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ANALYSIS OF NEW KENTUCKY PENAL CODE

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Introduction

When the Kenton-Maloney Code of Criminal Justice becomes effective on July 1, 1974, it will significantly alter the criminal law of Kentucky. It will replace the common law with a statutory scheme of offenses, penalties, and law enforcement procedures. As a totality, the Code should improve the criminal law substantially and should benefit law enforcement in numerous respects. Nevertheless, certain provisions in the Code weaken the criminal law and could unreasonably hamper the functioning of law enforcement.

The Code should improve the criminal law in at least six major respects. First, it reduces the unnecessarily large number of existing criminal statutes to a much smaller, more manageable number. Second, it greatly simplifies the law by collecting similar types of offenses and classifying them by degree. For example, the Code divides the offenses of homicide, burglary, robbery, and theft into

degrees according to the criminality of the intent and the conduct involved in various situations.

Third, the Code strengthens the criminal law by prohibiting certain forms of harmful conduct which are not presently covered. Specifically, it creates the new offenses of reckless endangerment, terroristic threatening, sexual abuse, unsworn falsification to authorities, and others. In addition, the Code expands the criminal law by redefining numerous offense categories, such as burglary, arson, forgery, false reports of emergencies, criminal escape, resisting arrest, bribery, and tampering in court proceedings.

Fourth, the Code also improves the law by clarifying and sometimes reversing rules which were either ambiguous or unjust. By way of example, the sections on justification as a defense permit a private citizen to use physical force, without retreating, when necessary to defend himself against attack. Moreover, under the Code a citizen may use deadly force when required to protect himself against serious bodily injury or a burglary of his home, as well as to prevent the commission of a crime which is likely to endanger human life.

Fifth, the Code markedly simplifies the system of penalties for offenses. It classifies all offenses as A, B, C, or D felonies, A or B misdemeanors, or simple violations, and it establishes maximum penalties for each class of offense. Last, certain sections of the Code strengthen Kentucky law by increasing the maximum penalties for such serious offenses as perjury, witness bribery, and jury tampering.

Although the strong points of the Code outweigh its shortcomings considerably, it does contain a number of serious weaknesses. First,

and most significantly, it includes certain provisions which create serious, unreasonable dangers to society or which simply appear unwise. For example, the riot provisions could severely weaken the law by requiring that actual violence occur before the offense of riot is committed. Furthermore, the Code redefines the offenses of loitering and disorderly conduct in a manner which unjustifiably may impair the ability of police to protect life and property. It eliminates the presumptions of guilt created under the KRS by possession of stolen property and by remaining at the scene of a riot after being ordered by the police to leave. Additionally, ignorance is a defense under the Code to any sexual offense where the lack of consent results from legal incapacity. Moreover, the Code strikes out the felony-murder rule and the malice aforethought requirement in homicide cases. As a final example, with limited exceptions, the Code reduces the maximum penalty for first degree rape and forcible sodomy to 20 y.

Second, the Code presents several definitions which conflict with long-standing principles of the criminal law as well as the general understanding of law enforcement authorities. The definitions of "felony," "misdemeanor," and "intoxication" are notable examples.

Third, certain provisions of the Code are seriously misleading, such as the sections on commercial bribery (Section 156) and carrying a concealed deadly weapon (Section 229). Finally, although Section 11 provides for use of the original Commentary to interpret provisions of the Code, the Commentary leaves many important points unclear. The Commentary discussions of the defense of justification, the offense of riot, and the offenses involving theft are particularly weak in this respect.

In light of these strengths and weaknesses of the new criminal Code, it is recommended that the following sections of the Code be accepted as they now stand:

Sections 1 through 3 (Applicability of the Code)
Sections 6 and 7 (Jurisdiction, Right of Appeal)
Sections 10 and 11 (Forfeiture, Code Interpretation)
Sections 13 through 26 (Definitions, Defenses to Crimes)
Sections 27 through 34
and 36 through 38 (Justification, Use of Force)
Sections 39, 41, 42 (Insanity Defense, Incapacity)
Sections 44 through 60 (Entrapment; Lesser Included Offenses;
Former Trials; Criminal Attempt, Con-
spiracy, and Facilitation)
Sections 63, 64, 65 (Manslaughter and Reckless Homicide)
Sections 66 through 69 (Criminal Assault)
Sections 70 through 81 (Menacing, Threatening, Reckless En-
dangerment, Unlawful Imprisonment, and
Offenses Against Freedom of Action)
Section 84 (Consent as an Element of Sexual Offenses)
Sections 87, 88 (Second and Third Degree Rape)
Sections 90, 91, 91A (Second, Third, and Fourth Degree Sodomy)
Sections 92 through 95 (Sexual Abuse, Sexual Misconduct)
Sections 98 through 111 (Burglary, Criminal Trespass, Criminal
Mischief, Noxious Substances)
Sections 113, 115 through 117 (Posting Advertisements, Arson)
Sections 118 through 124 (Theft Offenses)
Sections 127 through 130 (Obscuring Identity of Machine,
Robbery)
Sections 131 through 155 (Forgery Offenses, Criminal Simula-
tion, Fraud and Deceptive Business
Practices, Bribery Definitions)
Sections 160 through 175 (Tampering with a Sports Contest,
Obstructing Government Operations,
False Reports, Escape)
Sections 178 through 182
185 through 201 (Bail Jumping, Resisting Arrest, Public
Servant Offenses, False Statement Offenses)
Section 202 (Bribery and Tampering Definitions)
Sections 205, 206 (Intimidating and Tampering with Witnesses)
Sections 209 through 213 (Intimidating Juror, Jury Tampering,
Tampering with Physical Evidence,
Definitions)
Sections 219 through 220 (Harassment Offenses)
Sections 222 through 226 (Public Intoxication, Desecration,
Cruelty to Animals, Obstructing Public
Passage)
Sections 228, 230 through 234 (Firearm Definitions, Possession
of Defaced Firearm or Explosives)
Sections 236 through 244 (Gambling Offenses)

Sections 245 through 251 (Prostitution Offenses)
Sections 252 through 260 (Bigamy, Incest, Offenses Against
Minors)
Sections 262, 266, 267, 269
through 271, 273 through 305 (Penalty Categories, Fines,
Disposition of Convicted Persons,
Miscellaneous Provisions on Shop-
lifting and other Offenses)

It is further recommended that the following sections of the Code
be amended in accordance with the subsequent analysis:

Section 4 (Retroactive Application of the Code)
Section 5 (Limitations on Felony Prosecutions)
Sections 9, 12 (Definitions)
Section 35 (Justification as a Defense)
Sections 40, 43 (The Insanity Rule, Psychiatric Exams)
Sections 61, 62 (Classes of Homicide, Murder)
Sections 82, 85, 86, 89 (Definitions of Sexual Terms, Ignorance
as a Defense, First Degree Rape, First
Degree Sodomy)
Section 96 (Indecent Exposure)
Section 97 (Burglary Definitions)
Section 112 (Littering)
Section 114 (Arson Definitions)
Section 125 (Unauthorized Use of Vehicles)
Section 126 (Receiving Stolen Property)
Sections 156 through 159 (Commercial and Sports Bribery)
Sections 176, 177 (Promoting Prison Contraband)
Sections 183, 184 (Hindering Prosecution or Apprehension)
Sections 203, 204 (Witness Bribery)
Sections 207, 208 (Juror Bribery)
Sections 214 through 218 (Riot Offenses, Unlawful Assembly,
Disorderly Conduct)
Section 221 (Loitering)
Section 227 (Disrupting Meetings)
Section 229 (Carrying Concealed Deadly Weapon)
Section 235 (Gambling Definitions)
Sections 261, 263, 264, 265, 268, 272 (Penalty Provisions)

Sections 1 through 6: Applicability of the Code

The new penal Code in effect repeals numerous sections of the Kentucky Revised Statutes, adds new chapters to the KRS (Chapters 433A through 435A), and amends many other KRS sections. Moreover, Section 2 specifies that the Code abolishes all common law offenses, with the exception that should the courts hold Kentucky's abortion statute unconstitutional, the common law on abortion will again take effect.

