MODERN CRIMINAL LAW

CASES, COMMENTS AND QUESTIONS

Second Edition

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[State Criminal]

another 2 have revisions under way. These codes draw heavily upon the Model Penal Code, and most of them have followed its lead (see § 1.05) in abolishing common law crimes.

5. It has long been settled that there are no federal common law crimes. *United States v. Hudson and Goodwin,* 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). The need for recodification of the federal statutory criminal law was recognized by the Congress when, in 1966, it established a National Commission on Reform of Federal Criminal Laws. The Commission issued its final report, a proposed revision of Title 18 of the U.S.Code, in 1971, but Congress never adopted the Commission's recommendations or alternative proposals recommended by the Administration or by certain members of Congress.

KEELER v. SUPERIOR COURT OF AMADOR COUNTY

Supreme Court of California, 1970.
2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617.

MOSK, JUSTICE. * * *

The evidence received at the preliminary examination may be summarized as follows: Petitioner and Teresa Keeler obtained an interlocutory decree of divorce on September 27, 1968. They had been married for 16 years. Unknown to petitioner, Mrs. Keeler was then pregnant by one Ernest Vogt, whom she had met earlier that summer. She subsequently began living with Vogt in Stockton, but concealed the fact from petitioner. Petitioner was given custody of their two daughters, aged 12 and 13 years, and under the decree Mrs. Keeler had the right to take the girls on alternate weekends.

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm, and she rolled down her window to hear him. He said, "I hear you're pregnant. If you are you had better stay away from the girls and from here." She did not reply, and he opened the car door; as she later testified, "He assisted me out of the car. * * * [I]t wasn't roughly at this time." Petitioner then looked at her abdomen and became "extremely upset." He said, "You sure are. I'm going to stomp it out of you." He pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows. She fainted, and when she regained consciousness petitioner had departed.

Mrs. Keeler drove back to Stockton, and the police and medical assistance were summoned. She had suffered substantial facial injuries, as well as extensive bruising of the abdominal wall. A Caesarian section was performed and the fetus was examined *in utero.* Its head was found to be severely fractured, and it was delivered stillborn. The pathologist gave as his opinion that the cause of death was skull fracture with consequent cerebral hemorrhaging, that death would have been immediate, and that the injury could have been the result of force applied to the mother's abdomen. There was no air in the fetus' lungs, and the umbilical cord was intact.

Upon delivery the fetus weighed five pounds and was 18 inches in length. Both Mrs. Keeler and her obstetrician testified that fetal movements had been observed prior to February 23, 1969. The evidence was in conflict as to the estimated age of the fetus; the expert testimony on the point, however, concluded "with reasonable medical certainty" that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of survival.

run afoul of basic 1st Amendment concepts. A neighborhood gossip could, with but little imagination, be indicted as a Common Scold. To state the proposition reveals its absurdity. If N.J.S.A. 2A:85–1 purports to make criminal the common law offense of being a Common Scold it is void because of its vagueness and is constitutionally unenforceable.

By definition only a woman can be a "Common Scold." A man might be "troublesome and angry" and by his "brawling and wrangling among" his "neighbors break the peace, increase discord and become a nuisance to the neighborhood" yet he could not be a common scold. The discrimination between the sexes is obvious. It is senseless. It is unconstitutional under the Equal Protection Clause of the 14th Amendment. * * *

Notes and Questions

1. Compare *State v. Egan,* 287 So.2d 1 (Fla.1973), upholding a charge of "the common-law offense of nonfeasance" in light of a state statute providing: "The common law of England in relation to crimes * * * shall be of full force in this state where there is no existing provision by statute on the subject." As to the vagueness objection, the court responded that the statute was not vague because (i) "the legislative intent * * * is plain and unambiguous," and (ii) it is not objectionable that "the statute imposes the duty upon the reader thereof to ascertain for himself what the common law is." As for the claim that there was no longer any need for common law crimes, the court replied: "Whenever a principle of the common law has been once clearly established, the courts of this country must enforce it until repealed by the legislature, as long as there is a subject matter for the principle to operate on, and although the reason, in the opinion of the court, which induced its original establishment may have ceased to exist. Of course, when the rules of the common law are in doubt, or when a factual situation is presented which is not within the established precedents, courts are called upon to determine what general principles are to be applied, and, in so doing, of necessity, must exercise a broad judicial discretion. The courts of this jurisdiction do, and properly so, take into account the changes in our social and economic customs and present day conceptions of right and justice. But the fact remains, as this Court said in *Ripley v. Ewell,* [61 So.2d 420 (Fla.1952)] 'When the common law is clear we have no power to change it.' "

2. In *Commonwealth v. Mochan,* 177 Pa. Super. 454, 110 A.2d 788 (1955), the defendant was indicted and convicted for a common law misdemeanor on evidence that on numerous occasions he telephoned a married woman to suggest sexual intercourse and sodomy. The court affirmed, reasoning:

"It is of little importance that there is no precedent in our reports which decides the precise question here involved. The test is not whether precedents can be found in the books but whether the alleged crimes could have been prosecuted and the offenders punished under the common law. In *Commonwealth v. Miller,* 94 Pa.Super. 499, 507, the controlling principles are thus stated: 'The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government.' * * *

"To endeavor merely to persuade a married woman to commit adultery is not indictable. *Smith v. Commonwealth,* [p. 699

Appendix

AMERICAN LAW INSTITUTE MODEL PENAL CODE (OFFICIAL DRAFT, 1962)

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