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# LEGISLATIVE COMMENTS

## SENTENCING IN CRIMINAL CASES: HOW GREAT THE NEED FOR REFORM?

*Anthony P. Giorno\**

Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.<sup>1</sup>

### I. INTRODUCTION

For many years, the sentencing process of the criminal justice system sought to achieve four goals: deterrence, rehabilitation, incapacitation of the offender, and retribution for society and the victim.<sup>2</sup> The achievement of these goals was implemented in the majority of jurisdictions through imposition of an indeterminate sentence and discretionary release by an administrative body—traditionally a parole board. This approach allowed courts to announce relatively long sentences as a deterrent to future criminal behavior and to placate the victim and society, but tempered the punishment by allowing early release on an individual basis as soon as the offender had been rehabilitated.

Recently, however, the system has been called into question.<sup>3</sup> Given the broad range of penalties and other sentencing options

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1. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 3 (1969).

2. The American Bar Association has proposed that all of these goals are legitimately considered in an appropriate case. *PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES* § 2.2 (1968). See also, *NATIONAL COUNCIL ON CRIME AND DELINQUENCY MODEL SENTENCING ACT (1972 Revision)*; *NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS STANDARD 5.2 (1973)*.

3. See, e.g., Atschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Cassou and Taugher, *Determinative Sentencing in California: The New Numbers Game*, 9 PAC. L. REV. 5 (1978); Evans and Gilbert, *The Case for Judicial Discretion in Sentencing*, 61 JUDICATURE 66 (1977).

available to a court, it often happens that two defendants charged with the same offense in different jurisdictions, or within the same jurisdiction, receive widely disparate sentences.<sup>4</sup> As the public has become more aware of cases of seemingly unjustifiable disparity<sup>5</sup> in sentencing, their confidence in the ability of the criminal justice system to deal justly with those who come before it has diminished. Unjustifiable disparity in sentencing creates problems in the correctional system as well: prisoners convicted of the same offense often find that they have received different sentences and, if they feel they have been treated unjustly, they become hostile and more difficult to rehabilitate.

The movement to rectify perceived injustices of the sentencing process has been sounded by legislators, jurists,<sup>6</sup> legal scholars, and members of the bar of the several states. Their purpose has been to bring a degree of uniformity to sentencing and thereby assure that all offenders are treated equally by the courts. This article will examine and evaluate some of the more innovative approaches to sentencing reform from the perspective of the criminal trial lawyer.

## II. TRENDS IN SENTENCING REFORM<sup>7</sup>

At least forty states and the federal government utilize what is known as indeterminate sentencing. The sentencing authority, be it

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4. A definite geographic disparity exists in Virginia for certain crimes. For example, the average sentence for robbery from October, 1973 to October, 1976 in Alexandria was 7 years, 2 months, but in Portsmouth the average was 15 years, 3 months. In Bedford, the average sentence for robbery was 32 years, 2 months. 1977 VA. STATE CRIME COMM'N ANN. REP. 88-89.

5. In a broad sense, the term "unjustifiable disparity" is used to refer to differences in sentencing based upon unarticulated factors or from attaching a different weight to the same factor in two or more cases. J. MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISONER BUSINESS* (1973). In more narrow terms, "unjustifiable disparity" refers to differences in sentencing growing out of the biases or prejudices of an individual judge as opposed to different attitudes toward criminals and crime from one community to another. Whether disparity growing out of the latter factor is "unjustifiable" is a matter of debate.

6. Chief Justice Warren Burger, in delivering his State of the Judiciary Address to the American Bar Association National Conference in Atlanta, remarked: "No one can examine from a national perspective, or even the over-all perspective within one district or one metropolitan area, the sentences of individual judges without being deeply concerned about seeming disparities." 65 A.B.A.J. 358, 360 (1979).

