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While nineteenth-century Kentucky produced fine horses, hemp, and whiskey, she excelled most in crime. The *New York Times* referred to Kentucky as the Corsica of America and then added that the Italians actually were more civilized in their criminal activity.[1] Speaking at mid-century, Garrett Davis contended that only Arkansas and Mississippi rivaled Kentucky in capital crimes.[2] In the words of a delegate to the constitutional convention of 1890, Kentuckians were "denounced outside of [their] limits of jurisdiction by the press of the whole country as being a lawless and bloodthirsty kind of people."[3] By 1890 most observers found no serious competition for Kentucky in murders or any other category of crime.[4] Even those counties not afflicted by feuds found themselves awash in bloodshed by the end of the century.

Almost all commentators on the problem blamed the "system" for permitting Kentucky's crime problem to grow steadily throughout the nineteenth century. By "system," critics meant those officers and citizens charged with making and enforcing laws against criminal activity. These included prosecutors, trial and appellate judges, grand and petit jurors, legislators, sheriffs, and governors. Lawyers permeated the system, not only serving as judges, prosecutors, and defense attorneys, but also increasingly dominating the legislative and executive branches. Indeed, twenty-one out of Kentucky's thirty-one nineteenth-century governors were lawyers.[5]

Critics asserted that the failure of the criminal justice system to punish criminals not only permitted the guilty to escape but also encouraged others to commit crime. Crime hindered the State's economic growth and sullied its reputation in general. In the opinion

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1. N.Y. Times, Dec. 26, 1878, at 4, col. 6.

2. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849, at 688 [hereinafter cited as 1849 DEBATES].

3. OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF KENTUCKY 588 [hereinafter cited as 1890-1891 DEBATES].

4. *See generally* H. REDFIELD, HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERSON IN SEVERAL PARTS OF THE UNITED STATES 36-62 (1880).

5. *See* L. COLLINS, HISTORY OF KENTUCKY (1874).

of one eastern Kentucky resident, "[n]o Commonwealth of this Union . . . is more blest with natural facilities for development and the enrichment of the country than Kentucky. Emigration is kept from among us by the name we bear, . . . that we legislate and our courts construe laws in favor of criminals."[6]

Open discussion about the crime problem in nineteenth-century Kentucky furnishes historians with much information about the realities of the criminal justice system from the prosecutors to the governor, a subject largely ignored by historians. Throughout the century, the commonwealth's attorneys were the principal prosecutors of crime. Until 1850 the commonwealth's attorneys for the most part were appointed by the governor; thereafter, they were elected. The commonwealth's attorneys numbered from ten to nineteen during the first half of the century and nineteen during most of the second half of the century. In 1891 the legislature increased their number to thirty. Although some contended that the commonwealth's attorneys generally performed their duties competently, most observers held negative opinions about the officers ranging from mild chagrin to utter contempt. A few observers, including Ben Hardin, the famous antebellum lawyer, regarded the office as "a mere nothing,"[7] attracting only attorneys who had failed at everything and who depended upon political favor in order to survive. Most critics, however, recognized that the job was difficult no matter how well trained its occupant might be. Because prosecutors represented entire circuits or districts and not single counties, they were required to follow the circuit court and to try cases in numerous locations during the course of a year. This meant that prosecutors generally operated in unfamiliar places at a pace that usually did not afford adequate time for preparation. The following is the testimony of a commonwealth's attorney about the realities of this institutional haste and the handicaps it created:

> I have, on many occasions, gone to a Court when I had never seen a witness on behalf of the Commonwealth. The Judge sat upon his bench, and called the case . . . . I handed the indictment to the Sheriff, and he went to the door and called the witnesses; the witnesses answered "Ready," and within five minutes we were selecting a jury to try that case, never having had an opportunity to talk to a single witness in reference to what they knew about the commission of the offense; never having had a history of the case given me by any one, when there were able counsel defending the criminal, which is always the case—especially if he has money to back him—and hurried into a trial without time to deliberate and understand the case. This is the attitude that a Commonwealth's Attorney is often placed in.[8]

6. 1890-1891 DEBATES, *supra* note 3, at 588.
7. 1849 DEBATES, *supra* note 2, at 673.
8. 1890-1891 DEBATES, *supra* note 3, at 1680.

"[L]ike a rat in a strange garret,"[9] the prosecutor's inability to prepare adequately for his cases often constituted "a loop-hole by which criminals . . . escape[d]."[10]

The necessity to rush into cases prevailed even though in most circuits the position of commonwealth's attorney was only a part-time job. Most criminal cases were tried in the circuit court, which had a crowded civil docket. By statute the courts were required to try criminal cases first, but pressure to get to the civil cases caused judges to hurry through criminal matters as quickly as possible.[11] Apparently because their pay as prosecutors was relatively poor and because they often had their own private practices, prosecutors did not spend the time that the court was attending to civil business preparing for the next batch of criminal cases.

Although some critics charged that commonwealth's attorneys were overpaid, most admitted that a good defense lawyer could earn from two or three cases what a prosecutor gained from an entire year's employment.[12] Moreover, even though the prosecutors worked as commonwealth's attorneys only part time, their private practices apparently suffered.[13] For most of the century, prosecutors were paid principally by fees, receiving a percentage of fines recovered.[14] Because generally the law imposed fines only in misdemeanor and minor felony cases, the system of payment encouraged commonwealth's attorneys to prosecute misdemeanors and minor felonies and to avoid lengthy major felony trials that often resulted only in imprisonment. Thus, the system of pay created another loophole for the criminal.

