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A NEW CRIMINAL CODE FOR MARYLAND?

By John M. Brumbaugh*

There has been considerable recent interest in fundamental revision of the criminal law of Maryland. In 1960 the Maryland Self-Survey Commission, originally appointed by Governor McKeldin, reported to Governor Tawes a Proposed Criminal Code. The Maryland State Bar Association now has this question under consideration. This article will examine the need for a new criminal code and suggest how such a code may best be formulated.

Before what should be done can be decided, it is necessary to have in mind what now exists.

THE PRESENT MARYLAND CRIMINAL LAW

Analytically, the constitutions of the United States and the State furnish the starting point for Maryland criminal law. The federal constitution has considerable importance in indicating the limits of permissible state criminal procedure, but its bearing on state substantive criminal law is relatively slight. While it may strike down a state statute for vagueness or for infringement of some constitutionally guaranteed right, or may permit Congress to pre-empt a field and oust state legislation, the federal constitution remains in the background as far as the problems of substantive criminal law are concerned. Similar limiting safeguards in the Maryland constitution

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1 STATE OF MARYLAND, FOURTH AND FINAL REPORT OF MARYLAND SELF-SURVEY COMMISSION, RELATING TO PROPOSED CRIMINAL CODE (1960). The Report contains the text of a proposed code and valuable notes on the sources of the provisions.
2 The writer acted as a consultant to the draftsmen for a small portion of the original draft of the proposed criminal code and is a member of the committee of the Maryland Bar Association charged with consideration of the problem. This article does not purport to represent the views of anyone but the writer.
must be borne in mind, but the principal source of our law of crimes is Article 5 of the Declaration of Rights, which provides in part:

"That the Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State."

So the basis of our criminal law is "the Common Law of England." In an early case an older version of the present Article 5 of the Declaration of Rights is described as having reference

"to the common law in mass, as it existed here, either potentially, or practically, and as it prevailed in England at the time, except such portions of it as are inconsistent with the spirit of that instrument, and the nature of our new political institutions."

British and American judicial decisions and the writings of recognized authorities, as modified by early British and American statutes, provide the starting point for our present law. For our purposes, it is sufficient to note that this starting point is by its nature vague in its provisions and that there is no single authoritative or complete exposition of the contents of this early law.

Apparently, the first attempt of our legislature to deal systematically with the law of crimes came in 1809. The preamble to the resulting act states as a reason for the legislation that:

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8 See Clark & Marshall, Crimes (6th ed. 1958) §§ 1.03, 1.04, for a discussion of the nature of the common law of crimes and its reception on this side of the Atlantic, including references to Maryland authority. See Alexander, British Statutes in Force in Maryland (2d ed. 1912), for an attempted compilation of the British statutes received under Article 5 of the Declaration of Rights.
9 Md. Laws 1809, Ch. 138. The act was actually passed January 6, 1810.
“it frequently happens, that men resigning themselves to the dominion of inordinate passion, commit great violations upon the lives, liberties or property, of others, which it is great business of the laws to protect and secure, and experience evinces that the surest way of preventing the perpetration of crimes, and of reforming offenders, is by a mild and justly proportioned scale of punishments. . . .”

The act is concerned primarily with the problem of punishment. In many cases the statute, when it deals with particular crimes, does nothing more than refer to a common law crime, without defining it, and announce a penalty. For example:

“Every person duly convicted of the crime of manslaughter shall be sentenced to undergo a confinement in the said penitentiary for a period not more than ten years, to be dealt with as hereinafter directed.”

A second group of crimes is derived from common law offenses and builds on them by way of sub-division or extension of the common law idea. For example, without defining murder, the statute divides it into degrees:

“And whereas the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrocity, that it is unjust to involve them in the same punishment; therefore, Be it enacted, That all murder which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, or to burn any barn, tobacco-house, stable, warehouse, or other out-house, not parcel of any dwelling-house, having therein any tobacco, grain, hay, horses, cattle, or goods, wares and merchandise, rape, sodomy, mayhem, robbery or burglary, shall be deemed murder of the first degree; and all other kind[s] of murder shall be deemed murder in the second degree. . . .”

The words between “arson” and “rape” illustrate an extension of the common law crime of arson for purposes of

30 Md. Laws 1809, Ch. 138, § 4 (3).
31 Md. Laws 1809, Ch. 138, § 3.
the felony-murder rule, and they reflect the statute's extension of arson-like crimes.\(^\text{12}\)

Finally, there are some crimes which either were unknown to the common law or were so altered that fairly complete definition was required:

"Every person or persons duly convicted of wilfully and maliciously stabbing, killing or destroying, any horse, mare, gelding, colt, ass or mule, not the property of such person, and not in the act of trespassing on his enclosures, shall undergo a confinement in the penitentiary house for a period not less than one year nor more than four years, to be treated as hereinafter directed."\(^\text{13}\)

Perhaps the most interesting thing about the statute of 1809 to the modern lawyer is its close resemblance to Article 27 of the Maryland Code today. A large number of provisions have survived in practically identical form. Today's statutes form the same classes as those identified in the 1809 legislation; the same practice of building on the common law where possible, and of bothering to define only where there is no convenient common law concept, is apparent.

The strong staying power of the 1809 provisions is seen when we consider the fate of each of the substantive provisions of chapter 138, as shown by the following classification:

### Sections of 1809 act repealed\(^\text{14}\)

2 (1): Treason.
2 (4): Counterfeiting gold or silver coin.
6 (4): Destroying horses, etc.
6 (5): Ship stealing.
6 (9): Forging bank notes.
7 (3): Importing felons, convicts, and slaves.

\(^\text{12}\) See Md. Laws 1809, Ch. 138, §§ 5 (2) and (3). The felony-murder rule was not applied to all of these arson-like crimes.

\(^\text{13}\) Md. Laws 1809, Ch. 138, § 6 (4).

\(^\text{14}\) Designations of offenses, e.g., "Treason", are unofficial and are intended only to give a general idea of the nature of the offense.

In some cases there are modern offenses which overlap these repealed provisions. The Negro insurrection statute appears as Art. 30, § 87, of the Code of Public General Laws (1860), but seems to have been repealed at or prior to Md. Laws 1888, Ch. 74, adopting the 1888 Code. The statute against destroying horses was repealed by Md. Laws 1953, Ch. 407, and all of the remaining provisions listed were repealed by a general statute getting rid of a number of obsolete crimes, Md. Laws 1953, Ch. 411.
Sections of 1809 act substantially changed\(^{15}\)

5 (1), (2), and (3), and 8 (6) and (7): Arson and related burning offenses. (Almost nothing of the original scheme of 1809 is left. Principal changes were effected by Md. Laws 1929, ch. 255. Present provisions will be found in §§ 6-11.)

7 (2): Gaming. (Very little of the original simple provision remains. Piecemeal changes brought about gradual evolution into the present §§ 237-264A.)

8 (4): Bribery of Judges, etc. (An entirely new form of words was adopted in Md. Laws 1868, Ch. 369. More recent changes have made explicit or enlarged the classes of persons to whom the provisions apply. The present provision is § 23.)

Sections of 1809 act only slightly changed\(^{16}\)

3 (in part) and 4 (1) — now §§ 407-410, 413: First degree murder.\(^{16abc}\)

4 (5) — now § 385: Cutting out tongue, etc. (The only substantive change here is that the original required intent to "maim or disfigure" and the present act requires intent to "mark or disfigure." The change appears to have been made in Md. Code, P.G.L. (1860), Art. 30, § 121.)

4 (6) — now § 461: Rape.\(^{16c}\) (A new provision that proof of penetration, without proof of emission, is sufficient appears in Md. Code, P.G.L. (1860), Art. 30, § 161.)

4 (7) — now § 462: Carnal knowledge.\(^{16bc}\)

4 (9) — now § 12: Assault with intent to rob, murder, or rape.\(^{16bc}\) (The crime is made a felony and different maximum punishments are now provided for different branches of the crime. Such changes in punishment were effected by Md. Laws 1908, Ch. 366, Md. Laws 1941, Ch. 722, and Md. Laws 1949, Ch. 196; the crime was made a felony by Md. Laws 1943, Ch. 402.)

4 (10) — now § 337: Kidnapping.\(^{16bc}\)

5 (4) — now § 29: Burglary.\(^{16c}\)

5 (5) — now § 32: Certain forms of breaking.\(^{16b}\)

5 (6) — now § 33: Breaking and stealing.\(^{16bc}\)

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\(^{15}\) Section references to current provisions in this classification are to 3 Md. Code (1957) Art. 27, as amended.

\(^{16}\) There is some difficulty in classification, particularly as between this and the preceding category. Changes are regarded as "substantial" if little or nothing of the original language remains. The changes classified as "slight" usually involve (aside from minor style changes and provisions for alternate penalties) only one or more of the following: (a) a breaking-up of offenses, originally covered in one or two sections, into more sections; (b) a change (usually an extension) in enumerated persons,
6 (1) — now § 340: Grand larceny.16b (This offense was expressly designated a felony by Md. Laws 1933 (Sp. Sess.), Ch. 78, § 318).
6 (3) — now § 348: Stealing horses, etc.16b
6 (6) — now §§ 341, 342: Petty larceny, or breaking and stealing small amount.16abc (The word “feloniously” was omitted from the description of the petty larceny portion of this offense by Md. Laws 1933 (Sp. Sess.), Ch. 78, § 319.)
6 (7) — now § 343: Robbery or larceny of choses in action.16b
6 (8) — now §§ 466, 467: Receiving stolen goods.16ab
6 (10) — now § 44: Forging deeds, wills, bonds, notes, etc.16b
7 (1) — now § 18: Polygamy (bigamy). (Md. Laws 1937, Ch. 142, clarified the effect of annulment or divorce in the first marriage.)
7 (4) — now § 490: Rogues and vagabonds.16b (The original provision required “an intent feloniously to break and enter” in the first branch of this offense, “intent feloniously to assault” in the second branch, and “intent to steal” in the third. By Md. Laws 1878, Ch. 467, the intent description for the third branch remained unchanged, but the intent descriptions for the first and second branches were changed to read, respectively, “at places and under circumstances from which an intent may be presumed feloniously to break and enter” and “at places and under circumstances from which may be presumed an intent feloniously to assault.”)

