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The Kentucky Penal Code: Forty Years of Unresolved Tension and Conflict Between Sentencing Philosophies

By Ernie Lewis and Dan Goyette

Watch out for those who *"constantly cudgel their brains to think of new things to punish, and severer penalties to inflict on others."*

Clarence Darrow

"The purposes of the Penal Code will be subverted if the legislature persists in continuing the current trend toward proliferation 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…"

Prof. Kathleen F. Brickey, Judicial Conference and Council Executive Director

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"We have met the enemy, and he is us."

Pogo

We have witnessed the tortuous evolution of the Kentucky Penal Code. Both of the authors of this article have practiced law as public defenders throughout the era following the passage of the Kentucky Penal Code by the General Assembly (1974 Ky. Acts, Ch. 406), which became effective on January 1, 1975. Many of the observations that follow are their opinions, borne of this experience. It is a story of mostly good people trying to do the right thing, often succeeding, sometimes failing, always trying again. It is also a story of a model code subjected to the vagaries of the political process over the course of the ensuing forty years, and the failure of the legislative branch to agree on basic principles. The end result has been a Code that in many ways bears little resemblance to the design, spirit and intent of the one enacted in 1974, one with which few are currently satisfied, and even fewer motivated or able to marshal the political will to form the consensus necessary to address and remedy the problems that have developed, particularly in the area of sentencing.

Confusing and inconsistent: the Kentucky criminal law prior to the Penal Code. For centuries, criminal law in Kentucky was the product of what had been inherited from Virginia and the common law. The Kentucky Constitution of 1792 stated that all laws in force on June 1, 1792 from Virginia were also in force in Kentucky, including common law from England prior to March 24, 1607.[1] Specific sentences were included with each criminal law. "The statutory law had grown haphazardly over the better part of two centuries."[2] The "great body of substantive criminal law was not in the statutes at all… It resided in the restless ocean of common law, some of it floating near the surface for everyday observation, and therefore quite familiar, and some of it virtually indefinable in the obscurity of the deep."[3] Often, laws were redundant, inconsistent or outright contradictory. Penalties varied and were similarly inconsistent. The only codification of anything was that of criminal procedure, which had occurred in 1962.

Thus, on the dawn of the Penal Code, the criminal law of Kentucky was "anachronistic, disorganized, and sometimes contradictory. Laws overlapped, such that the same criminal conduct could result in prosecution for different offenses and could result in illogically applied, disparate, or discordant sentences and other punishment. No operational definitions existed for criminal acts; defining crime was essentially left to the judiciary and its appellate writings. In short, Kentucky had a criminal law 'beset by shortcomings, inequities, and, in some cases, nonsense.'"[4]

The Model Penal Code was influential. The Model Penal Code has been called the "closest thing to being an American criminal code."[5] It was the product of the American Law Institute, a "non-governmental organization of highly regarded judges, lawyers and law professors in the United States."[6] Its development began in 1931, stalled during World War II, and resumed in earnest in 1951. The chief "architect" of the

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Model Penal Code was Columbia University's Herbert Wechsler, who had participated in the Nuremberg trials. Tentative drafts were debated until 1962, when a "Proposed Official Draft" was approved by the ALI.

The Model Penal Code has been characterized as "principled pragmatism."[7] Since its release, it has been used by thirty-four states to draft their own codes.

Kentucky Penal Code was written in order to deal with the confusion. After the release of the Model Penal Code, the powers that be in Kentucky saw a way out of the confusion. A decision was made to codify the Commonwealth's criminal laws. In 1968, the General Assembly ordered a study of the criminal code by both the Kentucky Crime Commission and the Legislative Research Commission. The Kentucky Criminal Law Revision Committee was created to write a new criminal code. It included powerful and insightful people, including Court of Appeals Judge John Palmore, Attorney General John Breckenridge, two trial judges (including Hon. Robert Lukowsky), two prosecutors, and four practicing attorneys (including Frank Haddad).

The Committee worked with four drafters. These drafters included the remarkable and highly respected Professors Robert Lawson and Kathleen Brickey, as well as Paul Murphy and Assistant Commonwealth's Attorney Carl Ousley. The drafters reviewed the Model Penal Code as well as codes from other states. The effort was ably supported by LRC staffer Norm Lawson. Norm Lawson still offices on the top floor of the Capitol, and he is a living repository on the history and development of the Penal Code. He was very

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[1] Kentucky Criminal Law, A Treatise on Criminal Law under the New Kentucky Penal Code, Professor Kathleen Brickey (1974).

[2] "Preface to Symposium on the Kentucky Penal Code," John S. Palmore, 61. Ky. L. J. 620 (1972-1973).

[3] *Id.* at 622.

[4] Violence against Women in Kentucky, Professor Carol E. Jordan (2014).

[5] "An Introduction to the Model Penal Code," Paul Robinson and Markus Dubber at 1.

[6] *Id.*

[7] *Id.*

generous to the authors with his time and vast knowledge. It is hoped that one day he will memorialize his unique experience and perspective in writing for posterity.

There were six original aims for the Penal Code, to wit: 1) eliminate common law offenses; 2) create elements for all criminal offenses; 3) establish a system of punishments based on the seriousness of the offense, with offenses that caused death or serious physical injury, or in which a deadly weapon was used, resulting in higher sentences; 4) examine the Model Penal Code of the American Law Institute and the recent penal codes of other states as templates for the Kentucky Penal Code; 5) establish a presumption in favor of rehabilitation programs over imprisonment; and 6) replace numerous existing specific offenses with the general offenses set forth in the various penal codes which were studied.

While the Model Penal Code was the primary document utilized by the drafters, they relied extensively on the codes that existed in Michigan, Illinois, and New York. The first draft was completed in 1971. This draft was proposed as House Bill 197. Oddly, HB 197 was characterized in the media as an abortion bill, with scant attention paid to the codification of criminal law. The abortion provision appeared on only one page of the 373-page bill. It was one of the "hot potatoes" encountered in 1972.[8] Ultimately, the abortion provision was removed, and the bill passed. However, it was not to be implemented until there was further study and reflection.

Thereafter a resolution was passed to create a Kentucky Penal Code Study Commission to work on a new draft. This new draft was proposed in 1974 as House Bill 232, and it passed that year with the guidance of Rep. Bill Kenton and Sen. Mike Moloney.

Kentucky Penal Code was organized in a manner similar to the Model Penal Code. The Code followed roughly along the same lines as the Model Penal Code. It abolished all common law offenses. It contained a general section including definitions, mental states, and broad principles of justification, inchoate offenses, double jeopardy, and the like. All criminal offenses required an act or omission. One of four specific mental states was set out for each offense ("criminal negligence" was replaced by "recklessness" in 1974). The law of parties to crime was abolished, and liability for crime was henceforth based upon the actor's state of mind and the conduct of others. The second section of the Code set out the criminal offenses. It defined offenses, spelling out the elements that had to be proven. As opposed to laws previously in place, the Code did not provide for the sentence within the offense itself, but rather simply placed the offense in one of a range of four classifications (not counting the "capital" denomination). A third section specified the penalties for the different classifications as well as other laws pertaining to sentencing, probation and fines.

One writer characterized the new Code this way: it was "drafted to be a comprehensive but highly flexible codification, a codification that would fully define all criminal offenses, eliminate the need for 'special legislation,' and provide a uniform classification of crimes. Probation was to be a primary sentencing option for a broad range of offenses. Judges were to be given substantial flexibility in determining the concurrent or consecutive service of multiple terms of imprisonment."[9]

Prisons were overcrowded even when the Penal Code was drafted. In the early 1970s, Kentucky prisons were overcrowded. The Legislative Research Commission was studying the corrections system and prison population at that time. They observed that probation was not being used enough – Kentucky's rate was 32 percent, compared with a nation-wide average of over 50 percent. At the time, the annual cost of incarceration was $2,300 per inmate, compared to a cost of $400 for those who were placed on probation and parole. Reforms were passed in 1972 in response to the LRC's report. These included the creation of community residential correctional centers (which eventually led to half-way houses), the conditional release of inmates who had served their time, and the use of shock probation.

In retrospect, prison overcrowding should have been manageable at that point in time. There were only 3,216 inmates in Kentucky's penal system by 1975. The rate of incarceration was only ninety-five per 100,000. Another 3,500 offenders were under supervision. And DOC's budget was only $11 million.[10] However, it is important to note that the context for the creation of the Code was the perception that prisons were overcrowded. Indeed, the reliance in the Code on indeterminate sentencing and on the presumption of probation was based in part on the desire to reduce incarceration.

Drug laws were ultimately addressed in separate legislation. The original draft of the Code contained Sections 2900-2915 addressing controlled substances. These sections included six crimes related to trafficking and possession in the 1st to 3rd degree. Ultimately, the state's controlled substance laws were not part of the effort to draft a Penal Code. Instead, in 1972, the General Assembly passed the Controlled Substances Act.

The Penal Code was based on a philosophy of rehabilitation. The new Code relied upon a philosophy of sentencing that was borrowed from the Model Penal Code. The Model Penal Code "recommended all of the essential components of a rehabilitation model – penalty ranges for most crimes, indeterminate sentencing for serious offenses, individualization of punishment… broad discretion placed in the hands of the sentencing authorities, and heavy use of parole for determining the actual lengths of incarceration."[11]

Kentucky's adoption of a philosophy of rehabilitation came at the beginning of a nationwide change in sentencing policy. The Model Penal Code's "provisions for sentencing and treatment have not been influential. They reflect a rehabilitative approach that has since fallen out of favor."[12] "Current American practice is to limit sentencing discretion. That change in approach comes in part from a belief that discretion undercuts the virtues of the legality principle: Discretion increases the likelihood of disparate sentences for similar offenders committing similar offenses."[13]

Kentucky's new Penal Code followed the rehabilitation philosophy for the most part. "The drafters of the Code have apparently decided that the primary objective of criminal sanctions should be the rehabilitation of the offender."[14] "It is hoped that, by reforming the criminal and turning him into a useful, law-abiding member of society, the wasting of human resources can be avoided and real progress can be made towards reducing crime."[15] To facilitate rehabilitation, the law featured indeterminate sentencing, whereby the defendant in large part had control over when he would be released.

There were four classifications of felonies, with penalty ranges from 1-5, 5-10, 10-20, and 20 years-life depending upon the class of felony (A, B, C or D). The death penalty was also an option for capital offenses. Jury sentencing was maintained, keeping Kentucky in the minority of the states in that regard. The jury or the judge fixed a penalty within the penalty range established by the classification.

Probation was to be the "primary sentencing option for a broad range of offenses."[16] There were no exclusions from consideration for probation other than a life or death sentence. There were no mandatory minimums. The sentencing authority was not "empowered to set a minimum sentence which must be served."[17] The presumption of probation was the "most important change… wherein the trial court is *required* to consider the possibility of probation

[8] "Preface to Symposium on the Kentucky Penal Code," John S. Palmore, 61. Ky. L. J. 620 (1972-1973).

[9] "The Kentucky Penal Code," Frank Haddad, The Advocate (April 1991).

[10] "Difficult Times in Kentucky Corrections – Aftershocks of a 'Tough on Crime' Philosophy," Robert Lawson, 93 Ky. L. J. 305, 323-324 (2004-2005).

[11] *Id.* at 312-313.

[12] "An Introduction to the Model Penal Code," Paul Robinson and Markus Dubber at 6.

[13] *Id.* at 7.

[14] "Authorized Dispositions of Offenders under the New Kentucky Penal Code," Gregory Bartlett, 61 Ky. L. J. 708 (1972).

[15] *Id.* at 709.

[16] "The Kentucky Penal Code," Frank Haddad, The Advocate (April 1991).

[17] Kentucky Criminal Law, A Treatise on Criminal Law under the New Kentucky Penal Code, Professor Kathleen Brickey (1974).

or conditional discharge before imposing sentence. Furthermore, this section provides that, after considering factors such as the defendant's background, character, and the nature and circumstances of the crime, probation or conditional discharge *should* be granted unless imprisonment is deemed necessary for the protection of the public."[18]

If probation was denied, the defendant was committed to the Department of Corrections. Thereafter, the convicted defendant would serve his time until the Parole Board decided that he was ready for release. Parole eligibility was set by regulation. "This is consistent with the Code's objective of reforming and rehabilitating the criminal. If rehabilitation is the primary goal, the actual length of imprisonment, up to the maximum set by the sentence, should be determined by those who supervise and continually re-evaluate the offender's case long after the jury is dismissed."[19]

This was a profoundly hopeful philosophy, reliant upon a belief that a person could be changed in prison. It "arose during an era not dominated by the belief that crime can and should be controlled by infliction of harsh punishment, and in most respects it duplicated the sentencing policies and practices that prevailed in most of America ahead of the tough-on-crime era."[20]

At the time of its passing, the philosophy of rehabilitation was in many ways discordant with what was occurring in the country, a shift that would have a profound effect in the decades that follow.

Law and order arose as a major concern of the American people. Professor Robert Lawson, the University of Kentucky law professor who was one of the primary drafters of the Penal Code, identifies the decades following the creation of the Model Penal Code as a "perfect storm." That storm consisted of a law and order philosophy ascendant in the late 1960s, which thereafter combined with a "war on drugs." President Richard Nixon campaigned for President in 1968 using a "law and order" theme. This resonated with a populace weary of civil unrest and significant social change. It was against this backdrop that the hopeful new Penal Code in Kentucky was passed.

