

PROPOSED KENTUCKY
PENAL CODE

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THE PROPOSED
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The last Athenaeum paper I delivered was given at ^athe January meeting. The first Thursday of January that year was January second and I had just finished my paper the night before while watching the wind-up of the Orange Bowl football game. At that time, I proposed to ^{the}this Society that we amend our by-laws to provide that any person who is, one, ^{the father}a parent of small children, and two, a football fan, be forever exempt from ^{having to give}delivering a paper at the January meeting. This suggestion of mine, however, was not acted upon by the Society, and ^{my proposal was}the by-laws were not ^{adopted.}changed. Therefore, if the paper I am giving tonight is of poor quality, you can blame only yourselves.

The subject I have chosen is the proposed Kentucky Penal Code. Many of you have probably seen in the newspapers or heard on the radio about the proposed Kentucky Penal Code. Generally what the Penal Code will do is to codify in a rational and logical system the existing criminal laws of the State of Kentucky. As an old debater, I know that before a change can successfully be urged, it is necessary to show what is wrong with the present system. I will, therefore, devote the first portion of this paper to an attempt to do that, and then, in the latter portion of my paper, I will very briefly examine a few of the features of the proposed Penal Code.

The current criminal law of the State of Kentucky consists of approximately 350 to 400 different sections of the statutes. Now these sections of the statutes were not adopted in any logical manner. They, like Topsy, simply grew. Each Legislature saw problems which were believed to require criminal sanctions. The result was a statute against the act to be prohibited. The trouble with this method of doing things, however, was that no cohesive pattern emerged, and the current criminal laws of the state are a weird jumble of crimes, many of them hopelessly obsolete, often with ^{gaping} glaring loop holes. Let me give you a few examples of some of the things I am talking about.

First, let us examine some of the archaic laws on our statute books, some of which have been fairly well publicized in the news media, such as, permitting cattle to graze on the Capitol grounds.¹ One of my favorites is the section of the statutes that makes it a felony to trespass in a gensing garden.² I'll come back a little later to the entire subject of criminal trespass, but let us proceed to some other anachronisms. It is a crime to walk on a public highway in a bathing suit.³ It is a crime to ~~live on a shanty~~ operate a concession stand, without permission, within one and a half miles of a camp meeting.⁴

boat and to steal something from a person who lives along
the river. It is a crime to sell comic books ^{or magazines} if they depict
crime ⁵ and whoever saw or heard of a comic book that did not
do just that. It is a crime to erect a spite fence. ⁶ It is
a crime to sell magazines that depict people in an intoxicated
condition. ⁷ It is a crime to exhibit or show a stud horse,
jack or bull within view or hearing of any public religious
worship. ⁸ It is a crime to present a play that depicts
antagonism between a master and his slave or a play that
excites race prejudice. ⁹ It is a crime to give a ~~child or~~
person under 18 a cigarette. ¹⁰ It is a crime to advertise a
cure for venereal disease. ¹¹ It is a crime to operate a
marathon dance. ¹² Although we have a Health Department that ^{presumably}
would handle this type of thing, ^{we have special statutes making} it ~~is~~ a crime to keep a
common drinking cup ¹³ and a crime to spread smallpox. ¹⁴ In
summary there are, therefore, many, many crimes which are
out-dated, old-fashioned, and in today's modern world almost
totally irrelevant.

Another trouble with the present Kentucky criminal
laws is that the statutes contain separate penalties for
each crime. This results in nobody really knowing what the
penalty is, for ^{all but the most common} many particular offenses, without looking it up.

We have some good lawyers in our audience tonight, and yet I dare say that they could not tell me right now the penalty for flourishing a deadly weapon (\$.50 - \$100 and/or 10-50 days)¹⁵ or for writing a cold check under \$20 (\$1 - \$100 and/or 1-90 days).¹⁶ So in addition to having over 350 different statutes, we are almost confronted with the problem of having over 350 different penalties.