Compounding the difficulty of the job—and some argued it was the most difficult job in state government—influential local residents traditionally hounded the commonwealth's attorney to persuade him to drop charges against friends and relatives under indictment by the grand jury. In some feud-infested counties, private armies threatened prosecutors, forcing more than a few to abandon attempts to try cold-blooded murderers and other members of warring factions.[15] Critics accused the commonwealth's attorneys of cowardice and nonfeasance, while the prosecutors pleaded self-

9. *Id.* at 4052.
10. *Id.* at 1680.
11. *See id.* at 3274, 3463.
12. *See id.* at 1694.
13. *Id.* at 4057.
14. *See* 1890-1891 DEBATES, *supra* note 3, at 1680; 1849 DEBATES, *supra* note 2, at 672.
15. *See* 1890-1891 DEBATES, *supra* note 3, at 1105-07.

preservation in the face of anarchy.[16] Not surprisingly, the best lawyers in a community seldom sought the job, and when one took it, he often found relinquishing the responsibility nearly impossible. Charles Bronston, an able Fayette County lawyer, became commonwealth's attorney for his circuit in 1878. When he attempted to resign several years later, he found to his consternation that "no lawyer of any experience in the district" would have the job, and he reluctantly continued in the office rather than risk a return to incompetent prosecution.[17]

Faced with poorly prepared prosecutors who were encouraged to try misdemeanors rather than major crimes, and with better paid and often more skillful defense attorneys, wealthy victims of crime or their survivors frequently hired private counsel to assist the prosecution in order to enhance the chances of conviction.[18] Sometimes private counsel assumed the entire responsibility for the prosecution. In some cases the victim's family had to hire a special prosecutor to gain a trial of the accused because the commonwealth's attorney had been persuaded by influential friends of the defendant to file away the charges. A widow of a wealthy and influential resident of Perry County "had to fee the lawyers to prosecute" the murderer of her husband and vowed that "she would rather give everything she had and work the balance of her life . . . than to compromise . . . ."[19] Ben Hardin volunteered to act as the special prosecutor of an alleged murder of a child because the commonwealth's attorney believed that the accused was innocent. Hardin secured a conviction, but not absolutely certain himself of the defendant's guilt, he went to the hanging hoping to hear a last-minute confession. He did.[20]

In 1884 the general assembly attempted to shore up the prosecutorial system by requiring county attorneys to assist commonwealth's attorneys in the trial of felonies.[21] County attorneys, legal advisors to county governments on matters such as processing claims against the county and opening and closing roads, prosecuted certain minor offenses, such as disturbances of the peace, and represented the Commonwealth during preliminary hearings of more severe offenses.[22] The legislators hoped that the county attor-

16. *See* Louisville Courier Journal, June 26, 1885, at 8, col. 4.

17. 1890-1891 DEBATES, *supra* note 3, at 4169.

18. *See id.* at 4044.

19. *Id.* at 1122.

20. 1849 DEBATES, *supra* note 2, at 681.

21. An Act to amend the General Statutes and to enlarge the duties of county attorneys, 1883 Ky. Acts, ch. 1066.

22. THE GENERAL STATUTES OF KENTUCKY 177-82 (J. Bullitt & J. Feland, eds. 1888) [hereinafter cited as GENERAL STATUTES].

ney's residence in the forum and his familiarity with the crime, its witnesses, and jurors, would enable the commonwealth's attorney to surmount the obstacles that the system of "institutional haste" previously had constructed. The reform proved sufficiently successful to prompt some delegates to the constitutional convention meeting six years later to propose the replacement of the commonwealth's attorney with county attorneys as the exclusive prosecutors for the State. Convinced that it would be difficult to find a qualified attorney in every county and that local influences might undermine the office, opponents of the reform narrowly prevailed.[23]

At first blush, judges in nineteenth-century Kentucky appeared to preside over their local criminal courts like medieval barons. Ben Hardin contended that a judge had "more power in his theatre, the court, than the president of the United States in his theatre."[24] Sheriffs, jailers, constables, and lawyers all catered to the local judge. County officials needed the judge's approval of their accounts, and the local lawyers hoped that they would win his favor and thereby gain new clients. Until 1854 criminal defendants prosecuted for offenses punishable by imprisonment could not appeal convictions; thus most rulings during a trial could not be challenged before another tribunal. Furthermore, the legislature did not issue a criminal code of practice until 1854. This condition not only gave judges plenary power over certain phases of criminal trials, such as the introduction of evidence, but also created criminal laws unique to particular districts. In other words, during the first half of the nineteenth century, there was a decided lack of uniformity in the criminal law of Kentucky. For example, a Barren County Circuit Court judge ruled that a slave found quilty of a capital offense was entitled to benefit of clergy and ordered him released.[25] Two months later a Warren County Circuit Court judge ruled that a slave convicted of arson was not entitled to the benefit of clergy and sentenced him to be hanged.[26] In another instance, one circuit court ruled unconstitutional an act of the legislature limiting *voir dire* examination, while another declared it valid.[27] Such inconsistencies apparently were numerous and prompted the constitutional convention of 1849 to authorize the legislature to permit appeals from felony convictions, a reform it enacted in 1854.[28]

23. 1890-1891 DEBATES, *supra* note 3, at 4041-4101.
24. 1849 DEBATES, *supra* note 2, at 328.
25. *Id.* at 395.
26. *Id.*
27. *Id.* at 685.
28. CODE OF PRACTICE IN CRIMINAL CASES IN KENTUCKY § 327 (1854).

