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JURY SENTENCING — GRAB-BAG JUSTICE

by

Charles W. Webster*

“TRYING a man is easy, as easy as falling off a log compared with deciding what to do with him when he has been found guilty.”¹

It has often been stated that the most significant advance which could be made in the criminal jurisprudence of the State of Texas would be to take the sentencing power away from the jury. Only Texas and seven other states² give the jury discretion to determine sentences in all cases, while the other forty-two plus the federal system vest the power of sentencing in the court. This Article is designed to determine whether there is any valid reason for continuing the practice of jury sentencing in present-day law or whether (as

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¹ Justice Henry Alfred McCardie, cited in *Guides for Sentencing*, Advisory Council of Judges of the National Probation and Parole Association (1957).

² See Ark. Stat. Ann. § 43-2307 (1948); Va. Code Ann. § 19-624 (1949). See, e.g., Ill. Ann. Stat. ch. 38, § 360 (Smith-Hurd 1935); Ind. Ann. Stat. § 9-1811 (1956); Ky. Crim. Code § 284 (Baldwin 1959). In addition, the jury is given discretion in death cases in the following states: Alabama, Ala. Code tit. 14, § 318 (1940); Arizona, Ariz. Rev. Stat. Ann. § 13-453 (1956); Arkansas, Ark. Stat. Ann. § 43-2152 (1948); California, Cal. Pen. Code § 190 (1959); Colorado, Colo. Rev. Stat. Ann. § 40-2-3 (1953); Connecticut, Conn. Gen. Stat. § 53-10 (1958); Georgia, Ga. Code Ann. § 26-1005 (1933); Hawaii, Hawaii Rev. Laws § 291-5 (1955); Idaho, Idaho Code Ann. § 18-4004 (1947); Illinois, Ill. Ann. Stat. ch. 38, § 360 (Smith-Hurd 1935); Indiana, Ind. Ann. Stat. § 10-3401 (1933); Iowa, Iowa Code § 690.2 (1958); Kansas, Kan. Gen. Stat. Ann. § 21-403 (1949); Kentucky, Ky. Crim. Code § 435.010 (Baldwin 1959); Maryland, Md. Ann. Code art. 27, § 413 (1957); Massachusetts (jury discretion except if murder was connected with commission of rape or attempt to rape, then mandatory death sentence), Mass. Gen. Laws Ann. ch. 265, § 2 (1956); Mississippi, Miss. Code Ann. § 2217 (1942); Missouri, Mo. Ann. Stat. § 559.030 (1949); Montana, Mont. Rev. Codes Ann. § 94-2505 (1947); Nebraska, Neb. Rev. Stat. § 28-401 (1957); Nevada, Nev. Rev. Stat. § 16-200.030 (1959); New Hampshire, N.H. Rev. Stat. Ann. § 585:4 (1955); New Jersey, N.J. Rev. Stat. § 2A:113-4 (1953); New Mexico, N.M. Stat. Ann. § 40-24-10 (1953); New York, N.Y. Pen. Law § 1045 (1944); North Carolina, N.C. Gen. Stat. § 14-17 (1953); North Dakota (no penalty except if convicted for murder while serving a life sentence for murder), N.D. Rev. Code § 12-2713 (1943); Ohio, Ohio Rev. Code § 2901.01 (Anderson 1953); Oklahoma, Okla. Stat. Ann. tit. 21, § 707 (1951); Oregon, Ore. Rev. Stat. § 163.010 (1957); Pennsylvania, Pa. Stat. Ann. tit. 18, § 4701 (1945); Rhode Island, R.I. Gen. Laws Ann. ch. 11, § 23-1 (1956); South Carolina, S.C. Code § 16-52 (1952); Tennessee, Tenn. Code Ann. § 39-2405 (1956); Texas, Tex. Pen. Code Ann. art. 1257 (1948); Utah, Utah Code Ann. § 76-30-4 (1953); Vermont, Vt. Stat. § 2303 (1957); Virginia, Va. Code Ann. § 18-31 (1950); Washington (life imprisonment unless jury specifically finds death penalty), Wash. Rev. Code § 9.48.030 (1950); West Virginia, W. Va. Code Ann. § 5917 (1955); Wyoming, Wyo. Comp. Stat. Ann. § 6-54 (1951).