7. For an excellent overview of the predominant features of the major determinate sentencing proposals, see, Kneedler, *Sentencing in Criminal Cases: Time for Reform*, 55 U. VA. NEWSLETTER 17 (Jan. 1979).

judge or jury, is vested with wide discretion in setting punishment. However, the actual time served by the prisoner often bears little resemblance to the sentence imposed. Once an individual is committed to the correctional system, his actual release date is set by an administrative body—typically a parole board. A prisoner first becomes eligible for parole after serving some fractional portion of his sentence; on the average, one-fourth of the active term imposed. The character and background of the defendant play a large role not only in terms of the actual punishment imposed, but also in the parole board's determination of when he will actually be released on parole. Although general statutory guidelines govern the granting or denial of parole, the board is vested with a great deal of discretion in determining when to release an individual offender.

Proposals for reform have centered on what may be classified as determinate sentencing. Unlike the indeterminate system, which focuses on the characteristics of the individual offender, determinate sentencing is "offense oriented." Specifically rejecting the rehabilitation of the offender as a goal of the sentencing process,<sup>8</sup> the theory is that each offense should merit the same punishment regardless of the individual character traits of the offender.

There are two major subcategories of determinate sentencing. The first is so-called flat sentencing, already adopted in at least two states.<sup>9</sup> This system allows the sentencing authority a wide range of discretion in imposing sentence up to a statutory maximum. However, discretionary release is abolished and, with the exception of statutorily mandated good time credits, the offender serves the en-

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8. Authority for the shift away from rehabilitation as the theoretical basis of sentencing may be found in the following publications: AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); CITIZENS INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., PRISONS WITHOUT WALLS: REPORT ON NEW YORK PAROLE (1975); D. FOGEL, WE ARE THE LIVING PROOF (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); J. WILSON, THINKING ABOUT CRIME (1975); HARRIS, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263 (1975); McGee, *A New Look at Sentencing: Part I*, 38 FED. PROBATION 3 (June, 1974); McGee, *A New Look at Sentencing: Part II*, 38 FED. PROBATION 3 (Sept., 1974).

9. ME. REV. STAT. tit. 17-A, §§ 1253-54 (1977); IND. CODE ANN. §§ 35-50.2-3 *et. seq.* (Burns 1979).

tire term imposed. The second approach, presumptive sentencing, has been enacted in six states,<sup>10</sup> and was recently proposed for adoption in Virginia.<sup>11</sup> This system contemplates the legislative or administrative promulgation of sentencing guidelines and a presumptively proper sentence for each offense. Each category of crime is assigned a specific punishment which may be reduced or enhanced by the sentencing authority only in extraordinary circumstances. Discretionary release through parole or the suspension of sentences is prohibited, and the prisoner serves the entire term imposed subject only to good time credit.<sup>12</sup>

### III. THE VIRGINIA PRESUMPTIVE SENTENCING ACT—AN OVERVIEW

Present Virginia law establishes six classes of felonies and four classes of misdemeanors and prescribes maximum and minimum punishments for each category.<sup>13</sup> The judge or jury is directed to impose a penalty within the permissible range of punishment.<sup>14</sup>

The proposed Virginia Presumptive Sentencing Act (VPSA), on the other hand, would provide only maximum punishments, with two or three separate series of maximum sentences for each offense.<sup>15</sup> The lowest tier of maximum sentences would be for the ordinary criminal offense and be classified in accordance with Virginia classification for felonies and misdemeanors. In limited cases, in which an offender has a long history of prior convictions or has

10. California, CAL. PENAL CODE §§ 1170-1170.6 (West Cum. Supp. 1979); Illinois, Act of July 26, 1972, P.A. 77-2097, ILL. ANN. STAT., ch. 38 § 1005-8-1 (Smith-Hurd, 1979); Indiana, IND. CODE ANN. §§ 35-50-1-1—35-50-6-6 (Burns Cum. Supp. 1979); Minnesota, MINN. STAT. ANN. §§ 244.01—.11 (West Cum. Supp. 1979); Oregon, OR. REV. STAT. §§ 144.775—144.790 (1977); Pennsylvania, 18 PA. CONS. STAT. §§ 1381—86 (1978). In addition, 35 other states are considering revisions of their sentencing laws. See, Zalman, *Making Sentencing Guidelines Work: A Response to Professor Coffee*, 67 GEO. L. J. 1005 (1979).