Sections of 1809 act not materially changed17

2 (3) — now § 46: Counterfeiting public seals.
3 (in part) and 4 (2) — now §§ 411, 414: Second degree murder.

*actions, or things to which the provisions apply, unaccompanied by change in the underlying scheme, conception, or language (cf. extension of the original statutory prohibition by addition of separate sections building on the original idea, discussed infra in the text accompanying note 32); (c) a change in the maximum term of imprisonment or in the death penalty.

Changes falling into these categories are indicated by footnote references to the appropriate letter or letters. E.g., the note “16abc” to the first item in the present category stands for first degree murder changes in (a) further subdividing the original sections, (b) extending the felony-murder rule to the crime of escape, and (c) providing life imprisonment as an alternative to the death penalty. Other changes of any importance are specifically indicated in the text.

17 Nothing more than slight changes in style or punishment variations not affecting the death penalty or maximum term of imprisonment is involved in the crimes in this category.
4 (3) — now § 387: Manslaughter.
4 (4) — now § 384: Mayhem.
4 (8) — now § 553: Sodomy.
6 (2) — now § 486: Robbery.
7 (5) — now § 234: Fugitive felons.
8 (1) — now § 439: Perjury and subornation of perjury. (additional acts have been made perjury and subornation of perjury by §§ 435, 437, and 438.)
8 (2) — now § 126: Embezzling wills, deeds, records, etc.
8 (3) — now § 45: Forging public documents.
8 (5) — now § 26: Bribing jurors.

As indicated before, the embryo code of 1809 was in no sense complete; its principal purpose was to provide definite punishments for most of the important offenses. A number of crimes, dealt with by statute before 1809, and still in existence in some form today, were omitted from the 1809 statute.18 A number of offenses were dealt with by statute neither then nor now, but are purely common law crimes.19

The 1809 act has been dealt with at some length because there does not appear to have been any fruitful general reconsideration of Maryland criminal legislation since that day.20 In 1860, in what seems to be the first attempt to

18 E.g., Md. Laws 1715, Ch. 27 (adultery); Md. Laws 1798, Ch. 101, Sub-Ch. 2, § 1, (destroying or secreting wills); Md. Laws 1728, Ch. 7, § 7 (hunting on another's land); and Md. Laws 1713, Ch. 2 (opening letters without permission). The modern counterparts of these old laws are respectively 3 Md. Code (1957) Art. 27, §§ 1, 127, 268 and 354.

20 There was an abortive effort early in this century. Md. Laws 1908, Ch. 325, and Md. Laws 1910, Ch. 345, provide for a Governor's Commission to draft a bill "revising, making harmonious and rearranging systematically the criminal statutes now in force in Maryland," and for review by a Court of Appeals Commission. A report of the Maryland Bar Association's vote favoring such a bill, following debate, will be found in Report of the Twelfth Annual Meeting of the Maryland State Bar Association (1907) 207. But the new criminal code, Bagby reports in his preface to volume 3 of the Annotated Code of Public General Laws (1912) — not published until 1914 due to anticipation of the new code, "did not materialize."

Pursuant to Senate Joint Resolution 2, Md. Laws 1952, p. 331, a committee under the chairmanship of Hon. John E. Raine accomplished a
produce a complete and orderly collection of the criminal statutes, the alphabetical classification of the present day was adopted. The modern series of codes begins with Article 27 of Poe's Code of Public General Laws of 1888. This has since periodically gone through new editions. Throughout the years, legislatures have added new ideas piecemeal, as necessary, and the legislators and codifiers have sifted out certain of the obsolete provisions. But there has been no fundamental structural change and relatively little redrafting of old provisions.

Typical historical development of an offense can be illustrated in common law perjury (in a judicial proceeding) and false swearing (in other proceedings). Bit by bit, a kind of coral reef is built by legislative accretion on the underlying common law crime. The original colonial perjury statute of 1692 provided:

"That if any person or persons, after the publication hereof, either by subornation, unlawful procurement, sinister persuasion, or means of any other, or by their own act, consent or agreement, wilfully and corruptly, commit any manner of willful perjury, by their deposition in any court of record in this province, as aforesaid, or being examined in perpetuum rei memoriam; that then every person and persons so offending, and being thereof duly convicted or attainted by the laws of this province, shall, for his or their said offence, lose and forfeit twenty pounds sterling, and suffer imprisonment in the space of six months, without bail or mainprise; and the oath of such person or persons so offending, from thenceforth not to be received within any court of record within this province, until such time as the judgment given

useful preliminary step to a general reconsideration of the criminal law in recommending the repeal of a number of obsolete laws. Repeal was accomplished by Md. Laws 1953, Ch. 411, referred to supra, note 14.

21 Md. Code Public General Laws (Scott & M'Cullough 1860). There was also an interesting code in which the arrangement of topics and sections was logical rather than alphabetical. Revised Code of Public General Laws (Mayer, Fischer & Cross 1879), legalized by Md. Laws 1878, Ch. 196. There are collections of statutes dating back to colonial times, but all prior to 1860 that the writer has seen are arranged chronologically. The most famous of the colonial works is Bacon, Laws of Maryland at Large (1765). Interesting material on the colonial "codes" will be found in Wroth, A History of Printing in Colonial Maryland (1922) 22-26 and 95-210.

22 There were revisions by Poe in 1904, Bagby in 1912 (criminal code in 1914) and 1924, and Flack in 1939 and 1951. The current revision (Michie 1957) is kept current by supplements.


24 Md. Laws 1692, Ch. 16, § 4.
against the said person or persons shall be reversed, by attaint, or otherwise, as aforesaid; and that, upon every such reversal, the parties grieved to recover their damages as aforesaid. And if it happen that the said offender or offenders, so offending, shall not have goods and chattels to the value of twenty pounds, that then he, she or they, be set on the pillory next adjoining to the place where he, she or they shall be convict, as aforesaid, and to have both ears nailed, and be from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time [as] the said judgment be reversed; upon which he, she or they, shall recover his, her or their damages, in manner and form as is before mentioned; the one moiety of all the said fines and forfeitures, to be to our sovereign lord and lady, the king and queen, for the support of government; and the other moiety to such person or persons as shall be grieved, hindered or molested by reason of any [of] the offence or offences before mentioned, that will sue for the same, by action of debt, bill, plaint or information, or otherwise, in any court of record within this province, wherein no essoin, protection, or wager of law shall be allowed.”

The act was confirmed by Md. Laws 1705, Ch. 8. In 1763 its provisions were extended to oaths required to be made by assignors of obligations under seal before suit could be brought on behalf of the assignees.25

The statute of 1809 — more austerely — provided: 26

“Every person who shall be duly convicted of the crime of perjury . . . shall be sentenced to undergo a confinement in the penitentiary-house herein after mentioned for a space of time not less than five nor more than ten years, to be treated as hereinafter directed.”

Md. Laws 1828, Ch. 165, § 6, extended the penalties of perjury to cases of false testimony before commissioners appointed to take depositions in civil cases. In 1858 an act was drafted to deal with some other cases of false swearing; 27 and in Article 30, § 155, of the 1860 code, the former provisions were extended to read:

25 Md. Laws 1763, Ch. 23, §§ 10, 11.
"An oath or affirmation if made wilfully and falsely in any of the following cases, shall be deemed perjury: first, in all cases where false swearing would be perjury at common law; secondly, in all affidavits required by law to be taken; thirdly, all affidavits to accounts or claims made for the purpose of inducing any court or officer to pass such accounts or claims; fourthly, all affidavits required to be made to reports and returns made to the General Assembly or any officer of the government."

By Md. Laws 1894, Ch. 262, the 1809 act was amended in its penalty provision so as to assume its present form:

"Every person who shall be convicted of 'perjury' . . . shall be sentenced to imprisonment in the jail or penitentiary for not more than ten years."

At the same time it was provided in a new section:

"Any person who shall make oath or affirmation to two contradictory statements, each of them in one of the cases enumerated in . . . [what is now 3 Md. Code (1957) Art. 27, § 435] and in either case shall make oath or affirmation wilfully and falsely, shall be deemed guilty of perjury; and to sustain an indictment under this section it shall be sufficient to allege and prove that one of the said two contradictory statements is or must be false and wilful, without specifying which one."

In Md. Laws 1945, Ch. 95, a simplified indictment form for perjury was set out. In 1957 affidavits or affirmations made pursuant to the Maryland Rules were brought under the provisions of the present § 435.

In the case of perjury, the elaboration of the crime took place through the addition of a section expanding the definition of common law perjury and other sections dealing with indictment and proof. The original section which derives from the act of 1809 is hardly changed. In some offenses the expansion of the common law has been by way of amendment of the original section. For example, until 1918, Md. Laws 1809, Ch. 138, § 6(3), dealing with the theft of horses, mules, and the like, remained virtually unchanged.

