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

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

The 1972 legislative session may be recorded as one characterized by more demonstrative evidence concerning pending legislation than any in history. From the now infamous wild turkey unleashed in the House to stimulate debate on a proposed industrial loan bill,[2] to the homemade brownies intended to sweeten the legislators' dispositions toward transfer of territory of certain school districts,[3] to the diaper pails which bedecked the marble staircase ascending to legislative chambers where hearings on a liberalized abortion law were in progress[4]—it was anything but a dull session.

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

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[1] N. Morriss & G. Hawkins, The Honest Politician's Guide to Crime Control 20 (1970) [hereinafter cited as Morriss & Hawkins].

[2] H.B. 236, 1972 Ky. Gen. Ass., Reg. Sess.

[3] H.B. 440, 1972 Ky. Gen. Ass., Reg. Sess.

[4] H.B. 197, 1972 Ky. Gen. Ass., Reg. Sess. § 276 [hereinafter cited as H.B. 197].

[5] Ky. Acts ch. 385 (1972) [chapter 385 is hereinafter cited as KYPC]; Proposed Ky. Rev. Stat. §§ 433A.1-010 to 435A.3-060 [hereinafter cited as [KRS]].

I. Genesis and Goals

The Kentucky Penal Code is the first complete revision and codification of Kentucky's substantive criminal law. Although the present law was "revised" in 1962, the primary thrust of that effort was merely to organize and renumber existing provisions scattered throughout the statute books. There was no attempt to update in toto the form and substance of the criminal statutes. Piecemeal revision can not serve as an adequate substitute for a full scale reconciliation of the many conflicting and overlapping penal provisions. "The proliferation of the corpus of law, the failure to distill and refine, to reduce to minimums, can hurl the system out of control."[6] In tacit recognition of this proposition, the 1968 General Assembly directed the Kentucky Crime Commission and the Legislative Research Commission to undertake a complete revision of Kentucky's substantive criminal law.[7]

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

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

[6] R. Clark, Crime in America 182 (1971).

[7] H.R. 430, Ky. Acts ch. 232 (1968).

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

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

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

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

[8] H.B. 197 § 2.

[9] *See, e.g., id.* at §§ 9, 12 and 27.

[10] *Id.* at § 283.

[11] *See* examples cited at note 44 *infra*.

[12] For example, a provision permitting therapeutic abortion following a pregnancy resulting from rape or other felonious intercourse upon certification by three physicians provided "such certificate shall be filed with the hospital in which the abortion is to be performed at least forty-eight hours prior to the abortion, and in case of an abortion following felonious intercourse [sic] with the County Attorney." KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 3315(3) (Final Draft 1971) [hereinafter cited as LRC].

[13] Among primary areas of public concern were the abortion provision and the absence of any provision punishing homosexual conduct between consenting adults.

[14] The Final Draft authorized the use of deadly physical force by a defendant when he believed the person against whom such force was used was attempting to dispossess him of his tangible, movable property. LRC § 435(2)(d). This was one of the issues upon which there was no unanimity among the drafters and Advisory Committee members.

II. THE LEGISLATIVE PROCESS: POLITICS AND THE PUBLIC

On January 20, 1972, House Bill 197 was introduced

> . . . creating an entirely new penal code; 36 major areas of criminal law would be affected by enacting new sections to replace the major portions of KRS Chapters 432, 433, 434, 435, 436, 437, and 438 and small portions of other chapters; repeal major portions of the present above listed chapters and smaller portions of other chapters, and amend numerous sections to conform.[15]

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

After being referred to the House Judiciary Committee for consideration, House Bill 197 was subjected to public and private scrutiny. The public aspects are easy to recount; the private aspects remain a mystery. Public hearings on House Bill 197 narrowed the focus of deliberations to two aspects of the bill—drugs[18] and abortion.[19] Somewhere in all of this hoopla was "an entirely new penal code" waiting to be enacted. But this idea was rapidly fading.

> A larger issue is being obscured by the thunder and lightning loosed on the proposed revision of Kentucky's abortion law. It involves the unquestioned merits of the proposed penal

[15] 10 KY. LEG. REC. 65 (March 30, 1972) [hereinafter cited as LEG. REC.].

[16] Louisville Courier-Journal, Jan. 21, 1972, § A, at 15, col. 3.

[17] The same day House Bill 48, increasing the penalty for assaulting prison guards, was reported favorably out of the House Judiciary Committee. As discussed *infra*, the primary purpose of this bill was to save financially pressed counties the expense of holding such offenders while awaiting trial and during their sentence. Ironically, the headline did not read "Bill to ease financially pressed county jails reported favorably," but read instead "Bill to stiffen assault penalty draws support." *Id.* at § A, at 14, col. 1.

