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CRIMINAL LAW REVISION IN GEORGIA

By T. T. Molnar*

Hammurabi, the king of Babylonia, who is said to have ruled about 2200 B.C. a greater empire than any man in history, boasted that in his realm one could safely travel from the Mediterranean Sea to the most eastern shores of India. The columns unearthed in the capital of Babylonia contained the oldest written code of law. These laws in the valley between the Tigris and Euphrates Rivers, where legend locates the site of the Garden of Eden, were chiseled in wedge-shaped characters on their shafts of stone, and are said to be the earliest code of law to come down to us. It is also written that Hammurabi caused the laws, now known as "Codex Hammurabi," to be chiseled into granite because he wanted them to be permanent. It was the philosophy of ancient rulers that permanence was the greatest virtue in any government, and changes should be slow and difficult.

Originally all laws were of a penal nature, prescribing conduct and providing punishment for violation.

The principles of permanence came down through ancient Greece where Solon's edicts were chiseled on stone tablets for permanence. Historians claim that the fall and disintegration of the Greek city-states came when the people started writing laws in an easier manner.

Compare this with the history of the Georgia Criminal Code. After the Revolution, there was a general desire among the states to break away from the English criminal common law, due to the harshness of the provisions from which the colonies had suffered. Most felonies were punishable by death. Larceny of more than one pound was a felony, as was cutting down young trees. Judges and juries made every attempt to save lives in the colonies as well as in the mother country. Our criminal laws, and those of most of the states, have developed into a patchwork of inconsistencies, contradictions, and confusion by reason of the desire to break away from the common law and create as rapidly as possible a legal system more nearly adapted to local conditions.

The science or art of criminal law has its origin in antiquity. A true answer to the question of basic concept of criminal law and procedure and the punishment of criminals has never been found. The Greeks had a greatly developed sense of the law and most of their laws were of the criminal regulatory type, that is, involving punishment for the violation

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of edicts. In Plato's days the Greeks distinguished laws from decrees. Tyranny was defined as the form of rule in which the sovereignty of law disappeared, and a personal rule usurped its place.

The prevention of crime and the protection of society are the ends accepted throughout history for criminal law and for punishment. For centuries there has been an unresolved debate as to whether the purpose of punishment is or should be vengeance, retribution, rehabilitation of the criminal, protection of society, or the soothing of the hurt feelings of the injured party.

The common law of medieval England had a somewhat different concept of crime and punishment. Treason was loosely defined to include all actions endangering the life or majesty of the sovereign. The first and foremost object of the criminal law and prosecution was to serve the king. Treason charges could be prosecuted before the Star Chamber which was the Privy Council in its judicial capacity. There the defendant was denied a trial by jury, counsel, and the right of habeas corpus. Anyone charged with treason was subjected to exhausting interrogation, even torture, and was almost without exception condemned to death.

The criminal law of England relied on deterrents rather than surveillance or detection. Since the forces of law were few and scattered, harshness was depended upon for protection against crime. Enforcement being weak, of necessity the punishment was severe. Death was the penalty for any of two hundred offenses, including blackmail, cutting down young trees, and stealing more than a shilling. It is recorded that in an average year eight hunderd persons were hanged in England for crime. As a result, judges and juries tried to hide behind technicalities to save lives, but even at that, the attempt was at best very meager.

In Georgia the debate continues. The object of the criminal laws is stated to be "to deter the defendant from a repetition of his act, to reform the defendant, to deter other persons from committing similar breaches of the law, to promote the public safety, and to compel all persons to obey the law."

In 1811 the General Assembly of Georgia passed "An Act to Ameliorate the Criminal Code and Conform the same to the Penitentiary System."[1] Thus, the first aim of the criminal law and the study of criminal law was to "ameliorate" the same, probably to conform to the new ideas of the New World. In 1817 a penal code was published by Carey and Sons, Philadelphia. In 1821 Lucius Q. C. Lamar published a compilation of the laws of the State of Georgia as passed by the legislature from 1810 to 1819 inclusive. Thereafter, in 1822, Oliver H. Prince published a digest of the laws of Georgia and "Penal Laws" appeared on

1. Ga. Laws 1811, p. 540.

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2. Turner v. Thompson, 58 G

pages 341-348. These were followed by Prince's Digest of 1834, Howell Cobb's Compilations with forms of bills of indictment necessary in prosecutions under it, and the rules of practice. In 1863 a code was published by R. H. Clark, T. R. R. Cobb and D. Irwin, followed by "Annotated Penal Laws" by John L. Hopkins in 1875.

On May 15, 1890 Richard H. Clark read a paper before the Georgia Bar Association at its annual meeting in Augusta, Georgia, and recited in detail the arduous work of writing a code which was published in 1862, was known as the Code of 1863, and was in fact adopted in 1860. Thomas R. R. Cobb, David Irwin and the speaker served as code commissioners.

Mr. Clark pointed out that in the early days of the state nearly all crimes were those of the common law and virtually all felonies were punishable by death. As soon as the state had a penitentiary, a penal code was enacted, principally to fill the penitentiaries instead of the cemeteries. Each succeeding code, *i.e.*, those of 1817, 1833 and 1863 was but a revision of the former and the substance of the earlier work. Thus, the Penal Code of Georgia began with an effort to "ameliorate" harsh penal laws of England, create procedures which were more suitable to the New World and ease the brutality of the punishment inherited from the mother country. This effort has continued through a process of evolution to the present time.

There is some doubt as to who is the author of our Judiciary Act of 1799, which then distinguished Georgia from her sister states mainly by abolishing special pleadings, but there is no doubt that George A. Gordon was the originator of the Code of Georgia and that his efforts and influence secured the law requiring it. As late as 1877 there were but five codes in the United States: Virginia, Alabama, Tennessee, California and Louisiana.

There is still another version of the history of criminal law in Georgia. Our adopting statute of February 25, 1784, whereby the law of England, as it applied to Georgia on May 14, 1776, with certain qualifications, was declared to be of force in this state, is the basis of our jurisprudence in Georgia. While this statute adopted the English common law and the old English statutes, it did so "only where applicable to our people in this new country, and the circumstances surrounding them here."[2]

Although the Code of 1863 is often referred to as the first official code, it is correctly so described only in the sense that it was the first general code. In the year 1811 the legislature adopted a criminal code, but it was not to become effective until proclaimed by the governor after

2. Turner v. Thompson, 58 Ga. 268, 271 (1877).

completion of "a suitable penitentiary edifice."[3] No such proclamation was ever made, and the act adopting it was repealed in 1818.

Next came the Penal Code of 1816, as adopted by the General Assembly in December of that year. This code also was to be proclaimed by the Governor; and it was proclaimed, although it remained in force for only about two years, the act in reference to it having been repealed at the same time as the act of 1811. In the meantime, the legislature passed the act of December 20, 1817, "to amend the Penal Code of this State,"[4] which act became of force on its approval by the Governor on that date. This act, while called an amendment, virtually constituted a new penal code, since it included most of the matter which had been embodied in the Code of 1816. It did not altogether supersede the former code, but became the only code extant upon the approval of the act of 1818, repealing the acts of 1811 and 1816.

The Code of 1817, with amendments adopted from time to time, remained in force until the passage of the act of December 23, 1833, entitled "An Act to Reform, Amend, and Consolidate the Penal Laws of the State,"[5] and providing that the existing code should continue in effect until June 1, 1834. Thus, the General Assembly adopted what was known as the Penal Code of 1833, and what has also been erroneously referred to as the first code.

In 1850 the Honorable Howell Cobb of Houston County, compiled a code which is known as "Cobb's Penal Code," but that code was never adopted by the General Assembly. Next came the Code of 1863, which embodied both criminal and civil law, and was adopted by the General Assembly as the first general code of this state.

Seemingly the Codes of 1816 and 1817 were considered as repealing the criminal common law, adopted by the act of 1784, only so far as in conflict with it: but the Code of 1833, being more comprehensive, has been regarded as an exclusive declaration of what acts would constitute criminal offenses in Georgia at that time, and so it has been said, that, since the adoption of that code "it has been the uniform understanding that we had no crimes in this State save such as were defined and punished in the Code." Thus, it should be remembered that, while the common-law terms may be found in our statute law, we have in this state, and have had at least since the act of 1833, only statutory offenses; also, that while these terms are defined in the code substantially as they were understood at common law, the definitions were expressly enacted into law by our own legislature, and therefore are to be treated as statutory definitions.

3. *Supra* n. 1.
4. Ga. Laws 1817, p. 611.
5. Ga. Laws 1833, p. 113.

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6. *Supra* n. 1.

