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Jury Consideration of Parole

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Introduction

Under our system of criminal justice, a jury faces two basic decisions: the determination of guilt and, in many cases, the selection of an appropriate penalty for the convicted. In both instances the jurors' impressions of the parole system could be crucial. For example, the jury's notion—correct or incorrect—that the defendant will be eligible for parole very quickly if sentenced to prison may cause it to compromise on the issue of guilt. In cases where the jury has discretion in setting the penalty, this notion may seduce it into selecting the death penalty over life imprisonment.

There are additional problems connected with jury consideration of parole. Even if it is a desirable jury consideration, it is impossible to anticipate how parole will affect a particular defendant since the law itself might change and since the actual granting of parole will rest on post-conviction factors and the discretion of the parole board. If, on the other hand, it is thought undesirable for the jury to consider parole, what should be the policy of the law in view of the fact that many jurors will undoubtedly carry into the trial parole knowledge obtained independently? The great number of times jurors are informed at trial of the possibility of parole indicates the importance of the subject.[1] This article proposes to evaluate the attitude of the law towards giving this information to a jury.[2] The discussion will consider the desirability of the jury's being informed

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1. The problem is by no means a new one. *See* Seymour v. Commonwealth, 220 Ky. 348, 295 S.W. 142 (1927) where, even at that early date, the Court of Appeals of Kentucky referred to "the long line of cases" in which it considered (and condemned) prosecutorial reference to the possibility of parole. *See also* Jacobs v. State, 103 Miss. 622, 60 So. 723 (1913).

2. Other types of information which might be made available to the jury raise similar considerations. *See, e.g.,* Boyle v. State, 229 Ala. 212, 154 So. 575 (1934) (possibility of release from mental asylum); Jones v. State, 161 Ark. 242, 255 S.W. 876 (1923) (possibility of industrial school sentence); People v. Linden, 52 Cal. 2d 1, 338 P.2d 397, *cert. denied,* 361 U.S. 867 (1959) (possibility of pardon); Biggers v. State, 171 Ga. 596, 156 S.E. 201 (1930) (possibility of escape); People v. Burgard, 377 Ill. 322, 36 N.E.2d 558

about the parole possibility, the role of the harmless error rule, and the relationship that the source and the context of the informing have to the problem.

The Desirability of Jury Knowledge of Parole Operation

The nature of parole is important to the inquiry. It has been defined as the "conditional release of a selected convicted person before completion of the term of imprisonment to which he has been sentenced."[3] Parole provides a method for the supervision of the prisoner's transition into society and, therefore, is not merely an expression of "leniency or forgiveness."[4] As the Task Force on Corrections of the President's Commission on Law Enforcement and Administration of Justice reported, "prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not."[5] There is no guarantee that a prisoner will actually be granted parole since many factors—the prisoner's history, danger to the community, rehabilitation, skills, etc.—enter into the parole decision. The source and extent of parole authority varies. "[It] may depend on statutes enacted by the legislature, on the sentence imposed by the court, or on the determination of correctional authorities or an independent parole board. For certain offenses some statutes require that various amounts of time must be served before parole can be considered, or they prohibit parole entirely."[6]

Speculation on Parole Operation

By the weight of authority, informing the jury of parole possibility is improper,[7] but appellate courts which have deemed such information proper have argued that since parole provisions might have a drastic effect on the sentence, the jury must be made aware of them.[8] It is further argued that in any case tried without

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(1941) (possibility of probation); Bryant v. State, 205 Ind. 372, 186 N.E. 322 (1933) (possibility of suspended sentence); State v. Clark, 196 Iowa 1134, 196 N.W. 82 (1923) (possibility of stay of execution); State v. Kiefer, 16 S.D. 180, 91 N.W. 1117 (1902) (invariable rule of the court to follow jury recommendation of mercy); State v. Clark, 227 Ore. 391, 362 P.2d 335 (1961) (right to appeal); Coward v. Commonwealth, 164 Va. 639, 178 S.E. 797 (1935) (possibility of time off for good behavior).

3. Parole and After-Care, (ST/SOA/SD/4) (U.N. Pub. Sales No. 1954. IV. 16), p. 1, quoted in M. PAULSEN & S. KADISH, CRIMINAL LAW AND ITS PROCESSES 198 (1962).

4. *Ibid.*

5. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 62 (1967).

6. *Ibid.*

7. Shoemaker v. State, 228 Md. 462, 180 A.2d 682 (1962); State v. White, 27 N.J. 158, 142 A.2d 65 (1958); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 COLUM. L. REV. 946, 957 (1954).

8. *See, e.g.,* Mallory v. United States, 236 F.2d 701 (D.C. Cir. 1956), *rev'd on other grounds,* 354 U.S. 449 (1957); People v. Linden, 52 Cal. 2d 1, 338 P.2d 397, *cert.*

a jury the trial judge becomes the finder of fact, and he is very likely to be aware of the specifics of the parole law.[9] This reasoning at first blush is compelling; parole affects the sentence and, in order to make an intelligent judgment, the jury should be aware of the effect parole might have on the accused. A closer analysis, however, discloses serious defects in this logic. First, the parole law may not be the same by the time the defendant becomes eligible for parole. In *Broyles v. Commonwealth*[10] the Kentucky Court of Appeals reversed a murder conviction because the prosecutor had explained to the jury what the period of time after which the defendant would become eligible for parole would be with respect to each possible sentence. "Although the attorney's explanation of the parole law in this case seems to be correct," the court said, "the law might be radically different by the time the defendant would be eligible for parole."[11] The possibility is that the sentence might be set with an eye to a parole law more lenient or more severe than the one actually in force at the time of the defendant's eligibility. In considering parole, then, the jury speculates on the future action of the legislature.

Jury consideration of parole also involves speculation concerning the actions of the defendant and of the parole board. The judiciary has no more control over these factors than it does over prospective legislation. This was recognized by the New Jersey Supreme Court in *State v. White*.[12] Reversing a first degree murder conviction on the ground that the jury had been informed of the parole law, the court noted that the legislature had provided only two possible penalties—death or life imprisonment subject to parole. An immutable life sentence had not been enacted because the legislature "believed it to be beyond the talent of any one to anticipate whether future circumstances will warrant amelioration of the life sentence."[13] Although the defendant may be entitled to parole consideration at a time certain, it is impossible for the jury to know with any certainty whether the defendant will in fact be released on parole. While punishment is meted out in the defendant's sentence "on the basis of his acts and con-

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denied, 361 U.S. 867 (1959); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), *cert. denied*, 353 U.S. 930 (1957), *appeal dismissed*, 358 U.S. 646 (1959); People v. Reese, 47 Cal. 2d 112, 301 P.2d 582 (1956), *cert. denied*, 355 U.S. 929 (1958); Watts v. State, 226 Ind. 655, 82 N.E.2d 846 (1948), *rev'd on other grounds*, 338 U.S. 49 (1949); State v. Rombolo, 89 N.J.L. 565, 99 A. 434 (1916); State v. Meyer, 163 Ohio St. 279, 126 N.E.2d 585 (1955).

9. *See* Jones v. Commonwealth, 194 Va. 273, 281, 72 S.E.2d 693, 697 (1952) (concurring opinion).

10. 267 S.W.2d 73 (Ky. 1954).

11. *Id.* at 76; *See also* People v. Treloar, 61 Cal. 2d 544, 393 P.2d. 698, 39 Cal. Rptr. 386 (1964).

12. 27 N.J. 158, 142 A.2d 65 (1958).

13. *Id.* at 178, 142 A.2d at 76. *See also* People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964).

duct prior to trial . . . parole is determined mainly on the basis of subsequent acts and demeanor."[14] Even if the jury could reasonably expect the defendant's post-conviction conduct to be perfect in every way, it would still be speculating as far as parole eventualities are concerned because of the wide discretion vested in the parole board. Because "a prisoner has no absolute right to be released upon parole where he has a clean conduct record while in prison and has served the minimum term for his offense,"[15] a reasonably certain prediction of parole vis-à-vis a particular defendant is impossible, and consideration of the parole factor by the jury amounts to "conjecture"[16] and "mere guesswork."[17]

It has been argued that it is permissible for the jury to "estimate" when the defendant will be released on parole so long as the jury is aware that the parole process is not automatic. In *Grandsinger v. State*,[18] the prosecutor referred to the defendant's right to seek a hearing before the Nebraska Board of Pardons and Parole. The court, in refusing to deem the reference reversible error,[19] noted that the prosecutor had merely set out the applicable law without indicating how difficult parole was to secure or whether it could be secured by the defendant at all. In line with this reasoning, courts have emphasized that informing the jury of parole is permissible so long as there is no assertion concerning the actual time parole would occur,[20] the actual policy of the parole board,[21] or other specifics of parole operation.[22]

Usurpation of the Functions of Other Branches of Government

Even if the future operation of parole could be accurately predicted, any consideration of that operation usurps the functions of other branches of government.[23] The parole law was intended to affect sentences as they are in good faith