Professor Kathleen Brickey cautioned policy makers to avoid degrading the Code. One of the law professors who worked on the drafting of the new Code was Professor Kathleen Brickey. After the passage of the Code in 1972, she wrote a law review article expressing pride in what had been accomplished. "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 in Kentucky law."[21]

At the same time, she expressed concern over the possibility of changing the document. She advised the General Assembly to be cognizant that the Code had 280 provisions that were interrelated. This fact "requires an entirely different methodology with regard to modification of its content."[22] "The purposes of the Penal Code will be subverted if the Legislature persists in continuing the current trend toward proliferation 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."[23]

Brickey proposed an alternative to changing the Code as soon as it was written. She suggested a "permanent body of impartial and qualified persons established to review proposed criminal legislation and to advise the Legislature as to the effects of such proposals on the Penal Code." That body was never created. Professor Brickey's warnings, as early as 1972, against "degradation" of the new Penal Code would prove prescient.

What does degradation of the Penal Code mean? "Degradation" has been associated with what has happened to Penal Codes written in the various states. It essentially means that new statutes are passed that undercut the basic structure or philosophy of the particular code, that are inconsistent with another statute in the code, or that are redundant. "The main form of degradation is the proliferation of numerous offenses that duplicate, but may be inconsistent with, prior existing offenses."[24]

Why is degradation a problem? Professors Paul Robinson and Michael Cahill identify three problems. First, degrading a code results in citizens not being advised of exactly what law might apply to particular behavior. A second problem is that it "destroys the rule of law."[25] "But the modern expansion of criminalization also reflects a shift of practical authority away from the legislature to prosecutors and police, who now have broad discretion over who gets punished and the level of punishment." Finally, when offenses are inconsistent or redundant, interpretation and implementation of a code becomes more difficult.

How and why does degradation happen to a criminal code? The primary reason, of course, is that citizens experience events that move them to seek some sort of remedy or redress from their legislators, who in turn propose some action in response to the particular situation. This is the "crime *du jour*" problem. Another reason is that prosecutors benefit from degradation because it presents an opportunity to ask for new laws that make their jobs easier, particularly ones that give them "a great deal of discretionary power and leverage to induce plea bargains on their terms."[26] A third reason is that of "special interest lobbying."[27] And a final reason, identified by Professors Robinson and Cahill, is that of the "news-story/political response cycle."

Code degradation, which most frequently results from designer offenses and crimes *du jour*, "cause(s) positive damage to the effective operation of the code. The new offenses tend to be drafted as if the existing general offensive(s) did not exist."[28]

Degradation of the Kentucky Penal Code began shortly after it was passed and took effect in 1975. Perhaps because of the clash between the Code's reliance upon rehabilitation and an increasing fear of crime, or perhaps because prosecutors deliberately waited until the dust had settled in the aftermath of the Code's passage to propose contrary measures, the Penal Code did not remain intact for long. The 1976 session of the General Assembly demonstrated that the allegiance to the underlying philosophy of the Code, including its belief in rehabilitation, its wide flexibility and discretion in sentencing with a presumption in favor of probation, was shaky at best. The General Assembly immediately set out to undercut that philosophy, a process of degradation that has been steady and ongoing since 1976.

The first and most significant changes to the Code related to the persistent felony provisions contained in KRS 532.080. Enhancement of sentences was not an innovation of the Code. Pre-Code law featured a harsh "habitual offender" law whereby a second felony offense was subject to the doubling of the sentence and a third offense required a life sentence. The Code altered this regimen significantly. It established the status of being a persistent felony offender. PFO in the 2nd degree did not exist in the original Code. To be found guilty of being a persistent felon, one had to have committed two prior felonies and served time in prison. PFO was intended to be reserved for the truly persistent and unrepentant felon who had served time twice in prison and continued to reoffend. "The 1974 Code carefully and deliberatively guaranteed that its 'three strikes' law would be used only against high-rate offenders who had been unresponsive to extended rehabilitation by the State."[29] "These elements indicate that the

[18] "Authorized Dispositions of Offenders under the New Kentucky Penal Code," Gregory Bartlett, 61 Ky. L. J. 708, 726 (1972).
[19] *Id.* at 717.
[20] "Difficult Times in Kentucky Corrections – Aftershocks of a 'Tough on Crime' Philosophy," Robert Lawson, 93 Ky. L. J. 305, 311 (2004-2005).
[21] "Introduction to the Kentucky Penal Code: A Critique of Pure Reason," Professor Kathleen Brickey, 61 Ky. L. J. 624, 639 (1972).
[22] *Id.* at 631.
[23] *Id.*
[24] "The Accelerating Degradation of American Criminal Codes," Paul Robinson and Michael Cahill, 56 Hastings L. J. 633, 635 (2005).
[25] *Id.* at 639.
[26] *Id.* at 646.
[27] "Can a Model Penal Code Second Save the States from Themselves?" Paul Robinson and Michael Cahill, 1 Ohio St. J. Crim. L. 169, 170 (2003).
[28] *Id.*

persistent felony statute will be applied only in those cases where the offender truly deserves to be considered an habitual criminal."[30] At the same time, a person found to be a persistent felon was still eligible for early release. "In taking this position, it (the Code) chose to leave persistent felons with a glimmer of hope for freedom and to give corrections professionals the authority to release long term prisoners who cease to be threats to public safety…"[31]

Penal Code Reform in Kentucky was short-lived. No change better demonstrates the clash between the sentencing philosophy proposed and adopted in the Code and that held by at least the political class and perhaps by the public at large. In the 1976 session, a 2nd degree persistent felony offense was created. In addition, the legislature removed the requirement that a persistent felon must have actually served time in prison on the previous offense. Further, the possibility of probation was eliminated. And eligibility for parole consideration in sentences involving PFO in the 1st degree was set at a minimum of ten (10) years. In many ways, the harshness of the pre-Code habitual criminal statute was restored and even enhanced.

These changes to the PFO law "would one day find the state's laws full of mandatory minimum sentences that play a very substantial role in the state's chronic prison population problem, with very little evidence that they work to reduce crime rates and lots of opinion suggesting that they do not."[32] This turned the PFO law into a "lethal weapon against repeat offenders… and provided Kentucky's prosecutorial forces with one of the toughest 'three strikes' laws enacted."[33]

"Once reserved for rare use against incorrigible offenders (twice incarcerated and still offending), Kentucky's PFO law now awaits every defendant who arrives in court with a felony record. It supplies prosecutors with sentencing weapons that exist in very few states, inflates the prosecution's already extraordinary power over punishment, deflates the judge's role in that crucial decision, pushes some of the law's most important decisions out of the sunshine and into the shadows, and, in conjunction with other sentencing weapons, elevates the risk of trial to almost intolerable levels. Exemplifying our undeniable enthusiasm for incarceration, it deserves a lion's share of credit for the inmate explosion that has overcrowded our prisons and done far worse to our jails."[34]

The changes to the PFO laws had an immediate effect on incarceration. In 1980, there were only seventy-nine persons held as a PFO in Kentucky's prisons. By 1984, the PFO population had grown to 1,142. By 2004, that level had risen to 4,187. Today, the PFO numbers have declined somewhat to 3,592. Unfortunately, while the PFO law contributed to the rapid expansion of Kentucky's prisons and to their cost, "these laws have done little to reduce crime."[35]

One recent effort at reforming this situation came close to changing the PFO law. In 2008, the Kentucky Criminal Justice Council recommended that PFO 2nd be abolished. In addition, the Council recommended the removal of the ten-year mandatory minimum for PFO 1st, and also recommended restoring the requirement that a defendant must have served time in prison before becoming eligible for persistent felony offender status.[36]

The passage of KRS 533.060 in 1976 effected a second major change to the Code. This amendment undercut the presumption of probation inherent in the Code and prohibited consideration of probation when a weapon was involved in the commission of a crime. It also required consecutive sentencing when a defendant committed an offense while awaiting trial or while on probation or parole.

Many prosecutors and judges were reluctant to consider alternatives to incarceration. The presumption of probation was a fundamental tenet of the Kentucky Penal Code when it was adopted. In order for this sentencing strategy to work, however, prosecutors and judges had to endorse and actually use the new law. However, history proved that passage of a Code does not effectively change decades of sentencing behavior.[37] Of course, as subsequent events have demonstrated, this would not be the last time a law was passed with the intent of altering sentencing behavior which in practice was largely ignored by prosecutors and judges.

1980: parole eligibility changed slightly. The "perfect storm" continued to develop in the 1980s. By that time, "most law and policy makers had abandoned rehabilitation as the predominant justification for punishment," and it was replaced by a philosophy of "just deserts." Punishment was linked primarily to the crime rather than to the offender.

When the Code was passed, parole eligibility was set by regulation. A person who had received a lengthy prison sentence was eligible for probation. And even a life sentence did not disqualify a prisoner at least for consideration of release on parole in six years. This time frame changed slightly from six to eight years with revisions in parole regulations that occurred in 1980.

1984: No probation for sex offenders. Degradation continued in 1984 with the passage of KRS 532.045. This statute precluded most sex offenders from consideration for probation. It also required sex offender treatment prior to release, and allowed for revocation for failure to complete treatment.

1986: A high-profile crime leads to major degradation of Code reforms with the enactment of "Truth-in-Sentencing." On September 29, 1984, two Trinity High School students were murdered while on their way to a high school football game in Louisville. In the aftermath of this case, which included a highly publicized trial, two death sentences, and controversial rulings on the inadmissibility of evidence, the first "truth-in-sentencing" law was passed and codified in KRS 532.055 and KRS 439.3401. In addition to adding a second hearing before the jury during which parole eligibility was discussed and the nature of criminal records was revealed, "truth-in-sentencing" also created a new criminal category in Kentucky known as a "violent offender." The violent offender was one who had committed a few narrowly drawn, clearly violent Class A and Class B felonies. Such an offender would have to serve a mandatory minimum period of time prior to being eligible for parole. In 1986, this mandatory minimum was set at 50 percent of the term of years imposed at the time of sentencing.

The War on Drugs increased and exacerbated additional degradation of the Code and caused an explosion in the inmate population. Following on the heels of the "law and order" and fear of crime trend that developed in the late 60s and 1970s, the 1980s birthed a new crime phenomenon – the spread of crack cocaine and the gang wars and homicides related to its proliferation, which resulted and a brief, but sharp increase in the rate of violent crime. President Richard Nixon had already declared a "war" on drugs in June of 1971, resulting in certain mandatory sentences, the rejection of the decriminalization of possession of marijuana, and a growth in federal interest in controlled substances. This approach intensified during the Reagan administration, during which the number of people incarcerated for nonviolent drug offenses increased from 50,000 in 1980 to over 400,000 by 1997.[38]

The war on drugs had a profound effect on sentencing policy and incarceration rates in Kentucky. "Kentucky signaled fairly early a determination to use imprisonment as the first and foremost weapon against the drug epidemic."[39] During the 80s and 90s, other

[29] "Difficult Times in Kentucky Corrections – Aftershocks of a 'Tough on Crime' Philosophy," Robert Lawson, 93 Ky. L. J. 305, 336 (2004-2005).

[30] "Authorized Dispositions of Offenders under the New Kentucky Penal Code," Gregory Bartlett, 61 Ky. L. J. 708, 718 (1972).

[31] "Difficult Times in Kentucky Corrections – Aftershocks of a 'Tough on Crime' Philosophy," Robert Lawson, 93 Ky. L. J. 305, 336 (2004-2005).

[32] *Id.* at 339.

[33] *Id.* at 337.

[34] "PFO Law Reform, A Crucial First Step toward Sentencing Sanity in Kentucky," Robert Lawson, 97 Ky. L. J. 1, 31 (2008-2009).

[35] "Unlocking America: Why and How to Reduce America's Prison Population," JFA Institute, Dr. Jim Austen, *et al.* (November 2007), at 13.

[36] KCJC Report and Recommendations on PFO (2008).

[37] "Alternative Sanctions and the Governor's Crime Bill of 1998 (HB 455): Another Attempt at Providing a Framework for Efficient and Effective Sentencing," Judge Gregory Bartlett, 27 N. Ky. L. Rev. 283 (2000).

[38] Drug Alliance, http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war.

provisions, such as raising penalties for selling drugs to a minor, selling drugs within 1000 yards of a school, selling drugs while a weapon is nearby, and enhancing drug offenses in addition to PFO, increased potential sentences significantly. These statutory provisions were passed in response to the escalation in the use of drugs. "There is nothing in the content or history of those provisions… to indicate that they derive from some kind of carefully calculated effort to develop a rational penalty structure for drug crimes. They were enacted one-by-one over a period of about twenty-five years and appear to be related to one another only by a common motive – a firm belief that the best way to control the drug epidemic is to put more people in prison for longer periods of time."[40]

The War on Drugs had a secondary negative effect. "The prosecution and imprisonment of low-level traffickers has increased racial disparities, and is the largest factor contributing to the rapid rise in imprisonment rates for women."[41]

1991: Frank Haddad calls for penal code reform. Frank Haddad had been a member of the original Criminal Law Revision Committee that produced the Kentucky Penal Code. A prominent Louisville criminal defense lawyer, Haddad was in a position to witness the very real degradation of the project on which he had worked two decades before. In an article written in April 1991 for the Department of Public Advocacy's The Advocate, he looked back and saw changes that had "so degraded the uniform sentencing structure envisioned by the drafters of the Code that the very inflexibility they struggled to remove is now indelibly ingrained in the present Code. Seventeen years of sporadic and isolated legislative tinkering have left the sentencing structure of the Code riddled with inflexibility and inconsistency." Haddad called for a return to the reform efforts of the early 70s and a re-examination of the Penal Code. "It may well be time once again, in the words of Professor Brickey, that the criminal law of Kentucky is 'dragged, screaming,' into the twenty-first century."[42]

1992: A Task Force fails to reform sentencing. Another sign of growing dissatisfaction with the sentencing provisions of the Penal Code was the creation of a Task Force in 1992 to study the issue. This Task Force, chaired by Rep. Bill Lear of Lexington, heard several proposals from its committees. Among the proposals were ones to require a person to spend half of his life expectancy on a life sentence, another that would establish in one section of the Code all offenses where probation could not be granted, and a third that would have established punishment as a goal of the Penal Code. Sentencing guidelines were considered by the Task Force. The "Report of the Task Force on Sentences and Sentencing Practices" was released by the LRC in July of 1992. Ultimately, a community corrections statute was passed as a result of the action of the Task Force, but none of the other more draconian recommendations were adopted. The dissatisfaction remained.