11. The Virginia Presumptive Sentencing Act was originally offered as Senate Bill 180 on January 20, 1978. It was reintroduced as Senate Bill 777 on January 16, 1979 and was killed by a vote of the Senate Courts of Justice Committee on February 1, 1979. All references in this article to the Virginia Presumptive Sentencing Act shall refer to the provisions of S. B. 777 unless otherwise noted.

12. Determinate sentencing is not necessarily mandatory sentencing, which usually contemplates a mandatory minimum sentence for each particular offense or a required sentence for each specific offense.

13. VA. CODE ANN. §§ 18.2-9 *et seq.* (Repl. Vol. 1975).

14. VA. CODE ANN. § 19.2-295 (1975).

15. Virginia Presumptive Sentencing Act § 19.2-316.4 (hereinafter cited as VPSA).

committed a particularly aggravated offense, the act would provide for a maximum term substantially longer than that of the ordinary offense.<sup>16</sup>

In addition, the VPSA would create a six member administrative body known as a sentencing council, charged with the duty of formulating and promulgating sentencing guidelines and a presumptively proper sentence for each specific crime.<sup>17</sup> The council would also determine which offenses merit community supervision, split sentences, or periodic confinement.<sup>18</sup> The sentencing authority would impose the presumptively proper punishment as set forth in sentencing guidelines unless it could demonstrate that another sentence would better serve the goals and purposes of the Act.<sup>19</sup> Once sentence is pronounced, the court would be without power to suspend any portion thereof.<sup>20</sup>

The VPSA would require a bifurcated trial in each criminal case.<sup>21</sup> This procedure, analogous to present Virginia law relating to capital

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16. For example, the VPSA provides for a maximum punishment of 12 years in the penitentiary for a Class 3 felony, but the maximum is 18 years for a persistent offender and 24 years for an especially aggravated offense. VPSA § 19.2-316.4(4). "A persistent offender is a person who has a least two prior felony convictions for offenses committed within the five years immediately preceding commission of the instant offense, excluding time spent in confinement." VPSA § 19.2-316.5(A).

An "especially aggravated offense" is:

1. a felony resulting in death or great bodily harm or involving the threat of death or great bodily harm to another person if,

(i) the defendant knowingly created a great risk of death to more than one person;

(ii) the offense manifested exceptional depravity; or

(iii) the defendant was previously convicted of murder or a felony resulting in death or great bodily harm or involving the threat of death or great bodily harm to another person; or

2. murder in the first degree if, at the time the murder was committed, the defendant committed another murder.

VPSA § 19.2-316.6(A).

Compare VA. CODE ANN. § 18.2-10(c) (1975) which provides that Class 3 felonies shall be punished by imprisonment of not less than 5 nor more than 20 years.

17. VPSA §§ 19.2-316.10—316.16.

18. For general provisions relating to community supervision, *see*, VPSA § 19.2-316.25—316.32. Split sentencing is explained in VPSA § 19.2-316.37, and periodic confinement is provided for in VPSA § 19.2-316.38—316.40.

19. VPSA § 19.2-316.23(A).

20. VPSA § 19.2-316.23(B).

21. VPSA § 19.2-316.22. General procedures for imposing sentence are set forth in VPSA §§ 19.2-316.17 *et seq.*

punishment,<sup>22</sup> would separate the trial into two phases—the first involving the question of guilt or innocence, the second concerning punishment.

If the defendant is found guilty, a separate hearing would be conducted in which the trier of fact would set the punishment.<sup>23</sup> Prior to the hearing date, a probation officer would prepare a presentence report setting forth such information as the circumstances of the offense, the defendant's role in the crime, aggravating or mitigating circumstances, the defendant's prior criminal record, and past sentencing practices relating to similar crimes. The report also would contain an analysis and explanation of the sentencing guidelines applicable to the offense in question.<sup>24</sup> At the hearing itself, the prosecution, the defense, and the victim would be entitled to present testimony and other information to persuade the trier of fact either to enhance or diminish the sentence.<sup>25</sup>

The VPSA would abolish parole,<sup>26</sup> and all powers of discretionary release would be transferred to the sentencing council. Once the Act became effective, the parole system would be discontinued; in its place, a system of good time credits would be established providing for one day of credit for each day served.<sup>27</sup>

Provisions allowing a prisoner to accelerate his parole eligibility or release date by participation in rehabilitative or optional programs would also be eliminated.<sup>28</sup>

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22. VA. CODE ANN. §§ 19.2-264.3—264.4 (Cum. Supp. 1978).

