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Model Penal Code: Sentencing, Probation and Parole

By ROY MORELAND*

I. INTRODUCTION

Sentencing, probation and parole are three aspects of treatment for persons convicted of crimes. It should be pointed out at the very beginning that they are administered by different bodies, sentencing and probation by the judiciary, and parole by the executive. Even though their purposes are much the same, their differences in nature must be considered in any discussion of the regulation and administration of sentencing, probation and parole.

What are the theories underlying sentencing, probation and parole? How do they fit into fundamental concepts of "punishment" and "correction" in the administration of the criminal law? The answer to questions such as these entails an examination of society's purposes in treating criminals. There are three leading theories on "punishment" of criminals: (a) Retribution; (b) Deterrence to the individual and to others; and (c) Rehabilitation or Reformation.¹

A. Retributive Punishment

The first theory is the historic one. The criminal had committed a crime; it was only just that he be punished. It was the application of the biblical injunctions of "an eye for an eye" and "the wages of sin is death." There is currently a strong revulsion against the theory but it still has strong appeal among the public generally, particularly with respect to certain offenses. Sheldon Glueck, one of the leading criminologists of the century, has warned that society demands punishment per se for some heinous

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¹ Palmore, *Sentencing and Correction: The Black Sheep of Criminal Law*, 26 FED. PROB., Dec. 1962, at 6, L. HALL & S. GLUECK, *The Aims of the Criminal Law*, CRIMINAL LAW AND ENFORCEMENT 15 (1958).

crimes. If punishment is denied, the public may take the law into its own hands.

An illustration of the general public demand for punishment per se in the case of heinous crimes occurred in Lexington, Kentucky, about forty-five years ago. A middle-aged Negro man raped a ten year old white girl who was on her way to school. When apprehended, the local circuit judge insisted on trying the case although there was strenuous argument for a change of venue. On the morning of the trial, a huge mob formed. A unit of the Kentucky National Guard took positions around the court-house with machine guns and loaded rifles. All who entered the courtroom were searched for weapons. The defendant was surrounded by eight deputy sheriffs armed with sawed-off shotguns.

The trial had hardly begun when the mob broke through the ropes and stormed the courthouse, but the attack failed. Six members of the mob were killed and about twelve were wounded. The crowd in the courtroom became restive but the Commonwealth's Attorney was able to persuade them to return to their seats and restore order. The jury did not leave the jury box to decide the defendant's guilt and to return a penalty of death. That afternoon the U.S. Army, First Division, was brought into town to control the mob. The defendant was spirited away and eventually executed.²

Was it the atrocious nature of this crime, the fact that the accused was a Negro, or a combination of both which ignited this mob violence? Might the same thing happen today when, fifty years later, the Negro is at last being emancipated, and color is no longer so important? Was the unfortunate decision of the judge, who refused to allow a change of venue, the true cause of the tragedy? These questions, and various others, indicate the psychological and sociological implications inherent in such situations. Perhaps the tragedy was partly caused by the bad judgment of those who administered the criminal law, but the case certainly illustrates that, for certain heinous crimes, the public may well demand punishment per se and want to be sure that it is rendered. It is no answer to such a display of emotion to say that it is not

² W. COLEMAN, *THE COURT HOUSES OF LEXINGTON* 33 (1937); For an account of a lynching on the lawn of the Lexington Court House in 1858 after a particularly savage killing, see *id.* at 24.

humane, or that it is not the mark of a "good" society. Perhaps it is the mark of a good society when its citizenry takes a violent attitude toward those who commit heinous crimes.

The public feeling that those who commit heinous crimes should receive purely retributive punishment is illustrated by the prevailing attitude toward capital punishment. The death penalty is still found in the statutes of the great majority of states.³ Five states have completely renounced it,⁴ and some others use it to a lesser degree, but little headway has been made toward abolishing it.⁵ Admittedly fewer and fewer persons convicted of heinous crimes are executed in the United States. In 1935, an all-time high of 199 people were put to death for committing crimes, but only one American was actually executed in 1966.⁶

Several reasons, in addition to the niceties of a developing civilization, have contributed to this state of affairs. A large proportion of those executed in former times were Negroes; the continuing emancipation of that race has materially changed this situation. There is an increasing tendency to appeal convictions and delay executions. Finally, pardons are often granted. In this way the emotions of the involved community are allowed to cool and few objections are heard at the time of the final decision. Time and delay do much to soften the public's demand for death as punishment for crime. But all this does not change the fact that the general public still insists that a *potential* punishment of death for heinous crimes remain on the statute books, even though

³ MODEL PENAL CODE, App., *The Death Penalty* 1 (Tent. Draft No. 9, 1959).

⁴ *Id.*

⁵ Recently this writer served as a member of a panel on capital punishment at the annual meeting of the Kentucky State Bar Association. The panel was composed of three circuit judges, the moderator, Judge Morris Montgomery of the Kentucky Court of Appeals, and this writer. The three circuit judges all advocated abolishing the death penalty. This writer advocated its retention for three offenses, in the discretion of the jury: (1) killing a police officer; (2) killing a child under ten in rape; and (3) in kidnapping, if the kidnapped person is killed. The moderator, Judge Montgomery, spoke vigorously, and almost emotionally, for the retention of the death penalty. He said that during his sojourn on the Court of Appeals, the Court had reviewed a number of death cases and in each, where the Court affirmed, he thought that the defendant merited the death penalty. He said the cases showed great savagery and brutality, many of the victims being the weak and the helpless. At that point lawyers spoke from the audience and most agreed that the death penalty should be retained.

These events, and the defeat of the legislation proposed by the Governor in 1966 to abolish the death penalty, would seem to indicate that Kentucky will not abolish the death penalty in the very near future.

⁶ U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES Table 247 (1967).

a cursory examination indicates it is seldom carried out.⁷ The average citizen, enraged at the suggestion that the death penalty be abolished, gives little thought to the fact that there are few actual executions.

B. Deterrent Punishment

Deterrence, the second theory of punishment for convicted criminals, has been given wide credence although no one knows how effective it is, either to the person being punished or to others, as its effect is wholly subjective and incapable of accurate measurement. It is practically impossible to find studies where criminals themselves have discussed the matter, but undoubtedly punishment does have some deterrent effect, both to the individual and to others (notwithstanding the fact that pickpockets were active at public hangings in Elizabethan England, that offense then being punishable by death). It is probably true that the criminal himself is not often deterred by the fear of punishment because *he* considers that he will not be caught. But the fact remains that deterrence *does* psychologically deter most people to a certain extent and this fact should be taken into consideration as one of the factors in the determination of what to do in the sentencing of convicted criminals.⁸

C. Rehabilitative Punishment

Rehabilitation is by far the more appealing theory of punishment, and one's humane, idealistic tendencies prompt him to accept it to the exclusion of all others. On the other hand, there is a presumption against its complete acceptance at the very outset by students of human nature. Admittedly, many of those convicted for the first time have not accepted crime as a way of life. Many first offenses are the result of the influences of associates or are crimes of passion, often the case in homicides. The associates may later be discarded or the passion to kill removed with the death of the person slain. Yet, even in these cases, bad associates are too

⁷ A somewhat similar situation occurs in the cases of adultery and fornication, where the "offenses" remain on the books but there are no prosecutions or convictions.