1997: Governor's Criminal Justice Response Team calls for major reform of the criminal justice system. A few years and a couple of governors later, Governor Paul Patton created what he called the Governor's Criminal Justice Response Team. His stated reason for forming the Team was because "crime in Kentucky was exacting an unacceptable toll both in taxpayer dollars and in human suffering."[43] This was a hand-picked group of over thirty individuals, heavy with law enforcement, which spent months reviewing the entire criminal justice system. They divided into subcommittees and presented numerous recommendations to the full Response Team. They issued an eighty-page report in December of 1997 with 100 recommendations. Among their recommendations were the following:

- The creation of the Kentucky Criminal Justice Council to "provide leadership and coordination for criminal justice concerns at the state level."
- A comprehensive review of sentencing, concluding that the Penal Code's sentencing provisions had "aged" enormously, resulting in inequities and inconsistencies. It was envisioned that this would be accomplished by the creation of a Sentencing Commission.
- Structured judge sentencing, with the elimination of jury sentencing.

The report also asserted that the philosophy of rehabilitation, embedded in the Penal Code, had been replaced by a philosophy of deterrence and incapacitation. "This change in philosophy, along with an increase in the use of enhanced penalties and more restrictions on the availability of alternatives, has almost certainly resulted in the current population explosion in the prison system, and with it the increased cost of operating the correctional system."[44] Their work culminated in the proposal of one of the major criminal justice reform efforts since the writing of the Penal Code, House Bill 455.

1998: The "Riverboat Gamble" of House Bill 455, or how we took the federal money and changed our sentencing philosophy. House Bills 455 and 463 constitute the two most significant efforts to reform the criminal justice system since the Penal Code was passed. Neither purported to change the Penal Code; rather, both were attempts to address dissatisfaction with the operation of criminal justice system, mostly resulting from sentencing provisions in the Code.

HB 455 adopted many of the recommendations of the Criminal Justice Response Team. Some of the provisions of HB 455 included:

- The creation of a thirty-three-member Criminal Justice Council from across the criminal justice system.
- Crime Victim Bill of Rights
- Criminal gang legislation
- Sex offender risk assessments
- Drug testing as part of pretrial release
- Life without parole for capital murder
- Lethal injection to replace the electric chair
- No probation for crimes committed while wearing body armor

Arguably the most significant change in HB 455 was raising the parole eligibility rate for "violent offenders" contained in KRS 439.3401 from 50 percent to 85 percent. To offset the possible costs of this change, HB 455 altered the language of the probation statute, making it more likely that trial judges would be granting probation for low-level offenders. This was a "river-boat gamble" – in essence, the legislature mandated longer prison sentences for violent offenders, but suggested to trial judges that they use their discretion to grant probation more often.[45] Since that time, corrections costs have more than doubled, demonstrating that the gamble failed. And since the 85 percent provision did not take effect until 2000, the full impact of the law has not yet been seen or fully realized.

At the time, Judge Greg Bartlett, who as a young lawyer had written a law review article on the Penal Code, weighed in again on the effects of HB 455. "Unless the citizens of Kentucky are willing to suffer continued and increased overcrowding of the prisons, and unless they are content to bear the ever-rising cost of operating the penal system, the longer mandatory sentences called for in HB 455 must be balanced with the use of appropriate alternative sanctions for the minimum risk offenders."[46]

HB 455 virtually guaranteed that Kentucky's prison population would continue to increase over the coming years. It did so by raising the mandatory minimum for a violent offender to 85 percent. It also did so by increasing the minimum

[39] "Difficult Times in Kentucky Corrections – Aftershocks of a 'Tough on Crime' Philosophy," Robert Lawson, 93 Ky. L. J. 305, 353 (2004-2005).
[40] *Id.* at 358.
[41] "Unlocking America: Why and How to Reduce America's Prison Population," JFA Institute, Dr. Jim Austen, *et al.* (November 2007), at 24.
[42] "The Kentucky Penal Code," Frank Haddad, The Advocate (April 1991).
[43] "Alternative Sanctions and the Governor's Crime Bill of 1998 (HB 455): Another Attempt at Providing a Framework for Efficient and Effective Sentencing," Judge Gregory Bartlett, 27 N. Ky. L. Rev. 283, 295 (2000).
[44] *Id.* at 298.
[45] "HB 455 is a Gamble," Ernie Lewis, The Advocate (September 1998).
[46] "Alternative Sanctions and the Governor's Crime Bill of 1998 (HB 455): Another Attempt at Providing a Framework for Efficient and Effective Sentencing," Judge Gregory Bartlett, 27 N. Ky. L. Rev. 283, 299 (2000).

parole eligibility for a life sentence from twelve to twenty years. Further, violent offenders were not eligible for good time as a result of HB 455. Sex offenders had to complete treatment before receiving good time or becoming eligible for parole. A new three-year conditional discharge was added to the sentences of all sex offenders. Probation was prohibited for all violent felons.

There were some off-setting provisions: a provision that probation could be considered in some non-violent Class D cases involving persistent felons in the 1st and 2nd degree; the sentence of a person in possession of drug paraphernalia could not be enhanced under PFO provisions; the probation statute was changed to read that probation "shall be granted" unless necessary to protect the public, and that alternatives to incarceration "shall be considered" unless certain criteria are met; denial of probation required written findings by the trial judge. Additionally, other alternatives to incarceration were created, including pre-release probation (later found to be unconstitutional), pre-trial diversion, and increased use of split sentences.

2000: Manufacture and use of Methamphetamine prompts change. Kentucky had earlier changed its drug laws in response to the growing use of crack cocaine, a phenomenon that occurred mostly in Kentucky's cities and larger towns beginning in the late 1980s. By the late 1990s, manufacturing of methamphetamine began to alarm Kentucky's law enforcement community, as thefts of anhydrous ammonia increased, meth labs were exploding, innocent victims were maimed or killed, and the meth addict became a problem for prosecutors, defenders, jailers, and treatment professionals. In response, Kentucky once again passed a series of draconian laws that were dramatically out of proportion to statutes involving other similarly dangerous drugs. Manufacturing meth became a Class B felony, and a second offense became a Class A felony. KRS 218A.1432. Statutes were written dealing with precursors associated with the manufacturing of meth. KRS 218A.1437 and .1438. Stealing anhydrous ammonia was included in the receiving stolen property statute, potentially a Class A felony. KRS 514.110(3)(d). The new crimes of controlled substance endangerment in the 1st, 2nd, 3rd degree were created. KRS 218A.1441, .1142, .1443, .1444.

A redraft of the Kentucky Penal Code is developed. HB 455 charged the new Kentucky Criminal Justice Council with studying and reforming the Penal Code. The need for a revised code had been recognized for more than a decade, summarized in the following way: "the current Penal Code has numerous inconsistencies, redundancies, ambiguities, and contradictions."[47]

[47] "Final Report of the Kentucky Penal Code Revision Project of the Kentucky Criminal Justice Council," (July 2003).

An energized KCJC, under the leadership of former Supreme Court Justice and existing Justice Cabinet Secretary Robert F. Stephens and KCJC Director Kim Allen, tackled the project. A penal code subcommittee was created, led by UK law professor Bill Fortune and Carol Jordan. Professor Paul H. Robinson of the University of Pennsylvania Law School, one of the world's leading criminal law scholars and an expert in the development of penal codes, was retained as the Reporter for the effort. Paul Robinson is one of the world's leading criminal law scholarsPaul Robinson is one of the world's leading criminal law scholarsThree Kentucky law professors, Les Abramson of the Brandeis School of Law at the University of Louisville, Bill Fortune of the College of Law at the University of Kentucky, and Mark Stavsky of the Chase College of Law at Northern Kentucky University, worked with Prof. Robinson to draft a new Kentucky Penal Code. They wrote the code section by section, distributed each section to the subcommittee for thoughts and comments, and redrafted it until it was acceptable to all. Unfortunately, early in the process, prosecutors "withdrew from the drafting effort to signal their opposition to any kind of broad code reform."[48] Eventually, a draft was completed and presented to the full KCJC, which adopted it and sent it to the legislature and the Governor.

The revised Penal Code was completed in July of 2003. It included additional provisions not in the present Penal Code. It eliminated unnecessary or inconsistent provisions of the Code. It also set out to ensure that offenses and rules were coherent and related to one another in a consistent and rational manner. Five principles guided the work of the revised penal code:

1. Clear and accessible language and organization.
2. A comprehensive statement of rules.
3. Consolidation of offenses. This was undertaken in order to deal with the proliferation of special legislation. Consolidation "ensures against the confusion that results when one encounters, and must make sense of, multiple provisions that overlap or contradict…"[49] Consolidation also "aids the task of proper grading, because it is nearly impossible to maintain consistent, proportional grading when offense definitions are based on insignificant, or incomprehensible, distinctions."
4. Grade offenses rationally and proportionally.
5. Retain as much of the existing policy decisions as is reasonable.

The new and improved Kentucky Penal Code sits on a shelf collecting dust. Politics happen … unfortunately, in this case. A Republican Governor, Ernie Fletcher, was elected in 2001 to replace a Democratic Governor, Paul Patton, who had been the sponsor of the Criminal Justice Response Team. Under Gov. Fletcher, the Kentucky Criminal Justice Council atrophied. The Executive Director and a researcher both left the Council and were not replaced. Eventually, the membership of the Council was cut by more than half, reducing its broad-based nature and influence significantly.

[48] "The Accelerating Degradation of American Criminal Codes," Paul Robinson and Michael Cahill, 56 Hastings L. J. 633, 650 (2005).

[49] "Final Report of the Kentucky Penal Code Revision Project of the Kentucky Criminal Justice Council," (July 2003).

The effect of politics on the Criminal Justice Council cannot be emphasized enough. There was strong sentiment and support for the Council in the Criminal Justice Response Team. HB 455 endorsed the concept. The Executive Branch funded it and fully supported it. The Council met on a quarterly basis with great energy, hiring a superb criminal justice professional in Kim Allen to lead it. It was divided into committees, and produced excellent work, including studies on racial profiling, parole, and sexually violent predators. It was well attended by large segments of the criminal justice system, including legislators. It served as a vehicle for studying problems in the criminal justice system and bringing them to the attention of the larger community, including the legislative and executive branches.

Ultimately, Penal Code revision was one of the projects sidelined by the change in administrations. Despite the high quality, exemplary work produced by the KCJC, it was never introduced as a bill. No legislator championed it. And soon it took its place on various shelves around Frankfort.

2000-2011: One failed task force or commission after another. The Task Force on Sentencing and Sentencing Practices met in 1992 and produced very little. The Criminal Justice Response Team, on the other hand, was highly productive, resulting in the passage of HB 455. Once the revised Penal Code effort was derailed and its recommended legislation was put to rest, the dissatisfaction with sentencing, the increase in incarceration, and the burgeoning costs returned. Some policy makers realized that prison costs were going up by tens of millions of dollars a year, and that DOC was projecting over 30,000 inmates by 2014.

This time the response was not to revise the Penal Code, nor was it to commit to sentencing reform that would effectively address the driving forces of over-incarceration. Instead, what followed in the 2000s was a series of task forces that met and attempted to find common ground.

Particularly noteworthy were the efforts of Chief Justice Joseph Lambert and Lieutenant Governor Steve Pence, who convened the Blue Ribbon Commission on Sentencing in 2005. The impetus for this Commission was the publication of Professor Robert Lawson's influential law review article, "Difficult Times in Kentucky Corrections –

Aftershocks of a 'Tough on Crime' Philosophy." The charge for the Commission was "studying sentencing practices [and] identifying potential changes in sentencing practices, and ultimately with making recommendations to the General Assembly."[50] The Commission met several times and attempted to find consensus on ways to reduce the prison population. After considerable opposition from the Attorney General and prosecutors, the Commission stopped meeting after three sessions and issued a report on January 20, 2006. Agreed recommendations were few in number and of no great consequence other than, perhaps, the felony threshold on theft crimes. The Commission could not agree on whether to change the PFO statute, either by eliminating PFO 2nd or by applying the PFO statute only to Class A or B felonies. The Commission could not agree on whether to permit drug enhancements. Similarly, no other amendments to KRS 218A could be agreed upon. While the Commission rejected any changes to enhancements to property crime sentences, they were able to agree to raise the theft threshold from $300 to $1,000. The Commission recommended that a defendant who commits a crime while on pretrial release would have his sentence enhanced by one level. To demonstrate the dysfunction of the Commission, the last paragraph of the report suggested that "the recommendations approved by a majority of the Commission, even if adopted, will not significantly impact Kentucky's increasing prison population." The report noted that several "members of the Commission, however, believe that elimination of 'two strikes' provisions for drug offenses would significantly reduce the prison population." Yet no recommendation to that effect was made.

Thereafter, legislative task forces were appointed almost annually to tackle the issues of sentencing and the prison population, again with few tangible results. The proliferation of task forces and calls for Penal Code reform have demonstrated, if nothing else, the need for reform. Whether a renewed commitment to real reform results from all this remains to be seen.

2011: A Task Force finally produces some success – HB 463 is born. House Bill Concurrent Resolution 250 created yet another task force to study the Penal Code, the Controlled Substances Act, and other statutes. Yet, it was not just another task force. It had two strong leaders from different parties at the helm, Rep. John Tilley and Sen. Tom Jensen. It was small in size and consisted of powerful people who were engaged in and committed to the process, including the Supreme Court Chief Justice, John D. Minton, Jr., Secretary of the Justice Cabinet J. Michael Brown, former Commonwealth's Attorney Tom Handy, defense lawyer Guthrie True, and County Judge Executive Tommy Turner. They engaged the expertise and assistance of the Pew Center on the States, which served as the primary consultant to the Task Force, along with JFA and CJI. The consultants were essential to the process, supplying a significant amount of data to the Task Force and demonstrating what was working in other states.