[18] LRC §§ 2900-15. The drug hearings were reported in one-half inch headlines "Panel Hears Debate On Legalizing Marijuana Possession," but the attendant publicity failed to note that nowhere in the Penal Code was it proposed that marijuana possession be legalized. *See* Louisville Courier-Journal, Feb. 8, 1972, § B, at 1, col. 1.

[19] This was the most emotional and volatile issue publicly discussed with witnesses advocating positions ranging from total prohibition to total repeal, and all were center stage.

> code of which the abortion section is not the most significant portion.
>
> But the danger that has arisen is that the abortion debate will become the tail that wags the dog and [will] prevent enactment of the substance of the updated code.[20]

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

> Anyone following the news from the Kentucky General Assembly could well have the distinct impression that the proposed Penal Code is all about abortion.
>
> In hearings on the code, the controversy has been drawn to the single section that occupies a little more than a page of the 373-page draft of the proposed set of criminal laws.[21]

A. *House Committee Substitute*

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

[20] Editorial, The Louisville Times, Feb. 21, 1972, § A, at 8, col. 1.

[21] Finley, *Blurred Issue–Penal Code Proposal Covers More Than Abortion*, Louisville Courier-Journal, Feb. 22, 1972, § A, at 1, col. 1.

[22] H.B. 197 (House Comm. Substitute), 1972 Ky. Gen. Ass., Reg. Sess. §§ 267-73 [hereinafter cited as House Comm. Sub.].

[23] *Id.* at §§ 46-48.

[24] "(1) A person is not guilty of an offense arising out of proscribed conduct when he was induced *or encouraged* by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution." *Id.* at § 44 (emphasis added). The language contained in the original bill "*and* at the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct" was omitted. H.B. 197 § 44(1)(b) (emphasis added).

[25] "A person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury." H.B. 197 § 70. Apparent confusion over the change in terminology resulted in the deletion of any analogous provision in the House Committee Substitute.

injury with a deadly weapon.[26] Nevertheless, the Penal Code had passed a major hurdle and was introduced in the Senate the following day. A new element was then captured by the Associated Press: "Bill Would End Death Penalty For Some Crimes."[27]

B. *Senate Committee Substitute*

Absent the fanfare surrounding its consideration in the House, House Bill 197, *Senate Committee Substitute*, was reported favorably out of committee a week after its introduction in the Senate.[28] The Senate version reinserted most of the original provisions of House Bill 197 while accepting such changes as deletion of the abortion provision and the pornography chapter. The bill received its second reading in the Senate and was sent to the Rules Committee which the next day reported it out for passage with twenty-three typewritten pages of amendments. While most of the 284 changes were confined to renumbering sections of the bill, some of the substantive amendments included conditional retention of the common law offense of abortion,[29] creation of an "ex pre facto" law,[30] significant changes in culpable mental states,[31] de-

[26] *Compare* H.B. 197 § 67 *with* House Comm. Sub. § 67.

[27] Louisville Courier-Journal, Feb. 25, 1972, § A, at 11, col. 6.

[28] H.B. 197 (Senate Comm. Substitute), 1972 Ky. Gen. Ass., Reg. Sess. [hereinafter cited as Sen. Comm. Sub.].

[29] Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state, except that if the statutes relating to abortion, or portions thereof, are declared unconstitutional, the common law of abortion shall prevail. KYPC § 2 [KRS § 433A.1-020].

This is anathema. While the issue has recently been mooted in part by Roe v. Wade, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973), this unsophisticated approach to legal problem solving remains part of a modern criminal code. The abortion issue must be approached rationally in a carefully formulated provision conforming with current constitutional guidelines.

[30] KYPC § 4 [KRS § 433A.1-040] reads as follows:

> The provisions of this code shall not apply to any offense committed prior to its effective date, *unless the defendant elects to be tried under this code.* Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted, *if he does not so elect* (emphasis added).

For want of terminology referring to this unprecedented sleight of hand, this provision has been dubbed Kentucky's first "ex pre facto" law. Section 4 made its debut in the House Committee Substitute. It was not included in the Senate Committee Substitute, but it inexplicably reappeared in the amendments thereto.

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

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laying required notice of the insanity defense to the day of trial,[32] reduction of the authorized penalty for certain inchoate offenses,[33] creation of a strict liability theft offense[34] and elimination of another theft crime,[35] expansion of the justified use of deadly force,[36] reinstatement of criminal penalties for deviate sexual conduct between consenting adults,[37] and postponement of the effective date of the legislation to July 1, 1974.[38] The Senate passed the bill by a vote of 22-12. During the closing hours of the session the House concurred, 47-10, and House Bill 197 was signed into law March 27, 1972.[39]

In addition to enacting the Penal Code, the House and Senate each adopted, by voice vote, resolutions requesting the Governor to appoint a Kentucky Penal Code Study Commission.[40] In light of the deferred effective date of the Code and the monumental mechanical problems arising by virtue of the Code's turbulent adoption, a thorough reevaluation of the document was essential. Accordingly, an eight member Commission was appointed by Executive Order.[41] The Commission's task of developing recommendations for the 1974 General Assembly is difficult. It requires reconciling numerous inconsistencies and redirecting legislative efforts to achieve the original goal of providing Kentucky with a modern criminal code.