Despite these powers, judges were significantly constrained in other ways. Until 1854 judges had only a limited right to instruct juries, which in most jurisdictions then could ignore their instructions and decide the case as they pleased. The lack of uniformity that characterized judges and criminal law in general also characterized judges and their power of instruction in particular. In most districts, judges would not instruct the jury unless both the prosecution and the defense so requested. The judge then would inform the jury that it could find the law to be different from the instructions. In other districts, judges routinely instructed the jury although neither party requested instructions. Usually, these judges also advised the jury that it was the ultimate finder of law as well as fact. In a few jurisdictions, if requested by either party, the judge instructed the jury and ruled that its instructions were binding on the jury and were not to be questioned by the parties. In most districts, however, either party in final argument could contest the instructions of the judge. One observer recalled that in a certain trial a defense attorney moved unsuccessfully to quash an indictment for larceny on the grounds that it failed to describe sufficiently the property allegedly stolen, but argued successfully the same point to the jury and thereby secured an acquittal for his client.[29] In another case, where the judge did not instruct because both sides had not agreed, one member of the jury, woefully ignorant of the law, voted to find the defendant guilty of manslaughter although he believed that he was legally insane. After all, the juror declared, the defendant had slaughtered a man.[30] In those districts where judges claimed only a limited right to instruct, defense attorneys sometimes took great liberty with the law to fabricate defenses for their clients. Once a jury accepted the dubious propositions, they frequently became an indelible part of the law despite the chagrined rantings of subsequent prosecutors. The 1854 criminal code of practice ameliorated the problem somewhat by requiring judges to issue written instructions to juries upon the motion of either party.[31] The code of 1854, however, proved to be a mixed blessing because the court of appeals ruled that its provision on instructions eliminated the judge's right to comment on the evidence, a privilege he possessed before the code was enacted.[32]

The privilege and practice of criminal defendants swearing judges off the bench further limited the ability of judges to enforce

29. 1849 DEBATES, *supra* note 2, at 835.
30. *Id.* at 835-36.
31. CODE OF PRACTICE IN CRIMINAL CASES IN KENTUCKY § 226 (1854).
32. Brady v. Commonwealth, 74 Ky. (11 Bush) 282 (1875).

effectively the criminal law. By statute, a defendant, if supported by the affidavits of "two reputable persons not kin or counsel," could force a judge to withdraw from the defendant's trial by asserting under oath that he believed the judge would not "afford him a fair or impartial trial."[33] The members of the local bar then would elect from their number a special judge. The problem was especially pronounced in feud-ridden counties where defendants turned the statute on its head by routinely swearing unbiased judges off the bench in favor of partisans.[34]

Especially during the second half of the century, critics complained that judges did not attend to their criminal docket as expeditiously as they might; consequently, indictments took as long as two years to come to trial.[35] The problem became so acute in some counties that representatives from these places persuaded the general assembly to create special criminal courts to supplement the circuit courts in handling criminal cases. Even these tribunals did not substantially shorten the delay in trying crimes in some districts. Arguing that the establishment of special courts constituted an unnecessary burden on the taxpayers, a lawyer from Allen County contended that if judges worked harder and more efficiently, they could cope with the criminal docket. He pointed out that a newly elected circuit judge in his district did twice as much work as the former circuit judge and criminal court judge combined.[36] Others noted that the existence of special courts only in certain places simply added to the parochial nature of the criminal justice system and the confusion that it produced. Still worse, they added, was the tendency of the legislature to authorize more terms for some courts than for others.[37]

Some judges' habit of failing to hold court in certain places compounded the delay in trying accused criminals. A Carroll County resident reported that a criminal court judge in his district "frequently" failed to hold court in his county. The problem grew worse after the judge's party failed to nominate him for circuit court judge. Thereafter, he told Carroll County residents to "go to hell," and failed completely to hold court there.[38] Although the legislature provided that in the regular judge's absence the lawyers of the affected locale could elect a special judge from their number, it did not provide effective penalties against the errant judge. In

33. GENERAL STATUTES, *supra* note 22, at 241.
34. 1890-1891 DEBATES, *supra* note 3, at 1164, 3400.
35. *See id.* at 3049.
36. *See id.* at 3052.
37. *See also id.* at 3319-26.
38. *Id.* at 3328-29.

1852 and again in 1881, the legislature passed statutes providing that if a judge failed to hold court, the cost of hiring a substitute would be deducted from his salary. The court of appeals, however, declared both acts unconstitutional.[39] An effort at the 1890 constitutional convention to have such a provision inserted into the new charter of government failed to secure a majority vote.