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30 This provision is now 3 Md. Code (1957) Art. 27, § 436.
31 Md. Laws 1957, Ch. 399, § 17.
unchanged; the growing importance of the automobile required the legislature in that year to expand the section to include motor vehicles.\(^2\)

Even in the few cases in which the wording of 1809 underwent radical changes, the underlying concepts have not changed much. This can be seen in arson and the related offenses. The original arson provision\(^3\) did not define common law arson, but merely stated the penalty for it. The modern provision\(^4\) can be regarded as a spelling out of the common law definition with specific modifications. The central mental element of wilfulness and malice and the physical element of burning remain. Revision comes in expanding the list of things the burning of which is arson, in providing related crimes dealing with intentionally defrauding insurers or setting fires while committing other crimes, and in extending the crime of common law attempt in the arson field.\(^5\)

It is fair to conclude that there has been little fundamental change in those statutory crimes which have persisted from 1809 to the present day, and these crimes include most of the important ones. Of course, a great many provisions have been added since 1809, aside from those, discussed previously, which have merely extended the original ideas to new situations or changed penalties. Some have given statutory recognition to common law crimes excluded from the 1809 act.\(^6\) Other statutes have created new crimes to meet new problems of public safety and order, e.g., narcotic drugs\(^7\) and machine guns.\(^8\) A great many regulatory offenses, dealing with public health or undesirable commercial practices, have been added.\(^9\)

\(^2\) Md. Laws 1918, Ch. 422, § 293. Where such a change was effected by amendment of the 1809 section itself, it falls into the class identified as (b) in note 16, supra. Where the expanding enactment left the wording of the original section untouched, and added other sections, such identification is not made. Assuming changes such as the one now under discussion to be the only ones made, such a case would appear in the note 16 classification under Sections of the 1809 act not materially changed, instead of Sections of the 1809 act only slightly changed. For the present purpose — illustrating the process of building on the foundation of 1809 — it of course makes no difference whether the draftsmen choose to add a new section or merely a new phrase to the old section.

\(^5\) Md. Laws 1809, Ch. 138, § 5 (1).


\(^7\) The burning offenses are now found in 3 Md. Code (1957) Art. 27, §§ 6-11.


\(^{11}\) See, e.g., 3 Md. Code (1957) Art. 27, §§ 191 (dealing with fraudulent use of trade names) and 321 (dealing with the slaughter of animals for food).
Most of these probably belong elsewhere — in separate articles, like the traffic code — because of rather remote relation to the true problems of crime.

In summary, the present criminal code has a common law base. Gradual and rather haphazard additions have been made extending the common law ideas to new situations. Some new crimes have been added, and some public welfare, or regulatory offenses have been placed in with the crimes.\(^4\)

While in one sense this describes the history of Maryland criminal law, in another sense it might be said that Maryland had virtually no criminal law, and therefore virtually no historical development of criminal law, until about 1950, at which time a dormant code, built in the dark and without plan, suddenly came to life.

Prior to a constitutional amendment in 1950, Maryland juries were judges of law as well as of fact.\(^4\) In addition to the usual jury power to bring in an incontestable, even if irrational verdict of acquittal, a Maryland jury could bring in an irrational conviction, not subject to judicial correction for errors of substantive criminal law. So, when convicted of false pretenses, it was pointless for the defendant to argue to judges that the evidence showed no crime but larceny; such a determination was the jury's alone.\(^4\) The Court of Appeals seldom had occasion to pass on points of substantive criminal law.\(^4\)

\(^{40}\) The proper subject matter for a criminal code is a difficult matter in borderline areas. It is characteristic of most things usually regarded as crimes that they involve a seriously blameworthy state of mind in the violator and a potential threat to the social order sufficient to warrant a sentence of imprisonment in a substantial portion of the cases. In mere regulatory offenses the mental element tends to be unimportant, punishment is generally no more serious than a fine, and a serious moral censure by the community is generally absent. Classifying these offenses as crimes may confuse public attitudes toward crime, either by bringing unjustly intense moral censure down upon one who may not be guilty even of carelessness, or by encouraging a casual attitude towards crime because some "crimes" are seen to be trivial or even blameless. A classic exposition of these minor regulatory offenses is Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

\(^{41}\) Md. Const. Art. XV, § 5. This amendment has been part of the Maryland constitution since 1851; prior to that time the supremacy of the jury seems to have been in doubt, and practice varied within the state. See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 34-38 (1943).

\(^{42}\) Simmons v. State, 165 Md. 155, 167 A. 60 (1933).

\(^{43}\) See casenote, Difficulty of Obtaining Appellate Rulings on Substantive Criminal Law — Corroboration of Accomplices, 1 Md. L. Rev. 175 (1937). The author points out that under the old rule matters of substantive criminal law could reach the Court of Appeals only on rulings on demurrers to indictments, rulings as to the relevancy of proffered evidence, or by way of civil cases involving incidental points of criminal law. Although
Although the opinions of the Court of Appeals prior to the 1950 amendment contain a few helpful discussions of points of substantive criminal law, these hardly form a significant exposition either of the common law of crimes or of the meaning of specific language in criminal statutes. And even in the relatively few cases in which the court spoke, its words were not binding on later triers of fact as to the definitions of crimes. The substantive criminal law of Maryland prior to 1950 could be plausibly maintained to be what each jury, or court sitting as a jury, happened to think it was in the particular case before it; and the triers of fact did not spell out in any detail what they thought. They were not required to give reasons for results, write opinions, or pay any attention to what other triers of fact had done or learned authorities had said. Whatever continuity and coherence the law of crimes had was due to the control which the actions of judges, the choices of prosecutors, and the arguments of counsel exercised as a practical matter over what got before the jury.

The uncertainty resulting from this practice may have contributed to the prevalent Maryland practice of waiving jury trials in criminal cases. Where the court sitting as a jury was the ultimate judge, it was at least possible to make legal arguments to men trained in the law. In a jury trial, counsel's arguments on the law were to the jury.

The amendment to the constitution in 1950 allowing the court to pass on the sufficiency of the evidence to sustain a conviction, and the accompanying Maryland

the trial judge could be reversed for erroneous instructions to the jury, he was not required to give the jury any instructions at all, and he usually did not do so. The court could not pass on the sufficiency of the evidence to convict.

44 See e.g., State v. Buchanan, 5 H. & J. 317 (1821) (conspiracy, arising on demurrer to the indictment); Spencer v. State, 69 Md. 28, 13 A. 809 (1888) (insanity test, arising on evidence ruling); Insurance Co. v. Prostic, 169 Md. 535, 182 A. 421 (1936) (felony-murder rule, arising in a civil case).

45 When the court tried a criminal case without a jury, its decisions had the same finality as a jury's, and the sufficiency of the evidence was not reviewable. See e.g., Berger v. State, 179 Md. 410, 20 A. 2d 146 (1941).

46 Counsel were free to argue against the trial judge's expressed view of the law — assuming the trial judge saw fit to express any view; in fact, the Court of Appeals suggested that it was better practice for the trial judge to give any instructions only after counsel had argued to the jury, to spare counsel the embarrassment of contradicting the judge! Vogel v. State, 163 Md. 267, 102 A. 705 (1932). Unless the case is taken from the jury altogether because of insufficiency of the evidence, counsel may still argue law to the jury. Schanker v. State, 203 Md. 15, 116 A. 2d 363 (1955).

47 Art. XV, § 5.
Rules, which in effect allow a motion for directed verdict of acquittal, reviewable if denied, and require instructions to the jury on request of counsel, have brought about a sudden change. The defects and uncertainties of the present law are becoming visible as important criminal law decisions begin to come down from the Court of Appeals. The time is ripe for a reconsideration of our criminal law.

A New Criminal Code: Available Sources, and Advantages of Adoption

If adoption of a new criminal code is worth serious consideration, how can such a code be created? What are the available sources? An existing code or codes can be taken as a model, to serve as a kind of first draft of a Maryland code, or the draftsmen might start afresh, without any model. While the latter procedure cannot be immediately dismissed, it has great disadvantages. A code so produced, if a good one, would be costly, long in production, and would require much highly skilled effort. Since a number of recently produced codes of high quality, most notably the American Law Institute's Model Penal Code, are available, it would seem sensible to use one or more of these as a starting point.

The present Maryland criminal code should not be used as the first draft. As discussion of its history has shown, it does not possess the coherence and uniformity necessary for a model. It should of course be used for purposes of comparison and to help make sure that nothing that the new code ought to contain is overlooked. It may even furnish some useful provisions in specific instances; the point here to be made is simply that as a starting point for drafting, it would be hard to imagine a worse candidate among those models likely to be considered. Perhaps it would be well to demonstrate its inadequacy by a few examples.

Whatever might have then been said for the sentencing provisions of 1809, the Topsylike growth of the code has left us with sentencing provisions which are now logically indefensible. This is easiest to see in a small area of similar crimes. Consider the penalties for various forms

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46 The current versions of these rules are found in Md. Rules of Procedure (1961) Rules 755 and 756.

of non-violent theft. Historical accident has left us with five separate offenses here, aside from the statutory distinctions between grand and petty forms of stealing based on the value of the goods taken. The mental elements of these offenses do not differ very significantly; roughly, they all require an intent to deprive the possessor or owner more or less permanently of his interest, without claim of right. The original offense, common law larceny, at first dealt only with those cases involving a trespassory interference with the rights of the possessor. Although the courts extended the crime by fictions to certain situations in which it was difficult to make out a trespass, legislation was eventually needed to punish more subtle malefactors. This legislation created a number of new crimes on the border of common law larceny. In Maryland, the results of this legislation can be seen in the following currently existing theft offenses:

1. **Common law larceny**, divided into two offenses according to the value of the stolen goods (§§ 340, 341).

2. **Embezzlement**, where the thief, in a designated position of trust, innocently receives possession for the person trusting him from a third person and later wrongfully appropriates the goods (§ 129).