23. VPSA § 19.2-316.22.

24. VPSA § 19.2-316.20.

25. VPSA § 19.2-316.22(B).

26. VPSA § 53-250.6.

27. VPSA § 19.2-316.35B. The reason for the retention of good time credits would be to maintain order in the correctional facilities by providing some reward to inmates who remain on good behavior. Reductions for good behavior would be forfeited or withheld only in limited circumstances as a punishment for disciplinary offenses involving violations of institutional rules. VPSA § 19.2-316.35E. This seems to be in accord with recent federal court rulings such as *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), holding that, unlike parole, inmates have a constitutional right not to have good time allowances withheld arbitrarily.

For present statutory provisions relating to good time allowances, see VA. CODE ANN. § 53-213 (Repl. Vol. 1978).

28. See VPSA § 19.2-316.35(D).

#### IV. THE THRESHOLD ISSUE: IS DISCRETION THE CULPRIT?

No one would argue with the proposition that ideally the law should provide equal punishment for defendants convicted of the same crime. Indeed, proponents of the VPSA can point to numerous cases in which co-defendants received widely disparate sentences for the same crime, or where two offenders in different localities received widely diverse sentences.

The problem is that, too often, extreme examples are cited as the rule rather than the exception. Further, the underlying facts often belie the surface appearance of inequitable sentencing.<sup>29</sup> As an illustration, consider a series of recent cases tried in the Circuit Court of Patrick County. Defendants Shaw, McBride and Payne were indicted in connection with the burglary of an appliance store. Shaw and McBride were tried by separate juries, and each was convicted of statutory burglary and grand larceny. Shaw, who actually entered the building and carried away the merchandise, was sentenced to three years in the penitentiary.<sup>30</sup> McBride, who was 20 miles away at the time the crime was committed, received an active sentence of 25 years in prison.<sup>31</sup> Payne, on the other hand, plea bargained and received an active term of less than 12 months in jail.<sup>32</sup>

On the surface, these three cases would exemplify unjustifiable disparity in sentencing at its worst. However, a closer look at the facts reveals otherwise. Shaw and Payne went to the store at the insistence of McBride. McBride planned the crime, counseled the others on how entry to the building could be made, and provided a means for disposing of the stolen goods. In addition, he derived the lion's share of the proceeds of the crime. Circumstantial evidence served to establish McBride as the central figure of a burglary ring

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29. The Virginia Supreme Court in 1970 addressed the issue of disparate sentencing. Codefendants Kirkpatrick and Poole were each tried by jury and found guilty of robbery. Kirkpatrick was sentenced to 5 years in prison, and Poole received a 20 year term. When Poole attempted to use the disparity to infer prejudicial error, the court noted that he had entered the motel with a sawed-off shotgun and robbed the clerk. Kirkpatrick stayed outside, and was convicted as a principal in the second degree. The Court held that "[t]he disparity in sentence can be explained by the disparity in conduct." *Poole v. Commonwealth*, 211 Va. 262, 267, 176 S.E.2d 917, 921 (1970).

30. *Commonwealth v. Shaw*, No. 6067 (Patrick County Cir. Ct. July 10, 1978).

31. *Commonwealth v. McBride*, No. 6209 (Patrick County Cir. Ct. Nov. 10, 1978).

32. *Commonwealth v. Payne*, No. 6069 (Patrick County Cir. Ct. Jan. 29, 1979).

that operated in five counties and two states. Unlike Shaw and Payne, who had no prior criminal history, McBride was a repeat offender with a lengthy record.

Payne, meanwhile, testified on behalf of the Commonwealth against both Shaw and McBride, and without his assistance, the chances for conviction of the other parties would have been remote.