14. State v. Conner, 241 N.C. 468, 469, 85 S.E.2d 584, 586 (1955).
15. Graham v. State, 202 Tenn. 423, 426, 304 S.W.2d 622, 623 (1957).
16. McLendon v. State, 205 Ga. 55, 65, 52 S.E.2d 294, 300 (1949).
17. Graham v. State, 202 Tenn. 423, 427, 304 S.W.2d 622, 624 (1957).
18. 161 Neb. 419, 73 N.W.2d 632 (1955), *cert. denied,* 352 U.S. 880 (1956).
19. *But see* Coward v. Commonwealth, 164 Va. 639, 178 S.E. 797 (1935).
20. People v. Ashley, 59 Cal. 2d 339, 379 P.2d 496, 29 Cal. Rptr. 16, *cert. denied,* 374 U.S. 819 (1963).
21. French v. State, 397 P.2d 909 (Okla. Crim. 1964).
22. Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965), *cert. denied,* 384 U.S. 1012 (1966); Martin v. State, 400 S.W.2d 919 (Tex. Crim.), *cert. denied,* 385 U.S. 961 (1966).
23. A closing argument is objectionable if it involves (1) inflammatory statements, (2) improper reference (*i.e.*, reference to a statement of fact—other than a matter of common knowledge—for which no evidence was introduced), or (3) improper issues (*e.g.*, the wisdom of legislation). 47 IOWA L. REV. 1131, 1132 (1962). It can be argued that a parole reference by the prosecutor does concern the wisdom of legislation and is therefore objectionable. Furthermore, if the prosecutor informs the jury of actual cases in which prisoners were released on parole, that phase of the argument would involve an improper reference to a fact not in evidence. *See* Estepp v. Commonwealth, 185 Ky. 156, 214 S.W. 891 (1919); Augustine v. State, 201 Miss. 277, 28 So. 2d 243 (1946).

set by judges or jurors. If at the trial stage sentences are prescribed with a view toward offsetting the operation of parole, the judicial branch has in effect thwarted the legislative intent and usurped executive discretion.[24] In *Pena v. State*[25] the Texas Court of Criminal Appeals found such usurpation reversible error. The defendant was convicted of murder after the prosecutor had argued the parole law to the jury. At the hearing on the motion for a new trial it was shown that the jury during its deliberations had in fact discussed the prosecutor's parole argument. The court concluded, "[t]he parole law is not to be applied by the trial court, but is to be exercised by the board of pardons exclusively when facts are presented which would authorize them to exercise their power . . . ."[26] Where a prosecutor argues the leniency of the parole system he, in effect, urges the jury to legislate according to that prosecutor's own view of parole.[27] Yet "[e]quality under the law is not to be attained by permitting the prosecuting attorney to prevail upon the jury to forego what may be an otherwise satisfactory course of action in order to preclude the future application of that which he considers bad parole law administered by irresponsible officials."[28]

Absent any constitutional question, the proper role of the judicial branch is to presume the wisdom of the parole law. If the law is unwise, the appropriate corrective is legislative amendment or repeal, not the neutralization of the law by the jury. This usurpation is particularly egregious in those cases where the jury has the power to choose between life imprisonment and capital punishment or to recommend one or the other to the court. If the jury is informed of the parole possibility by the court or by the prosecutor, there is a serious danger that the defendant may be sentenced to death—where otherwise he might have been sentenced to life imprisonment—because the jury anticipated the parole system. If this occurs, the net result of the parole system—which has as at least one of its objectives the benefit of the convicted person—is to execute a person deserving no more than life imprisonment. "It is no more proper for a jury to conclude that death be the penalty because . . . the defendant [may be] paroled, than it would be for a trial judge in other criminal causes deliberately to impose an excessive sentence to frustrate the statutory scheme committing parole

24. *See* People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964); *compare* Broyles v. Commonwealth, 267 S.W.2d 73 (Ky. 1954) *with* Houston v. Commonwealth, 270 Ky. 125, 109 S.W.2d 45 (1937), where the trial court's negative answer to a jury inquiry as to whether a life sentence precluded pardon was held reversible error on the ground that the question involved a coordinate branch of government.

25. 137 Tex. Crim. 311, 129 S.W.2d 667 (1939).

26. *Id.* at 314, 129 S.W.2d at 669.

27. *See* State v. Johnson, 151 La. 625, 92 So. 139 (1922).

28. 28 N.C.L., Rev. 342, 345 (1950). *See also* Jones v. Commonwealth, 194 Va. 273, 279, 72 S.E.2d 693, 696 (1952), where the court stated that the jury "should not fix a defendant's punishment with the view of preventing the operation of laws that have been duly enacted for the handling of a prisoner after sentence in a way considered by the lawmakers to be in the best interests of the public and the prisoner."

to another agency. . . . That death should be inflicted when a life sentence is appropriate is an abhorrent thought."[29] In capital cases, therefore, very few jurisdictions allow the prosecution to urge the death penalty in order to prevent the defendant's possible release on parole.[30]

The Relevance of Parole Law to the Case

The United States Court of Appeals for the District of Columbia Circuit has said that a trial court could properly inform the jury of the parole law because such informing was part of the law of the case which it has a right to consider.[31] That argument assumes, however, that the parole law is relevant and appropriate *to the case*—not merely that it is the *law*. It is not appropriate for a jury to consider the mechanics of parole—no more appropriate than to consider the law governing the maintenance of the prison in which the defendant might serve any term imposed. Thus, when the state's counsel in *Graham v. State*[32] urged that arguing parole to the jury was not error because it is proper for the prosecutor to argue the law of the case, the court responded that "the fallacy of this argument is *that the parole law is not the law of the case, or any part of it.*"[33]

Relevance of Parole to the Penalty-Setting Function

The substance of the argument in support of informing the jury of parole provisions is that they are relevant to the penalty the defendant should receive. This reasoning is not persuasive in those cases in which the jury has no function in determining or recommending punishment,[34] and courts have justifiably been reluctant to allow parole provision information in such cases—particularly in the form of a prosecutorial argument.[35] In *Shoemaker v. State*,[36] the prosecutor

29. State v. White, 27 N.J. 158, 177-78, 142 A.2d 65, 76 (1958).

30. See Note, *supra* note 7.

31. Mallory v. United States, 236 F.2d 701 (D.C. Cir. 1956), *rev'd on other grounds*, 354 U.S. 449 (1957). *See* Phillips v. State, 92 So. 2d 627 (Fla. 1957), where the Supreme Court of Florida approved the trial court's informing the jury, at the request of the foreman, of the parole provisions on the ground that a Florida statute (now FLA. STAT. ANN. § 918.10 (Supp. 1969)) directs the trial court to charge on the penalty as well as on the law.

32. 202 Tenn. 423, 304 S.W.2d 622 (1957).

33. *Id.* at 426, 304 S.W.2d at 623. *See also* Bland v. State, 211 Ga. 178, 183, 84 S.E. 2d 369, 372 (1954) (dissenting opinion), where it is argued that the regulation book of the parole board is not law and cannot be judicially noticed.

34. Rowe v. State, 237 N.E.2d 576 (Ind. 1968). *See* People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), *cert. denied*, 353 U.S. 930 (1957), *appeal dismissed*, 358 U.S. 646 (1959).

35. Rowe v. State, 237 N.E.2d 576 (Ind. 1968).

36. 228 Md. 462, 180 A.2d 682 (1962).

made reference to parole possibilities where the penalty was in fact, if not in theory, out of their hands. The Maryland Court of Appeals concluded, "[t]he chief vice of the reference in this case to the possibility of parole is that it suggested to the jury that it might in part shift its responsibility for a finding of the defendant's guilt to some other body."[37] The danger is that jurors might resolve a close question of guilt against the defendant and allay their consciences by relying upon the parole board's future decisions with reference to the defendant. In *Commonwealth v. Mills*[38] the jury, during its deliberations, asked the judge to define life imprisonment and to inform them whether the defendant would be eligible for parole at any time under a life sentence. The judge answered the inquiries and the jury found the defendant guilty. On appeal, the Supreme Court of Pennsylvania reversed, holding, *inter alia,* that since the only issue before the jury was the *guilt* of the defendant rather than his punishment, the judge's answer tended to lead the jury to believe that if it unjustifiably settled a doubtful issue against the defendant a parole board would vitiate the error.

It is interesting to note the different role the parole concept might play when the jury has a function in setting the penalty. Where the jury has a say as to the punishment, the principal danger is that it will anticipate the action of the parole board and attempt to offset it by a larger prison sentence or, in extreme cases, the death penalty.[39] Furthermore, in most cases where the jury sets the penalty, it also determines the guilt issue.[40] In a murder case where the jury has discretion to recommend life imprisonment or the death penalty, if the evidence is overwhelming and the crime a shocking one, the *fear* of parole may play a role in determining the penalty; if the evidence is comparatively weak or the defendant's situation relatively sympathetic, *reliance* on the parole board may play a role in determining guilt. In this latter circumstance the jury is likely to be concerned with the choice between life imprisonment (for murder) and some other penalty (for a lesser included offense) or even acquittal. Therefore, whatever objections can be voiced against informing the jury about the parole law

37. *Id.* at 469, 180 A.2d at 685.