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50 Only the major divisions are here considered. Larceny, embezzlement, and false pretenses each have a number of specialized subdivisions. For larceny, embezzlement and false pretenses, respectively, see 3 Md. Code (1957 and Cum. Supp. 1962) Art. 27, §§ 340-352, 126-138, and 140-149 plus a number of the fraud provisions at §§ 159-233. (Hereinafter in the discussion of the Maryland theft and breaking offenses, current section references are to 3 Md. Code (1957 and Cum. Supp. 1962) Art. 27).

To these crimes might be added two others where the intent is slightly different, in that the actor means to deprive only temporarily. Many of such trespassory takings are punished by § 349, carrying a maximum penalty of four years imprisonment or $100 fine or both. Misappropriations by bailees for hire, by § 5, carry a lesser maximum penalty of six months in jail or $100 fine or both. Section 5 would presumably be interpreted to cover cases of intent to deprive permanently, not all of which fall within § 353 (larceny after trust), because § 353 requires entrusting “for the purpose of applying the same for the use and benefit of the owner or person who delivered the goods,” an element which would be lacking, say, in the typical automobile rental situation. Note that in such a bailment for hire, a bailee who got the goods by trick, under circumstances not amounting to false pretenses, or who received the goods innocently and later broke bulk and took away part of them with intent to deprive permanently, would be guilty of larceny by early common law authority. See Perkins, CRIMINAL LAW (1957) 202-204, 218. Since that portion of the field is occupied by the crime of common law larceny, it presumably would not be covered by the statutory offense of § 5. For this reason, § 5, insofar as it deals with the case of a bailee for hire receiving innocently and misappropriating, without breaking bulk, and with intent to deprive permanently, is included in the table and discussion of the central theft provisions which follows in the text.
3. **Larceny after trust**, similar to embezzlement, except that the thief gets possession from the person trusting him rather than a third person; divided into two offenses according to the value of the stolen goods (§ 353).

4. **Appropriation by bailee for hire**, dealing, among other things, with such a bailee who, without breaking bulk, misappropriates the bailed goods, not having had the intent to do so from the beginning (§ 5).\(^{51}\)

5. **False pretenses**, dealing with the obtaining of title by means of a false pretense (§ 140).

There is no good reason why the penalties for these similar crimes should not be identical, or at least similar. Factors which may properly bear on sentence in an individual case, e.g., the value of the goods taken, the breach of a fiduciary obligation, the amateur or professional nature of the theft enterprise, cross the lines of the offenses and are not well reflected in the present statutory scheme. Consider the current maximum penalties for the theft offenses:

<table>
<thead>
<tr>
<th></th>
<th>More than $100 taken</th>
<th>$100 or less taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>Larceny</td>
<td>15 years imprisonment</td>
<td>18 months imprisonment</td>
</tr>
<tr>
<td></td>
<td>$1000 fine</td>
<td>$100 fine</td>
</tr>
<tr>
<td></td>
<td>felony</td>
<td>misdemeanor</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>15 years imprisonment</td>
<td>15 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>no fine</td>
<td>no fine</td>
</tr>
<tr>
<td></td>
<td>felony</td>
<td>felony</td>
</tr>
<tr>
<td>Larceny after trust</td>
<td>5 years imprisonment</td>
<td>1 year imprisonment</td>
</tr>
<tr>
<td></td>
<td>$1000 fine</td>
<td>$500 fine</td>
</tr>
<tr>
<td></td>
<td>felony</td>
<td>misdemeanor</td>
</tr>
<tr>
<td>Appropriation by bailee</td>
<td>6 months imprisonment</td>
<td>6 months imprisonment</td>
</tr>
<tr>
<td></td>
<td>$100 fine</td>
<td>$100 fine</td>
</tr>
<tr>
<td></td>
<td>misdemeanor</td>
<td>misdemeanor</td>
</tr>
<tr>
<td>False pretenses</td>
<td>10 years imprisonment</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>fine (unspecified)</td>
<td>fine (unspecified)</td>
</tr>
<tr>
<td></td>
<td>misdemeanor</td>
<td>misdemeanor</td>
</tr>
</tbody>
</table>

\(^{51}\) For further explanation of § 5, see note 50, supra.

The suggested division ignores some of the subtleties (e.g. the servant who gets mere custody from his master is guilty of larceny rather than larceny after trust). It is based on the assumption that the Maryland Court of Appeals, which has not yet passed on some of these distinctions, will follow the usual practice of construing these offenses to be mutually exclusive. See Nolan v. State, 213 Md. 298, 314, 131 A. 2d 851 (1967),
Since so much of the definition of crime remains based in the common law, the punishment provisions of the Maryland code are probably its most significant feature. A general reconsideration of punishment provisions, not only in the theft area, is overdue.62

Another illustration of the unsuitability of the present Maryland code as a drafting model can be found in the burglary and breaking and entering field, where the distinctions are ridiculous and the draftsmanship is appalling.53

The following offenses are separately set forth:

1. Common law burglary (not defined in the statute): roughly, breaking and entering the dwelling house of another at night with intent to commit a felony (usually therein). A provision is added in a separate section to assure that an intent to commit petty larceny suffices as felonious intent for common law burglary.54

2. Breaking a dwelling house in the daytime with felonious intent (including intent to steal).55

3. Breaking a stated class of buildings—"storehouse, filling station, garage, trailer, cabin, diner, warehouse, or other outhouse"—with felonious intent (including intent

noted in 18 Md. L. Rev. 227 (1958). The distinction between larceny after trust and embezzlement is suggested, if not made entirely clear, by the language of the sections, and at first glance appears to be supported by the Reporter's headnote to the official report (at 299) to the Nolan case, although the opinion itself is silent on the point. Since the Reporter speaks of the "common law crime of larceny after trust" ("larceny after trust" did not exist as a common law crime) and the Court is speaking of common law "larceny" in situations of trust, presumably the Reporter did not refer to the purely statutory crime of "larceny after trust.""

"An effective consolidation of the central theft offenses, to avoid some pointless distinctions, is a prime need. Maryland has effected a very limited consolidation in permitting conviction of false pretenses upon proof of larceny or robbery (§ 140). Many jurisdictions have found a more complete solution. The Model Penal Code (Prop. Off. Draft 1962) § 223.1 treats the question.

³² This muddle was explored in Moylan, Maryland Law of Burglary and Breaking and Entering, Daily Record, March 14, 1960, p. 3. The situation was even worse then than it is now.

³³ § 29, 30. Section 30, providing that an intent to "steal, take or carry away" suffices for burglary (1) is probably unnecessary, since at common law intent to steal goods of any value provided sufficient burglarious intent (see Perkins, Criminal Law (1957) 167); and (2) is in danger of being construed to require something less than an intent to commit larceny, e.g., intent to borrow. On the face of §§ 28 and 30 it is even possible to argue that the latter section defines an offense for which the former merely provides the punishment, thereby abolishing all forms of burglary in which there is an intent to commit some felony other than larceny.

³⁵ § 32. This is subject to the construction danger numbered (2) in note 54, supra.
to steal only if the value of the property sought is $100 or more).\(^{56}\)

4. Breaking a second class of buildings — “shop, storehouse, tobacco house, warehouse, or other building, although the same be not contiguous to or used with any mansion house” — with intent to steal property worth less than $100.\(^{57}\)

5. Breaking the same second class of buildings and actually stealing property worth less than $5.\(^{58}\)

6. Breaking a third class of buildings — “Shop, storeroom, filling station, garage, trailer, cabin, diner, tobacco house or warehouse, although the same be not contiguous to or used with any mansion house” — and actually stealing property worth $5 or more.\(^{59}\)

7. Breaking and entering a building and opening or attempting to open a vault, safe or other secure place by explosives.\(^{60}\)

Intriguing construction problems arise. It can be argued, for example, that one who breaks a tobacco house, intending to steal property worth $100 or more, but actually taking nothing, is guilty of no offense under the statutes, while if his intention had been to take less than $100 worth of property, he would have been subject to 18 months imprisonment.

Because of its failure to give explicit definition to many important offenses, the Maryland code is subject to a special kind of difficulty, nicely illustrated by a recent development in the conspiracy statute. Prior to 1961 the general conspiracy section of the Maryland code read: \(^{61}\)

"Every person convicted of the crime of conspiracy shall be liable to be punished by a fine not exceeding

\(^{56}\)§ 32. This is also subject to the construction danger numbered (2) in note 54, supra.

\(^{57}\)§ 342. This section is found in the larceny part of the code, although logically it belongs with the breaking offenses. It has been in its orphaned state since Md. Laws 1809, Ch. 138, when its predecessor, subsection 6 (6), was combined with the petty larceny provision.

There is an orphaned murder offense in the present code as well, classified under "Railroads" 3 Md. Code (1957) Art. 27, § 454.

\(^{58}\)§ 342.

\(^{59}\)§ 33.

\(^{60}\)§§ 34, 35. Out of mercy for the reader, I suppress reference to other peripheral statutes relating to burglary, e.g., 3 Md. Code (1957) Art. 27, § 114 (breaking or entering railroad car with intent to steal).

\(^{61}\)3 Md. Code (1957) Art. 27, § 38. (The amendment was accomplished by Md. Laws 1961, Ch. 651).
two thousand dollars, or imprisonment in the jail or the Maryland House of Correction or the Maryland Penitentiary, for not more than ten years, or both, in the discretion of the court; provided that all actions or prosecutions hereunder shall be commenced within two years after the commission of said offense.”

It has been amended to read:

“The punishment of every person convicted of the crime of conspiracy shall not exceed the maximum punishment provided for the offense he or she conspired to commit.”

