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An Introduction to the Kentucky Penal Code: A Critique of Pure Reason?

BY KATHLEEN F. BRICKLEY

Our present criminal law is a product of historical accidents, emotional overreactions, and the comforting political habit of adding a punishment to every legislative proposition.¹

The 1972 legislative session may be recorded as one characterized by more demonstrative evidence concerning pending legislation than any in history. From the now infamous wild turkey unleashed in the House to stimulate debate on a proposed industrial loan bill,² to the homemade brownies intended to sweeten the legislators' dispositions toward transfer of territory of certain school districts,³ to the diaper pails which bedecked the marble staircase ascending to legislative chambers where hearings on a liberalized abortion law were in progress⁴—it was anything but a dull session.

It was in this arena that the criminal law of Kentucky was dragged, screaming, into the twentieth century. The task was not an easy one for any of the participants—members of the Advisory Committee, the drafting staff, legislators, or the public. But somehow four years of careful deliberation, expenditure of thousands of dollars, dissemination of a considerable amount of misinformation, and emotional public reaction culminated in the enactment of House Bill 197—the Kentucky Penal Code.⁵

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I. GENESIS AND GOALS

The Kentucky Penal Code is the first complete revision and codification of Kentucky's substantive criminal law. Although the present law was "revised" in 1962, the primary thrust of that effort was merely to organize and renumber existing provisions scattered throughout the statute books. There was no attempt to update in toto the form and substance of the criminal statutes. Piecemeal revision can not serve as an adequate substitute for a full scale reconciliation of the many conflicting and overlapping penal provisions. "The proliferation of the corpus of law, the failure to distill and refine, to reduce to minimums, can hurl the system out of control." In tacit recognition of this proposition, the 1968 General Assembly directed the Kentucky Crime Commission and the Legislative Research Commission to undertake a complete revision of Kentucky's substantive criminal law.

Drawing heavily upon the Model Penal Code and recent criminal law revisions of other states, a team of four drafters worked under the guidance of a twelve member advisory committee in an attempt to bring order and rationality to the state's substantive law of crimes. In addition to purging the existing criminal law of many anachronistic provisions, the major objectives of the project were to codify and fully define all criminal offenses, to eliminate the need for "special legislation" in the sphere of criminal law, and to provide a uniform classification of crimes.

Codification and definition of crimes and general principles of criminal liability were an absolute necessity. Not only had the haphazard proliferation of penal laws resulted in overlapping and inconsistent statutory provisions, but it also failed to come to grips with the problems posed by the fact that Kentucky criminal law incorporates a substantial amount of common law which has never been embodied in statutes. This left the task of formulating and reconciling numerous aspects of criminality entirely to the courts. The direct beneficiary of this diabolical non-system was the lawyer upon whom the burden of ferreting out "the law" pertaining to a particular offense was imposed.

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6 R. CLARK, CRIME IN AMERICA 182 (1971).
This process consisted of rummaging through poorly indexed statutes and laboriously researching appellate court decisions to gain access to very basic information which was otherwise inaccessible. The Penal Code abolishes common law crimes and requires a statutory definition of every criminal offense.\(^8\) By utilizing clearly defined terminology which is systematically integrated into the document,\(^9\) the Code provides an authoritative central source for determining the relevant points of law in any given criminal case.

Redefinition also serves to reduce the number of statutes by eliminating laws proscribing substantially similar conduct and having wholly illogical distinctions. This "special legislation" is quietly put to rest by Code provisions of broader applicability.

The Code provides a unified sentencing structure by creating seven classes of offenses.\(^10\) The classification scheme abolishes the tremendous disparities in punishment for offenses of equal gravity\(^11\) and provides a remedy for inconsistent and discriminatory sentencing practices.