It is important to note, however, that the Code only repeals those sections of the KRS which are spelled out in Section 306. Consequently, many significant sections of the KRS remain part of Kentucky criminal law when the Code takes effect. The following provisions of the KRS, among others, continue in force:

1. most of the sections in Chapter 26 on the powers and procedures of police courts;
2. most of Chapter 29 on juries;
3. most sections in Chapter 61 on public offices and officers;
4. Chapter 63 on resignations, removals, and vacancies;
5. Chapter 65 on the powers of cities, counties, and other local units;
6. Chapters 69 through 72 on attorneys, jailers, sheriffs, coroners, and inquests;
7. Chapter 95 on city police and fire departments;
8. Chapter 124 on election offenses and prosecutions;
9. most of Chapter 150 on fish and wildlife offenses;

10. all of Chapters 186, 187, 189 on licensing of motor vehicles (including Section 186.565 on "Implied Consent"), the financial responsibility law, and traffic regulations (including 189.520 on operating a vehicle while intoxicated);
11. most of Chapter 208 on juvenile courts;
12. Chapter 229 on prize fighting;
13. Chapter 231 on places of entertainment;
14. most of Chapters 241, 242, 244 on alcoholic beverage control, local option, and alcoholic beverage regulations;
15. Chapter 281 on motor carriers;
16. Chapter 344 on civil rights;
17. Chapter 365 on trade practices;
18. most of Chapters 421 and 422 on witnesses and evidence;
19. portions of Chapter 431 on the power to arrest (431.005) and notice to arrest (431.025);
20. Section 432.570 (misdemeanor of illegally possessing a police radio);
21. portions of Section 433.234 and all of Section 433.236 on shoplifting;
22. Section 436.020 on abortion;
23. Section 436.101 on the distribution of obscene matter;
24. Section 436.160 on holding matches or playing pool on Sunday;
25. Section 437.030 on dueling;
26. Sections 437.095 and 438.100 through 438.143 on fireworks offenses;
27. Chapter 440 on escape and fugitives from justice;
28. sections of Chapter 441 on county jails.

The foregoing list reveals that Kentucky's statutory law on abortion, obscenity offenses, alcoholic beverage regulations and traffic offenses remains basically unchanged by the Code. But it should be noted that, although the Code itself does not cover most drug offenses, the Kentucky legislature has enacted a law on controlled substances which the governor recently signed. This Controlled Substances Act of 1972 (formerly Senate Bill No. 274) replaces Chapters 217 and 218 of the KRS on dangerous drugs and narcotics. It takes effect on July 1, 1972 and is beyond the scope of the present analysis.

The new Code takes effect on July 1, 1974 (under Section 307), unless the next Kentucky legislature provides otherwise. Consequently, from July 1, 1974 on, conduct must fall within a section of the Code, a section of the new Controlled Substances Act, or another portion of the KRS which has not been repealed by the Code, in order to be a criminal offense in Kentucky.

Nevertheless, Section 4 of the Code provides that if the defendant in a case is charged with an offense that was committed prior to July 1, 1974, he may still elect to be tried under the provisions of the Code. This provision seems extremely unwise. In effect, it would allow a defendant who was arrested and charged under the old sections of the KRS to be tried under provisions of the Code which may be quite inconsistent with the old sections. The probable result in many cases will be confusion for everyone concerned. Moreover, it would be much fairer to apply the law which existed at the time the alleged conduct occurred, for it is this law which was in the mind of the defendant, the public, and the police at the time of the conduct. The Code should be amended in Section 4 to state that the provisions of the

Code shall not apply to any offense committed prior to its effective date, July 1, 1974. The language on the defendant's election should be stricken.

Section 5 of the Code provides that, as a general rule, there is no time limitation for felony prosecutions but that misdemeanor prosecutions must begin within one year after commission of the offense. This section carries over the substance of KRS 431.090. But while the current KRS contains a number of sections creating time limitations for specific offenses, the Code eliminates these provisions. The net result is that the Code authorizes prosecution of felony offenses at any time following commission of the crime.

Capital offenses present such a severe threat to life and property that the Code is warranted in not providing any time limitation for their prosecution. But the danger to society inherent in non-capital offenses is far less, while the danger of a wrong conviction increases during the years following the offense. It is therefore urged that Section 5 of the Code be amended to provide that in non-capital felony cases, prosecution must begin within five years after discovery that the offense was committed.