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

[31] *Compare* Sen. Comm. Sub. § 12 *with* KYPC § 13 [KRS § 433B.1-020].

[32] *Compare* Sen. Comm. Sub. § 43 *with* KYPC § 43 [KRS § 433C.2-050].

[33] *Compare* Sen. Comm. Sub. §§ 50, 52, *with* KYPC §§ 50, 52 (1972) [KRS §§ 433D.1-010, 433D.1-030]. See text at note 51 *infra*.

[34] Sen. Comm. Sub. § 122; KYPC § 122 [KRS § 434C.1-050]; see text at note 55 *infra*.

[35] The offense eliminated was "Theft by Failure to Make Required Disposition of Property Received." Sen. Comm. Sub. § 123.

[36] *Compare* Sen. Comm. Sub. §§ 32, 33 *with* KYPC §§ 32, 33 [KRS §§ 433C.1-060, 433C.1-070].

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

[38] KYPC § 307.

[39] Leg. Rec., *supra* note 15.

[40] S.R. 96, Ky. J. of Senate 2981 (1972); H.R. 160, Ky. J. of House of Rep. 3790 (1972).

[41] Exec. Order No. 72-614 (June 28, 1972).

III. The Nature of a Code: Effect of Collateral Legislation

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

The Penal Code consists of more than 280 interrelated provisions which have been carefully meshed to achieve internal consistency within a unified statutory framework. Thus, amending a Code provision is wholly different from amending other types of statutes which are isolated provisions. Such statutes largely function independently and amendment, therefore, has little effect on other laws. This is simply not the case when a code is amended, and it is imperative that this be understood before further legislative changes are considered.[42] Otherwise the most serious threat to the viability of the Code *qua* code is, ironically, the legislative process itself. The 1972 General Assembly, succumbing to the temptation of hasty and "isolated" changes, demonstrated some of the pitfalls of following old legislative habits.

A. *Amendments Affecting Classification System*

One of the primary goals of any major criminal law revision is that of eliminating inequities in penalty provisions.[43] Piecemeal revision inevitably leads to irrational disparities in authorized

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

[43] "From the standpoint of fundamental importance and need for revision, the single most important area was considered to be that relating to classification of offenses and sentencing." New York State Comm'n on Revision of the Penal Law and Criminal Code, Proposed New York Penal Law VI (1963).

punishment, as there is no objective reference point to which newly enacted criminal statutes may be related. Examples of the inverse relationship between the relative gravity of offenses and their accompanying penalties are abundant and all too familiar.[44]

One logical and presently favored approach to abolishing these discriminatory and anomalous distinctions is the use of a comprehensive classification system designed to provide a uniform sentencing structure.[45] By classifying crimes according to their relative severity, existing and potential inconsistencies can be avoided. The Kentucky Penal Code incorporates a classification scheme consisting of seven classes of offenses.[46] While this constitutes a vast improvement over former law, isolated amendments to the Code as adopted threaten to undermine the conceptual basis of the unified sentencing structure.

[44] The litany begins as follows: Petty larceny (stealing money or property worth less than $100) is punishable by a maximum of 12 months in jail, while theft of a chicken worth $2.00 can result in a five year prison sentence. *Compare* KY. REV. STAT. § 433.230 (1972) [hereinafter cited as KRS], *with* KRS § 433.250. Carrying a concealed deadly weapon is punishable by two to five years imprisonment, while reckless shooting into the back of an automobile carries a maximum of 12 months imprisonment. *Compare* KRS § 435.230 *with* § 435.190. Drawing or flourishing a deadly weapon in any school assembly, place of public worship or on a public highway carries a maximum term of imprisonment of 30 days, while drawing or flourishing a deadly weapon inside or on the platform of an occupied passenger coach is punishable by a maximum of 12 months imprisonment. *Compare* KRS § 435.200 *with* § 435.210. Rape of a child under 12 may be penalized by sentence of life imprisonment with privilege of parole, while rape of a child over 12 is punishable by life imprisonment without privilege of parole. *Compare* KRS § 435.080 *with* § 435.090. Et cetera *ad nauseam*.

[45] The American Bar Association project on criminal justice adopted a standard approving this approach:

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

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

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

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

> The authorized maximum terms of imprisonment for felonies are:
> (a) For a Class A felony, not less than twenty years nor more than life imprisonment;
> (b) For a Class B felony, not less than ten years nor more than twenty years;
> (c) For a Class C felony, not less than five years nor more than ten years; and
> (d) For a Class D felony, not less than one year nor more than five years.

KYPC § 268 [KRS § 435A.1-090] reads in part:

> (a) For a Class A misdemeanor, the term shall not exceed twelve months;
> (b) For a Class B misdemeanor, the term shall not exceed ninety days.

