KENTUCKY LAW JOURNAL

Volume 61 1972-73 Number 3

CONTENTS

SYMPOSIUM ON THE NEW KENTUCKY PENAL CODE

Page

PREFACE TO SYMPOSIUM ON KENTUCKY PENAL CODE 620
By John S. Palmore

AN INTRODUCTION TO THE KENTUCKY PENAL CODE: A CRITIQUE OF PURE REASON? 624
By Kathleen F. Brickey

THE EVOLUTION OF DRUG LEGISLATION IN KENTUCKY 641
By Dale H. Farabee, M.D.

KENTUCKY PENAL CODE: THE CULPABLE MENTAL STATES AND RELATED MATTERS 657
By Robert G. Lawson

AUTHORIZED DISPOSITIONS OF OFFENDERS UNDER THE KENTUCKY PENAL CODE 708
By Gregory M. Bartlett

CLASSIFICATION OF OFFENDERS AND DISPOSITION OF OFFENDERS 734
By Marvin L. Coan

DOUBLE JEOPARDY AND THE NEW KENTUCKY PENAL CODE 763
By Neil S. Hackworth

(continued on next page)

The *Kentucky Law Journal* is published in Fall, Winter, Spring, and Summer by the College of Law, University of Kentucky, Lexington. Second class postage paid at Lexington, Kentucky 40506.

Communications of an editorial or business nature should be addressed to *Kentucky Law Journal*, University of Kentucky, Lexington, Kentucky 40506. All notifications of change of address should include old address and new address, including zip code. Please inform us one month in advance to ensure prompt delivery.

Subscriptions are accepted only on a volume basis, starting with the first issue of the current volume. If subscription is to be discontinued at expiration, notice to that effect should be sent; otherwise, it will be renewed as usual.

The purpose of the *Kentucky Law Journal* is to publish contributions of interest and value to the legal profession, but the views expressed in such contributions do not necessarily represent those of the *Journal*.

The *Journal* is a charter member of the Southern Law Review Conference and the National Conference of Law Reviews.

Subscription price: $6.00 per year $2.00 per number

CONTENTS—Continued

COMMENTS

Page

THE KENTUCKY CONSUMER ACT—TRUE HAPPINESS? 793
By Levi Daniel Boone, III

COLTON V. KENTUCKY: DE NOVO REVIEW AND THE PRICE OF A FAIR TRIAL 813
By Ronald L. Caffney

CLEARING THE PATH FOR AN ENTRAPMENT DEFENSE 822
By Paul V. Hibberd

PUBLIC SCHOOL TEACHERS AND THE LIMITS OF DUE PROCESS PROTECTION 830
By Mark L. Moseley

FIRST SECURITY BANK OF UTAH—ITS EFFECT UPON THE EXPANDED SCOPE OF SECTION 482 845
By James E. Rogers and Danny R. Taulbee

Preface to Symposium on Kentucky Penal Code

By John S. Palmore*

The Kentucky Penal Code formally originated in a joint resolution of the 1968 General Assembly directing the Legislative Research Commission and the Kentucky Crime Commission to study the statutory criminal law of the state and to make recommendations to the 1970 General Assembly for their substantive revision, with "suitable penalties for offenses according to modern theory and practice . . . and . . . similar penalties for offenses of like seriousness."[1] Though it was not possible for such an undertaking to be completed by 1970, a final draft of the proposed Kentucky Penal Code was finished, published in a bound volume, and widely distributed in November of 1971, after which it was presented to the 1972 General Assembly as House Bill 197 and, as extensively amended, was enacted into law. Subject to whatever action the 1974 General Assembly may take, it becomes effective on July 1, 1974.

The drafting of the work was done by a staff and project director employed by and under the supervision of the Kentucky Crime Commission and with the assistance and cooperation of the Legislative Research Commission. As the various chapters and segments were tentatively completed they were submitted to a review committee composed of myself as chairman, the Attorney General, two Circuit Judges, one County Judge, one Commonwealth's Attorney, one County Attorney, two attorneys active in the defense of criminal cases, the deans of the University of Kentucky and University of Louisville law schools, and a delegate of the Legislative Research Commission. This committee convened on a monthly basis from September 1969 through June 1971 with an over-all review session in July (three days) and a supplementary clean-up session in October 1971.

* Chief Justice, Court of Appeals of Kentucky.

[1] Ky. Acts ch. 232 (1968).