Under Section 6, a defendant may be tried in Kentucky for an attempt made in another state to commit a crime in Kentucky. Moreover he may be tried in Kentucky for criminal conspiracy so long as he performs in Kentucky some act furthering the conspiracy, or, with regard to homicide, so long as the body is found in Kentucky.

Section 8: Burden of Proof

Section 8 places upon the Commonwealth the burden of proving every element of the case beyond a reasonable doubt. It further

states that the Commonwealth is not required to disprove any element that is named as a "defense" in the Code, "until the defendant has made such an element an issue in the case by introducing evidence to support it."

This language restates the fundamental rule in criminal law that the prosecution must prove the defendant's guilt beyond a reasonable doubt. Moreover, while the defendant must introduce evidence in order to raise the defense as an issue in the case, the ultimate burden of proving guilt beyond a reasonable doubt remains with the Commonwealth. Consequently, once the defendant meets his immediate burden of producing evidence of insanity, self-defense, coercion or other defenses, the burden of presenting evidence returns to the Commonwealth; but the overall burden of proof as to guilt does not shift.

Section 9: Definitions

This section of the Code sets out a number of important definitions for terms used in later provisions (e.g., "deadly weapon,"

"felony," "misdemeanor," "possession," etc.). Several of these definitions seem inconsistent with the meanings commonly accepted by courts, attorneys, and law enforcement officers.

The definition of "deadly weapon" is limited to loaded weapons from which a shot may be fired, switchblade or gravity knives, billy clubs, blackjacks and metal knuckles. Many other objects are deadly weapons. The definition should be expanded to include the words "or any other object readily capable of producing death or other serious physical injury."

Similarly, the definitions of "felony" and "misdemeanor" run counter to current law and understanding. "Felony" should be defined as an offense for which a sentence to more than twelve months imprisonment in the custody of the Department of Corrections may be imposed. The definition of "misdemeanor" should be an offense, other than a traffic violation, for which a sentence to imprisonment for twelve months or less may be imposed.

Section 10: Forfeiture

Section 10 simply provides for the forfeiture of stolen property to the state unless the lawful owner properly establishes his claim before the court which is trying the criminal case.

Section 11: Interpretation of the Code

Under this provision the Commentary will be used as an aid for interpreting ambiguous provisions of the Code. It should therefore be noted that the Commentary is itself ambiguous in explaining a number of the Code's provisions, particularly the sections on burden of

D. Rape

Sections 86 through 88 establish the offenses of first, second and third degree rape, all of which will be felonies. Rape will be first degree where force is used or where the victim is either under 12 or physically helpless. The maximum penalty will be twenty years, unless the victim is under 12 or receives a serious physical injury in which case the death penalty may be imposed.

This general maximum penalty of twenty years is not sufficient to cope with the serious criminal conduct involved in first degree rape. As a practical matter, at least six aggravating factors can be present in a first degree rape offense: 1. illegal force; 2. a severe invasion of bodily privacy; 3. a substantial threat of serious mental or physical injury; 4. the possibility of unwanted children; 5. the creation of psychological barriers in the marriage relationship; and, 6. a damaging impact of the act on the security of society. These factors argue forcefully to change the Code by classifying first degree rape as a capital offense.

At a minimum, the offense of first degree rape should be punishable by death or life imprisonment without parole where the victim receives serious psychological or physical injury. The mental or psychological damage caused by rape is often severe and can equal any physical injury that may occur. Psychological barriers created by the assault can mar normal relationships between a married victim and her spouse or prevent an unmarried victim from being capable of a normal marriage in the future.

Second degree rape (Section 87), a Class C felony, encompasses sexual intercourse between one person 18 years or older and a victim

under the age of 14. Where one person is 21 or older and the victim is under 16, or mentally defective or incapacitated, the offense will be third degree rape, punishable as a Class D felony.

E. Sodomy Offenses

Sections 89 through 91 A divide the crime of sodomy into four degrees. The first three degrees will be felonies and the fourth degree will be a Class A misdemeanor. First degree sodomy (Section 89) occurs when the defendant uses force to engage in deviate sexual intercourse with another person, or has such intercourse with a victim who is under 12 or physically helpless. The maximum penalty is twenty years with the exception that the offense becomes a capital crime where the victim is under 12 or receives a serious physical injury.