While the subject of the death penalty is beyond the scope of this paper, one cannot wonder at the giving of this discretion to the jury. However, it may be better for society to require that its representatives actually make the decision each time it must be made, rather than to determine the imposition of the death penalty solely on the basis of the crime committed.

so often happens in the law) it has remained long after its reason for existence has disappeared, solely because there has been no organized effort to effectuate a change.

I. OUR COMMON-LAW TRADITION

The jury system as we know it came to us from our English forebearers, and it has been with pride that the right to trial by a jury made up of one's peers has been regarded as an important guarantee of our liberty.³ While there have been many theories advanced as to the beginning of the jury system, legal historians seem to favor the idea that it sprang from the early *inquests* used by Frankish kings and brought to England in 1066 by the Norman invaders. The early jury was used primarily as a means of getting information known in the area but unknown to the traveling judge.⁴ In 1166, Henry II gave instructions that in the future no man was to be brought to trial unless first found guilty by "twelve knights, good and true."⁵ This action of Henry II was the beginning of the *grand jury indictment*, which determined if the accused must stand trial.⁶ After a grand jury indictment was returned, which determined that the accused must stand trial, he then was tried by ordeal,⁷ wager of law,⁸

³ The Magna Carta, as construed in the 17th century, was thought to guarantee jury trials. But that could not have been the case, for at the time the Magna Carta was assented to in 1225, jury trial had not developed as a general procedural institution and for some time thereafter it was still regarded by many Englishmen as a tyrannical innovation. Plucknett, *A Concise History of the Common Law* 106-38 (1956). See also the guarantees to trial by jury established in the United States Constitution, amends. VI, VII.

⁴ Thus, early juries were selected because of their knowledge of the facts while today a juror is disqualified if he is personally aware of the facts. See Windeyer, *Legal History* 62 (2d rev. ed. 1957).

⁵ Assize of Clarendon, 1166. This procedure was further extended by the Assize of Northampton, 1175. See Stephenson & Morcham, *Sources of English Constitutional History* 76, 80 (1937).

⁶ The grand jury today, in returning an indictment, merely returns an accusation, and, generally speaking, the grand jury returns the indictment on a three-quarters vote. In addition, with a rare exception, the grand jury hears only the evidence of the state and is not made aware of the defendant's contentions. Puttkammer, *Administration of Criminal Law* 119, 127 (1953).

⁷ Four kinds of trial by ordeal were in common use in England. The Ordeal by Fire required the accused to carry a piece of hot iron for nine paces. The hand was then wrapped for three days. At the end of the third day the bandage was removed; if the hand had festered, it was determined that the man was guilty because it had previously been requested that God keep an innocent man's hand clean of infection. The Ordeal by Hot Water was similar to ordeal by fire in that the same routine was followed, except that the accused was required to remove a stone from the bottom of a vessel of boiling water. In the Ordeal of the Corsnade, the priest gave to the accused a one-ounce morsel of bread or cheese which had been charged to stick in the man's throat if he were guilty. When the Ordeal was by Cold Water the accused was bound and lowered into a pool of water which the priest had consecrated and adjured to receive the innocent but to reject the guilty. Therefore, if the man floated he was guilty; if he sank he was innocent. See Windeyer, *op. cit. supra* note 4, at 14-15.