While the 373 page Final Draft and accompanying commentary was a progressive and commendable achievement, it was not without attendant problems and vocal critics. Among the specific targets of criticism were sections of the published draft embarrassing garbled by printing errors,\(^12\) controversial provisions which largely functioned as lightning rods attracting sporadic fits of vituperation,\(^13\) and instances in which current notions of "law and order" clashed squarely with traditional concepts of justice.\(^14\)

\(\text{\textsuperscript{8}}\) H.B. 197 § 2.
\(\text{\textsuperscript{9}}\) See, e.g., id. at §§ 9, 12 and 27.
\(\text{\textsuperscript{10}}\) Id. at § 283.
\(\text{\textsuperscript{11}}\) See examples cited at note 44 infra.
\(\text{\textsuperscript{12}}\) For example, a provision permitting therapeutic abortion following a pregnancy resulting from rape or other felonious intercourse upon certification by three physicians provided "such certificate shall be filed with the hospital in which the abortion is to be performed at least forty-eight hours prior to the abortion, and in case of an abortion following felonious intercourse [sic] with the County Attorney," KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 3315(3) (Final Draft 1971) [hereinafter cited as LRC].
\(\text{\textsuperscript{13}}\) Among primary areas of public concern were the abortion provision and the absence of any provision punishing homosexual conduct between consenting adults.
\(\text{\textsuperscript{14}}\) The Final Draft authorized the use of deadly physical force by a defendant when he believed the person against whom such force was used was attempting to dispossess him of his tangible, movable property. LRC § 435(2)(d). This was one of the issues upon which there was no unanimity among the drafters and Advisory Committee members.
II. THE LEGISLATIVE PROCESS: POLITICS AND THE PUBLIC

On January 20, 1972, House Bill 197 was introduced

... creating an entirely new penal code; 36 major areas of
criminal law would be affected by enacting new sections to
replace the major portions of KRS Chapters 432, 433, 434,
435, 436, 437, and 438 and small portions of other chapters;
repeal major portions of the present above listed chapters
and smaller portions of other chapters, and amend numerous
sections to conform.16

The following morning the public was informed of this action
in an Associated Press article which heralded “House bill would
ease abortions.”16 Some seven additional column inches were
then devoted to describing the “abortion bill.” Only passing
reference was made of the “entirely new penal code” and the
other 35 major areas affected by the legislation.17

After being referred to the House Judiciary Committee for
consideration, House Bill 197 was subjected to public and private
scrutiny. The public aspects are easy to recount; the private
aspects remain a mystery. Public hearings on House Bill 197
narrowed the focus of deliberations to two aspects of the bill—
drugs18 and abortion.19 Somewhere in all of this hoopla was “an
entirely new penal code” waiting to be enacted. But this idea
was rapidly fading.

A larger issue is being obscured by the thunder and lightning
loosed on the proposed revision of Kentucky’s abortion law.

It involves the unquestioned merits of the proposed penal

15 10 KY. LEG. REC. 65 (March 30, 1972) [hereinafter cited as LEG. REC.].
17 The same day House Bill 48, increasing the penalty for assaulting prison
guards, was reported favorably out of the House Judiciary Committee. As
discussed infra, the primary purpose of this bill was to save financially pressed counties
the expense of holding such offenders while awaiting trial and during their sentence.
Ironically, the headline did not read “Bill to ease financially pressed county jails
reported favorably,” but read instead “Bill to stiffen assault penalty draws sup-
port.” Id. at § A, at 14, col. 1.
18 I.R.C §§ 2900-15. The drug hearings were reported in one-half inch head-
lines “Panel Hears Debate On Legalizing Marijuana Possession,” but the attendant
publicity failed to note that nowhere in the Penal Code was it proposed that
marijuana possession be legalized. See Louisville Courier-Journal, Feb. 8, 1972,
§ B, at 1, col. 1.
19 This was the most emotional and volatile issue publicly discussed with
witnesses advocating positions ranging from total prohibition to total repeal, and
all were center stage.
code of which the abortion section is not the most significant portion.

But the danger that has arisen is that the abortion debate will become the tail that wags the dog and [will] prevent enactment of the substance of the updated code.\textsuperscript{20}

A similar observation was made the following day by a related source.

Anyone following the news from the Kentucky General Assembly could well have the distinct impression that the proposed Penal Code is all about abortion.