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

> (1) . . . A person who has been convicted . . . may be sentenced to pay a fine in an amount not to exceed:
> . . .
> (c) For a violation, $250.

For example, the Final Draft submitted to the 1972 General Assembly contained four degrees of homicide, each defined and graded according to specified culpable mental states.[47] Each homicide offense constituted a different class of felony for purposes of penal sanctions. Manslaughter in the second degree, causing the death of another by *consciously disregarding* a substantial and unjustifiable risk of which the actor was aware, was classified as a Class C felony.[48] Criminally negligent homicide, causing the death of another person by the actor's *failure to perceive* a substantial and unjustifiable risk, was graded as a Class D felony.[49] By definition, these offenses involve types of conduct which necessarily differ in terms of traditional notions of blameworthiness. While the Legislature retained the two separate and distinct offenses in the Code, the penalty for second degree manslaughter was reduced to that of criminally negligent homicide—a Class D felony. Treatment of these two crimes as identical in terms of the risk/harm factor is difficult to understand and impossible to rationalize since the penalties for assault remain undisturbed. The improbable result is that wantonly *causing* the *death* of another is punishable by one to five years imprisonment, while wantonly *causing physical injury* by means of a deadly weapon is punishable by five to ten years imprisonment.[50] The result is clearly wrong, but failure to respect the interrelationship of Code sections will inevitably lead to unreconciled and indefensible conflicts in penal provisions.

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

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

[48] *Id.* at § 64.

[49] *Id.* at § 65.

[50] *Compare* KYPC § 64 [KRS § 434A.1-040] *with* KYPC § 67 [KRS § 434A.2-020].

a lower degree of the crime which was the object of the actor's conduct.[51] For instance, a criminal attempt would be a Class B felony when the crime attempted was a Class A felony, a Class C felony if the attempted crime was a Class B felony, a Class D felony when the substantive offense was a Class C felony, and a Class A misdemeanor when the crime attempted was a Class D felony.

While the Legislature generally adhered to this classification scheme, it lowered the penalty for certain attempt and solicitation offenses. Thus, when the crime attempted or solicited is a Class C *or* D felony, the inchoate offense constitutes a Class A misdemeanor.[52] There may have been good reasons to modify these provisions, but these reasons should equally apply to the conspiracy statute, which remained unchanged. Failure to reconcile the sections across the board has created dubious results. Agreeing (conspiracy) to commit a Class C felony is punishable as a felony. Encouraging or commanding another to do so (solicitation) or actually taking a substantial step toward the commission of that crime (attempt) is a misdemeanor. This approach distorts the meaning of classification of crimes.[53]

B. *The Mechanics of Amendment*

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

[51] H.B. 197 §§ 50, 52 and 53.
[52] KYPC §§ 50, 52 [KRS § 433D.1-010, 433D.1-030].
[53] Even bills submitted by the Kentucky Crime Commission, the agency primarily responsible for funding and supervising the Penal Code project, were not immune from myopic drafting techniques. House Bill 203, which establishes a police salary supplement program, contains a provision punishing one who "knowingly or willfully makes any false or fraudulent statement or representation in any record or report to the Kentucky Crime Commission. . . ." HB 203, 1972 Ky. Gen. Ass., Reg. Sess. § 23. It is presently a felony to obtain money by false pretenses or to make a false claim against the state. KRS §§ 434.050, 434.230, 434.240. Thus, this provision complements existing criminal statutes punishing the submission of false or fraudulent reports or records with the intent to obtain funds to which the agency or individual was not entitled. What it covers, which is not presently a criminal offense, is conduct comparable to that proscribed by Section 201 of House Bill 197—unsworn falsification to authorities, a Class B misdemeanor. KYPC § 201 [KRS § 434E.5-100]. While the penalty in House Bill 203 is comparable to that contained in the Code, it deviates from that penalty by defining authorized fines and sentences in terms of maximums and minimums and by including a fine which is double the amount authorized under the Penal Code for an offense with an identical maximum term of imprisonment. If there is any jurisprudential validity in the classification system incorporated in the Penal Code, it certainly should be applicable to this special but unincorporated offense.

a striking example. The Final Draft defined the offense as being committed by one who comes into control of such property and fails to take reasonable measures to restore it to the owner with intent to deprive him of it.[54] The Legislature amended the provision by eliminating the requirement that the actor must attempt to restore the property to the person entitled to it. The form of amendment was simply to delete in its entirety the subsection containing that element. It was, however, that subsection which also specified the requisite intent for commission of the offense. Consequently the enacted provision defines the offense as being committed when the actor merely "comes into control of property of another that he knows to have been lost, mislaid or delivered under a mistake as to the nature or amount of the property or the identity of the recipient."[55] Undoubtedly it was not the purpose of the amendment's drafter to create a strict liability theft offense, but the provision contains no requirement of intent. This puts the courts in the position of having to ignore the plain meaning of the statute and to supply legislative text in order to avoid direct conflict with Section 16 of the Act which specifically prohibits imposition of absolute liability for an offense defined in the Code unless it is only a violation. Theft of lost property is either a Class A misdemeanor or a Class D felony, depending upon the value of the property which is the subject of the theft.

