Eldred, John S. 1968. Classification and degrees of offenses—an approach to modernity. Kentucky Law Journal, 57, 491-507.

Eldred argues that "the criminal laws of most states can be described as irrational, and at best, disorganized. He discusses the code of New York, and proposed code of Michigan to advocate assignment of degrees of offense based on age of victim, intent of the aggressor, and injurious result. He cites the American Bar Association's project on Criminal Justice, that recommends classification and categorization of crimes.

The influence of the MPC is spelled out, "Of course, all current revision of criminal codes has been given great impetus by the Model Penal Code, which was produced after a decade of sustained labor." (p. 493).

Using rape as an example of need for revision, Eldred claims, "To have only one penalty for all types of rape . . is patently illogical, and indeed unfair." (p. 494). Concern for the perpetrator is expressed, "An orderly rational code which defines sepcific degrees of crimes and sets punishments for those degrees based on specific conduct will prevent judges or juries from giving out inordinately heavy sentences." One effect of the implementation of degrees, will be a reduction of charges in plea bargaining. Explains Eldred, "Since there will be more options open, the defendant may be encouraged to plead guilty to a lesser degree of the offense charged . . . Further, the grading of crimes can aid the prosecution in obtaining convictions—in cases where the prosecution might be unable to prove all the elements of the offense, he can drop to a lower degree with less elements to be proved." This provision would have a great impact on statistics regarding rape, since lesser charges of assault or sexual misconduct, previously chargeable as rape, would no longer be reported.

The penalty for first degree rape is labelled "extreme" and the Model Penal Code suggests there is a legal difference between raping a friend and raping a stranger. Rape could only be charged when there is "forcible compulsion overcoming earnest resistence." He cites to Morris Plowcowe (1951) for his treatment of rape.

The Michigan criminal code is cited to show that the intent of the aggressor is a factor in determining the seriousness of the crime. "it would be unnecessarily harsh to subject a person to a severe penalty for a mere attempt to iflict minor injury with a knife or club."

He concludes that the "anti-reformers" will resist because of the confusion these complex reforms will bring. He claims it has lessened confusion in Louisiana and Wisconsin, and that their adoption in Kentucky will be a "giant stride forward."

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CLASSIFICATION AND DEGREES OF OFFENSES—AN APPROACH TO MODERNITY

I. INTRODUCTION

Professor Jerome Hall has stated that the ultimate objectives of criminal law may be described in terms of order, survival, security, maintenance of conditions which permit progress to be made, experience of the "higher" values, and, finally, "the good life".[1] These objectives, along with the more pragmatic goals of deterrence, rehabilitation, fairness and accuracy which are inherent in the American concept of due process of law, are being stifled and prevented from full realization because of the present status of most of the substantive criminal law in the United States. The criminal laws of most states can be described as irrational, and at best, disorganized. Typically, says Hall, the laws are an amorphous mass of statutes unrelated to each other or to any unifying ideas. Further, most present criminal laws "represent intermittent responses to pressures on legislatures, reactions to public opinion which sometimes borders on hysteria, or, at best, intelligent guesswork".[2] This type of piecemeal revision, primarily legislative reaction or overreaction to a particular crime or occurrence, can often result in inconsistencies and other anomalies.

The current revision of the law by the Kentucky Crime Commission presents the opportunity to alleviate many of these anomalies. This revision will be based in part on the recent revisions in other states,[3] but Kentucky remains one of the few states attempting a *sweeping* reformation. The present Kentucky statutes, like those of many other states, are disorganized and reflect legislative patchwork. As the report of the Commission states, the present statutes contain many sentencing anomalies brought about by a failure to analyze and compare former statutes already on the books with proposed piecemeal revision.[4] As an example, rape of a child under twelve is punishable by life imprisonment, but the rapist of a person over twelve can receive a sentence of life without benefit of parole;[5] carrying a concealed, deadly weapon is punishable by up to five years in prison, while shooting into a moving automobile can result only

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[1] Hall, *Revision of Criminal Law—Objectives and Methods*, 33 NEB. L. REV. 383 (1954).

[2] *Id.* at 384-85.

[3] The Crime Commission has thoroughly studied and will use as guidelines the recent revisions in New York and Illinois, the proposed revisions in Michigan and Delaware, and the Model Penal Code.

[4] KENTUCKY CRIME COMMISSION, OUTLINE FOR PROPOSED CRIMINAL LAW REVISION, Comment 2 (1968).

[5] *Compare* KRS § 435.080 (1962), *with* § 435.090 (1962).

in a twelve month maximum sentence;[6] and larceny of less than one hundred dollars is punishable by twelve months in jail, although the theft of a chicken worth two dollars can result in a five year prison sentence.[7]

This is typical of what most states criminal codes contain—"ambiguity by default"—a bewildering confusion resulting from chronic failure to revise the criminal code to eliminate inconsistencies, overlapping provisions, archaic language, and obsolete provisions.[8] Indeed, the wide varieties of penalties stated in the present Kentucky Revised Statutes [hereinafter referred to as KRS] have no ascertainable basis or logical design. It would appear that some penalties have been set, not to fit the crime, but to satisfy outrage at a particularly abhorrent act, or to effectuate a compromise.