⁸ See Cellar, *An Expression of Congressional Interest in the Federal Institute*, 26 F.R.D. 241, 243 (1959); Gignoux, *Sentencing the Income Tax Violator—Misdemeanant*, *Id.* at 282.

often a way of life, and a passion to kill directed towards one person may indicate a potential uncontrolled passion which may subsequently be directed towards someone else.

While the problem of dealing with convicted criminals is a most complex and difficult one, rehabilitation potentially offers the most satisfactory sentencing approach, particularly if done in a cautious and scientific manner. Actual results reflect its value to the individual and society.

The fact remains, however, that in spite of much experimentation with the three theories of correction and in spite of tedious social planning, society has accomplished little in either preventing crime or rehabilitating criminals. The situation rapidly worsens and at present is at a particularly low ebb. Among a welter of discussion, complaint, and recommendations, the *Report of the President's Commission on Law Enforcement and Administration of Justice*, a comprehensive study of crime in the United States,⁹ has just been released. The *Report* offers numerous suggestions for improvements but one doubts whether the *Report* will have major curative effect; yet, even if it merely alarms the public, as did the earlier *Wickersham Report*,¹⁰ and indirectly leads to some changes, it will have served a useful purpose.

II. SENTENCING

Among the studies and affirmative recommendations of recent years touching on sentencing, probation and parole, the most thorough and helpful are those of the American Law Institute's *Model Penal Code*. The following is an examination of Kentucky's sentencing provisions¹¹ as they relate to comparable portions of the *Code*, with recommendations suggested by a comparison of the two.

A. Who Should Determine The Punishment?

1. *Judge Versus Jury Sentencing*.—The determination of guilt by the jury still leaves undetermined the punishment to be im-

⁹ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOC'Y (1967) [hereinafter cited as REPORT BY THE PRESIDENT'S COMM'N].

¹⁰ 3 NATIONAL COMM. ON LAW OBSERVANCE AND ENFORCEMENT (1931).

¹¹ Primarily, KY. R. CRIM. P. 9.84 [hereinafter cited as RCr].

posed for the crime. At common law the punishment was fixed by the court,¹² and this remains the rule today in the majority of the states¹³ as well as in the federal courts. In some jurisdictions, however, the jury is authorized by statute to fix the punishment, or to recommend alternate penalties.¹⁴ Thus, in Kentucky, the Rules of Criminal Procedure provide:

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

(2) When the defendant enters a plea of guilty, the court may fix the penalty, except in cases involving offenses punishable by death.¹⁵

Is it better that the jury fix the punishment, or should it be fixed by the court? It should be pointed out that while most of the states leave sentence determination to the court, they make an exception where there is a possibility of a death sentence. In such case the responsibility of determining whether the extreme penalty should be given is that of the *jury*. It is argued that in cases where the death penalty is not involved the judge is better qualified, more apt to be objective in his decisions, and because of the large number of trials over which he presides, more experienced on the matter than a jury.

Admitting the presumed objectivity and better legal qualifications of a judge, it is difficult to justify taking the sentencing function from the jury. One might argue that, theoretically, the same reasons which prompt leaving the determination of guilt or innocence to the jury should be reason to permit it to exercise the sentencing function as well. In line with that thinking, it should be emphasized that it *is* somewhat inconsistent to leave the ultimate question, whether a death penalty should be given, to a jury while delegating the decision in lesser situations to a judge. Juries are a cross section of the community representing the community's idea of justice for particular cases. If they represent the community's sense of justice as to guilt or innocence, they should also

¹² 29 AM. JUR. 2d *Criminal Law* § 586 (1965).

¹³ *Id.* For a breakdown of the situation in the various states in 1942, see THE COMM. ON PUNISHMENT FOR CRIME, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 85 (1942).

¹⁴ 29 AM. JUR. 2d *Criminal Law* § 586 (1965).

¹⁵ RCR 9.84.

represent the community's idea of what punishment should be meted.

Undoubtedly, a jury is more apt to impose a subjective judgment as to punishment than is a judge. This may cause them to consider the circumstances in particular cases and to be more lenient than a judge. "The quality of mercy is not strained," and so, sometimes, subjective opinion provides a good social result. The poor widow who steals the loaf of bread is not the only one who should receive subjective mercy. There are others. On the other hand, a jury in a particular case, impressed more by personal appearance than by the circumstances, may impose too light a sentence or, because of personal prejudices, may impose a sentence which is too severe and quite contrary to justice and social good. But judges too are susceptible to personal appearances, *and personal prejudices as well*, and their individual determinations compared to a juror, are not subject to the leveling influence of eleven other minds.

Such arguments point up the limitations of both the judge and the jury in performing the responsibility of imposing sentences. The net result is that, considering the various arguments, the Anglo-American legal system has left the determination of the sentence to the judge, rather than to the jury. Those who have upheld that system have struggled to retain in the jury the function of fixing guilt or innocence of the accused but generally, the supplemental problem of sentence imposition has been left to the judge. The judge, like the jury, usually has choices between minimum and maximum punishments, and, while he may be somewhat less attuned to community ideas of punishment in *certain cases*, he may, statistically speaking, choose a more appropriate punishment in *more cases* than would a jury. Certainly his better training, his more even objective temperament, and his experience would indicate this to be the case. But this does not change the fact that there is much merit in the minority rule, followed in Kentucky, that the sentence is to be fixed by the jury.¹⁶ The matter is one for legislative determination—and it is not a question of easy decision.

¹⁶ It is sometimes suggested that one reason for allowing the judge, rather than the jury, to impose the sentence is that the judge has more facts concerning the defendant than has the jury, *e.g.*, the pre-sentence report. The simple answer

(Continued on next page)

There are those who would take sentencing from *both* judge and jury and place it in other agencies such as the legislature. This is done now in certain instances. Often the punishment for a particular crime is specified in the statute defining the offense.¹⁷ Such a method of sentence determination has two advantages: certainty and objectivity, but, the very certainty and objectivity of such a method tend to discourage its extensive use. While the exercise of discretion by the judge or jury permits variances in the administration of justice, it also encourages balancing of subjective circumstances such as the personality and character of the accused. By imposing a penalty which fits not only the offense but the offender as well, a better societal result than the mere rule of thumb application of legislative penalties is achieved.¹⁸

2. *Sentencing By Experts.*—There is also a certain tendency to place the responsibility for sentencing in a body of "experts," who theoretically are better qualified than either judge or jury to exercise the function. The first fruit of the various criminologic studies which indicated that the courts' sentencing practices needed reappraisal was the Youth Correction Authority Act promulgated by the American Law Institute in 1930.¹⁹ This Act, inaugurating an expert sentencing procedure, was designed specifically to focus attention upon youthful offenders *above* juvenile age,²⁰ specifically that group from seventeen to twenty-one years.²¹ The states of Illinois, Kentucky, Massachusetts, Texas, and Wisconsin have utilized the Act to deal exclusively with juveniles. Only two states, California and Minnesota,²² have extended provisions of the Act to the group above juvenile age.