C. *The Problem of Special Legislation*

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

[54] H.B. 197 § 121.
[55] KYPC § 122 [KRS § 434C.1-050].

intended to function independently of the Code were enacted, creating the same problems the Code was supposed to eliminate.

An example is House Bill 395 which makes punishable the intimidation or injuring of any witness, juror or officer of the court on account of his participation in a judicial proceeding, or corruptly or forcibly obstructing the due administration of justice. The bill includes a penalty of one to five years imprisonment and/or a fine of $1,000-$5,000.[56] While such conduct should be treated as criminal, the crimes defined by this statute are not novel. It is presently an offense to obstruct justice, to procure the absence of a witness, to bribe a juror, to send threatening communications, to commit an assault, and to inflict bodily injury upon another. Such conduct may also be punishable as embracery and contempt. The various types of conduct proscribed by House Bill 395 will also be covered by numerous Penal Code provisions of broader applicability such as obstructing governmental operations,[57] harrassing communications,[58] terroristic threatening,[59] menacing,[60] and assault.[61]

The main thrust of House Bill 395 appears to be to increase the penalty imposed for such conduct when its object is a specified limited class of persons. While it is laudable to protect trial participants from criminal assaults, all citizens are entitled to be free from such intrusions. If the penalty for those existing offenses which House Bill 395 restates is too light, the logical action is to increase the penalty rather than to indulge in the fiction of creating a "new crime." Moreover, if the statute is designed to remedy inadequate penalties, it both succeeds and fails. While the penalties for offenses such as obstructing justice, sending threatening communications, and common law assault are increased, penalties for other bodily injury offenses are decreased.[62] The same conflict exists with reference to the aforementioned Penal Code provisions.

This problem is not unique to Kentucky legislation. In fact,

[56] H.B. 395, 1972 Ky. Gen. Ass., Reg. Sess.
[57] KYPC § 164 [KRS § 434E.1-020].
[58] *Id.* at § 220 [KRS § 434F.1-080].
[59] *Id.* at § 73 [KRS § 434A.2-080].
[60] *Id.* at § 70 [KRS § 434A.2-050].
[61] *Id.* at §§ 66-68 [KRS §§ 434A.2-010 to .2-030].
[62] *See, e.g.*, KRS § 435.170 authorizing imprisonment for two to twenty-one years for malicious and wilful shooting, cutting, or poisoning.

it closely parallels recent experiences in other states which have labored long and hard to codify and modernize criminal law. One striking example is the Illinois "Masked Gunman Bill" which was drafted in response to a situation where the suspects were apprehended "while riding in a stolen automobile while masked and carrying unconcealed weapons." Although the police believed the men were planning either murder or robbery, they lacked sufficient evidence to support such a charge and were compelled to content themselves with merely charging the suspects with auto theft. Shortly thereafter a bill was introduced in the Illinois General Assembly making it a felony for any person to possess a firearm on his person or in his vehicle "when he is hooded, robed or masked in such a manner as to conceal his identity." The crime, which includes no element of intent, is punishable by one to five years imprisonment in the penitentiary—a penalty which vastly exceeds that authorized for possession of a deadly weapon *with intent* to use it unlawfully against another person. The bill passed both houses of the Legislature unanimously.[63]

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

House Bill 48, introduced January 7, declared that

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

[63] Heinz, Gettleman & Seeskin, *Legislative Politics and the Criminal Law*, 64 NW. U.L. REV. 272, 292-93 (1969).
[64] C. DARROW, THE STORY OF MY LIFE 122 (1932).

> officer, warden, employee . . . or any person who, not being a prisoner, is lawfully in or about the penitentiary or other institution or facility.[65]

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

The bill passed the House by a vote of 68-17,[67] but became bogged down in the Senate Judiciary Committee because of concern over imposition of harsher penalties upon imprisoned felons who commit an offense punishable by a maximum of twelve months in jail when committed by non-prisoners.[68] Two members of the House appeared before the committee to explain the need for such legislation.[69] It was stated that Oldham and Lyon counties, the locations of Kentucky's two state penitentiaries, are financially burdened by the problem created when a prisoner assaults a guard. The prisoner is confined in the county jail to await trial, and, if he is convicted, he is subject to a fine and/or a sentence up to one year in that jail. He may not be returned to the penitentiary to serve the sentence since assault is a misdemeanor and penitentiary sentences are authorized only for felony convictions.[70] At the time the bill was under consideration the Oldham County jail had seven such prisoners serving sentences for assaulting a penitentiary guard.[71] After consideration of the legislation in light of these problems, the bill was reported favorably with an amendment redefining the penalty as a maximum of twelve months imprisonment (the penalty for ordinary assault and battery) to be served in the penitentiary. House Bill 48 was passed as amended, signed by the Governor, and became effective June 16, 1972.[72]