II. CLASSIFICATION

Eradication of inequities is one of the chief goals of the revision, and through sustained efforts of systematized revision, which by logic compels inclusive analysis and synthesis in terms of similarities, differences, and interrelationships, this goal should be achieved. The chief method by which the proposed code will seek this result is by classifying all crimes into felonies, misdemeanors, and violations. Felonies will be sub-classified into class A felonies, class B felonies, and so on, as will misdemeanors. Every type of conduct deemed to be criminal will thus be designated as a certain class of felony, misdemeanor, or violation, and in turn each class of felony will prescribe a minimum and a maximum sentence. Further, the grading of certain types of crimes into degrees based on defined aggravating circumstances will aid in the rational classification of offenses. For example, rape in the first degree may be a class A felony, rape in the second degree, a class B felony, and so on.

Classification of offenses has occurred in every substantive criminal law revision in the past decade, and has been recommended by several authorities, including the American Bar Association, whose project on Criminal Justice states that:

> Standard 2.1:
>
> a.) 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.

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[6] *Compare* KRS § 435.230 (1962), *with* § 435.190 (1962).
[7] *Compare* KRS § 433.230 (1962), *with* § 433.250 (1962).
[8] Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 485-86.

> 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.[9]

Of course, all current revision of criminal codes has been given great impetus by the Model Penal Code, which was produced after a decade of sustained labor. The Code places much emphasis on the classification of offenses. The importance of classification is also reflected in the New York Penal Law proposal: "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."[10]

It is asserted that the best method of assuring consistent penalties is a process which forces comparison among offenses. Classification provides for the creation of a rational sentencing structure according to the seriousness of the offense by forcing the legislature to make this comparison. The legislature is compelled to examine carefully both the crime and the punishment in order to bring about an equalization of penalties for those offenses roughly equal in seriousness. If rape in the first degree is deemed a class A felony, logic compels all other offenses designated as class A felonies to be of similar gravity. Classification and the use of degrees thus forces the legislature to thoroughly analyze what they are doing, and should culminate in an organized and systematized product—in short, an orderly code.

Another advantage of classification is that such an orderly code would insure the equalization of future amendments to the existing statutes. A new crime or a new degree of a crime would be "forcibly" related to existing provisions, thus avoiding the anomalies, particularly of the sentencing variety, that have occurred in the past. Suppose the legislature desired to create a higher degree of vandalism for the destruction of art objects. By having to specifically state the class of felony or misdemeanor that such conduct would comprise, the legislators would, by logic, compare this crime with all others in the proposed class, and more rationality, accuracy, and fairness should result.

III. DEGREES

A. *In General*

Categorization of specific crimes into degrees according to the seriousness of the offense due to mitigating factors is not foreign to

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[9] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, (Tent. Draft 1967).

[10] NEW YORK STATE COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW VI (1963).

Kentucky. Although not specified as degrees, there are several statutes which prescribe different penalties for variations of essentially the same crime.[11] However, this facet of the substantive law needs to be thoroughly revamped. The President's Commission on Law Enforcement and Criminal Justice reported:

> The criteria for distinguishing greater and lesser grades and degrees of crime are in need of reexamination. They frequently determine the severity of the punishment, an issue that can be more significant in a particular case than the question of whether the defendant's conduct was criminal.[12]

The degree concept in substantive criminal law is significant in Kentucky's proposed code, as almost all felonies will be graded into degrees. The final form of the degrees will consist of those factors which, in the judgement of the legislature, make certain conduct a more serious offense. An examination of burglary, for example, will show how the degree concept operates. Entry into a building with the intent to commit a crime might constitute burglary in the third degree, which in turn might be designated a class C felony. If the actor is armed, or if he enters a dwelling, the crime might be raised to second degree burglary (class B felony), should the legislature consider that such circumstances constitute a more serious offense. First degree burglary could perhaps occur when the actor is armed *and* enters a dwelling, or if some other person suffers a physical injury as a result of the act.

Utilization of the degree concept and the grading of felonies, although a difficult task, would seem to be advantageous and would doubtless have far-reaching effect. First of all, it would seem obvious that degrees promote fairness and justice. To have only one penalty for all types of rape, one penalty for all types of robbery, arson, assault, homicide, etc., is patently illogical, and indeed unfair. Distinctions must be made within certain crimes because of the distinctions in the way crimes are committed. An armed robbery in which the victim is shot offends society much more than the burglary of a vending machine. Similarly, the burning of a crowded theater is a greater danger to the public welfare than the burning of an abandoned shack.