In hearings on the code, the controversy has been drawn to the single section that occupies a little more than a page of the 373-page draft of the proposed set of criminal laws.\textsuperscript{21}

\textbf{A. House Committee Substitute}

Despite understandable public confusion concerning this "controversial bill," the House reported favorably and passed House Bill 197, \textit{House Committee Substitute} by a vote of 70-17, on March 7, 1972. As expected, the ersatz bill contained several major changes, including the deletion of the abortion provision and reinstatement of existing obscenity laws.\textsuperscript{22} What was not expected, however, were provisions imposing unrealistic limitations on retrial of a defendant,\textsuperscript{23} a modification of the entrapment defense which afforded a unique justification for the commission of a crime,\textsuperscript{24} the abolition of common law assault,\textsuperscript{25} and classifying as a misdemeanor intentionally causing serious physical

\begin{footnotesize}
\begin{enumerate}
\item Editorial, The Louisville Times, Feb. 21, 1972, § A, at 8, col. 1.
\item Id. at §§ 46-48.
\item "(1) A person is not guilty of an offense arising out of proscribed conduct when he was induced or encouraged by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution." Id. at § 44 (emphasis added). The language contained in the original bill "and at the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct" was omitted. H.B. 197 § 44(1)(b) (emphasis added).
\item "A person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury." H.B. 197 § 70. Apparent confusion over the change in terminology resulted in the deletion of any analogous provision in the House Committee Substitute.
\end{enumerate}
\end{footnotesize}
injury with a deadly weapon. Nevertheless, the Penal Code had passed a major hurdle and was introduced in the Senate the following day. A new element was then captured by the Associated Press: “Bill Would End Death Penalty For Some Crimes.”

B. Senate Committee Substitute

Absent the fanfare surrounding its consideration in the House, House Bill 197, Senate Committee Substitute, was reported favorably out of committee a week after its introduction in the Senate. The Senate version reinserted most of the original provisions of House Bill 197 while accepting such changes as deletion of the abortion provision and the pornography chapter. The bill received its second reading in the Senate and was sent to the Rules Committee which the next day reported it out for passage with twenty-three typewritten pages of amendments. While most of the 284 changes were confined to renumbering sections of the bill, some of the substantive amendments included conditional retention of the common law offense of abortion, creation of an “ex pre facto” law, significant changes in culpable mental states, de-

29 Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state, except that if the statutes relating to abortion, or portions thereof, are declared unconstitutional, the common law of abortion shall prevail. KYPC § 2 [KRS § 433A.1-020].
30 KYPC § 4 [KRS § 433A.1-040] reads as follows:
The provisions of this code shall not apply to any offense committed prior to its effective date, unless the defendant elects to be tried under this code. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted, if he does not so elect (emphasis added).
For want of terminology referring to this unprecedented sleight of hand, this provision has been dubbed Kentucky’s first “ex pre facto” law. Section 4 made its debut in the House Committee Substitute. It was not included in the Senate Committee Substitute, but it inexplicably reappeared in the amendments thereto.

The paramount problem presented by this section is determining just what it means. Is the intent to permit the defendant to elect to be tried under the Penal Code now? If so, this creates an anomalous doctrine of prospective retroactivity since section 307 unequivocally states “This act shall become effective July 1, 1974.” But perhaps section 4 is intended to apply only to defendants who commit an offense before the effective date of the code and who are tried after that date.

(Continued on next page)
laying required notice of the insanity defense to the day of trial,\(^2\) reduction of the authorized penalty for certain inchoate offenses,\(^3\) creation of a strict liability theft offense\(^4\) and elimination of another theft crime,\(^5\) expansion of the justified use of deadly force,\(^6\) reinstatement of criminal penalties for deviate sexual conduct between consenting adults,\(^7\) and postponement of the effective date of the legislation to July 1, 1974.\(^8\) The Senate passed the bill by a vote of 22-12. During the closing hours of the session the House concurred, 47-10, and House Bill 197 was signed into law March 27, 1972.\(^9\)

In addition to enacting the Penal Code, the House and Senate each adopted, by voice vote, resolutions requesting the Governor to appoint a Kentucky Penal Code Study Commission.\(^{10}\) In light of the deferred effective date of the Code and the monumental mechanical problems arising by virtue of the Code's turbulent adoption, a thorough reevaluation of the document was essential. Accordingly, an eight member Commission was appointed by Executive Order.\(^{41}\) The Commission's task of developing recom-

(Footnote continued from preceding page)

Such selective retroactivity invokes prospects of docket manipulation and constitutional problems of penalizing those who receive speedy trials by denying them the opportunity to choose which law will govern the outcome of the case. Assuming *arguendo* the constitutionality of the provision, how does a defendant exercise this option? At what stage of the proceedings is he required to do so? Can an indictment or information be amended to conform with the defendant's election even though it will charge him with an additional or different offense? Obviously the Code provides no answer. This is nothing more than a defense lawyer's pipe-dream.