On its face, the amendment accomplishes two things: it abolishes the special statute of limitations for conspiracy, and it changes the punishment from a fixed term of imprisonment or fine or both to a sentence like the one provided for the particular crime which is the subject of the conspiracy. The casual reader would suppose that it does nothing more. However, the amendment probably abolishes a large portion of the law of conspiracy. At common law the object of a conspiracy need not be a crime; certain other unlawful or immoral acts are enough. By implication of the amendment, conspiracies having such objects appear to be abolished. Perhaps they should be. But the failure to define conspiracies in the statute permits such a change in the law to be made without its becoming apparent on the face of the language of the statute, and perhaps even to be made inadvertently.

Enough has been shown to demonstrate that the present Maryland statutes make a poor drafting model. They do not form a well thought out, coherent product, and the

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*State v. Buchanan, 5 H. & J. 317, 351-352 (1821), lists the following conspiracies for which indictments will lie at common law (other than those having common law criminal objects):

1st. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. . . . 2d. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose, which has a tendency to prejudice the public. . . . 3d. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual, as by verbal defamation, and that, whether it be to charge him with an indictable offense or not. . . . 4th. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual. . . . 5th. For a malicious conspiracy, to impoverish or ruin a third person in his trade or profession. . . . 6th. For a conspiracy to defraud a third person by means of an act not per se unlawful, and though no person be thereby injured. . . . 7th. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time. . . ."
product they do form has not really been tested by long time practice and judicial scrutiny, because of the small role of the courts in substantive criminal law prior to 1950.

Fortunately, there are several recent codes which would make good models. The states of Illinois, Wisconsin, and Louisiana have enacted carefully considered codes. The most ambitious project has been that of the American Law Institute. Its well-annotated Model Penal Code is approaching completion as this is written. One of these codes would give Maryland its best starting point. Probably the most satisfactory of all of them would be the Model Penal Code, which represents the careful thought of many of the outstanding judges, lawyers, and teachers from Maryland and other parts of the country.

It might be supposed that the best result could be obtained by choosing, for each Maryland provision, the most likely looking code source which can be found in the various code systems. This approach was adopted by the Maryland Self-Survey Commission's proposed criminal code. With all respect to the diligent and able laborers who produced this code, their method, under the limitations of time and expense imposed on the draftsmen, has brought about an unsatisfactory result. Multiplicity of drafting sources has produced an ill-matched assortment of provisions. It is difficult enough to produce an internally consistent code under even the best drafting procedures. A "cut and paste" procedure magnifies the danger. Perhaps a single illustration will show the kind of drawback which is most serious in the proposed code. Its § 7(d)(1) provides:

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66 This proposed Code has been modeled upon (a) the Wisconsin Criminal Code, adopted in 1955; (b) the Louisiana Criminal Code, adopted in 1942; (c) the Model Penal Code of the American Law Institute and (d) Article 27 of the Annotated Code of Maryland. The latter has been followed in all cases where it is equally as good or is better than the others.” State of Maryland, Fourth and Final Report of Maryland Self-Survey Commission, Relating to Proposed Criminal Code 2 (1960).
"When criminal intent is an element of a crime in the criminal code, such intent is indicated by the term 'intentionally', the phrase 'with intent to', the phrase 'with intent that', or some form of the verbs 'know' or 'believe'.”

This section is derived from the Wisconsin Code. The proposed Maryland code’s kidnapping provision (§ 21) was taken from other sources. It reads:

“Whoever transports, from one place to another, confines or conceals, any person who had been unlawfully, by force or by threats of imminent force, or by fraud or deceit, or, while he is unconscious, or under the influence of alcohol or drugs, seized, confined, inveigled, decoyed, kidnapped, abducted, concealed, detained or carried away and held, whether for ransom, reward or otherwise, except in the case of a minor by a parent thereof, shall be guilty of a felony...."

Are we to assume that criminal intent is not to be an element of kidnapping, and that the man who drives off in his automobile, not knowing that a kidnap victim has been hidden in his trunk, is to be convicted?

If we take a single, carefully drawn code for a starting point, and make departures from it only where they can be plainly justified, carefully blending in changes with other portions of the code, a coherent result, satisfying special Maryland needs, can be attained.

Not only consistency in form and language, but consistency in treatment can be achieved by taking a single good source as a draft. Sentencing provisions will become more uniform. Interpretation for the bench and bar may be simpler under a well-annotated product like the Model Penal Code than under the still largely unexplored jungle of the present Article 27, with its great reliance on

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68 41 West’s Wis. Stats. Ann. (1958) § 939.23 (1).
70 This intent problem is endemic in the Self-Survey Commission’s proposed code. The proposed code appears to make one who accidentally sets fire to the building of another without consent guilty of the code equivalent of arson, one who absent-mindedly drives off in somebody else’s car without consent punishable by four years imprisonment, and an unconscious rape victim guilty of adultery or fornication. State of Maryland, op. cit. supra, n. 67, §§ 43, 55 and 75, respectively. There may be other instances of failure to provide explicitly for intent.
common law for definition. The drafting process can be relatively simple and quick. Principal attention can be focused on resolving a few important questions of policy rather than on minor details of composition.

A New Criminal Code: Some Objections Examined

The potential benefit of a new code is obvious. Objections exist, however, and they need to be examined. Four of the principal objections are here considered.

1. Maryland has got along all right with its system of common law and fragmentary legislation for many years; why change? This objection has two weaknesses. First, Maryland criminal law has been nowhere close to ideal in its operation. Its weaknesses have been obscured to some extent by the tradition of trial of criminal cases without juries, because a succession of able trial judges has been able to mitigate them. A competent bench and bar, dedicated to fair administration of justice, can go a long way towards making even the worst system work passably. Maryland's system of substantive criminal law is probably closer to the worst than the best of those within the common law tradition. A combination of the vagueness of much common law definition, the unsystematic nature of our statutory law, and the lack (until recently) of judicial analysis in the field could hardly be expected to produce a model system.

Second, the fundamental procedural change inaugurated in 1950 by the amendment of Article XV, section 5, of the Maryland Constitution, to take the question of sufficiency of the evidence from the exclusive province of the jury, makes more pressing the need for substantive reform. As more and more of the provisions of our present common and statutory law come before the Court of Appeals for review, the inadequacies will become more obvious and more painful.

Our criminal law is in such a state of disorganization now that it would put an impossible strain on piecemeal legislative and ordinary judicial processes to expect them to work it pure in the foreseeable future. We need a substantially new code as a good beginning on which the routine methods can work. The necessary systematic correction and improvement can only then be expected to take place in the legislature and courts.

2. Why abandon the heritage of our common law crimes, developed through centuries of practical, trial and
error judicial development, and, especially, why abandon the common law tradition which has given us this remarkable body of law? This objection requires a rather full answer. It might be supposed from the foregoing criticisms of the Maryland criminal law that the writer is contemptuous of the achievements of the common law. This is false, but the writer does believe that a romantic haze surrounds the concept of common law growth and needs to be dispelled.

When we try to form a mental picture of common law development, the stage setting for our thoughts is apt to be Old Bailey, or some vaguely imagined precursor. The 
\textit{dramatis personae} includes a few star parts, like Lord Coke’s, and features justices in eyre, sergeants at law, and country justices of the peace at quarter sessions. All are charmingly costumed and stand around arguing nice points of law. Perhaps some reporter takes down the words (more or less in the form they are uttered) of the learned judge as he recalls some oral precedent. Later and greater judges recast and order his thoughts as the necessities of new cases require. Eminent text writers attempt more general formulations. The whole thing grows beautifully, like a mediaeval cathedral; gradually, almost imperceptibly, the structure matures and improves. Who would destroy this ancient, this beautiful, this glorious monument? Motherhood would probably be the next target.

Now, in the first place, this leaves out of account the bell tower that collapsed, some rather inferior decoration in the north transept, and the general prevalence of drafts. Despite its great and undoubted accomplishments, the common law had its share of errors and lapses; these had to be corrected, when corrected at all, by legislation. From the earliest times, traditional common law development was supplemented by legislative action. Almost any of the major crimes generally thought of as of common law origin have a surprising number of statutes contributing to their history.

Stephen\textsuperscript{71} lists most of the important ones. Between the \textit{leges Henrici Primi},\textsuperscript{72} dating from about 1100-1135, and the first statute consolidating the homicide offenses in

\textsuperscript{71} 3 Stephen, A History of the Criminal Law of England (1883). The homicide statutes are discussed at 1-107 (particularly at 34-79), statutes dealing with assault and related offenses at 108-120, and statutes relating to theft offenses at 121-176. Other offenses are treated in subsequent pages.

\textsuperscript{72} This was an unofficial compilation of laws in force in the time of Henry I. There were earlier statutes and codes. See 1 id. 51-53.
1861, he discusses nineteen British statutory provisions relating to homicide, and many more dealing with assaults and the like. The theft field (here including for convenience robbery, burglary and extortion along with the more peaceful theft crimes) is so crowded with legislation that, in connection with the Theft Consolidation Act of 1827 and related legislation, it was necessary to repeal more than 135 statutes, at least 68 of which related directly to theft itself.

These statistics are not intended to establish that most of the major development of the criminal law has been statutory; in most fields it has not been. Although some major changes have been made by statute, most enactments have tended to deal with punishments or to extend the scope of common law ideas to new fields, much as

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53 24 & 25 Vict., c. 100 (1861).