⁸ In Compurgation or Wager at Law the accused swore that he was not guilty and he then called several of his neighbors to state upon their oath that the accused party's

or trial by battle.⁹

When ordeals were abolished in 1215, people who had been arraigned by the grand jury were then tried by a *petty* or *petit jury* made up of a group of men varying in number from twelve to forty-eight.¹⁰ At first a unanimous verdict was not required, but, in view of the fact that the juries were to represent the voice of the country (which could speak in only one voice), unanimity soon became a requirement. It was not hard to obtain a unanimous verdict, however, for it became the custom to keep the juries locked up without food or drink until they had arrived at a decision.¹¹ Historically, jurymen could be punished by the court for returning a verdict the judge considered incorrect. They could also be tried before a jury of twenty-four for returning an erroneous verdict.¹² However, since 1670¹³ it has been established that judges have no power to punish juries because of disagreement with their verdicts, and since that time the jurymen has become the uncontrolled judge of the facts. From that time on, with a few minor variations in the different states by statutes, the

oath was clean, i.e., that he was the sort of person who would not tell a lie under oath. Although somewhat difficult to understand by modern standards, at this time in history a man would hesitate to swear a false oath. His neighbors, if not convinced of his innocence, might fear to support his oath because of their belief that the wrath of God would be made manifest upon them and that misfortunes would follow such a false oath. Therein lay the effectiveness of Compurgation. (Compurgation provides the historical setting for the policy which has continued to modern times requiring all witnesses to be sworn.) See Windeyer, *op. cit. supra* note 4, at 12.

⁹ Trial by Battle was also a way of determining the decision of God in the quarrels of men. In some cases the parties to the suit fought their own battle; in others they were allowed to hire champions to fight for them. Usually these battles were fought with weapons similar to a pick-axe and if the accused could stand throughout the entire day until the stars shone in the evening, it was determined that he had won his case. On the other hand, if his adversary could make him cry "Craven" he was held to be guilty. This method is believed to have been used last in *Ashford v. Thornton*, 1 B. & Ald. 405, 106 Eng. Rep. 149 (K. B. 1818) before Parliament repealed it in 1819. 59 Geo. III c. 46. See Windeyer, *op. cit. supra* note 4, at 44-46.

¹⁰ Even after the ordeals had been abolished a man still could not be forced to be tried by his fellow-countrymen rather than by God. The accused was given the opportunity to "stand mute" to the question "How will you be tried?" Where the accused did not answer, the jury then decided if he were "mute by Act of God" or "mute of malice." If the determination was the latter, the authorities then had to put pressure on the prisoner to compel him to speak. In order to accomplish this, a barbarous torture called *peine forte et dure* was used, where the accused person was tied to the ground and weights were placed upon him until he either spoke out or died. The only advantage to the accused from *peine forte et dure* was that he died an innocent man; therefore, his lands were not forfeited to the crown. These rules were not abolished in England until 1870. See Windeyer, *op. cit. supra* note 4, at 67-69.

¹¹ It should be pointed out that there was no prohibition at this time against members of the grand jury also serving on the petit jury and it was quite common for the same person to serve on both. This also helped towards unanimity, especially if the verdict were guilty. See Windeyer, *op. cit. supra* note 4, at 67.

¹² Windeyer, *op. cit. supra* note 4, at 61.

¹³ *Bushell's Case*, cited in Windeyer, *op. cit. supra* note 4, at 61.

jury came to be used as it is today. While the determination of guilt or innocence has traditionally been a jury function, in only a few states has the jury also been granted the power to fix the sentence within limits established by the legislature.¹⁴

Since the common law permitted the judge to determine the punishment, this for a time became the procedure in Texas. Following the formation of the Republic of Texas, the First Congress in 1836 enacted legislation which made no appreciable change in the existing practice.¹⁵ For the ten years of the Republic, the power of the judge to fix the penalty was not disturbed. The change to jury determination of the penalty was affected by one of the first laws passed by the first legislature of the State of Texas in 1846, which empowered the jury to sentence the defendant in all criminal cases except (1) capital cases and (2) cases for which punishment was fixed by law.¹⁶