\(^{33}\) Sen. Comm. Sub. § 122; KYPC § 122 [KRS § 434C.1-050]; see text at note 55 infra.

\(^{35}\) The offense eliminated was "Theft by Failure to Make Required Disposition of Property Received." Sen. Comm. Sub. § 122; KYPC §§ 122, 124 [KRS §§ 434C.1-060, 434C.1-070].

\(^{37}\) KYPC § 91A [KRS § 434A.4-100]. The continued criminalization of deviate sexual conduct between consenting adults reflects the view that "... support for the removal of a sanction is often interpreted as support for the behavior previously punished..." Moruss & Hawkins, *supra* note 1, at 2. Removal of the criminal sanction for private conduct which does not cause direct injury to person or property is not equivalent to positive approval of that conduct. It is a realization that the criminal law is an inappropriate and ineffective means of regulating private moral conduct.

\(^{38}\) KYPC § 307.

\(^{39}\) [LEG. REC., supra note 15.]


\(^{41}\) Exec. Order No. 72-614 (June 28, 1972).
recommendations for the 1974 General Assembly is difficult. It requires reconciling numerous inconsistencies and redirecting legislative efforts to achieve the original goal of providing Kentucky with a modern criminal code.

III. THE NATURE OF A CODE: EFFECT OF COLLATERAL LEGISLATION

By definition a code is a comprehensive and systematic enactment of a body of jurisprudence. As such, the Kentucky Penal Code includes a number of provisions of broad applicability which set forth general principles underlying the entire document, as well as provisions defining specific substantive offenses and their accompanying penalties. While the structure of such an integrated document simplifies and clarifies the law, it requires an entirely different methodology with regard to modification of its content.

The Penal Code consists of more than 280 interrelated provisions which have been carefully meshed to achieve internal consistency within a unified statutory framework. Thus, amending a Code provision is wholly different from amending other types of statutes which are isolated provisions. Such statutes largely function independently and amendment, therefore, has little effect on other laws. This is simply not the case when a code is amended, and it is imperative that this be understood before further legislative changes are considered. Otherwise the most serious threat to the viability of the Code qua code is, ironically, the legislative process itself. The 1972 General Assembly, succumbing to the temptation of hasty and "isolated" changes, demonstrated some of the pitfalls of following old legislative habits.

A. Amendments Affecting Classification System

One of the primary goals of any major criminal law revision is that of eliminating inequities in penalty provisions. Piece-meal revision inevitably leads to irrational disparities in authorized

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42 Similar pleas were made following the adoption of the Uniform Commercial Code. See, e.g., Whiteside & Lewis, Kentucky's Commercial Code—Some Initial Problems in Security, 50 Ky. L.J. 61 (1961); Whiteside, Amending the Uniform Commercial Code, 51 Ky. L.J. 3 (1962).

43 "From the standpoint of fundamental importance and need for revision, the single most important area was considered to be that relating to classification of offenses and sentencing." New York State Comm'n on Revision of the Penal Law and Criminal Code, Proposed New York Penal Law VI (1963).
punishment, as there is no objective reference point to which newly enacted criminal statutes may be related. Examples of the inverse relationship between the relative gravity of offenses and their accompanying penalties are abundant and all too familiar.\(^4\)

One logical and presently favored approach to abolishing these discriminatory and anomalous distinctions is the use of a comprehensive classification system designed to provide a uniform sentencing structure.\(^5\) By classifying crimes according to their relative severity, existing and potential inconsistencies can be avoided. The Kentucky Penal Code incorporates a classification scheme consisting of seven classes of offenses.\(^6\) While this con-