Some defendants suffered from delays in holding their trials, but others benefited. Naturally, those defendants without funds to post bail endured the most hardship. A Logan County resident charged that in his district, defendants who could not furnish bail routinely spent from six to twenty-four months in jail before trial. This subjected defendants to the extreme discomforts of the local jail and their families to poverty because of the absence of the principal breadwinner. Others complained that the long delay often permitted the guilty to go free. Some escaped from jail, and others were acquitted at trial because witnesses had died, disappeared, or forgotten important facts, or because jurors reflected the changed attitude of the general public that had grown sympathetic toward the poor unfortunate defendant languishing all those months in jail.[40]

Besides judges' inability to clear dockets and some judges' habit of not holding court at all, judges allegedly contributed in other ways to Kentucky's leniency toward accused criminals. Even defense attorneys admitted that judges tended to overemphasize the doctrine of reasonable doubt when instructing juries.[41] Consequently, the rule seemed to guarantee acquittal for those who had "powerful and influential connexions [*sic*]."[42] Likewise, judicial construction of the privilege against self-incrimination arguably gave the defendant an extra advantage since he was permitted to invoke it even though he himself had introduced "the particular topic upon which he [was] being interrogated."[43] Champions of law and order also accused judges of ignoring national standards and construing the law of double jeopardy in a manner overly lenient to defendants.[44] However accurate these complaints were, attempts to redress them largely failed.

As soon as the court of appeals was given the right to hear appeals from criminal trial courts, it was blamed also for the grow-

39. Perkins v. Auditor, 79 Ky. 306 (1881); Auditor v. Adams, 52 Ky. (13 B. Mon.) 120 (1852).

40. 1890-1891 DEBATES, *supra* note 3, at 3049; 1849 DEBATES, *supra* note 2, at 681.

41. *See* 1849 DEBATES, *supra* note 2, at 686-87.

42. *Id.* at 686.

43. 1890-1891 DEBATES, *supra* note 3, at 953-54.

44. *Id.* at 566-69; *see* O'Brian v. Commonwealth, 72 Ky. (9 Bush) 333 (1872).

ing softness on crime. Critics accused the high tribunal of reversing convictions by using "technicalities" whose collective effect was said to add to the aura of permissiveness surrounding the criminal justice system.[45] If undue leniency resulted from the right of appeal, the responsibility for this condition probably rested with the lawyers as well as the judges. A lawyer testified in 1890 that he once examined an appellate record in which the court of appeals reversed a conviction although, in the lawyer's opinion, the defendant had been given a fair hearing and richly deserved hanging. Much to his horror, he had discovered that the defense attorney in his bill of exceptions had "false[ly] and fraudulent[ly]" misrepresented the actions of the lower court, a deceit compounded by the failure of the commonwealth's attorney to correct the record.[46] If this practice was widespread, and it may have been given the unscrupulous nature of some defense attorneys and the inattentiveness of certain prosecutors, that the high tribunal reversed more than a few convictions is no wonder.

The legislature increased the parochial nature of the criminal justice system not only by failing until 1854 to provide a criminal code of practice, but also by enacting at each session a wide variety of local statutes establishing special crimes for individual judicial districts, counties, or parts of counties. For most of the century, residents of individual counties besieged legislators with petitions to enact local statutes outlawing various activities. What resulted was a panoply of local statutes making conduct criminal in one county although innocent in another. Soon the legislature and the courts lost track of the local laws; consequently, some contradicted others.[47] Defendants constantly complained of confusion and failure of notice, and many were either acquitted by sympathetic and equally confused juries or pardoned by governors. The 1890-1891 constitutional convention largely remedied the situation by prohibiting most local statutes.[48]

Lawyers, whether judges, prosecutors, or defense attorneys, were not the only members of the criminal justice system of nineteenth-century Kentucky. Laymen also played an important role serving as grand or petit jurors. By statute, if the punishment for an offense was more than a fine or imprisonment of fifty days, the Commonwealth could not prosecute anyone for the offense unless by indictment from a grand jury.[49] Until 1891 grand juries con-

45. 1890-1891 DEBATES, *supra* note 3, at 1265.
46. *Id.* at 1286-87.
47. *Id.* at 1291.
48. KY. CONST. § 59 (1891).
49. GENERAL STATUTES, *supra* note 22, at 807-09.

sisted of sixteen residents of the county in which the court was being held, and the votes of at least twelve grand jurors were needed for an indictment. Thereafter, grand juries consisted of twelve jurors, with nine votes needed to indict.[50]

In Kentucky, as elsewhere in the nation, pressure mounted throughout the century to abolish the grand jury because its members were generally ignorant of the law and its traditions, because it operated inefficiently, and because it was too susceptible to the behest of the prosecutor. These efforts failed in Kentucky, perhaps because critics of the grand jury failed to make their case. Even a commonwealth's attorney, an officer that stood to gain power if the institution were abolished, admitted that grand juries frequently lived up to their ancient responsibility of shielding the accused from irresponsible charges. In the words of a prosecutor, "according to my experience and the experience of gentlemen with whom I have talked, with all its faults, the right of investigation by the Grand Jury is one of the greatest protections the citizen has."[51]

Nor did grant juries always adhere to the wishes of prosecutors. At least in one area grand juries universally defied the wishes of the commonwealth's attorneys by refusing to bring indictments against those accused of purchasing votes. This failure to indict accounted in large part for the continuing tradition of vote buying in Kentucky,[52] a practice that was not curtailed until the Constitution of 1891 provided for the return of the secret ballot. Vote buying apparently constituted one of the few areas in which nonfeasance by the grand juries accounted for the existence of crime. Petit juries, on the other hand, contributed more significantly to this problem.[53]