Present law provides that the jury shall assess the penalty in all cases where it is not absolutely fixed by statute. "If the plea is not guilty . . . [the jury] . . . shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty."¹⁷ If the accused pleads guilty and waives a jury trial, the judge may affix the sentence.¹⁸

II. PRESENT SCOPE OF DISCRETION

In order to point up the vagaries of the jury, the records of the District Court of Dallas County for the years 1958 and 1959 have been studied. The author has arbitrarily chosen the crimes of murder, rape, and narcotics to point out the variation in sentences which have been imposed by juries during this two-year period. As a comparison, statistics on the sentences imposed by judges for these three crimes during the same period of time have also been compiled.¹⁹ These statistics are as follows:

¹⁴ See note 2 *supra*.

¹⁵ 1 Gammel, *Laws of Texas* 540 (1898).

¹⁶ *Texas Laws*, 1846, p. 161.

¹⁷ *Tex. Code Crim. Proc. Ann.* art. 693 (1925).

¹⁸ *Tex. Code Crim. Proc. Ann.* art. 10A (1925).

¹⁹ It is realized that to a certain extent the statistics on judicial sentencing are of no value for comparative purposes because, in most of the cases, the sentence imposed was the result of negotiation between the state and the defendant, and the end result has been horse trading, or as it is commonly known, "copping a plea."

Chart I

Disposition of Convictions for Murder, Rape, Narcotics, and Related Offenses, Dallas County, 1958 and 1959.

	Number	Percentages	
		Of Jury Convictions	Of All Convictions
Jury Trial			
Probation	0	0	0
Suspended Sentence	5	5	1
Texas State Penitentiary	89	95	23
	—	—	—
Total	94	100%	24%
Jury Trial			
		Of Court Convictions	Of All Convictions
Plead Guilty (without jury)			
Probation	68	24	18
Suspended Sentence	47	16	12
Texas State Penitentiary	174	60	46
	—	—	—
Total	289	100%	76%
Totals—Both			
Jury and Court	383		100%

Chart I illustrates the fact that the juries do not know how properly to use suspended sentences (5%), but that judges sometimes do (16%). While juries are unable to probate a sentence, the judges have occasionally used probation (24%) although a judge cannot probate the sentence in *any* murder case.

Chart II

Heavy Convictions, Dallas County, 1958 and 1959.

Number of Cases	Percentage of Total Convictions	Sentences			
		25 yrs. or more	50 yrs. or more	Life	Death
By Jury	94 24%	30	21	12*	1
By Court ..	289 76%	13	6	—*	—

*Does not include 4 sentences of 99 years each.

Chart II illustrates the fact that juries pass out heavier sentences. Though they consider only 24% of the cases, they pass out 70% of all sentences of 25 years and over, 78% of all sentences of 50 years or over, and all of the life and death sentences. This tends to show that their motivation is more one of vengeance than of rehabilitation.

It should be pointed out that the judge cannot assess punishment in rape or *any* murder case. In non-capital felony cases, the judge can assess the punishment only where a jury is waived and the defendant pleads guilty. This arises because of the inconsistency which exists between our probation laws and our suspended sentence laws.

Chart III

Various Penitentiary Sentences Imposed in Dallas County,
1958 and 1959, for the Crimes of Narcotics, Murder,
Assault-Attempt to Murder, and Rape.

	<i>Number</i>	<i>Range</i>	<i>Median</i>	<i>Mode</i>	<i>Mean</i>
<i>Narcotics</i>					
Jury	15	2-life	13	15	18.4
Court*†	64	2-45	5	5	6.4
<i>Murder</i>					
Jury	31	5-death	25	life	52.5
Court†	4	2-5	3	5	4.0
<i>Assault-Attempt Murder</i>					
Jury†	12	5-15	15	15	11.8
Court*†	38	2-15	5	5	6.0
<i>Rape</i>					
Jury†	16	5-life	30	none	41.4
Court†	10	4-99	35	none	44.2

*Does not include probated sentences.

†Does not include suspended sentences.