And the penalties, all up and down the line, are ludicrously inappropriate. For example, a person who rapes someone over the age of 12 years can be punished with life imprisonment without parole.¹⁷ But a person who rapes someone under 12 years of age cannot be so punished.¹⁸ The assault statutes are in a similar category. Assault and Battery, beating up another without a weapon, regardless of how severely, can be punished with a jail sentence of no more than one (1) year.¹⁹ That is, of course, if the attacker is sufficiently careful to avoid the following: Putting out an eye; cutting, biting off or slitting the tongue, nose, ear or lip or cutting or biting off any other member of another. If he does any of that damage he is guilty of maiming and²⁰ that is a felony. Our attacker can, however, beat someone (even a cripple or a child) to within an inch of his life,

with fists, or feet, or even burn him with a blow-torch, and still be subject only to the one year jail penalty mentioned earlier.

Dozens of statutes exist punishing the various types of larceny. A catalogue of all of them would become almost endless. Most of us have read of the illustration that the person who steals chickens worth ~~more than~~ ^{over} \$2.00 ²¹ is guilty of a felony, while the person who steals your \$99 portable TV set is guilty only of a misdemeanor. ²² Other felonies include the theft of a hog worth more than \$4.00 ²³ and the theft of anything from a railroad or other common carrier. ²⁴ The theft of a cow is a felony punishable by ten years imprisonment, ²⁵ regardless of the value of the animal.

Earlier we mentioned the anomaly in the Kentucky criminal law concerning trespass. As stated, trespassing in a ~~gensing~~ garden is a felony. ²⁶ It is also a felony to trespass on posted property enclosed by a seven foot fence. ²⁷ In fact, it is even a felony to damage the fence! ²⁷ On the other hand, the rest of the trespass statutes, are pretty much hit or miss. It is a misdemeanor, for instance, to trespass on the enclosed farm premises of another. ²⁸ It is a crime to ^{first or without permission} hunt on the ^{enclosed} agricultural land of another. ²⁹ It is

a crime for the occupant of a shanty boat to trespass on the river bank.³⁰ Existing trespass statutes do not, however, cover the more irritating situation of the person who intentionally and deliberately trespasses upon the property where you live and reside.

In addition to being archaic, the present Kentucky criminal law also contains some serious gaps and loop holes. For example, it is not a crime to escape from the county jail unless you do so by ^{barbering or by} using force.³¹ If you are in the county jail and someone cuts the bars or tunnels out and escapes, and you simply follow him out, you have committed no crime. The situation is different at the penitentiary level where a felony is committed if an inmate simply hides himself somewhere on the grounds or in one of the buildings.^{31a} This inconsistency is typical however of what you have when each statute is passed individually for one specific purpose with no consideration of the problem as a whole.

Our cold check law also has a glaring loop hole. It is bad enough to have to explain to an irate creditor that he can not get a warrant for a criminal cold check because the check was given for a debt or on an account, and not "for something of value", but ^{even more of a loop hole} ~~exists~~ because the present cold check

while awaiting trial
usually
trial

law does not prohibit the stopping payment of a check, even if goods or money was obtained.³³ Our cold check statute does, with some forethought, (undoubtedly an amendment after the original statute had been successfully violated by some charlatan,) punish the person who issues a check and then rushes to the bank and withdraws his money before the check given can get to the bank. Nothing, however, is said about the "stop payment" gambit. It would be perfectly legal for a person simply to open an account for \$15 or \$20, in other words have an account, then go all over Hopkinsville writing cold checks for an amount less than what he had on deposit,^{and} then stop payment on each and every check. The victims could, of course, bring suit for the money, but it would not be a crime, and if any of you have ever tried bringing suit against the typical cold check writer for small sums such as we are discussing, you know what a difficult, exhausting and expensive process that could become. I think something should be done about this and probably something will, but it won't if we continue our present method of writing the criminal law, namely, sticking one more specific crime on the books while ignoring everything else.