The petit jury formed the most important part of the criminal justice system of nineteenth-century Kentucky. Most criminal defendants were entitled to jury trial, and almost all who did not plead guilty availed themselves of this opportunity. Comprised of twelve men, a jury needed a unanimous vote for a verdict. Although they disagreed over the precise meaning of the rule, all legal experts in the Commonwealth acknowledged that juries in criminal trials were the ultimate triers of law as well as fact.[54] At least before 1854, some juries deliberated without being instructed, and throughout the century they alone determined the guilt or innocence of a defendant. The court of appeals ruled that although the trial judge might

50. KY. CONST. § 248 (1891).
51. 1890-1891 DEBATES, *supra* note 3, at 1221.
52. *Id.* at 1875.
53. *Id.* at 1893; *see* 1849 DEBATES, *supra* note 2, at 676.
54. *See, e.g.*, 1849 DEBATES, *supra* note 2, at 1085-86.

instruct the jury about the law of the case, the jury had the power, if not the right, to ignore the instructions when deciding upon a verdict.[55]

Until 1838 the process of selecting potential jurors was a very informal haphazard affair—the sheriff simply rounded up as many candidates as he could find. In 1838 the legislature required the sheriff to initiate a more formal system to assemble a minimum number of citizens from which to pick twelve-man petit juries.[56] This reform did not cure many of the evils it was supposed to cure, and late in the century observers complained that sheriffs ignored the law and relied upon courthouse bums who served on juries in order to collect a little wine money.[57] Critics charged that these "miserable wretches . . . in defiance of the most positive proof of the guilt of the [defendant]" almost invariably rendered verdicts of acquittal.[58]

More serious was the widespread practice of packing juries. Defendants, through bribery or simple appeal to friendship, persuaded someone to volunteer for service in order to hang the jury. Apparently, in some places it was almost routine for defendants with money to hire at least one juror to insure a divided vote. Some defendants packed the jury so proficiently that they secured verdicts of acquittal. Officials in antebellum Jefferson County tried for years to convict a notorious counterfeiter for making and passing bogus bank notes, but failed entirely because of the man's ability to pack the jury. Ben Hardin recalled a client named Carter who was accused of murdering a wealthy boat owner and selling the boat and cargo. After four trials ended in hung juries, the judges concluded "that the whole county had made up their opinion, and that no trial could be had;" the governor then released the accused. Subsequently, Hardin not only learned that Carter had paid a juror in each case, but also discovered that he was guilty of the crime for which he had been indicted.[59] Garret Davis once helped prosecute one of the "most diabolical and outrageous murders that was ever perpetrated," but the defendant escaped with a verdict of manslaughter because he had slipped five of his friends onto the jury.[60] Although three of the friends were later indicted for perjury, the murderer escaped while out of jail on bail.[61]

55. Commonwealth v. Van Tuyl, 58 Ky. (1 Met.) 1 (1858).
56. An Act to Alter the Mode of Selecting Petit Jurors, 1838 Ky. Acts, ch. 960.
57. Louisville Evening Post, Feb. 4, 1879, at 2, cols.1-2.
58. 1849 DEBATES, *supra* note 2, at 676.
59. *Id.* at 680-81.
60. *Id.* at 687.
61. *Id.*

Despite protests from civil libertarians, law and order delegates at the 1849 constitutional convention believed they could remedy the problem of packed juries by giving prosecutors a limited number of peremptory challenges, a privilege that they did not have for most of the antebellum period.[62] Four years later, the framers of the first code of criminal practice gave prosecutors five challenges in felony cases and three in misdemeanor proceedings, whereas the defense had twenty in felony cases and three in misdemeanor cases.[63] But the reform, like so many others, did not eliminate the evil, and commentators continued to complain of tainted juries.[64]

Mid-century reformers also tried to curtail the evil of packed juries by expressly authorizing in the new constitution the selection in certain instances of jurors from outside the county of the trial. Supporters argued that such a reform not only would curtail the practice of bribing jurors but also would facilitate the trial of notorious criminals who benefited from the judicial rule that jurors must not have formed or expressed an opinion about the guilt or innocence of the accused. A Jessamine County resident noted that in his county outrageous murders had gone unprosecuted because jurors who had not formed an opinion about the culpability of the defendant could not be found. Delegates to the 1849 constitutional convention defeated a provision authorizing jurors from outside the county and retained the constitutional guarantee to all criminal defendants of a "speedy public trial by an impartial jury of the vicinage . . . ."[65] "Vicinage" commonly was held to be synonymous with "county." Nevertheless, five years later the framers of the criminal code of practice provided for out-of-county jurors when the trial judge was "satisfied . . . that it [would] be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending . . . ."[66] Oddly enough, while out-of-county jurors were used at least in some parts of the Commonwealth to convict defendants, during the period of the third constitution no one challenged the constitutionality of the code provision before the court of appeals. Widening the geographical area of potential jurors did not cure the problem of tainted juries, and by 1888 ingenious prosecutors seized upon another method of securing impartial jurors—by interpreting vicinage to mean adjacent counties.[67]