Under present statutes, when there are no degrees or varying statutes, we have relied upon judges and prosecutors to make these

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[11] For example, there are five separate statutes, with varying penalties, proscribing various forms of conduct similar to blackmail: KRS §§ 435.260-90 (1962); an entire chapter [KRS 434] devoted to various form of fraud, forgery, and embezzelment; and eleven statutes deal with some form of arson [KRS §§ 433.010-10 (1962)].

[12] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 126 (1967).

distinctions in light of mitigating circumstances. Doubtlessly these distinctions have been made in many instances, but by including these distinctions in the statutes, uniformity will be insured. Judicial discretion will be limited; yet when it is curtailed by the community's concern over the seriousness of an offense, such limitation will not be harmful. Insofar as the discretion of a judge is limited, the grading of statutes will promote the social goal of rehabilitation. An orderly, rational code which defines specific degrees of crimes and sets punishments for those degrees based on specific conduct will prevent judges or juries from giving out inordinately heavy sentences. In like manner the effect of political, personal and other factors on judges and juries will be reduced.

In addition to proper punishment and rehabilitation, the use of degrees may also effectuate the social goal of preventing crime—or at least the prevention of needless prosecutions. When the code is made more rational and orderly, it will become more intelligible and understandable to the police, who certainly make many arrests after personally viewing what they believe to be criminal conduct. The present law gives policemen great latitude in determining the offenses to be charged—often the arraigning magistrate has to alter the charge. Many charges are based only on the policeman's interpretations of the conduct he saw in the light of the law as he knows it. Because police are prone to use familiar, open-ended offense charges, a code that gives them great latitude would seemingly have a greater tendency to lead to instances where the wrong charge was proffered. Every incorrect charge made slows down the criminal process and may lead to miscarriages of justice. A code that is well-defined according to specific conduct patterns should correct this. Indeed, the clarity and accuracy that will result from the use of degrees will be an aid to all who are concerned with the operation of the code. The specific and orderly delineation of crimes will aid the police in making charges, the prosecution in preparing its case, attorneys in their understanding of the code, and the mere simplicity of the language will aid the layman.

The use of degrees may also affect the crime itself. The concept of the criminal law as a deterrent comes into play here. This concept is twofold. There is the protective deterrence of higher penalties for those who commit the more serious offenses—they stay in prison longer, so they are not at large to repeat their crime. The other facet of deterrence is preventive, where the stiffer penalty of the higher degree deters a man from such conduct. Although there is much debate over the value of a penalty as a deterrent, it seems safe to assume that the economic and professional criminal, at least, is aware of

the deterrent value. Hence a calculating, premeditating burglar, if he is aware of the degrees of the statute, may be deterred from arming himself. The crime of burglary may still be committed, but if the higher degree is deterred, if society's value judgment as to what constitutes a more serious danger to it does not occur, then the criminal law has achieved its goal. Conceding that those crimes commonly committed out of spontaneity may not be affected by degrees, it is submitted that in those instances where premeditation is prevalent, the criminal may well tailor his actions to the way the law is written, and to this end the grading of crimes should be well publicized.

Another aspect of the criminal process that will be affected by degrees is plea bargaining. While the use of degrees may limit the discretion of the judge and prosecutor, especially as to the sentence involved, it will give more flexibility to both the prosecution and the defense as to what crime will be *tried*. Since there will be more options open, the defendant may be encouraged to plead guilty to a lesser degree of the offense charged, which the prosecution may be inclined to accept if there are mitigating circumstances surrounding the crime. Further, the grading of crimes can aid the prosecution in obtaining convictions—in cases where the prosecution might be unable to prove all the elements of the offense, he can drop to a lower degree with less elements to be proved.

This technique may also bring about new prosecutions for those offenses which at present are little-used. An example of this situation is the crime of perjury. The present statute on perjury[13] is very broad and makes any intentionally false, sworn statement a felony, punishable by one to five years in prison. The crime could be graded along the following lines suggested by the Crime Commission: perjury in the first degree, a felony, would be a knowingly false statement on a material matter, under oath and in an official proceeding; second degree perjury, a misdemeanor, would be the same offense but not in an official proceeding; and immaterial false swearing under oath would be a petty misdemeanor.[14] Such a rational structure would encourage the use of the statute, whereas today, because of the harshness of the penalty, the crime is rarely prosecuted, and then only for the most severe form of the offense.

It would seem clear, then, that the use of degrees provides a more rational and orderly criminal code; that while limiting the discretion of the judges and prosecutors, it reflects the concern of the community

[13] KRS § 432.170 (1962); *See also* KRS §§ 243.390, 305.175, and 186.590 (1962).

[14] KENTUCKY CRIME COMMISSION, OUTLINE FOR PROPOSED CRIMINAL LAW REVISION ch. 23 (1968).