\(^4\) The litany begins as follows: Petty larceny (stealing money or property worth less than $100) is punishable by a maximum of 12 months in jail, while theft of a chicken worth $2.00 can result in a five year prison sentence. Compare KY. REV. STAT. § 433.230 (1972) [hereinafter cited as KRS], with KRS § 433.250. Carrying a concealed deadly weapon is punishable by two to five years imprisonment, while reckless shooting into the back of an automobile carries a maximum of 12 months imprisonment. Compare KRS § 435.230 with § 435.190. Drawing or flourishing a deadly weapon in any school assembly, place of public worship or on a public highway carries a maximum term of imprisonment of 50 days, while drawing or flourishing a deadly weapon inside or on the platform of an occupied passenger coach is punishable by a maximum of 12 months imprisonment. Compare KRS § 435.200 with § 435.210. Rape of a child under 12 may be penalized by sentence of life imprisonment with privilege of parole, while rape of a child over 12 is punishable by life imprisonment without privilege of parole. Compare KRS § 435.080 with § 435.090. Et cetera ad nauseam.

\(^5\) The American Bar Association project on criminal justice adopted a standard approving this approach:

All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, GENERAL PRINCIPLES: STATUTORY STRUCTURE, Standard 2.1(a) (Tent. Draft 1967).

The Model Penal Code, which provided the impetus for criminal law revisions throughout the country, included such a classification scheme. The lead has been followed in several jurisdictions.

\(^6\) KYPC § 265(2) [KRS § 435A.1-060] reads as follows:

The authorized maximum terms of imprisonment for felonies are:

(a) For a Class A felony, not less than twenty years nor more than life imprisonment;

(b) For a Class B felony, not less than ten years nor more than twenty years;

(c) For a Class C felony, not less than five years nor more than ten years; and

(d) For a Class D felony, not less than one year nor more than five years.

KYPC § 268 [KRS § 435A.1-080] reads in part:

(a) For a Class A misdemeanor, the term shall not exceed twelve months;

(b) For a Class B misdemeanor, the term shall not exceed ninety days.

KYPC § 280 [KRS § 435A.3-040] reads in part:

(1) ... A person who has been convicted ... may be sentenced to pay a fine in an amount not to exceed:

(c) For a violation, $250.
stitutes a vast improvement over former law, isolated amendments to the Code as adopted threaten to undermine the conceptual basis of the unified sentencing structure.

For example, the Final Draft submitted to the 1972 General Assembly contained four degrees of homicide, each defined and graded according to specified culpable mental states. Each homicide offense constituted a different class of felony for purposes of penal sanctions. Manslaughter in the second degree, causing the death of another by consciously disregarding a substantial and unjustifiable risk of which the actor was aware, was classified as a Class C felony. Criminally negligent homicide, causing the death of another person by the actor's failure to perceive a substantial and unjustifiable risk, was graded as a Class D felony. By definition, these offenses involve types of conduct which necessarily differ in terms of traditional notions of blameworthiness. While the Legislature retained the two separate and distinct offenses in the Code, the penalty for second degree manslaughter was reduced to that of criminally negligent homicide—a Class D felony. Treatment of these two crimes as identical in terms of the risk/harm factor is difficult to understand and impossible to rationalize since the penalties for assault remain undisturbed. The improbable result is that wantonly causing the death of another is punishable by one to five years imprisonment, while wantonly causing physical injury by means of a deadly weapon is punishable by five to ten years imprisonment. The result is clearly wrong, but failure to respect the interrelationship of Code sections will inevitably lead to unreconciled and indefensible conflicts in penal provisions.

Another blow to the classification system was dealt by amendment of certain provisions relating to inchoate offenses. Adopting the view that these types of crimes are generally less serious than the completed offense to which they are merely preparatory, the Final Draft treated attempt, solicitation and conspiracy each as

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47 The four classes of criminal homicide were murder, a Class A felony; manslaughter in the first degree, a Class B felony; manslaughter in the second degree, a Class C felony; and criminally negligent homicide, a Class D felony. H.B. 197 §§ 62-65.