The final draft published in November 1971 and then introduced as House Bill 197 represented a composite of what the members of the review committee, through discussion and compromise but certainly not always unanimously, believed would be generally acceptable to the public. As such, from a substantive viewpoint it is a conservative document in that with rare exceptions it reflects familiar, traditional philosophies and avoids substantial departure from what the members of the reviewing committee, based on their broad variety of experience in public life, considered to be the attitudes of the average man in the street. It was his ideas, as we conceived them to be, and not our own, that the review committee tried sincerely to apply as its criterion of judgment. It was, in fine, guided by the late Edmond Cahn's felicitous analogy between law and consumer goods, the public being the consumer for whose satisfaction the law is spread on the counters.[2]

Before leaving that subject, let me hasten to confess that the committee did encounter a few hot potatoes with varying results. It let a liberalized chapter on abortion get by which was promptly knocked in the head by the 1972 General Assembly. After considering a drafted chapter on drugs and other controlled substances it abandoned the field to the Department of Mental Health, which prepared and succeeded in having passed separate legislation more nearly to its liking.[3] We compromised here and there on the subject of capital punishment, leaving it basically intact, only to see *Furman v. Georgia*[4] blow it into the atmosphere, whence the pieces have not thus far returned to earth. Meanwhile a study commission, appointed by the Governor pursuant to a joint resolution[5] of the 1972 House and Senate for the corrective purpose of helping the 1974 General Assembly unravel the knots and kinks left in the Code following the hurried and extensive amendments made by the 1972 General Assembly, has that additional problem currently in its lap.

The statutory law had grown haphazardly over the better part of two centuries. From time to time it had been reviewed and reorganized and in the *Kentucky Revised Statutes* had been

[2] *See* E. Cahn, The Predicament of Democratic Man 28 *et seq.* (1961).
[3] Ky. Rev. Stat. ch. 218A (1972).
[4] 408 U.S. 238 (1972).
[5] H.R. 160, Ky. J. of House of Rep. 3790 (1972).

arranged into logical topical divisions. Much improvement had been accomplished through the continuing efforts of the Legislative Research Commission. Still, the law bristled with inconsistencies and incongruities. Consider, for example, Ky. Rev. Stat. §§ 435.170, 435.180, and 435.190, and the discussion of these sections in *Williams v. Commonwealth*.[6] Other anomalies are ably illustrated in Dean Lawson's comment on the subject of culpable mental states, appearing in this symposium.

But that was not the worst of it. The worst was that the great body of substantive criminal law was not in the statutes at all, as of course it never had been. It resided in the restless ocean of common law, some of it floating near the surface for everyday observation, and therefore quite familiar, and some of it virtually indefinable in the obscurity of the deep.

I have always been intrigued by the ancient fiction that every man is presumed to know the law. Ordinarily, presumptions bear some relation to probabilities, but not that one. The real reason ignorance of the law is no excuse is that otherwise there really could not be any law. The need of society for order and tranquillity demands that everyone be held to the law whether he understands it or not. Nevertheless, in recent times the United States Supreme Court has not hesitated to strike down laws both statutory and nonstatutory, including our own common-law offense of criminal libel,[7] which in its opinion had not attained a reasonable degree of certainty.

In the field of criminal law it seems to me that these Supreme Court opinions call for more precise and readily ascertainable definitions than have prevailed heretofore in our system. Though we may well doubt that potential offenders are likely to acquaint themselves with the metes and bounds of the law before they act, the new order of things is that at least they should be able to. In its attempt to satisfy that objective the Kentucky Penal Code is timely if nothing else.

Quite aside, however, from the imaginary potential offender who may be deterred by a foreknowledge of the law, for the first time in history the average police officer should be able to find out what the law is without asking a lawyer. It will all be there

[6] 464 S.W.2d 806 (Ky. 1971).
[7] Ashton v. Kentucky, 384 U.S. 195 (1966).

in one place for ready reference. Whatever may be its merits and shortcomings from the standpoint of substance or draftsmanship, that alone makes it worthwhile.

This same circumstance should be of great assistance to members of the General Assembly as well, especially those who are not lawyers. Since the law can be more easily consulted, it can be more easily understood and amended. That, I think, is good.

As between the body of law that is written in the statutes and that which must be found in court decisions, by far the greater portion is in the decisions. But every principle that has been articulated by the courts across the 800 year history of the common law represents a failure by the sovereign lawmaking authority to meet the need for it by enacting it beforehand.

Self-government is best achieved by the direct process of legislation. No doubt it can never be fully and exclusively so accomplished, but the more legal goods that are stocked in the shelves by conscious choice of the consuming public, and the less by courts and judges who are, at best, assuming the role of interpreters, the better the system works and the more likely it is that the consumer will be satisfied.

One final word, as the old-fashioned country lawyers used to tell the jury, and I am done. This penal code is not like an egg, which must be left intact and in its pristine state if it is to remain a functioning egg. To the contrary, it is severable and separately changeable. It can be amended in pieces, as time reveals flaws. No one thing in it is indispensable to the rest. As a matter of fact, not a member of the reviewing committee liked every word of it, but all of them liked most of it. Though I shy away from calling it an "experiment" (a term that conjures visions of wild-eyed tinkerers with explosive substances), government should not be held to standards of perfection that exclude the wholesome benefits of trial and error. I close with the words of that great prayer for the Church, "where it is in error, direct it; where in any thing it is amiss, reform it. Where it is right, establish it."[8]

[8] THE BOOK OF COMMON PRAYER 37.