Doubtless many of you have heard with approval or even said, "We don't need any more laws. ^{All} what we need is better enforcement of the laws we've got." And yet, in view

of the foregoing, are you really so sure? Do you really believe that we don't need a law against escaping from jail? Or a law against writing cold checks and then simply stopping payment on them? Do you really believe that we need better enforcement of the ridiculous and archaic laws I mentioned earlier? And there are a lot more of them that time does not permit me to mention tonight.

I would also like to suggest one other thing. I don't believe we need any more laws which are drawn extremely broadly and extremely strictly, and then "leave it up to the courts" as to when we will enforce them. Let me give you an example, marijuana possession. Marijuana possession was originally made a serious felony³³, simply because the proponents of the law argued that it would make it much simpler to convict peddlers and narcotic pushers if a severe law punishing simple possession were on the statute books. Everyone was assured, of course, that the law would not be used except against peddlers or pushers. And for many years it was not. However, the advent of the American version of the cultural revolution changed all this. We were outraged at long-haired hippies, shouting obscenities, picketing and demonstrating, and "something had to be done." Since many of these persons also smoked marijuana, sometimes flagrantly and openly, we had a tool ^{right} ~~there~~ at hand. Possession of marijuana was already a felony and the persons involved could be prosecuted for a

serious crime. This seemed all right to most people as long as the persons punished were hippies and beatniks -- though not, it will be remembered, professional narcotics pushers as was originally intended. But it got pretty sticky when some of the subsequent marijuana possessors turned out to be the college kid who lived down the block or even the children of governors, senators, college and corporation presidents, and successful businessmen. ⁹ The revolt against *the severity* of the marijuana laws developed, and now, (and I think correctly so) simple possession of marijuana is not a felony. I think perhaps we may have gone too far, however, since simple possession ^{of marijuana} is, for all practical purposes, not even really a misdemeanor. Under the current law, in existence since 1970, simple possession of marijuana can only be punished by committing the person to the Department of ^{Mental} Public Health for treatment. ³⁴ Dr. Sivley is in the audience and perhaps he knows what the local mental health clinic prescribes for this type of treatment. I don't know, and I don't know if they even have a program, but nevertheless that is the status of the current law on marijuana.

Let us move on to examine the new Penal Code. What would the new penal code do? Why should we adopt it? First, and this is basic, the penal code is a code, -- crimes are spelled out with particularity; and offenses are grouped

Hyper and penalties are scaled according to the seriousness of the crime.
according to ^{the} seriousness. The entire body of criminal law
will be unified and correlated. For example, the countless
different penalties will be abolished and the penalties
simplified. Under the penal code there are four degrees of
felonies, ^{and} two degrees of misdemeanors, ^{three, if you count} plus another category
known as a violation. ³⁵ For example, all class A felonies ^{murder, etc.}
can be punished by death, life imprisonment, life without
parole, or a penitentiary sentence of twenty (20) years or
more. ³⁶ You will note that life without parole now becomes a-
vailable for all the very serious crimes, and not for just the
single crime for which it is now permitted in Kentucky-- rape
of a female over the age of 12. Another interesting feature
of ^a the class A felony ^{case} penalty is that there is a two-part
trial, the first part to determine guilt or innocence and the
second to determine the penalty. ³⁷ At this second stage evidence
can be admitted which was not permissible during the portion of
the trial at which the defendant's innocence or guilt was
determined, for example, the defendant's previous criminal
record. This will assist juries in more appropriately
setting the penalties. A friend of mine who is a layman,
but who has served on circuit court juries, told me just the
other day that he thought that this one change was worth the
adoption of the entire ^{penal} criminal Code.

