

CRIMINAL CODES: KENTUCKY AND OHIO

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I. INTRODUCTION

Kentucky and Ohio have completely revised their criminal codes. The Ohio Criminal Code, adopted in December 1972,¹ became effective January 1, 1974, except for a few provisions which became effective in March 1973. The Kentucky Penal Code was approved in March 1972.² It will not become effective until July 1, 1974, so that the General Assembly may consider changes. Many proposed changes have been submitted for consideration.³

These states join more than a dozen others which in recent years have completely revised their laws of criminal offenses. A bill is under consideration to revise the federal law of criminal offenses which is included in title 18 of the United States Code, but its adoption is not expected in the immediate future.⁴

The purpose here is to discuss, in somewhat generalized form, the new criminal codes of Kentucky and Ohio, and to compare their provisions with the laws which they replace.

II. BACKGROUND

Kentucky's substantive criminal laws have never been the subject of a complete revision but have simply developed over the years, generally following the common law.

The Kentucky General Assembly in 1968 ordered a study and revision of the commonwealth's criminal laws and this task was undertaken by two groups, the Kentucky Crime Commission and the Legislative Research Commission. At first they acted independently but in November 1971 issued a final report acting jointly.⁵

The present Ohio Revised Code was adopted in 1953 but this was a revision of the entire code without particular attention to individual subjects to the extent found in the new Criminal Code.

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1. Amended House Bill No. 511, filed in the office of the Secretary of State on December 22, 1972.

2. 1972 HB 197, approved March 27, 1972.

3. Reproduction of the enactment, with proposed changes, issued by the Legislative Research Commission, December 1972.

4. A committee print of the Senate Committee on the Judiciary, unnumbered, was widely circulated after its issuance November 10, 1972. References herein to the proposed federal code will be to this committee print.

5. Kentucky Penal Code, Final Draft, November, 1971, published by the Commonwealth. This is denominated the Commentary in KRS 433A.1-110.

The new Ohio revision had its genesis with a House Resolution of the General Assembly adopted in June 1965. A Technical Committee was appointed which was assisted by the Legislative Service Commission. A final report of the Technical Committee was issued in March 1971.⁶ It gives the background of each new section, but in using this for legislative history, it will be found that some of the proposed sections are deleted from the enactment and others are inserted.

The new Kentucky Penal Code states that the Commentary published in November 1971 may be used as an aid in construing the provisions of the code in the event of ambiguity.⁷ The numbering scheme in the Commentary is different from that found in the enactment.

II. FORMAT

One of the most striking features of the new Kentucky Penal Code is the enumeration of the sections. The present code defines crimes in chapters 432 through 438 beginning with KRS 432.010. The new code will define them in chapters 433, 434, and 435, but the first two of these chapters are subdivided.

An example of the new citation is that of the statute of limitations which will be found in KRS 433A.1-050. An inquiry to a staff member of the Legislative Service Commission indicated that the scheme may be changed to that used in the remainder of the Kentucky Revised Statutes, but he cited as precedent the Insurance Code adopted in 1970 which begins with KRS 304.1-010.

The numbering scheme of the new Ohio code will follow that used throughout the Revised Code, the criminal provisions beginning with R.C. 2901.01.

If the bill to revise federal criminal law is enacted in the form now under consideration, the numbering scheme will be even more complicated. Presently, murder is prohibited by 18 U.S.C. § 1111. Under the proposal which has been circulated, it being under 18 U.S.C. § 2-7B.1⁸

IV. CLASSIFICATION OF OFFENSES

Under the common law, offenses were classified as treason, felonies, and misdemeanors. In America, treason is defined by the Constitution of the United States⁹ and by the constitutions of some of the states. It is considered the most serious of the felonies.

The Model Penal Code prepared by the American Law Institute, which has not been adopted by any state but studied by those which have enacted penal codes in recent years, classifies offenses as felonies, misdemeanors, petty misdemeanors, and violations.

6. Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, March 1971, published jointly by Banks-Baldwin Law Publishing Company and The W. H. Anderson Company.

7. Supra note 5.

8. Supra note 4.

9. Art. III, § 3.

Present Kentucky and federal laws and former Ohio law define a felony as an offense which may be punished by death or imprisonment in a penitentiary, and a misdemeanor as any other offense.¹⁰ Under the new Kentucky and Ohio codes, there will be various degrees or classes of felonies and misdemeanors.

Both Kentucky and Ohio formerly had minimum and maximum authorized sentences for felonies, and this is continued, although more discretion as to the minimum is given the trial court in Ohio. Present federal law and that of some of the states provide a maximum punishment but no minimum punishment for most offenses.

Presently, the criminal laws of Kentucky and the federal government and formerly Ohio law provide the authorized punishment in the section which prohibits the conduct. Under the new Kentucky and Ohio codes, a section prohibits conduct and then states the degree or class of felony or misdemeanor which it constitutes. One must look elsewhere in the code to determine the authorized punishment.

Kentucky will provide four classes of felonies, two classes of misdemeanors, and an offense known as a violation.¹¹ The punishment for felonies is as follows:

Class A felony, death or life imprisonment for some offenses, twenty years to life imprisonment for others.

Class B felony, ten to twenty years of imprisonment.

Class C felony, five to ten years of imprisonment.

Class D felony, one to five years of imprisonment.

A fine may be imposed for a felony in double the amount gained, or not to exceed \$10,000, which ever is the greater, if the felon is granted probation or conditional discharge.¹²

The punishment for misdemeanors is as follows:

Class A misdemeanor, maximum of twelve months of confinement and a maximum fine of \$500.