48 Id. at § 64.

49 Id. at § 65.

50 Compare KYPC § 64 [KRS § 434A.1-040] with KYPC § 67 [KRS § 434A.2-020].
a lower degree of the crime which was the object of the actor's conduct. For instance, a criminal attempt would be a Class B felony when the crime attempted was a Class A felony, a Class C felony if the attempted crime was a Class B felony, a Class D felony when the substantive offense was a Class C felony, and a Class A misdemeanor when the crime attempted was a Class D felony.

While the Legislature generally adhered to this classification scheme, it lowered the penalty for certain attempt and solicitation offenses. Thus, when the crime attempted or solicited is a Class C or D felony, the inchoate offense constitutes a Class A misdemeanor. There may have been good reasons to modify these provisions, but these reasons should equally apply to the conspiracy statute, which remained unchanged. Failure to reconcile the sections across the board has created dubious results. Agreeing (conspiracy) to commit a Class C felony is punishable as a felony. Encouraging or commanding another to do so (solicitation) or actually taking a substantial step toward the commission of that crime (attempt) is a misdemeanor. This approach distorts the meaning of classification of crimes.

B. The Mechanics of Amendment

Amendments affecting a single provision can also be problematic if the structure of the entire section is not considered. Theft of property lost, mislaid or delivered by mistake provides

51 H.B. 197 §§ 50, 52 and 53.
52 KYPC §§ 50, 52 [KRS § 433D.1-010, 433D.1-030].
53 Even bills submitted by the Kentucky Crime Commission, the agency primarily responsible for funding and supervising the Penal Code project, were not immune from myopic drafting techniques. House Bill 203, which establishes a police salary supplement program, contains a provision punishing one who "knowingly or willfully makes any false or fraudulent statement or representation in any record or report to the Kentucky Crime Commission. . . ." HB 203, 1972 Ky. Gen. Ass., Reg. Sess. § 23. It is presently a felony to obtain money by false pretenses or to make a false claim against the state. KRS §§ 434.050, 434.230, 434.240. Thus, this provision complements existing criminal statutes punishing the submission of false or fraudulent reports or records with the intent to obtain funds to which the agency or individual was not entitled. What it covers, which is not presently a criminal offense, is conduct comparable to that proscribed by Section 201 of House Bill 197—unsworn falsification to authorities, a Class B misdemeanor. KYPC § 201 [KRS § 434E.5-100]. While the penalty in House Bill 203 is comparable to that contained in the Code, it deviates from that penalty by defining authorized fines and sentences in terms of maximums and minimums and by including a fine which is double the amount authorized under the Penal Code for an offense with an identical maximum term of imprisonment. If there is any jurisprudential validity in the classification system incorporated in the Penal Code, it certainly should be applicable to this special but unincorporated offense.
a striking example. The Final Draft defined the offense as being committed by one who comes into control of such property and fails to take reasonable measures to restore it to the owner with intent to deprive him of it.\textsuperscript{44} The Legislature amended the provision by eliminating the requirement that the actor must attempt to restore the property to the person entitled to it. The form of amendment was simply to delete in its entirety the subsection containing that element. It was, however, that subsection which also specified the requisite intent for commission of the offense. Consequently the enacted provision defines the offense as being committed when the actor merely “comes into control of property of another that he knows to have been lost, mislaid or delivered under a mistake as to the nature or amount of the property or the identity of the recipient.”\textsuperscript{45} Undoubtedly it was not the purpose of the amendment’s drafter to create a strict liability theft offense, but the provision contains no requirement of intent. This puts the courts in the position of having to ignore the plain meaning of the statute and to supply legislative text in order to avoid direct conflict with Section 16 of the Act which specifically prohibits imposition of absolute liability for an offense defined in the Code unless it is only a violation. Theft of lost property is either a Class A misdemeanor or a Class D felony, depending upon the value of the property which is the subject of the theft.

C. The Problem of Special Legislation

A problem which frequently impairs the effectiveness of a code is the tendency of legislatures to respond to public reaction when new forms of old problems surface. Viewed in isolation from their proper context, these problems give rise to the emergence of “special legislation” creating “new crimes.” This, in part, accounts for the hodgepodge of overlapping and inconsistent criminal statutes which gave impetus to the Penal Code project. Sections 285-306, an integral part of House Bill 197, are designed to reconcile Code provisions with other existing statutes and to eliminate duplication and conflict. These sections expressly repeal some 430 statutes and amend 22 others. Unfortunately, during the 1972 legislative session a number of criminal statutes

\textsuperscript{44} H.B. 197 § 121.  
\textsuperscript{45} KYFC § 122 [KRS § 434C.1-050].
intended to function independently of the Code were enacted, creating the same problems the Code was supposed to eliminate.