To this date there are conflicting authorities on that subject. Code sections 26-5001 and 26-5501 clearly providing that the common law crimes have been adopted in Georgia, while the courts hold that there are no common-law crimes in this state and that only violations of public laws are recognized as criminal offenses.

Let us remember that the first Georgia criminal laws were designed "to ameliorate the criminal code and conform the same to the Penitentiary System."[6] At this writing our penitentiary system is so bitterly criticized, and distressing shortcomings of our prisons are so dramatically before our eyes, that it is shocking to find that again, as in the past, our criminal code and the penitentiary system are going hand in hand just as they have gone since 1811.

J. Edgar Hoover, Director of the Federal Bureau of Investigation, warns us that the seemingly uncontrolled wave of crimes, growing in intensity, could endanger our national existence. Financial institutions are being held up in open daylight in the presence of the public. In 1961 there were two holdups of financial institutions in Atlanta; in 1962 there were eleven and in 1963 there were thirteen. Georgia stands at the top of the record of crimes. We execute more criminals than any state in the union, but still as scientific methods improve, our rate of crime grows. At this writing the Securities and Exchange Commission is conducting an investigation to ascertain the extent to which criminal elements influence our business.

The world has experienced astonishing advances in practically every line of endeavor during the twentieth century. The only field in which there has been no break-through is the field of human relations. We have not learned yet how to live with each other. We have no substitute for violence, war, prejudice, divorce, and perennial unemployment. We still roll in selfishness, cruel brutality and crime.

Our criminal laws are antiquated. They are the stone pillars of Hammurabi with the code of laws chiseled into the granite for permanence. For years it has been a standing joke that the penalty for stealing a chicken (pea-fowl) is greater than for stealing the most expensive baby blue Cadillac; that the penalty for possessing tools that could be used for burglary is greater than using the tools and committing burglary. Writing a check when there is not sufficient money in the bank is a penitentiary offense, but if you buy the baby blue Cadillac and give a check in payment, then stop payment on the check, the state has a difficult, if not impossible, case to prosecute.

One section of the Georgia Code makes it a criminal offense to make a profit in a business transaction, and another section prohibits under-

6. *Supra* n. 1.

bidding a competitor. It is provided by statute[7] that a judge of the superior court shall, at each term of the court in every year, give specially to the grand jury the law as to certain offenses, among them forestalling, regrating, and engrossing. Nobody knows what forestalling, engrossing or regrating might be in present-day law, but the grand juries must investigate them. In A.D. 452, centuries before the Norman Invasion, Pope Leo I forbade commercial transactions, monetary profits, taking or receiving interest on money borrowed, whether usurious or not, because he wanted all wealth, the nobles' as well as the churchs', to be in land and precious stones, gold ornaments and fine clothing. He designated the offenses engrossing, forestalling, and regrating as punishable by excommunication. This prohibition was inherited in the common law and fifteen centuries later it is still on our statute books. The judges must charge grand juries accordingly. The penalty in Georgia is as for a misdemeanor and we no longer excommunicate the offender.

Our criminal laws are governed by technicalities, formalities, and precedents. It is so stated in the law itself. Code section 26-601 provides as follows: "If the indictment is found within the time limited, and for any informality shall be quashed or a nolle prosequi entered, a new indictment may be found and prosecuted within six months from the time the first is quashed or the nolle prosequi entered." Future generations will justly wonder how in the age of reason and incredible progress, coupled with incredible crime waves, indictments can be quashed and nol prossed due to an informality, with the resultant probability that a criminal may be discharged due to the informalities. No wonder we have great crime waves and they are getting worse by the year. In 1963 the Supreme Court of Georgia held in *Wood v. State*[8] that bribery is not a punishable crime, provided a municipal official is being bribed and not a state official. Under existing laws the Supreme Court could hold no other way; the tragedy is that existing laws should compel a reluctant court to hold that at this time for all practical purposes it is not a crime to bribe a municipal official.

Precedent dominates law because precedent is custom and the jealous older brother of law.[9] For centuries precedent dominated science and was the jealous older brother of science which moved slowly at the risk of the lives of those, who, like Galileo, dared to disagree until, suddenly, in a wave of a terrific explosion science threw off precedent and turned its back to its older brother.

On the other hand, law is a part of human nature. A criminal trial is

7. GA. CODE ANN. §59-601 (1933).
8. 219 Ga. 509, ___ S.E.2d ___ (1963).
9. DURANT, THE LIFE OF GREECE 54 (1939).

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10. Campbell v. United States.
11. Ga. Laws 1961, p. 96.

viewed as a latter-day circus, not unlike the ones Nero enjoyed, where giants fight in merciless battles. The lawyer, the layman, yes the juror, enjoy the struggle between masters of courtroom antics and very often, more frequently than we like to admit, verdicts are influenced by the skill of the advocates, by prejudice or preconceived ideas.

Criminal statutes are designed for the purpose of furthering the fair and just administration of criminal justice. The interest of a government in a criminal prosecution is not that it shall win a case, but that justice shall be done![10]

The confusion between the numerous code sections pertaining to larceny, embezzlement and larceny after trust is so great that in at least one case the Supreme Court of Georgia indicated that our embezzlement statutes are unconstitutional. The Supreme Court made it abundantly clear that there is a "twilight zone" in that branch of criminal law dealing with principals in the first degree, principals in the second degree, accessories before the fact, and accomplices, and that the twilight zone dates back to the "very ancient common law." Still, there is no such crime in Georiga as grand larceny, nor is there a law on petty larceny. All simple larcenies are misdemeanors regardless of whether the thief steals a dollar or a million dollars.

The public was aroused and demanded that the Criminal Code of Georgia be revised. Voluntary organizations sprang up in various parts of the state, each organization sponsoring a different system of criminal law. In the years immediately preceding 1960 this public demand grew in intensity. Governor Ernest Vandiver insisted that the creation of a code commission is the responsibility of the Georgia Bar Association and not of voluntary organizations.

The Georgia Bar Association, under the leadership of its president, Homer C. Eberhart, now Judge of the Court of Appeals, faced the emergency. Its Standing Committee on Criminal Law and Procedure met in August 1960 in the library of the Fulton County Courthouse. A resolution was drawn and was submitted to the Board of Governors of the Georgia Bar Association and approved by that body. The General Assembly passed the resolution with some changes at its 1961 session[11] and the Criminal Law Study Committee came into being. The resolution, as amended, provides that the committee should consist of sixteen members: five members of the Senate, to be appointed by the Lieutenant Governor; five members of the House of Representatives, to be appointed by the Speaker of the House; and the following to be appointed by the Governor: one member of the Superior Court Judges

10. Campbell v. United States, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed. 428, 437 (1961).
11. Ga. Laws 1961, p. 96.

Association; one member of the Solicitors General Association; one member of the City Court Judges Association; one member of the City Court Solicitors Association; one member of the staff of the Attorney General and one member of the Standing Committee on Criminal Law and Procedure of the Georgia Bar Association.

The resolution provides that the committee shall conduct a thorough study of the criminal laws of the state and all laws relating directly or indirectly thereto. It shall study the problems which have arisen due to ambiguities and inconsistencies in the present law and shall formulate a revision of the laws relative to criminal law and procedure. The committee is authorized to hold public hearings and is to remain in effect until, in its opinon, its work is completed. In order to perform its duties more effectively the committee is authorized to employ clerical help and an editorial and research staff.

The following sixteen members were appointed: five members of the Senate: Senator Willis Conger of Bainbridge, Senator Charles E. Dews of Edison (since deceased), Senator Howard Overby of Gainesville, Senator Earl Staples of Carrollton, Senator Mullins Whisnant of Hamilton; five members of the House of Representative: Mr. Pierre Howard of DeKalb County, Mr. Ralph McClelland of Fulton County, Mr. Richard B. Thornton of Macon, Mr. Frank Twitty of Camilla, Mr. Warner Wells of Fort Valley. The six members appointed by the Governor are: Judge Richard B. Russell III of Winder, of the Superior Court Judges Association: Judge Andrew McKenna of Macon, of the City Court Judges Association: Mr. Alfred A. Quillain, of Winder, of the Solicitors General Association; Mr. Marcus B. Calhoun of Thomasville, of the City Court Solicitors Association; Mr. Henry G. Neal, of Thomson and Atlanta, of the Attorney General's Staff; and Mr. T. T. Molnar of Cuthbert of the Georgia Bar Association.

In June, 1963 the Lieutenant Governor appointed Senator Ben F. Johnson of Decatur, Dean of Emory University Law School, to fill the vacancy created by the death of Senator Charles E. Dews.