Are the results of the foregoing cases justified in terms of the culpability of the respective defendants? Did the system fulfill its crime control function? The answer to both these questions is obviously in the affirmative.

This conclusion is borne out by the results of an exhaustive study conducted by Charles E. Silberman, a director of the Study of Law and Justice, a Ford Foundation research project.<sup>33</sup> In suggesting that the traditional judicial process produces results that are both rational and just, Professor Silberman concludes that "prosecutors and judges use their discretion to carry out the intent, if not the precise letter, of the law, *i.e.*, to prosecute, convict and punish 'real criminals,' while showing appropriate leniency to those whose crimes are not serious, or who seem to pose no real danger to the community."<sup>34</sup>

In answering critics of "disparate sentencing," Silberman points to the lack of data to support their claim that sentencing is capricious.<sup>35</sup> This hiatus can be traced to the failure of the critics to distinguish between sentencing disparities resulting from philosophical differences between *judges*, and those which result from societal attitudes of the *community* in which the crime is committed. Sentences, of necessity, can and must reflect local attitudes toward a given crime if the system is to serve any purpose at all. The apparent disparities in sentencing are often a reflection of the seriousness which a locality attaches to a specific crime.

The principal flaw of the VPSA is its myopic view of the role of sentencing. The criminal trial lawyer and jurist recognize that no two crimes or criminals are alike. The presumptive sentencing phi-

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33. C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* (1978).

34. *Id.* at 285.

35. *Id.* at 286.

losophy overlooks this and sees sentencing as an end in itself. However, justice is not something that can be mass-produced; if it is to have any meaning at all, it must be tailored to the specifics of each case.

The trial judge is the one most suited to perform the task of sentencing. He has the experience and knowledge necessary to administer fair sentences, and he is answerable to the citizens of the locality in which he resides. Most importantly, he has the benefit of personally observing the prosecution and defense witnesses and the defendant himself. A sentencing council, far removed from the scene of the crime, cannot presume to dictate "proper" sentences without considering these factors. It is doubtful that such a system could promote justice or improve the capacity of the courts to deal effectively with crime.

VPSA proposals to eliminate or curtail the use of plea bargaining should also be rejected.<sup>36</sup> Studies indicate that the overwhelming majority of criminal cases in all jurisdictions, regardless of the size or location, are disposed of by plea agreement. Moreover, this has been the rule for over a century.<sup>37</sup>

Contrary to the critics' contention that plea bargaining produces inequitable results, data assembled by the National Institute of Law and Research suggests that plea bargaining may actually reduce crime by reducing the number of acquittals.<sup>38</sup> It offers the prosecutor the benefit of increased convictions and considerable saving in resources, and benefits the public in reduced incidences of recidivism. The study concludes that "plea bargaining is an economical routine for proximating the outcome of an expensive trial."<sup>39</sup>

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36. VPSA proposals to overcome the force of plea bargaining are based in part on the recommendations of the NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.1 (recommending abolition of plea bargaining) and Standard 3.8 (recommending that guilty pleas not affect sentencing) (1973).

For general provisions governing plea agreements in Virginia, see Rule 3A:11 of the Supreme Court. See also *Lilly v. Commonwealth*, 218 Va. 960, 243 S.E.2d 208 (1978).

37. R. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* (1927); Wishingrad, *The Plea Bargain in Historical Perspective*, 23 *BUFFALO L. REV.* 2 (1974).

38. The results of the study are set forth in Vol. 7, No. 7 of the L.E.A.A. newsletter at 15-16 (Sept. 1978). The study analyzed the outcomes of more than 5,000 arrests for various crimes in the District of Columbia in 1974.

39. *Id.* at 15.

It is apparent, both from scientific studies and practical everyday exposure to it, that the current sentencing system works reasonably well in administering justice to criminal offenders. We should, therefore, be slow to change to a system which would circumscribe the discretionary power of our judges or eliminate community sentiment in the imposition of sentence.