An example is House Bill 395 which makes punishable the intimidation or injuring of any witness, juror or officer of the court on account of his participation in a judicial proceeding, or corruptly or forcibly obstructing the due administration of justice. The bill includes a penalty of one to five years imprisonment and/or a fine of $1,000-$5,000. While such conduct should be treated as criminal, the crimes defined by this statute are not novel. It is presently an offense to obstruct justice, to procure the absence of a witness, to bribe a juror, to send threatening communications, to commit an assault, and to inflict bodily injury upon another. Such conduct may also be punishable as embracery and contempt. The various types of conduct proscribed by House Bill 395 will also be covered by numerous Penal Code provisions of broader applicability such as obstructing governmental operations, harassing communications, terroristic threatening, menacing, and assault.

The main thrust of House Bill 395 appears to be to increase the penalty imposed for such conduct when its object is a specified limited class of persons. While it is laudable to protect trial participants from criminal assaults, all citizens are entitled to be free from such intrusions. If the penalty for those existing offenses which House Bill 395 restates is too light, the logical action is to increase the penalty rather than to indulge in the fiction of creating a "new crime." Moreover, if the statute is designed to remedy inadequate penalties, it both succeeds and fails. While the penalties for offenses such as obstructing justice, sending threatening communications, and common law assault are increased, penalties for other bodily injury offenses are decreased.

The same conflict exists with reference to the aforementioned Penal Code provisions.

This problem is not unique to Kentucky legislation. In fact,
it closely parallels recent experiences in other states which have labored long and hard to codify and modernize criminal law. One striking example is the Illinois "Masked Gunman Bill" which was drafted in response to a situation where the suspects were apprehended "while riding in a stolen automobile while masked and carrying unconcealed weapons." Although the police believed the men were planning either murder or robbery, they lacked sufficient evidence to support such a charge and were compelled to content themselves with merely charging the suspects with auto theft. Shortly thereafter a bill was introduced in the Illinois General Assembly making it a felony for any person to possess a firearm on his person or in his vehicle "when he is hooded, robed or masked in such a manner as to conceal his identity." The crime, which includes no element of intent, is punishable by one to five years imprisonment in the penitentiary—a penalty which vastly exceeds that authorized for possession of a deadly weapon with intent to use it unlawfully against another person. The bill passed both houses of the Legislature unanimously.63

Perhaps it was this form of legislative treatment of criminal law which provoked Clarence Darrow to lash out at those who "constantly cudgel their brains to think of new things to punish, and severer penalties to inflict on others."64 While legislatures are continuously subjected to pressures from various interest groups and the general public, the responsive action must be tempered with reason and concern for its consequences. Clearly this is not always the case, and the preceding Kentucky and Illinois statutes are examples of the exercise of bad legislative judgment. There are, however, variations on this theme which require more difficult decisions. They include proposals which have a practical basis for consideration but which call for an awkward or inappropriate legislative response. Another new Kentucky criminal statute illustrates this particular problem.

House Bill 48, introduced January 7, declared that

[j]t shall be unlawful for any prisoner confined at the penitentiary or at any other institution or facility operated by the Department of Corrections to assault or batter any guard,

64 C. Darrow, THE STORY OF MY LIFE 122 (1932).
officer, warden, employee . . . or any person who, not being a prisoner, is lawfully in or about the penitentiary or other institution or facility.65

This portion of the bill merely restates the commonly understood prohibition against assault and battery, but with respect to a narrowly defined class of persons. The penalty imposed by the original bill was one to five years imprisonment, a significant increase in existing penalties for ordinary assault and battery.66 The really novel aspect of the bill is that a prisoner accused of this crime shall be confined in the penitentiary rather than a county jail while awaiting trial.