The Act is intended as the next step beyond the juvenile

(Footnote continued from preceding page)

to this argument is that it would be just as feasible to give the jury this report after the determination of guilt, as to give it to the judge. It is merely a matter of procedure. But the question is whether the jury would have the capacity to use such information if given access to it. See Hurt, *Determination of the Penalty—By Judge or Jury?*, 1 TEX. LAW & LEG. 124, 131 (1947).

¹⁷ R. MORELAND, *MODERN CRIMINAL PROCEDURE* 290 (1959).

¹⁸ Michael & Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1308 (1937).

¹⁹ THE COMM. ON PUNISHMENT FOR CRIME, *supra* note 13, at 14-20. See also Glueck, Book Review, 56 HARV. L. REV. 839, 840 (1943).

²⁰ See MODEL PENAL CODE 1, *Reporter's Notes* (Tent. Draft No. 7, 1957).

²¹ See MODEL PENAL CODE 2, *Reporter's Notes* (Tent. Draft No. 3, 1955).

²² CAL. WELFARE & INSTITUTIONS CODE §§ 1700-1783 (1941); MINN. STAT. § 242.01-54 (1956). See also MODEL PENAL CODE 1, *Reporter's Notes* (Tent. Draft No. 7, 1957).

court system in an evolving process projected to materially improve sentencing and rehabilitation procedures. Most crimes are committed by members of the seventeen to twenty-one age group. Such offenders are still young enough to justify the hope of society that they might still be rehabilitated. The procedures for treatment of those in the juvenile category have been accepted by the citizenry, as have the large tax expenditures required to support such a program. Perhaps society is now ready to accept this additional great change in sentencing and the large financial expenditure that it would entail. That remains to be seen.

The Act makes a radical departure in sentencing practices. Presently in most jurisdictions the trial judge imposes the sentence. Of course, in jurisdictions like Kentucky, where the jury now fixes the punishment, even more radical change would be effected, because under the Act *sentence is fixed by an Authority of three members created by the Act*. These three members are appointed by the Governor for staggered terms of nine years. If the defendant's crime was one for which the punishment would only be life or death, the judge imposes the penalty. But in other felony cases, the judge commits the convicted offender to the Authority which determines the disposition of the case.²³

Placing sentencing in an Authority has not proved popular. The matter was bruited about for several years in meetings of the American Law Institute until a member, speaking for the Institute, finally admitted that "Certainly the experience of the past fifteen years indicates that the states are not eager to establish boards for young adult offenders."²⁴ However, after further consideration, part of the sentencing function was left in the Authority.²⁵

A second approach to the problem of sentencing was presented by the *Federal Report to the Judicial Conference of the Committee on Punishment for Crime*, published in 1942.²⁶ This report states that it approached the problem with an endeavor "to preserve the sentencing power in the judges,"²⁷ but at the

²³ *Proposals for the Sentencing and Treatment of the Young Adult Offender Under the Model Penal Code*, MODEL PENAL CODE 15 (Tent. Draft No. 3, 1955).

²⁴ *Id.* at 17.

²⁵ See MODEL PENAL CODE § 6.05, Comment (Tent. Draft No. 7, 1957).

²⁶ THE COMM. ON PUNISHMENT FOR CRIME, *supra* note 13, at 7.

²⁷ *Id.*

same time to secure a more scientific method of sentencing. The Committee made several recommendations, only one of which found favorable response. That part of the report providing for the treatment of youthful offenders under the age of twenty-one years advocated that the judge should have discretion as to whether he would probate the offender, punish him under the ordinary provisions of the law, or commit him to the Youth Authority of the Board of Corrections for correctional treatment. This became a part of the Federal Youth Correctional Act of 1950²⁸ which reduced the maximum age of offenders to twenty-one years.

Thus, in the Youth Correction Authority Act recommended to the states by the American Law Institute in 1930 and the Federal Youth Correction Act of 1950, two fundamentally different methods of sentencing youthful offenders have been proposed. Under the American Law Institute's Act, a Board (Authority) of appointed individuals sentences felony offenders who have committed a crime for which the punishment is more than a specified minimum.²⁹ Under the federal statute the responsibility for the sentence is in the discretion of the judge. Whether the ultimate responsibility of sentencing should be in the judge or in some sort of Authority has been the subject of considerable controversy among commentators and authorities.³⁰ It is apparent that sentencing will remain a judicial duty in federal courts in view of the recent controversy which arose when it was urged that sentencing be taken from the judges and lodged in a special body of experts. Such opposition was based largely on the ground that sentencing has traditionally been a judicial function and should remain so.³¹

The American Law Institute's proposal that part of the responsibility for sentencing youthful offenders be lodged in an appointed group Authority has not met with much enthusiasm, although the Institute still sponsors that plan. This writer is inclined to agree with the federal view which leaves discretion in

²⁸ 18 U.S.C. §§ 5005-24 (1950).

²⁹ MODEL PENAL CODE § 6.05(1) (Tent. Draft No. 7, 1957).

³⁰ "This field of sentencing young offenders is one that arouses, we have discovered during the past year . . . not only diversity of opinion but emotional response. It is a difficult field to come to finite conclusions on." AMERICAN LAW INSTITUTE, PROCEEDINGS, 33D ANN. MEETING 306 (1956).

³¹ See R. MORELAND, *supra* note 17, at 298.

the judge as to whether he will sentence or leave the matter to an Authority. Admittedly judges have not exercised the sentencing function satisfactorily in the past. The criticism that variances have existed between the sentences of different judges for similar offenses is justified. However, the experience of the American Law Institute in attempting to take sentencing from the judge, and the strong reaction when it was attempted on the federal level indicate that sentencing will remain a judicial duty, perhaps with discretion to pass it on to an expert body as a part of an enlarged correctional and rehabilitation program. A possible modification of that approach would be to insist that the judge give at least a minimum sentence and leave any additional treatment to an Authority of some sort.

Thus far, the problem of sentencing has been discussed from the standpoint of the treatment of youthful offenders between maximum juvenile court age and approximately twenty-one years. This upper limit could be extended to twenty-four years since the great bulk of crimes are committed by young offenders in these age brackets who may still be young enough to be rehabilitated. Is it wise to add this additional category to the juvenile courts as the federal system has done? In spite of the federal experiment and the American Law Institute's like recommendation, the idea has not found support in the various states. Perhaps a more economical and satisfactory method of handling such individuals would be to make their correction and treatment a part of the treatment and rehabilitation program for criminals above the age of juveniles.

B. Aids To The Judge In Sentencing and Probation

If the judge is to exercise the functions of sentencing and probation, what aids can be devised to make his determinations more intelligent and socially acceptable? The following suggestions have been offered:

1. *Report of Pre-sentence Investigation.*—The pre-sentence report is an integral part of current sentencing and probation provisions. Kentucky Revised Statutes [hereinafter referred to as KRS] § 439.280 provides that whenever an accused pleads guilty to a felony, a probation officer shall make a written report of any investigation of the defendant to the court, and in any case the

judge may request such a report. What information should the report contain? Rule 32 (c) (2) of the Federal Rules of Criminal Procedure provides:

The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

A note to Federal Rule 32 (c) (1) states that it is contemplated that the report will present a thorough social case history of the defendant.³² The *Model Penal Code*, in attempting to spell out with some particularity what the report should contain, states:

the pre-sentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits and any other matters³³

that are relevant, or the court directs.