Class B misdemeanor, maximum of ninety days of confinement and a maximum fine of \$250.

Violation, maximum fine of \$250.

Under the new Ohio code, one convicted of aggravated murder shall be punished by death or imprisonment for life, and he may be fined a maximum of \$25,000.¹³ The penalty for murder is an indefinite term of confinement of fifteen years to life.

Penalties for other felonies under the new Ohio code¹⁴ are as follows:

10. KENTUCKY REV. STATUTES ANN. § 431.060 (Banks-Baldwin, 1963). OHIO REV. CODE ANN. § 1.06 (Banks-Baldwin, 1965). Accord, 18 UNITED STATES CODE § 1.

11. KENTUCKY REV. STATUTES ANN. § 435A.1-010 (Commonwealth of Kentucky, 1971).

12. KENTUCKY REV. STATUTES ANN. § 435A.3-030 (Commonwealth of Kentucky, 1971).

13. OHIO REV. CODE ANN. § 2929.02(A) (Banks-Baldwin, 1971).

14. OHIO REV. CODE ANN. § 2929.11 (Banks-Baldwin, 1971).

First degree felony, four, five, six, or seven years to twenty-five years of imprisonment, and a maximum fine of \$10,000.

Second degree felony, two, three, four, or five years to fifteen years of imprisonment, and a maximum fine of \$7,500.

Third degree felony, one, one and a half, two, or three years to ten years of imprisonment, and a maximum fine of \$5,000.

Fourth degree felony, one-half, one, one and a half, or two to five years of confinement, and a maximum fine of \$2,500.

It has been explained that the multiple minimum sentences have been provided to give the trial court more discretion so that if there are two or more jointly accused persons, the court may provide one minimum for one accused and a different minimum for another.¹⁵

The misdemeanor penalties under the new Ohio code¹⁶ are as follows:

First degree misdemeanor, maximum confinement of six months and a maximum fine of \$1,000.

Second degree misdemeanor, maximum confinement of ninety days and a maximum fine of \$750.

Third degree misdemeanor, maximum confinement of sixty days and a maximum fine of \$500.

Fourth degree misdemeanor, maximum confinement of thirty days and a maximum fine of \$250.

Minor misdemeanor, a maximum fine of \$100.

The proposed revision of federal criminal law would provide five classes of felonies, a misdemeanor, and a violation.¹⁷

V. PARTIES TO A CRIME

At common law, anyone connected with treason was treated as a principal. There were four classifications of parties to a felony: (1) A principal in the first degree was the perpetrator, or the one who committed the crime. (2) A principal in the second degree was one who aided or abetted in the commission of an offense but did not actually commit the act. (3) An accessory before the fact was one who incited another to commit an offense. This would be the modern offense of solicitation. (4) An accessory after the fact was called the protector. Under modern statutes, he might be guilty of misprison of a felony. In the case of a misdemeanor, all were punishable as principals except the protector, and he was not punishable.¹⁸

The new Kentucky code is not intended to change existing law as to the parties to a crime.¹⁹ Existing law generally follows the common law

15. *Supra* note 6 at 286.

16. OHIO REV. CODE ANN. § 2929.21 (Banks-Baldwin, 1971).

17. *Supra* note 4, § 1-4B1.

18. Perkins on Criminal Law (1969), 643 *et seq.*

19. *Supra* note 5 at 30.

but has been judicially interpreted many times.²⁰ The new code provides that a person is guilty of an offense committed by another if he solicits, commands, aids, counsels, agrees to aid, or attempts to aid in commission of a crime or if, having a legal duty to prevent commission of an offense, he fails to make a proper effort to do so.²¹

Former Ohio law provided that one who aids, abets, or procures another to commit an offense may be prosecuted as a principal offender,²² but solicitation to commit an offense was not a crime except in specific instances such as soliciting a bribe²³ or soliciting money from a convict on a promise to obtain a pardon.²⁴ The provision relating to aiding, abetting, or procuring one to commit a crime has not been modified by the new Ohio code.

VI. INCHOATE CRIMES

Under the classification of "Inchoate Crimes," the new Kentucky code clarifies the law of criminal attempts, solicitation, conspiracy, and facilitation,²⁵ which usually is called aiding and abetting.

Present Kentucky law has a general statute relating to an attempt to commit a crime,²⁶ and numerous statutes creating crimes involving particular attempts. There is no statutory provision for the offense of solicitation although it has been suggested that it exists as a common-law crime.²⁷ There are two different ways in which conspiracy may be charged: under a statute,²⁸ or as a common-law offense.²⁹ There are numerous statutes relating to criminal facilitation.³⁰

The new Kentucky code brings this body of law together in ten sections and in the case of a criminal attempt³¹ or a conspiracy,³² the defense of renunciation is provided.

Former Ohio law had no general conspiracy prohibition although there were several provisions relating to particular conspiracies.³³ There

20. E.g., *In Moore v. Commonwealth*, 282 S.W. 2d 613 (Ky., 1955), it was held that mere acquiescence in the criminal act without cooperation in its commission is insufficient to constitute one an accomplice.