The committee has two working subcommittees. The Drafting Subcommittee drafts the proposed statutes. These drafts have been carefully prepared by the research staff. When it is believed that the drafts are in such form and substance that they can be placed before the full committee with the recommendation of the Drafting Subcommittee that they be adopted, the drafts are submitted at a meeting when all members of the Full Committee participate in the decisions. The drafts may be adopted or amended. Often they are returned to the Drafting Subcommittee for further study.

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The Research Staff is an integral part of the Drafting Subcommittee. The members of the Research Staff are invited to vote at the meetings of the Drafting Subcommittee. The Research Staff is composed of outstanding legal scholars who are the lifeline of the committee's work. Without their wholehearted cooperation and zealous interest in the work, the Committee would be hard put to fulfill its functions. The Research Staff is composed at present of Dean James C. Quarles and Professor James C. Rehberg of the Walter F. George School of Law, Mercer University, and Professors Royal Shannonhouse and Marion W. Benfield, Jr. of the University of Georgia Law School. They are assisted by such staffs as they may select. Dean Quarles and Professor Rehberg have been leaders of the Research Group from the beginning. Professor Shannonhouse and Professor Benfield have recently joined the staff. In between, Dr. Albert B. Saye of the University of Georgia was active on the Drafting Subcommittee. Mr. Norman Crandell, who started with the Drafting Subcommittee at its beginning, recently withdrew due to other assignments on the Institute of Law and Government of the University of Georgia.

By a coincidence, at the time when the committee completed its organization, Illinois had completed the Code of Substantive Criminal Law. It took Illinois six years to do the work. In September, 1961 Professor Charles H. Bowman of the University of Illinois School of Law, chairman of the Illinois Drafting Subcommittee, visited in Athens, Georgia, addressing the joint meeting of the Criminal Law Study Committee and the Solicitors General Association.

It is interesting to record that in 1827 a Judge Lockwood, in submitting to the Illinois General Assembly a draft of the laws of Illinois, described the small chapter on criminal jurisprudence as having been adopted primarily from a volume of the Laws of New York of 1802 which he brought with him to Illinois, and the volume of the Laws of Georgia which he located in the office of the Secretary of State. From this beginning grew the jurisprudence of the frontier states, notably Illinois and Wisconsin, which in those days were "The West." The difficulties encountered by Illinois and Wisconsin in their criminal laws since 1827 were similar to the difficulties Georgia is still experiencing.[12]

Writing a code is not dissimilar to being in the center of a lion-taming act. Every law affects every other law, and a good code is so interwoven that no part is entirely independent of any other part.

All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it; that they are to be construed in connection and in harmony with the

12. See p. 17 of the original draft.

existing law; and that their meaning and effect will be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts. Statutes relating to the same subject matter (in pari materia) should be considered and construed together.

What are the principal sources upon which the work of the committee is based? First, we have the present Georgia law with a great wealth of court decisions interpreting almost every phase of the code. As Georgia was one of the thirteen original states, there are more decisions to fall back on than in many of the younger jurisdictions. It is a fundamental rule of the Committee that as many code sections as possible should be retained with the interpretations of the courts carefully observed. The form and arrangement might be different to meet modern conditions, but the substance should be retained wherever possible. The second source is the Model Penal Code prepared by a great number of prominent lawyers, judges and law teachers under the guidance of the American Law Institute. Special attention is invited to an article of Professor Louis B. Schwartz in the American Bar Association Journal.[13] It presents some of the issues and the methods by which the Model Penal Code suggests that they be solved. It is not intended that Georgia follow very closely the Model Penal Code, but the committee considers the solutions suggested along with other sources. The third source is the new Illinois Code. Illinois is paying back with compound interest the initial contribution Georgia made to the first Illinois Code. Fourth is the weight of the authority in other states and jurisdictions. The fifth source is the constructive ability of the Research Group and of the members of the Committee.

At the outset, the Committee adopted the following basic principles and objects:

1. The Committee shall conduct a thorough study of the present criminal law, taking into consideration the following:
   (a) Elimination of ambiguities and inconsistencies in the present law.
   (b) Preservation of historical background.
   (c) Elimination of obsolete and antiquated principles.
   (d) Stare decisis.

2. The Committee shall prepare the revised Criminal Code of Georgia based on the following considerations:
   (a) Established precedents.
   (b) Traditions and customs.
   (c) Social structure.

13. 49 A.B.A.J. 447 (May, 1963).

   (d) Modern advances in
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3. The Code shall be wr
   (a) Substantive Law.
   (b) Procedural Law.

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8. In conclusion, the C science, medicine, techno will endeavor to create a ditions so far as they are precedent in our court d present day standards.

(d) Modern advances in related fields.
(e) Objects which the law is intended to serve.
(f) Exclusion of regulatory laws.
(g) Brevity and simplicity of expression.
(h) The future in mind.

3. The Code shall be written in two divisions:

(a) Substantive Law.
(b) Procedural Law.

The Substantive Law shall be written first and shall be done without limitation by ancient theories on the division of the two. The Substantive Law shall be presented to the General Assembly as a complete Code and no part shall be released for publication until the Code is complete. Specialized criminal statutes relating to traffic, agriculture, municipalities, elections, revenue and other like statutes shall not be dealt with by the Committee as such.

4. Any participation by members of the Committee on matters relating to Criminal Law shall be done in an individual capacity. No statement shall be issued by the Committee except upon a majority vote of the entire committee.

5. The constitutional rights of all persons shall be carefully guarded and preserved, the Committee being mindful at all times that the primary purpose of our law is to protect the innocent and assure a fair trial to any accused. The Committee shall also keep in mind that the constitutional guarantees under our law amount to nothing unless they are constantly enforced in a reasonable and honest manner; neither must we permit these guarantees to be misused by criminal elements to our peril.

6. The new Criminal Code shall be prepared and presented by the Committee as a whole and shall not be submitted piece-meal, nor released for publication in parts.

7. The Committee shall study and compare punishments provided for the various crimes and shall at all times endeavor to make the punishment fit the degree of the crime.

8. In conclusion, the Committee shall follow the advances made by science, medicine, technology, social improvements and the arts and will endeavor to create a Criminal Code which will retain the old traditions so far as they are applicable; preserve the store of wisdom and precedent in our court decision so far as they are in harmony with present day standards.

Classification of Crimes

Even a casual study of our criminal code convinces us that the principal reason for the ambiguities and inconsistencies is an unregulated multitude of bills introduced in our General Assembly without regard to the body of laws on our statute books accumulated during more than a century and a half. There is no control over the new bills and temporary expediency overcomes reason at times. When a legislator loses chickens (pea-fowl) to a chicken thief, chicken stealing becomes the most heinous of crimes and so it happens that the penalty for larceny of a pea-fowl is greater than that for larceny of an automobile.

For similar reasons we have a list of 85 code sections dealing with homicide. They range from abortion to obstructing a railroad. It is an offense to kill another with a pistol, a different offense to kill another on a railroad track, still another to kill with explosive, still another when death results from wrecking a train, and still another resulting from mob violence.

The present Georgia law of theft, apart from robbery and burglary, which must be treated separately, is divided into two categories, larceny or theft and embezzlement and fraudulent conversions. The Georgia statutes are highly technical and unduly detailed, which explains why there are forty-two code sections on larceny alone. Still, there is no distinction in simple larceny between stealing a dollar and stealing a million dollars. Both come under the same statute, have same definition and carry the same penalty.

We have 92 code sections dealing with arson. They range from burning a fence to burning a dwelling house, bridge, clothes and crops.

The Criminal Law Study Committee has reduced these multiple code sections to the minimum. The Committee used plain, understandable language to enable solicitors to draft indictments which can be understood by judge and jury and will enable judges to charge juries in simple language. There is an interesting study before the Committee analyzing punishments. If we consider that the maximum in a sentence is, for all practical purposes, meaningless, the minimum sentence is simply a figure one-third of which denotes the time when a prisoner may be paroled. Since neither minimum nor maximum sentence has binding effect because some administrative agency may disregard either or both, the incongruity of our criminal laws becomes evident.

The wide variety of penalties contains no ascertainable basis or logical design. Some penalties must have been set, not to fit the crime, but to satisfy somebody's personal venom, or to effectuate a compromise.

Let it be stressed at this point that there is nothing to restrict future

action by the General Assembly, which can completely disregard whatever classification may be established. There is no constitutional or legislative rule that can prevent a law making the punishment for stealing a "pea-fowl" greater than that of stealing a helicopter, or a rocket to the moon.