The Federal Rules provide in Rule 32 (c) (1) that the probation service of the court *shall* make a pre-sentence investigation and report to the court, "unless the court directs otherwise," before the imposition of sentence after a plea of guilty or a finding of guilty. This would indicate that a pre-sentence report is prepared in each case of guilt. As the federal courts have much greater financial resources and fewer criminal cases than state courts, it would appear that the Kentucky Code provision that a pre-sentence report shall be prepared, *if requested by the court*, is more practical and a reasonably satisfactory rule in state criminal cases.

The authors of the *Model Penal Code* confidently state that "the use and full development of this device appears to us to offer the greatest hope for the improvement of judicial sentencing."³⁴ The opinion of the bar upon the matter is illustrated by the

³² L. YONKWICH, *THE NEW FEDERAL RULES OF CRIMINAL PROCEDURE, Commentary on Rule 32(c)(1)* (1946).

³³ MODEL PENAL CODE § 7.07(3) (Tent. Draft No. 2, 1954).

³⁴ *Id.*, Comment at 53.

statement of a federal judge, that: "I have leaned heavily upon all pre-sentence reports which I have received while on the federal bench and know that they have aided me greatly in giving just and proper attention to each case."³⁵ The value of the report will depend largely upon the ability of the officer who prepares it, his objectivity, and the time and "shoe-leather" he gives to its preparation.

2. *National Probation and Parole Association's Guides For Sentencing.*—Ten years ago the National Probation and Parol Association published *Guides For Sentencing*.³⁶ This book was the result of a study by The Advisory Council of Judges,³⁷ an integral body of the Association, and it is a practical, helpful guide to sentencing. Forty specially selected judges contributed to the study which has been distributed to some 5,000 judges throughout the country. The book contains a full chapter on the pre-sentence report, studies of special types of offenders, and numerous citations to other research concerning sentencing and probation. *Guides for Sentencing* presents a condensed version of current practice which should be of great practical value in sentencing.

C. Recommendations

When considering specific recommendations on sentencing, one must examine the suggestions and experiments of the federal and state correctional systems so as to adopt practices and methods which seem most acceptable for a particular state. Judge John Palmore of the Kentucky Court of Appeals cites two current proposals for sentencing which present different approaches to the problem. The first of these is that of the *Model Penal Code*,³⁸ the second is proposed in the Model Sentencing Act³⁹ prepared by the Advisory Council of Judges for the National Council on Crimes and Delinquency.

The *Model Penal Code* is revolutionary. It divides all felonies

³⁵ Platt, *The Judge and the Probation Officer—A Team for Justice*, 16 FED. PROB., Dec. 1952, at 3, 5.

³⁶ NATIONAL PROBATION AND PAROLE ASS'N, GUIDES FOR SENTENCING (1957).

³⁷ *Id.* at vii.

³⁸ MODEL PENAL CODE § 6.01-13 (Tent. Draft No. 4, 1955). See also Palmore, *Sentencing and Correction: The Black Sheep of Criminal Law*, 26 FED. PROB., Dec. 1962, at 12.

³⁹ NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT (1963) [hereinafter cited as MODEL SENTENCING ACT].

into three degrees with uniform sentences of maximum imprisonment depending upon the degree: first degree—life imprisonment (or death); second degree—ten years; third degree—five years. If a prison sentence is imposed for commission of a felony, the *Code* prescribes a minimum of one year on the theory that such a period, or a substantial part thereof, is necessary for effective correction.⁴⁰ However, the court may reduce the grade of felony, even to a misdemeanor, and evade this minimum. The court also has the power to suspend or probate the sentence⁴¹ and to increase the minimum term for felonies.⁴²

Misdemeanors are likewise divided into three degrees. This general approach gets away from the usual method of prescribing maximum and minimum sentences for particular offenses. The emphasis is upon the *grade* of the offense, not its particular features.

The Model Sentencing Act is also revolutionary. It abandons the traditional method of attempting to fit the punishment to the crime, and focuses upon the fundamental question of the amount of "dangerousness" in the offender.⁴³ This has not been done in the past and it has been a marked weakness in both sentencing and probation. The first offender is one thing, even when his offense is a serious one; the defendant who has a record of repeated and atrocious crimes is quite another, and he should be dealt with in a way which will keep him out of public circulation. The punishment for murder in the first degree under the Act is life imprisonment. For lesser felonies, the punishment is five years or less, as the judge may direct. However, the judge may impose a sentence up to a maximum of thirty years if he believes the defendant dangerous. The Act also has a specific section on Atrocious Crimes, providing for a punishment of ten years more or less, depending on the facts and the offender. All of the terms of imprisonment under the Act are for maximum punishment; there are no provisions for fixed minimum punishments as such, and the trial judge may suspend the sentence or probate the offender. From that point the sentence is in the hands of parole authorities.

⁴⁰ Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 PA. L. REV. 465, 475 (1961).

⁴¹ MODEL PENAL CODE, *supra* note 38, at § 6.11.

⁴² *Id.* at § 6.07.

⁴³ MODEL SENTENCING ACT §§ 5, 8.

In recommending selected provisions for a penal code for a particular state, much consideration should be given to the *Model Code* and to the Model Sentencing Act, both of which have been considered above, and to the New York Revised Penal Law.⁴⁴ The latter, which became effective in 1967 represents approximately three and one-half years of work by a select Commission. These suggested provisions are by no means a complete code; they are neither inclusive nor exclusive, but are offered for consideration to show tentative fundamental policies and proposals which call for important changes in sentencing. More particularly, they indicate that revolutionary changes are occurring in this area, changes which must be discussed and accepted, or rejected, before the details of a revised code can be attempted.

This writer recommends the approach of the *Model Penal Code* and the New York Revised Code which divide felonies into degrees, rather than one which would provide a punishment for each particular crime. Ordinarily punishment should depend upon the gravity of the offense and its danger to society, rather than its particular generic features. The identity of the crime is ordinarily not important; its classification in the general scheme and its dangerousness and atrociousness *are* important.

With these thoughts in mind, one might classify all felonies into three categories, first, second, and third degrees. Willful (deliberate) murder, kidnapping (where the victim is killed), and perhaps forcible rape upon a child of ten or under could be classified as felonies in the first degree.⁴⁵ The minimum sentence fixed by the court for these offenses should not be less than one year nor more than ten years with a maximum sentence of death.

The Model Sentencing Act lists those crimes which could be classified as felonies of the second degree. Voluntary manslaughter, kidnapping where the victim is not killed, arson, forcible rape, robbery while armed with a deadly weapon, and bombing of an airplane, vehicle, vessel, building or other structure could be classified in this category. If the accused is not committed under

⁴⁴ N.Y. PEN. LAW § 65 (McKinney 1965).