21. KENTUCKY REV. STATUTES ANN. § 433B.2-020 (Commonwealth of Kentucky, 1971).

22. OHIO REV. CODE ANN. § 1.17 (Banks-Baldwin, 1965).

23. OHIO REV. CODE ANN. § 2917.01 *et seq.* (Banks-Baldwin, 1965).

24. OHIO REV. CODE ANN. § 2917.03, 2917.11 (Banks-Baldwin, 1965).

25. KENTUCKY REV. STATUTES ANN. § 433D.1-010 (Commonwealth of Kentucky, 1971).

26. KENTUCKY REV. STATUTES ANN. § 431.065 (Banks-Baldwin, 1963).

27. *Begley v. Commonwealth*, 22 Ky. L. Rptr. 1571, 60 S.W. 847 (1901).

28. KENTUCKY REV. STATUTES ANN. § 437.110 (Banks-Baldwin, 1963).

29. *Baker v. Commonwealth*, 204 Ky. 420, 264 S.W. 1069 (1924).

30. *Supra* note 5 at 91.

31. KENTUCKY REV. STATUTES ANN. § 433D.1-020 (Commonwealth of Kentucky, 1971).

32. KENTUCKY REV. STATUTES ANN. § 433D1-060 (Commonwealth of Kentucky, 1971).

33. *Supra* note 6 at 242.

was no general provision relating to attempts but there were prohibitions against attempting to commit some acts.³⁴

The new Ohio code does not have an all-embracing conspiracy provision as does the new Kentucky code, but in Ohio it is a crime to conspire to commit aggravated murder, murder, kidnapping, compelling prostitution, promoting prostitution, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or the felonious unauthorized use of a vehicle.³⁵

The new Ohio code includes a general provision relating to an attempt to commit an offense,³⁶ and although it was not included in the Technical Committee's draft, there is a provision which prohibits soliciting, procuring, aiding, or abetting the commission of an offense.³⁷

VII. LIMITATION OF ACTIONS

The present Kentucky law provides no statute of limitations for a felony, but a misdemeanor must be tried within one year.³⁸ The new code is in substantially the same language but adds a subsection relating to a continuing act as constituting a crime.³⁹

Ohio did not have a statute of limitations for a felony, but a misdemeanor had to be tried within three years⁴⁰ with three exceptions: a prosecution for betting on an election,⁴¹ or maliciously opening another's fence⁴² must have been begun within a year, and a prosecution for the use of profanity must have been begun within ten days.⁴³

The new Ohio code provides no limitation for aggravated murder, six years for any other felony, two years for a misdemeanor, and six months for a minor misdemeanor.⁴⁴ The new code also provides that the period shall not run while the *corpus delicti* of the offense is undiscovered, or while the accused absents himself from the state to avoid prosecution.⁴⁵

VIII. COMMON LAW OFFENSES

The present Kentucky code recognizes common law offenses⁴⁶ but they are specifically abolished by the new code.⁴⁷

34. *Id.* at 245.

35. OHIO REV. CODE ANN. § 2923.01 (Banks-Baldwin, 1971).

36. OHIO REV. CODE ANN. § 2923.02 (Banks-Baldwin, 1971).

37. OHIO REV. CODE ANN. § 2923.03 (Banks-Baldwin, 1971).

38. KENTUCKY REV. STATUTES ANN. § 431.090 (Banks-Baldwin, 1963).

39. KENTUCKY REV. STATUTES ANN. § 433A.1-050 (Commonwealth of Kentucky, 1971).

40. OHIO REV. CODE ANN. § 1.18 (Banks-Baldwin, 1965).

41. OHIO REV. CODE ANN. § 2915.08 (Banks-Baldwin, 1965).

42. OHIO REV. CODE ANN. § 2909.08 (Banks-Baldwin, 1965).

43. OHIO REV. CODE ANN. § 2923.16 (Banks-Baldwin, 1965).

44. OHIO REV. CODE ANN. § 2901.13 (Banks-Baldwin, 1971).

45. *Id.*

46. KENTUCKY REV. STATUTES ANN. § 431.070 (Banks-Baldwin, 1963).

47. KENTUCKY REV. STATUTES ANN. § 433A.1-020 (Commonwealth of Kentucky, 1971).

Ohio abrogated common law offenses by statute in 1806,⁴⁸ and the new code reaffirms this in stating that no conduct constitutes an offense against the state unless defined as an offense by statute.⁴⁹

IX. CAPITAL PUNISHMENT

Kentucky⁵⁰ and Ohio⁵¹ have had statutes authorizing the death penalty. Since the Supreme Court of the United States held in *Furman v. Georgia*⁵² that the death penalty is cruel and unusual punishment under some circumstances, these provisions no longer are valid. The Court of Appeals of Kentucky and the Supreme Court of Ohio have so held.⁵³

After the new Kentucky code had been enacted,⁵⁴ an amendment was proposed to change the death-penalty provision in the light of *Furman v. Georgia*. It resembles the new Ohio provision.

Under the new Ohio code, the death penalty may be imposed for capital murder.⁵⁵ The provision as enacted differs considerably from the final committee draft since the General Assembly had the opportunity to endeavor to conform with the rule of *Furman v. Georgia*.⁵⁶

Capital murder under the new Ohio code is either of two things. It is causing the death of another purposely and with prior calculation or design, or killing another under the felony-murder doctrine. Ohio thus retains the felony-murder doctrine, but it is not presently applicable in Kentucky nor will it be under the new code.

The new Ohio code defines the felony-murder doctrine as killing another while committing, or while fleeing immediately after committing or attempting, enumerated serious offenses: kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

The Supreme Court has held that under the former felony-murder statute in Ohio, the offense was committed if two or more persons were jointly committing a felony and while in flight, a short distance from the scene of the crime, one of the felons killed a person.⁵⁷ There is no Ohio precedent for the more difficult problem of whether it applies if the

48. *Supra* note 6 at 24.