38. 350 Pa. 478, 39 A.2d 572 (1944).

39. See Note, *Statements by Prosecuting Attorneys to Juries Which Demand Improper Considerations for Verdict or Punishment,* 39 VA. L. REV. 85, 92 (1953).

40. Nevertheless, a bifurcated trial arrangement does not solve the basic problem presented by a jury's parole knowledge, even if that jury deals only with the penalty. The Supreme Court of California initially held that it was not error in the penalty phase of the case for the jury to be informed in detail of the defendant's parole possibilities. People v. Turville, 51 Cal. 2d 620, 335 P.2d 678, *cert. denied,* 360 U.S. 939 (1959); People v. Ward, 50 Cal. 2d 702, 328 P.2d 777 (1958), *cert. denied,* 359 U.S. 945 (1949). Due to abuses resulting from this policy, however, the court, in People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964), halted the flow of parole information to the jury by prohibiting speculation as to when the defendant may be released.

where the jury determines guilt alone are equally present where the jury has influence over the penalty.[41]

'Neutral' Informing and Informing on Jurors' Inquiry

An important distinction can be drawn between parole information given the jury by the judge and that given the jury by the prosecution.[42] A trial judge's instructions to the jury about parole are given with no attempt to persuade the jury of what it should do in light of that information,[43] and his language will tend to be neutral in tone when compared to that of the prosecutor. It is not altogether certain, however, that it will have any less influence. A jury is more likely to rely on the trial judge than on the prosecutor, for it knows that the prosecutor, although representing society in general, is partisan. When the judge informs the jury that, due to parole, the defendant may not serve his whole prison term, he is inherently persuasive; the jury might over-react to the judge's information and attempt to offset the effect of parole by imposing a greater penalty.[44]

The issue becomes more difficult in those cases where the jury returns from its deliberations and inquires as to parole possibility. In such cases, whether or not the judge answers the question, the parole concept is obviously on the minds of the jurors and will continue to play a role until a verdict is reached.[45] In *State v. Nelson*[46] the jury inquired of the court whether the defendant would actually spend his life in prison if given a life sentence. In answer, the judge read the state's constitutional provisions concerning parole and pardon. The defendant was found guilty of murder and sentenced to death. Emphasizing that the trial court had not indicated in its answer which sentence the jury should choose, the New Mexico Supreme Court affirmed, stating: "The fact that the jury, of its own volition, directed the inquiry to the court indicates that one or more of the jurors had some knowledge of the laws relative to pardon and parole. Such be-

41. See 15 STAN. L. REV. 349, 351-52 (1963). Juries rather than judges set sentences in ten states. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967).

42. See 20 WASH. & LEE L. REV. 168, 170 (1963).

43. *See* Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960).

44. *See* Bland v. State, 211 Ga. 178, 181, 84 S.E.2d 369, 372 (1954) (concurring opinion), where it is argued that remarks from the prosecutor are mere argument while those from the judge are "solemn" law. In McGruder v. State, 213 Ga. 259, 98 S.E.2d 564 (1957), the Supreme Court of Georgia refused to find any significant difference between *instruction* on parole by the judge and *argument* on parole from the prosecutor, holding that the former is prohibited under the state statute (now GA. CODE ANN. § 27-2206 (Supp. 1967)) prohibiting attorneys from arguing parole to the jury. The court reasoned that this statute established a policy that juries are not to be influenced by parole considerations.

45. See 20 WASH. & LEE L. REV. 168, 170 (1963).

46. 65 N.M. 403, 338 P.2d 301, *cert. denied,* 361 U.S. 877 (1959).

ing the case, a refusal to answer would not dispell [sic] erroneous notions implanted by a juror with a 'little learning' on the subject, and in all probability would leave the jury in confusion and doubt."[47] The argument is that jurors' questions should be answered[48] and that, if they are not, jurors will resort to whatever information they might have concerning the parole law. If, for example, one juror has the false impression that prisoners are let out on parole almost immediately, and no other juror has any information to refute it, the jury will in effect be deciding the case just as if state law were as represented by the "informed" juror. In such a case, the defendant is likely to receive harsher treatment than he deserved, harsher even than if the court had answered the inquiry. Furthermore, a refusal by the judge to answer a question which the jury deems relevant to its mission is likely to create or strengthen an impression that somehow parole is a sinister concept unjustifiably calculated to free criminals despite the wishes of the jury. Thus, even one who argues generally that jurors should not be informed of parole provisions could, without inconsistency, favor so informing the jury upon its inquiry. The fact that parole information was given to the jury following its inquiry, however, has not prevented courts from concluding that such informing was improper.[49]

Parole Information and the Harmless Error Rule

An appellate court can reach one of three decisions when reviewing a case where parole information has been made available to the jury: (1) it can find the informing proper;[50] (2) it may deem the informing improper but, under the circumstances, not prejudicial error;[51] or (3) it might find the informing not only improper but prejudicial, and therefore reversible.[52] The latter two deci-

47. *Id.* at 409, 338 P.2d at 305. *See also* Glover v. State, 211 Ark. 1002, 204 S.W.2d 373 (1947).

48. *See* State v. Carroll, 52 Wyo. 29, 86, 69 P.2d 542, 564 (1937). The dissent argued that while the inquiry should have been answered, the trial court should have directed the jury to "return the verdict that would carry the punishment they thought the defendant should suffer," without speculating upon "what might happen after the verdict."

49. *See, e.g.,* McCray v. State, 261 Ala. 275, 74 So. 2d 491 (1954); State v. White, 27 N.J. 158, 142 A.2d 65 (1958); McKuhen v. State, 216 Ga. 172, 115 S.E.2d 330 (1960).

50. *See, e.g.,* Mallory v. United States, 236 F.2d 701 (D.C. Cir. 1956), *rev'd on other grounds,* 354 U.S. 449 (1957); State v. Jackson, 100 Ariz. 91, 412 P.2d 36, *cert. denied,* 385 U.S. 877 (1966); State v. Jordan, 80 Ariz. 193, 294 P.2d 677 (1956); People v. Ketchel, 59 Cal. 2d 503, 381 P.2d 394, 30 Cal. Rptr. 538 (1963); Phillips v. State, 92 So. 2d 627 (Fla. 1957); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965), *cert. denied,* 384 U.S. 1012 (1966); State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959); State v. Meyer, 163 Ohio St. 279, 126 N.E.2d 585 (1955); Martin v. State, 400 S.W.2d 919 (Tex. Crim.), *cert. denied,* 385 U.S. 961 (1966).

51. *See, e.g.,* Singer v. State, 109 So. 2d 7 (Fla. 1959).

52. *See, e.g.,* McCray v. State, 261 Ala. 275, 74 So. 2d 491 (1954); People v. Hillery, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965), *cert. denied,* 386 U.S. 938 (1967); McKuhen v. State, 216 Ga. 172, 115 S.E.2d 330 (1960); Rowe v. State, 237

sions result from the operation of the so-called "harmless error" rule, adopted in most jurisdictions by constitutional amendment, statute or judicial decision.[53] This rule precludes the reversal of a conviction for error committed at trial unless the error was prejudicial. That the harmless error rule plays a very important role in parole-informing cases[54] is evidenced by the large number of cases where an appellate court has refused to reverse because some aspect of the trial, while error, was not "clearly prejudicial"[55] or "substantially prejudicial,"[56] or because there was no "reasonable probability"[57] that the result would have been different without the error.

The harmless error rule serves a reputable purpose in preventing retrials due to trivial errors. No complex trial can be held without some mistakes occurring. Many of these errors are extremely technical and could not have prejudiced the defendant, and it is properly felt that such errors should not invalidate the trial. Nonetheless, the application of the harmless error rule to cases involving parole information raises serious questions.

The particular wording of the harmless error rule and the attitude of the court in applying it are especially important. In *Tate v. Commonwealth*,[58] the Kentucky Court of Appeals found the prosecutor's parole argument improper but refused to reverse "unless other circumstances in the case *clearly* established the fact that is was *substantially prejudicial* to defendant's rights . . . ." (Emphasis added.)[59] Such a formula places the burden of showing prejudice on the defendant, though the very nature of the harmless error concept demands reversal *except* where it is *clear* that the error did not adversely affect the defendant. The *Tate* application allows serious questions of prejudice to be resolved against the defendant, and the *harmless* error rule becomes a *harmful* error rule.

Applicability of the Rule

The subject matter of the error may be such as to make the harmless error rule inapplicable. There are errors which by their very nature are so prejudicial that

N.E.2d 576 (Ind. 1968); Broyles v. Commonwealth, 267 S.W.2d 73 (Ky. 1954); Shoemaker v. State, 228 Md. 462, 180 A.2d 682 (1962); State v. Cornett, 381 S.W.2d 878 (Mo. 1964); State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955); French v. State, 397 P.2d 909 (Okla. Crim. 1964); Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (1966); Williams v. State, 191 Tenn. 456, 234 S.W. 2d 993 (1950); *see also* State v. Hinton, 210 S.C. 480, 43 S.E.2d 360 (1947).