The bill passed the House by a vote of 68-17,67 but became bogged down in the Senate Judiciary Committee because of concern over imposition of harsher penalties upon imprisoned felons who commit an offense punishable by a maximum of twelve months in jail when committed by non-prisoners.68 Two members of the House appeared before the committee to explain the need for such legislation.69 It was stated that Oldham and Lyon counties, the locations of Kentucky's two state penitentiaries, are financially burdened by the problem created when a prisoner assaults a guard. The prisoner is confined in the county jail to await trial, and, if he is convicted, he is subject to a fine and/or a sentence up to one year in that jail. He may not be returned to the penitentiary to serve the sentence since assault is a misdemeanor and penitentiary sentences are authorized only for felony convictions.70 At the time the bill was under consideration the Oldham County jail had seven such prisoners serving sentences for assaulting a penitentiary guard.71 After consideration of the legislation in light of these problems, the bill was reported

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66 KRS § 431.075.
67 LEG. REC., supra note 15, at 50.
69 Id. The House members appearing before the committee were Rep. Jay Louden, D-Carrolton and sponsor of the bill, and Rep. Richard Lewis, D-Benton.
70 KRS § 431.060.
71 Two House Members, supra note 68.

favorably with an amendment redefining the penalty as a maximum of twelve months imprisonment (the penalty for ordinary assault and battery) to be served in the penitentiary. House Bill
48 was passed as amended, signed by the Governor, and became effective June 16, 1972.72

The result of this effort was the creation of another "new crime" which is identical in definition and penalty with an existing crime. In order to avoid such needless duplication which merely clutters and confuses the criminal statutes a carefully drafted amendment to Kentucky Revised Statutes § 431.216 (1972), dealing with commitment of prisoners to the custody of the Department of Corrections, would have been a preferable alternative. Maverick legislation such as House Bill 395 and House Bill 48 must be repealed before the Penal Code becomes effective if it is to bear any resemblance to a true code.

IV. THE KENTUCKY PENAL CODE: A SUCCESS STORY?

From the standpoint of positive impact on a massive body of substantive law, the Penal Code makes tremendous headway toward accomplishing needed reforms. Classification of offenses lends uniformity to the statutory structure of the law of crimes and eliminates arbitrary sentencing practices without being inflexible. This is a milestone for Kentucky criminal law. Codification signifies the elimination of archaic criminal provisions and special legislation which are indigenous to our criminal law. It also means consolidation of offenses by use of well defined provisions of broader applicability than prior statutes, thus greatly simplifying and clarifying the law. Incorporation of general principles of criminal liability and provisions relating to inchoate offenses serves to provide concrete definitions where none heretofore existed. The format utilizes a topical arrangement of provisions which should facilitate research as well as amendment. The overall product is a welcome and needed change in a long ignored critical area.

This is not to say, however, that the Code as adopted eliminates all of the defects that it was intended to remedy. The long-range implications must be given serious attention before the 1974 General Assembly convenes.

The purposes of the Penal Code will be subverted if the Legislature persists in continuing the current trend toward pro-

72 LEG. REC., supra note 15, at 50.
liferation of statutory law. This will cause undue complexity and substantially impair the functional approach contained in the Code. New criminal legislation must be carefully considered lest it conflict with rather than complement Code provisions. New legislative techniques and analytical skills must be developed with a view toward perceiving the structural relationships implicit in any true code.

This is not to suggest, however, that the process of codification is equivalent to that of ossification. The emergence of issues not adequately dealt with is an absolute certainty, and this will require amendment and/or repeal of some provisions of the Code. But sensible revision cannot be accomplished on an ad hoc basis. Complete reform is a long term project which requires continuing attention. Careful analysis of the interrelationship of an isolated bill with all other criminal laws cannot be sandwiched in by legislators who are given 60 days every two years to consider 1,048 bills and 261 resolutions, as in 1972.

It is strongly urged that a permanent body of impartial and qualified persons be established to review proposed criminal legislation and to advise the Legislature as to the effects of such proposals on the Penal Code. Some will undoubtedly be superfluous, others critically needed. But it is of paramount importance that dedicated efforts by those having the requisite expertise play an integral part in this ongoing process. The structural and substantive integrity of this complex body of law must not only be safeguarded by constant surveillance, but it must also be adapted to respond to the inevitable social and legal changes which will confront the administration of criminal justice.