54 These are 52 Hen. 3, c. 25 (1267) (abolishing fine on township in certain classes of homicide); 6 Edw. 1, c. 9 (1278) (introducing special verdict for self-defense and misadventure, and providing for pardons in such cases); 21 Edw. 1, st. 2 (1293) (protecting from prosecution foresters killing without malice in making certain arrests); 14 Edw. 3, st. 1, c. 4 (1340) (abolishing presentment of Englishry, earlier required to avoid payment of the murdrum, a special fine against the community levied for killing a Norman, as opposed to an Englishman); 25 Edw. 3, st. 5, c. 2 (1350) (defining petty treasons); 13 Rich. 2, st. 2, c. 1 (1389) (providing material toward a definition of murder); 16 Rich. 2, c. 6 (1392) (repealing penalties imposed by the previous act for soliciting pardons in specified homicide cases); 12 Hen. 7, c. 7 (1466) (making petty treason non-clergiable); 4 Hen. 8, c. 2 (1512) (making murder in churches or on highways non-clergiable); 22 Hen. 8, c. 9 (1530) (making willful murder by poison high treason and therefore non-clergiable); 23 Hen. 8, c. 1, §§ 3, 4 (1531) (making willful, malicious murder non-clergiable); 24 Hen. 8, c. 5 (1532) (abolishing forfeiture of goods for killing a thief in self-defense); 1 Edw. 6, c. 12, § 10 (1547) (making all murder non-clergiable); 2 Jac. 1, c. 8 (1604) (making killing by stabbing, when the victim had not drawn his weapon, non-clergiable); 3 Geo. 4, c. 38 (1822) (providing punishment of transportation, imprisonment, or fine for manslaughter); 7 & 8 Geo. 4, c. 27 (1827) (repealing 21 Edw. 1, st. 2 (1293), supra, this note); 9 Geo. 4, c. 31, § 10 (1828) (abolishing forfeiture of goods for killing by misfortune, in self-defense, or in any other manner without felony); 9 & 10 Vict., c. 62 (1846) (abolishing forfeiture of chattels occasioning homicide (deodands)).

55 Stephen cites as illustrative eight statutes dealing with specialized kinds of assaults prior to 43 Geo. 3, c. 58 (1803), the first general assault statute. 3 Stephen, op. cit. supra, n. 71, 109-113. A number of other related statutes are also treated.

56 7 & 8 Geo. 4, c. 29 (1827).

57 The repealing act, 7 & 8 Geo. 4, c. 27 (1827), also repealed certain acts relating to benefit of clergy, malicious injury to property, and remedies against the hundred, and it is not always possible to be sure from the titles which of the acts relate to theft. The 68 acts clearly dealing with theft do not include all acts repealed prior to 1827; e.g., an act of 23 Geo. 2, c. 26 (1750), dealing in part with turnip theft (§ 13); is not counted because it was repealed by 13 Geo. 3, c. 32 (1773), an act “for the more effectually preventing the stealing or destroying of turnips, potatoes, cabbages, parsnips, peas, and carrots.”
Maryland legislation has been shown to do. The point is rather that the development of the criminal law has by no means been a purely judicial one at any period of its history, and that there has been constant need for legislative action. And of course in recent times there has been a movement towards statutory consolidation in various fields of criminal law and towards the production of unified criminal codes.

If a partial answer to those who deplore departure from the common law tradition is that legislation has always played a role in the development of the criminal law, perhaps a better answer is that the central ideas of the common law will necessarily be reflected in any modern code that Maryland might adopt. Under any code, judges would continue to contribute to the growth of the law through interpretation. Furthermore, the substantive provisions of a new code would necessarily bear the marks of its history. Concepts developed at common law form the basis of modern codes. Of course the modern codes make noticeable and important changes in previous common law and statute, but the underlying ideas are for the most part familiar to the common lawyer. The heritage of previous law is not lost.

To illustrate this, consider the action of the Model Penal Code on the common law crime of murder and the statutory crime of receiving stolen goods. The Model Penal Code's treatment of murder can be seen from the following sections:

"§ 210.1 Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

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78 Indeed, in the major crimes, the definitions in the major mature legal systems in the world have much in common, simply because of the similar demands of civilized life over the globe. See infra notes 92 and 99 for a comparison of French and German provisions with current American law.

79 Sections are taken from, and unless otherwise noted, citations are to the Proposed Official Draft (1962), which gives reference to earlier formulations and to commentaries. No isolated provision of the code can be fully understood without reference to related matters: in the case of homicide, e.g., to the treatment of such topics as self-defense and other justifications (Art. 3), and insanity and other provisions limiting responsibility (Art. 4). However, it is hoped that enough is given here to illustrate underlying common law concepts in a modern code.

80 Section 2.02 defines "purposely" (having death as a conscious object), "knowingly" (being aware that conduct is practically certain to cause death), "recklessly" (consciously disregarding a substantial and unjustifiable risk of death), and "negligently" (unconsciously disregarding a substantial and unjustifiable risk of which the actor should be aware). The definitions suggested here are approximate only.
§ 210.2 Murder.

(1) Except as provided in Section 210.3 (1) (b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape."

Section 210.2 (1) (a) corresponds to that class of common law murder in which, without justification, excuse or mitigating circumstances (similar to those provided for in the Model Penal Code), the actor intends to kill or cause great bodily harm. The provision is slightly narrower than the common law; it does not include cases in which the actor intends great bodily harm but not death, and is unaware that his conduct is practically certain to cause death. However, subsection (1) (b) would make murder those killings within that class in which the actor’s conduct is “committed recklessly under circumstances manifesting extreme indifference to the value of human life.” Only cases in which the trier of fact found that the actor intended serious bodily harm (but not death) and caused death by conduct showing less than a reckless, extreme indifference to life, would no longer be murder. Such cases hardly represent a significant departure from common law theory.

The cases in subsection (1) (b) in which the killing is committed recklessly, under circumstances manifesting extreme indifference to the value of human life, would also include the common law “depraved heart” doctrine, making defendants like those who play a form of Russian Roulette, in which the defendant “hopes” that the bullet is not in firing position as he aims at the victim’s head, guilty of murder. The Model Penal Code eliminates a

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81 Section 210.3 (1) (b) deals with provocation, which reduces what would otherwise be murder to manslaughter.
82 This class of common law murders is identified in Perkins, Criminal Law (1957) 31-32.
83 Id., 32. Some of the cases are discussed in a comment to the earlier form of the Model Penal Code section (then § 201.2) in Tentative Draft No. 9 (1959) at 29-30. The Russian Roulette example is suggested by Commonwealth v. Malone, 354 Pa. 180, 47 A. 2d 445 (1946).
class of cases whose status was in doubt at common law, in that it plainly requires that the defendant — and not merely some reasonable man in his position — actually be aware of the risk. There is some authority, much criticized, to the effect that if a reasonable man would recognize that his conduct would cause great bodily harm or death, it is murder when death results, even if the particular defendant, less perceptive than most, did not realize this. A separate offense of negligent homicide, a lesser crime than manslaughter (which requires advertisement), is provided in the Model Penal Code. Negligent homicide ordinarily carries a maximum penal sentence of five years, as opposed to ten years for manslaughter, and death or life imprisonment for murder.

Felony-murders, the third great class of common law murders, are abolished as such by the Model Penal Code. But they reappear in the form of a presumption of recklessness and extreme indifference to life (and therefore murder) in killings by the defendant in the course of specified crimes, quite similar to those familiar to Maryland lawyers. The unlimited form of the common law felony-murder rule, by which any death caused by the actor in the course of a felony is murder, is now rarely applied and is not easily justified. Commonly, the rule is applied only to some felonies (e.g., those naturally dangerous to life), the causal requirement is tightened, or some other limitation is imposed. The interest of the public seems adequately protected by leaving it to the defendant to advance proof that something less than the extreme recklessness described in the Model Penal Code caused death.

Regina v. Ward, [1956] 1 Q.B. 351 (C.C.A.), so holds. The tort or objective view of criminal liability followed in this case is criticized in HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, ch. V (2d ed. 1960). The Model Penal Code accepts objective criminal liability in some situations, but not here. In discussing the criminal liability sometimes imposed in the code for mere negligence (where it is enough that the defendant should be aware of risk, even if in fact he is not), it is stated that negligence “should not generally be deemed sufficient in the definition of specific crimes,” but that to some extent, knowledge that punishment may follow inadvertence may encourage care, and therefore that limited use of punishment for negligence is justified. Model Penal Code (Tent. Draft No. 4, 1955) § 2.02, comment at 120-127.

\[6.06.\] Note that “when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.” § 1.12 (5) (b). Thus, even
One familiar concept abandoned by the Code is that of degrees of murder. Unknown at common law, first degree murder was invented to reduce the incidence of the death penalty theretofore applicable to all common law murder. The usual requirements for murder in the first degree in cases involving intentional physical harm are premeditation, deliberation and a specific intent to kill. (Killings in the course of certain serious crimes are commonly also made first degree murder.) In intentional killings many courts have so watered down the requirements of premeditation and deliberation as to leave them almost meaningless. Also, the distinction can separate sheep from goats only very roughly. The mercy killer is a first degree murderer while the impulsive killer, even if acting on the slightest of provocations or no provocation at all, is found guilty of only second degree murder. The division of murder into degrees is usually condemned, or supported only because it is thought that no better device can be found to limit the death penalty. Instead of dividing murder into degrees, the Model Penal Code provides, for jurisdictions where the death penalty is retained, a catalogue of aggravating and mitigating circumstances used as a guide for the court or jury in determining sentence.

If the defendant introduced evidence suggesting accident and the prosecution introduced nothing which would directly rebut the suggestion, the jury could convict if it disbelieved the defendant's claim.

A survey of the current status of the felony-murder rule and an explanation of the reasons for the code treatment will be found in Model Penal Code (Tent. Draft. No. 9, 1959) § 201.2, comment at 33-39.

See casenote, Deliberation and Premeditation in First Degree Murder, 21 Md. L. Rev. 349 (1961).

A classic attack on the premeditation and deliberation test is found in CARDOZO, LAW AND LITERATURE (1931) 95-101. The REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT (1949-1953), Cmd. No. 8932, pars. 485-534, carefully discusses the rationale of dividing murder into degrees, proposed tests, and the history of the operation of the division in the United States, and reaches a decision rejecting the division.