⁴⁵ Judge Palmore, who advocates abolishing the death penalty, basically agrees with these proposals. Palmore, *Sentencing and Correction: The Black Sheep of Criminal Law*, 26 FED. PROB., Dec. 1962, at 6, 13. See N.Y. PEN. LAW § 55.05 (McKinney 1965); MODEL PENAL CODE § 6.01 (Tent. Draft No. 4, 1955). Judge Palmore uses the phrase "deliberate murder," while KRS § 435.010 reads "willful murder."

section (d) of the Act, the court should commit him for a minimum term of not less than one year nor more than three years, to a maximum of ten years, or sentence the defendant and place him on probation under the terms and conditions provided by the Act.⁴⁶

All felonies, other than those designated as felonies in the first or second degree are felonies in the third degree. The minimum sentence to be received by one convicted of a felony in the third degree should be fixed by the court at not less than one year nor more than three years; the maximum should be five years.⁴⁷

The above classification should be adequate to encompass all felonies. Within the present homicide law in Kentucky, which incorporates a somewhat complicated series of offenses, willful murder would become a felony in the first degree and voluntary manslaughter, a felony in the second degree; involuntary manslaughter in the first degree would become a third degree felony and involuntary manslaughter in the second degree, at present subject to a punishment of a year in the county jail, or a fine of \$5,000, or both, would remain a high misdemeanor.⁴⁸ Other crimes could be incorporated into the suggested classification, or felonies in the fourth degree, similar to those in the New York Revised Penal law, could be added.

Except for the crime of murder in the first degree, the Model Sentencing Act provides that the court may sentence a defendant convicted of a felony to a maximum term of thirty years if it finds that because of the dangerousness of the defendant, such a period of confined correctional treatment or custody is required for the protection of the public,

and if it further finds, as provided in section (e), that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the

⁴⁶ MODEL SENTENCING ACT § 8.

⁴⁷ See MODEL PENAL CODE § 6.07(3) (Tent. Draft No. 2, 1954).

⁴⁸ KRS § 435.022 (1962).

instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.⁴⁹

* * * *

§ (e) PROCEDURE AND FINDINGS

The defendant shall not be sentenced under subdivision (a) or (b) of section (d) unless he is remanded by the judge before sentence to a diagnostic facility of the state correctional system for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section (d). The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section (d). Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section (d) unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.⁵⁰

The above provisions of the Model Sentencing Act are innovations in the law about which this writer is enthusiastic. Presently, criminals who have repeatedly committed serious, or even atrocious felonies are repeatedly returned to society to commit crimes again. Parole boards have not met this problem adequately. Even

⁴⁹ MODEL SENTENCING ACT § 5. A similar provision is embodied in the MODEL PENAL CODE §§ 6.07, 7.03 (Tent. Draft No. 4, 1955).

⁵⁰ MODEL SENTENCING ACT § 6.

with this Model statute, they may still parole serious offenders, but the boards will be less likely to do so until a considerable period has elapsed. These sections, or similar provisions⁵¹ should be included in any revised code. However, there remains the problem of coordinating them with probation and parole, if the provisions are to have any appreciable effect.

For misdemeanors the *Model Penal Code* provides:

Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Ordinary Terms. A person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the Court and shall not exceed one year (*in the county jail*) in the case of a misdemeanor or three months in the case of a petty misdemeanor.⁵² (Emphasis added).

The *Code* also provides for extended *terms* in the case of misdemeanors.⁵³ It is popularly believed that no misdemeanor should entail a penitentiary sentence although there are presently exceptions to that opinion in the Kentucky statutes. Confinement in the penitentiary stamps a man or woman as a criminal for life. Moreover, the criminal associates and atmosphere to which he is exposed while there reinforce anti-social conduct.⁵⁴

III. PROBATION

Thirty-five years ago, the Wickersham Commission issued a statement about probation which is true today and which casts light upon the prevailing attitude toward probation as a corrective device:

No man should be sent to a penal institution until it is definitely determined that he is not a fit subject for probation. To this end it is urged that every effort be made to broaden probation and provide more and better probation supervision. With adequate probation staffs the number of persons who might be placed on probation with success can be materially

⁵¹ Compare KRS § 431.190.

⁵² MODEL PENAL CODE § 6.08 (Tent. Draft No. 2, 1954).

⁵³ *Id.* at § 6.09.

⁵⁴ It is arguable that the suggested minimum sentence of one year in the penitentiary for felonies in the third degree is inconsistent with sentences for other classifications of felonies. However, such a sentence is given for the commission of a felony, not a misdemeanor. It is the felon not the misdemeanant who goes to the penitentiary.

increased. It is clear that probation, where it is applicable, is much less expensive and, from the social point of view, much more satisfactory than imprisonment.⁵⁵

As previously suggested in this paper, historic ideas concerning crime, particularly in the case of certain heinous offenses, emphasized primarily punishment. While the possibility of deterrence as a correctional theory is involved in today's correctional program, it is clear that the fundamental principle is now that of reclamation and reformation. Perhaps it is correct to conclude that this current attitude toward correction was originally formulated in the period during which the *Wickersham Report* was released.

The reclamation principle is very persuasive. On the other hand, one is apt to be somewhat cynical about reforming criminals, particularly in this time of tragically increasing crime rates. In the immediate past, probation and parole have been increasingly used, but during that same period, crime has also increased by leaps and bounds. It would appear either that reclamation of criminals is a faulty premise, that the methods of reform used in the past have been ineffective, or that society is producing new criminals at a far higher rate than it is able to reform the old ones. At any rate, the pros and cons of probation and parole need to be carefully and seriously examined before attempting to alter the procedures in order to satisfy the needs of modern society.

One argument for probation is that it is much less expensive than imprisonment. Everyone who discusses probation agrees on that point. Researchers long ago recognized the financial advantages of probation over imprisonment:

It has been estimated that in New York imprisonment costs about nineteen times as much as does probation. The institutional cost of confinement was estimated in 1926 at \$555.72 per inmate, as against \$29.34 for probation supervision per case. In Ohio for the same year probation cost \$32 as against \$236 for imprisonment. In Massachusetts the difference in cost is \$35 for probation and \$350 for incarceration. In Indiana the cost comparison between these two methods of treatment has been estimated at \$18 for probation against \$4300 for imprisonment. This cost comparison, though striking,

⁵⁵ NATIONAL PROBATION AND PAROLE ASS'N., GUIDES FOR SENTENCING 17 (1957).

is only partial. It does not include the investment by the State of millions of dollars in the land, buildings and equipment of the original prisons. An example of the possible initial cost of housing per inmate is indicated by the following: 'If the plans for the Attica Prison in New York State are carried out to provide adequately for 2,000 inmates, the cost per inmate would be undoubtedly \$5,000.'⁵⁶

A more recent study⁵⁷ states that an effective probation program can be financed on a budget of \$150 per case, including investigation and supervision, while the cost of imprisonment would be at least ten times that figure. It may well be that the effective probation supervision costs are understated but the comparison of relative costs is reasonably accurate.

But the cost to the state in prison construction and operating personnel still leaves the comparison between probation and imprisonment incomplete. One must remember that the probated offender not only supports himself but maintains his family, frequently keeping them from becoming dependent upon public welfare. Probation officers also collect, as part of their duties, large sums on fines, court costs, and other obligations of the offender. The argument that an *efficient* probation system would be vastly more expensive than the previous study indicates, may be countered by the fact that the costs to build and maintain prisons have also gone up tremendously. It is therefore apparent that probation is much less expensive than imprisonment.