Rape Section

MPC 1111

KRS 111

NY Penal Code 111

Michigan Rev Criminal Code 1

Proscore 1

and legislature regarding the seriousness of offenses; that it will bolster the deterrent value of the criminal law; that it promotes flexibility and encourages plea bargaining; and that it can encourage the use of some statutes presently threatened by desuetude. Further enlightenment as to the operation and effect of the degree concept can be gained from an analysis of specific crimes and the factors upon which degrees are based.

B. Rape

The crime of rape has always been subject to much newspaper publicity and public cries of indignation and outrage. It is everywhere regarded as a serious offense for a male to have sexual intercourse with a female other than his wife by means of force, threats, or certain forms of fundamental deception. A major statutory drafting problem is devising a grading system that distributes the entire group of offenses rationally over the range of available punishments. This is especially important because: (1) the upper ranges of punishment include life imprisonment and even death; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the consent of the female, a subtle psychological problem in view of the social and religious pressures on the woman to conceive of herself as victim rather than collaborator; and (4) the offender's threat to society is difficult to evaluate.[15]

Because of this nature of the crime, rape is highly susceptible to rational structuring into degrees for the purposes discussed above. There are many factors which should be considered by any legislature attempting to write a rape statute, including many non-legal elements. The utilization of social theory and the sociological disciplines as an aid to revision of the substantive law has been urged by Professor Hall, especially in regard to sexual offenses:

> The impetuous reaction of legislators to a vicious crime and consequent public hysteria is apt to result in legislation which is very cruel and violative of elementary legal safeguards. Adequate, defensible controls can be invented only if the relevant facets are known, together with the available knowledge of the personality of sexual offenders, the etiology of their offenses, and so on. We shall never know enough facts and psychology to satisfy every doubt, but before officials are empowered to imprison human beings for many years, every possible effort should be made to provide legal controls which are defensible on rational grounds.[16]

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[15] MODEL PENAL CODE § 207.4, COMMENT (Tent. Draft No. 4, 1955).
[16] Hall, *supra* note 1, at 393.

The crime of rape is further complicated by the desire to punish persons having sexual intercourse with a child below a certain age even when the child has given her consent.[17] But if the age of the victim limits her capacity to understand the character of the offense being committed against her person, would not the age of the actor likewise limit his capacity to understand the nature of the offense?

The present Kentucky rape law is graded to some extent, in that some forms of the crime are more serious than others. Statutory carnal knowledge with consent of the victim is a less serious offense than forcible rape,[18] as it should be. Also, there are degrees within the crime of statutory carnal knowledge with consent, and a recognition that the youthfulness of the actor is a mitigating factor. But there are no degrees of forcible rape, and indeed a great sentencing anomaly exists in this area.[19]

New York has divided its rape statute into three degrees. A person is guilty of rape in the third degree when he engages in sexual intercourse with a female less than seventeen years of age if the defendant is twenty-one years of age or more.[20] The more serious crime of second degree rape occurs when the female is less than fourteen and the defendant is eighteen or more.[21] Both of these degrees describe conduct presently proscribed by Kentucky's unlawful carnal knowledge statute, except for the age factors. The statutes reflect the policy that when the parties are of the same approximate age, voluntary sexual intercourse can not mean rape. If the female is sixteen and the actor twenty or less, he is guilty of the lesser offense of sexual mis-

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[17] The Kentucky Court of Appeals has said the reason for setting a statutory age below which consent may not legally be given is that the victim is without capacity and discretion to have a proper conception of the character of the offense being committed against her person, or to comprehend its consequences fully, or perhaps to possess strength of character to resist the influence and importunities of the ravisher. That is accepted as the law of an idiot and presumptively so of a child. Golden v. Commonwealth, 289 Ky. 379, 383, 158 S.W.2d 967, 969 (1942).

[18] KRS § 435.100(1) (1962) provides that if the victim is from twelve to sixteen years of age the actor may receive from five to twenty years. If the victim is from twelve to eighteen years, the sentence is from two to ten years and the actor has a defense of promiscuity and immorality. Forcible rape, KRS § 435.090 (1962), is punishable by death, life without parole, life, or ten to twenty years.

[19] Anomalous that it is *possible* for a person guilty of forcible rape to receive only ten years knowledge of a fifteen prison, whereas a person convicted of statutory carnal pointed out, forcible year old can receive twenty years; further, as hereinafter (KRS § 435.080 (1962) if a child under twelve can result in life imprisonment life without parole or but if the child is over twelve the rapist can receive

[20] N.Y. PENAL CODE § 130.25 (McKinney 1967) [hereinafter cited as N.Y. PENAL CODE].