## V. PRACTICAL SUGGESTIONS FOR REFORM

That the present system works well does not mean that it is flawless. Changes in certain aspects of sentencing would enhance the quality of justice and remedy some of the perceived injustices. Among the recommended changes:

### A. *Sentencing by Jury Should Be Eliminated.*

Virginia is one of only a handful of states which provides for jury sentencing in non-capital cases.<sup>40</sup> After passing upon the issue of guilt or innocence, a jury is then charged with the duty of setting punishment within the terms prescribed by law.<sup>41</sup>

Unfortunately, the jury is given little guidance in how to go about executing this charge. The only evidence put before it relates to the question of guilt or innocence, yet it must use this same evidence to set the punishment. It is permitted to know little about a defendant's background. It cannot be told of his past record, nor is it advised about the availability of parole or other early release provisions.<sup>42</sup> It has no power to suspend sentences or grant probation.<sup>43</sup>

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40. Other states allowing juries to sentence include Alabama, ALA. CODE tit. 15, § 18-22 (1975); Arkansas, ARK. STAT. ANN. § 43-2306 (Repl. Vol. 1977); Kentucky, KY. REV. STAT. ANN. § 9.84 (Baldwin, 1978); Mississippi, MISS. CODE ANN. § 97-3-53 (Cum. Supp. 1978); Missouri, MO. ANN. STAT. § 557.036 (Vernon, Spec. Pam. 1979); Oklahoma, OKLA. STAT. ANN. tit. 22, § 926 (West, 1958); Tennessee, TENN. CODE ANN. § 40-2707 (Repl. Vol. 1975); Texas, TEX. CRIM. PRO. CODE ANN. Art. 37.07 (Vernon, Cum. Supp. 1978).

In Virginia, the right to a jury trial is the prerogative of either the Commonwealth or the defendant. VA. CODE ANN. § 19.2-257 (1975). *Singer v. U.S.*, 380 U.S. 24 (1965), holds that the government may constitutionally limit the right of an accused to waive a jury.

41. It has been reported that a defendant has a 16% better chance of acquittal with a jury than a judge. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 58-59 (1966). Depending upon the jurisdiction, these odds rise or fall on such variables as the quality of the prosecution or defense, and, more significantly, the demeanor and temperament of the circuit court judge.

42. It is reversible error for the court to instruct the jury in any manner concerning the good time allowance, *Coward v. Commonwealth*, 164 Va. 639, 178 S.E. 797 (1935), or parole,

In effect, the jury is required to sentence based solely upon the facts of the case and whatever it can derive about the character of the defendant during the course of the trial. Even if the jury had access to this information, it is unlikely that it would possess the legal sophistication and perception to utilize these facts in a reasonable manner.<sup>44</sup>

The trial judge, on the other hand, has the benefit of a presentence report, which he must consider prior to disposing of a criminal case.<sup>45</sup> Prepared by a trained probation officer, the report provides important biographical information about the defendant, including his past record, work history, family background, education, and, in some cases, a psychological profile. Prior to the imposition of sentence, copies of the report are given to the prosecutor and defense

Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978); Jones v. Commonwealth, 194 Va. 273, 72 S.E.2d 693 (1952).

43. *But see* VA. SUP. CR. R. 3A:25(e), providing that the trial judge may, in any case, if circumstances so warrant, suspend a jury sentence in whole or in part and place the defendant on probation. However, as a practical matter, the court will rarely override a jury verdict. *See also* Roman v. Parrish, 328 F. Supp. 882 (E.D. Va. 1971).

44. Consider the following statement, printed in a "Letters to the Editor" column, of a citizen after having served as a juror in a trial in northern Virginia:

My general impressions are that the "average citizen" is generally incapable of grasping the issues of law in a case as elaborate as this trial was. The responsibility of sentencing in this case became an element of barter to cause a contrived consensus among a group of generally confused people.

Personally, I have lost a measure of faith in the jury system as a method of obtaining "equal justice under law," especially in a case with as many subtleties as the one we dealt with. However, I recognize that 200 years of judicial precedence assure the continuance, if not the efficacy, of the jury system.

However, the Virginia requirement that juries establish the sentence in a case is an unnecessary and confounding component of a system that struggles for objectivity and impartiality. The removal of this responsibility from the jury would allow jurors to focus more directly on the evidence and points of law involved in the case, and thus be more likely to render fair and impartial verdicts.

