sentences invariably ensue from invocation of its provisions, there has been a tendency on the part of judges and prosecutors to ignore the "Habitual" even though its invocation is warranted.[97] Consequently, the Act has been irregularly applied which in turn has led to disparate sentences being imposed upon defendants with similar criminal histories.[98]

Second, prosecutors have tended to use the Habitual Criminal Act to secure guilty pleas rather than to secure enhanced terms for recidivists.[99] The inconsistencies attributable to plea bargaining have previously been discussed.[100] It is sufficient to point out that retention of the "Habitual" as an aid to plea bargaining serves only to further encourage frustration of the legislative policy of individualization.

The final point to be made with reference to the effect of the "Habitual" on the legislative sentencing policy is that it fails to accomplish its intended purpose. So-called "hardened" or professional criminals have not been sentenced to longer terms under the provisions of the "Habitual."[101] On the contrary, recidivists more often plead guilty to a reduced charge and receive a correspondingly lighter sentence.[102] Even when recidivists receive longer sentences, it is doubtful that further depredations are avoided.[103] The deleterious effects, which retention of the Habitual Criminal Act in its present form has on the achievement of consistent sentencing, demand that the provision be amended to promote individualization.

V. *Conclusion*

The foregoing analysis of the possible consequences which each of the selected provisions may have should not obscure the advancement towards

96. M. ELLIOT, *supra* note 95.
97. P. TAPPAN, *supra* note 72, at 474.
98. RESEARCH DEPT. KAN. LEGISLATIVE COUNCIL, THE OPERATION OF THE KAN. HABITUAL CRIMINAL LAW, Institutional Survey Rep. No. 2, publication No. 47 (Nov. 1936). The report came to the following conclusion: "The irregular application of the habitual criminal law results in varying sentences ranging from a minimum of one year to life for the same offense. . . . Such difference not only affects the attitude of the individual prisoner toward the courts and government but also seriously undermines prison morale and discipline." *Id.*, at 42. The inclusion of a discretionary habitual criminal act promotes increased disparity due to indivdual differences among judges. S. RUBIN *et al*, *supra* note 12, at 398.
99. P. TAPPAN, *supra* note 71, at 474; Note, *supra* note 91. "... [M]any times it [the Habitual Criminal Act] was not used to give longer sentences, but was used by county attorneys as a bargaining tool to get pleas of guilty," quoting Sen. Steadman Ball, Topeka Daily Capital, Jan. 29, 1969, at 8, col. 5.
100. *Supra* notes 54-55.
101. Rubin, *Federal Sentencing Problems and the Model Sentencing Act*, 41 F.R.D. 467, 514 (1967).
102. Brown, *supra* note 96, at 663.
103. "If anything, there may be a tendency for violent offenders who have served longer sentences to recidivate more often. . . ." 12 CRIMES OF VIOLENCE 569 (D. MULVIHILL, M. TUMIN, L. CURTIS ed. 1969).

consistent sentencing attained by the new Criminal Code. However, before individualization can be totally achieved, the Code must be amended to eliminate the possibility of subjective bias or other forms of disparity which result in sentences inconsistent with individualization and detrimental to rehabilitation.

Most importantly, provision must be made for a mandatory presentence investigation. Current staff and budget limitations prevent achievement of the ideal which would be to require a presentence investigation in every case. The Judicial Council proposal would have required that a presentence investigation be conducted in every case where imprisonment is being considered as a possible disposition.[104] Compliance with this provision would demand more manpower than the probation and parole departments are able to supply.

The Model Penal Code provision would seem to be more compatible with available resources. This provision would require that a presentence investigation be conducted where

(a) the defendant has been convicted of a felony for the first time; or

(b) the defendant is under 21 years of age and has been convicted of a crime; or

(c) the defendant will be placed on probation or sentenced to imprisonment for an extended term.[105]

Although it does not require that a presentence be conducted in every case, the provision does assure that youthful and first offenders will be dealt with in a manner which will afford optimum opportunity for rehabilitation. And it assures that the community's and the offender's well-being will be protected by insuring that probation or an extended term will be selected objectively, based on an appraisal of the offender's needs.

Another provision which would assist in eliminating inconsistencies, if included within the sentencing structure, would require judges to state their reasons for selecting a sentence. This same provision would also permit appellate review of sentencing decisions.[106] A statute embodying these provisions would serve three major purposes:

1) permit the direct correction of unjust sentences;

2) create a body of judicial opinion on sentencing which could guide the trial courts;

104. Proposed Kan. Crim. Code § 21-1604, Kan. Judicial Council Bull. 128 (April, 1968).
105. Model Penal Code § 7.07(1) (Tent. Draft No. 2, 1956).
106. Note, *Procedural Due Process at Judicial Sentencing For Felony*, 81 Harv. L. Rev. 821, 845 (1968). *Contra*, Hart, *supra* note 45, at 440.