There are several advantages for probation rather than imprisonment. Probation enables the offender to reform and adjust his life to community standards while living under normal conditions, and enables him to maintain normal sexual and social relationships. Probation prevents the shattering impact of imprisonment on personality and character. Imprisonment clouds a man's whole after-life; it may often make him hate society and his fellow-men; it thwarts his ambition. Its stigma is never erased. Even though the offender may change his life and never commit a crime again, society remains skeptical about him.

Probation, properly administered, helps a man adjust to a new way of life by finding him a job and supervising his activities.

⁵⁶ NATIONAL COMM'N ON LAW OBSERVATION AND ENFORCEMENT, REPORT No. 9, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 168 (1931).

⁵⁷ NATIONAL PROBATION AND PAROLE ASS'N, *supra* note 55, at 16.

Whether a criminal is either a "loner," or merely makes the wrong friends, he needs someone to guide him, to encourage him, to point the way. A good probation or parole officer who is a leader of men, not merely a checker of derelictions, can provide both encouragement and direction if he gives the probationer individual attention and guidance.⁵⁸

But lest the reader be carried away by the merits of probation, it is necessary to warn of its dangers. One familiar with criminal patterns knows that too many of those who are probated become repeating offenders. The situation has become somewhat analogous to the present state of affairs in juvenile courts, where every offender is allowed to commit two or three offenses, some of them serious, before the law imposes imprisonment.⁵⁹ This trend is also prevalent in the disposition of adult offenders; a large percentage of adult offenders are now probated. Too many of them use the opportunity to commit later crimes. An offender has to commit several crimes, or one violent, serious one, before society is protected from him.

As in the case of juveniles, one cause of increased crime is the probation of adults without continuous and effective supervision. Many adult offenders are *naturally* bad and will commit later crimes, regardless of supervision. In the series of studies by Eleanor and Sheldon Glueck, it was found that "thirty-two percent of the men who could be followed over a 15-year period repeatedly committed serious crimes during the period, and many others did so intermittently."⁶⁰ A recent report in California showed that twenty-eight percent of probationers had been taken off probation because they had committed new offenses, or "had absconded or would not comply with regulations."⁶¹

The foregoing discussion indicates the need for intelligent, planned probation. Much more should be involved than the casual judgment of the court as to the fitness of the offender for probation based upon observation of the offender during the trial. The man's history, his personality, and his propensities should be examined. Facts and informed opinions concerning the offender

⁵⁸ See discussion, *id.* at 16-17.

⁵⁹ Many think this is the most serious criticism that can be made of juvenile court methodology. Like the dog, the juvenile is allowed several bites before he is put away.

⁶⁰ REPORT BY THE PRESIDENT'S COMM'N 45.

⁶¹ *Id.*

are necessary before any conclusion as to probation can be intelligently made. Several devices are available to the judge to help him reach these conclusions. More need to be developed.

A. *The Pre-sentence Report*

As previously stated, the pre-sentence or pre-probation report is the heart of sentencing and probation. In the ordinary state, it serves the judge both in sentencing and in determining probation; in states like Kentucky, where the jury fixes the sentence, it serves the judge in deciding whether to probate the offender. It is largely this report, if properly compiled and prepared, which provides the basis for determining what should be done with the offender.

The Kentucky statutes provide that in any case where a plea of guilty is entered, the probation officer *shall* make a written report on his investigation of the defendant, and in *any* case the judge may request such report.⁶² The Federal Rules of Criminal Procedure provide that the report *shall* contain what amounts to a case history of the defendant.⁶³ Since the report ordinarily is prepared by officers of the state correctional system in the various states, it is usually done in a professional manner. The value of the report will depend upon the thoroughness of the investigation and the ability of the man who prepares it.

The National Probation and Parole Association's discussion of probation outlines its values; however, the association is not specific in discussing aids to the judge in determining probation. The discussion is valuable because it reflects the experience of the many judges who participated in writing it, and who know whereof they speak. One significant conclusion of the discussion is that probation is not leniency;⁶⁴ it is a method of correction and hopeful reclamation. The offender is not set free; he is subject to the continued direction and supervision of the court. If the probated offender does not meet the standards demanded of him he may be imprisoned. The report emphasizes that this should be pointed out to him in unmistakable terms.

⁶² KRS § 439.280 (1962).

⁶³ FED. RCR § 32(c)(1).

⁶⁴ NATIONAL PROBATION AND PAROLE ASS'N, *supra* note 55, at 13.

B. Prediction Tables and other Predictive Devices

The determination of whether to grant probation is largely a matter of attempted prophecy. Will the offender repeat? Will he profit by his lesson? Naturally the prophecy should be based upon facts about the defendant's past and current proclivities. Moreover, the decision must be a reasoned determination by competent persons who are aware of the risk involved.

Is it possible to predict what a convicted offender will do if he is probated, especially if he has committed a crime prior to the current offense? One of the most encouraging devices for that purpose, developed by Sheldon and Eleanor Glueck in their continuing studies of juveniles, is their Prediction Tables. They are the first, and remain the most reliable, method of determining the chance that probation for an offender will, or will not be successful. Modeled on actuarial tables formulated by insurance companies, the tables have proved reasonably accurate in predicting the future of criminal offenders. The Gluecks have explained their methodology in several places,⁶⁵ and the writer has discussed it at some length in a book, *Modern Criminal Procedure*.⁶⁶ The technique is a fine beginning and has great possibilities.

The Gluecks' experiment has encouraged current commentators and legislators to attempt a more scientific approach to probation and parole. Correctional devices in the past have been largely a matter of guesswork. Two things are needed for the future—more scientific and accurate determination of how great a risk the offender would be if probated or paroled, and qualified supervision to assist him in satisfying the terms of his probation.

The *Model Penal Code*, in an attempt to be specific in its guides for the judge who considers probation, has promulgated the following:

Section 7.01. Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.

(1) The Court may deal with a person who has been convicted of a crime without imposing sentence of imprison-

⁶⁵ E.g., Glueck & Glueck, *Predictability in the Administration of Criminal Justice*, 42 HARV. L. REV. 297 (1929). This was reprinted as Chapter XVIII of the Gluecks' book, *FIVE HUNDRED CRIMINAL CAREERS* (1930).

⁶⁶ R. MORELAND, *MODERN CRIMINAL PROCEDURE* 307 (1949).

ment if, having regard to the nature and circumstances of the crime and to the history and character of the defendant, it deems that his imprisonment is unnecessary for protection of the public, on one or more of the following grounds:

(a) The defendant does not have a history of prior delinquency or criminal activity, or, having such a history, has led a law abiding life for a substantial period of time before the commission of the present crime;

(b) The defendant's criminal conduct neither caused nor threatened serious harm;

(c) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(d) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(e) The defendant acted under the stress of a strong provocation;

(f) The victim of the defendant's criminal conduct consented to its commission or was largely instrumental in its perpetration;

(g) The imprisonment of the defendant would entail excessive hardship because of his advanced age or physical condition;

(h) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

(2) When a person who has been convicted of a crime is not sentenced to imprisonment, the Court shall place him on probation if he is in need of supervision, guidance or direction that it is feasible for the probation service to provide.⁶⁷

These criteria are helpful but will be difficult to apply. Will the judge read the provisions quoted above, and write "Yes" or "No" after each and then count the number of positive and negative answers? Manifestly not. The result is a number of stimulating and pertinent, but also ambiguous, questions. The criteria do not provide an accurate and definite answer to the judge's dilemma. More specific, more accurate and more prophetic criteria need to be devised. The Gluecks' technique and methodology are far superior to any existing proposal as they are taking a more scientific and dependable approach to the problem.