[T]he current jury-sentencing system . . . pressures jurors beyond their capabilities and risks unreasonable jury findings in criminal cases.

Washington Star, Aug. 4, 1978, at A-10, cols. 3-4.

45. VA. CODE ANN. § 19.2-299 (1975); Rule 3A:25(c)(1). In any case, after a plea or finding of guilt, the circuit court may direct a probation officer to make a presentence investigation and written report. The accused may demand and be entitled to a presentence report after a plea or finding of guilt in the case of a felony. When the proper motion is made, the statute is mandatory, and failure of the trial court to comply is error. McClain v. Commonwealth, 189 Va. 847, 55 S.E.2d 49 (1949).

counsel, who are then permitted to present other witnesses on the question of punishment.

Logic dictates that sentencing by the court is clearly preferable to jury sentencing from the standpoint of the uniform imposition of punishment. There is no reason to continue to allow juries to sentence while denying them access to information which would have a crucial bearing on their decisions. The alternative of using the bifurcated procedure with a jury has the drawback of being time consuming. On the other hand, sentencing by the trial judge is efficient and provides a degree of certainty and uniformity in sentencing which would be welcomed in our courts.<sup>46</sup>

*B. Eliminate Parole and, at the Same Time, Limit the Permissible Range of Punishment for any Given Crime.*

Under present law, a prisoner sentenced to confinement in a state correctional institution is eligible for parole after serving one-fourth of the term imposed.<sup>47</sup> Eligibility does not necessarily guarantee that parole will be granted, however.<sup>48</sup> The decision to grant or deny parole is left largely to the discretion of the parole board. Although its decisions must be based upon established standards and criteria,<sup>49</sup> it is nevertheless afforded a great deal of discretion in deter-

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46. An ad hoc group of 5 Virginia circuit court judges who studied proposed sentencing reforms, particularly the VPSA, unofficially recommended the abolition of jury sentencing. Minutes of Ad Hoc Comm. Studying Methods of Improving Sentencing Process of Criminal Justice System (June 20, 1978).

47. VA. CODE ANN. § 53-251 (Cum. Supp. 1979). In 1979, the law was amended to extend the time in which repeat offenders become eligible for parole. Parole was not adopted in Virginia until 1942. VA. CODE ANN. § 4788c, *et seq.* (1942). Prior to that time, the only provision for early release was a good time allowance of one day for each day served.

Interestingly, prior to the institution of a parole system, there was considerable activity with respect to grants of executive clemency. From 1940-42, the Governor of Virginia granted 706 conditional pardons. However, from 1942-44, only 108 such pardons were granted. Address by Pleasant Shields, Chairman, Virginia Parole Board to Ad Hoc Comm. Studying Methods of Improving Sentencing Process of Criminal Justice System (Aug. 9, 1978).

48. From July 1, 1977 through June 30, 1978, 4,994 offenders were considered for parole. Parole was granted to 1,635 of those eligible, and 3,359 were denied. Letter from Jean F. Anderson, Executive Secretary, Virginia Parole Board to Circuit Judge John D. Hooker, member Ad Hoc Comm. Studying Methods of Improving Sentencing Process of Criminal Justice System (Aug. 8, 1978).

49. See *Franklin v. Shields*, 399 F. Supp. 309 (W.D. Va.), *cert. denied*, 423 U.S. 1037 (1975), holding that as a matter of procedural due process of law, inmates must be afforded

mining exact release dates. Prisoners are permitted to accelerate their parole eligibility dates by participation in vocational or educational training, or by demonstrating work habits which project "unusual progress toward rehabilitation."<sup>50</sup> Parole eligibility may be further advanced by an inmate performing certain enumerated "extraordinary" services while incarcerated.<sup>51</sup>

Although there is no concrete factual data supporting allegations of unfairness in the parole system in Virginia,<sup>52</sup> the wisdom of discretionary release has been assailed by almost everyone affected by it.<sup>53</sup>

Prosecutors complain that the parole board is more concerned with prison logistics than with the protection of the public, and often releases dangerous criminals before they have served a sufficient term for their crime. Prisoners complain that uncertainty as to the exact time to be served makes it difficult to plan for release, and the lack of adequate guidelines often hinders them in their preparation for parole hearings. Most importantly, the public is dismayed when they find that an offender who was given a substantial prison sentence is back in the community a short time thereafter. If he commits further crimes, they blame "the system" for allowing this to happen.