The Task Force returned with a report to the General Assembly in January of 2011. Immediately thereafter, HB 463 was proposed and ultimately passed, incorporating many of the recommendations of the Task Force. The Task Force managed to break through the gridlock that had plagued previous task forces. The members were not intimidated by opposition from prosecutors, likely due to the reasonable contributions of former Commonwealth's Attorney Tom Handy. And for the first time in decades, they veered sharply away from the incapacitation and retribution philosophies of the previous three decades, substituting a philosophy of pragmatism and commitment to evidence-based practices.

The report indicated what finally forced change to occur: "Looking back over a longer period, the state's prison population has jumped more than 260 percent since 1985, from about 5,700 inmates to more than 20,700 in 2010, according to the Department of Corrections. At year-end 2007, one of every ninety-two adults in Kentucky was incarcerated, compared with one of every 100 adults nationally. This high rate of prison expansion is not due to an increase in crime. Kentucky's serious crime rate has been well below that of the nation and other southern states since the 1960s, and the current crime rate is about what it was in 1974. Nevertheless, the state imprisonment rate went from well below to slightly above the national average between 1985 and 2009… During the past two decades, the Commonwealth's spending for the increased incarceration has grown dramatically. In fiscal year 1990, general fund corrections spending in Kentucky totaled $140 million. In FY 2010, that amount was $440 million, an increase of 214 percent."

HB 463 made profound changes to the criminal justice landscape, including the following:

- Reduced the sentences for possessory drug offenses.
- Introduced differentiation between quantities of drugs sold in order to distinguish between peddler/addicts and true traffickers. Unfortunately, at the request of law enforcement, the bill introduced the concept of aggregation, giving ninety days to law enforcement to obtain sales of enough quantity to charge trafficking.
- Reduced the use of enhancers in drug offenses.
- Reduced the maximum sentence for possession of marijuana from twelve months to forty-five days.
- Created an alternative called "deferred prosecution" for certain possessory drug offenses.
- Created "presumptive probation" for certain possessory drug offenses.
- Introduced new sentencing ranges of 1-3 years for Class D felonies, thereby informally creating a new classification. Misdemeanor classifications were reduced as well to 1-45 days or 1-30 day sentences for some drug offenses.
- A possessory offense could not be enhanced by PFO.
- Introduced mandatory reentry supervision.
- Authorized the use of graduated sanctions for technical violations of probation and community supervision.
- Authorized early termination of probation.
- Required savings to be plowed back into treatment in the form of "justice reinvestment."
- Required the use of risk assessments throughout the criminal justice system, including sentencing and parole decisions. Judges are also required to use risk assessment instruments in the pretrial release decision.
- Mandated the use of evidence-based practices throughout the criminal justice system.
- Altered the school drug offense changing the offense from trafficking within 1,000 yards of a school to 1,000 feet.
- Most misdemeanor arrests could not result in custody, but rather required citations to court.

Three years have passed since HB 463. Some of its provisions have had profound effects, while others are simply being ignored by prosecutors and judges. The Criminal Justice Council is required to meet annually to review the implementation of HB 463.

HB 463 and various half-measures bent the projected inmate populations. In the 2004-2014 Department of Corrections population forecasts, it was projected that Kentucky would have 26,527 inmates by 2010 and 31,057 by 2014 if nothing was done.[51] That has not happened. Instead, for the last several years, the population has remained somewhat static at a little over 20,000.

The Penal Code responded to changes in society. A penal code is not a static thing. It must respond to the changes in the society or it will lose legitimacy. In 1972, Professor Brickey tempered her caution against changing the Code by acknowledging that the process of writing a Code was not the same thing as "ossification. The

[50] "Difficult Times in Kentucky Corrections – Aftershocks of a 'Tough on Crime' Philosophy," Robert Lawson, 93 Ky. L. J. 305 (2004-2005).

[51] "Turning Jails into Prisons – Collateral Damage from Kentucky's 'War on Crime,'" Robert Lawson, 95 Ky. L. J. 1, 3 (2006-2007).

emergence of issues not adequately dealt with" in the Code "will require amendment and/or repeal… 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."[52]

Examples of how the Kentucky Penal Code changed over time to avoid "ossification" are abundant. When fear of terrorism and school shootings grew in the late 1990s and early 2000s, the General Assembly passed legislation creating a new crime that specifically punished the use of a weapon of mass destruction (KRS 527.205). When the public became aware of teenagers, mostly young girls, from this country and, even more so, from other nations being sold into a form of slavery or forced into prostitution, the General Assembly responded by passing laws relating to human trafficking (KRS 529.100). When the damage that bullying did to the psyche of students was revealed, statutes were written such as harassment dealing with theft of the property of a student, disrupting a school, and creating a hostile environment. KRS 525.070. When technology made possible new kinds of sex crimes, video voyeurism was made a Class D felony in 2002. KRS 531.100. And, during the early part of the 2000s, with Second Amendment concerns rising, the General Assembly passed the "Castle Doctrine" in KRS 503.050.

Societal views on DUI, drugs, sex offenses, and domestic violence shifted. Other topics caught the eye of the general public throughout the 1980s and 90s, and they reshaped Kentucky's criminal law. Prior to the 1980s, driving under the influence of alcohol was viewed as a relatively minor offense. MADD Mothers proved to be an effective advocate for altering this view, and DUI laws changed dramatically. Mandatory jail time, scrutiny over plea bargains, a *per se* law that eventually lowered the blood alcohol content level to .08 in DUI cases, and creation of a felony offense DUI were just some of the changes that were made in response to the shift in public opinion.

Similarly, drug offenses gathered the attention of policy makers as the War on Drugs dragged on from the 80s and through the 90s into this century. First attention was directed at crack cocaine; then attention turned to methamphetamine, followed by prescription drugs, which dominated several sessions, as did synthetic drugs. Today, all the attention is being directed at heroin.

The Code recognized that the rights of victims needed to be addressed. Another significant development that affected the criminal laws in Kentucky was attention to and advocacy for the rights of victims. The 1986 Truth-in-Sentencing law reflected this new attention and aggressive advocacy, which was fueled by politicians running for elective office. In addition to Truth-in-Sentencing, numerous "rights" were accorded to victims of crime in that same year and thereafter. This included requirements that victims be "consulted" by the Commonwealth's Attorney regarding the disposition of a case (KRS 421.500(6), as well as the right to make a "victim impact statement" to the probation officer for inclusion in the presentence investigation report which the trial judge had to consider in sentencing. KRS 421.520 (1) & (3). KRS 532.055(7) also required that the "impact of the crime upon the victim…including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim…" was to be included as part of the evidence heard by the jury when fixing a sentence.

The Evolving View of Women. The clearest example of being responsive to societal changes occurred in the area of domestic violence. At the time the Penal Code was written, the women's movement was hitting its stride. However, according to Professor Carol Jordan, author of a well-written and thoroughly researched book on the development of domestic violence legislation in Kentucky (and much more), the Penal Code that passed in 1974 was not what the women's movement would have wished.[53] A few examples demonstrate her point: a married man could not be prosecuted for raping his wife; prior "unchaste" conduct of a rape victim was relevant at a rape trial; the crime of rape included the element of forcible compulsion requiring proof of earnest resistance by the victim.

Violence against women was brought into public consciousness during the 1980s and 90s. The General Assembly began to pass legislation in response, with considerable pressure from powerful women's groups. Civil protective orders were established in law in 1980. The crime of criminal abuse was created in 1982. Two years later, the Domestic Violence and Abuse Act of 1984, which included a law authorizing *ex parte* protective orders, passed the General Assembly. That same year, the Crime Victims' Bill of Rights was passed, as was the first requirement of sex offender treatment for those so convicted. In 1988, civil protection was expanded to include ex-spouses and unmarried couples with children. Also that year, the earnest resistance part of forcible compulsion was removed from the rape statute, and the prosecution of marital rape became possible in 1990. In 1992, rape with a foreign object became a crime, as did stalking. That same year, DNA testing for convicted sex offenders passed, followed by sex offender registration laws in 1994 and laws denying probation to most sex offenders. Enhanced penalties for misdemeanor domestic assault were passed in 1996, and the assault 3rd degree statute was expanded to include social workers. As part of HB 455, life-time registration for some sex offenders was authorized in 1998.

The 2000s continued the same trend. Protective orders for stalking victims passed in 2002. That same year, the crime of video voyeurism passed. Indecent exposure 1st degree and fetal homicide statutes passed in 2004. In 2010, Amanda's Law and statutes making it a crime to have sexual relations with incarcerated persons passed.

Special legislation has been unabated and abundant. The Code was written in part to eliminate the need for "special legislation." Special legislation includes statutes written to apply to a specific situation or a high publicity crime – so-called designer offenses and the crimes *du jour*. "The problem of both sorts of legislation – designer offenses and crimes du jour – is that they not only are generally unnecessary, but also cause positive damage to the effective operation of the code. The new offenses tend to be drafted as if the existing general offense(s) did not exist."[54] By 1992, the Penal Code had been "ravaged by special legislation that undermines the most important elements of sentencing discretion… Many of the very problems the Code sought to cure are back in force, reanimated by ill-conceived, special legislation."[55]

During the last forty years, the General Assembly has passed numerous laws that can be classified as "special legislation." An example of a "crime du jour" is the 2nd degree manslaughter amendment in 2000, amending KRS 507.040(2) to include leaving a child under eight in a vehicle. This was precipitated by a specific case involving the tragic death of a child. The existing 2nd degree manslaughter statute already applied to the proscribed behavior. Yet, the General Assembly added redundant language to the existing statute.

Perhaps the best example of special legislation has occurred over time to the assault 3rd statutes of KRS 508.025. Initially, assault was divided into three classifications, assault in the 1st, 2nd, and 4thdegrees, based upon the severity of the injury and how the injury was inflicted. The classifications were reasonable. But in 1982, the assault 3rd degree statute was written ostensibly to protect law enforcement, even though the existing classifications already protected law enforcement. Thereafter, the identity of the person assaulted became more important than the dangerousness of the assault or the extent of the injury. All that is required for a conviction of assault 3rd is an intentional mental state and an attempted physical injury. Yet each session of

[52] "Introduction to the Kentucky Penal Code: A Critique of Pure Reason," Professor Kathleen Brickey, 61 Ky. L. J. 624, 640 (1972).

[53] Violence against Women in Kentucky, Professor Carol E. Jordan (2014).

[54] "Can a Model Penal Code Second Save the States from Themselves?" Paul Robinson and Michael Cahill, 1 Ohio St. J. Crim. L. 169, 171 (2003).

[55] "The Kentucky Penal Code," Frank Haddad, The Advocate (April 1991).

the General Assembly saw another class of persons seeking a special felony classification for an assault on them. Now a person can be convicted of a felony assault 3rd for the assault of a social worker, an EMT, a volunteer fire person, a rescue squad volunteer, a probation officer, a school employee, and a school volunteer. Each legislative session in recent years has also seen a bill proposed to place taxi drivers into a special, albeit unnecessary, category.

Other examples of special legislation can be found. After the BOPTROT scandal, a Class C felony was created for bribing a public servant. KRS 521.050. In response to the Westport Baptist Church outrage, 1st degree disorderly conduct was created. KRS 525.055. When flowers were taken from a cemetery in southeastern Kentucky, a Class C felony was created for desecrating a venerated object. Violating graves was created as a Class D felony. Assault of a service dog in the 1st and 2nd degree passed in response to stories of this occurring. KRS 525.200. And the list goes on, despite the fact that most if not all of this conduct can already be prosecuted as criminal activity under existing law.

Violent offender as special legislation. Of all the changes contrary to the basic philosophy behind the Code, none has been more significant than the creation of the "violent offender" category or had a more negative effect on the goals and structure of the Code. Violent offender legislation punctuated the predomination of the punishment/incapacitation principle over the rehabilitation principle. The Code was premised on the notion that consideration of probation by a judge was not prohibited for any crime other than a capital crime or felony with a life sentence. In 1986, the violent offender statute substituted a mandatory minimum service of 50 percent of sentence prior to parole eligibility. This was changed to 85 percent after HB 455 was passed in 1998.

Was the creation of the violent offender category the recognition of a change in society that mandated an alteration of the Code, the sort of legitimate change to the Code that was contemplated and referred to by Professor Brickey? Or was it special legislation? In many ways, it was the former. Societal views toward the purpose of corrections had shifted at the time the Code was being written. Confidence in rehabilitation had waned. The people of Kentucky were calling for longer sentences and harsher punishments. Probation and parole were derided. From this perspective, it may have been appropriate to create mandatory minimums reflective of what society was calling for, even if, in the views of the authors, as well a number of commentators and authorities, the change was unwise and contributed to over-incarceration.

On the other hand, one can persuasively argue that it was special legislation in terms of both cause and effect. KRS 439.3401 was a direct result of and response to a "crime *du jour*," *i.e.*, the Trinity students murder case. It was fundamentally inconsistent with the basic philosophy of the Code. It created mandatory minimums for Class B felonies, something previously not allowed. And by not changing the rest of the Code, the violent offender statute was inconsistent with the remainder of the Code.