Murders involving aggravating circumstances include multiple murders or murders causing great risk of death to many persons, murders in the course of specified crimes, murders for pecuniary gain, murders by convicts under sentence of imprisonment or by persons seeking to avoid arrest or effect escape, and murders manifesting exceptional depravity. Mitigating circumstances in murder include lack of history of prior significant criminal activity, the participation or consent of the victim, the defendant's belief in moral justification for his act, domination of a defendant whose participation was relatively minor by another, the defendant's action being under the influence of extreme mental or emotional disturbance or certain kinds of impaired mental capacity less than insanity, and the defendant's youth. If the court finds either no aggravating circumstances or the presence of substantial mitigating circumstances (or certain other circumstances exist), this eliminates the death penalty. Otherwise a separate proceeding, in which the rules of evidence are relaxed, is held to afford the prosecution and defense an opportunity
In summary, the action of the Model Penal Code on the common law offense of murder is by no means to abandon the teachings of the common law. In intentional killings, the formulation is slightly narrower but quite close to the common law provision, and it does not employ concepts which are particularly unfamiliar and difficult for a common lawyer. In extremely reckless killings, the Code provision could stand as a reformulation of the common law, except that in one doubtful case an act which might be common law murder has been made negligent homicide. It abandons the felony-murder rule in order to achieve a fairer result, but it retains the unsympathetic attitude of the common law to killings in the course of dangerous crimes, by the device of a presumption of extreme recklessness in the former felony-murder area. This retention of common law building blocks while choosing among competing theories and clarifying and improving the arrangement and formulation of ideas is typical.92

A second illustration will show the action of the Model Penal Code on a familiar crime of statutory origin, receiving stolen goods.93 In the course of consolidating the

to explore the defendant's background and to show the presence of aggravating and mitigating circumstances, the final imposition of the death sentence being in the discretion of the court, or court and jury.

92 Even non-common law formulations show similarity to American Law. Cf. The French and German penal codes. Some of the French Penal Code provisions are:

"Willful homicide is murder. (Art. 295) Every murder committed with premeditation or by lying in wait is an assassination. (Art. 296) Premeditation consist of an aforethought decision to make a homicidal attack on a certain person or anyone encountered, regardless of any circumstances or conditions on which the act may be dependent. (Art. 297) Lying in wait consists of waiting for whatever length of time in one or several places for a person either to kill, or inflict violence upon, him. (Art. 298) Any person guilty of assassination . . . shall be punished by death . . . (Art. 302) Murder, preceded, accompanied or followed by another felony, shall be punished by death . . . (Art. 304)". 1 American Series of Foreign Penal Codes (Mueller ed. 1960) 104, 105. The German Penal Code provides (§ 211): "1. Murder shall be punished by confinement in a penitentiary for life. 2. Anybody who kills a human being out of murderous lust, or to satisfy a sexual urge, or out of greed or from other base motives, maliciously or cruelly, or by means of endangering the public, or in order to commit or cover up another punishable act, is a murderer." 4 id., 113 (1961).

93 Despite some possibly misleading language in State v. Hodges, 55 Md. 127 (1880), and Henze v. State, 154 Md. 332, 335, 140 A. 218 (1928), receiving was not punishable as a separate crime at common law. In early times the receiver might be prosecuted for misprision of felony or compounding a felony. Later, by statute (3 W. & M., c. 9, § 4 (1861)), he was punishable as an accessory after the fact to larceny. Finally, receiving became a separate statutory offense (7 & 8 Geo. 4, c. 29, § 54 (1827)). See Clark & Marshall, Law of Crimes (6th ed. 1958) 856-
Theft offenses, the Code makes receiving theft, and describes it as follows:

"§ 223.6. Receiving Stolen Property

(1) Receiving. A person is guilty of theft if he purposely\textsuperscript{84} receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner. 'Receiving' means acquiring possession, control or title, or lending on the security of the property.

(2) Presumption of Knowledge. The requisite knowledge or belief is presumed in the case of a dealer who:

(a) is found in possession or control of property stolen from two or more persons on separate occasions; or

(b) has received stolen property in another transaction within the year preceding the transaction charged; or

(c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.

'Dealer' means a person in the business of buying or selling goods."

Theft offenses, including receiving, are graded.\textsuperscript{85}

Comparison of this draft with the present Maryland provision will show the similarity of concepts and treatment; the Maryland statute grades the offense according to whether or not the stolen property is worth less than $100, and defines it as: \textsuperscript{86}

"receiving any stolen money, goods, or chattels ... knowing the same to be stolen, or ... receiving any

\textsuperscript{84} This word was added in Model Penal Code, Changes and Editorial Corrections, in the May 4, 1962, Proposed Official Draft (July 30, 1962) at 3. The definition of "dealer" is to be expanded to include pawnbrokers.

\textsuperscript{85} § 223.1 (2). In the highest grade the amount involved exceeds $500, or the property involved is a firearm, automobile, or other motor-propelled vehicle, or the receiver is in the business of buying or selling stolen property. There is another dividing line at the $50 level.

bond, bill obligatory, bill of exchange, promissory note for the payment of money, bank note, paper bill of credit, or certificate granted by or under the authority of this State, or the United States, or any of them... knowing the same to be stolen..."97

A recent Maryland case, reviewing authorities, summarizes the crime as follows:98

"In order to constitute the offense of receiving stolen goods four elements are necessary: (1) the property must be received; (2) it must, at the time of its receipt, be stolen property; (3) the receiver must have guilty knowledge that it is stolen property; and (4) his intent in receiving it must be fraudulent."

Again, the Maryland and Model Penal Code rules are similar in fundamentals.99

What would be lost in transition to the Model Penal Code thus would not be the valuable part of the common law-statutory tradition. Underlying ideas are the same. Changes are almost always for the better. They are largely improvements consisting of abolition of obsolete accretions, attainment of clearer and more unified formulation, and incorporation of promising new ideas.

One important portion of the objection to abolition of the common law remains to be considered. Modern codes define each crime; they commonly provide that nothing shall be a crime unless explicitly made such by the code

97 Note that the Model Penal Code provision quoted supra in the text accompanying notes 93 and 94 (§ 223.6) uses the term "movable property" in place of the cumbersome list in the Maryland statute. This is defined as "property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby have no physical location." "Property" is defined as "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power." § 223.0 (4) and (6).


99 Cf. crimes similar to receiving in non-common law jurisdictions. Art. 460 of the French Penal Code states, "Any person knowingly receiving, totally or partially, good [sic] stolen, misappropriated or obtained through any felony or misdemeanor, shall be subject to... punishments. ..." 1 American Series of Foreign Penal Codes (Mueller ed. 1960) 150. The German Penal Code provides in Art. 259, "1. Anybody who for gain conceals, purchases, accepts or pledges or otherwise acquires property of which he knows or under the circumstances should know that they have been acquired by means of a punishable act, or who participates in the disposal of such goods, shall be punished by imprisonment as a receiver of stolen property..." 4 id., 133 (1961).
or some other statutory provision. This means that the capacity of the common law to expand, without need of legislation, to meet new situations is limited to rather minor, interstitial matters. It may be feared that the code will turn out to be incomplete — overlooking some old offense, or failing to anticipate some new form of evil — and that wrongdoers will go unpunished under the code, while they might have been dealt with under the common law. To judge the weight of this objection it is necessary to know what this expansion power of the common law actually amounts to, first in the case of extending by analogy old offenses to meet new situations, and second in the case of creation of new offenses — or perhaps theorists would prefer “newly discovered offenses.”

The nature of borderline expansion of a common law offense is quite complex. The extent to which the common law would expand was unpredictable. Common law larceny, for example, expanded in some ways by case to case analogy, e.g., by employment of the fiction of custody in certain cases of theft by servants. However, the judges refused to expand it in other ways; to cover embezzlements, and thefts of some animals, legislation was required. Reasons for expansion in some areas and lack of expansion in others appear to rest largely on historical accident rather than common sense. The complicated borderline between common law larceny and its related statutory offenses is a product of this eccentric development; very little making sense in terms of modern policy can be found in the placement of this line. It would seem that by now the criminal law has reached a stage of development which permits us to see approximately where rather stable lines between innocence and guilt can be drawn in most offenses. These can best be drawn by statute. Lawful conduct can be determined with closer precision than at common law if the statute is carefully drafted. Minor adjustments can be handled by further legislation. The tendency of modern statutes to speak in terms of general classes of things, as opposed to the old statutory tendency to change by adding only the narrowest of classes of things, one at a time, reduces the need for constant tinkering and expansion.101

100 E.g., Model Penal Code (Prop. Off. Draft 1962) § 1.05 (1).
As far as the supposed power of the common law to declare new offenses is concerned, the case was well put by Mr. Justice Stephen about eighty years ago:102

"Though the existence of this power [to declare acts to be offenses at common law, although no such declaration was ever made before] as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it as the present day; and any such attempt would be received with great opposition, and would put the bench in an invidious position. . . .

"In times when legislation was scanty, the powers referred to were necessary. That the law in its earlier stages should be developed by judicial decisions from a few vague generalities was natural and inevitable. But a new state of things has come into existence. On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them. If parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides, there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought to be left in the hands of parliament."