It is submitted that the state correctional system which has the primary responsibility for both the probation and parole analyses needs to be more scientifically structured. Tables and

⁶⁷ MODEL PENAL CODE § 7.01 (Tent. Draft No. 4, 1955).

statistics of how criminals may be expected to perform, much on the order of the Gluecks' Prediction Tables, need to be developed, compiled, and utilized. The State Department of Corrections knows that the recidivism rate is higher among certain classes of offenders. Such statistical information should be formulated and utilized as one *factor* in probation and parole methodology. Chapter II of the *Report of the President's Commission on Law Enforcement and Administration of Justice*⁶⁸ suggests an information system which is a move in the right scientific direction. What we are endorsing is state and national statistical studies on offenders, their crimes, the factors that compose their personalities, and the details on their recidivism. For example, the President's Commission reports that the majority of offenders committing the crimes of fraud, embezzlement, gambling, drunkenness, offenses against the family and vagrancy are white, male, and over twenty-four years of age.⁶⁹ For many other crimes the peak of criminality occurs below twenty-four years. The fifteen-seventeen year-old group has the highest age group rate for burglaries, larcenies and auto theft.⁷⁰ The President's Commission reports that the most frequent recidivists are

those who commit such property crimes as burglary, auto theft, forgery, or larceny, but robbers and narcotic offenders also repeat frequently. Those who are least likely to commit new crimes after release are persons convicted of serious crimes of violence—murder, rape, and aggravated assault.⁷¹

The writer is not able to present detailed charts, or tables similar to the Gluecks' Prediction Tables, which could only be developed through long study and experimentation by a state correctional department, buttressed by university and national research assistance. But the primary responsibility in a particular state lies with the department of corrections with a professional staff, the machinery for collecting statistics, and the incentive to do a professional job using scientific procedures and methods. If

⁶⁸ REPORT BY THE PRESIDENT'S COMM'N 33-46 provides these and other statistics.

⁶⁹ *Id.* at 44.

⁷⁰ *Id.*

⁷¹ *Id.* at 45-46. Kentucky Department of Corrections statistics indicate that forgers are the most likely to repeat.

society is to throw back the rising tide of crime, it is going to take work and intelligent thought.

Finally, a fundamental problem in both probation and parole is the caseload of supervising officers. How many probationers or parolees can an officer adequately supervise, find jobs for, and help lead to a reclaimed life? The President's Commission suggests a limit of thirty-five although it would appear that he could handle more.⁷² It is obvious that a program with so much supervision would be expensive. But then, imprisonment is also expensive, so either alternative will cost the taxpayers.

IV. PAROLE

A. The Parole Board

A fundamental problem in the area of parole is the composition of the state parole board. Parole differs fundamentally from sentencing and probation in that while the latter two are judicial in nature, the former is an executive function. The almost inevitable result is that in the selection of parole personnel at all levels, the problem of patronage will be involved. It is useless for those who have the power over such appointments to say that selections are made solely upon the basis of merit; the fact is that patronage is often a factor in such selections.

One has only to view the membership of parole boards to see the effects of patronage. One often finds elderly ladies and gentlemen as a part of the group, men or women who close their eyes during hearings and only open them to give a quick "No" when a vote as to a specific parole is taken. Almost invariably parole boards have such elderly members who have served in public office creditably in their younger days and now, needing a job, lend their prestige—and their years—to the parole board. Such individuals are usually men and women of high character but possessing dated and fading vision.

Even more serious are the recurring scandals which cloud the public's faith in the integrity of parole boards. Recently, the Kentucky Parole Board has been the subject of investigation by two grand juries. The first criticized the Board; the second

⁷² *Id.* at 167.

exonerated it.⁷³ But the feeling persists that where there is so much smoke, there must be fire.

These recent criticisms of the Parole Board and of parole have been made during the administration of a Governor of high integrity and esteem. Criticism is inevitable where personnel is appointed under the direction of the executive branch of the government. One might conclude that the answer to this part of the parole problem would be to take the appointment of parole personnel out of the hands of the executive branch and thus remove the factor of patronage. In support of this argument it may be suggested that there is no fundamental reason why parole, like probation, could not be a judicial function. But there are also problems in securing competent judicial officers.

Yet, even if it would improve the situation, the change is not likely to occur. The executive branch is not likely to give up the patronage that goes with the present power of executive appointment. The writer is not ready to recommend such a change. It is hoped that a study would be made to determine whether the executive branch might not be controlled to a sufficient extent in making appointments to the Parole Board itself, and to the administrative staff. This could be accomplished by requiring appointments to be limited to selections submitted by a responsible committee, somewhat like the selection of judges under the Missouri Plan where appointment of judges is made from a list of individuals recommended by the bar association.

A quick rejoinder to that suggestion, however, is that in Kentucky an advisory commission presently exists which supposedly exercises much of this suggested advisory function. This commission, called the Commission on Correction and Community Service, submits to the Governor a list of names from which appointments to the Parole Board are made.⁷⁴ But since the Commission which submits the list is also appointed by the Governor, the Parole Board appointments are not likely to be completely impartial. The fact that the procedure is somewhat circular does

⁷³ At about the same time, there appeared in the newspaper a charge by the Kentucky Commissioner of Corrections, an executive appointee, that he had been fired because of "politics." He claimed that his refusal to appoint guards and other correctional personnel, suggested by the executive branch and picked because of patronage rather than merit, caused his dismissal. Lexington Herald, Feb. 21, 1967, at 1.

⁷⁴ KRS § 439.320 (1962).

not change the ultimate fact. The Governor has full patronage power; the only question is how far he wishes to exercise it. The recent President's Commission on Crime recognized the influence of patronage on Parole Board appointments in these words: "It [the decision on parole] is made by parole board members who are often political appointees."⁷⁵

The method of selection of appointees to the Parole Board as recommended by the *Model Penal Code*⁷⁶ adds nothing of value to the present system in Kentucky. In fact, the Kentucky method is fashioned after the *Model Code* recommendations. In 1964, after a series of Parole Board scandals in Kentucky, the present method of appointment was adopted. Some details in the *Model Penal Code* were changed but the Kentucky procedure is substantially the same. One difference is that the *Model Penal Code* suggests full-time Board members; Kentucky members are appointed on a part-time basis in the belief that there is not enough business for full-time employment. The *Model Penal Code* also suggests that at least one member of the parole board be a full-time employee if the state is unable to provide that all members be full-time employees. Because the full-time employee might easily dominate the board, this writer rejects the suggestion.