The epidemic of feuds that afflicted many Kentucky counties

62. *Id.* at 674-79. *See also* KY. CONST. art. 2, § 39 (1850).
63. CODE OF PRACTICE IN CRIMINAL CASES IN KENTUCKY § 205 (1854).
64. 1890-1891 DEBATES, *supra* note 3, 1163-64.
65. 1849 DEBATES, *supra* note 2, at 797.
66. CODE OF PRACTICE IN CRIMINAL CASES IN KENTUCKY § 195 (1854).
67. 1890-1891 DEBATES, *supra* note 3, at 450-51.

following the Civil War compounded the problem of selecting impartial juries. In feud-ridden counties it was often impossible to find jurors who were not members of rival factions or who were unintimidated by them. Finally in 1888, facing a condition of anarchy in Perry County and entertaining no hope of selecting a jury with the courage to convict, officials secured from the legislature a statute authorizing a change of venue from Perry County to Clark County. The general assembly so acted despite the general notion that only a defendant had the right to secure a change of venue. Asserting that the transfer to Clark County had brought peace to the county, accomplishing what soldiers and residents themselves could not do, reformers at the 1890-1891 constitutional convention supported a provision in the new state government structure that would permit the Commonwealth generally to secure a change of venue if it believed a transfer would result in a fairer trial.[68]

Opponents of this reform contended that to permit the Commonwealth to secure changes of venue would work an undue hardship on indigent defendants who could not afford to pay expense money to their witnesses during a trial out of their home county. Pointing to the Perry County experience, these critics argued that there "were men who had not a dollar in the world, and who had to sell their clothes to pay their witnesses to go to Clark."[69] Submitting that the change would work no hardship because the Commonwealth paid for indigent defendants' witnesses, reformers contended that changing the venue law was the most practical way to deal with feud-stricken counties. Stating that he had been besieged with many proposals to curtail feuding, Governor Buckner confirmed the opinion that changing venue offered the most promising solution. The convention endorsed Buckner's views and authorized the general assembly to "provide by a general law for a change of venue . . . for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."[70] The legislature did so shortly thereafter.[71]

Even if not packed or prejudiced in favor of the defendant, juries manifested a general sympathy for criminals. Prosecutors and their allies contended that the public was soft on crime and tended to sympathize with those indicted for criminal activity. In 1849 a commentator wondered "[w]hy is it . . . that the sympathies of

68. *Id.* at 951-53, 1163-71.
69. *Id.* at 952-53.
70. KY. CONST. § 11 (1891).
71. An Act to provide change of venue from another county, 1891-1892 Ky. Acts, ch. 162.

gentlemen appear to flow so freely in favor of those who are charged with crime,"[72] and forty years later another noted that "[t]he tendency of every man is to sympathize with and pity the . . . criminal . . . ."[73] Toward the end of the century, an observer lamented that "the verdicts of juries in criminal and penal cases have done more to destroy confidence in the administration of the criminal law than" almost anything else.[74] Another claimed to have "heard jurors admit, in penal cases, punishable by imprisonment in the penitentiary, that they had added together the different periods voted for by the different jurors, and divided the result by twelve."[75] Perhaps reflecting this "jugglery,"[76] in 1877 a Nicholas County jury that sentenced a murderer to only eleven years in prison was thanked by the defendant himself, who expressed "surprise at the light sentence," admitting that he believed "he deserved the extreme penalty of the law."[77] Despite this testimony, efforts to permit two-thirds of a jury to convict failed.

Governors, often themselves lawyers, formed a significant part of the criminal justice system. All of Kentucky's constitutions empowered the governor to remit fines and forfeitures and to grant reprieves and pardons. Held in one form or another by governors of most states and based upon the ancient practices of English kings, the power to remit and pardon constituted an increasingly important element of the governor's business in the nineteenth century. Before the Constitution of 1850, governors spent most of their time appointing civil and military officers and pardoning and remitting convicted criminals. After 1849 pardoning and remitting became, in the words of Governor Buckner, "the great labor of the office" because petitions continued to increase in number and the Constitution of 1850 substantially curtailed the power of appointment.[78] In the words of a United States Senator from Kentucky, the governor had become nothing but a "big Squire," a term that suggested that his most important function was pardoning and remitting. To strip him of these powers, as was proposed at the 1890-1891 constitutional convention, would in the opinion of one delegate remove one of the few "dignities and responsibilities" that made the office "worthy of the ambition and the hopes of the rising, gifted spirits of the future

72. 1849 DEBATES, *supra* note 2, at 676-77.
73. 1890-1891 DEBATES, *supra* note 3, at 4167.
74. *Id.* at 1263.
75. *Id.* at 4796.
76. *Id.*
77. Paris True Kentuckian, Dec. 26, 1877.
78. *See, e.g.*, KY. CONST. art. 3, § 10 (1850).

. . . ."[79] Because Kentuckians had no parole board until 1888, the governor's power was especially important.