[65] H.B. 48, 1972 Ky. Gen. Ass., Reg. Sess., § 1.
[66] KRS § 431.075.
[67] LEG. REC., *supra* note 15, at 50.
[68] *Two House Members Push Prisoner-Penalty Bill*, Louisville Courier-Journal, Feb. 11, 1972, § A, at 11, col. 1. [hereinafter cited as *Two House Members*].
[69] *Id.* The House members appearing before the committee were Rep. Jay Louden, D-Carrolton and sponsor of the bill, and Rep. Richard Lewis, D-Benton.
[70] KRS § 431.060.
[71] *Two House Members*, *supra* note 68.

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

IV. THE KENTUCKY PENAL CODE: A SUCCESS STORY?

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

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

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

[72] LEG. REC., *supra* note 15, at 50.

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

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

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

The Evolution of Drug Legislation in Kentucky

BY DALE H. FARABEE, M.D.*

The Kentucky Penal Code chapter[1] directed at the establishment of uniform penalties for standardized drug abuse offenses was a serious effort to achieve a rational basis from which to view the area of drug abuse control. Its failure to be enacted into law must be charged to the intensity of feelings that surround this entire area of concern in contemporary society.

A primary antecedent of the present furor is the centuries old medico-socio-theological-legal debate about use, abuse and/or control of alcohol. From a generic standpoint, one must look at the "drug" controversy as developing along the exact same lines—for alcohol is indeed a drug. All we have done is shift the controversy from alcohol to other drugs.

As long as man has a body and consciousness, he will be exposed to the possibilities of alterations in that body and consciousness through external substances and circumstances. What substances he will use, whether and how he will use them, and for what purposes, are critical questions which each individual must answer, both to himself and in the context of society. Individuals are influenced in these decisions by their concept of personal needs and satisfactions and by their relative desire to accommodate these satisfactions to the demands of their social environment. Society, in turn, often argues that acceptance of the individuals' rights hinges upon subjugation of his desires to the norms or standards of the established society. The degree of separation of these conflicting positions is an index of the degree of social turmoil.

In the case of drugs, many viewpoints of various institutions of society were in such a state of conflict with those of significant

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[1] KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE §§ 2900-2915 (Final Draft 1971) [hereinafter cited as LRC].

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Book Reviews

THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1969-1971. By the Editors of *The Criminal Law Reporter*. Washington: The Bureau of National Affairs, Inc., 1972. Pp. 335. $10.00.

The Editors have provided the scholarly community and practictioners of the law with an excellent reference work. Indeed, even the jacket describes accurately the book's contents. "This book provides a Term-by-Term, case-by-case review of the Supreme Court in the area of criminal law since *Mapp v. Ohio*." For those who have racked their brains looking for a stray citation, a forgotten date, the correct chronology of cases, or which Justice said that catchy little phrase or made that abominable admission, this book will more than pay for its purchase price by saving many trips to the library or piles of those photostats stashed away somewhere in a file drawer, attic or basement.

The title is somewhat modest, for the book scans an enormous range material. There are cases decided by the Court, literally from "Abortion" to "Witnesses," including such staples as the major decisions on the First Amendment, guilty pleas, interrogation and confessions, military and selective service, confrontation, right to counsel, search and seizure and self-incrimination. Not only do the editors proceed from year to year and provide the standard table of cases, but an additional excellent reference aid, a table cases arranged by subject classification, also is included.

Two minor organizational criticisms may be noted. First; the table of cases and cases arranged by subject classification frequently do not include cases mentioned in the course of the volume which were not decided during the 1960-1971 terms of Court. Thus, one must scan the book to find which case decided between 1960-1971 overruled prior cases. For example, while the editors note during their discussion of *Mapp* that *Wolf* was overruled, *Wolf* is not listed in either index. Second, for some reason the cases do not proceed as they were decided. While it is understandable and convenient that the editors divided the cases by subject matter for each term of Court, there seems to be no reason why the cases should not follow in perfect chronological order. Why, for example, should *Escobedo* precede *Massiah*? Although the editors' presentation may make more sense to them and their readers alike, such methodology serves to distort the actual historical

picture and brings a certain logical development to the cases which in fact may be absent.

The editors fulfill another promise, one which I was particularly pessimistic about: "Each case is concisely analyzed and attention is drawn to earlier cases now overruled or distinguished and to the views of dissenting Justices."[1] The editors have no ideological axe to grind. Each analysis is done fairly and concisely—no easy task considering the topics covered. I could not detect any bias whatsoever, only the constant attempt to understand the views of the Justices and the general trend of the Court's decisions. The crucial points in majority and often minority opinions are presented, with the editors always alert to clarify differences between the views of the Justices. They also have a discerning eye for telling arguments, regardless of whether they stem from majority or minority points of view. The introduction, clear and arranged topically, is helpful, providing the reader with a quick summary of current law. The editors' interjections throughout the volume are objective, concise and meaningful.