New York has attempted to temper the danger of patronage by providing that appointment of board members be made by the Governor "by and with the advice and consent of the senate."⁷⁷ This is a somewhat cumbersome procedure, patterned after the method for presidential appointments, most of which have to be confirmed by the United States Senate. It represents a check on the executive by the legislative branch of the government. It is believed that the quality of executive appointments to the Parole Board would be improved by such a procedure and a provision providing for such confirmation would be a valuable addition to the Kentucky Act.⁷⁸

The net result of the above discussion then is that parole is executive in nature thus leading to the danger of patronage in

⁷⁵ REPORT BY THE PRESIDENT'S COMM'N 12.

⁷⁶ MODEL PENAL CODE § 402.1 (Tent. Draft No. 5, 1956).

⁷⁷ N.Y. CORRECTION LAW, § 241 (McKinney 1951).

⁷⁸ In New York, appointments are made by the Governor, without the advice of an advisory commission such as is used in Kentucky. It is recommended the Advisory Commission be continued in Kentucky and the requirement of senate confirmation be added.

appointments. It is believed that the New York technique of reducing this danger by requiring that appointments be confirmed by the state senate, a legislative branch of the government, would cause an improvement in the methodology suggested by the *Model Penal Code* and now provided under Kentucky law. There has been so much criticism of the Kentucky Parole Board, both before and since the present Kentucky Act, that it seems desirable to try the New York experiment in the hope that this would improve the method of selection. The change suggested is not a radical one. The Parole Board appointments would still be made by the executive, as at present, the only restraint being that such appointments be confirmed by the Kentucky Senate.

B. Guides in the Administration of Parole

The pre-sentence report is available to the parole board as one of the guides in determining whether to grant parole. The investigation for this report in Kentucky is made by the Department of Corrections for the sentencing judge. A copy of the report should also be filed with the Department of Corrections in Frankfort. This report, if carefully made in the first instance, will give to the Parole Board a complete case history of the prisoner at the time when he is being considered for probation. Where the court imposes the sentence, the report is available to the judge to assist him in determining how to *sentence*, as well as whether to grant *probation*.

In addition to the pre-sentence report, the Parole Board should have before it the additional facts necessary to make the report complete if the original report was incomplete or poorly done. Also, the Parole Board should have a supplemental report bringing the pre-sentence report up to date, detailing the conduct and attitude of the offender while in prison. Included should be a copy of the prison psychiatrist's study and analysis of the prisoner as well as the recommendation of the warden, supposedly a trained professional expert.

There is a great deal of merit in the suggestion that the Department of Corrections should devise and experiment with prediction tables like those developed by Eleanor and Sheldon Glueck in their studies and predictions of the future conduct of juveniles confined in Massachusetts correctional institutions. These

predictions of the possibility of future crime, discussed *supra*, were devised by using certain key factors such as home life, education, and the individual's past record of offenses and their nature. They have been fairly successful in predicting the offender's chance of becoming a good parole risk.⁷⁹ Such a device, re-examined and further developed, might well be adopted as a substantial aid in determining whether probation or parole should be granted.

Most of these devices, such as the pre-sentence report have been almost wholly *subjective* in regard to information recorded and recommendations made. Prediction data, while compiled from subjective data on the individual offender, would apply objective criteria and formulae in reaching a conclusion as to whether the individual offender should be granted probation or parole. Such devices are scientific in nature and represent a novel approach to the problem of predicting whether an offender would be a good societal risk if given his freedom.⁸⁰

KRS § 439.340 provides that the Parole Board shall adopt such rules of eligibility for parole as are in accordance with prevailing ideas of correction and reform. In accordance with this provision the Board has adopted an elaborate and detailed set of rules regarding length of confinement before a prisoner may be eligible for parole, *e.g.*, six years in the case of a life sentence. Some persons believe that no minimum or set periods of confinement before eligibility for parole should be set, that a prisoner may be paroled without *any* confinement. More generally, it is believed that the Board should be able to parole an inmate without any set period of confinement, if at any time he is considered a safe risk, has been reclaimed, and has seen the error of his ways. The writer is in favor of provisions of minimum confinement, as in Kentucky, in the belief that a minimum period of incarceration will give the prisoner time and opportunity for sober thought about the ramifications of criminal conduct.

The *Model Penal Code* provides for a reduction of the prison term for good behavior.⁸¹ The granting of statutory "good time" is generally considered to be a useful incentive to good behavior

⁷⁹ See R. MORELAND, *supra* note 66, at 307 for a discussion of the Glueck innovation.

⁸⁰ REPORT BY THE PRESIDENT'S COMM'N 45 mentions these prediction tables in relation to the problem of recidivism among paroled offenders.

⁸¹ MODEL PENAL CODE, *supra*, note 76, at § 305.5.

and morale in prison. All states, except California, provide for such commutation for good conduct.⁸² Prisons often have a difficult time preserving discipline. Good time has nothing to do with punishment for the crime for which the prisoner was convicted but it may be closely related to the offender's reclamation. It helps him to feel that society is not vindictive, that good behavior does pay. When this is taken into consideration in connection with the added value of prison good order and morale, it becomes clear that the reward of good behavior has a commendable place in prison practice. Good behavior is also often used to reduce the parolee's parole term. This is done in at least eighteen states.⁸³

C. *Recommendations on Parole*

Since Kentucky has adopted by statute most of the recommendations of the *Model Penal Code* relating to parole, and since these are largely in accord with what are considered good practices, it is difficult to suggest new or novel procedures for the state. As discussed above, a major problem in Kentucky has been criticism of the personnel of the Parole Board. It has been suggested that this situation could be materially improved by requiring by statute that the appointment of members of the Parole Board by the Governor be ratified by the state senate. This would tone down some of the patronage problems with which the state has been plagued in past years.

The use of the pre-sentence report, supplemented by additional data having to do with the prisoner's conduct and attitude in prison, in addition to the prison psychiatrist's analysis and recommendations of other prison personnel should materially aid the Parole Board. This kind of data should include a prophecy as to the risk of turning the prisoner back into society determined by prediction formulae on the order of the Glueck Prediction Tables, developed by the state Department of Corrections. This device holds great possibilities for a scientific determination of fitness for parole.

These suggestions do not add much to present procedures in

⁸² *Id.* at § 305.9, Comment.

⁸³ *Id.*

Kentucky, but undoubtedly new procedures must be developed. The paroled "repeater" is a substantial part of the nation's crime problem. A subcommittee found the state parole procedures fundamentally sound but recommended further efforts to take parole personnel out of politics and to upgrade the Department of Corrections.⁸⁴ These recommendations need implementation. The Report stated that the subcommittee listened to the parole hearing in fourteen parole requests and found nothing to criticize.⁸⁵ That is the difficulty. Constructive criticism is difficult. Procedures *are* apparently inadequate however, if increasing recidivism is a valid criterion. What these additional parole aids should be will require creative thinking and scientific study by all concerned.

⁸⁴ KENTUCKY LEGISLATIVE RESEARCH COMM'N, INFORMATIONAL BULL. No. 63, 1967 REPORT: SUBCOMM. ON PROBATION AND PAROLE, 17-18 (1967).

⁸⁵ *Id.* at 17.