Criminal law, like all laws, is divided into two basic parts, substantive law, prescribing the crime and setting the punishment, and adjective, or procedural law prescribing the procedure from the moment when the complaint is filed to the moment when the sentence is executed. There is a twilight zone between substantive and procedural law which can not be disregarded. For example, at least two witnesses or one witness and direct corroboration are required to convict of perjury. A similar law governs treason and there are still other provisions as to the testimony of accomplices, or co-conspirators. The law of venue is half-substantive and half-procedural. Superimposed on the body of substantive law of specific offenses is a chapter of general provisions applicable to all crimes, such as definition of crime, rights of the state, rights of the accused, criminal responsibility, justification, defenses, criminal intent, malice, etc.

Specific offenses may be classified in various manners, as an example: inchoate offenses; offenses against the person; bodily injury and related offenses; kidnapping and related offenses; offenses involving damage to property; offenses involving trespass; offenses involving misappropriation of property; sexual offenses; abuse of governmental office; offenses against the Government; perjury and false swearing; offenses affecting public peace, order and safety; malicious mischief; offenses involving dangerous instrumentalities and practices; criminal libel; and contempt of court.

The ideal law would provide penalties to fit the crime, uniformly, justly, intelligently. The punishment for the same crime under the same circumstances should be as nearly identical as can be devised. Human weaknesses among judges, prosecutors and jurors, prejudices, bias, preconceived ideas and other extra-judicial influences should be eliminated as far as possible.

But how?

The proposed Model Penal Code as prepared by the American Law Institute classifies felonies, for the purpose of sentencing into three degrees, as follows: (a) felonies of the first degree; (b) felonies of the second degree; (c) felonies of the third degree. It provides that a crime declared to be a felony, without classification of degree, is of the third degree. It further provides that, notwithstanding any other provision of law, a felony defined by any statute other than the Code shall constitute for the purpose of sentence a felony of the third degree; and no person

convicted of an offense shall be sentenced otherwise than in accordance with this article.

In addition to the three classes of felony, there is a provision for the death sentence in capital cases, or life imprisonment in lieu of the death sentence. There is a schedule of fines in addition to, or in lieu of, the imprisonment, at a scale to match the various degrees of felony. The Illinois Code of 1961 retains the old features of sentencing, setting minimum and maximum terms of years and to that extent is not a great improvement over the present Georgia system.

Two other classifications of sentencing have been suggested. Felonies may be divided into minor felonies and major felonies, each with a standard minimum of one year and minimum of years in multiples of five. In contrast, some criminal lawyers feel that felonies should be broken down into capital felonies and numerous classifications, as many as six or seven, into one of which every new law shall be fitted. Once the class is established, the penalty should follow a true pattern previously determined.

Still others propose a truly indeterminate sentence. This proposal envisions a separation of trial from punishment. The jury would determine the guilt or innocence of the accused, and the judge or the jury would set the penalty, not less than a number of years nor more than another number. The penalty itself would be an administrative matter, to be determined after the whole minimum sentence has been served. It would be within the sole jurisdiction of the administrative agency to set the actual term of the sentence, not less than the minimum provided.

No attempt has been made so far to classify misdemeanors, although some states do classify them and there are misdemeanors which should be punished with small fines, and no more, or light confinement when the offender is unable or unwilling to pay the fine. This should be provided as a matter of right, not as a matter of grace.

One of the great weaknesses of our criminal law of today is the intermingling of felony and misdemeanor prisoners. It is absurd to punish one who, while sober, has slightly exceeded the speed limit out of the confines of a municipality, and caused no damage except perhaps to the injured feelings of a deputy sheriff hiding behind a billboard, by the same yardstick a prisoner is punished who is guilty of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. They are both misdemeanors.

The Model Penal Code classifies misdemeanors as misdemeanors and petty misdemeanors. The maximum penalty upon conviction for a misdemeanor, or a plea of guilty, is imprisonment for a definite term not exceeding one year, or thirty days in the case of a petty misdemeanor.

Where crimes and penalties are classified, the method of classification becomes a legislative policy. While there is no assurance that future legislatures will adhere to the classification once it is established, it is likely that committees and legislative counsel would keep a watchful eye in order that the present state of confusion shall never again occur.

Capital Punishment

The question of capital punishment has a great emotional appeal to the American public. As potential jurors, Georgians worry about the possibility of being selected on capital cases. The Criminal Law Study Committee received its full share of the emotional appeal.

In Georgia capital offenses are dealt with in 29 code sections. Every practicing lawyer knows that every year the proportion of prospective jurors who disqualify themselves on the ground that they are conscientiously opposed to capital punishment grows and even multiplies. The time is drawing near when it will be impossible in some jurisdictions to obtain qualified juries in capital cases.

Georgia executes more criminals year after year than any other state in the union but still the wave of crime grows and gets worse. Georgia has executed more persons over the past 38 years than any other state in America. Since 1926 it has electrocuted 391 persons (to the day when this is written, and probably more than that when the reader receives the information) and 45 of those electrocuted were teen-agers.

Michigan, Minnesota, Wisconsin, Maine, Alaska and Hawaii have abolished capital punishment. So have most European countries. New York, with its conglomeration of races and the birthplace of "Murder, Inc.," Oregon, and North Dakota have abolished the death penalty except in very restricted cases, such as a murder of a guard or a police officer. At this writing, 19 state legislatures are considering the abolishing of the death penalty.

There are at least three theories advanced in the field of capital punishment.

The first theory demands the complete abolishment of capital punishment, on conscientious grounds, on religious grounds, and on moral grounds. Those favoring this view insist that only God can give life and therefore man has no right to take away life no matter how heinous the crime for which the penalty is exacted. Again, as so eloquently stated by Justice MacNaghten in his charge to the jury in *Rex v. Bourne*, "The Law of the land always held human life to be sacred." It is further insisted that a criminal procedure entirely free from error has not been devised as yet and, if a mistake is made and the accused is executed, the mistake cannot be corrected.

It is insisted that the death penalty has not served as a deterrent to crime; the death penalty is inconsistent with Christian principles; the state has no right to commit murder in the name of the state; the death penalty is an irrevocable act and mistakes cannot be corrected; only the poor and uneducated are executed today; the sensationalism of a trial for a life adversely affects the dispensation of justice.

As we have noted, criminal prosecution serves several purposes and at times these purposes have been stated in different words in different civilizations. The Greeks had seven suggested principles of criminal law, viz: legality, conduct, mens rea, concurrence, harm, causation, and punishment. Executing a criminal fits into none of these principles. In our age it is said that the prevention of crime and the protection of society are the ends most acceptable for criminal law and punishment. There has been a debate reaching into antiquity as to whether the purpose of punishment is vengeance, which is punishment inflicted for an injury, or offense, retribution, rehabilitation of the criminal, protection of society or the soothing of the hurt feelings of the injured party.

It is argued that capital punishment does not protect society or prevent crime. To kill a man for vengeance is unworthy of a civilized society. Retribution is in vain. A criminal cannot be reformed or rehabilitated after he is executed, and to soothe the hurt feelings of the injured party by throwing a switch on an electric chair takes us back to the horrors of the Middle Ages.

But, it is argued, our crime wave would be even greater except for the horror of capital punishment kept constantly before public view. There is an element of our population which will not be deterred from evil doing except by constant reminder of the horrors of an execution chamber.

And so the debate continues. There seems to be a desire to abolish capital punishment but it is coupled with a fear of consequences in an increased wave of crimes.

The Illinois Code of 1961 provides as follows: "If the accused is found guilty by a jury, a sentence of death shall not be imposed unless the jury's verdict includes a recommendation that such sentence be imposed." This was offered in Illinois as a compromise between the two extreme views of retaining the capital punishment on one hand, or abolishing it altogether on the other. It reverses the present Georgia procedure when an accused who is found guilty of a capital offense is sentenced to death unless the jury in its verdict recommends mercy. In the new Illinois Code an affirmative recommedation of each juror that the death penalty be imposed must be obtained before a death sentence may be imposed.

Plea of Insanity

The plea of insanity and the theory of insanity in criminal law are among the most controversial issues in criminal jurisprudence today. The great advent of psychology and psychiatry has substantially altered public opinion with regard to an understanding of the nature of insanity. The controversy is pronounced. Both sides of the argument insist that the defense of insanity in criminal cases could, and does, influence the great wave of crime we are now experiencing. It is a common feeling that, if all other defenses fail, the accused can always resort to a plea of insanity. Added to the problem may be a complication when the accused was *committed* in a civil or quasi-criminal lunacy trial prior to the time when the crime was committed, and has not been legally restored to sanity.

What is insanity?