You will note that the Penal Code does not abolish jury sentencing. Many critics of jury sentencing exist and a lot of people feel that Kentucky should abandon it. However, the penal code does not do so. [The penal code is not a revolutionary document.] It retains jury sentencing. You will notice that it will also retain capital punishment. It was believed, and I think properly so, that these and many other questions are certainly debatable, but that they deserve to be argued on their own, and that disputes over points like these should not be permitted to intrude on the adoption of a comprehensive ^{As a} criminal code.

The new penal code would, however, do a few things that might be regarded as quite innovative. I know the mind and the outlook of the Athenaeum Society, and I think I should ^{be interested in hearing} ~~probably explain to you~~ a little about what the new penal code would do, and what the current law is, on sex offenses. Probably the most radical, and don't think this provision will escape the scrutiny of some of our ever vigilant Legislators, the new Code would abolish, as a crime, practically all sexual acts between consenting adults. The current Kentucky law prohibits ^{all} homosexual relations; in fact, it's a felony punishable by up to five years in the penitentiary. ³⁸ This will be gone. The current law also treats as a crime adultery and fornication. ³⁹ Now adultery is a serious crime in many states,

sometimes a felony, punishable by imprisonment in the penitentiary. Kentuckians, although they do not like adultery and undoubtedly yield to none in their reverence for the Seventh Commandment, have never felt too strongly on the subject, since the maximum penalty for adultery in the State of Kentucky is a fine of not more than \$50 (no jail sentence),³⁹ and I do not know of a lawyer at this bar who has ever heard of a prosecution for the offense. But under the new penal code, *there* adultery ^{-- at least not as a crime} will be gone. You will notice that I said that the only type of sexual crimes that will be made non-crimes are those involving consenting adults. Stiff penalties will still be provided for those who take advantage of younger persons or for those who forcibly urge their sexual attentions on someone else.

The Kentucky Penal Code as proposed is not a revolutionary document. It retains most of the important and substantial features of the existing Kentucky Criminal Law. What the Code does is to codify and unify the law. It will ^{updates and revises the law} ~~take different offenses and grade~~ the severity of the offenses by more realistic standards than are in use today.

Will the Kentucky Penal Code be adopted? Will the Legislature pass it? Now no one would expect the entire Penal Code to be adopted in exactly its present form, without any amendments. However, we are now asking whether the Penal Code will be adopted at all. I don't know. I have some doubts. For one thing, there is always a great deal of difficulty in obtaining the adoption of any detailed body of law on any subject, unless, of course, the subject is of such a highly technical nature that the average person is very little concerned and if all the experts in the field are in agreement that ^{a change made} it should be adopted. Witness, for example, the Uniform Commercial Code, which sailed through the Legislature with scarcely an amendment. Not to be placed in the same bracket as commercial law, however, is the criminal law. Everyone has some knowledge of the criminal law and strong opinions about it. And everyone has his own infallible theories. It's kind of like coaching a professional football team. Anybody can do it! Anybody knows what play ^{the coach} should ^{similarly,} call. Anybody knows how the Supreme Court should rule on a particular question. And anybody knows what the criminal law should be. With these factors to consider, there will be great pressures on the Legislature either to change the Code almost in its entirety, or ~~des~~paring of doing that, to simply refuse to adopt it all.

I am afraid that I must also report that difficulty will come from another sector, ~~the~~ members from my own profession, the lawyers, and, more specifically, from ^{some of} those who practice criminal law. Lawyers often have a vested interest in the "way we do things now." You know about "old dogs and new tricks". Many lawyers, I fear, will lobby militantly against the penal code and attempt to sabotage it. I already know one lawyer here in town, and this occurred ^{even} before the copies of the penal code had been printed and circulated, who said that he had already heard about the penal code and that half of it was unconstitutional and the other half was damned foolishness. With this attitude I cannot agree, but plenty of people will be arguing in just this manner. Many other criticisms will be heard. ^{It} It is hoped, however, that those of you here tonight who have heard this paper will realize that the state of Kentucky and our citizens have a definite stake in the adoption of the Kentucky Penal Code or at least in an extensive revision of our criminal law. It is time that Kentucky is brought up to date. It is time that our penal laws be revised to more accurately reflect the current times, to consolidate the maze of laws we now have into a concise, concrete, coherent code of laws that will enable the people of Kentucky to ^{meet} ~~cope with~~ ^{a challenge} the problems of crime in a free society."