The same arguments for making first degree rape a capital offense apply with equal force to first degree sodomy. In addition, the perverted nature of sodomy constitutes another aggravating factor which justifies classifying first degree as a capital offense.

The elements of second and third degree sodomy (Sections 90 and 91) are identical to those for second and third degree rape except that deviate sexual intercourse is involved. Section 91 A defines as fourth degree sodomy any engaging in deviate sexual intercourse with another person of the same sex. Consent is no defense to this Class A misdemeanor, which apparently includes sodomy in private between consenting adults.

Sections 92 through 94: Sexual Abuse

These sections create the new offenses of first, second and third degree sexual abuse. Where the defendant simply causes

sexual contact without the other person's consent, he is guilty of third degree sexual abuse. Where the victim of the contact is mentally incapable or under 14, the offense is second degree. Second and third degree abuse are misdemeanors. First degree is a felony and includes using force to cause sexual contact without consent as well as abuse of a victim who is helpless or under 12.

Section 96: Indecent Exposure

Section 96 limits the offense of indecent exposure to exposure by the defendant of his genitals under circumstances likely to cause affront, and with the specific intent "to arouse or gratify sexual desire of himself or of any person other than his spouse."² Present law requires no such specific sexual intent. Since the harm resulting from the conduct consists in the affront or alarm to other people, this requirement of a certain mental state seems illogical and unwise. Section 96 should be amended to eliminate the requirement.

Sections 97 through 100: Burglary

The Code separates the crime of burglary into three degrees, all felonies. First degree occurs where the person knowingly enters or illegally remains in a dwelling with the intent to commit a crime and any one of the following factors is also present: 1. the burglar is armed; 2. he injures an occupant or threatens him with a weapon;

²Section 96 apparently authorizes prosecution of female as well as male defendants, since the word "genitals" is a general term meaning the human reproductive organs. But while the police under certain circumstances might arrest a completely naked woman for indecent exposure, Section 96 evidently does not include topless dancers who have their sex organs covered.

3. the crime occurs at night. The offense thus requires a dwelling, defined in Section 97 as a building usually occupied at night. But unlike the old crime of burglary, no breaking need be present. The essence of the offense is illegal entry in any manner with the intent to commit a crime, so long as one of the aggravating factors listed earlier is present.

The definition of "dwelling" contained in Section 97 should not be restricted to buildings usually occupied by lodgers at night. Black's Law Dictionary defines the word "dwelling-house" in general language as including the house in which a man lives with his family, a residence, abode, or habitation. It is significant that many persons work at night and occupy their places of lodging only in the daytime. Moreover, the basic purpose underlying these sections on burglary is to protect private citizens from illegal entries by thieves into homes or other places of lodging. In order to better fulfill this purpose and to conform the Code to basic legal definitions, Section 97 (2) should be amended. It should define "dwelling" as any building which is usually occupied as a home by persons who lodge there

Where all of the facts are the same and one of the aggravating factors is involved but the structure entered is merely a "building," the offense is second degree burglary. Under Section 97, "building" includes all structures where a person lives or where people assemble for some business, religious, or social activity. Where the defendant knowingly enters or remains illegally in a building but none of the aggravating factors are present, he is guilty of third degree burglary under Section 100.

These sections on burglary improve the criminal law greatly. First, they collect all of the many burglary situations into three

offenses and grade them by degree. Second, they eliminate the unnecessary requirement of breaking and emphasize the critical element of illegal entry. Third, they provide more severe penalties according to the threat to life and property which is involved in a particular situation.

Section 102 through 105: Criminal Trespass

Sections 102 through 105 create three degrees of the offense of criminal trespass. Where the defendant knowingly and unlawfully enters, or remains, in a dwelling, he commits first degree trespass. If he knowingly and unlawfully enters a building or fenced premises, the offense is second degree. Third degree includes simple knowing and unlawful entry of any premises. Trespass in the first and second degrees are Class A and Class B misdemeanors, respectively, while third degree is a violation punishable by fine only.

Sections 107 through 109: Criminal Mischief

These sections divide the offense of criminal mischief into three degrees. First degree covers intentionally defacing or damaging any property so as to cause a loss of \$1,000 or more. Where the defendant intentionally or recklessly damages property causing a loss of \$500 or more, he commits second degree mischief. Where the loss falls below \$500, the offense is third degree. Only the first degree of mischief is a Class D felony.