Since 1986, the evidence has only increased that KRS 439.3401 is a clear example of special legislation as new crimes *du jour* have been proposed and passed. By choosing the particular name "violent offender," the legislature invited the public to compare the particular crime they may have experienced to others. For example, the question of whether an unintentional homicide should be placed into the violent offender category typically is supported by a statement such as, "but somebody died! You mean that's not violent?" As a result, the reach of the statute has been extended considerably. Today, one can be a violent offender not only for murder in the 1st degree, manslaughter, 1st degree assault, and 1st degree rape and sodomy, as originally intended, but also for the unintentional killing of a police officer or firefighter while in the line of duty resulting in a conviction for 2nd degree manslaughter (a Class C felony) or even for reckless homicide (a Class D felony). Any felony sexual offense, including an attempt, is a violent felony (including a so-called statutory rape or 1st degree sex abuse). The use of a minor in a sexual performance, promoting a sexual performance by a minor, unlawful transaction with a minor 1st degree, human trafficking, 1st degree criminal abuse, some burglary 1st cases, and robbery 1st are now all included in the "violent offense" category. Most carry a mandatory minimum sentence. Like the amendments to the PFO statute after the Code was first written, what was to have been a narrow statute applicable to only a few has now reached a significant number of charged felonies. This has contributed significantly to the degradation of the Code as well as to the explosive growth of incarceration.

Class A theft? Another example of special legislation occurred in 2013 with the passing of an amendment to KRS 514.030. Theft had been classified as a misdemeanor in the original Penal Code, unless the value exceeded a particular amount. Initially, some called for a threshold difference between misdemeanor and felony at $1,000. Instead, the threshold was set at $100. This threshold was changed to $300, and then changed again to $500, but only after the passage of considerable periods of time. However, theft by unlawful taking remained a Class D felony. That changed in 2011, when an amendment to the statute established a Class C felony for theft over $10,000.

Then came the special legislation. FedEx approached legislators in Jefferson County in 2013 and convinced them that five years was not sufficient for thefts from their trucks. As a result, we now have a Class C felony theft for amounts between $10,000 and $1 million, a Class B felony for theft from $1 million to $10 million, and a Class B felony with 50 percent parole eligibility for a theft exceeding $10 million.

Nothing demonstrates better the abandonment of the philosophy of the Code than establishing a Class A theft at the request of one corporation or one industry. The Class A and B felony classifications were reserved in the Penal Code for serious and violent offenses involving serious physical injury or death or the possibility thereof. Now, a sophisticated cat burglar, or a thief of a parked tractor trailer truck, is equivalent to a murderer for purposes of punishment under our existing Code. Such a thief can theoretically spend the rest of his or her life in prison.

We continue to hold on to enhancers rather than use the full range of available penalties. After the Code was written, virtually the only enhancer was that of PFO. Since that time, the General Assembly has grown fond of creating additional enhancers beyond the persistent felony category, often creating confusion regarding whether double enhancement can occur. Some examples of this are the 3rd misdemeanor sex offense under KRS Chapter 510, the third assault 4th of a family member (KRS 508.032), and the second misdemeanor conviction of the torture of a dog or cat (KRS 525.135), all of which are elevated from misdemeanors to felony offenses.

Prosecutors resist any change in the enhancers, particularly PFO. Prosecutors are able to hold an enhancer over the head of a defendant who is reluctant to take a plea offer, often wearing down the resistance of the overcharged or innocent defendant. They also seem mostly unwilling to use the upper ranges of classifications (five years on a Class D) in lieu of the enhancer.

We have enhanced the power of prosecutors, and reduced the authority and discretion of the judiciary and the Parole Board. One of the more recent trends has been the "disappearing jury trial." The most likely culprit for this is the degradation of the Penal Code. Changes in the law have filled up the quiver of aggressive prosecutors, who can charge an offense carrying a mandatory minimum and then plead that charge down to one with a more acceptable parole eligibility.

Prof. Lawson has made the following observation about the PFO statute as it currently is written: "An adversarial balance that once dominated the criminal justice system has been victimized by unprecedented, unguided, and largely unchecked prosecutorial discretion to dictate sentences, evidenced most clearly by the ever increasing percentage of cases resolved by guilty plea and a virtual disappearance of the criminal trial, a

troubling and largely unexplored phenomenon…"[56]

Obtaining a felony conviction has become quick and easy. The line of demarcation between a misdemeanor and a felony was once clear. A misdemeanor was for a petty offense not involving a large amount of property or a serious injury, and a small amount of jail time usually was deemed sufficient punishment. A felony was reserved for more egregious behavior and involved a sentence of imprisonment in a penal institution that results in an annual investment of what now amounts to $22,000 in taxpayer money. Today, dozens upon dozens of collateral consequences follow a felony conviction, including loss of the right to vote and to carry a firearm, as well as the loss of many benefits including the right to work in particular jobs and professions.

Nevertheless, the legislature has chosen to obliterate the distinction between a felony and a misdemeanor. For example, violating a grave is now classified as a Class felony. The prohibited behavior that constitutes this crime may only involve removal of a shrub. KRS 525.115. Yet, the convicted shrub thief can receive up to ten years in prison at a potential cost of over $200,000 to Kentucky taxpayers. Another example of this incongruity is the offense of assault on a service dog. This crime can be a Class D felony, but it may involve nothing more than kicking at a dog that is trying to bite a citizen during an arrest.

The original classification system has been degraded. For decades, the classification system of four felonies worked well. However, in recent years the General Assembly has added on years of supervision that potentially extend the maximum sentence above the particular classification. For example, post-incarceration supervision of five years has been added to the sentences of sex offenders, thereby converting a maximum sentence of five years for a Class D felony to ten years, formerly reserved for a Class C felony. KRS 532.043. Potentially that could result in a one year sentence for sex abuse first converted to six years, not even the minimum on a Class C felony. Post-incarceration supervision of all persons serving out sentences includes one additional year of supervision, including all classifications. KRS 532.400.

Many half-measures have been taken to reduce over-incarceration while maintaining the classification system. State officials have viewed with alarm the exponential growth of the prison population since the Code was enacted, from 3,000 to 22,000 over the course of forty years. The cost has risen even more dramatically, from $9 million in 1970 to $500 million today. One response might have been to reduce potential sentences within the classifications. Another response might have been to move some offenses into a lower classification. A third response might have been to increase the number of classifications with lower sentences for the bottom classifications. None of these possible solutions has been undertaken or even attempted.

Instead, the General Assembly in recent sessions has taken half-measures, often as part of the budget bill, that result in the release of inmates before serving their time in order to make room for others awaiting transport to prison. These measures include allowing for home incarceration of Class C and D felons within nine months of release (KRS 532.260), the split sentence (KRS 532.210), and credit for time spent in substance abuse treatment and home incarceration (KRS 532.120(6) and (7)). In the 2008 session alone, the General Assembly increased the use of home incarceration, the use of the parole supervision credit, increased the size of the Parole Board, mandated Parole Board review of nonviolent Class D offenders after service of 15 percent of sentence, increased educational good time credit from sixty to ninety days for obtaining a GED, increased the use of meritorious credit from five to seven days per month, moved up the final discharge date, increased funding for substance abuse treatment in jails, and allowed for GPS tracking of certain felons, all through the device of the budget bill, HB 406.

Keeping inmates in county jails has been the primary response to over-incarceration. Kentucky today houses more state inmates in county jails than any other state in the country other than Louisiana. As of the writing of this article, more than 9,000 persons are serving felony sentences in detention facilities intended for misdemeanants and persons held awaiting trial. Those 9,000 are part of a jail population that by 2006 had risen nationwide to 713,990.[57] Jails are frequently over-crowded, in violation of correctional standards, and subject to lawsuits and federal court intervention.

Rather than taking responsible measures to reduce the number of state inmates being housed in jails, Kentucky has changed the plumb line and reduced the standards, increasing overcrowding. "In the 1980s, jail standards required '60 square feet of confinement space per inmate – roughly the size of an average bathroom.' In the 1990s, those standards softened under the pressure of inmate flows to require only fifty square feet of space per inmate. In the 2000s, under more pressure from inmate flows, the standard in question converted by practice into a jail standard on beds (from "[fifty feet per prisoner" to fifty feet per jail bed). The end result was eight beds for 400 square feet of pod space (or ten beds for 500 square feet), mattresses on the floor not counted as beds, and inmates with far less than fifty square feet of living space."[58]

The result is a stark and disturbing one. "It begins to look more like a storage bin or human warehouse than a penal institution in pursuit of corrections. In a jail converted into a prison (and holding inmates in close confinement for years rather than days), it is almost sure to harden the unhardened and do far more harm than good to the whole troubled lot that supplies most of the jail population."[59]

It has not always been so. As late as 1983, Kentucky housed only 564 felons in county jails. By 1990 this had doubled. By 2000, there were 3,639 inmates in county jails. But today, almost half of all incarcerated felons are held in county jails. The 9,000 convicted felons being so held are enough to require construction of nine additional prisons.

The structural spine of the Kentucky Penal Code remains sound. A review of the Penal Code as it exists today reveals something surprising: the spine of the Code, its overall structure, remains sound. The original purpose in creating the Penal Code – eliminating common law offenses, defining offenses, creating four mental states, classifying offenses primarily according to dangerousness, and establishing general principles of law, has been achieved and survived the test of time. Most of the general provisions have gone unchanged, such as burdens of proof, the requirement of an act and a mental state (501.070), causation (501.060), ignorance and mistake (501.070), intoxication (501.080), duress (501.090), choice of evils (503.030), entrapment (505.010), and prosecution for multiple offenses (505.020).

Likewise, many of the definitions of crimes have also remained the same. The definition of homicide as defined in KRS 507.010 has remained unchanged. Other examples are the following: reckless homicide (507.050), assault 1st (508.010), assault 2nd (508.020), unlawful imprisonment 1st and 2nd (509.020 & .030), rape 1st (510.040), sodomy 1st (510.070), sexual misconduct (510.140), trespass 1st, 2nd, and 3rd (511.060, .070, and .080), criminal mischief 1st, 2nd, and 3rd (512.020,.030,.040), robbery 1st and 2nd (515.020, .030), forgery 1st, 3rd (516.020, .040), criminal possession of a forged instrument 1st, 2nd, and 3rd (516.050, .060, .070), riot 1st (525.020), all of Chapter 526 involving eavesdropping, bigamy (530.010), concealing the birth of an infant (530.030), and abandonment of a minor (530.040).

Does the success of risk assessment instruments indicate a possible return to the rehabilitation model? The rehabilitation approach to

[56] "PFO Law Reform, A Crucial First Step toward Sentencing Sanity in Kentucky," Robert Lawson, 97 Ky. L. J. 1, 14 (2008-2009).

[57] "Turning Jails into Prisons – Collateral Damage from Kentucky's 'War on Crime,'" Robert Lawson, 95 Ky. L. J. 1, 8 (2006-2007).

[58] *Id.* at 35.

[59] *Id.* at 36.

sentencing, favored in the Model Penal Code, fell out of favor when "the limited ability of the social sciences to rehabilitate dampened the interest in broad sentencing discretion."[60]

However, HB 463 offers some hope to those supportive of the rehabilitation philosophy. The sentencing policy of the Commonwealth was announced in HB 463, now codified in KRS 532.007. That policy has announced that the objective of sentencing is to "maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced." While not explicitly endorsing rehabilitation, HB 463 calls for using the social sciences, including evidence-based practices, and it explicitly endorses the use of risk-assessment instruments. It can be argued that this represents a tacit renunciation of the retribution and incapacitation philosophies of the past three decades.

2014: An inmate population of 22,000 costing $500 million annually. Forty years ago, policy makers were dealing with prison overcrowding, hoping that the new Penal Code would help reduce the prison population by presuming the imposition of probation and the use of other alternative types of sentencing. That was not to be. Instead, Kentucky went on an incarceration binge. The trend line has bent only slightly since HB 463 and, unfortunately, shows no signs of declining significantly.

Costs have risen as well. In 1970, we spent only $9 million on corrections. That rose to $28.7 million in 1980, and to $129.1 million by 1990. By 2000, we were spending $273.9 million annually. Today we spend approximately half a *billion* dollars. The Department of Corrections seeks budget authorizations each year, and each year they seek emergency dollars known as a "necessary government expense." In essence, law enforcement by virtue of their arrest decisions, prosecutors by their charging decisions, and judges by their sentencing decisions, collectively determine the extent of the state's investment in annual corrections costs.

It is at best only slightly comforting to realize that what Kentucky has experienced also occurred nationwide. In the United States in the year 1970, only 196,429 inmates were housed in state and federal prisons.[61] Today, that number has grown to 2.3 million. What has caused this to happen? "This "generation-long growth of imprisonment has occurred not because of growing crime rates, but because of changes in sentencing policy that resulted in dramatic increases in the proportion of felony convictions resulting in prison sentences and in the length-of-stay in prison that those sentences required."[62]

"By far the major reason for the increase in prison populations at least since 1990 has been longer lengths of imprisonment."[63] It is important to note that this has occurred while the crime rate, which increased significantly in the 1980s, is back at the level it was in 1973.

Professor Lawson attributes what he generally refers to as an incarceration addiction to many factors. A "quiet change of philosophy from rehabilitation to retribution" is the primary factor. He decries the "loss of appreciation" for the presumption of probation and for flexibility in the ultimate imposition of sentences of imprisonment. He also cites the changes in the PFO statute, tougher attitudes in the parole system, "truth in sentencing," penalty enhancements, the creation of new crimes like flagrant nonsupport, and tougher penalties across the board.[64] Lawson sees a "loss of proportionality", citing the "vanishing" distinction between "serious and non-serious offenders."

Has Kentucky accepted a public policy that incarcerates 22,000 inmates costing a half billion dollars a year? The 1970s were a time of reform. In addition to the Penal Code, the Controlled Substances Act was passed. The Judicial Article followed, eliminating bail bonds and establishing one of the most progressive court systems in the nation, including an innovative approach to pretrial release. None of the original reformers are left from that band of legislators who committed to the codification of criminal law in the early 1970s. No one who served on the budget review subcommittee charged with creating a budget for Corrections of $9 million per year for 3,000 inmates is still serving in the legislature. Many legislators have left since HB 455 was passed in 1998, when a $200 million corrections budget was approved to service 10,000 inmates.