Probably because governors were so lenient, convicted criminals frequently applied for remission of fines or pardons, or both. In the opinion of some, Kentucky governors granted more pardons and remissions than chief executives of other states. One observer claimed that governors of Michigan had granted only 447 pardons in a seventeen-year period, while a particular governor of Kentucky had granted 845 pardons in less than sixteen months.[80] Because petitions were so common, governors, especially before 1854, became a court of last resort. Not surprisingly, the implementation of this quasi-judicial function produced much controversy. Some argued that governors caused more harm by remissions than by pardons. Normally, misdemeanors were punishable only by fine; nevertheless, this category of crime encompassed a number of disruptive and potentially dangerous antisocial activities including carrying concealed weapons, gambling, serving liquor to minors, disturbing the peace, and disturbing Sunday worship. By the reportedly wholesale remission of fines, governors allegedly encouraged the commission of these crimes. Prosecutors claimed that gubernatorial permissiveness toward the indiscriminate carrying of concealed weapons led to "much of the bloodshed which has given Kentucky the unenviable name of 'the dark and bloody ground . . . .' "[81] Likewise, one critic submitted that the routine remission of fines imposed upon the operators of tippling houses, grog shops, faro tables, and other gambling devices produced incalculable evils to the Commonwealth. "[F]rom these corrupt beginnings," they stated, "flow those streams of crime which afterwards disgrace the Commonwealth . . . ."[82]

Hypocrisy characterized the rantings of many prosecutors who themselves played an important part in the remissions scandal. Before 1850 governors apparently often remitted the portion of fines that paid commonwealth's attorneys for their services.[83] Complaints by prosecutors and doubts about the constitutionality of this practice caused the framers of the Constitution of 1850 to prohibit the remission of the prosecutor's portion of fines.[84] Curing one abuse led to another. To collect their portion of fines from elusive defendants, prosecutors often promised defendants that they would sign their

79. 1890-1891 DEBATES, *supra* note 3, at 1250.
80. *Id.* at 1269.
81. *Id.* at 1252.
82. *Id.* at 1249.
83. 1849 DEBATES, *supra* note 2, at 672.
84. KY. CONST. art. 3, § 10 (1850).

petitions for remission, thereby adding considerable authority to these documents and enhancing the chances of favorable action by the governor.[85]

However abusive remissions were, pardons aroused the greatest fury. A former prosecutor from Knox County claimed that notorious murderers when convicted laughed openly in the realization that they soon would be pardoned. Indiscriminate pardoning did "more to embolden crime, interrupt the peace of society, and trample under foot the morals of the community, than all other causes combined."[86] Convicted criminals with money and influential friends often "seduced" governors into pardons by false and misleading petitions.[87] The pardoning process required no formal proceeding, and normally governors received petitions from the defense only. Defendants with powerful friends, often their attorneys, found it relatively easy to gather an impressive number of signatures on petitions pleading for their release. A Carter County lawyer aptly described the realities of signature gathering:

> And how are signatures to these petitions, filled with exaggerated, and sometimes false statements, procured. One signs it to accommodate a friend; a second, after continued importunity; a third through sympathy; a fourth carelessly, because . . . it costs nothing; and others have signed it, a fifth—the wily and desining [*sic*] politician or demagogue—for the purpose of attaching to himself the friends and relations of the convict, for future political purposes . . . and often times too, without so much as reading the statements they certify—until a long list of names are [*sic*] procured.[88]

The victim of the crime, his family, the prosecution, or those favoring the prosecution seldom petitioned the governor, often because they had no notice that a pardon was being sought. Thus, governors normally were given only one side of the case, often by fast-talking, highly persuasive lawyers hired for the job or by influential members of the community doing a favor for the petitioner. Subjected to such tremendous pressure, governors sometimes lacked the courage to resist and pardoned to relieve themselves of the burden of the moment. Adding to the *ex parte* nature of the proceedings, commonwealth's attorneys seldom took the time to discover which of the criminals they convicted were seeking pardons.[89] They rarely presented their side of the question to the governor, and governors sought opinions from prosecutors too infrequently.

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85. 1890-1891 DEBATES, *supra* note 3, at 1289.
86. 1849 DEBATES, *supra* note 2, at 672-73.
87. *Id.* at 720-21.
88. *Id.* at 721.
89. 1890-1891 DEBATES, *supra* note 3, at 1110-12, 1289-91.

Since there was no formal system, governors pardoned inconsistently, one executive "grant[ing] a pardon where another . . . refuse[d] it" under precisely the same circumstances. Much depended upon the "emotions of the incumbent . . . and . . . upon his temperament" rather than a set of fixed standards. Consistent with the entire criminal justice system, this favored the rich and discriminated against the poor.[90] Convicted criminals without funds could not hire lawyers or others to gather signatures or represent them before the governor. They could not circulate petitions themselves because usually they were imprisoned promptly upon conviction, being unable to post an appeals bond.