Chart III illustrates the fact that when one throws himself at the jury's mercy, the result is one of "grab-bag" sentencing. In the area of narcotics, for example, jury sentences ranged from 2 years to life for the same offense, and these sentences were imposed without any knowledge of the characteristics of individual offenders. Compare the narrower range of court sentences.

As can be seen from the foregoing, juries have been extremely reluctant to use suspended sentences and on a general average juries are much more severe. The range in sentencing by the jury in narcotics cases has been from 2 years to life. In murder cases the range has been from 5 years to the death sentence. It is interesting

to note that the median for murder has been 25 years and the arithmetical mean 52.5. In rape cases the range has been from 5 years to life, with the median being 30 years and the arithmetical mean 41.4.

The statistics merely show that the juries have in fact exercised the discretion vested in them by the statutes. The statistics, of course, do not and cannot reflect the basis for the exercise of this discretion. The contention of this writer is that no matter how sincere the jurors may be, jury imposition of sentences constitutes merely "sanctified guessing." A criminal trial can not bring out reasons for variation in sentencing, and it is solely the persuasive oratory of the district attorney or defense counsel which determines the severity of the sentence. This is playing games with human lives.

III. ARGUMENTS AGAINST CHANGE

No time need be spent discussing man's natural resistance to change, nor the inherent conservatism of the Bar which fears repeal of any law which it has mastered, regardless of its merits. The argument most often advanced against taking the power from the jury is that it would be turned over to the judges who, because of their short tenure, must be politicians first and judges second. However, in many jurisdictions which vest sentencing power in the court, the tenure of criminal judges is not materially different from the tenure of such judges in Texas. The judges in these jurisdictions seem to perform the function adequately even though they must return to the electorate for re-election.²⁰ While, as will be set out later,

²⁰ In a recent survey conducted by the Dallas Morning News the question posed to the jurors and attorneys polled was whether they would prefer the system in use in Texas or the system used in the federal courts. It is interesting to note the loaded nature of the question, which disregarded the fact that there are 42 states in which the judge imposes the sentence. One of the major objections raised was that the federal bench is appointed for life and is thereby immune from political pressure, while the four-year term of Texas district judges makes such a situation impossible. See Dallas Morning News, Feb. 29, March 2, 6-9 (1960). Terms of office of criminal judges of the various American jurisdictions are as follows: Alabama, 6 years, Ala. Const. art. 6, § 155; Alaska, 4, Alaska Comp. Laws Ann. § 54-1-1 (1949); Arizona, 4, Ariz. Const. art. 6, § 5; Arkansas, 4, Ark. Const. art. 7, § 17; California, 6, Cal. Const. art. 6, § 8; Colorado, 6, Colo. Const. art. 6, § 12; Connecticut, 4, Conn. Const. art. 5, § 4; Delaware, 2, Del. Const. art. 4, § 3; District of Columbia, 10, D.C. Code Ann. § 11-753 (1952); Florida, 6, Fla. Const. art. 5, § 7(2); Georgia, 4, Ga. Const. art. 6, § 2-3101; Hawaii, 4, Hawaii Organic Act § 80, 31 Stat. 141 (1900); Idaho, 4, Idaho Const. art. 5, § 11; Illinois, 6, Ill. Const. art. 5, § 12; Indiana, 4, Ind. Ann. Stat. § 4-3201 (1946); Iowa, 4, Iowa Const. art. 5, § 5; Kansas, 4, Kan. Const. art. 3, § 3; Kentucky, 5, Ky. Const. § 129; Louisiana, 6, La. Const. art. 7, § 33; Maine, 7, Me. Const. art. 6, § 4; Maryland, 15, Md. Const. art. 4, § 3; Massachusetts, as long as commission provides, Mass. Const. ch. 3, § 82; Michigan, 6, Mich. Const. art. 7, § 9; Minnesota, 6, Minn. Const. art. 6, § 4; Mississippi, 4, Miss. Const. art. 6, § 153; Missouri, 6, Mo. Const. art. 5, § 23; Montana, 4, Mont. Const. art. 8, § 12; Nebraska, 4, Neb. Const. art. 5, § 10; Nevada, 4, Nev. Rev. Stat. § 3,050 (1951); New Hampshire, as expressed in commission, N.H. Const. pt. 2, art. 74; New Jersey, 5, N.J. Rev.

it is not necessary, and may not even be advisable to vest the power solely in the district judges, it cannot be believed that vesting this power in district judges would produce a system inferior to the one in effect.