Today, corrections is costing a half billion each year. Costs are not declining. While private prisons and FCDC have been closed, no prisons are now scheduled to be closed. There are no forecasts projecting a significant reduction in prison costs or inmate populations. Many believe reform began and ended with HB 463. Professor Lawson, on the other hand, sees HB 463 as a modest measure, with much more significant reform needed to break Kentucky's addiction to incarceration.[65]

Yet the crime rate in Kentucky is no different than it was in 1970. Only our philosophy has changed. Have we accepted this new level of incarceration, this exorbitant expenditure of public monies, this intrusion into the lives of our citizens, and this destruction of many of our families and neighborhoods?

We must remember that Kentucky, like the nation, has gotten to this point not because of an explosion of crime but because of choices our policy makers have made. "[L]awmakers are learning that current prison growth is not driven primarily by a parallel increase in crime, or a corresponding surge in the population at large. Rather, it flows principally from a wave of policy choices that are sending more lawbreakers to prison and, through popular 'three-strikes' measures and other sentencing enhancements, keeping them there longer."[66]

Recommendations for the next time penal code revisions are considered.

- Create a process to rewrite the Penal Code that includes the political branch of government from the beginning of the process.
- Resolve the debate on the purpose of punishment, and embed that purpose into the new Penal Code.
- Seriously consider beginning the revision with the draft of the Penal Code produced in 2003.
- Establish the reduction of incarceration levels as one of the goals of a new Penal Code.
- Given the growing reach of collateral consequences, reserve the felony classification for serious offenders.
- Eliminate technical violations of probation and parole as a reason to send the violator back to jail or prison.
- Eliminate the use of jails to house state prisoners.
- Reduce the length of prison sentences in each classification.
- Consider the creation of a gross misdemeanor classification.
- Establish a Penal Code Commission with authority to review and approve all potential amendments to the Penal Code prior to consideration by the General Assembly.
- Establish a Sentencing Commission that would focus on what works throughout the United States and coordinate the number of inmates coming into the system with corrections capacity.
- Eliminate the persistent felony offender law; at a minimum, eliminate PFO 2nd.
- Reduce the length of probation and parole periods.
- Decriminalize as many low level offenses as possible, including all or most possessory drug offenses.

[60] "An Introduction to the Model Penal Code," Paul Robinson and Markus Dubber at 7.
[61] "Unlocking America: Why and How to Reduce America's Prison Population," JFA Institute, Dr. Jim Austen, *et al.* (November 2007).
[62] *Id.* at 1.
[63] *Id.* at 3.
[64] "Kentucky Criminal Justice 2012: In Decline or on the Mend?" Robert Lawson (2014).
[65] *Id.*
[66] "One in 100: Behind Bars in America 2008," PEW Center on the States (2008) at 3.

The Kentucky Penal Code

A Time for Reexamination

(This article was originally published in the April 1991 Advocate. Its call for reexamination is even more relevant 23 years later.)

"Our present criminal law is a product of historical accidents, emotional over-reactions, and the comforting political habit of adding a punishment to every legislative proposition."[1]

FRANK E. HADDAD, JR

Almost twenty years ago, Professor Kathleen Brickey began her review of the "new" Kentucky Penal Code with the above quotation. At the time, the 1972 Kentucky General Assembly had recently passed House Bill 197 creating the Kentucky Penal Code. As Professor Brickey observed with the passage of the Code ". . . the criminal law of Kentucky was dragged, screaming, into the twentieth century."[2]

The twenty-first century is now looming large on the horizon. This year we will celebrate the two hun-dredth anniversary of our U.S. Bill of Rights and the one hundredth anniversary of our Kentucky Bill of Rights. It is only appropriate in view of this historic occasion that the Kentucky Bar pause to reexamine the Penal Code. Many statutory amendments and judicial reinterpretations of the Code have developed over the past seventeen years. In the author's view, a significant number of these *ad hoc* changes represent an unfortunate departure from the underlying purpose and policy of the 1974 Code.

The original Penal Code was drafted to be comprehensive but highly flexible codification, a codification that would fully define all criminal offenses, eliminate the need for "special legislation" and provide a uniform classification of crimes. Probation was to be a primary sentencing option for a broad range of offenses. Judges were to be given substantial flexibility in determining the concurrent or consecutive service of multiple terms of imprisonment. The absence of extreme emotional disturbance was intended to be a statutory element of the offense of intentional murder.

This was not the way that things have worked out, however. Seventeen years of piecemeal special legislation and judicial reinterpretation, have created a Kentucky Penal Code that in significant respects no longer represents the structure of intentions of the original drafters. The comprehensive and highly flexible sentencing plan of the Code has been ravaged by special legislation that undermines the most important elements of sentencing discretion. Judicial interpretation has in certain instances rewritten the statutory elements of certain crimes. Many of the very problems the Code sought to cure are back in force, reanimated by ill-conceived, special legislation. It may well be time once again, in the words of Professor Brickey, that the criminal law of Kentucky is "dragged, "scream- ing," into the twenty-first century.

I. THE PENAL CODE: AN HISTORIC PERSPECTIVE

There is an old maxim that to know where you are going you must first know where you are and where you have been. This observation applies well in the present circumstances. It is difficult, if not impossible, to appreciate the problems that have developed in the present Penal Code without at least a brief understanding of Kentucky criminal law as it existed prior to the code.

Some new attorneys might be surprised to realize the Kentucky Penal Code is a relatively recent statutory creation. The Code originated in a joint resolution of the 1968 General Assembly that directed the Legislative Research Commission and the Kentucky Crime Commission to study the statutory criminal law of the state.[3] In 1971, a team of four drafters working under the guidance of a twelve member advisory committee presented a final draft of the proposed Penal Code which was presented to the 1972 General Assembly as House Bill 197.[4] The proposed Kentucky Penal Code was the first complete revision and codification of Kentucky's substantive criminal law.[5] The new Code was a revision that was sorely needed at the time.

Kentucky criminal law prior to the Code consisted of a patchwork of haphazardly proliferated penal statutes that, in the words of one jurist, "bristled with inconsistencies and incongruities."[6] Over the years, the legislature had randomly codified most of the common law criminal offenses. The criminal statutes were widely scattered throughout the revised statues and poorly indexed. Each criminal statute carried its own separate penalty. Many times, this piecemeal codification of common law crimes had led to irrational disparities in the punishment for similar crimes.

Examples of inequitable punishment for similar offenses were common. For example, petty larceny was punishable by a maximum of twelve months while the theft of a chicken worth two dollars could result in a five year prison sentence.[7] Carrying a concealed weapon was punishable by two to five years of imprisonment, but reckless shooting in the back of an automobile carried a maximum of twelve months of imprisonment.[8] Drawing a deadly weapon at a school, church or on a public highway carried a maximum of fifty days imprisonment, while drawing a deadly weapon inside the platform of an occupied passenger coach was punishable by twelve months of imprisonment.[9] Finally, the rape of a child under twelve was penalized by a sentence of life imprisonment *with* the privilege of parole, while the rape of a child over twelve years of age was punishable by life imprisonment *without* privilege of parole.[10]

To remedy these inconsistencies, the drafters of the Penal Code created a unified codification of the criminal law "consisting of more than two hundred and eighty interrelated provisions. . . carefully meshed to achieve internal consistency with a unified statutory framework."[11] A major policy underlying this unified system of classification and sentencing was flexibility in sentencing. As one commentator aptly observed, "the drafters of the Kentucky Penal Code stressed the importance of flexibility in the alternatives available to the sentencing authority."[12] Automatic sentences for various crimes, without consideration of alternatives such as probation, were to be avoided.[13] The breadth of the sentencing judge's discretion to impose probation was broad under the code; Any person convicted of a crime who had not been sentenced to death was eligible to be sentenced to probation.[14] The liberal use of

[1] Brickey, An Introduction to the Kentucky Penal Code: a Critique of Pure Reason?, 61 Ky. L.J. 623 (1973) citing M. Morriss and G. Hawkins The honest Politicians Guide to Crime Control, p. 20 (1970).

[2] *Id*.

[3] Palmore, *Preface to Symposium on Kentucky Penal Code,* 61 Ky. L. J. 620 (1973) *citing* Ky. Acts Ch. 232 (1968).

[4] Brickey, *supra,* note 1, at p. 625; HB 197, 1972 Ky. Gen. Ass. Reg. Sess.

[5] Kentucky's Substantive Criminal Law was somewhat revised in 1962 when the existing statutory provisions were reorganized and renumbered, but this earlier revision was not a comprehensive attempt to revise the substance of the criminal statutes. Brickey, *supra,* note 1, at page 628.

[6] Palmore, *supra,* note 3, at p. 622.

[7] Compare KRS 433.230 (repealed effective July 1, 1974) with KRS 433.250 (repealed effective July 1, 1974).

[8] Compare KRS 435.230 (repealed effective July 1, 1974) with KRS 435.190 (repealed effective July 1, 1974).

[9] Compare KRS 435.200 (repealed effective July 1, 1974) with KRS 435.210 (repealed effective July 1, 1974).

[10] Compare KRS 435.080 (repealed effective July 1, 1974) with KRS 435.090 (repealed effective July 1, 1974). *See* Brickey, *supra,* note 1, p. 632, n. 44.

[11] Brickey, *supra,* note 1, p. 631.

[12] Bartlett, *Authorized Disposition of Offenders Under the New Kentucky Penal Code,* 61 Ky. L.J. 708 (1973).

[13] *Id*., at 709.

[14] KRS 533.010.

creative sentencing tools such as probation and conditional discharge was to be encouraged.[15] This policy was well-summarized by one commentator who observed that probation is,

> Not a mere gratuity bestowed up- on criminals by lenient or weak trial judges, probation is a legitimate device for the treatment and rehabilitation of offenders; consequently, it should be given as much consideration in the sentencing decision as the more common forms of punishment, imprisonment and fines.[16]

The Commentary of the Kentucky Crime Commission left little doubt about the drafters' intentions on the use of probation and conditional discharge. The Commentary accompanying KRS 533.010 unequivocally states that,

> This section provides encouragement in several specific ways. First of all, (1) provides that probation or conditional discharge may be granted to any offender, without regard to the seriousness of the offense, unless that offender has been sentenced by a jury to death. This provision reflects the judgment that power-ful and important mitigating circumstances may exist even with commission of the most serious of criminal offenses. No reason exists for denying to the trial court sufficient flexibility to exercise discretionary judgment as to probation or conditional dis-charge following conviction of such a crime.
>
> . . . This subsection seeks to start the sentencing process with probation or conditional dis-charge as the desired disposition with a movement from there to a sentence of imprisonment only upon finding of some particular reason justifying the latter. It is to be acknowledged that the trial court must be granted substantial discretion in deciding upon the disposition of convicted offenders.[17]

The substantial discretion of the sentencing court to decide the disposition of convicted offenders also was reflected in other provisions of the Penal Code. For example, KRS 532.110 as originally drafted was intended to afford the sentencing court extensive flexibility in determining whether multiple sentences ran concurrently or consecutively. The Kentucky Crime Commission in its Commentary provided that KRS 532.110,

> [H]as as its underlying basis the idea that a trial court should be given as much flexibility as possible in providing the disposition of an offender. In this respect, the section is consistent with the general policy of this entire chapter. Under this provision, when faced with the task of imposing multiple sentences, the court is given discretion to run them concurrently or consecutively. Pursuant to (2), if there is no designation as to the manner in which the sentences are to run, they must run concurrently. The reason for this combined effect was stated well in the Commentary to the New York Penal Code:
>
> The rationale of these rules of construction is that the consecutive sentences ought to be the result of deliberate action and not inadvertence or rote.[18]

The discretion to impose concurrent or consecutive sentences applied even to defendants who committed offenses while on parole. The sentencing judge was to have discretion to determine whether the defendants new sentence was to be served concurrently or consecutively to the unserved portion of his previous sentence. The court was to be obligated to designate the second sentence as consecutive if it was to be so treated. Without the designation, the new sentence and the unserved portion of the old sentence were to be served concurrently.[19]

Unfortunately, these policies of sentencing flexibility, and other important elements of the code, were soon to be diluted or entirely abandoned. Almost from the inception of the code, the legislature began to materially alter its unified structure. Although House Bill 197 passed the House on March 7, 1972, the substituted bill contained several major changes, including the deletion of the abortion provisions and reinstatement of the existing pre-code obscenity statutes.[20] The House of Representatives also modified the provisions of the Code relating to culpable mental states.[21]

The original draft of the Code proposed four mental states:

1) intentional,

2) knowing,

3) reckless and

4) criminal negligence.

The House version redesignated the definition of reckless conduct to be wanton conduct and relabeled criminal negligence to be a reckless mental state.[22] Fortunately, the Senate substantially reinstated the original version of the culpable mental states with only minor changes in the labels used to designate two of the four states of mind.

Such legislative tinkering with the Codes was quick to cause concern among legal scholars. Professor Brickey in her article on the Kentucky Penal Code pointed to the dangers inherent in sporadic and isolated changes to the structure of the code.

> 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'. . ..[23]

In retrospect, Professor Brickey's warning has proved to be all too prophetic. Special legislation and judicial departure from the policy of the drafters have significantly undercut the Code. Over the years, the flexibility and discretion once vested in the sentencing court have been gradually eroded to the point that the Code no longer reflects the sentencing policies of its original drafters. Many of the inequities and irrationalities that prompted the enactment of the original code have crept back into the statutory picture.

II. SPECIAL LEGISLATION AND THE PENAL CODE

The legislature did not waste any time in beginning its retreat from the sentencing policies underlying the newly-enacted penal code.