Despite these abuses, the pardoning power had its defenders. Describing governors as the fountainheads of mercy, supporters of an unlimited power to pardon submitted that it was necessary to correct the abuses of the criminal justice system. How else could a defendant remedy the excesses of unscrupulous prosecutors, tyrannical judges, and perjury-ridden witnesses?[91] They argued that it was far better for ninety-five persons to be pardoned wrongfully than for one innocent man to be imprisoned.[92] The pardoning power was needed to temper excessive punishment sometimes meted out by judges overly concerned with the letter of the law. Governor J. Proctor Knott defended the pardoning of two teenage boys who had been sentenced to a public whipping after being found guilty of drunkenly stealing sixty cents worth of goods. They had been pardoned, Knott contended, to spare them "the most degrading punishment that could be conceived by a sensible mind," which would have "ruin[ed] them for life" and compelled "their parents to go with bowed heads sorrowing to the grave."[93] Governor Luke P. Blackburn pardoned large numbers of prisoners in the state penitentiary to call attention to the legislature's failure to remedy the institution's inhumane conditions.[94]

In the majority of cases, governors pardoned only after defendants had been convicted and had actually served part of their sentence in prison. Kentucky, however, was one of only four states that permitted pardons before trial. This privilege produced the most criticism of all. In the opinion of reformers, pardoning before trial compounded all of the alleged deficiencies of the pardoning power. The rich and influential benefited; the poor and helpless

90. *Id.* at 1087.

91. 1849 DEBATES, *supra* note 2, at 721-28.

92. 1890-1891 DEBATES, *supra* note 3, at 1277.

93. *Id.* at 1321-22.

94. *See* JOURNAL OF THE REGULAR SESSION OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF KENTUCKY, 36-37 (1881).

suffered through discrimination. Notorious murderers hoodwinked unknowing governors into pardons before trial, while humble citizens guilty of highly technical violations of the law were forced to serve time in the penitentiary. A wealthy farmer from Todd County, who ambushed and killed a young man after a trivial argument, secured a pardon before trial. Unknown to the governor, earlier during the trial of one of the farmer's enemies, the same farmer had threatened a judge with a knife and pistol in open court.[95] Another farmer was pardoned before trial although he had shot his victim in the back after the latter had what was described as a routine argument with the killer's wife, the victim's sister.[96] A governor pardoned three wanton murderers from Perry County, while a fellow resident had been imprisoned for bigamy despite his belief that his first wife was dead.[97] Governors pardoned bluegrass distillers before trial although they repeatedly polluted streams and sold liquor in violation of local option laws.[98]

Despite these horror stories, there were those who defended the power of pardon before trial and conviction.[99] Governor Buckner argued that wholesale pardons before trial were necessary to quell a feud in an eastern mountain county.[100] Reiterating theories advanced to defend the pardoning power in general, others argued that it was a corrective to prosecution for merely technical violations of the law.[101] Furthermore, pardoning before trial spared the Commonwealth of the expense of trial and possible incarceration. Most tellingly, defenders stressed that denying the governor the power of pretrial pardon would enhance the power of the commonwealth's attorneys and increase their tendency to prosecute trivial offenses to collect percentages of fines.[102]

Throughout the century, especially at the two constitutional conventions, reformers tried to restrict the pardoning power. While few advocated the complete abolition of the power, many proposed the elimination of pardons before trial.[103] Other propositions included a requirement that governors publicize petitions including signatories to give the prosecution's side an opportunity to be heard and to discourage insincere and ill-considered signings, the creation

95. 1890-1891 DEBATES, *supra* note 3, at 110.
96. *Id.* at 1253.
97. *Id.* at 1122.
98. *Id.* at 1254.
99. *Id.* at 1090-93.
100. *See id.* at 1105-07.
101. *Id.* at 1097.
102. *See id.* at 1283-84.
103. *Id.* at 243-44, 1109, 1258-61.

of a board of pardons to supplement or supplant the governor, and a system of full accounting for all pardons to the legislature and the public. But despite the growing number of outcries against pardoning, the power was left largely intact. The only meaningful reform occurred toward the end of the century, when the legislature created a parole board.[104]

Counties and their officers also underscored the parochial nature of the criminal justice system and contributed to its shortcomings. The sheriff, the principal peace officer of the Commonwealth, devoted more and more of his time to civil business such as tax collecting because these duties multiplied, and because they furnished most of his income. When sheriffs did attend to law enforcement, they sometimes did so as partisans, especially if their county was engaged in one of the many feuds that ripped Kentucky following the Civil War. Their numbers per acre ranking second in the nation, Kentucky's counties were the "storm centers from which feuds" were created and "from which antagonisms radiated."[105] Often beginning during election campaigns for county offices, these brawls frequently involved gangs led by rival peace officers. It is symbolic that those who were charged with keeping the peace in nineteenth-century Kentucky often did the most to disrupt it.[106]

Nineteenth-century Kentuckians responded paradoxically to their criminal justice system. Although they complained constantly about the inadequacies of their constabulary, they refused to appropriate funds necessary to establish more efficient police forces. And while they carped continually about the ineffectiveness and ineptitude of prosecutors, the slowness and timidity of judges, the permissiveness of juries, and the leniency of governors, they also expressed equal concern about the rights of the accused and the convicted.[107] By their ambivalence, nineteenth-century Kentuckians reflected an internal conflict that historically has characterized the response of Americans to the problem of crime. A free and dynamic society inevitably spawns crime. In their efforts to control antisocial behavior, freedom-loving people dare not be too effective for fear of eliminating the liberty that helped produce the problem. This Gordian Knot of nineteenth-century Kentucky is the enduring dilemma of America.

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104. *Id.* at 240-41, 246, 1087, 1090-93, 1287-88.
105. R. IRELAND, LITTLE KINGDOMS: THE COUNTIES OF KENTUCKY, 1850-1891, at 77 (1977).
106. *Id.* at 71-86.
107. *Id.* at 86-89.