3) serve the goal of rehabilitating offenders.[107]

Although this system would not eliminate all dispartities (particularly those introduced as a consequence of plea bargaining), those disparities attributable to bias and prejudice would be reduced, and individualization would be facilitated by establishment of judicial guidelines to complement the legislative guidelines.

Finally, the habitual criminal provision should be amended to promote individualization.[108] This could be accomplished by establishing criteria which would assist the judge in the exercise of his discretion. For example, New York provides that an extended term may be imposed only when the court is of the opinion that

> . . . the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration . . . will best serve the public interest . . . ."[109]

The Minnesota statute may be indicative of the type of provision best suited for Kansas. That statute authorizes imposition of an extended term only after a presentence investigation has been made, and the court is required to make appropriate findings.[110] The advisory committee's comment to this section best summarizes the end for which an extended provision should be intended.

> These requirements are intended to assure that the habitual offender act is applied only in those cases of the serious offender who for his own sake or in the interest of the public should be confined for a period longer than the maximum provided by the statute violated and that it should not be applied to the offender who is guilty of two or more isolated criminal acts and not otherwise shown to be disposed to criminal behavior dangerous to the public.[111]

In addition, the Minnesota advisory committee recommended that a diagnostic evaluation and report also be required.[112] Inclusion of a similar requirement in Kansas would not unduly tax available resources. Kansas already has one of the nation's leading diagnostic and reception centers. All that would be needed would be to amend the statute[113] to permit presentence evaluations at the Kansas Reception and Diagnostic Center and to appropriate sufficient funds to enable the center to accommodate the increased caseload.

107. Corman, *Unfair Sentences: A Breeding Ground For Crime*, 5 Trial 19 (Oct./Nov. 1969).
108. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 143 (1967).
109. N. Y. Penal Law § 70.10 (McKinney 1967).
110. Minn. Stat. Ann. § 609.155 (1964).
111. *Id.*, Comment.
112. Proposed Minn. Crim. Code § 609.155(2)(2) (1962).
113. Kan. Stat. Ann. § 76-24a03 (1969).

Amendment of the Code to incorporate these provisions would contribute incalculably to the advancement of individualization and to the achievement of consistent sentencing. True individualization is scientific and requires objectivity. Hence, individualization can be achieved only by insuring that every disposition is arrived at objectively and that individual bias and prejudice are eliminated.

Raymond W. Baker

Right of Redemption of Real Property in Kansas

A discussion of the right of redemption of real property in Kansas hopefully holds particular interest for the Kansas Bar because of the revisions made in the law governing redemption by the 1970 session of the Kansas Legislature.[1] Although the statute[2] governing the right of redemption remains essentially intact, reduction in the time allowed various parties to effect redemption has made a survey of the right of redemption particularly seasonable.

I. Background

The right of redemption is "the right to disencumber property or to free it from a claim or lien; specifically [it is] the [statutory] right to free property from the incumbrances of a foreclosure or other judicial sale, or to recover the title passing thereby, by paying what is due, with interest, costs, etc."[3] The right of redemption is not to be confused with the equity of redemption, which exists independently of statute. The equity of redemption must be exercised before a foreclosure or other sale.[4]

Enactment of statutes providing for redemption from sale generally coincided with periods of economic depression and collapse of land values. The first legislation, enacted in the 1820's, was confined to redemption from execution sale, although in one state the statute was held to apply to mortgage foreclosures as well. New redemption legislation followed the Panic of 1836; mortgage sales were expressly included. The period of redemption was originally six months from sale, but in the late nineteenth century the period was lengthened to one year.[5]

The redemption statutes were intended to effect a dual purpose. The mortgagor or other person entitled to exercise the right was given additional time to refinance and save his property. Furthermore, it was hoped that the statutes would put pressure on the mortgagee, who was usually the chief if not the only bidder at the foreclosure sale, to bid for the prop-

1. Ch. 221, [1970] Kan. Sess. Laws 746.
2. Kan. Stat. Ann. § 60-2414 (1964).
3. Black's Law Dictionary 1489 (4th ed. 1968).
4. *Id.*
5. G. Osborne, Osborne on Mortgages § 307 (1951).