49. OHIO REV. CODE ANN. § 2901.03 (Banks-Baldwin, 1971).

50. KENTUCKY REV. STATUTES ANN. § 431.070, 435.010 (Banks-Baldwin, 1963).

51. OHIO REV. CODE ANN. § 2901.01 (Banks-Baldwin, 1965).

52. 408 U.S. 238 (1972).

53. *Lenston v. Commonwealth*, 497 S.W.2d 561 (Ky., 1973); *State v. Leigh*, 31 Ohio St.2d 97, 285 N.E.2d 333 (1972).

54. KENTUCKY REV. STATUTES ANN. § 435A.1-030(1) (Commonwealth of Kentucky, 1971).

55. OHIO REV. CODE ANN. § 2929.02 (Banks-Baldwin, 1971).

56. An excellent article on the effects of *Furman v. Georgia* is J. CALLAHAN, *Capital Punishment — Dead or Alive?*, 46 Ohio Bar 1055 (1973).

57. *State v. Habig*, 106 Ohio St. 151, 140 N.E. 195 (1922); *Conrad v. State*, 75 Ohio St. 52, 78 N.E. 957 (1906).

killing is by someone other than the felon who set the chain of events in motion.⁵⁸

An indictment for capital murder must include an allegation of the aggravating circumstances.⁵⁹ Such aggravation must have been any one of the following: (1) the victim was a person in a specified category; (2) the offense was committed for hire; (3) the offense was committed to escape detection, apprehension, trial, or punishment for some other offense; (4) the offense was committed while the accused was in penal confinement; (5) the accused was previously convicted of purposeful murder or attempted murder; (6) the killing was a part of a course of conduct involving the purposeful killing or attempting to kill two or more persons; (7) the victim was a law-enforcement officer, known to have been such by the accused; or (8) the offense was committed under the felony-murder doctrine.

Returning to the first subsection of this code provision, the specified victim must have been (1) the President of the United States, (2) someone in line of succession to the presidency, (3) the Governor or Lieutenant Governor of Ohio, (4) the President-elect or Vice President-elect of the United States, the Governor-elect or Lieutenant Governor-elect of Ohio, or (6) a candidate for any of these offices.

Even though aggravated murder has been charged in the indictment, the death penalty cannot be imposed if, considering the nature and circumstances of the offense, and the history, character, and condition of the accused, any of the following mitigating circumstances is established by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) the accused was under duress, coercion, or strong provocation; or (3) the offense was the product of the offender's psychosis or mental deficiency even though legally sane.

If the jury returns a verdict of guilty of capital murder, it must in a separate finding state whether any of the aggravating circumstances has been proved beyond a reasonable doubt. If a jury trial is waived, the trial must be by a three-judge panel which must make this determination.

After the jury has returned a verdict of guilty and found one of the aggravating circumstances, the trial court then must direct a psychiatric examination and then hold a separate adversary hearing to determine, by a preponderance of the evidence, whether any of the mitigating circumstances has been established. If none of the mitigating factors is found, the death penalty is mandatory.

X. HOMICIDE

Presently, Kentucky law prohibits murder without defining it,⁶⁰ volun-

58. Cf. *People v. Washington*, 62 Cal.2d 777, 44 Cal. Rptr. 422, 402 P.2d 130 (1965); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

59. OHIO REV. CODE ANN. § 2929.04(A) (Banks-Baldwin, 1971).

60. KENTUCKY REV. STATUTES ANN. § 435.010 (Banks-Baldwin, 1963).

tary manslaughter,⁶¹ homicide where there is an intent to injure but not kill,⁶² and involuntary manslaughter, a common-law misdemeanor.⁶³

The new Kentucky code defines murder as intentionally causing the death of another or a third person, but exempts a killing under extreme emotional disturbance, and provides that wanton conduct creating a grave risk of death of another which causes death is murder.⁶⁴ Manslaughter in the first degree is the causing of death while intending to cause serious physical injury, or that which would be murder except for extreme emotional disturbance.⁶⁵ Manslaughter in the second degree is "wanton" causing the death of another.⁶⁶ Reckless homicide is engaging in reckless conduct which causes the death of another.⁶⁷

Ohio formerly had murder in the first degree, murder in the second degree, and manslaughter in the first degree, with separate sections relating to murder by obstructing or injuring a railroad, killing a guard, taking the life of a police officer, and malicious injury to property causing death.⁶⁸

Under the new Ohio code, the classifications are aggravated murder which was discussed with relation to capital punishment;⁶⁹ murder;⁷⁰ voluntary manslaughter, which is causing death under extreme emotional stress brought on by serious provocation;⁷¹ involuntary manslaughter, which is a killing while committing or attempting to commit a felony or misdemeanor (it is a felony in the first degree if a felony is involved, and a felony in the third degree if a misdemeanor is involved);⁷² negligent homicide, which involves the negligent use of a deadly weapon;⁷³ aggravated vehicular homicide, the killing by operation of a vehicle in a reckless manner;⁷⁴ and vehicular homicide, which involves operation of a vehicle in a negligent manner.⁷⁵

61. KENTUCKY REV. STATUTES ANN. § 435.020 (Banks-Baldwin, 1963).

62. KENTUCKY REV. STATUTES ANN. § 435.050 (Banks-Baldwin, 1963).

63. *Jones v. Commonwealth*, 213 Ky. 356, 281 S.W. 164 (1926).