The book is not, nor does it pretend to be, a substitute for reading either the actual opinions of the Court or the legal literature. Thus, the publisher's claim that the work will prove "extremely useful to . . . law enforcement officers" is doubtful.[2] First, the case law is too confusing, even to the Justices, in such areas as confessions and searches and seizures, and second, the stakes are too high—exclusion of pertinent evidence, that there appears to be no prudent substitute for reading the actual opinions or accepting the guidelines issued by official prosecution sources.

The diversity of subject matter, the multiplicity of opinions, the shifting of majorities, the exceptions and modifications, make it a book with which one would not curl up by the fire. The book is, therefore, primarily a reference work. It is a reference work, however, which one engaged in Bill of Rights research can justify purchasing for his personal library, and, without question, it would be a valued addition to law and university libraries. Moreover, this contribution to the researcher and student of the Court could be solidified by moderately priced annuals or biannual updatings, perhaps also including pertinent bibliographical material.

So concentrated a reading of Court decisions between 1960 and 1971 cannot but help invoke comments of a wider perspective. The controversey revealed in *The Criminal Law Revolution and Its After-*

[1] BUR. OF NAT'L AFFAIRS, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1971 inside book jacket (1972) [hereinafter cited as CLR].
[2] *Id.*

math does not center upon whether the Justices have rewritten the constitutional protections afforded by the First, Fourth, Fifth, Sixth and Fourteenth Amendments, for all parties to the controversy accept that proposition as true. The debate, and it is a continuing one, is over whether the Court has enhanced or diminished the Constitution in the process. While in many respects this book is a dream come true, an opportunity to expand upon an infinite number of topics close to the reviewer's heart, time and the editor's poised red pencil necessitate only brief indulgence.

One prominent thread runs throughout this volume and appears to hold the fabric of the Warren Court's criminal law revolution together, its almost religious subscription to the exclusionary rule. The Court has defended its utilization primarily on two grounds: 1) as a means by which an individual's Fourth, Fifth and Sixth Amendment rights may be effectively safeguarded against police misconduct, and 2) as ethically necessary if courts are not to sanction police illegality. As this volume reveals, there was an increasing tendency for the Warren Court to expand the application of the exclusionary rule by defining new "illegalities" and coupling them with the poisonous tree doctrine. The branches and roots of this "tree" have made it, in recent years, not merely another shrub requiring care in the constitutional garden, but a tree which in its quest for self-preservation (read effectiveness) and nourishment has proved deadly to old familiar, and in many ways still logically sound, *Wolf, Snyder, Palko* and *Twining* plantings.[3] This tree has not only proved poisonous to the chain of physical or verbal evidence, but to criminal jurisprudence itself. The exclusionary rationale is often a substitute for thinking and the agonizing choices associated with political order and public policy. The Court has claimed that utilization of the exclusionary rule preserves its sense of ethics by not sanctioning police illegality; yet, rarely have we seen the Justices admit ethical responsibility when justice is not done, when the guilty go free.

The editors trace the haunting consistency of the Warren Court in their attempt to make the exclusionary rule work, but the idiosyncrasies of individual Justices from time to time restrains this attempt. Sacrificed at the altar of exclusion has been an essential ingredient of justice, evidence "relevant, reliable and highly probative

[3] *Compare* Wolf v. Colorado, 338 U.S. 25 (1949); Snyder v. Massachusetts, 291 U.S. 97 (1934); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908) *with* Mapp v. Ohio, 367 U.S. 643 (1961); Malloy v. Hogan, 378 U.S. 1 (1964); Duncan v. Louisiana, 391 U.S. 145 (1968) and Benton v. Maryland, 395 U.S. 784 (1969).

of the issue."[4] Justice, under the Warren Court, has been subjected to new onslaughts of the "sporting theory,"[5] not even redeemed by any concrete contribution in actually punishing the malicious and/or corrupt police officers whom the exclusionary rule cannot touch.[6] Innocent victims of police misconduct (that is, where no evidence is found) are offered not one whit of additional protection by the exclusionary rule. Only where the illegality is fruitful does the rule come into play. Only the guilty, therefore, obtain a privilege unavailable to the innocent victim of police misconduct—exclusion of pertinent evidence. In fact, the Warrent Court has made pursuit of those who violate public trust more difficult.[7]

While space does not permit examination of the Court's ideological posture,[8] a review of the cases presented in this volume reveals certain inconsistencies on the part of the Justices. We see Justice Brennan assert that "the government's primary responsibility in a criminal case was to see that justice was done, rather than merely to win the case;"[9] or, the Court quite rightly condemning a prosecutor's deliberate misrepresentation of the truth as denying a fair trial;[10] or, for example, the remarks of Justice Fortas concurring in *Giles v. Maryland*:

> A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. . . . If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the State caused to be given at the trial—the State is obliged to bring it to the attention of the court and the defense.[11]

The evident concern of the Court with the discovery of truth, hence justice, appears more like an exercise in nostalgia than concern

[4] CLR, *supra* note 1, at 39. Massiah v. United States, 377 U.S. 201 (1964) (White dissenting). *See also* Linkletter v. Walker, 381 U.S. 618 (1965) and Kaufman v. United States, 394 U.S. 217 (1969).