A mere two years after the effective date of the code, the legislature in 1976 enacted the first special legislation undercutting the code's flexible approach to sentencing. This first special legislative departure appeared in KRS 533.060, the statute that prohibits a sentencing court from considering probation, shock probation or conditional discharge for defendants convicted of a Class A, B or C felony involving the use of a weapon.[24] Not only did the new statute summarily exclude such defendants from consideration for probation or conditional discharge, it continued to Subsection (2) to remove the discretion of the sentencing court to impose either concurrent or consecutive sentences for offenses committed by a defendant while awaiting trial on another offense, on probation, shock probation, or conditional discharge.

In one fell swoop, the legislature had dealt a devastating blow to the ability of sentencing judges in Kentucky to consider probation or conditional discharge based on the individual circumstances of a defendant.

The legislature, by its special legislation, created a conclusive presumption that defendants such

[15] Kentucky Legislative Research Commission, Kentucky Penal Code Commentary 285.
[16] Bartlett, *supra,* note 13, at p. 724.
[17] *Id*.
[18] Kentucky Crime Commission, Kentucky Penal Code Commentary 283.
[19] *Id*.
[20] Brickey, *supra,* note 1, at p. 628.
[21] Lawson, *Kentucky Penal Code: The Culpable Mental States and Related Matters,* 61 Ky. L.J. 657, 658 (1973).
[22] *Id.*
[23] Brickey, *supra,* note 1, at p. 635.
[24] KRS 533.060(1).

as those described in KRS 533.060 are *automatically* ineligible for probation or parole, a result that flies directly in the face of the intent of the drafters of the code.

The automatic ineligibility provisions of this first special legislation have caused recurrent problems for Kentucky courts. The provisions of Subsection (2) of KRS 533.060 are irreconcilable with the concurrent and consecutive sentencing provisions of KRS 532.110, which were intended to give sentencing judges the discretion to impose consecutive or concurrent sentences for offenses committed while on probation or parole.

As the matter stands, KRS 533.060 has been interpreted in *Devore v. Commonwealth*, Ky. 662 S.W.2d 829 (1984), to *require* the imposition of consecutive sentences for offenses committed while a defendant is on parole. *Devore* further departs from the policy of the penal code by holding that the limitation on the maximum length of consecutive sentences found in KRS 532.110(1)(c) does *not* apply to sentences imposed on defendants who commit further offenses while on parole. Unlimited, consecutive sentences now appear to be the rule for offenses committed while on probation, parole or conditional discharge.[25] The special legislation of KRS 533.060 and the judicial gloss of *Devore* represents a 180 degree departure from the sentencing policies underlying the Kentucky Penal Code.

The sentencing problems created by Subsection (1) of KRS 533.060 were further exacerbated in 1985 when the concept of strict vicarious liability was judicially incorporated into subsection (1) by *Pruitt v. Commonwealth*, Ky., 700 S.W.2d 68 (1985), to deny the option of probation to a defendant convicted of complicity to commit murder in the shooting death of her husband. Although the defendant did not "use" the weapon herself, the court ruled that her vicarious use of the weapon rendered her ineligible for consideration of probation under Subsection (1), a result that overruled an earlier Court of Appeals decision, *Commonwealth v. Reed*, Ky. App., 680 S.W.2d 134 (1984). The resulting *Pruitt* represents another departure from the sentencing policies of the Code.

The next piece of special legislation appeared from the General Assembly in 1984 in the form of KRS 532.040. This statute, similar to the special legislation of 1976, was enacted to exclude a broad class of defendants from consideration for probation or conditional discharge. Under KRS 532.045, defendants convicted of rape, sodomy, sexual abuse, promoting or permitting prostitution, incest, or using a minor in a sexual performance are *automatically* denied consideration for probation or conditional discharge. The statute completely strips the sentencing judge of any sentencing discretion he or she might previously have had under the Penal Code. With regard to probation or conditional discharge, sentencing is a rote process involving no individual consideration of the circumstances of any single defendant. The constitutionality of this statute was upheld by the Court of Appeals in *Owsley* v. *Commonwealth*, Ky. App., 743 S.W.2d 408 (1987).

The third piece of special legislation appeared in 1986 in the form of the controversial "truth-in-sentencing" law. Undeniably an unconstitutional violation of the separation of powers doctrine, the state was enacted to legislatively revise Kentucky's sentencing procedures by permitting juries to consider the existence and nature of a defendant's prior felonies and misdemeanors, along with minimum parole eligibility and maximum expiration of sentence. It is simply impossible in the context of this article to discuss the many problems created by this one piece of special legislation. The statute has been propped-up repeatedly over the past five years by a series of controversial decisions founded only on comity.[26] One has only to read these decisions to appreciate the serious problems created by this latest special legislation.

In terms of sentencing, KRS 532.055 immediately runs afoul of the sentencing policies of the 1974 Penal Code by permitting the jury to recommend concurrent or consecutive service of sentence. The Kentucky Penal Code intended that judges make this important determination, free from outside influences, and that they be afforded maximum flexibility when doing so. Indeed, the entire impetus of KRS 532.055 is the imposition of harsher punishments through "truth-in-sentencing." This runs directly contrary to the policy of the Code drafters to make rehabilitation the primary objective of the code.[27] The "judicial band-aids" (as one judge has referred to the opinions on KRS 532.055) relied on to save the statute only further remove sentencing from the unified structure envisioned in the Code.

Over the years, special legislation such as KRS 532.055, 532.040 and 533.060 has so degraded the uniform sentencing structure envisioned by the drafters of the Code that the very inflexibility they struggled to remove is now indelibly ingrained in the present code. Probation and conditional discharge are the *exception*, not the rule, for a large class of criminal defendants. Sentencing judges have absolutely *no* discretion to consider probation or conditional discharge for a wide variety of offenses regardless of the individual circumstance of the defendant. It is difficult to imagine a sentencing scheme less flexible and more contrary to the policies of the 1974 Code.

Consecutive sentences are now the rule for offenses committed by defendants awaiting trial, or on probation, conditional discharge or parole. The sentencing judge has *no* discretion to consider concurrent sentences, again a result that is one hundred and eighty degrees the opposite of what was intended under the original Kentucky Penal Code. In these important respects, sentencing is now the type of automatic, rote sentencing that the code specifically sought to prevent.

III. EXTREME EMOTIONAL DISTURBANCE

Another troubling departure from the original provisions of the penal code centers on the treatment of extreme emotional disturbance under KRS 507.020, Kentucky's murder statute. Extreme emotional disturbance was intended by the drafters to be a negative essential element of murder, an essential element of manslaughter and a mitigating circumstance of capital punishment. Under KRS 507.020(1)(a), a person is guilty of murder when he causes the death of another with intent to cause that death,

> Except that in any prosecution, a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.[28]

The negative element of extreme emotional disturbance was created by the penal code drafters to replace the common law element of sudden heat of passion with a broader concept. Under this new broader concept, the circumstances which would constitute a reasonable explanation for the defendant's disturbed emotions were to be viewed from the standpoint of an individual in the defendant's situation under the circumstances as the defendant believed them. This new language introduced an element of subjective evaluation which did not exist under the old common law. Under the old law, provocation was required to be reasonable in an objective sense.[29]

At first, the courts appeared to follow the language of the statute to require the Commonwealth to negate the presence of

[25] The courts of Kentucky have uniformly adhered to *Devore* over the years. A long line of Kentucky decisions cites *Devore* with approval. *See, e.g., Riley v. Parke,* Ky., 740 S.W.2d 934 (1987); *Corbett v. Commonwealth,* Ky., 717 S.W.2d 831 (1986); *Commonwealth v. Martin,* Ky. App., 777 S.W.2d 236 (1989); *Harris v. Commonwealth,* Ky. App., 674 S.W.2d 528 (1984).

[26] *See, Boone v. Commonwealth,* Ky., 780 S.W.2d 615 (1989); *Commonwealth v. Hubbard,* Ky., 777 S.W.2d 882 (1989); *Huff v. Commonwealth,* Ky.. 763 S.W.2d 106 (1989); *Commonwealth v. Reneer,* Ky., 734 S.W.2d 794 (1987).

[27] Bartlett, *supra,* note 13, at p. 709.

[28] KRS *507.020(1)(a).*

[29] *See, Creamer* v. *Commonwealth,* Ky., 629 S.W.2d 324 (1982) (reasonableness must be viewed through the defendant's eyes no matter how preposterous).

extreme emotional disturbance as an element of murder.[30]

However, in 1980, the Supreme Court in *Gall v. Commonwealth,* Ky., 607 S.W.2d 97 (1980), began to significantly revise the importance of extreme emotional disturbance as an essential negative element of murder. In *Gall*, the court concluded that while the Commonwealth still has the burden of proof in order to justify an instruction on manslaughter, "there must be something in the evidence sufficient to raise a reasonable doubt whether the defendant is guilty of murder or manslaughter."

In *Wellman v Commonwealth*, Ky., 694 S.W.2d 696 (1985), the Court specifically overruled its earlier decisions in *Ratliff, Bartrug* and *Edmonds*[31] that held that the absence of extreme emotional distress is not an essential element of the crime of murder. The court continued to hold that the absence of extreme emotional distress is merely a matter of evidence rather than an element of the crime. The court also held that mental illness in and of itself is not the equivalent of extreme emotional disturbance.

Gradually, over the years, the Court has continued to narrow the breadth of extreme emotional disturbance to where it is no longer the expansive concept envisioned in the model penal code. For example, evidence of a defendant's drug use is of itself not sufficient to warrant a manslaughter instruction under extreme emotional disturbance.[32] Nor is evidence of the use of alcohol enough to trigger and instruction based on extreme emotional disturbance.[33] Earlier decisions that referred to "any" or "some" evidence as being needed to request an instruction based on extreme emotional disturbance apparently have now been undercut by *Bevins v. Commonwealth,* Ky., 712 S.W.2d 932 (1986). In *Bevins*, the Court speaks in terms of a defendant's burden of proof to establish extreme emotional disturbance as being required to produce "probative, tangible and independent evidence of initiating circumstances."

When one examines the Model Penal Code commentary on extreme emotional disturbance, it is apparent that the drafters of the 1974 Kentucky Penal Code had in mind a much broader meaning. The Model Penal Code contains an expansive concept of extreme emotional disturbance intended to "sweep away the rigid rules that have developed with respect to the sufficiency of particular types of provocation. . .."[34] As the matter presently stands, extreme emotional disturbance is merely an affirmative defense, not a negative essential element of KRS 507.020. The Courts have by judicial interpretation removed this statutory element. Such judicial surgery violates the due process clause. Only the legislature may constitutionally "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in their statutes."[35] So long as KRS 507.020 contains the negative essential element of extreme emotional disturbance, it is the burden of the prosecution to prove beyond a reasonable doubt the absence of this element included in the definition of the offense.[36]

CONCLUSION

This article began with the words of Professor Kathleen Brickey. It is only appropriate that it end with them as well. More than seventeen years ago, Professor Brickey offered the following warning. In her Penal Code article, she cautioned that,

> Isolated amendments to the Code as adopted threaten to undermine the conceptual basis of the unified sentencing structure.[37]

The professor could not have been more correct. Seventeen years of sporadic and isolated legislative tinkering have left the sentencing structure of the Code riddled with inflexibility and inconsistency. The broad-ranging problems that now exist in the Code have not gone unnoticed by the General Assembly, which this past year created a legislative task force on sentences and sentencing practices[38] or by the federal courts, which recently refused on grounds of comity to consider what was characterized as a "serious question" involving consecutive sentencing in Kentucky.[39]

In sum, the time has come for a serious and deliberate reexamination of the Kentucky Penal Code, its policies and provisions. Until such reexamination is made, it may justifiably be argued that our present criminal sentencing law is the product of "historical accidents, emotional overreactions and the comforting political habit of adding a punishment to every legislative proposition."[40]

FRANK E. HADDAD, JR. (1928-1995)

Frank E. Haddad, Jr. was past president of KBA (1977-78): past president of KATA (1965); past president of the Louisville Legal Aid Society (1967—72); past president of NACDL (1973), and past president of the KACDL.

The Degeneration of KY's Penal Code

I learned during the turbulent enactment process that sensible revision could not be accomplished on an ad hoc basis. That experience prompted me to urge that reform of the state's criminal law should be viewed as an organic and ongoing process requiring an independent, permanent body of qualified persons to advise the legislature on how proposed criminal legislation would affect the structural and substantive integrity of the Penal Code. We cannot expect careful analysis of how an isolated bill interrelates with the rest of the Penal Code by legislators who convene 60 days every two years and who consider, as in 1972, more than one thousand bills and more than 250 resolutions. That much is clear.