Sections 110 through 111: Noxious Substances

These sections prohibit unlawful use and possession of noxious substances where the defendant has a specific intent to interfere

degree that he may endanger persons or property. Second, it improves the law by extending coverage to all controlled substances (i.e., dangerous drugs and narcotics). Third, the medical treatment exception is new and is warranted to prevent persons affected by medically prescribed drugs from being prosecuted for a crime.

Harassing Communications

This misdemeanor set forth in Section 220 covers the use of the telephone or mail to communicate with a person in a manner that causes annoyance or alarm. Section 220 expands and strengthens the criminal law. Unlike the obscene phone call statute (KRS 436.107), it extends to communication by writing and to any non-legitimate communication which annoys or alarms. For example, the police should be able to use the section in charging persons who make "silent" or "panting" phone calls.

The Code does, however, weaken the law unnecessarily by making this offense a Class B misdemeanor with a 90-day maximum penalty. It should be amended to provide for a one-year maximum sentence where the communication is obscene.

Sections 223 through 224: Desecration Offenses

Section 223 prohibits as a Class A misdemeanor the intentional desecration of venerated objects such as the flag or a public monument. Abuse of a corpse constitutes a Class A misdemeanor under Section 224.

Section 225: Cruelty to Animals

A person is guilty of cruelty to animals, a Class B misdemeanor, whenever he intentionally or recklessly kills, injures or subjects an

animal to cruel neglect or mistreatment. Although the Code eliminates buggery as a sexual offense, it should be quite valid for the police to charge with cruelty any person who engages in intercourse with an animal.

Sections 226 and 227: Obstruction and Disruption

Section 226 authorizes prosecution for a Class B misdemeanor when a person intentionally or recklessly, and with no legal right, makes a public passage, such as a highway, "impassable without unreasonable inconvenience." Although the KRS now prohibits obstruction as disorderly conduct, this section changes the law by creating two important limitations to the power of the police. First, a person cannot be convicted of obstruction solely because persons gather to hear someone speak. Second, a police order that a gathering disperse will be unlawful if the police can "readily" correct the obstruction by controlling either the size or location of the gathering. In other words, if the police can clear the obstruction by simply limiting the number of persons in the gathering or moving the gathering to another location, they cannot charge persons under this section.

In light of recent increases in the occurrence of public demonstrations, Section 226 could become an essential instrument of the police in controlling traffic obstructions and preventing violence. Moreover, although the section's limitations may make the police task more difficult, recent federal court decisions on freedom of speech and assembly require such limitations.

Section 227 provides that a person commits a Class B misdemeanor when he intentionally does any act tending to obstruct a meeting

G. Summary of Major Changes

The new criminal Code alters the law on gambling in seven primary ways: 1. it collects a large number of offenses into the categories of promoting and permitting gambling; 2. it grades offenses according to the size of the operation; 3. it establishes gambling conspiracy as a separate offense with felony status; 4. the Code repeals the present KRS sections providing criminal penalties for police officers who fail to arrest persons operating gambling devices or to suppress places where bets are placed (KRS 436.350 and 436.470); 5. the Code introduces possession of a gambling device as a new misdemeanor in the criminal law; 6. persons who are merely "players" in gambling activities commit no criminal offense under the Code; 7. according to Section 244, gambling devices or records seized by the police are automatically forfeited to the state whether or not anyone is convicted and whether or not a jury decides that the items were intended for gambling.

Sections 245 through 251: Prostitution Offenses

The Code repeals the KRS sections on prostitution and pandering offenses, and it substitutes the following basic crimes: 1. prostitution; 2. promoting prostitution in three degrees; and 3. permitting prostitution. First and second degree promoting prostitution are felonies (Class C and D respectively). Third degree promotion is a Class A misdemeanor. Simple prostitution and permitting prostitution are Class B misdemeanors (90 days or less). As a totality, the Code's provisions make the law stricter in certain respects and weaker in others.