53. See Note, *Prosecutor Forensic Misconduct—"Harmless Error"?* 6 UTAH L. REV. 108, 115 (1958); 20 WASH. & LEE L. REV. 168, 172 (1963).

54. See 20 WASH. & LEE L. REV. 168, 170 (1963); Note, *supra* note 39, at 86.

55. State v. Shawen, 40 W. Va. 1, 20 S.E. 873 (1894).

56. Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935).

57. State v. Junkins, 147 Iowa 588, 126 N.W. 689 (1910).

58. 258 Ky. 685, 80 S.W.2d 817 (1935).

59. *Id.* at 694, 80 S.W.2d at 821.

a court can never be justified in holding them harmless, even though there is no concrete indication that *actual* prejudice occurred. To inquire whether the defendant was harmed overlooks the fact that an error occurred which might well have infected the trial despite the absence of any manifestation of prejudice. The more serious the subject matter, the more it becomes necessary to remove the burden of showing harmful prejudice from the defendant. Where constitutional errors are concerned, for example, the United States Supreme Court has held that a state's harmless error rule is not the test for reversibility; in such cases the federal test, *harmless beyond a reasonable doubt,* applies.[60] When parole is argued to a jury by the prosecutor or explained to it by the judge, appellate courts could justifiably deem this so improper as to be prejudicial as a matter of law. In *Sukle v. People*[61] the Supreme Court of Colorado reversed a death penalty conviction where the judge had indicated to the jury, in response to its inquiry, that a life sentence could be shortened by parole. The court noted that "[p]rejudicial error is obvious."[62] The argument that parole information may be inherently prejudicial is especially strong where such information is given to a jury charged with choosing between life imprisonment and a death sentence.[63]

The harmless error rule presents a further difficulty if the prosecutor argues parole to a jury in a jurisdiction which considers such informing improper. The parole information supplied by the prosecutor is likely to come during his summation to the jury. During the presentation of evidence, a complicated system of rules governs what is to be admitted. There are, however, no such tight controls over the closing arguments.[64] It is here that the prosecutor has the greatest freedom and may argue the parole consideration, realizing that he is unlikely to be interrupted by an objection.[65] This freedom may encourage the prosecutor to engage in the improper conduct since he realizes that the appellate court will probably utilize the harmless error rule to overlook the misconduct. The prosecutor may intentionally resort to this misconduct due to the political nature of his office or his spirit of advocacy; he may be reacting to similar tactics by the defense attorney, or seeking to overcome the favorable position afforded the defendant by law.[66] Whatever the reasons, courts should be ever alert to the

60. Chapman v. California, 386 U.S. 18 (1967).
61. 107 Colo. 269, 111 P.2d 233 (1941).
62. *Id.* at 273, 111 P.2d at 235.
63. State v. White, 27 N.J. 158, 142 A.2d 65 (1958).
64. See Levin & Levy, *Persuading the Jury with Facts not in Evidence: The Fiction-Science Spectrum,* 105 U. PA. L. REV. 139, 140 (1956).
65. Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968): "Counsel may, of course, object during the argument, but unless the departure from the proprieties is egregious neither the court nor the jury is likely to look favorably upon such an interruption at that stage."
66. See Note, *supra* note 53, at 111.

possibility that the prosecutor may not be as detached and as fair an enforcer of the law as he should be.

Although courts have been reluctant to admit it, a liberal use of the harmless error rule may promote forensic misconduct. The important factor in dealing with forensic misconduct is not whether the appellate court terms it improper but whether the judgment is reversed.[67] The Kentucky experience is revealing. In 1927, in *Seymour v. Commonwealth*,[68] the Court of Appeals of Kentucky, referring to a prosecutor's argument that people sentenced to life imprisonment are released and kill again, stated:

> We are surprised that the commonwealth's attorney indulged in this argument, since *in a long line of cases* we have unhesitatingly condemned like arguments. . . . The very fact that we are called on *so many times* to discuss this question . . . induce [sic] the belief that many of the commonwealth's attorneys are not heeding as they should our ruling in this matter. We are loathe to believe that such action on their part is encouraged because these arguments, although condemned, have under the particular facts in the cases involved been held by us not so prejudicial as to warrant a reversal.[69] (Emphasis added.)

In 1935, the same court found improper a parole argument, but refused to reverse.[70] It did, however, "*again* admonish prosecuting counsel throughout the commonwealth not to indulge in such statements . . . ."[71] (Emphasis added.) In *Broyles v. Commonwealth*,[72] decided in 1954, the court was called upon to review a murder conviction carrying life imprisonment. During his argument to the jury, the prosecutor had indicated the precise point at which the defendant would become eligible for parole under each of the possible sentences. The appellate court's patience had finally run out. It reversed the conviction on the sole ground of the parole argument: "since for the past 30 years we have been condemning arguments less pernicious than this, we cannot in good conscience continue to overlook the error."[73]

Mandatory reversal for certain kinds of misconduct, through legislative amendment or judicial interpretation, is the appropriate remedy for the bulk of the cases. Mr. Justice Fortas, dissenting from the denial of a writ of certiorari in a case involving prosecutorial misbehavior, stated, "it is by no means clear that petitioner must show that the prosecutor's knowing acquiescence in a material

67. *Id.* at 115.
68. 220 Ky. 348, 295 S.W. 142 (1927).
69. *Id.* at 353-54, 295 S.W. at 145.
70. Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935).
71. *Id.* at 694, 80 S.W.2d at 821.
72. 267 S.W.2d 73 (Ky. 1954).
73. *Id.* at 76.

falsehood prejudiced him. There is no place in our system of criminal justice for prosecutiorial misconduct."[74] Where misconduct of the prosecutor is concerned, then, the harmless error rule should be irrelevant. Certainly such cases call for a restricted application of the rule.[75] The argument that the expense of new trials "weighs strongly against the use of reversal as a means of disciplining prosecutors"[76] fails to recognize that expense in such a matter must be a subordinate consideration. Furthermore, very few reversals in a given jurisdiction would be required before this particular kind of misconduct would stop. The parole argument seems an especially apt candidate for the "reversal cure" since it is clearly definable. The line between arguing and not arguing parole is clear and, unlike in other areas of forensic misconduct, there is little danger that a prosecutor will accidentally slide into it, even in the heat of battle.

To instill a fear of reversal is not the only remedy, nor is it foolproof. In a sensational case, the prosecutor, recognizing that the public pays closer attention to the trial than to the appeal, may be prepared to pay the price of later reversal for a "present, conspicuous victory."[77] The trial judge, however, is in a good position to reprimand and to correct the misconduct, especially since he has so much discretion over the opening and closing statements and need not await a defense objection before intervening.[78] Such intervention might include disciplining the offender,[79] declaring a mistrial, or granting a new trial. In especially serious situations, or where the misconduct is repetitious, the trial judge should resort to his contempt power[80] or to the professional penalties of disbarment, suspension or reprimand.[81] As a practical matter, measures such as removal from office or the imposition of civil liability offer little hope.[82] The harmless error rule restrains effective attempts by appellate courts to deal with misconduct which, even though not fatal to *this* appellant, jeopardizes the integrity of the system.[83] Appellate courts should acknowledge that overseeing the fairness of an individual trial is not their only function; they must also show concern for the preservation of appropriate trial court standards.[84] Even if such an objective is

74. Nash v. Illinois, 389 U.S. 906 (1967).

75. For an example of a restricted application of the harmless error rule in a case involving prosecutorial misconduct (arguing from facts not in evidence), *see* McCall v. State, 120 Fla. 707, 163 So. 38 (1935).

76. Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 COLUM. L. REV. 946, 978 (1954).

77. Cain, *Sensational Prosecutions and Reversals,* 7 NOTRE DAME LAW. 1, 41 (1931).

78. Note, *supra* note 53, at 112; Goff v. Commonwealth, 241 Ky. 428, 432, 44 S.W.2d 306, 309 (1931).

79. *See* Seymour v. Commonwealth, 220 Ky. 348, 295 S.W. 142 (1927).

80. See 60 W. VA. L. REV. 375, 378 (1958).

81. *Cf.* Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys,* 52 COLUM. L. REV. 1039 (1952).

82. See Note, *supra* note 76, at 979.

83. *Id.* at 959.