Foot-Notes

1. Grazing cattle on Capitol grounds	KRS 433.510	\$25-\$100 per day
2. Gensing Garden	KRS 433.720(1)	1-3 years
3. Bathing suit on highway	KRS 436.140	\$5-\$25
4. Operating a concession stand near camp meeting	KRS 437.080(1)	\$10-\$100
5. Selling comic books on crime	KRS 436.550	Up to \$1000 and/or up to 1 yr.
5a. Selling publications featuring crime	KRS 436.110	\$50-\$1000 and/or 10 days - 1 yr.
6. Spite fence	KRS 433.860	\$5-\$10 per day
7. Selling magazines depicting drunks	KRS 436.130	\$25-\$200
8. Exhibiting a bull, jack or stud	KRS 436.170	\$10-\$50
9. Showing a play with antagonism between master and slave	KRS 437.100	\$100-\$500 and/or 1-3 mos.
10. Selling cigarettes to minors	KRS 438.030	1st offense \$10-25 Subsequent" \$25-300
11. Advertising a V.D. cure	KRS 438.070	\$50-\$500 and/or up to 6 mos.
12. Holding a marathon dance	KRS 438.080	\$50-\$300 and/or up to 180 days
13. Having a common drinking cup	KRS 438.070	\$1-10 per day
14. Spreading small-pox	KRS 438.010	Wilfully importing \$1,000 Endeavoring to spread - \$500 or 6 mos. Going about having reason to believe you have smallpox-\$100-\$1000
15. Flourishing a deadly weapon	KRS435.200	
16. Issuing cold check for less than \$20.00	KRS 434.070	
17. Rape of person under 12	KRS 435.080	
18. Rape of person over 12	KRS 435.090	
19. Assault and battery	KRS 431.075	Up to 1 yr. and/or up to \$5,000

19.	Assault and battery	KRS 431.075	Up to 1 yr. and/or up to \$5,000
20.	Maiming	KRS 435.160	1-5 yrs.
21.	Stealing poultry worth over \$2.00	KRS 433.250(4)	1-5 yrs.
22.	petit larceny	KRS 433.230	
23.	Stealing hogs worth over \$4.00	KRS 433.250(2)	1-5 yrs.
24.	Stealing from the railroad	KRS 433.210	1-5 yrs.
25.	Stealing cattle	KRS 433.250(1)	1-10 yrs.
26.	Trespass in a gensing garden	KRS See for 2, supra	
27.	Trespass or damaging fence on posted property	See for 2, supra	
28.	Trespass on enclosed farm premises	KRS 433.720(2)	Up to \$500 and/or up to 6 mos.
29.	Hunting on enclosed property	KRS 150.991	\$15-\$100
30.	Trespass by shanty-boater	KRS 433.780	\$5-20 and/or 5-20 days
31.	Escape from County Jail	KRS 432.370	
31a.	Attempted escape from penitentiary	KRS 432.390	3-6 yrs.
32.	Issuing cold check	KRS 434.070	
33.	Marijuana possession(before 1970)	KRS 218.010(13)	
34.	Penalty for possession of marijuana	KRS 217.731(1)(a) and KRS 217.995(3)(a)	
35.	Degrees of offenses	K.P.C. 3405	
36.	Penalty for Class A felony	K.P.C. 3415	
37.	Two-Part trial for Class A felony	K.P.C. 3440	
38.	Indecent and immoral practices	KRS 435.105(a)	
39.	Adultery and fornication	KRS 436.070	