A. Definitions (Section 245)

In a manner similar to the breakdown of gambling offenses, the Code gears its prostitution provisions to two forms of promotion: advancing and profiting from prostitution. The term "advancing prostitution" relates to any intentional conduct directed toward aiding prostitution. Operating a house of prostitution, procuring customers or prostitutes, and other acts which might constitute pandering under current law are all forms of advancing prostitution. "Profiting from prostitution" covers any situation where someone besides a prostitute knowingly receives money or property under an agreement to share in the proceeds of prostitution. It would, therefore, include a number of forms of "pimping." Last, Section 245 brings any act of sexual gratification involving the sex organs within the meaning of "sexual conduct."

B. Prostitution (Section 246)

The defendant commits prostitution in violation of Section 246 when she engages in (or agrees or offers to engage in) any sexual conduct with a person for a fee. The offense apparently includes any solicitation or offer of a sexual act, or the sexual act itself, so long as money is involved.

C. Promoting Prostitution (Sections 247, 248, 249)

When a person knowingly advances prostitution by using force or threat to obtain prostitution, he commits first degree promotion. If he knowingly advances prostitution by owning or operating a prostitution business involving two or more prostitutes, he is guilty of second degree promotion. This statute gives felony status

to pimps running two or more prostitutes as well as the owner of a large house of prostitution. If the conduct merely amounts simply to knowingly advancing or profiting from prostitution, the offense is third degree.

D. Corroboration Requirements (Section 250)

Section 250 alters Kentucky law significantly by prohibiting conviction of the defendant for either prostitution or promoting prostitution solely on the uncorroborated testimony, respectively, of a customer or prostitute. This provision may create a serious obstacle to law enforcement because there are frequently no other witnesses to an act of prostitution besides the prostitute and the customer. But the obstacle may be minimal if the courts hold physical evidence (e.g., marked money) or circumstantial evidence to be sufficient corroboration for conviction. In any event, the requirement of corroboration is consistent with the basic legal principle that the defendant is presumed innocent by the law and must be proven guilty beyond a reasonable doubt.

E. Permitting Prostitution (Section 251)

A person commits the misdemeanor of permitting prostitution when he knows, or has reasonable cause to know, that premises under his control are being used for prostitution and fails to make a reasonable effort to stop the offense.

F. Summary of Important Changes

The following are significant changes introduced by the Code:

1. The law on prostitution is expanded to include any act of sexual gratification involving the sex organs;

2. Conduct is not prostitution unless done for a fee;
3. The Code replaces numerous sections of the KRS on prostitution and pandering with five basic offenses;
4. Simple pandering or pimping is only a misdemeanor unless the defendant operates two or more prostitutes;
5. Testimony by a customer or prostitute must be corroborated.

Section 252: Bigamy

The defendant is guilty of bigamy, a Class D felony, when he marries another person while knowing that he has a spouse, or when he marries another while knowing that the other person has a spouse, or when he cohabits in Kentucky after a bigamous marriage in another state. With this section the Code changes Kentucky law tremendously. First, unlike KRS 436.080, Section 252 requires that the defendant know that his conduct is illegal. Second, Section 252 authorizes prosecution for bigamy of the unmarried as well as the married partner to the conduct. Third, KRS 436.080 does not authorize prosecution where the bigamous marriage occurs in another state. And fourth, the Code creates as a new defense the belief of the defendant that he was entitled to remarry.

Section 253: Incest

Sexual intercourse will constitute the offense of incest under the Code if it is between the defendant and someone whom he knows to be an ancestor, descendant, brother, or sister (including relationship by adoption and half-blood relationships). Section 253 expands the law on incest by including ancestors, descendants, and half-blood relationships.

Sections 254 through 260: Offenses Involving Minors
and Incompetent Persons

These sections create six Class A misdemeanors: intentionally concealing the birth of an infant (Section 254); abandonment of a minor (Section 256); intentional nonsupport of minors or indigent spouse (Section 257); endangering the welfare of a minor (Section 258) unlawful transaction with a minor (Section 259); and endangering the welfare of an incompetent person (Section 260). The first four sections make no great change in the present law, but there are significant alterations in Sections 259 and 260.