84. Note, *supra* note 53, at 117.

not legislatively expressed, surely the application of the rule reflects the extent to which prosecutorial misconduct taints the criminal process.[85]

The Source and Context of the Informing

Where the judge has informed the jury of parole provisions, some courts have deemed it relevant to inquire whether countervailing considerations were also furnished to the jury. In *State v. White*,[86] for example, the New Jersey Supreme Court reversed a murder conviction carrying a death sentence on the ground that the judge, upon inquiry by the jury, had instructed it concerning parole provisions. The court emphasized that the trial judge had not read a certain part of the law *limiting* parole and had not disclosed that a parolee could be returned to prison for parole violation. In *Jones v. Commonwealth*,[87] the jury asked the court if there was any assurance that the defendant would not be released if they affixed his punishment at life imprisonment or a long term of years. The trial judge, while not setting out the specifics of the parole law, answered that no such assurance could be given since any release would be an executive decision. On appeal, the Supreme Court of Virginia reversed, holding it improper to so instruct the jury without informing them that under Virginia law persons sentenced to life imprisonment were not eligible for parole. In each of these cases, it was the trial judge who had informed the jury of the parole possibilities. The appellate courts recognized that the mere statement of such possibility carries with it, albeit unintended, at least some degree of persuasion, and that any such information ought to be balanced by instruction concerning aspects of the law tending to offset that persuasion. Instruction should include such factors as parole ineligibility for certain verdicts or sentences open to the jury, any restrictive criteria used by the parole board before release, factors in the case which make parole highly unlikely or difficult,[88] and the conditions to

85. 60 W. VA. L. REV. 375, 377 (1958). See Note, *supra* note 76, at 971, for the suggestion that affirming a conviction under the harmless error rule despite the prosecutor's improper remark (1) assumes that the jury disregarded the remark and (2) presupposes that the defendant is not entitled to a fair trial if he can otherwise be shown guilty.

86. 27 N.J. 158, 142 A.2d 65 (1958).

87. 194 Va. 273, 72 S.E.2d 693 (1952).

88. Not every aspect of a *particular* defendant's parole chances may be brought before the jury since items such as past convictions, which would play a role in the parole process, may be inadmissible at trial.

In an analogous situation, in People v. Linden, 52 Cal. 2d 1, 338 P.2d 397, *cert. denied*, 361 U.S. 867 (1959), the prosecutor argued to the jury that if given life imprisonment rather than death the defendant would be pardoned by the governor. On appeal of his death penalty conviction, the appellant claimed that the prosecutor should have added that the governor could not grant a pardon to one twice-convicted of a felony except upon the recommendation of a majority of the state supreme court. The court rejected this argument, refusing to attach any significance to the particulars of executive clemency. *Id.* at 25, 338 P.2d at 409.

which a parolee is subject after his release. If the jury, empowered to select life imprisonment or capital punishment upon conviction, is told that parole may decrease any life sentence, perhaps they should also be told that a death penalty itself can be set aside.[89] This is not desirable since the very knowledge that another agency will "oversee" its death verdict may diminish the jury's sense of responsibility. Nevertheless, it is necessary to balance the parole information, and such effort need not be carried to a detrimental extreme.

The Prosecutor as Informer

Where the parole information comes to the jury from the prosecutor rather than from the judge, new considerations arise. Dangers of undue influence over jurors are high because of the prosecutor's prestige and presumed experience in the legal area.[90] Clearly a prosecutor's argument urging that the jury inflict the death penalty rather than risk a parole grant carries great weight. Moreover, his argument is likely to influence the jury more than the defendant's attorney because the jury relies on the prosecutor for relatively greater objectivity.[91] Consider the following examples of prosecutorial references to parole:

> "Life imprisonment? Is there any such thing under our system of parole?"[92]
>
> "If you give the defendant a life sentence, his lawyers and some politicians will get him out of jail and have him walking the streets in a few years."[93]
>
> "There is a parole law which turns them out as fast as it gets them there."[94]
>
> "I am not criticizing those [parole] laws, they are good in some cases, but . . . these Boards do not have the opportunity to pass on the facts of the case

89. *See* State v. Mosley, 102 N.J.L. 94, 114-15, 131 A. 292, 297 (1925) (dissenting opinion).

The argument that the death penalty itself can be set aside apparently was used to justify the affirmance of a conviction in State v. Thorne, 41 Utah 414, 431, 126 P. 286, 293 (1912) (*semble*): "In any event, the argument of the prosecutor [that the jury should give the death penalty to preclude the possible release of the defendant if sentenced to life] can be of no avail. If the 'power' to which he referred should feel impelled to turn convicted murderers loose, that 'power' could just as well do so when the murderer is sentenced to death as it could if he is merely sent to the state prison for life." The court overlooked the fact that the issue was not what the executive had the power to do, but what the jury *felt* the executive *might* do based upon their knowledge of the subject. In short, regardless of the existence of the "power," the jury in *Thorne* may not have given the death penalty had they not been informed of the possibility that the defendant could be set free.

90. See 12 TEMP. L.Q. 496 (1938).

91. Note, *supra* note 76, at 947.

92. Commonwealth v. Crittenton, 326 Pa. 25, 29 n.*, 191 A. 358, 360 n.1 (1937) (conviction affirmed).

93. McLendon v. State, 205 Ga. 55, 63, 52 S.E.2d 294, 299 (1949) (conviction affirmed).

94. People v. Murphy, 276 Ill. 304, 323, 114 N.E. 609, 616 (1916) (conviction affirmed).

> like you do. So we can eliminate the possibility of later injustice by following what the law clearly tells you you have a right to do, and that is to find the defendant guilty as charged."[95]
>
> "[D]on't leave this thing to the whim of some future governor or parole board . . . ."[96]
>
> "Now what does [life imprisonment] mean? It means that after three years this defendant has a right to ask for a parole by going over with a sob sister from the interracial commission."[97]

All of these statements not only convey parole information but also plainly and effectively urge the jury to act on the information in a particular way. This persuasion makes it highly possible that the jury will consider parole to the detriment of the defendant.

In assessing the propriety of parole information being given to the jury, an appellate court must consider the range of the trial court's discretion. In *State v. Meyer*,[98] the trial judge himself had instructed the jury concerning parole. On appeal, the Supreme Court of Ohio explained that *in its view* it was preferable for the jury to be told, should it inquire, that parole and similar matters are not issues in the case and, therefore, the jury should not speculate about them. The court concluded, however, that the trial court in its discretion may explain these matters to the jury.

If it is the prosecutor's remarks that are in question, trial court discretion again plays a key role, for the trial judge is in a better position than the appellate court to assess the remarks. Whatever the value of this principle in passing upon other types of forensic misconduct by the prosecutor, the record in the case of parole arguments would appear well adapted to an appellate determination of propriety. Unlike an epithet directed at the defendant or a reflection upon opposing counsel, the propriety and effect of which could depend on tone of voice, gestures, or other factors not represented in the record, a prosecutor's parole argument is primarily informational and, even when it is graphically or even sarcastically advanced, the full impact can be gleaned from the record. What has already been said concerning the undesirability of informing the jury of parole suggests that the informing is inherently prejudicial and that the manner in which the information is presented to the jury is relevant only to the intensity of the harm. Fortunately, forensic conduct is not *solely* within the discretion of the trial judge but is subject to appellate review.[99]

95. State v. Henry, 196 La. 217, 258, 198 So. 910, 923 (1940) (conviction reversed on this ground plus others).

96. State v. Buttry, 199 Wash. 228, 248, 90 P.2d 1026, 1034 (1939) (conviction affirmed).

97. White v. State, 177 Ga. 115, 125, 169 S.E. 499, 504 (1933) (conviction affirmed).

98. 163 Ohio St. 279, 126 N.E.2d 585 (1955).

99. Note, *supra* note 76, at 959.

Defendant's Failure to Object

The failure of the defendant to object (or to seek a ruling or an instruction to disregard from the trial judge) may bar review.[100] In *Lee v. State*,[101] the jury sentenced the defendant to death for first-degree murder. The prosecutor had argued to the jury that a life sentence would render the defendant subject to parole. On appeal, the Supreme Court of Alabama affirmed, noting that "when that argument was made counsel for the defendant interposed no objection . . . ."[102] The bar is no mere procedural nicety since the objection at the trial level allows the judge the opportunity to make a correction.[103] Since the rationale of the objection requirement is to allow for timely correction, it should not be applied where the error is so serious as to be incorrigible.[104] Informing the jury of parole is such an error, for once the jury has been told of parole, nothing the judge says will be sufficient to assure that it will not consider the information.[105]

As indicated earlier,[106] interruptions during the prosecutor's closing argument to the jury are not likely to be well received; it is at this stage that jurors are likely to see objections as calculated to deny them information they should have. An objection risks the annoyance of the jury[107] and emphasizes the very matter counsel deems objectionable. The parole argument would be especially difficult to disregard, even upon correction by the judge, when the argument is forcefully called to the jurors' attention by defense counsel's objection. It is not surprising that suggestions have been made that little importance be attached to the failure to object.[108] In *Sukle v. People*[109] the jury interrupted its deliberations to inquire of the court whether the defendant, if sentenced to life, would be eligible for parole. The judge asked counsel if an answer to the inquiry was

100. Bland v. State, 211 Ga. 178, 84 S.E.2d 369 (1954); Anderson v. State, 209 Ala. 36, 95 So. 171 (1922); Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934).

101. 265 Ala. 623, 93 So. 2d 757 (1957).

102. *Id.* at 629, 93 So. 2d at 763.

