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Kentucky Criminal Law Reform in the Age of Aquarius

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The law has a way of seeming timeless, but there are eras when everything seems to be subject to change. Fifty years ago, in a few years between the break-up of the Beatles to the dawn of disco, everything from the courts to the criminal law was transformed. The criminal justice reforms of the "age of Aquarius" still echo today.

The legal history of Kentucky laws perhaps is not the most relevant topic for the day-to-day work of the lawyers who appear regularly in Jefferson County's district and circuit courts. However, since the twin themes of this issue of *Bar Briefs* are criminal law and appellate law, I think it appropriate for me to review the history and sources of these reforms to assist legal researchers digging deep as they draft criminal appeals.

In Kentucky criminal law, it is useful to divide legal history into two broad eras: the years before the 1970s and those after that pivotal decade of reforms. The 1970s brought a new court system, a dramatic bail reform law which criminalized the hated bail-bondsmen and even a new court house, designed in the Brutalist architecture that was all the rage in public buildings in an era that thought leisure suits were acceptable male attire.

However, for the modern case law researcher the most significant change was the adoption of a statutory penal code—a code that marked a break between the two centuries of common-law crimes that preceded 1974 and the four decades afterwards.

Thumbnail Legal History of the 1970s

Around the time the Jefferson Airplane morphed into Jefferson Starship, Kentucky underwent a dramatic reform in the judicial article of its constitution, transforming a creaky system of justice of confusing courts, an overloaded single appeals court, and a partisan judicial branch subservient to the legislature, into a strong reformed judicial branch. Pushed by the state bar starting in the late 1960s, with a strong support by the Louisville Bar Association, a judicial-reform amendment to the state constitution was drafted and placed on the ballot in 1975. Ratified by the voters, it created a nonpartisan elective judiciary, a new Supreme Court and an intermediate Court of Appeals (the old name for the state high court).

In addition, it abolished a whole raft of lower trial courts (magistrate, county, municipal, police, juvenile), replacing them with a district court whose judges had to be licensed members of the bar. (For more, see Kurt X. Metzmeier, Michael Whiteman, and Jason Nemes, *United at Last: The Judicial Article and the Struggle to Reform Kentucky's Courts* (2006)).

The 1970s also saw Kentucky grab attention nationally for reforming its bail law. Pushed by Gov. Julian Carroll and sponsored by a youthful state House member from Lexington named Steven Beshear, in 1976 Kentucky's legislature outlawed commercial bail-bond services. In its place, they instituted a pre-trial system allowing defendants to personally post 10 percent cash bail and gave greater freedom to judges to release accused persons on their own recognizance. (Cash bail is still problematic in Kentucky, with studies indicating that it continues to disproportionally affect the poor, often stripping them of the presumption of innocence. However, researchers agree that those states still allowing commercial bail-bonds are the most unjust).

Kentucky Penal Code

The reform of this era that is probably the most legally relevant to a legal researcher is Kentucky's adoption of the Kentucky Penal Code in 1974 (effective January 1, 1975). Prior to this reform, all but a few economic offenses were common-law crimes, defined by case law. Before the 1970s, a researcher seeking a code of criminal law could get as much from a good annotated American edition of *Blackstone's Commentaries* than they could from the KRS which only set the statutory penalty for crimes.

In 1968, the Kentucky General Assembly directed the Legislative Research Commission and the Kentucky Crime Commission to revise the state's criminal laws and precedents into a penal code. Robert G. Lawson, then acting dean of the University of Kentucky College of Law, was charged with heading a group to draft the new penal code. They released their final draft in November of 1971, but it took until 1974 before the bill was passed.

The enabling law abolished common law crimes, creating statutory offences in the penal code for the ones existing in 1974. The 1974 act repealed a number of conflicting statutes but left some question as to the effect of judicial precedents in force as the penal code did not explicitly overrule all prior case law.

The commentary associated with the 1971 draft and with the 1974 law, while not the law (more on this later), offers researchers a few clues as to how courts might deal with prior case law. Commentary for each new code section has a heading "Relationship to Current Law," which offers specific guidance on how the new section should interact with existing case law.