[5] *See* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUD. SOC'Y 178 (1937).

[6] CLR, *supra* note 1, at 143; Brooks v. Florida, 389 U.S. 413 (1967).

[7] CLR, *supra* note 1, at 106; Garrity v. New Jersey, 385 U.S. (1967); Gardner v. Broderick, 392 U.S. 273 (1968).

[8] *See, e.g.*, Packer, *Two Models of the Criminal Process*, 113 U. PENN. L. REV. 1 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Griffiths, *Ideology in Criminal Procedure or, A Third 'Model' of the Criminal Process*, 79 YALE L.J. 359 (1970).

[9] CLR, *supra* note 1, at 5, paraphrasing J. Brennan in Campbell v. United States, 365 U.S. 85 (1961).

[10] *Id.* at 108; Miller v. Pate, 386 U.S. 1 (1967).

[11] *Id.* at 110; Giles v. Maryland, 386 U.S. (1967).

rooted in principles subscribed to by the Warren Court. The Court, on the contrary, had insisted that "there are considerations which transcend the question of guilt or innocence,"[12] and the Chief Justice had put the requirements of this code brutally in *Miranda:* "the existence of independent corroborating evidence, produced at trial is, of course, irrelevant. . . ."[13] Pursuit of truth and the exclusionary rule, like oil and vinegar, do not mix, a lesson as old as *Lisenba* and made abundantly clear in *Miranda.*[14] The Court has made its contribution to making the criminal process a game, and now it expresses horror when participants play that game spiritedly. Prosecutors are chastised to seek "justice," while defense attorneys are given free reign to protect their clients' "interests."

Changes in the Court's personnel make attempted pruning of the poisonous tree and denial of its exclusionary nourishment a realistic possibility.[15] As noted by Chief Justice Burger, we pay a "monstrous price . . . for the exclusionary rule in which we seem to have imprisoned ourselves."[16] The issue the Court may confront in coming years is how we can modify—abolition seems impractical—the exclusionary rule while reasonably protecting violations of individual liberty and establishing laws conducive to actual punishment of illegal enforcement of the law.[17]

William Gangi•

DEFENDING BUSINESS AND WHITE COLLAR CRIMES. By F. Lee Bailey & Henry B. Rothblatt, New York, New York: Lawyers Co-Operative Publishing Co., 1969. Pp. 740.

What two famous criminal trial lawyers have a habit of striking fear in the hearts of prosecutors? Why, F. Lee Bailey and Henry B. Rothblatt, of course. They do it in the courtroom and they do it when they team up to write a book for the benefit of their fellow trial lawyers. Their book, *Defending Business and White Collar Crimes,* has brought insight and confidence to the defense bar.

[12] Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960).
[13] Miranda v. Arizona, 384 U.S. 436, 481 n.52 (1966).
[14] Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Rogers v. Richmond, 365 U.S. 534 (1961); Lisenba v. California, 314 U.S. 219 (1941).
[15] CLR, *supra* note 1, at 277; Harris v. New York, 401 U.S. 222 (1971).
[16] *Id.* at 267; Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971).
[17] *Id.* at 275; Biven v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Chief Justice Burger dissenting).

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The field of white collar crimes, an area so unique in so many significant respects has, up until now, been avoided by the average practitioner. Since these prosecutions normally involve businessmen and professionals, a lawyer who does not usually handle criminal matters is likely to become involved. It is at this point when the attorney chosen should not only know his criminal law but should also be thoroughly familiar with the special problems attached to the white collar crimes. This is where *Defending Business and White Collar Crimes* achieves its greatness. Not only does it deal with the particular areas of white collar crimes, but it also gives a thorough and highly sophisticated course in criminal defense tactics that will be useful to the novice and expert alike.

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Stanley E. Preiser•

THE WARREN COURT'S CONCEPTS OF DEMOCRACY. By Howard Ball. Cranbury, New Jersey: Associated University Presses, Inc., 1971. Pp. 256. $10.00.

Howard Ball's critical study of Supreme Court cases dealing with legislative reapportionment focuses on two questions: (1) What were the conceptions of democracy expressed by the Justices? and (2) Which of the opinions, if any, could be called reasonable? The crux of the matter is stated by Justice Douglas in *Baker v. Carr,* in his concurring opinion, in which he said that "It is that the conception of

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