A Georgia court has stated that the law of no civilized country holds idiots or lunatics responsible for their acts, either civil or criminal.[14]

Nothing undermines general respect for law more than a feeling that the law is arbitrary in assigning guilt. Penal law must not condemn as criminals people who are not really blameworthy. Laws which purport to penalize conduct that is "blameless" in the ordinary sense of the term are more common than is generally realized. A man who is incontrovertibly a lunatic, unable to control his own behavior, remains subject to criminal conviction unless his mental illness is such as to prevent him from "knowing" what he is doing and that it is against the law.[15]

Under the traditional M'Naghten Rule only impairment of the defendant's "knowledge" is taken into account; there is no inquiry into the degree to which his self-control is impaired. He can be convicted despite an admittedly severe mental illness, if he is aware of what he was doing and that it is evil or proscribed behavior. In Georgia theM'Naghten doctrine is modified by allowing a partial inquiry into self-control by recognizing "irresistible impulse" as a defense. This theory has been criticized as unsatisfactory both because of the difficulty of distinguishing an irresistible impulse from any impulse which in fact was not resisted, and because overwhelming compulsion to misbehave may result from long, insane brooding as well as from momentary "impulse".

In Georgia it is provided by statute that a person shall be considered of sound mind who is neither an idiot, lunatic, nor afflicted with insanity and who has arrived at the age of fourteen years, or before that age if such person knows the distinction between good and evil.[16] It is also provided by statute that an idiot, a lunatic or person insane, without

14. Wilson v. State, 9 Ga. App. 274, 70 S.E. 1128 (1911).
15. 49 A.B.A.J. 447-48 (May, 1963).
16. Ga. Code Ann. §26-301 (1953 Rev.).

lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency.[17]

It is further provided by statute that any person counseling a lunatic or idiot to commit an offense shall be prosecuted for such offense, when committed, as principal.[18]

It was held that general insanity is a total or partial impairment of intellect rendering the person unable to know right from wrong.[19] An idiot is one "who hath no understanding from his nativity; he is a natural fool, or fool from birth."[20]

Intermittent insanity, caused by physical weakness or nervous disorder, is no excuse or justification for crime, unless it appears that at the time the crime was committed the defendant was incapable of adjudging the quality of the act and of knowing whether it was right or wrong.[21] Thus, we return to the "right and wrong" test.

The Penal Code of California provides that "A person can not be tried, adjudged to punishment, or punished for a public offense, while he is insane," and thereby an absolute right is conferred upon a condemned person, not only a privilege which may or may not be extended. To protect this right, the due process clause of the constitution may be invoked. The State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he has no such right.[22]

It was established at a very early date of Georgia jurisprudence that, if one has sufficient reason to distinguish between right or wrong, as to the act about to be committed, he is responsible; otherwise he is not. The general test of sanity is the ability to distinguish between right and wrong. The only exception from this rule is in a case of one who can distinguish right from wrong, but who acts under a peculiar delusion in consequence of which, and without criminal intent, his will is overmastered, and he commits the act.[23] This is the leading case on insanity as a defense in Georgia. Judge Nisbet's opinion is a classic and has been followed from the earliest time of jurisprudence in Georgia to this date.[24]

17. GA. CODE ANN. §26-303 (1953 Rev.).
18. GA. CODE ANN. §§26-304, 305 (1953 Rev.).
19. Carr v. State, 96 Ga. 284 (2), 22 S.E. 570 (1895).
20. Battle v. State, 105 Ga. 703, 708, 32 S.E. 160 (1898).
21. Carter v. State, 2 Ga. App. 254, 262, 58 S.E. 532 (1908).
22. Solesbee v. Balkcom, 205 Ga. 122, 52 S.E.2d 433 (1949).
23. Roberts v. State, 3 Ga. 310 (1847).
24. See also, Bryant v. State, 191 Ga. 686, 13 S.E.2d 820 (1941).

It is no defense that the accused, though able to distinguish between right and wrong, might be unable to evaluate the quality and consequence of his act to the same degree as a normal or average individual would.[25]

In Georgia, and most of the states, no cognizance is taken of what has been termed "impulsive" or "emotional" insanity, where a criminal act is done under some overwhelming and irresistible impulse, unless it be that such impulse is the result of a mental disease or mental defect, overriding reason and judgment and obliterating the sense of right and wrong. Nor, under Georgia law, is any recognition taken of so-called "moral insanity," or of an "irresponsibility" from an inability to control the will from the habit of indulgence. Nor does mere weak-mindedness alone relieve guilt.[26]

Since an insane person cannot have a criminal intent in a legal sense, if the mania or insanity, though caused by the use of drugs, be permanent and fixed in character, so as to destroy the knowledge of right and wrong, the person laboring under such infirmity is not criminally responsible.[27]

Although the evidence shows that the defendant is a sexual pervert of low mentality, it can not be said as a matter of law that he is free of responsibility.[28]

In every case there is a presumption that the accused is sane, but this presumption may be overcome by the preponderance of the evidence.

Where a witness testifies that the accused was insane, it is sufficient to establish that he could not distinguish right from wrong,[29] and a non-expert witness may give his opinion as to the sanity of another person, based upon his acquaintance and the manner, appearance, and conduct of such person during the time that the witness has known him.[30]

Where the evidence shows insanity prior to the commission of the crime, the presumption is that the accused continued to be insane, and the burden is upon the state to show that the accused was sane at the time of the crime.[31] The basic rule is that insanity, when once proved to exist, will be presumed to continue. This presumption is rebuttable.[32]

Against the M'Naghten Rule, there is a new theory advanced by the Model Penal Code. There has been no noteworthy change in the phi-

25. Bridges v. State, 43 Ga. App. 214, 158 S.E. 358 (1931).
26. Rozier v. State, 185 Ga. 817, 195 S.E. 172 (1938). Nor does sleepwalking relieve guilt. Lewis v. State, 196 Ga. 755, 27 S.E.2d 659 (1943).
27. Strickland v State, 137 Ga. 115, 116, 72 S.E. 922 (1911); Long v. State, 38 Ga. 491, 507 (1868).
28. Rozier v. State, *supra* n. 26.
29. Cochran v. State, 212 Ga. 245, 91 S.E.2d 601 (1956).
30. Harris v. State, 155 Ga. 405, 117 S.E. 460 (1923).
31. Allams v. State, 123 Ga. 500, 51 S.E. 506 (1905).
32. Dickens v. State, 7 Ga. 484, 490 (1849).

losophy of the law since Judge Nisbet's decision in 1847. Many changes have taken place since that time, but the basic rule of "right and wrong" and the "irresistible delusion" has not been changed. The rest of the world has advanced but most of the states have remained committed to the theory annunciated by Judge Nisbet more than a century ago. There is a new theory advanced by modern psychology which is reduced to a simple sentence substantially as follows: The test of criminal responsibility is whether the defendant lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The defendant would not be convicted of crime if, mental illness has deprived him of effective power to make the right choices in governing his own behavior. The defense should be available even though the defendant's mental incapicity is not absolute and total; the prosecution must prove that his capacity to behave as required by law is substantial, notwithstanding his mental illness or defect. On the other hand, the accused would not escape responsibility merely because he may be, by some psychiatric standard, in need of therapy and therefore classifiable for some purpose as mentally ill.

Two interesting cases were decided by the United States Court of Appeals for the Fifth Circuit while this article was in preparation. In *Argent v. United States*[33] the following was held: The test of the knowledge of right and wrong as applied to the peculiar act was established in the great leading case of *M'Naghten*, 10 Clark & Finn. 200, decided in 1843 before the English House of Lords. It was decided by the judges in that case that, in order to entitle the accused to acquittal, it must be clearly proved that, at the time of committing the offense, he was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did, not to know that what he was doing was wrong. . . . As to the burden of proof, the Supreme Court of the United States repudiated the rule of the M'Naghten case in *Davis v. United States*,[34] where it was said that the burden of proof is never upon the accused to establish his innocence or disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. . . . The term "insanity" as used in defense means such a perveted and deranged condition of the mental or moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the

33. 325 F.2d 162 (5th Cir. 1963).
34. 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895).

act is wrong, yet his will, the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

In the November, 1963 issue of the *American Bar Association Journal*, Chief Justice Joseph Weintraub of the Supreme Court of New Jersey presents an altogether new view.[35] When the author was a practicing attorney in 1949 he tried to overturn the M'Naghten Rule before the same court over which he now presides. In vain. Ten years later it became his turn as a judge to review that which he argued as a lawyer. He has come to the conclusion that the M'Naghten Rule is the only true rule of a plea of insanity.