64. KENTUCKY REV. STATUTES ANN. § 434A.1-020 (Commonwealth of Kentucky, 1971).

65. KENTUCKY REV. STATUTES ANN. § 434A.1-030 (Commonwealth of Kentucky, 1971).

66. KENTUCKY REV. STATUTES ANN. § 434A.1-040 (Commonwealth of Kentucky, 1971).

67. KENTUCKY REV. STATUTES ANN. § 434A.1-050 (Commonwealth of Kentucky, 1971).

68. OHIO REV. CODE ANN. § 2901.01 et seq. (Banks-Baldwin, 1965).

69. OHIO REV. CODE ANN. § 2903.01 (Banks-Baldwin, 1971).

70. OHIO REV. CODE ANN. § 2903.02 (Banks-Baldwin, 1971).

71. OHIO REV. CODE ANN. § 2903.03 (Banks-Baldwin, 1971).

72. OHIO REV. CODE ANN. § 2903.04 (Banks-Baldwin, 1971).

73. OHIO REV. CODE ANN. § 2903.05 (Banks-Baldwin, 1971).

74. OHIO REV. CODE ANN. § 2903.06 (Banks-Baldwin, 1971).

75. OHIO REV. CODE ANN. § 2903.07 (Banks-Baldwin, 1971).

XII. ARSON

Present Kentucky law relating to arson is very similar to the common-law definition.¹³⁵ Two principal sections of the code are involved. The elements of the first are a willful and malicious burning of a dwelling house or outbuilding within the curtilage, and belonging to the accused or another.¹³⁶ The second section prohibits the willful and malicious burning of some other structure.¹³⁷

Under the new Kentucky code, there will be three degrees of arson. In the first degree, it is intentionally damaging a building by starting a fire or causing an explosion when the accused knows or has reason to know that another person, not an accomplice, is in the building at the time.¹³⁸ In the second degree, it is not necessary that another person be present in the building.¹³⁹ Third degree arson involves reckless rather than intentional conduct.¹⁴⁰

The former basic Ohio statute prohibiting arson involved a willful or malicious act, or one with intent to defraud, of setting fire to or burning or causing to be burned, a dwelling house, kitchen, shop, barn, stable, or other outhouse that is parcel thereof, or belonging to or adjoining thereto, the property of the accused or another.¹⁴¹ There were a number of other offenses related to arson.¹⁴²

Under the new Ohio code, there are aggravated arson¹⁴³ and arson.¹⁴⁴ Aggravated arson is knowingly, by means of fire or explosion, doing either of two things: creating a substantial risk of serious physical harm to any person, or causing physical harm to any occupied structure.

Arson in its unaggravated form may be any of three things: (1) causing or creating a substantial risk of physical harm to the property of another without his consent; (2) doing such an act with the purpose of defrauding someone; or (3) doing the same act if the building is the statehouse, a courthouse, a school, or any other structure owned by the state or one of its political subdivisions or used for public purposes.

XIII. ASSAULT AND BATTERY

The present Kentucky statutes do not have an overall assault provi-

135. *Supra* note 5 at 161.

136. KENTUCKY REV. STATUTES ANN. § 433.010 (Banks-Baldwin, 1963).

137. KENTUCKY REV. STATUTES ANN. § 433.020 (Banks-Baldwin, 1963).

138. KENTUCKY REV. STATUTES ANN. § 434B.3-020 (Commonwealth of Kentucky, 1971).

139. KENTUCKY REV. STATUTES ANN. § 433B.3-030 (Commonwealth of Kentucky, 1971).

140. KENTUCKY REV. STATUTES ANN. § 433B.3-040 (Commonwealth of Kentucky, 1971).

141. OHIO REV. CODE ANN. § 2907.02 (Banks-Baldwin, 1965).

142. OHIO REV. CODE ANN. § 2907.03 et seq. (Banks-Baldwin, 1965).

143. OHIO REV. CODE ANN. § 2909.02 (Banks-Baldwin, 1971).

144. OHIO REV. CODE ANN. § 2909.03 (Banks-Baldwin, 1971).

sion but there are sections relating to particular types of battery such as maiming, malicious shooting, and armed assault with intent to rob.¹⁴⁵

The new code will provide for assault in the first degree,¹⁴⁶ assault in the second degree,¹⁴⁷ and assault in the third degree.¹⁴⁸ In the first degree, it is the causing of serious physical injury by means of a deadly weapon or dangerous instrument, or wantonly engaging in conduct which causes grave risk of death or causes serious physical injury. In the second degree, there either is no deadly weapon involved, or the injury caused is not serious. Assault in the third degree is reckless conduct or criminal negligence which causes an injury.

Former Ohio law had numerous provisions relating to assault and battery such as assault with dangerous weapon;¹⁴⁹ assault upon a child under sixteen years of age;¹⁵⁰ assault with intent to kill, rape, or rob;¹⁵¹ and assault in a menacing manner.¹⁵²

The new code consolidates these offenses into five sections: felonious assault,¹⁵³ aggravated assault,¹⁵⁴ assault,¹⁵⁵ aggravated menacing,¹⁵⁶ and menacing.¹⁵⁷ Felonious battery is causing serious physical harm to another. Aggravated battery is causing serious physical harm to another while under great physical stress, or while acting in a reckless manner. Battery is causing physical harm to another which is not serious. Aggravated menacing is causing another to believe that serious physical harm will be done to a person, his property, or a member of his immediate family. Menacing is the same offense but without the serious aspect.