If Stephen was somewhat optimistic about the lack of new offenses to be expected, on the whole this summary and prediction has proved accurate. There are a few instances of the exercise of this judicial power to find new offenses, but the instances are very rare. The decisions recognizing the new offenses seem unnecessary; the offenses are trivial, no emergency is involved; in short no good reason appears why they could not await legis-

102 3 Stephen, op. cit. supra, n. 71, 359-360.
lative consideration and avoid the appearance of retro-
active criminal law.\textsuperscript{103}

Some, while willing to abolish all but explicitly stated
offenses, do object to the abolishing of all but explicitly
stated defenses, on the ground that some obscure defense,
eexisting or discoverable at common law, might be over-
looked, and a defendant thereby improperly convicted.
The belief of such objectors is that while the state can
afford this kind of very slight risk in the case of offenses,
the defendant should not be required to take it in the
case of defenses.\textsuperscript{104} The Model Penal Code relies on elabo-
rate explicit formulation of defenses. A rather general
justification provision, however, may go a long way to-
wards resolution of this aspect of the problem.\textsuperscript{105}

So, what is lost by the abolition of the common law of
crimes is a rather vague and doubtful capacity for

\textsuperscript{103} A typical case is The King v. Manley [1933] 1 K.B. 529 (C.C.A.
1932), in which the knowing making of a false report to the police was
found to be a common law misdemeanor, despite the lack of specific
precedent. The Manley case has been much criticized; its reasoning was
1957 Maryland followed a sounder course by covering the Manley offense
Court, one judge dissenting, has recently found that making obscene phone
calls is a common law misdemeanor, at least in Pennsylvania. Common-
Penal Code (Tent. Draft No. 4, 1955) § 1.05, comment at 107, says:

"Indeed, in England it seems fairly clear that notwithstanding Rex
v. Manley . . . the common law power would not now be exercised
to declare conduct a misdemeanor, unless its criminality has been
established by clear precedent. . . . We should be even firmer in this
view in the United States. A statute declaring conduct contra bonos
mores to be criminal would hardly satisfy constitutional requirements
of specificity. . . . The concept has no greater merit when it rests
upon the common law."

\textsuperscript{104} This viewpoint is reflected in the Wisconsin Code, 41 West's Wisc.
State Ann. (1958) § 939.45 (6) and in State of Maryland, Fourth and
Final Report of Maryland Self-Survey Commission, Relating to Pro-
posed Criminal Code (1960), in §§ 3 and 8 (1) (4) of the proposed code,
which preserves common law defenses not made explicit in the codes.

\textsuperscript{105} Model Penal Code (Prop. Off. Draft 1962) § 3.02 provides that where
no legislative purpose to exclude such general justification plainly appears
and the statute does not explicitly provide exceptions or defenses dealing
with the particular situation:

"Conduct which the actor believes to be necessary to avoid a harm
or evil to himself or to another is justifiable, provided that . . . the
harm or evil sought to be avoided by such conduct is greater than
that sought to be prevented by the law defining the offense
charged. . . . When the actor was reckless or negligent in bringing
about the situation requiring a choice of harms or evils or in ap-
praising the necessity for his conduct, the justification afforded by
this Section is unavailable in a prosecution for any offense for which
recklessness or negligence, as the case may be, suffices to establish
culpability."

See the explanation for and the defense of the lack of precision in this
formulation in Model Penal Code (Tent. Draft No. 8, 1958) § 3.02, comment
at 9-10.
spontaneous growth and a theoretical completeness of occupancy of the field of whatever wrongdoing ought to be punished by the state. What is gained is greater certainty, and accompanying this, greater fairness in application of the law. Any necessary new legislation should be possible before too many malefactors escape by being just outside the clearer boundaries of a new code. The central areas of criminality would remain unchanged by a new code; the terminology would be largely either taken over intact or derivative.

3. **Would not radical change in our criminal law produce such chaos that the administration of criminal justice would suffer severely, at least in the short run?** It would not. As was pointed out in answer to the previous objection, discussing the nature of our common law heritage, the new code would derive largely from common law or familiar old statutory offenses. For reasons stated in the first section of this article, the body of articulated substantive criminal law in Maryland is small. Adoption of the Model Penal Code, with its extensive notes, would probably make legal research no more difficult than it now is. Presumably, if a new code were adopted, interested members of the bar could obtain any necessary orientation through short bar association programs of instruction. Adoption of a new code should not produce any crisis in the local criminal bar. Far from producing chaos, it ought to bring order to such matters as crime definition and imposition of punishment.106

4. **Why pursue an impractical dream of perfection?** To expect to achieve perfection in the adoption of a new criminal code would indeed be foolish. The most foresighted legislators cannot hope to produce a code which

106 Space does not permit discussion of the very interesting punishment provisions of the Model Penal Code. Very generally, offenses (aside from any that may be made capital) are divided into five classes, with ordinary terms of maximum imprisonment as follows: felonies of the first degree, life; felonies of the second degree, ten years; felonies of the third degree, five years; misdemeanors, one year; and petty misdemeanors, thirty days. Minimum terms for felonies are also provided, to be fixed by the court at one to ten years for first degree felonies, one to three years for second degree felonies, and one to two years for third degree felonies. Specified extended terms of imprisonment are permitted for such persons as may be (as defined by the code) persistent or multiple offenders, professional criminals, or dangerous, mentally abnormal persons. An automatic parole period of at least a year is required on release from prison for those sentenced to a year or more. Wide discretion is allowed the trial judge in granting probation in lieu of a sentence of imprisonment. Time off for good behavior is allowed for imprisonment and parole periods. See Model Penal Code (Proposed Off. Draft 1962) §§ 6.06-6.10, 7.01, 7.03, 7.04, 305.1 and 305.2.
will solve perfectly all the problems it is designed to solve — much less to foresee the problems which will ultimately arise under it. But there is a considerable advantage in moving in the right direction; this can be done and ought to be attempted. If Maryland attains an optimum product, the knowledge that this will still require reconsideration and amendment should not be disturbing.

A proposal that we follow closely such a model as the Model Penal Code is not impractical. This code is not something produced in a flight of fancy by a bunch of impractical dreamers; some of the ablest lawyers in the country — including Maryland lawyers — participated in the work. Anyone who examines the code carefully will, despite specific reservations he may have as to some particular provisions, recognize the high quality of thinking, the learning, and the resourcefulness that went into it.

The obstacles to adoption of a new code are essentially of two kinds. First, the profession, which to a large extent is already aware of the inadequacies of the present Maryland criminal law, and the public need to be made aware of the need for and the possibility of achievement of change. Second, the more difficult task of assembling a consensus in favor of a particular draft proposal remains. There is bound to be strong disagreement about many specific proposals that may be put forth; even a proposal that nothing be changed will produce opposition. To take only one example, whether or not the new code abolishes capital punishment (a matter left open in the Model Penal Code), it cannot avoid severe disappointment to one faction or another. There are a number of points on which such disagreement is likely. What is essential is that enough people see that, despite some specific defeats for their pet projects, the general advantage in adopting a rational new code far outweighs the loss of specific points.

It is partly because of the natural disagreement about particulars that the starting point is so important. When no argument convinces most of the debaters, there is a strong tendency to stay with the draft because departure cannot be clearly justified. So that this tendency may work to the advantage of solid accomplishment, the draft must be the best that can be obtained.

107 See Model Penal Code (Tent. Draft No. 9, 1959) § 201.6, comment at 65.
SUMMARY AND CONCLUSION

The present Maryland criminal law has a common law base, considerably modified in detail, both before and after the American Revolution, by specific, rather narrow legislative contractions and expansions. The common law base, where the central definitions are to be found, is often vague. The statutory changes have been made piecemeal and are not harmonious. No unified approach to the criminal law has accomplished anything since the general criminal legislation of 1809,108 and to the extent that any order was achieved then, it was in the area of punishments, an area which by now needs reconsideration as much as the area of crime definition. Until the constitutional amendment of 1950109 the inadequacies of the criminal law were partly hidden by the local doctrine giving the triers of fact in criminal cases unreviewable discretion as to the definitions of the crimes before them. Now these inadequacies are becoming obvious and painful.

The remedy is the adoption of a modern code. It should not be based, in the matter of drafting, on the present Maryland statutes, which (1) usually define important crimes only by reference to the common law, (2) do not reflect a well considered penalty scheme, and (3) have no organization but that imposed by historical accident and an alphabetical arrangement of crimes. A new code might profitably be based on the American Law Institute's Model Penal Code, now nearing completion. The ideas of a modern code necessarily derive from our common law heritage and would not be very difficult for a lawyer with a knowledge of the present system to master. A modern code differs from the common law (and from the Maryland combination of common and statutory law) in providing greater coherence and certainty, improved clarity of expression, and thoughtfully considered changes where the common law is obsolete. By using the Model Penal Code as a first draft of a new Maryland code, and making only those changes plainly warranted by local requirements, Maryland could produce an excellent new code relatively quickly and relatively cheaply.

The objections to such a procedure prove, on examination, to be weak. Little or nothing that is good in our present criminal law would be lost, and anything lost would be compensated for by large gains.

108 Md. Laws 1809, Ch. 138.
In debate before a Maryland Bar Association meeting in 1907 it was said:\(^{110}\)

"But I desire to say that, while the criminal law may be a growth, it seems to me it is a mere fungus growth. It seems to me that there are a great many glaring defects in it which ought to be remedied. . . . We passed statutes to cure [some of] these evils and the result is a crazy quilt. . . ."

"[T]he criminal code of the State, granting as true all the learned Attorney-General has said as to the superiority of the development of the law by decisions and interpretations, . . . is a law which is developed by hodgepodge from statutes prompted for one reason or another, and acts are defined as crimes to which penalties are appended entirely out of proportion to the offense."

Although the Association supported revision of the criminal law, nothing more than the repeal of some obviously obsolete statutes has been done in the way of reform of the substantive law of crimes. It is about time to begin moving.

\(^{110}\) REPORT OF THE TWELTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION (1907) 194, 196. The remarks in the first quoted paragraph were by Judge Eugene O'Dunne; those in the second paragraph by John Phelps, Esquire.