A. Unlawful Transaction with a Minor (Section 259)

Kentucky now has statutes covering the unlawful sale of alcoholic beverages or tobacco to minors (KRS 244.080 and 438.030). Section 259 amends the KRS by placing within the category of unlawful transactions with a minor anyone who knowingly sells or obtains alcoholic beverage or tobacco to or for a minor. In addition, it expands the law considerably by defining this new offense to include knowingly inducing a minor to engage in criminal activity, habitual truancy, or disobedience to parents. But the Code does not change the basic definition of minor contained at KRS 2.015 (21 for some purposes, 18 for others). It merely reduces the age of consent with regard to sexual offenses from 18 to 16.

B. Endangering the Welfare of an Incompetent Person (Section 260)

Section 260 creates a new criminal offense in Kentucky which consists of knowingly acting in a way which injures the physical or mental welfare of an incompetent person.

Sections 261 through 268: Categories of Offenses

The Code greatly simplifies the criminal law by dividing all offenses covered by the Code into seven categories: Class A, B, C, and D felonies; Class A and B misdemeanors; and violations (Section 264). Felony sentences will be indeterminate, with a maximum fixed by the courts (Section 265). Section 265 authorizes the following minimum and maximum terms of imprisonment for the categories of felonies:

1. Class A: 20 years to life; 2. Class B: 10 - 20 years; 3. Class C: 5 - 10 years; and 4. Class D: 1 - 5 years. In addition, Section 263 retains capital punishment by directing that a person convicted of a Class A felony "shall have his punishment fixed at death, life imprisonment, or imprisonment in accordance with Section 266 of this Act." Section 263 (1) (a) further empowers the jury to impose life imprisonment without privilege of parole where the defendant is convicted of raping a person who was physically helpless or under twelve years of

Taken together, Sections 263 and 265 create two unnecessary problems. First, Section 263 authorizes life imprisonment without parole as a punishment only for limited cases of first degree rape. This severe restriction on the penalty's availability raises the strong possibility that Kentucky's parole procedures, including the work release and early release programs, will frustrate the purpose of Section 263 by effectively destroying life imprisonment as a criminal sanction. In order to prevent this result, Section 263 (1) should be amended to read as follows:

"When a person is convicted of a Class A felony, he shall have his punishment fixed at death, life imprisonment without parole, life imprisonment, or imprisonment in accordance with Section 266 of this Act."

The Code creates a second problem by separating the punishment provisions for felonies into two different sections. It is confusing

for the reader to jump from Section 263 to Section 265. Moreover, the language of Section 265 implies that these terms of imprisonment are the maximum penalties for felonies, although Section 263 authorizes the death penalty for Class A felonies. The Code should be amended to combine Sections 263 and 265 into one section which sets forth all of the minimum and maximum penalties for each category of felony.

With regard to misdemeanors, Section 268 states that a misdemeanor sentence shall be for a definite term. It further stipulates that the maximum term of imprisonment is twelve months for Class A misdemeanors and 90 days for Class B. Violations are punishable by fine only. (See Sections 262 (4) and 268).

Although the Code's purpose of minimizing the number of offense categories is understandable, the nine-month gap in available maximum penalties between Class A and Class B misdemeanors seems excessive. Providing a further class of misdemeanors with a six-month maximum term of imprisonment would increase both the fairness of the penalty structure and the number of options available to courts in sentencing. Section 268 should be amended by changing the ninety-day misdemeanor category from "Class B" to "Class C," by changing subsection (b) into subsection (c), and by adding a new subsection (b) which reads as follows: "For a Class B misdemeanor, the term shall not exceed six months."

Continuing with the penalty provisions, Section 264 allows judges to sentence convicted felons to a period of probation or a period of conditional discharge, so long as the felon has not already been sentenced to death or to life imprisonment without parole. Consequently judges could give convicted murderers, arsonists, or rapists probation or even discharge them, under certain circumstances. The basic needs

of society for protection and the essential place of deterrence in the criminal law argue strongly against giving judges this sort of discretion. The Code should be amended in Section 264 at least to the extent of authorizing probation only for felons convicted of crimes which do not involve death or the threat of serious physical injury.

CONCLUSION

The new criminal Code contains many strong points and should markedly improve the criminal law of Kentucky, if the changes proposed in this analysis are incorporated into the Code. Without these changes, the Code will probably fail to protect the interests of society adequately in a number of vital areas and will unjustifiably hinder law enforcement.