For example, the 1971 commentary associated with KRS 501.020 (which defines culpable mental states under the code) warns that because this section deviates so much from prior precedent "reference to existing law is unnecessary and perhaps even inadvisable" and the 1974 commentary goes on to urge a "substantial break with the past." However, the commentary for the effect of "mistake of fact" on a culpable state, KRS 501.070, indicates that this provision represents "no substantive change" to the law and goes on to cite a 1927 legal treatise and cases from 1895 and 1917.

Understanding the Kentucky Penal Code

For most cases, the precedents of forty-five years are satisfactory for resolving a criminal law question. However, sometimes a question is such a knotty mixture of law and fact that an appellate lawyer wants the largest universe of legal precedents to work through.

A favorite example is self-protection in an affray where the upper hand is lost and regained several times before deadly force is used and the jury has to decide whether the defendant who provoked the fight later satisfactorily withdrew from the encounter and communicated it to the victim (who nonetheless continued to threaten physical force) such that a claim of self-defense is justified.

The leading case on this issue, *Charles v. Commonwealth*, 634 S.W.2d 409 (Ky. 1982), is a post-1974 case that nonetheless cites the 1971 commentary and a pre-code case, *Banks v. Commonwealth*, 245 S.W. 296 (1922) which the court finds perfectly illustrative of the rule.

So if a legal researcher pulls up the "perfect" pre-code case, how do they determine if it is good law? (Note: Shepard's and KeyCite find it very difficult to flag these cases unless a newer case discredits them by name). And if they want to see if researching older cases is worthwhile, how do they find and properly use these commentaries of which I speak?

To begin, one should read one of the surveys of the penal code written to introduce it to Kentucky lawyers. I would highly recommend Kathleen F. Brickey, *Kentucky Criminal Law* (Banks-Baldwin, 1974). Brickey was one of the drafters of the 1971 draft report and offers a knowledgeable treatise on the law and its history. Fully cognizant on the commentaries, she often gives fact-based illustrations to explain tough code concepts. Another important text is the *Report of the Seminar on the Kentucky Penal Code* (UK Office of Continuing Legal Education, 1974) held at UK in September 1974 by Professor Lawson to explain the new law. Both books are available at the UofL law library.

Researching the Commentaries

After these preliminaries, researchers should consult the 1971 and 1974 commentaries—but only after repeating "the commentaries are not the law" three times to satisfy the gods of statutory purity. While not "the law," the Kentucky Supreme Court has approved their use as an interpretive aid.

In *Kennedy v. Commonwealth*, 544 S.W. 2d 219 (1976) the court noted that "at the time the 1974 legislature enacted the penal code it had before it the commentary which explained the scope of this section. In the absence of the legislature having made any change in the language of the section we must conclusively presume that it assigned to it the meaning and effect attributed to the language by the 1971 commentary."

Researchers should take note that although for many code sections the 1971 and 1974 commentary has the same text, in others (see discussion of KRS 501.020 above) they vary significantly. Consult both.

The 1971 commentary was published with the draft code as *Kentucky Penal Code, Final Draft* (Kentucky Crime Commission, 1971). Note that the sections have their own numbering as this was well before KRS section numbers were assigned. Expect to do some manual comparison.

The Kentucky Crime Commission created the 1974 commentary in the months after the law was passed but before it went into effect. It was based on the 1971 notes but informed by the Commission's close contact with the legislative process. If you have access to the West version of the KRS (Westlaw or the print Banks Baldwin edition) the 1974 commentary is given in the annotations to each section of the penal code. If you do not, it was published in the post-code *Criminal Law of Kentucky* (Banks-Baldwin, 1975) which is available at the UofL law library.

Legal researchers would be wise to consult these commentaries to determine whether a pre-1974 case has any relevance before citing it. (You should also to collect the illustrative cases cited by the commenters.)

Conclusion

The 70s are often remembered for awful fashion choices, ugly architecture and economic troubles like "stagflation." But they were also an era when the "a-changing times" of the 60s infused the staid legal world with energy for real reform. Swept away were machine-elected judges taking campaign money from bail-bondsmen, a confusing warren of lower courts spread over downtown Louisville, and common-law crimes hidden from ordinary citizens in the Kentucky reports and only assessable with digests using the West Key-Number system. Legal history, perhaps, but history a good researcher can use.

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