A preferable alternative to this system would be the implementation of a "flat time" sentencing system.<sup>54</sup> The court would announce a fixed punishment for the offender, who would then serve the entire term imposed subject only to good time credits. This procedure should eliminate unregulated discretionary release by the Board, protect society by guaranteeing that an offender will serve a reason-

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access to the information and criteria upon which a parole board reaches its decision to grant or deny parole.

50. VA. CODE ANN. § 53-213.1 (Repl. Vol. 1978).

51. VA. CODE ANN. § 53-220 (Repl. Vol. 1978).

52. State Senator Frederick T. Gray, (D.-Chesterfield County), in hearings on S.B. 180, seriously questioned allegations that the Virginia Parole Board was arbitrary in its decisions. Minutes of Joint Comm. Mtg. for Courts of Justice of House and Senate Studying Sentencing in Criminal Cases (June 30, 1978).

53. See, e.g., D. GLASER, *EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* (1964); D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975).

54. The American Bar Association Joint Committee on the Legal Status of Prisoners has proposed a modified flat sentencing system for approval by the Association. 14 AM. CRIM. L. REV. 375, 410 (1977).

able portion of the term imposed, and the retention of good time allowances would help maintain order in the prison system.

The abolition of discretionary release, however, mandates a corresponding legislative narrowing of the range of penalties for the various offenses. It is a rare case of breaking and entering with the intent to commit larceny that warrants the imposition of the twenty year maximum now provided by law.<sup>55</sup> Making the permissible range of punishment more realistic, particularly in terms of legislatively authorized maximums, together with the present power of the courts to suspend active jail terms, and other available options, will provide a fair degree of certainty in the sentencing process. In addition, it will not unduly burden an already overcrowded state prison system.

### *C. Collect and Publish Sentencing Information Relating to Each Category of Crime in the Commonwealth.*

It is well established that significant disparity in sentencing may be found in different parts of the state depending upon its location and its demographic composition. To the extent that this disparity results from differing community reactions to a given crime, it should not be cause for great concern. However, if the distinction rests solely on the philosophical outlook of the particular judge, efforts should be made to promote some degree of uniform thinking among the judiciary.

The dictation of mandatory presumptive sentences would curb judicial discretion to an extent which would be detrimental to the system as a whole. As an alternative, a central data bank could collect information on sentencing from each circuit on a semi-annual basis and distribute the results to each judge.<sup>56</sup> This information would include:

- a) The category of crime, *i.e.*, robbery, murder, larceny, etc.
- b) The number of offenses charged for each category.

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55. VA. CODE ANN. § 18.2-91 (Repl. Vol. 1975). This section further provides for punishment, in the discretion of the trier of fact, for a jail term not to exceed 12 months and/or a fine not to exceed \$1,000. Thus, an offender may receive either no time at all or a maximum of 20 years.

56. VPSA § 19.2-316.12(4) would require the Sentencing Council to collect and maintain statistical information relating to sentencing and other dispositions of criminal complaints.

- c) The number convicted in each category.
- d) The most severe penalty imposed.
- e) The least severe penalty imposed.
- f) The median penalty within the circuit.
- g) The median penalty for each category of crime in the state as a whole.

The results of these compilations, upon distribution to the judges, would serve as "informal norms" to provide some means of imposing an individual sentence in keeping with the statewide median. The court would at least have the benefit of this statewide data and, in considering local norms, could set the punishment accordingly.

## VI. CONCLUSION

The history of Virginia jurisprudence has demonstrated the wisdom of making a careful evaluation of all factors involved before changing existing laws. Given the lack of concrete data justifying change, we should be especially cautious before abandoning our traditional system of sentencing.