103. In death cases, courts are likely to be more reluctant to consider the procedural bar. *See* State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953). The same may be true where the case is closely balanced. People v. Sampsell, 34 Cal. 2d 757, 214 P.2d 813, *cert. denied*, 339 U.S. 990 (1950).

104. Burnette v. State, 157 So. 2d 65 (Fla. 1963); State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948); State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947).

105. Eaton v. State, 278 Ala. 224, 177 So. 2d 444 (1965); Wise v. State, 251 Ala. 660, 38 So. 2d 553 (1948). If the defendant does object and is overruled, no correction of any sort is attempted—indeed, the overruling confirms, in the eyes of the jury, the propriety of the action objected to. In such a case the appellate court will consider the asserted error and, if it finds prejudice, reverse the verdict.

106. See p. 318 *supra*.

107. In People v. Nolan, 126 Cal. App. 623, 14 P.2d 880 (1932), involving an improper remark by the prosecutor, the court recognized this risk yet refused to reverse, emphasizing the corrective action that might have occurred upon timely objection.

108. Note, *supra* note 39, at 97.

109. 107 Colo. 269, 111 P.2d 233 (1941).

appropriate. The response being affirmative, the judge informed the jury that parole was available to the defendant under a life sentence. The jury returned a first-degree murder conviction carrying a death sentence. Reviewing the matter on its own motion, the Supreme Court of Colorado held that the action of the trial court was improper even with the defense attorney's approval: "[r]efusal of defendant's counsel to consent to the action of the court, in the circumstances appearing, would have been fraught with grave peril to his client."[110] The detrimental effect of making objection to parole information introduced by the prosecutor during summation or provided by the judge upon the jury's request, together with the fact that the trial judge need not await a defense objection before intervening,[111] weigh heavily against the critical importance some decisions have attached to timely objection.

When the trial court, upon objection or sua sponte, does attempt to correct an improper reference to parole by an instruction to disregard, the reviewing court might consider the error cured or non-prejudicial.[112] A conviction is more likely to be affirmed despite an improper parole argument where the instruction clearly and fairly informs the jury.[113] The timing of the court's action may also affect a determination concerning the sufficiency of the cure and, while courts have not tended to emphasize this factor, it has been noted as support for affirmance.[114] Immediate correction is better calculated to prevent the jury from forming a lasting misimpression. Nevertheless, where the error consists of exposing the fact-finder to such volatile information as the operation of parole, no correction, however strong and however prompt, can remedy the situation. Once

110. *Id.* at 273, 111 P.2d at 235.

111. See p. 320 *supra.*

112. Lee v. State, 265 Ala. 623, 93 So. 2d 757 (1957); Pilley v. State, 247 Ala. 523, 25 So. 2d 57 (1946); Thackston v. State, 205 Ark. 493, 169 S.W.2d 130 (1943); Jones v. State, 161 Ark. 242, 255 S.W. 876 (1923); Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934); Brady v. State, 199 Ga. 566, 34 S.E.2d 849 (1945); White v. State, 177 Ga. 115, 169 S.E. 499 (1933); Manchester v. State, 171 Ga. 121, 155 S.E. 11 (1930); State v. Edwards, 155 La. 305, 99 So. 229 (1923).

113. *See* Lee v. State, 265 Ala. 623, 93 So. 2d 757 (1957); People v. Lynn, 387 Ill. 549, 56 N.E.2d 808 (1944) ("in strong language"); Commonwealth v. Earnest, 342 Pa. 544, 21 A.2d 38 (1941).

114. *See* State v. Thorne, 41 Utah 414, 126 P. 286 (1912); Note, *supra* note 76. In McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949), however, the court rejected the appellant's contention that his case differed from past cases in that the trial court had not acted *promptly* and positively.

It has been suggested that the point at which the challenged remark itself occurred might be significant: "Argument by an advocate cannot be treated as an isolated phenomenon, insulated from all other aspects of the trial. Relatively little attention has been paid to the significance of the order of argument and the extent to which that order should be considered by the trial court or in appellate review of challenged persuasion." Levin & Levy, *supra* note 64, at 180-81. See also 15 STAN. L. REV. 349, 355 n.25 (1963). No case has been found, however, where this factor has been given significant mention by a court reviewing jury consideration of parole.

learned, that type of information is impossible to "unlearn," and to suppose that an instruction to disregard will suffice to eliminate the parole knowledge and the prosecutor's argument from the jury's consideration is common yet unrealistic.

Accuracy of the Information

Even if informing the jury of parole is not in itself considered reversible error, a further question concerning the accuracy of the information given may arise. In *People v. Linden*,[115] the prosecutor, speaking of life imprisonment during the examination of prospective jurors, referred once to the possibility of parole "in" seven years. In fact, a sentence of life imprisonment rendered one eligible for parole only *after* seven years. The possibility that the jury construed the prosecutor's language to mean that the defendant, if given a life sentence, could be paroled well before seven full years of imprisonment did not influence the Supreme Court of California and the imposition of the death penalty was affirmed. With respect to this misstatement (and another concerning executive clemency), the court stated: "The significant matter was that if the jury fixed the penalty of life imprisonment there were nevertheless means by which defendant could be released from prison; the precise operation of those means was of no particular importance."[116] The net result of this line of reasoning is that not only has the jury been informed of the parole possibility, but they also have been led to believe that the parole law was more lenient than it was in fact. The *extent* to which the information was erroneous certainly is relevant in discussing possible prejudice to the defendant. Had the jury been told that if sentenced to life the defendant would be eligible for parole in six months, could the court still have maintained that the "precise operation of those means was of no particular importance"?

In another case before the California Supreme Court a similar incident occurred. In *People v. Sampsell*,[117] the prosecutor had argued to the jury against a recommendation of mercy, pointing out that the average prisoner sentenced to life imprisonment in California served less than seven years. Since the law required a prisoner to serve at least seven full years of a life sentence before parole could be considered, the true average life term must have been substantially

115. 52 Cal. 2d 1, 338 P.2d 397 (1959), *cert. denied*, 364 U.S. 849 (1960).

116. *Id.* at 25, 338 P.2d at 409. *See also* People v. Turville, 51 Cal. 2d 620, 335 P.2d 678, *cert. denied*, 360 U.S. 939 (1959), where the same court affirmed a conviction despite a parole argument, noting that the prosecutor had *correctly* stated the law. In People v. Varnum, 61 Cal. 2d 425, 392 P.2d 961, 38 Cal. Rptr. 881 (1964), *vacated*, 63 Cal. 2d 629, 408 P.2d 97, 47 Cal. Rptr. 769 (1965), the inaccuracy of the parole information was considered significant but reversal was based substantially on a different but related error.

117. 34 Cal. 2d 757, 214 P.2d 813, *cert. denied*, 339 U.S. 990 (1950).

higher. Although the court affirmed the conviction, it noted that whether this was error would depend on the individual case. *Linden* seems to support the proposition that a misstatement is no cause for reversal, whereas in *Sampsell* the court recognizes that the degree of misstatement can be grounds for reversible error. Of course, some misstatements are negligible, either because their content errs on a minor point or because the jury must have been aware of the misstatement. In *McLendon v. State*,[118] the prosecutor stated to the jury: "If you give the defendant a life sentence, his lawyers and some politicians *will* get him out of jail . . . in a few years."[119] (Emphasis added.) One of the points urged by the appellant concerned the use of the word "will" rather than "may" since, under the law, there was no guarantee that the defendant would be released. In affirming the conviction, the Georgia court considered the prosecutor's remark obviously conjectural; the crux of the matter was not the technical misstatement nor the degree to which the statement erred, but whether the jury must have known that even though he used the word "will," the prosecutor was merely articulating a possibility in persuading the jury not to recommend mercy.

Although the factual or legal assertions contained in a statement to the jury may be accurate, certain statements might contain "opinions" or suggestions creating serious misimpressions in the jurors' minds. Where a statement suggests that the parole provisions in that jurisdiction are not carried out according to established procedures and criteria, the judgment may be reversed. Statements to the effect that the parole board can change the rules as often as it desires,[120] that the rules change every day,[121] or that politicians manipulate the parole board,[122] have resulted in reversals. Courts have, however, affirmed convictions despite assertions that the jury must either electrocute or free the defendant[123] or that the parole board will act according to whim.[124] These results have been justified on the ground that the prosecutor was purporting to state only an opinion on parole possibility rather than matters of objective truth, but this view fails to appreciate the substance of the statements in question. When such suggestions have as their source such a prestigious and authoritative figure as the prosecutor or the judge, what may seem at first blush to be mere argument becomes a statement of fact as to the actual operation of parole. Consequently, the jury receives a false impression of that jurisdiction's parole system. Even one who thinks it desirable for the jury to weigh the possibility of parole can re-

118. 205 Ga. 55, 52 S.E.2d 294 (1949).
119. *Id.* at 63, 52 S.E.2d at 299.
120. Thompson v. State, 203 Ga. 416, 47 S.E.2d 54 (1948).
121. McCray v. State, 261 Ala. 275, 74 So. 2d 491 (1954).
122. State v. Henry, 196 La. 217, 198 So. 910 (1940).
123. Young v. Commonwealth, 263 Ky. 683, 93 S.W.2d 10 (1936).
124. State v. Buttry, 199 Wash. 228, 90 P.2d 1026 (1939). *See also* Bryan v. State, 206 Ga. 73, 55 S.E.2d 574, *cert. denied*, 339 U.S. 904 (1949).

cognize that such consideration should be made with reference to the actual parole system to which the defendant will be subjected.[125]

A further and equally dangerous false impression which the jury might receive from a statement concerning the parole possibility is that because of this post-conviction procedure its own deliberations and verdict are less critical.[126] The reasoning is especially strong where the jury is determining guilt and not the sentence. Since it can have no function with regard to the penalty-setting, a parole reference in such a case must amount to a plea to the jury not to be overly concerned about the verdict since the defendant will actually serve very little time in prison, and the merits of the case will be reviewed by those who have the power to release the prisoner.