[21] *Id.* § 130.30.

conduct, a misdemeanor. Rape in the first degree in New York occurs when the actor engages in sexual intercourse by forcible compulsion with any female, or when he engages in sexual intercourse with a child of less than eleven years of age.[22]

The rape statute of the proposed code of Michigan is substantially the same as that of New York. Minor differences include a lowering of age of the female from less than seventeen to less than sixteen years in third degree rape. Third degree rape also occurs when the female is incapable of consent by reason of some factor other than being less than sixteen.[23] It is assumed that such factors would include the use of drugs, intoxicants, or the mental state of the female. A further distinction is that Michigan includes in first degree rape, intercourse with a female who is physically helpless and is incapable of consent because of her helplessness.

On the other hand, the stance of the Model Penal Code differs substantially from the New York and Michigan statutes in that it recognizes degrees of forcible rape. Rape occurs when the actor uses forcible compulsion, or threat of death, serious injury, extreme pain or kidnapping, to be inflicted on anyone.[24] The crime becomes a lesser offense if the victim is a voluntary social companion of the actor and has previously permitted him sexual liberties *if* serious physical injury does not occur. The statute suggests there is a legal difference between raping a friend and raping a stranger. The rationale of this statute is that the extreme punishment of first degree rape is reserved for situations which are the most brutal or shocking, evincing the most dangerous aberration of character and threat to public security.[25] Indeed it would seem that the distinction is a logical one, and one that should be written into the law instead of being left to a more-than-likely hostile jury. As the law now stands in Kentucky, the crime (and possible sentence) is the same whether the offense was a brutal attack on a passing stranger, nearly resulting in her death, or whether the attacker was an "overly amourous boy friend who assumed her inamorata's 'noes' were merely her bashful way of saying 'yes'."[26] The man who springs upon a woman unknown to him is the truly dangerous

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[22] *Id.* § 130.00 defines forcible compulsion as "physical force that overcomes earnest resistence; or a threat that places a person in fear of immediate death or serious physical injury to himself or another person." This would include a threat to a female's escort.

[23] MICH REV. CRIM. CODE § 2312 (Final Draft, 1967) [hereinafter cited as PROPOSED MICH. CRIM. CODE].

[24] MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962).

[25] MODEL PENAL CODE § 207.4, Comment (Tent. Draft No. 4, 1955).

[26] Kuh, *A Prosecutor Looks at the Model Penal Code*, 63 COLUM. L. REV. 608, 613 (1963).

and most feared rapist,[27] and the law should define this as a more serious crime.

C. *Burglary*

The issue has arisen in recent years as to whether the common law crime of burglary, even though modified by statute, should appear *at all* in modern criminal codes. Those who espouse the idea that burglary should be abolished base their reasoning upon the theory that the updated law of attempts should cover all burglarious situations. While this view may possess merit, the Kentucky Crime Commission has decided to include burglary in its revision. The decision rests upon three principle reasons: (1) the traditional view that an intrusion into a building for the purpose of committing a crime is of itself a felony; (2) a prosecution for an attempt must specify the crime intended and this may not always be clear; and (3) no revision of the substantive law of any state has seen fit to exclude burglary.[28]

Under KRS § 433.120 the crime of burglary is punishable by a term of two to ten years in the penitentiary. The Court of Appeals has defined burglary as the common law crime of breaking and entering the house of another at night with the intent to commit a felony.[29] In addition to common law burglary, the present Kentucky statutes also contain certain crimes which are to some extent degrees of burglary. When the actor uses or displays a deadly weapon the offense becomes much more serious.[30] Breaking into a storehouse or warehouse is a less serious crime than common law burglary.[31] Breaking into a dwelling, even when all the common law requirements are not met, is punishable by the same sentence as common law burglary.[32] Therefore, the use of degrees in the burglary statutes will be nothing new to Kentuckians. However, there are several other factors that should be considered by the revisors and the legislature, and an analysis of new statutes from other jurisdictions is relevant.

First, the "breaking" requirement of the common law and present Kentucky statutes has been abolished by all recent revisions.[33] It is

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[27] M. PLOSCOWE, SEX AND THE LAW 165 (1951).

[28] KENTUCKY CRIME COMMISSION, OUTLINE FOR PROPOSED CRIMINAL LAW REVISION, ch. 11, Comment (1968). For a general discussion of theft law in Kentucky, *see* Note, *Theft in Kentucky*, 57 KY. L.J. 539 (1969).

[29] Kidd v. Commonwealth, 273 Ky. 300, 116 S.W.2d 636 (1938); Fowler v. Commonwealth, 290 S.W.2d 617 (Ky. 1956).

[30] KRS § 433.140 (1962).

[31] KRS § 433.190 (1962).

[32] KRS § 433.180 (1962).