He argues that insanity should have nothing to do with the adjudication of guilt, but rather should bear only upon the disposition of the offender after conviction. . . . The law does not recognize insanity as such for any purpose. Rather the law is concerned with sundry capabilities and is interested in whatever bears upon them. . . . The common law did not punish for the mere commission of a hostile act. It conceived it to be unjust to stigmatize a man as a criminal unless his deed was done with a guilty mind—mens rea. . . . Thus the capacity to commit crime was at common law the capacity to see right from wrong. From this premise the rule of M'Naghten emerged honorably and indeed inexorably. . . . In other words, the mental illness met head-on the state's charge that the evil act was done with an evil mind. Although we sometimes speak of insanity as a "defense," it is not a "separate" defense to a case the state has otherwise established. Rather it is a denial of an essential ingredient of the state's case—mens rea. Thus, the attack upon M'Naghten is not an attack upon some peripheral doctrine, but rather upon the very foundation of our criminal structure. . . .

In separating the bad from the sick, the common law deemed it indisputable that every man has the ability to adhere to the right. Psychiatry challenges this basis for a finding of personal blameworthiness. Psychiatry does recognize a volitional apparatus, but concieves it to be integrated with the intellect and the emotions. From its objective view, no man can be said to have selected the dimensions of these faculties and hence to be the author of the inadequacy of any of them. Indeed, the unconscious is deemed to mock and play havoc with the conscious. In the psychiatric view, the distinction between the sick and the bad is an illusion. In terms of personal blameworthiness, there is no difference between the functional aberration called a disease or defect of mind and what is inscrutably called a defect of character. However helpful such classifications may be in the treatment of the sick, they are irrelevant to

35. 49 A.B.A.J. 1075 (Nov., 1963).

the infliction of the stigma of criminal. The thrust of the psychiatric thesis must be to reject insanity as a defense and to deal with all transgressors as unfortunate mortals.

The proponents of the M'Naghten Rule conclude that, although it is surely arbitrary, its several competitors are equally so and are more obscure to boot.

The Model Penal Code would substitute for the M'Naghten Rule the following: "[T]he test of responsibility is whether the defendant lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law. . . . The defense is available even though his mental incapacity is not absolute and total; the prosecution must prove that his capacity to behave as required by law is 'substantial', notwithstanding his mental illness or defect. On the other hand, he does not escape responsibility merely because he is, by some psychiatric standard, in need of therapy and therefore classifiable for some purposes as 'mentally ill'."

These are the prevailing views. Each has numerous variations and shades, but the basic differences have been stated. The Criminal Law Study Committee has assigned the problem to one of its subcommittees for special study.

Special attention should be given to a case recently before the United States Court of Appeals for the Fifth Circuit.[36] Carter was indicted for causing a forged check to be transported in interstate commerce and perjury. The principal defense was insanity, and because of the resulting question of the proper assessment of criminal responsibility the court, after arguments before a regular panel, ordered en banc consideration of the case, sua sponte, with further argument. After long deliberation the court held per curiam that the judgment of the trial court was affirmed by operation of law by an equally divided court; three of the judges holding that the M'Naghten Rule is binding because the use of precedents and the application of the doctrine of stare decisis are characteristic of Anglo-American law which distinguishes it from Roman law. The use of precedents is older than the Year Books.

The other three judges reviewed the case in the light of the principal defense of insanity. Because of the resulting question of the proper assessment of criminal responsibility, there were arguments before the regular panel and en banc, sua sponte.

The three judges reviewed many federal cases and held that three fundamental principles of law are usually brought into play where the defense of insanity is made in the federal courts. The first principle is concerned with the burden of proof. Strictly speaking, the burden of

36. Carter v. United States, 325 F.2d 697 (5th Cir. 1963).

proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence by whatever side adduced, guilt is established beyond a reasonable doubt. . . . It follows that if there is some evidence supporting the claim of insanity, the question must be submitted to a jury. This means only slight evidence.

The next principle is to admit all evidence, both lay and expert, in anywise relevant or pertinent to the issue of insanity, letting in, as it were, all raw material from which the jury is to make the final determination of the criminal responsibility of the accused. The scope of the contribution of the physchiatrist is to describe all the dimensions of the defendant's capacity, his competence and ability to control and regulate conduct and behavior.

The third principle is deemed to be error by these three judges. Within the framework of the burden of proof rule, and upon the evidence adduced, assuming at least slight evidence of insanity and no such reasonable doubt of sanity as would require the court to acquit, it becames the duty of the trial court to give the jury a standard by which the issue of not guilty by reason of insanity may be determined. In substance, that standard should concern itself with whether the defendant understood and appreciated the act in question and its consequences, and whether it was a result of a free exercise of will or choice—the right and wrong test, prevailing in most jurisdictions in this country, rests upon the proposition of cognition, that a defendant is not deemed to be criminally responsible if he does not know the nature of his act, or the difference between right and wrong with respect to that act.

Many jurisdictions have added the so-called irresistible impulse test to the right and wrong test. It rests on the proposition of volition. It is perhaps a misnomer because it includes acts resulting from premeditation as well as from sudden impulse, but it is applicable when one understands the nature and consequences of his act and appreciates the wrongness of the act, but, in consequence of a mental abnormality, is forced to its execution by an impulse which he is powerless to control.

Another and different standard was laid down in *State v. Pike*.[37] It

37. 49 N.H. 399 (1870).

was held an accused is not criminally responsible "if the unlawful act was the off-spring or product of mental disease."

The Court of Appeals for the District of Columbia adopted a standard, not unlike the New Hampshire rule in the Pike case, that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. This holding set off a national juridical discourse on the subject. No court has adopted the new test or rule although many have considered it and rejected it.

The court in the *Carter* case recites several other rules and cites cases but they are simply variations of the above. The reader is urged to read the *Carter* case for as complete a review of the law of plea of insanity as the writer could find.

As the court concludes "it is time for the full court to give critical review to this important problem of criminal law." As above stated, the judgment of the trial court was approved by operation of law by an equally divided court. It is interesting to note that the judges urge the Supreme Court of the United States that it accept this case for review.

There is an interesting Georgia case, decided in 1911 which holds that, irrespective of any technical rules of the plea of insanity, whether an act was caused by a diseased mind is to be determined primarily from the indicia presented by the act itself, and then from the results of an examination of the physical, moral, and mental condition of the accused before, at and after the act in question. The act itself may be so utterly senseless and abnormal as to furnish satisfactory proof of a diseased mind.[38]

Abortion

The law of abortion has occupied more attention of the Criminal Law Study Committee than any other chapter. There were several reasons for this unusual concern. The subject is all-important. Reports have reached the committee of the great number of clandestine abortions of which no record can be had. The number of agonizing deaths due to unsanitary and ignorant conditions surrounding abortion would appall the reader. At this writing it is reported that criminal abortion sends around 700 girls to Atlanta's Grady Hospital alone each year for emergency treatment. The abortionists generally are midwives, nurses or people who have worked around medical offices and have learned just enough to be dangerous.

Present Georgia law consolidates in a chapter, 26-11 (sections 26-1101 to 26-1106, inclusive) provisions respecting the crimes of abortion, foeticide, and infanticide. Infanticide is presently punished as murder and will not be covered here.

38. Wilson v. State, 9 Ga. App. 274, 281, 70 S.E. 1128, 1131 (1911).

Section 26-1101 provides that any person who shall administer to any woman, pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, or shall be advised by two physicians to be necessary for such purpose, shall, in case the death of child or mother be thereby produced, be guilty of an assault with intent to murder.

Section 26-1102 provides that any person who shall wilfully administer to any pregnant woman any medicine, drug, or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to produce the miscarriage or abortion of such woman, unless the same shall be necessary to preserve the life of such woman, or shall be advised by two physicians to be necessary for that purpose, shall be guilty of a misdemeanor.

It is evident that the law contemplates the protection of the mother, and the saving of the child alone will not excuse abortion. If the child is not developed to the point where it is called "quick," or if it is not destroyed or killed and the intent of the offender is to produce a termination of pregnancy, the offender is guilty of a misdemeanor. If the child is "quick" (a fetus which has matured to a stage where its independent heart beat can be ascertained or movements felt), by judicial interpretation generally considered in the fourth month, and the intent of the offender is to destroy the child, the offender is subject to the punishment of two to four years imprisonment for assault with intent to murder, provided that death is produced to either child or the mother.

Section 26-1103 provides that the wilful killing of an unborn child so far developed as to be ordinarily called "quick," by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be punished by death or imprisonment for life, as the jury may recommend.