Clearly, little distinction should be drawn among: (1) a factual or legal misstatement concerning parole; (2) a statement which, though not objectively erroneous, conveys a false impression concerning the ease, capriciousness, or indifference with which prisoners are paroled; and (3) a reference to parole calculated to cause the jury to take less seriously the importance of its function.

Prosecutorial Informing in Response to Defense Counsel's Argument

Courts have on occasion looked more kindly upon a parole argument by the prosecutor if it was in direct or indirect response to a point made by defense counsel.[127] In *State v. Burks*,[128] a murder conviction with no recommendation of mercy was affirmed despite the argument by the prosecutor that the average life term served was not more than ten years. Observing that the trial judge had correctly instructed the jury as to the law on the subject, the court added that the statement had been prompted by the defense attorney's implication that, if sentenced to life, the defendant would actually be incarcerated for life. Any allowances, however, for objectionable statements because made in retaliation for similar remarks by opposing counsel fail fully to recognize that the criminal law system does not envisage a trial as a contest between two equals. All of the protections accorded the defendant (many of which are denied the state) testify to the proposition that the state is committed to more than pure advocacy. An unfair comment by the defense attorney does not justify the ensuing objectionable statement by the opponent. As the Supreme Court of Georgia stated, "[t]wo wrongs do not make a right, and it was the duty of

125. Of course, this system might change before the defendant is eligible for parole. See p. 310 *supra*. Informing the jury, however, that the legislature might change the parole law may be more serious than reference to the present parole operation. *See* People v. Treloar, 61 Cal. 2d 544, 393 P.2d 698, 39 Cal. Rptr. 386 (1964).

126. See 20 WASH. & LEE L. REV. 168 (1963); Note, *supra* note 39, at 87.

127. *See* State v. Jackson, 100 Ariz. 91, 412 P.2d 36, *cert. denied*, 385 U.S. 877 (1966); Anderson v. State, 209 Ala. 36, 95 So. 171 (1922).

128. 196 La. 374, 199 So. 220 (1940); *accord*, Commonwealth v. Crittenton, 326 Pa. 25, 191 A. 358 (1937); State v. Shawen, 40 W. Va. 1, 20 S.E. 873 (1894).

the solicitor general to object to any improper remark of counsel for the defendant, rather than make one himself in reply."[129] Appellate courts should reject the provocation argument not only because the defense is allowed more latitude than the prosecutor in arguing to the jury,[130] but also because the defendant is entitled to a fair trial notwithstanding his counsel's improper argument.[131] Concededly, such a policy might encourage the defense intentionally to bait the prosecutor into improper argument. The remedy for a defense counsel's impropriety, however, is not to affirm an unfair conviction but to discipline the defense counsel according to appropriate procedures of the trial court or of the bar.[132]

The strength of the state's case against the defendant may be an important factor if the reviewing court deems the parole statement error. If the evidence is overwhelming or the result appears just, the conviction may be affirmed, the case's strength being offered as one of the supporting circumstances for the affirmance.[133] The argument is that since the evidence leads so inevitably to a conviction, there is little point in requiring a retrial. Such an argument carries the danger of justifying unfairness because the result is correct. Guilty or not, the defendant is entitled to a fair resolution of his guilt. Furthermore, the fact that parole information often affects not only the determination of guilt or innocence but also the penalty should be emphasized. The weight of the evidence has no direct bearing on the jury's exercise of its discretion concerning the penalty; the amount of evidence indicates *whether* to apply a penalty, but not which penalty to apply. Indeed, it is because the penalty is a matter of discretion that the potential detriment from a parole statement and the difficulty of assessing that detriment are so very high.[134]

Occasionally, appellate courts have refused to reverse a conviction, notwithstanding error, because of the shocking manner in which the crime was carried out. The prosecutor in *Peterson v. State*[135] referred to the "mushy parole board"

129. Manchester v. State, 171 Ga. 121, 133, 155 S.E. 11, 17 (1930) (affirmed for other reasons).

130. People v. Kirkes, 243 P.2d 816, 833, *aff'd on rehearing*, 39 Cal. 2d 719, 249 P.2d 1 (1952).

131. See Note, *supra* note 76, at 972.

132. It has been suggested that prejudicial misconduct by the defense attorney might best be dealt with by granting the state an appeal. In most states, however, double jeopardy interpretations would be a bar. See 34 MICH. L. REV. 1044, 1045 (1936).

133. People v. Linden, 52 Cal. 2d 1, 338 P.2d 397, *cert. denied*, 361 U.S. 867 (1959); State v. Thorne, 41 Utah 414, 126 P. 286 (1912); State v. Junkins, 147 Iowa 588, 126 N.W. 689 (1910); State v. Kingsley, 137 Ore. 305, 2 P.2d 3 (1931).

134. Pait v. State, 112 So. 2d 380, 385 (Fla. 1959). Yet, that discretion has been used to approve arguments to the effect that if given a life sentence the defendant may be pardoned. *See* Lucas v. State, 146 Ga. 315, 91 S.E. 72 (1916); Liska v. State, 115 Ohio St. 283, 152 N.E. 667 (1926).

135. 231 Ala. 625, 166 So. 20 (1936). *See* State v. Junkins, 147 Iowa 588, 126 N.W. 689 (1910).

in an opening statement designed to persuade the jury that the death penalty was appropriate. Allowing the judgment of conviction to stand, the Alabama Supreme Court noted the "gruesome" nature of the crime. The dissent pointed out, however, that whether the crime was gruesome or not, the defendant was entitled to a fair trial. A similar result was defended with the assertion that, given the vicious and atrocious circumstances of the crime, the minds of the jurors could hardly have been further inflamed by anything outside the record.[136]

The jury may allow the sordid nature of the crime to affect the guilt determination; however, such a consideration is improper since the issue is whether the defendant did or did not commit the crime. To overlook the introduction of parole information because of the gruesome nature of the crime is to allow both improper elements to affect the guilt determination. On the other hand, the shocking nature in which the crime was carried out is normally a proper consideration when levying the penalty. The jury, however, might deem life imprisonment an adequate punishment for the most sordid crime. Any consideration of parole information may lead the jury to impose capital punishment, believing that the defendant will be prematurely released under a life sentence. That a death penalty is appropriate in such a case is not in question, but the possibility that the parole information occasioned such a penalty is sufficient reason for an appellate court to call the penalty into question.

Some effort has been made by reviewing courts, in assessing prejudice, to determine whether the selection of the penalty was in fact influenced by the parole information. The court might determine that but for the parole argument a lesser penalty would have been imposed. This conclusion was reached in *Williams v. State*,[137] where the jury interrupted its deliberations to ask the judge whether the defendant would have to serve the whole term if sentenced to a term of years. The judge responded that actual time served would depend on the defendant's behavior and on the discretion of the parole board. Within five minutes of this exchange, the jury returned an electrocution verdict. The Supreme Court of Tennessee reversed since "[e]vidently the jury in the instant case would have sentenced the defendant to some term in the penitentiary had they believed that he would have to serve the full term of the sentence."[138] In *Williams*, the nature of the jury's question and the short period of time between the reply and the verdict made it clear that the information affected the result. Furthermore, the very fact that the jury discussed parole in its deliberations may be enough to indicate that the information influenced the penalty.[139] The

136. Lightfoot v. Commonwealth, 310 Ky. 151, 219 S.W.2d 984 (1949).
137. 191 Tenn. 456, 234 S.W.2d 993 (1950).
138. *Id.* at 459, 234 S.W.2d at 994. *See also* Sukle v. People, 107 Colo. 269, 111 P.2d 233 (1941); Burnette v. State, 157 So. 2d 65 (Fla. 1963).
139. Pena v. State, 137 Tex. Crim. 311, 129 S.W.2d 667 (1939).

same is true when the jury imposes capital punishment, and "the case does not, in fact, present exaggerating elements calling for such extreme penalty."[140] Often, the attempt to ascertain the effect of parole information has resulted in affirmance due to the court's conclusion that, since the jury either returned a minimum penalty,[141] qualified its verdict to exclude capital punishment,[142] or sentenced defendant to death, but not his co-defendant,[143] the parole information had no effect.