[33] N.Y. PENAL CODE §§ 140.00-35; ILL. ANN. STAT. § 19-1 (1961); PROPOSED MICH. CRIM. CODE §§ 2610-12. *See also* MODEL PENAL CODE § 221.1 (Proposed Official Draft 1962).

argued that the necessity for proving a "breaking" needlessly complicates burglary prosecutions, and that there are only two essential elements of the crime: (1) entering or remaining unlawfully in a building, (2) with intent to commit a crime therein.[34] The New York statutes define third degree burglary as the knowing entry into a building with the intent to commit a crime.[35] The crime becomes second degree if any of four aggravating factors are present: (A) the actor is (1) armed with explosives or a deadly weapon; or (2) causes physical injury to a person; or (3) uses or threatens to use a dangerous instrument; or (B) the building is a dwelling and the act occurs at night.[36] Burglary in the first degree occurs when the building is a dwelling and the entry occurs at night, *plus* any one of the three aggravating factors outlined in the first portion of the second degree statute.[37] An advantage of this statutory provision is that if the prosecutor is unable to prove any of the "plus" factors, the defendant can still be convicted of second degree burglary. Similarly, if "dwelling" and "nighttime" cannot be proven, but one of the "plus" factors can be, a second degree burglary case is proven.[38] It would appear that in grading the offense, New York placed special emphasis on protection of persons from the burglar.

On the other hand, Michigan did not seem so concerned with this aspect. Their proposed code does not utilize such factors as whether a serious injury occurred or whether the actor used or threatened to use a dangerous instrument.[39] By dropping the "nighttime" requirement for entry into a dwelling at both the first and second degree levels,[40] Michigan seems to place more interest on the *type of property* involved, as the reason for the nighttime requirement at common law would seem to be the protection of persons when they would most likely be in their dwellings. The Model Penal Code retained, however, the nighttime requirement, which, if a dwelling is the subject of the burglary, raises the crime to a more serious offense. Further, the crime becomes one of a higher degree if anyone is injured or if the actor is armed.[41] The Kentucky Crime Commission has

[34] Unless intent to commit a crime is proven, there is no burglary. But it is felt that such conduct should have sanctions, and that the common law trespass provisions are ill-defined and narrow in scope. Hence New York proscribes "criminal trespass" (N.Y. PENAL CODE §§ 140.00-15)--knowingly entering or remaining unlawfully on property, with no proven intent to commit a crime. Criminal trespass is also graded into three degrees.

[35] N.Y. PENAL CODE § 140.20.

[36] *Id.* § 140.25.

[37] *Id.* § 140.30.

[38] *Id.* § 140.30, Practice Comment.

[39] PROPOSED MICH. CRIM. CODE § 2611.

[40] *Id.* §§ 2610.11.

[41] MODEL PENAL CODE § 221.1 (Proposed Official Draft 1962).

suggested a grading of burglary along lines similar to Michigan: third degree burglary: knowingly entering a building for the purpose of committing a crime; second degree: armed entry into a building or entry into a dwelling; first degree: armed entry with resulting physical injury.[42] In regard to the occurrence of physical injury, the Commission's suggestion differs from the proposed Michigan code.

D. Assault

Assault at common law had three elements: (1) an attempt or offer, (2) with force and violence, (3) to inflict a corporal injury upon another.[43] Unfortunately, the present Kentucky law contains little else. It is a serious crime to shoot, cut, stab, or poison another with intent to kill,[44] as it is to maim another,[45] and to commit armed assault on another with intent to rob.[46] But if a person beats another within an inch of his life with his bare hands while intending to kill him, or maliciously stabs and seriously injures another with no intent to kill, that person commits no greater offense than common law assault, punishable by a maximum of one year, as are all common law crimes so punishable by statute.[47] Obviously, this situation should be remedied, and it can be corrected by considering other factors and situations involved in an assault, and adopting a comprehensive, graded statute based on these factors—a grading of the intent of the assailant and the results of his act according to their gravity.

Assault can be divided into several distinct conduct patterns. The actor can intend and cause physical injury to another; he can intend and cause *serious* physical injury; he can cause either the injury or the serious injury by use of a deadly weapon or dangerous instrument; he can recklessly injure another, with or without a deadly weapon. Texas, also undergoing a criminal law revision, currently suggests that the crime is more serious if the actor is masked or disguised.[48] New York, Michigan, and the Model Penal Code have recognized these distinctions in drafting their assault statutes. The latter's provision is broken down into categories of simple and aggravated assault. Simple assault consists of: (1) an attempt to cause bodily injury; (2) an at-

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[42] KENTUCKY CRIME COMMISSION, OUTLINE FOR PROPOSED CRIMINAL LAW REVISION §§ 1110-12 (1968).

[43] Byrn, *Assault, Battery and Maiming in New York*, 34 FORDHAM L. REV. 613 (1966).

[44] KRS § 435.170 (1962).

[45] KRS § 435.160 (1962).

[46] KRS § 433.150 (1962).

[47] KRS § 431.075 (1962).