In enacting the present law, the legislature, in 1876, undertook to provide by criminal law appropriate degrees of punishment for the destruction of an unborn child.[39]

This is the present Georgia law. What changes, if any, are proposed? Before discussing the proposed changes, let us consider the arguments. Those who favor the retention of the present law, insist that it is the best produced so far and enforceable in its present form. Those who want it relaxed call attention to the fact that the law is not being enforced, and argue that it helps but little and harms a great deal. Anyone who

39. Passley v. State, 194 Ga. 327, 21 S.E.2d 230 (1942).

wants an abortion can get one, and many Georgians are doing so every year. Making the law stricter would simply add to the cost of sin without eliminating a single abortion. It is argued that among those who can not, or will not, get an abortion are many mentally retarded, criminally disposed, idiots, and imbeciles who should be aborted to eliminate the burden on themselves and on society. It is stressed that the great crime wave is at least partially due to the indiscriminate breeding of the most undesirable elements of our society. The world needs the best and gets instead an oversupply of the worst.

Against these arguments others are presented for making the law more restrictive. It is proposed that, instead of the advice of two physicians, the mother should be required to obtain permission from the State Department of Health before an abortion may be performed. This proposal met with the charge of totalitarianism. Again, it was proposed that it shall be an affirmative defense that the abortion was performed based on the written opinion of at least two physicians in addition to the one who would perform the operation, in a licensed hospital or other licensed medical facility and the medical facility make the record available to the Solicitor General of the circuit for inspection once a month. Against these proposals it is insisted that most Georgia communities do not have two, let alone three, physicians, and the majority of medical facilities of Georgia are not licensed but operate on temporary permits.

Still another argument is advanced that the whole question of abortions should be left to the medical profession as a self-governing and regulating organization. The Bar of Georgia was recently given the greatest autonomy and self-policing authority ever granted to any group in Georgia. If the lawyers can be trusted to control legal problems and legal ethics, why could not the physicians and surgeons be trusted to control and police their own profession? Who, it is insisted, would know more about abortions by unscrupulous physicians, as well as by unclean pseudo-midwives, than the medical profession? The law enacted in 1875 failed to prevent or reduce abortions. It has instead driven desperate girls into the lowest position it can drive them. The present law is working for affluent women who can afford the best. It drives young girls into selling themselves for the price of a bootleg operation.

The problem is not peculiarly Georgian. It is a world-wide problem. In the January, 1964 issue of the *American Bar Association Journal*, Zad Leavy of the California Bar and Dr. Jerome M. Kummer of the U.C.L.A. School of Medicine treat the subject under the title *Criminal Abortion: A Failure of the Law*.[40] Most of the arguments presented in that article have been placed before the Criminal Law Study Committee

40. 50 A.B.A.J. 52 (Jan., 1964).

in some form or another during the past two years and have been fully considered. There are passages in the article which deserve mention. Although the laws in forty-one jurisdictions in the United States carry in one form or another the basic exception to the prohibitory statute, no judicial interpretation was found of the words "to preserve the life of the mother" comparable to the "Bourne instructions." A few decisions, however, seem to suggest that this interpretation should be the rule. What are the "Bourne instructions"? That the law first seeks to protect the mother is apparent from the basic exception found in the statute or case law of nearly every jurisdiction. To quote from the authors, it was eloquently stated by Justice Macnaghten in his oft-quoted charge to the jury in the famous English case of *Rex v. Bourne*:[41] The law of the land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.[42]

Dr. Bourne, a reputable obstetrician, openly and without remuneration terminated a pregnancy caused by forcible rape of a young girl. He testified that the girl might become a mental wreck if she were forced to bear the child. The jury was instructed that a woman need not be in the jaws of death before her pregnancy could be terminated lawfully, that the basic exception to the prohibition included emotional life as well as physical life. Dr. Bourne was acquitted and the case became one of international fame.

An attempted abortion is sufficient to fall within most substantive felony statutes; miscarriage need not result. In many states it is not even an element of the prosecution's case that the woman was in fact pregnant. It was held that the woman was not shown to be pregnant with child by testimony of a physician that she was pregnant, foetus was about four months of pregnancy.[43] The prosecution was under code section 26-1101. A distinction is observed between "pregnant woman" and "woman, pregnant with child."

It was proposed to the committee that an exception to the law of abortion be made in cases where the woman is a victim of rape or incest. It was agreed that it should not be unlawful for a licensed physician to perform an abortion of a pregnancy resulting from rape or incest if the abortion is performed in a properly accredited institution. Immediately the question arose who shall determine that the pregnancy was the result of rape or incest? Should it be required that the offender be convicted

41. [1939] 1 K.B. 687 (1938).
42. *Ibid.*
43. Hunter v. State, 29 Ga. App. 366, 115 S.E. 277 (1923).

of the crime before a physician would be safe to proceed? If so, in an average case the child would be two or three years old before the determination is made. It was then suggested that the judge of the superior court shall investigate the matter and shall find that such pregnancy probably resulted from rape or incest. The difficulties become apparent immediately. No judge would want to pre-try ex parte a serious charge such as rape. The accused could not be compelled to testify or even to be present without a question of jeopardy or self-incrimination being raised. The victim would have to go through the ordeal of a trial twice instead of once. Would the rules of evidence be applicable? It would change the Georgia law. There is no comparable provision in the legislation of Georgia or any other state. The question of venue was raised. If the county where the alleged crime was committed should be the place where the judge must determine the probability of rape or incest, the victim might possibly have to submit to investigation hundreds of miles from her home. If the venue is where the victim resides, she might have to prosecute in two counties before two judges. A small-town girl, pregnant in a distant place, such as a college, would be subjected to great distress in either place. As a matter of practical application, the girl would be on trial instead of the offender.

Sentence After Conviction

The writer has been requested on several occasions to appear before grand juries and consult with them with regard to investigations of our crime wave and the shortcomings of our criminal laws. It is interesting to note that in every instance, after some preliminary questions, the principal interest concerned our procedure of sentencing.

At present, in trials for felonies, juries determine the guilt or innocence of the accused and, if the accused is found guilty, set the penalty which, theoretically at least, the criminal must suffer. This procedure is the subject of considerable controversy among lawyers and laymen alike, some insisting that the jury's place in a criminal trial is the determination of guilt or innocence, and, if the accused is found guilty, it should be the judge's responsibility to set the punishment after examination of all circumstances in the case which might not be known to the jurors, and—this is most important—the past record of the accused. Others insist that the present system is satisfactory but needs some improvement. As one of the grand jurors expressed it "if I am forced by law to determine whether the accused shall live or die, I want to know all about him and the case and not just so much as is admitted in evidence by an incomprehensible rule of evidence that really nobody

understands." Every year since 1927 the Fulton County Grand Jury has recommended revision of this law of evidence. Some criminals have been arrested fifty times and the jury is kept in ignorance of this record when it is deliberating on the sentence after it has unanimously found the defendant guilty. One of the principal arguments advanced is that a seasoned offender has experience enough to present an innocent appearance before the jury and make an effective statement to the jury, while a first offender, inexperienced and frightened, at times convinces even his own lawyer that he is a professional criminal. The average juror feels strongly that the previous record of the accused should be presented with the evidence during the trial. The average legislator, unless legally trained, shares this view and is difficult to convince that the first rule of criminal law shall always be the protection of the innocent. It must be stressed that it is better that a hundred criminals go free than that an innocent person be convicted. The accused is on trial for the crime charged in the particular indictment and not for what he might have done in the past. There is an exception, of course, in the "second-offender" law but it is so complicated that it is very seldom used.

The next point which must be stressed is that the law must be the same everywhere in Georgia. We cannot have one set of rules for the city and another for the rural sections. Our larger counties have facilities to investigate the past record of every person charged with a crime, and the prosecutor and judge know everything of the criminal's past when the trial begins. The small counties do not have these facilities, and in most cases the accused is charged, tried, convicted, sentenced and has served his sentence without any review of his past record.

Georgia does not even have a central record-keeping agency. Until such central organization is established by law and is functioning, no purpose is served by demanding that the accused's past be made known to judge or jury in all cases.

The question is, why is there opposition to returning the power of sentencing to the judges, where it belongs? It is unquestioned that Georgia is widely split on this question.

It must be remembered that the lack of central record-keeping handicaps a judge as well as the jury. Who has not witnessed a judge, in a misdemeanor case or plea of guilty, turning to the sheriff or solicitor to ask "what do you know about this man?" Whereupon the sentence is adjusted to meet the answer of the sheriff or prosecutor. The accused is helpless and must suffer the penalty commensurate to the opinion of the sheriff.