KATHLEEN F. BRICKEY
George Alexander Madill
Professor of Law
Washington University

[30] *Edmonds v. Commonwealth,* Ky., 586 S.W.2d 24 (1979); *Bartrug v. Commonwealth,* Ky., 568 S.W.2d 925 (1978); *Ratlff* v. *Commonwealth,* Ky., 567 S.W.2d 307 (1978).
[31] See note 31, *supra.*
[32] *Moore v. Commonwealth,* Ky., 634 S.W.2d 426 (1982).
[33] *Ward v. Commonwealth,* Ky., 695 S.W.2d 404 (1985).
[34] Model Penal Code 201.3, Comments Note *5.*
[35] *Patterson v. New York,* 432 U.S. 197, 211 (1977).
[36] *McMillan v. Pennsylvania,* 477 U.S. 79 (1986).
[37] Brickey, *supra,* note 1, at p. 633.
[38] Kentucky Acts, Chp. 156, 1 and 2.
[39] *George* v. *Seabold,* 909 F.2d 157 6th Cir. (1990).
[40] Brickey, *supra,* note 1, at p. 624

1. **KY Department of Corrections Facts Regarding Persons Currently Incarcerated in KY Under KRS 532.080 and KRS 439.3401 (as of June 30, 2014)**

	Total	PFO 1st ONLY	PFO 2nd ONLY	PFO 1ST & 2ND	Total PFO Offenders	Violent Offender	Both PFO & Violent
Persons Currently Incarcerated	21623	1040	2270	282	3592	5260	625
Daily Cost of Incarceration							
Persons Sentenced Each Year (avg. for 2004-2014)	11528	173	618	9	800	483	41
Persons Sentenced in 2013	11978	201	584	12	797	574	43
Persons Sentenced in 2014*	7458	127	388	11	526	360	24
Average Sentence Length of all Persons Incarcerated	20656 (13 years) 934 (Life) 33 (Death)	962 (27 years) 76 (Life) 2 (Death)	2202 (20 years) 65 (Life) 3 (Death)	270 (36 years) 12 (Life) 0 (Death)	3434 (23 years) 153 (Life) 5 (Death)	4472 (22 years) 765 (Life) 23 (Death)	514 (39 years) 107 (Life) 4 (Death)
Avg. Age of All Incarcerated	36	43	37	43	39	40	42
Persons Over 65 years old	394	20	24	6	50	209	17
* 2014 data from January 1, 2014 to June 30, 2014							
Highest Current Offense Before PFO Enhancement (Avg Sentence)	**Total**	**PFO 1st ONLY**	**PFO 2nd ONLY**	**PFO 1ST & 2ND**	**Total PFO Offenders**	**Violent**	**Violent & PFO**
Capital felony	607 (39 years) 629 (Life) 26 (Death)	16 (51 years) 36 (Life) 2 (Death)	34 (71 years) 31 (Life) 2 (Death)	3 (46 years) 3 (Life) 0 (Death)	53 (63 years) 70 (Life) 4 (Death)	594 (39 years) 580 (Life) 22 (Death)	50 (65 years) 61 (Life) 4 (Death)
Class A felony	387 (44 years) 252 (Life) 7 (Death)	22 (46 years) 21 (Life) 0 (Death)	20 (56 years) 13 (Life) 1 (Death)	1 (37 years) 4 (Life) 0 (Death)	43 (51 years) 38 (Life) 1 (Death)	347 (39 years) 161 (Life) 1 (Death)	35 (48 years) 23 (Life) 0 (Death)
Class B felony	4844 (23 years) 48 (Life) 0 (Death)	329 (44 years) 19 (Life) 0 (Death)	507 (36 years) 20 (Life) 0 (Death)	103 (51 years) 5 (Life) 0 (Death)	939 (40 years) 44 (Life) 0 (Death)	2429 (22 years) 24 (Life) 0 (Death)	350 (39 years) 23 (Life) 0 (Death)
Class C felony	6537 (12 years) 1 (Life) 0 (Death)	284 (19 years) 0 (Life) 0 (Death)	858 (17 years) 1 (Life) 0 (Death)	96 (30 years) 0 (Life) 0 (Death)	1238 (19 years) 1 (Life) 0 (Death)	564 (10 years) 0 (Life) 0 (Death)	49 (17 years) 0 (Life) 0 (Death)
Class D felony	7738 (6 years) 2 (Life) 0 (Death)	310 (14 years) 0 (Life) 0 (Death)	779 (9 years) 0 (Life) 0 (Death)	67 (23 years) 0 (Life) 0 (Death)	1156 (11 years) 0 (Life) 0 (Death)	537 (5 years) 0 (Life) 0 (Death)	30 (11 years) 0 (Life) 0 (Death)
Class B felony involving death of the victim or serious physical injury to a victim	2586 (23 years) 218 (Life) 5 (Death)	151 (39 years) 26 (Life) 1 (Death)	181 (37 years) 24 (Life) 0 (Death)	38 (57 years) 3 (Life) 0 (Death)	370 (40 years) 53 (Life) 1 (Death)	2586 (23 years) 218 (Life) 5 (Death)	370 (40 years) 53 (Life) 1 (Death)
The commission or attempted commission of a felony sexual offense in KRS Chapter 510	2526 (20 years) 168 (Life) 4 (Death)	99 (41 years) 26 (Life) 0 (Death)	159 (31 years) 15 (Life) 0 (Death)	16 (76 years) 4 (Life) 0 (Death)	274 (37 years) 45 (Life) 0 (Death)	2072 (19 years) 121 (Life) 2 (Death)	199 (39 years) 33 (Life) 0 (Death)
Use of a minor in a sexual performance (KRS 531.310)	99 (38 years) 7 (Life) 0 (Death)	4 (141 years) 1 (Life) 0 (Death)	2 (44 years) 1 (Life) 0 (Death)	1 (22 years) 0 (Life) 0 (Death)	7 (96 years) 2 (Life) 0 (Death)	66 (31 years) 5 (Life) 0 (Death)	2 (52 years) 0 (Life) 0 (Death)
Promoting a sexual performance by a minor (KRS 531.320)	28 (25 years) 4 (Life) 0 (Death)	1 (34 years) 1 (Life) 0 (Death)	0	0	1 (34 years) 1 (Life) 0 (Death)	17 (19 years) 3 (Life) 0 (Death)	1 (34 years) 0 (Life) 0 (Death)
Unlawful transaction with a minor in the first degree (KRS 530.064(1)(a))	82 (23 years) 3 (Life) 0 (Death)	1 (10 years) 1 (Life) 0 (Death)	0	0	1 (10 years) 1 (Life) 0 (Death)	61 (25 years) 3 (Life) 0 (Death)	1 (10 years) 1 (Life) 0 (Death)
Human trafficking involving commercial sexual activity where the victim is a minor (KRS 529.100)	2 (11 years) 0 (Life) 0 (Death)	0	0	0	0	1 (20 years) 0 (Life) 0 (Death)	0
Criminal abuse in the first degree (KRS 508.100)	135 (20 years) 6 (Life) 0 (Death)	2 (30 years) 0 (Life) 0 (Death)	7 (18 years) 1 (Life) 0 (Death)	1 (30 years) 0 (Life) 0 (Death)	10 (21 years) 1 (Life) 0 (Death)	129 (21 years) 6 (Life) 0 (Death)	9 (22 years) 1 (Life) 0 (Death)
Burglary in the first degree accompanied by the commission or attempted commission of a assault	110 (31 years) 23 (Life) 1 (Death)	13 (57 years) 3 (Life) 0 (Death)	12 (49 years) 1 (Life) 0 (Death)	2 (58 years) 1 (Life) 0 (Death)	27 (53 years) 5 (Life) 0 (Death)	90 (32 years) 22 (Life) 1 (Death)	21 (56 years) 5 (Life) 0 (Death)
Burglary 1st degree accompanied by commission or attempted commission of kidnapping	63 (45 years) 7 (Life) 1 (Death)	8 (116 years) 0 (Life) 0 (Death)	3 (47 years) 0 (Life) 0 (Death)	2 (40 years) 0 (Life) 0 (Death)	13 (89 years) 0 (Life) 0 (Death)	57 (46 years) 6 (Life) 1 (Death)	12 (92 years) 0 (Life) 0 (Death)
Robbery in the first degree	1555 (30 years) 338 (Life) 20 (Death)	141 (59 years) 33 (Life) 2 (Death)	169 (54 years) 32 (Life) 3 (Death)	49 (56 years) 9 (Life) 0 (Death)	359 (56 years) 74 (Life) 5 (Death)	1199 (26 years) 263 (Life) 12 (Death)	230 (47 years) 47 (Life) 4 (Death)

Friday, November 7, 2014
The University of Louisville Louis D. Brandeis School of Law
11:45 a.m.- 5:00 p.m.

The Kentucky Bar Association Criminal Law Section
and
The University of Louisville Louis D. Brandeis School of Law
present

The Third Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky

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Founded in 1846, the University of Louisville's Brandeis School of Law is the Commonwealth's oldest law school and the fifth oldest American law school in continuous operation. Guided by the legacy of Justice Louis D. Brandeis, the law school is distinguished for its commitment to legal research and dedication to public service. The Brandeis School of Law sits at the center of the University of Louisville, a premier research institution founded in 1798. Its students have access to world-class faculty, a strong curriculum, and top-notch academic support. The school partners with Louisville's legal community and alumni around the world to provide students with the theory, knowledge, and skills required for a successful career in law.

Kentucky Bar Association Criminal Law Section

The purposes of the Section include promoting the interests of the Kentucky Bar Association, the practice of criminal law, and the legal profession, keeping the criminal law practitioners of Kentucky informed about current criminal law, trends, topics and proposed and enacted legislation and rules of criminal procedure; keeping the public informed about the criminal justice system and its fair administration; improving the quality of all aspects and types of criminal law practice through education, research, communication, and to serve as a liaison with interested groups.

This program is free and has been approved in KENTUCKY for 3.5 CLE credits.

The Third Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky

Friday, November 7, 2014
University of Louisville Louis D. Brandeis School of Law

Allen Courtroom; 11:45 a.m.-5:00 p.m.

Kentucky Penal Code Reform

11:45 a.m. light lunch in Cox Lounge

Moderator: Professor Luke Milligan

12:30 p.m.-12:45 p.m.
Welcome
Dean Susan Hanley Duncan, B. Scott West, Chair, KBA Criminal Law Section

12:45 p.m.-1:45 p.m. (1.00 CLE credit)
Penal Code Reform: Kentucky and the Nation
Paul H. Robinson, Colin S. Diver Professor of Law, University of Pennsylvania Law School

1:45 p.m.-2:00 p.m. Break

2:00 p.m.-3:00 p.m. (1.00 CLE credit)
The Kentucky Penal Code – A Model of Clarity and Construction in 1975: Restoring the Integrity and Intent of the Code After Nearly 40 Years of Damaging Amendments
Professor Les Abramson, Professor Bill Fortune, Professor Mark Stavsky, Kim Allen, Professor Paul Robinson

3:00 p.m.-3:15 p.m. Break

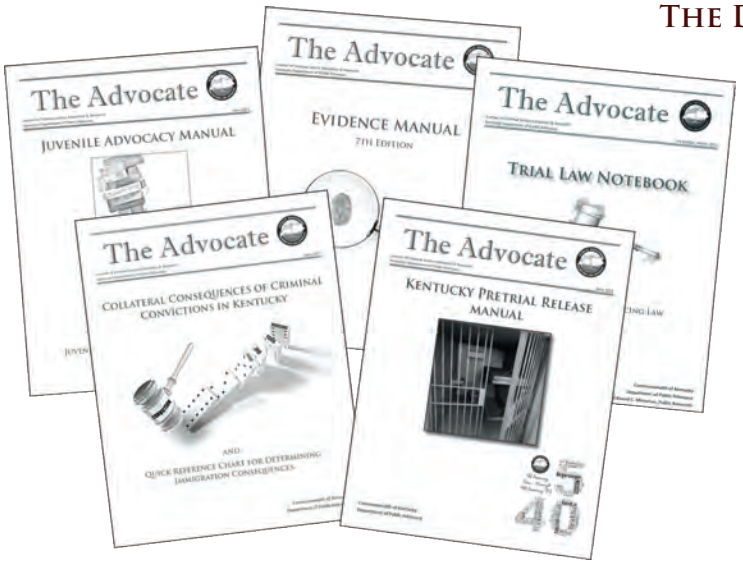
3:15 p.m.-4:45 p.m. (1.5 CLE credits)
The Opportunity for Reform in Kentucky and the Practicalities of Achieving It in 2015 followed by Q&A
Senator Whitney Westerfield and Representative John Tilley

4:45 p.m. – 5:00 p.m.
Closing Remarks – Professor Luke Milligan

This program has been approved in KENTUCKY for 3.5 CLE credits.

Paul Robinson is one of the world's leading criminal law scholars. A prolific writer and lecturer, Robinson has published articles in virtually all of the top law reviews, lectured in eighty-four cities in thirty-four states and twenty-five countries, and had his writings appear in thirteen languages. A former federal prosecutor and counsel for the U.S. Senate Subcommittee on Criminal Laws and Procedures, he was the lone dissenter when the U.S. Sentencing Commission promulgated the current federal sentencing guidelines. He is the author or editor of fourteen books, including the standard lawyer's reference on criminal law defenses, three Oxford monographs on criminal law theory, a highly regarded criminal law treatise, and an innovative case studies course book. He is the lead editor of *Criminal Law Conversations* (Oxford, 2009), a debate involving more than 100 scholars from around the world, and the author of *Intuitions of Justice and the Utility of Desert* (Oxford 2013); *Distributive Principles of Criminal Law* (Oxford 2008, also in Spanish and Chinese); and *Structure and Function in Criminal Law* (Oxford 1997 also in Chinese). Robinson recently completed two criminal code reform projects in the United States and the first modern Islamic penal code under the auspices of the U.N. Development Program. He also writes for general audiences, including popular books such as *Would You Convict?* (NYU 1999), *Law Without Justice* (Oxford 2005), and the forthcoming *Living Beyond the Law: Lessons from Pirates, Prisoners, Lepers and Survivors* (Rowman & Littlefield 2014).

The Kentucky Bar Association Criminal Law Section and the University of Louisville Louis D. Brandeis School of Law are sponsoring the Third Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky on Friday, November 7, 2014. The forum will be held from 11:45 a.m.-5:00 p.m. in the School of Law's Allen Courtroom. The program has been accredited for 3.50 CLE credits in Kentucky. Admission to the forum is free, but **space is limited**. Registrations will be accepted on a first come, first served basis until the seminar capacity is reached. A registration form with the full agenda is available on the Criminal Law Section's website (**www.kybar.org/357**). To register, you must download the paper form and return it via email to **lalvey@kybar.org**, FAX to Lori Alvey at (502) 564-3225 or mail to 514 West Main Street, Frankfort, KY 40601. **The registration deadline is Friday, October 31.**



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