[48] TEXAS PENAL CODE REVISION PROJECT § 211.011(3)(a) (Status Rep. No 2, 1968).

tempt by physical means to put another in fear of imminent *serious* bodily harm; or (3) a bodily injury *negligently* caused by an actor using a deadly weapon.[49] Aggravated assault contains two degrees: (1) an attempt to cause serious bodily injury by whatever means, and (2) the less serious crime of an attempt to cause bodily injury with a deadly weapon.[50] The comment to this section states that the attempt to cause bodily injury, as opposed to serious bodily injury, should be a lesser crime because it would be unnecessarily harsh to subject a person to a severe penalty for a mere attempt to inflict minor injury with a knife or club.

A major difference between the Model Penal Code and the Michigan and New York statutes, and also the Kentucky Crime Commission report, is that the states require the *actual infliction* of physical injury before the crime is complete. This is similar to common law battery, but the intent of the actor is still a major element of the crime. The Michigan requirements for third degree assault are: (1) the actor inflicts physical injury on another with intent to do so; (2) he recklessly injures another; or (3) he negligently injures another with a deadly weapon.[51] Assault in the second degree occurs when the actor: (1) intends to and causes serious physical injury; (2) causes, with intent, physical injury with a deadly weapon; or (3) recklessly injuries another with a deadly weapon.[52] First degree assault includes: (1) inflicting serious physical injury to another, with intent, the injury being caused by means of a deadly weapon or dangerous instrument; or (2) disfigurement of another with intent to do so; or (3) causing serious physical injury to another under circumstances where, in extreme indifference for the value of human life, the actor engages in conduct creating a grave risk of death to another; or (4) the actor commits any assault on another while the actor is engaged in committing a felony.[53]

Hence there are many elements and factors that pertain to the crime of assault. The distinction between the Model Penal Code and the state codes concerning the necessity of actual physical injury is important and should be considered. The policy behind requiring an actual infliction of injury seems understandable, because if no injury occurred, it would be exceedingly difficult to prove whether the actor attempted bodily injury or serious bodily injury. But by the same token, when injury does occur, to what extent will the seriousness of

[49] MODEL PENAL CODE § 211.1(1) (Proposed Official Draft 1962).
[50] *Id.* § 211.1(2).
[51] PROPOSED MICH. CRIM. CODE § 2103.
[52] PROPOSED MICH. CRIM. CODE § 2102.
[53] PROPOSED MICH. CRIM. CODE § 2101.

the injury control the requisite intent to inflict the injury? This is a difficult problem, and one that makes it difficult to assign rational and just degrees to the crime of assault. But it is a problem that must be attempted, especially in the light of Kentucky's present statutes on assault.

E. Arson.

As the Crime Commission report points out, KRS chapter 433 has *forty-four* separate laws protecting different kinds of tangible property from injury or destruction. The sheer weight of numbers emphasizes the need for consolidation, classification and grading in this area. A person commits arson if he wilfully and maliciously sets fire to, burns or causes to be burned, or if he aids, counsels, or procures the burning of any dwelling house or any of its appurtenances.[54] The crime is "graded" to the extent that there is a lower minimum sentence if the burned property is a building other than a dwelling.[55] This present arrangement thus makes it possible for a person who burns a school house, factory, or crowded theater to receive a lesser sentence than one who burns an isolated, abandoned dwelling. These statutes are not uncommon, however, as the majority of jurisdictions grade their arson statutes according to the *type* of property burned, generally with a special concern for dwellings.

The comments to the Model Penal Code criticize grading on this basis as being arbitrary from the penological point of view.[56] In addition to the crowded theater v. abandoned dwelling inconsistency, other inequities of the "type-of-property" grading are pointed out. For example, in Alabama, the burning of a stack of corn or "pile" of straw, grass or lumber is punishable by one to five years, whereas the burning of coal or a tank of gas of a value of less than twenty-five dollars is apparently not punishable at all.[57] In California, the burning of coal or gas is punishable by a three year maximum, but the burner of potatoes or beans can receive ten years.[58]

An alternative method of classifying arson is to grade it by the existence of accompanying danger to human life, generally the presence of a person in the burned building. This too has been criticized as arbitrary because the amount of sentence could depend, whether or not known to the actor, on the fact that a person entered or left the building while it was burned.

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[54] KRS § 433.010 (1962).
[55] KRS § 433.020 (1962).
[56] MODEL PENAL CODE § 220.1, Comment (Tent. Draft No. 11, 1960).
[57] *Compare* ALA. CODE tit. 14, §§ 27, 31 (1941).
[58] *Compare* CAL. PENAL CODE §§ 449(a)-(b) (1959).

To avoid these criticisms, the Model Penal Code has defined arson as the intentional burning of a building, and has created the affirmative defense that the fire did not place any person in danger of death or bodily injury. If the defense is proved, the crime becomes the lesser offense of reckless burning.[59] By writing the statute in this way, the Institute did not have to resort to degrees it considered arbitrary, yet at the same time placed emphasis on the protection of persons from death or bodily injury by lessening the seriousness of the crime if danger to persons did not occur.