Considering Parole Operation as Common Knowledge

Emphasis has often been placed upon the assertion that operation of parole is common knowledge, so that parole information from the judge or from the prosecutor can do no harm.[144] The Supreme Court of Arizona referred to the parole possibility as a "fact, so well known among all intelligent citizens that it would almost seem judicial notice might be taken thereof . . . ."[145] Such an argument, which becomes more forceful as the average citizen becomes more enlightened,[146] overlooks two points. First, even if the average juror is aware of the operation of parole, it is by no means certain that he will "refer" to that knowledge during the jury's deliberations. Even if this knowledge was considered, it would not play as emphatic a role as it would after a specific reminder. Second, the parole knowledge jurors have is likely to be vague and uncertain, and therefore difficult for them to apply to the case at hand. How different this is from informing them, for example, that the defendant will be eligible for parole in seven years if given life imprisonment. The Court of Appeals of Kentucky has summed it up: "It is true, we think, that the average juror does know there is a parole law in Kentucky, but it would be an unusual juror who would know the exact number of years a prisoner must serve before he becomes eligible for parole under a given sentence."[147]

Conclusion

The chief barrier to the resolution of the parole informing problem is probably the inability to assess both the number of jurors who possess parole operation

140. Augustine v. State, 201 Miss. 277, 291, 28 So. 2d 243, 246 (1946).
141. Thackston v. State, 205 Ark. 493, 169 S.W.2d 130 (1943). *See also* Jones v. State, 161 Ark. 242, 255 S.W. 876 (1923); Carpenter v. State, 129 Tex. Crim. 397, 87 S.W.2d 731 (1935).
142. State v. Edwards, 155 La. 305, 99 So. 229 (1923).
143. *See* House v. State, 192 Ark. 476, 92 S.W.2d 868 (1936); Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934); Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935); Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955), *cert. denied*, 352 U.S. 880 (1956); Graham v. State, 202 Tenn. 423, 304 S.W.2d 622 (1957); State v. Carroll, 52 Wyo. 29, 69 P.2d 542 (1937).
144. People v. Murphy, 276 Ill. 304, 114 N.E. 609 (1916).
145. Sullivan v. State, 47 Ariz. 224, 240, 55 P.2d 312, 318 (1936).
146. *See* Glenday v. Commonwealth, 255 Ky. 313, 74 S.W.2d 332 (1934).
147. Broyles v. Commonwealth, 267 S.W.2d 73, 76 (Ky. 1954).

information and the depth of that information. If it could be said with certainty that all jurors (or no jurors) in a given jurisdiction will be aware of parole before the trial, how much easier it would be to decide the matter. It would also be useful to have conclusive information on how jurors might apply whatever information they bring to the trial or secure from the judge or prosecutor. As a matter of fact, even after trial, it is not terribly clear how the jury has reacted to given parole information,[148] and, even if available, that knowledge is of aid only in appellate review, not in framing a prospective rule of general application to trials. This lack of predictability, however, does not relieve courts from the necessity of decisionmaking. Therefore, all possible approaches to the problem must be asserted in order that rules or guidelines can be formulated.

(1) *Allow both the judge and the prosecutor free rein in informing the jury of parole.* This approach is unacceptable. In cases where the jury decides only the issue of guilt, the information tends to cause a shifting of responsibility to the parole board by impliedly lessening the importance and finality of the jury decision. In cases where the jury also has a penalty-setting function, this policy has the added disadvantage of tending to legitimize any desire on the jury's part to offset the effects of parole.

(2) *Allow only the judge to inform the jury of parole.* Under this approach, the jury would not be subjected to direct persuasion and the parole law would emanate from a presumably neutral source. Current specific information is provided, perhaps displacing grossly erroneous notions held by some jurors. However, it would be desirable for the trial court to caution the jury that the question of parole is not a matter for them to decide.

(3) *Allow only the judge to inform the jury of parole only upon an express jury inquiry.* In such a case, the jury's conclusions will be influenced by some parole law—real or imagined—and they should have the benefit of the true state of the law. Furthermore, to refuse to answer a specific question put by the jury will not eliminate the role of their parole knowledge and may frustrate, anger or embitter them. In 1958, the New Jersey Supreme Court in *State v. White*[149] adopted this position despite its acknowledgement that the weight of authority disfavored informing the jury of parole. Referring to the fact that most jurors are aware that prisoners sentenced to life are paroled and to the common misconception that passage of time alone qualifies one for parole, the court held that a parole instruction should be given the jury in cases where the

148. *See* State v. Knapp, 194 Wash. 286, 77 P.2d 985 (1938), where, following a special finding by the jury in favor of the death penalty, the affidavits of two jurors were submitted asserting that the jury would not have imposed death had they been assured that life imprisonment would actually be fully served. The Supreme Court of Washington affirmed, noting that the verdict could not be impeached in that manner and that it was not for the jury to assess the effects of the prosecutor's remarks.

149. State v. White, 27 N.J. 158, 142 A.2d 65 (1958).

jury must choose between life imprisonment and the death penalty if, by specific inquiry, the jury indicates that parole knowledge "is playing a role in the deliberations."[150] The court stressed, however, that the instruction should conclude with an admonition to exclude parole from their deliberations. The instruction, decided the court, must be essentially the following:

> Any prisoner serving a sentence of life is eligible for consideration for release on parole after having served 25 years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments. The statute provides that no prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned to him, but only if the State Parole Board is of the opinion that there is reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society. A prisoner released on parole remains on parole for the balance of his life and if he violates the terms of the parole he may be returned to prison to serve the life sentence.
>
> I have answered your question, but instruct you that the subject of possible parole must be excluded from your deliberations. You may not speculate as to whether parole would or would not be granted. So far as you are concerned, a life sentence is a life sentence. If upon and after consideration of all the evidence you believe a recommendation for imprisonment for life should be made part of your verdict, it would be a violation of your duty to refuse to make that recommendation because of the existence in another authority of the power and responsibility with respect to parole.[151]

This lengthy instruction is reproduced in full because of its clarity and balance; the jury is given the important aspects of the parole law of the jurisdiction, including its restrictions, yet the second paragraph makes clear in solemn terms that the jury is not to be influenced by parole considerations.

(4) *Allow neither the judge nor the prosecutor to inform the jury of parole under any circumstances.*[152] One problem is that where jurors do in fact have

150. *Id.* at 178, 142 A.2d at 76. *But see* Jones v. Commonwealth, 194 Va. 273, 278, 72 S.E.2d 693, 696 (1952): "It seems to us that if it is thought necessary to tell the jury not to speculate about the information given, it is safer not to give the information at all, but rather . . . tell the jury that the information they ask is about something not proper for them to consider."

151. State v. White, 27 N.J. 158, 179, 142 A.2d 65, 76-77 (1958). For the reversal of a conviction for failure to give a *White*-type instruction, see State v. Laws, 50 N.J. 159, 233 A.2d 633 (1967). A similar instruction was adopted by the Supreme Court of California in People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964).

152. *See* McGruder v. State, 213 Ga. 259, 98 S.E.2d 564 (1957). In McKuhen v. State, 216 Ga. 172, 115 S.E.2d 330 (1960), the adoption of this position was completed in Georgia when, citing *McGruder,* the Georgia Supreme Court held that the trial court erred in charging the jury on pardon and parole, even though the charge was prompted by a question from the jury.

some parole knowledge, it might be applied to the case at hand despite any inaccuracies. To the extent that the knowledge is communicated to others, the problem is seriously compounded. The great advantage of this position, however, is that it does not inject the parole issue into the presumably large number of trials in which jurors do not have any parole knowledge or, if they do, do not actually call it into use.

(5) *Allow only the defendant to decide whether the jury is to be charged by the judge on the parole law of the jurisdiction.* The device of allowing the defendant to decide whether the jury is to be educated concerning parole seems especially appropriate. There may be situations in which having the choice is of great value. Considerations such as the nature of the crime, the particular composition of the jury, the character of the proof, the personality of the accused, and the "severity" or "leniency" of the particular parole provisions involved,[153] may indicate to the defendant whether it is to his benefit to have parole information officially imported to the jury. Should the defendant initially decide against any informing, a further option may be desirable if the jury returns from its deliberations to inquire about parole. That the jury is actively considering parole is a factor which the defendant should be allowed to take into account when deciding whether the jury is to be formally instructed about parole. To allow the defendant a choice in the matter seems more just than forcing him to accept a procedure which he might view as unfair.

Consideration of parole by the jury has received little attention. Very often, courts called upon to review the question have ruled without providing a suitable rationale. More attention is required, and as long as juries have any function with respect to the penalty the question will be of great importance. It may be a matter of life and death.

153. The jury might, for example, be more inclined to impose life imprisonment rather than the death penalty if they are aware that the defendant's recidivism precludes parole. *See* People v. Linden, 52 Cal. 2d 1, 338 P.2d 397, *cert. denied,* 361 U.S. 867 (1959); People v. Barclay, 40 Cal. 2d 146, 252 P.2d 321 (1953).