IV. ARGUMENTS FOR ABOLISHING

While it seems to this writer that the arguments stand out so clearly they need hardly be stated, nevertheless an attempt will be made to point out the fallacy of jury sentencing.

It seems abundantly clear that all offenders who commit the same criminal act should not be punished alike.²¹ It seems equally clear that reasons for imposing different sentences for like crimes are matters which cannot be brought out in the course of the trial to determine the guilt or innocence of the accused. Thus, the jury will probably be uninformed as to the factors which should be considered in arriving at a proper sentence. In addition, while the jury is a vital procedural safeguard in representing society in the determination of guilt or innocence, by its very nature a jury which is called upon to be unanimous in determining a single fact question, guilt or innocence, is completely unprepared to determine a complex question such as sentencing. In effect the jury is required to determine the *degree* of the defendant's guilt. Jury sentencing thereby becomes a system of compromises on the part of the twelve men. Most people would be shocked at the idea that, if half of the jury found a man guilty and half found him innocent, they would then try to find some lesser crime that was acceptable to all, but this practice is often

Stat. § 2A: 7-6 (1951); New Mexico, 6, N. M. Const. art. 6, § 12; New York, 14, N.Y. Const. art. 6, § 4; North Carolina, 8, N.C. Gen. Stat. § 7-41 (1953); North Dakota, 6, N. D. Const. art. 4, § 104; Ohio, 6, Ohio Const. art. 4, § 12; Oklahoma, 4, Okla. Const. art. 7, § 9; Oregon, 6, Ore. Const. art. 7 § 1; Pennsylvania, 10, Pa. Const. art. 5, § 15; Rhode Island, during good behavior, R.I. Gen. Laws Ann. § 8-2-2 (1956); South Carolina, 4, S.C. Const. art. 5, § 15; South Dakota, 4, S.D. Const. art. 5, § 15; Tennessee, 8, Tenn. Const. art. 6, § 4; Texas, 4, Tex. Const. art. 5, § 7; Utah, 4, Utah Const. art. 8, § 5 n.l.; Vermont, 2, Vt. Const. ch. 2, § 48; Virginia, 8, Va. Const. art. 6, § 96; Washington, 4, Wash. Const. art. 4, § 6; West Virginia, 8, W.Va. Const. art. 8, § 10; Wisconsin, 6, Wis. Stat. Ann. § 252.01 (1957); Wyoming, 6, Wyo. Const. art. 5, § 19.

In many of these jurisdictions the tenure of sentence-imposing judges is not significantly different from the tenure of Texas criminal judges. The judges in these jurisdictions are apparently able to discharge their duty of sentence imposition effectively, even though they must return to the electorate for re-election.

²¹ Under our system we do not even follow the sage advice of the Mikado, who tells us that

My object all sublime
I shall achieve in time —
To let the punishment fit the crime —
The punishment fit the crime.

The Best-known Works of W. S. Gilbert, Halcyon House, Garden City, N.Y.

utilized, in effect, when the jury engages in fixing a term of years for a particular offense.

Two other aspects of jury sentencing must be considered. First is the time-consuming aspect of arriving at the sentence. Informal discussions with former jurors indicate that more of their time is spent in determining the sentence than in determining the question of guilt or innocence. In addition, one of the big areas of jury misconduct has involved their exercise of the sentencing power.²²

V. SCIENTIFIC SENTENCING

There are three possible bases for punishment of a criminal act: retribution, deterrence, and reformation.²³ As the United States Supreme Court has said: "Retribution is no longer the dominant purpose of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."²⁴

It seems apparent that retribution no longer can be morally justified in a modern Judaeo-Christian society, and that therefore this may be ignored as a basis of sentencing.