New York did not follow this technique, and its arson statute is graded to a higher degree according to the presence of a person in the burned building. But New York attempted to avoid the arbitrariness criticism by creating a two-fold aggravating element. Arson in the first degree is the intentional damaging of a building by explosion or fire when (1) another person is present in such at the time, and (2) the actor knows this or the "circumstances are such as to render the presence of such person therein a reasonable possibility."[60] Thus only if the actor *actually knows* or the circumstances are such as to put a reasonable man on notice that the building was occupied can he be convicted of the highest degree. He is thus not subject to a greater sentence on the mere possibility that a person might enter the building at the time of the fire.

Two other degrees of arson are proscribed in New York. The second degree crime occurs when the actor intentionally damages a building by starting a fire or causing an explosion.[61] The comments to this statute explain that there are three elements of the crime: (1) an intentional fire or explosion; (2) an intent to damage the building; and (3) the occurrence of some damage. "Damage" occurs when the value of the building is lowered or its usefulness is impaired, as opposed to the common law "burning" where courts have said that proof of a mere wasting of the wood fibers would be sufficient. Arson in the third degree occurs when a person recklessly damages a building by intentionally starting a fire or causing an explosion.[62] In other words, the crime is committed when the offender engages in conduct under circumstances involving a *conscious disregard* of a substantial and unjustifiable risk that the actually ensuing damage to a building will occur. The proposed Michigan code provisions on arson are substantially the same as the New York laws.[63]

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[59] MODEL PENAL CODE § 220.1(b) (Proposed Official Draft 1962).
[60] N.Y. PENAL CODE § 150.15.
[61] *Id.* § 150.10.
[62] *Id.* § 150.05.
[63] PROPOSED MICH. CRIM. CODE §§ 2805-07.

The classification and grading of arson appears to be more difficult than that of any other serious crime, and it may be that any grading of arson into degrees is at best artificial. Perhaps the value of the property burned would be a significant factor in determining degrees along with the factor of possible human endangerment. It would seem that the burning of a department store worth $1,000,000 would be more heinous than the burning of a nearly abandoned warehouse valued at $10,000. But such a gradation certainly runs the risk of arbitrariness and raises further issues as to the proof of the value of the property.

IV. CONCLUSION

Certainly there is no one penal law that can apply to every state. In its revision of Kentucky's criminal law, the legislature must tailor the law to fit the needs of Kentucky, and in fixing degrees of specific crimes, the legislature should thoroughly analyze the possibilities and aggravating factors of specific crimes and apply them at their own discretion. But in so doing, the legislature should not ignore the products of other state revisions. The task is great, and as the President's Commission stated: "Defining, grading, and fixing levels of punishment for serious offenses. . . is persistently difficult. Many common offenses have ancient antecedents, yet age has not contributed to the clarity of their definitions. In other instances new situations strain familiar definitions."[64] To be sure, "reasonable men may differ in these areas in which subjective judgements—and consideration of how best to deal with aberrant human behavior—govern the 'sorting' of items and further determine what to do about them once the appropriate category has been selected."[65]

There are indeed many people who will oppose the expanded use of degrees of crimes and who will oppose *any* attempt at reform. They will say that the present system works, and in a sense they are correct. But as Professor Keeton points out,

> a rational, consistent, and clearly articulated penal code should assist those who must administer our present system by removing many of the unnecessary burdens they must bear. This state's default in providing a rational system of criminal law too often places an impossible burden on the police, prosecutors, and judges to bring both order and justice out of the chaos of our laws.[66]

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[64] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 12, at 126.

[65] Kuh, *A Prosecutor Looks at the Model Penal Code*, 63 COLUM. L. REV. 608, 613 (1963).

[66] Keeton & Reid, *Proposed Revision of the Texas Penal Code*, 45 TEX. L. REV. 399, 403 (1967).

This statement was made with reference to Texas but it is equally applicable to Kentucky. A further argument of the anti-reformers is that the transition to a completely revised code will result in much confusion. But in Louisiana, eight years after the adoption of a new criminal code, the administration of the criminal law was thought to be greatly improved and had not produced the confusion and uncertainty that had been predicted. In Wisconsin, the revision did not create confusion and the number of appellate reversals for error in interpretation of the substantive criminal law had even been reduced.[67]

Governor Louie B. Nunn, in commending the Commission for its report, said that

> While we demand respect for the law, we must continually see that the law remains respectable. I believe we can best accomplish this by providing better tools for law enforcement in the form of both updated laws and modern equipment and a full measure of fairness to the accused.[68]

Updated laws, laws which are made efficient, accurate, and fair by the use of degrees are sorely needed, and with their adoption Kentucky will take a giant stride forward.

John S. Eldred

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[67] *Id.* at 407.
[68] The Courier-Journal, July 17, 1968, § A, at 4.