XIV. SEX AND RELATED OFFENSES

Under present Kentucky law, rape is defined as carnal knowledge of a female over the age of twelve years against her will or consent, or by force or while she is insensible.¹⁵⁸ There are several degrees of statutory rape with the authorized punishment depending upon the age of the

145. *Supra* note 5 at 105.

146. KENTUCKY REV. STATUTES ANN. § 434A.2-010 (Commonwealth of Kentucky, 1971).

147. KENTUCKY REV. STATUTES ANN. § 434A.2-020 (Commonwealth of Kentucky, 1971).

148. KENTUCKY REV. STATUTES ANN. § 434A.2-030 (Commonwealth of Kentucky, 1971).

149. OHIO REV. CODE ANN. § 291.241 (Banks-Baldwin, 1965).

150. OHIO REV. CODE ANN. § 2903.01 (Banks-Baldwin, 1965).

151. OHIO REV. CODE ANN. § 2901.24 (Banks-Baldwin, 1965).

152. OHIO REV. CODE ANN. § 2901.25 (Banks-Baldwin, 1965).

153. OHIO REV. CODE ANN. § 2903.11 (Banks-Baldwin, 1971).

154. OHIO REV. CODE ANN. § 2903.12 (Banks-Baldwin, 1971).

155. OHIO REV. CODE ANN. § 2903.13 (Banks-Baldwin, 1971).

156. OHIO REV. CODE ANN. § 2903.21 (Banks-Baldwin, 1971).

157. OHIO REV. CODE ANN. § 2903.22 (Banks-Baldwin, 1971).

158. KENTUCKY REV. STATUTES ANN. § 435.090 (Banks-Baldwin, 1963).

female, whether under eighteen, sixteen, or twelve years of age.¹⁵⁹ Rape may be committed by a female upon a male.

The new Kentucky code provides three degrees of rape. Rape in the first degree is sexual intercourse by forcible compulsion, or with one who is incapable of consent because either physically helpless or less than twelve years of age.¹⁶⁰ It is a Class B felony unless the victim suffers serious physical injury or is under twelve years of age, in which case it is a Class A felony.

Rape in the second degree is when a person eighteen years old or more engages in sexual intercourse with a person under fourteen years of age.¹⁶¹

Rape in the third degree is sexual intercourse with a person incapable of consenting because mentally defective or mentally incapacitated, or a person twenty-one years of age or older engaging in intercourse with another person who is less than sixteen years old.¹⁶²

The new Kentucky code provides:

In any prosecution under this subtitle [which includes rape, sodomy, and sexual abuse] in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen years old, mentally defective, mentally incapacitated or physically helpless, it is a defense that the defendant at the time he engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent.¹⁶³

It has been held that it is a defense to statutory rape that the accused did not know that the female was an insane person or an idiot.¹⁶⁴ However, present Kentucky law does not make ignorance of the victim's age a defense.

The quoted portion of the new code would seem to make it a defense that the accused did not know that the victim was under twelve years of age, but it may be speculated that this was not the intention of the legislature.

In the section of the new Kentucky code defining sexual offenses, the offense involving sexual intercourse with another does not apply if the persons are living together as man and wife,¹⁶⁵ whether legally married or not, but marriage is not a defense to other sexual misconduct.

159. KENTUCKY REV. STATUTES ANN. § 435.100 (Banks-Baldwin, 1963).

160. KENTUCKY REV. STATUTES ANN. § 434A.4-040 (Commonwealth of Kentucky, 1971).

161. KENTUCKY REV. STATUTES ANN. § 434A.4-050 (Commonwealth of Kentucky, 1971).

162. KENTUCKY REV. STATUTES ANN. § 434A.4-060 (Commonwealth of Kentucky, 1971).

163. KENTUCKY REV. STATUTES ANN. § 434A.4-030 (Commonwealth of Kentucky, 1971).

164. *Wilson v. Commonwealth*, 160 S.W.2d 649 (Ky., 1942).

165. KENTUCKY REV. STATUTES ANN. § 434A.4-010 (Commonwealth of Kentucky, 1971).

The former Ohio code had four sections relating to rape: carnal knowledge of a female, forcibly and against her will;¹⁶⁶ carnal knowledge of one's daughter, sister, or a female under twelve years of age;¹⁶⁷ carnal knowledge by a person over eighteen years of age with a female under sixteen years of age, with her consent;¹⁶⁸ and carnal knowledge by a person over eighteen years of age with a female under fourteen years of age, forcibly and against her will.¹⁶⁹ The fourth of these sections would seem to be unnecessary other than its provision for greater punishment than that authorized for statutory rape.

The new Ohio code defines sexual conduct as including sexual intercourse and any deviate sexual activity where there is a penetration.¹⁷⁰ The Technical Committee expressed the view that the former sections which limited sexual offenses to those involving a male and a female should be eliminated,¹⁷¹ and this has been done.