Both deterrence and reformation, however, are important philosophies of punishment and a judge, depending on the facts, may well lean toward one or the other in imposing sentence. Modern criminal jurisprudence calls for a scientific approach to sentencing, wherein the judge is furnished a complete presentence investigation prepared by a trained person prior to the time of imposition of sentence.²⁵ In some respects a parallel might be drawn between the judge and the physician, who bases his diagnosis, treatment, and prognosis on a

²² See *Farias v. State*, 322 S.W.2d 281 (1959); *Salcido v. State*, 319 S.W.2d 329 (1959). See also Stout, *The Defensive Philosophy of Criminal Justice in Texas*, 27 *Texas L. Rev.* 792, 801 (1949).

²³ Michael & Wechler, *Criminal Law and Its Administration, Cases, Statutes and Commentaries* 6 (1940).

²⁴ Mr. Justice Black in *Williams v. New York*, 337 U.S. 241, 248 (1948).

²⁵ It is recognized that transferring the sentencing power to the court would not necessarily eliminate disparity. One possible suggestion which might be used is vesting in the appellate court the power to review the sentence. Okla. Stat. Ann. tit. 22, § 1066 (1953):

The appellate court may reverse, affirm or modify the judgement appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court.

Neb. Rev. Stat. § 29-2308 (1943):

In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court, against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence.

These statutes are illustrative of attempts by states to guard against such disparity. A workable solution which takes mitigating and aggravating circumstances into consideration of the sentence is often followed in civil law countries. See, e.g., *Francisco, The Revised Penal Code*, art. 61, 62 (1958). Some advocates of reform have suggested that the jury

complete medical history and physical examination of the patient. Likewise, the judge should base his sentence on a complete report of the defendant's entire background. The approach of California, where neither the judge nor the jury imposes the sentence, is also scientific. The law of that state delegates to a Board of Prison Directors the power to review any sentence imposed.²⁶

VI. CONCLUSION

It is obvious from a study of the Federal Bureau of Investigation crime reports and a reading of the daily newspapers that the frequency of crime is increasing. It is also obvious that our present system of sentencing is not acting either as a deterrent to crime or as a means of rehabilitation. In view of the fact that 95% of all persons in prison eventually return to society, diligent effort should be made to find a means which will enable return of these people as useful citizens rather than to prey upon society. It is submitted that at least part of the reason for recidivism is the injustice rendered at the time of sentencing. The prisoner, feeling that he has not been fairly treated, harbors a desire to avenge himself upon the society which he thinks has treated him unfairly. Disparity of sentence by juries for the same crime cannot but create this feeling of injustice. While there is no claim that scientific sentencing will be the panacea, it is nevertheless submitted that it will produce a system of justice superior to that found under our present laws. Scientific sentencing should come closer to making the punishment fit the criminal and thereby be individualized in nature.

While the California system may well be the ultimate answer, it is submitted that it may be necessary for us to crawl before we can walk. Our first advance toward the goal of individualized sentencing should be to remove the power from the jury.

be furnished the past criminal record of the defendant prior to imposition of the sentence. A study of pre-sentence investigations prepared by competent probation officers easily points out that there are many factors other than a man's past criminal record which should be weighed before sentencing. See *Guides for Sentencing*, Advisory Council of Judges of the National Probation and Parole Association, Appendix B, p. 67 (1957). No attempt has been made in this paper to urge the best means for handling the sentencing of persons convicted of crime. To a certain extent the approach has been a negative one; namely, to remove the power from the jury.

²⁶ Cal. Pen. Code §§ 1168, 3000, 3020, 3023 (1941).

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