The due process clause of the Constitution applies to sentencing as much as to the actual trial. The past record of the convicted criminal

must be presented in strict conformity to the rules of evidence, otherwise there is great danger that one man's record would be used against another due to similarity of names, fingerprints, or simple negligence on the part of some clerk in some record-keeping office. Sentencing is the crown and climax of all criminal prosecutions and, if this climax misses the desired end, all that preceded it is in vain.

It is one of the tragedies of administration of justice in Georga, as in most other states, that each judge is wholly independent, without accountability or supervision, and wherever the judge does the sentencing, the accused is left to the mercy, whim and idiosyncrasies of the judge. The great objection to our system of juries setting the sentences is that juries are ignorant, prejudiced and arbitrary. It is axiomatic that there is no uniformity in sentencing and that two defendants who committed the same crime under the same circumstances might receive widely divergent penalties depending upon the makeup of the juries.

Every experienced lawyer knows that no two judges see the same matter alike. One judge will become incensed where liquor is involved in the crime, another has a particularly strong view on any question pertaining to larceny, still another has preconceived theories on abandonment cases; others tend to favor the wife or the husband. We still have courts of multiple judges who are individualistic and guard jealously their prerogatives to be individualistic and independent. They even refuse to allow the chief judge of their own court to set rules of administration.

No two court clerks keep the record alike, and in some smaller counties, courthouse records may be examined by appointment only. In some courthouses public officials will not permit examination of public records, but will furnish information based upon their own knowledge on request. There seems to be no practical procedure to enforce uniformity.

In the Roman empire appeals from sentences were encouraged, even to the throne. In Georgia appeals are discouraged as every lawyer knows who has ever attempted that monstrosity known as certiorari from a mayor's court to the Superior Court. Some decisions of justices of the peace cannot be appealed even though the accused is in jail. Consider a peace warrant where a penal amount is excessive and the defendant cannot make bond, even though the subject is nothing more than a fuss between husband and wife. Consider further a bastardy procedure where a woman names a man as the father of her illegitimate child. The accused must make bond or go to jail. In the Roman empire only very high-ranking magistrates were empowered to issue warrants for arrest. In Georgia all of the thousands of justices of the peace may and do issue warrants for arrest. Information was received by the Criminal Law Study Committee of the not uncommon practice of justices of the peace signing criminal warrants in blank permitting peace officers to fill in the names and charges at pleasure; search warrants are signed, so the committee was informed, in blank and at times the names, places and objects of the search are filled in by the peace officer, after the search has been completed. Truly, if that condition exists one cannot say that a man's home is his castle.

These excesses of our judicial system have a very definite bearing on the question of sentencing, which again influence the drafting of the substantive law.

In the General Assembly it has been evident that legislators from the larger communities favor sentencing by judges, whereas those from smaller communities and from rural sections favor the present system of prescribing sentences in felony cases by the juries who convicted the criminals. Some lawyers favor extending the present system to misdemeanors.

The Georgia Bar Association, recognizing the shortcomings, has proposed to the committee which is redrafting a new Constitution for Georgia, the creation of a uniform judicial system, consisting of one court divided into component units under the supervision of the Chief Justice of the Supreme Court of Georgia and an administrative officer, molding into one homogenous entity the Georgia judiciary. While each judge should maintain judicial independence in reaching decisions on legal issues, the judiciary as a whole should be independent as a separate branch of the government and the individual judges should be subordinated to the whole judiciary. If adopted, it would end thousands of little empires which have remained from colonial days.

Regardless of the outcome of the rebuilding of Georgia's judiciary, if there should be a change, the problem of uniform sentencing, whether by judge or jury, with all elements, past record, mitigation and aggrevation will remain with us.

Assuming that the final outcome will be to restore to the judges the power and duty of passing sentences after convictions in felony cases, a new proposal is being studied by the Criminal Law Study Committee. It would provide that all sentences imposed by the trial courts shall be subject to review on the ground that "the sentence is cruel, excessive, or unusual." Established procedure would be used. The Supreme Court or the Court of Appeals may order a reduction of the sentence, without ordering a new trial. Those advocating this review of sentences feel that it would eventually bring uniformity into sentencing based on principles slowly developed by the appellate courts. A constitutional amendment would be required to enable the Supreme Court and the Court of Appeals to review sentences for excessiveness. It is further proposed that all

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cases in which the death penalty has been imposed be reviewed by the Supreme Court as a matter of public policy and the death penalty could not be executed until the Supreme Court, by affirmative judgment, had sustained the trial court's sentence after reveiwing the case.[44]

Conclusion

The foregoing summary attempted to show by way of illustration some of the problems facing the Criminal Law Study Committee and some of the proposals advanced in an attempt to solve the problems. We discussed classification of crimes, capital punishment, pleas of insanity, abortion and sentencing after conviction, as illustrative of the function of the commitee. While it is one of the basic principles adopted by the committee in its inception that no statute should be changed or new laws should be proposed by it unless such action is deemed necessary or constructive, it is also essential that we understand the changing of life in this country and that we meet new problems where they appear and not be timid in advancing new theories where they are demanded with changing times.

It must be restated that nothing herein should be construed as indicating the official view of the committee, such view being always open for reconsideration, nor should it be construed as the individual opinion of the writer. It should be understood to be, what it was intended to be, a summary of some of the problems facing the Criminal Law Study Committee and an illustration of some of the studies pursued by it.

We should always remember that the final object of all laws is that justice be done. The writer might be pardoned for concluding with the more or less imaginary recital from memory of a melodramatic letter written on clay tablets wherein a prehistoric potentate enjoined his magistrates in the land believed to be the site of the Garden of Eden substantially in these words: "Man will live without food because there is a substitute for food, he will live without wine because there is a substitute for drink, he will live without clothing because there is a substitute with which he can cover his nakedness, he will live without shelter because there are caves substituting for houses, but man can not live without justice because there is no substitute for justice."

44. In a very recent case the Supreme Court of Georgia held that a sentence cannot be deemed excessive if it falls within the minimum and maximum set by law. This ruling, not yet published, seems to destroy the plan herein stated.

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COMMENTS

THE CHIROPRACTOR AS AN EXPERT WITNESS?

By Floyd Banks Moon*

Is a chiropractor a "doctor,"[1] a "drugless healer,"[2] or a "business man"?[3] To answer this question determines to a large extent the competency of a chiropractor as an expert witness. It is the purpose of this article to examine the rules of admission of opinion evidence as to a chiropractor in his capacity as an expert witness in personal injury cases testifying as to the prognosis[4] of the injury.

As respects expert witnesses, the Georgia Code provides: "The opinions of experts, on any question of science, skill, trade, or like questions, shall always be admissible; and such opinions may be given on the facts as proved by other witnesses."[5] From this rule it is seen that the pertinent question is whether the witness qualifies as an expert. "Generally nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession; and special knowledge in regard to a particular subject may be derived from experience as well as study and direct mental application."[6] It is the sound discretion of the trial judge which determines the qualifications of a witness to give an opinion as an expert.[7] The jury must determine ultimately, the probative value,[8] the weight and credibility[9] of the opinion of an expert.

The determinative question then, is whether a chiropractor is an "expert." To resolve that query, it is necessary to consider precisely what a

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1. Kelly v. Carroll, 36 Wash.2d 482, 219 P.2d 79 (1950). "A person not having a license to practice medicine and surgery but assuming to act as a doctor is liable for malpractice and is to be judged as if he were a doctor." 19 A.L.R.2d 1171 (10).
2. *Ibid.* "A person licensed to practice drugless healing is not a doctor and rules of law pertaining distinctively to the latter are not applicable to the former."
3. Note, 31 Notre Dame Law. 562, 567 (1958). "Chiropractic is not a profession but a business. This is evidenced by its historical development."
4. "In medicine, a judgment in advance concerning the duration, course, and termination of a disease." Webster's New Twentieth Century Dictionary (1947).
5. Ga. Code Ann. §38-1710 (1955 Rev.).
6. Carter v. Marble Products Inc., 179 Ga. 122, 175 S.E. 480 (1934). See generally, 20 Am Jur. *Evidence* §861 p. 782 (1939).
7. Hinesley v. Anderson, 75 Ga. App. 391, 43 S.E.2d 736 (1947). See McDowell v. State, 78 Ga. App. 116 (2a), 50 S.E.2d 633 (1948). See generally, 20 Am. Jur. *Evidence* §§784, 785 (1939).
8. Clary v. State, 8 Ga. App. 92, 68 S.E. 614 (1910).
9. McDowell v. State, 78 Ga. App. 116, 121, 50 S.E.2d 633, 638 (1948).