The new Ohio code defines rape, a felony of the first degree, as sexual conduct with another who is not the spouse of the accused under any of three conditions: (1) the accused compels the conduct by force or threat of force; (2) the accused substantially impairs the other person's judgment, to prevent resistance, by administering a drug or intoxicant, or by deception; or (3) the victim is under thirteen years of age, whether or not this is known to the accused.¹⁷²

Somewhat similar to rape under the new Ohio code is the offense of sexual battery, a felony in the third degree.¹⁷³ It consists of sexual conduct with another, not the spouse of the accused, under any of six circumstances: (1) coercion that would prevent resistance by a person of ordinary resolution, (2) the accused knows that the victim's ability to appraise the nature of the conduct or control it is substantially impaired, (3) the victim is unaware that the act is being committed, (4) the victim mistakenly believes the accused is his or her spouse, (5) the accused is the victim's parent or otherwise in loco parentis, or (6) the victim is in penal or mental custody and the accused is in a position of supervisory authority over the victim.

The statutory rape provisions of the new Ohio code, known as corruption of a minor, involve sexual conduct by a person eighteen years of age or older with another more than twelve but less than fifteen years old when the offender knows of this fact or is reckless in failing to determine it.¹⁷⁴

166. OHIO REV. CODE ANN. § 2905.01 (Banks-Baldwin, 1965).

167. OHIO REV. CODE ANN. § 2905.02 (Banks-Baldwin, 1965).

168. OHIO REV. CODE ANN. § 2905.03 (Banks-Baldwin, 1965).

169. OHIO REV. CODE ANN. § 2905.031 (Banks-Baldwin, 1965).

170. OHIO REV. CODE ANN. § 2907.01(A) (Banks-Baldwin, 1971).

171. "Supra" note 6 at 100.

172. OHIO REV. CODE ANN. § 2907.02 (Banks-Baldwin, 1971).

173. OHIO REV. CODE ANN. § 2907.03 (Banks-Baldwin, 1971).

174. OHIO REV. CODE ANN. § 2907.04 (Banks-Baldwin, 1971).

In still another section, termed gross sexual imposition, anyone having sexual contact with another who is under thirteen years of age is guilty of the offense whether the accused has or has not knowledge of this fact.¹⁷⁵

Present Kentucky law prohibits sodomy without defining it,¹⁷⁶ and indecent or immoral practices with another if the accused is seventeen years of age or older.¹⁷⁷

Under the new Kentucky code, there are four degrees of sodomy, three degrees of sexual abuse, and the offenses known as sexual misconduct and indecent exposure.

Sodomy in the first degree¹⁷⁸ involves deviate sexual intercourse with another by forcible compulsion or with one who is incapable of consenting because physically helpless or less than twelve years old. In the second degree,¹⁷⁹ it is deviate sexual intercourse by a person eighteen years of age or older with another person less than fourteen years old. Sodomy in the third degree¹⁸⁰ is deviate sexual intercourse under either of two circumstances: the victim is incapable of consent because mentally defective or incapacitated, or the accused is twenty-one years of age or older and the other person is less than sixteen years old.

Sodomy in the fourth degree is deviate sexual intercourse with another person of the same sex.¹⁸¹ Thus Kentucky has not accepted the view of some jurisdictions that deviate sexual conduct between consenting adults of the same sex is not an offense. This provision was not recommended by the Committee but was included in the enactment.¹⁸²

The three degrees of sexual abuse involve sexual conduct not amounting to intercourse.¹⁸³

Sexual misconduct is engaging in sexual intercourse or deviate sexual intercourse without the consent of the other person.¹⁸⁴ This offense would seem to be included in the rape and sodomy sections. The Commentary states that it may be useful in plea bargaining, since it is a Class A misdemeanor, and it may reduce the stigma when the "victim" has persuaded the accused to engage in the conduct.¹⁸⁵

175. OHIO REV. CODE ANN. § 2907.05 (Banks-Baldwin, 1971).

176. KENTUCKY REV. STATUTES ANN. § 436.050 (Banks-Baldwin, 1963).

177. KENTUCKY REV. STATUTES ANN. § 435.105 (Banks-Baldwin, 1963).

178. KENTUCKY REV. STATUTES ANN. § 434A.4-070 (Commonwealth of Kentucky, 1971).

179. KENTUCKY REV. STATUTES ANN. § 434A.4-080 (Commonwealth of Kentucky, 1971).

180. KENTUCKY REV. STATUTES ANN. § 434A.4-090 (Commonwealth of Kentucky, 1971).

181. KENTUCKY REV. STATUTES ANN. § 434A.4-100 (Commonwealth of Kentucky, 1971).

182. *Supra* note 5 at 134.

183. KENTUCKY REV. STATUTES ANN. § 434A.4-110 *et seq.* (Commonwealth of Kentucky, 1971).

184. KENTUCKY REV. STATUTES ANN. § 434A.4-140 (Commonwealth of Kentucky, 1971).

185. *Supra* note 5 at 138-139.

Indecent exposure requires an intent to arouse or gratify the sexual desires of the accused or another.¹⁸⁶

The former Ohio provision relating to sodomy stated, "No person shall have carnal copulation with a beast, or in any opening of the body except sexual parts, with another human being."¹⁸⁷ It was also an offense to solicit another to commit sodomy.¹⁸⁸

Under the new Ohio code, deviate sexual conduct is included in the provisions relating to rape if there is a penetration.¹⁸⁹ Otherwise, it would be gross sexual imposition¹⁹⁰ or sexual imposition.¹⁹¹ In either case, it must be with someone other than the spouse of the accused. The aggravated form involves the use of force or threat of force, or impairing the victim's judgment by drugs or intoxicants, or when the victim is less than thirteen years of age whether the accused knows it or not.

The lesser form of sexual imposition may involve any of four circumstances: (1) the accused knows that it is offensive to the other person or is reckless in that regard, (2) the accused knows that the other person's ability to appraise the nature of the conduct is impaired, (3) the accused knows that the other person is submitting because unaware of the act, or (4) the victim is more than twelve but not more than fifteen years old and the accused is at least eighteen years old and more than four years older than the other person.

It may be observed that the new Ohio code does not prohibit deviate sexual conduct upon the part of consenting adults. No comment upon this has been found in the Committee Report.

Ohio's former provisions which prohibited indecent exposure¹⁹² have been changed in wording and it is provided in the new code that the conduct must be reckless.¹⁹³ A section has been added to prohibit trespass for the purpose of voyeurism or window peeping.¹⁹⁴

The present Kentucky provision relating to prostitution which defines it as giving the body for indiscriminate sexual intercourse for hire, or indiscriminate sexual intercourse without hire,¹⁹⁵ has been changed to limit the offense to engaging in the conduct in return for a fee.¹⁹⁶

Ohio has followed the same course. The former provision which in-

186. KENTUCKY REV. STATUTES ANN. § 434A.4-150 (Commonwealth of Kentucky, 1971). This section will replace KENTUCKY REV. STATUTES ANN. § 436.140 (Banks-Baldwin, 1963) which makes it an offense to appear on a highway in a bathing suit.

187. OHIO REV. CODE ANN. § 2905.44 (Banks-Baldwin, 1965).

188. OHIO REV. CODE ANN. § 2905.30 (Banks-Baldwin, 1965).

189. *Supra* note 170.

190. OHIO REV. CODE ANN. § 2907.05 (Banks-Baldwin, 1971).

191. OHIO REV. CODE ANN. § 2907.06 (Banks-Baldwin, 1971).

192. OHIO REV. CODE ANN. § 2905.30, 2905.31 (Banks-Baldwin, 1965).

193. OHIO REV. CODE ANN. § 2907.09 (Banks-Baldwin, 1971).

194. OHIO REV. CODE ANN. § 2907.08 (Banks-Baldwin, 1971).

195. KENTUCKY REV. STATUTES ANN. § 436.075 (Banks-Baldwin, 1963).

196. KENTUCKY REV. STATUTES ANN. § 434G.2-020 (Commonwealth of Kentucky, 1971).

cluded the wording "the offering or receiving of the body for indiscriminate sexual intercourse without a charge"¹⁹⁷ has been changed to define prostitution as engaging in sexual activity for hire.¹⁹⁸

XV. DISORDERLY CONDUCT

Present Kentucky law which prohibits disorderly conduct¹⁹⁹ is substantially the same in the new code except that an "offensively coarse" utterance has been substituted for an "obscene" utterance. Although not included in the committee recommendations, under the new code one may be guilty of disorderly conduct for making unreasonable noise.²⁰⁰

Ohio's former disorderly conduct provision was limited to the discharge of firearms²⁰¹ unless it was group conduct,²⁰² but the new code has a provision which makes it an offense for a person recklessly to cause inconvenience, annoyance, or alarm to another in any of five specified ways.²⁰³

XVI. MENTAL RESPONSIBILITY

The Kentucky Court of Appeals, in 1963, adopted the test for mental responsibility recommended in the Model Penal Code of the American Law Institute.²⁰⁴ The new code adopts this test:

(1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

(3) Mental disease or defect, as used in this section, is a defense.²⁰⁵ The Ohio rule is that announced by the Supreme Court in 1969:

In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other defect of his mind has so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.²⁰⁶

197. OHIO REV. CODE ANN. § 2905.26(A) (Banks-Baldwin, 1965).

198. OHIO REV. CODE ANN. § 2907.25 (Banks-Baldwin, 1971).

199. KENTUCKY REV. STATUTES ANN. § 437-016 (Banks-Baldwin, 1963).

200. KENTUCKY REV. STATUTES ANN. § 434F.1-060 (Commonwealth of Kentucky, 1971).

201. OHIO REV. CODE ANN. § 3733.21 (Banks-Baldwin, 1965).

202. OHIO REV. CODE ANN. § 3761.01 (Banks-Baldwin, 1965).

203. OHIO REV. CODE ANN. § 2917.11 (Banks-Baldwin, 1971).

204. Terry v. Commonwealth, 371 S.W.2d, 862, 864-865 (Ky., 1963).

205. KENTUCKY REV. STATUTES ANN. § 433C.2-020 (Commonwealth of Kentucky, 1971).

206. State v. Staten, 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969); followed in State v. Jackson, 32 Ohio St. 2d 203, 291 N.E. 2d 432 (1972).

The drafting committee included a provision very similar in substance to the new Kentucky provision,²⁰⁷ but this was not included in the enactment.

XVII. CONCLUSION

In this brief discussion, many offenses have been compared and discussed, but there has been no intention to make it exhaustive and include all of the crimes in the new enactments. Illustrative offenses have been chosen to emphasize the many departures from existing or former law in these two states.

It is the opinion of this writer that both of the new codes have been extremely well drafted. As this article goes to press, numerous amendments are under consideration by the Kentucky General Assembly. The form they will take will not be known until the legislature adjourns in March 1974, but it seems probable that there will be no major departures from the foregoing outline.

One may only speculate upon the future value of existing judicial precedent in these two states. Certainly it will not be without value, but it will take more than a few years to determine that which will be followed and that which will be considered obsolete.

Meanwhile, the practicing Bar may find ingenuous ways to endeavor to convince courts that the precedent of past years should or should not be followed.

207. Supra note 6 at 57.