

THE PUNISHMENT OF CRIME IN PROVINCIAL PENNSYLVANIA

THE history of the punishment of crime in provincial Pennsylvania is especially interesting, not only as one aspect of the broad problem of the transference of English institutions to America, a phase of our development which for a time has achieved a somewhat dimmed significance in a nationalistic enthusiasm to find the conditioning influence of our development in that confusion and lawlessness of our own frontier, but also because of the influence of the Quakers in the development of our law. While the general pattern of the criminal law transferred from England to Pennsylvania did not differ from that of the other colonies, in that the law and the courts they evolved to administer the law, like the form of their currency, their methods of farming, the games they played, were part of their English cultural heritage, the Quakers did arrive in the new land with a new concept of the end of the criminal law, and proceeded immediately to give force to this concept by statutory enactment.¹ The result may be stated simply. At a time when the philosophy of Hobbes justified any punishment, however harsh, provided it effectively deterred the occurrence of a crime,² when commentators on

¹ Actually the Quakers voiced some of their views on punishment before leaving for America in the Laws agreed upon in England, wherein it was provided that all pleadings and process should be short and in English; that prisons should be workhouses and free; that felons unable to make satisfaction should become bond-men and work off the penalty; that certain offences should be published with double satisfaction; that estates of capital offenders should be forfeited, one part to go to the next of kin of the victim and one part to the next of kin of the criminal; and that certain offences of a religious and moral nature should be severely punished. *Charter to William Penn and Laws of the Province of Pennsylvania* (Harrisburg, 1879), 99-103. This work will hereafter be cited as *Charter and Laws*.

In the First Frame of Government (April, 1682) Penn had rather ominously stated one of the two ends of government to be "to terrify evil doers"; *Ibid.*, 92.

² Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civill* (A. R. Waller, ed., Cambridge, 1904), Ch. 28, p. 223-25. Writing in 1651, Hobbes stated that "it is of the nature of punishment to have for an end, the disposing of men to obey the law"; *Ibid.*, 225.

Locke, in 1690, suggested that the power of punishment was not arbitrary, but was to be used "only as far as calm reason and conscience dictate what is proportionate to the transgressor, which is so much as may serve for reparation and restraint"; John Locke, *Of Civil Government* (W. F. Carpenter, ed., London, 1924), bk. ii, par. 8, p. 120. Locke's association with the English Quakers makes not untenable the thesis that he was influenced by them in the development of this broader concept of the end of the criminal law.

contemporary English law, despite its severity, remarked that "it is so agreeable to reason, that even those who suffer by it cannot charge it with injustice,"³ and while her neighbor colonies were punishing sixteen or more offences with death,⁴ the Quakers administered Pennsylvania for forty years with a criminal code punishing with death but two offences, murder and treason, penalizing lesser offences in proportion to their gravity, and promising a procedure simple and understandable.

Though one may be tempted to agree with the distinguished American philosopher who found the Quaker religion "something impossible to overpraise,"⁵ the historian must be interested primarily not in religious experience or in mere belief, but in the force of the belief in a world of fact. The Quaker views with regard to punishment and penal reform were born of the time in which the religion had its beginning, and were developed and articulated into dogma as a result of the experiences of the early Quakers in the jails of England. There had been considerable agitation before and during the Commonwealth for reform in the penal system, particularly with regard to the proportion between punishment and the seriousness of the offence, but the Restoration, in 1660, put an end to any hope for immediate change.⁶ The Quakers, however, had from the first pointed out the connection between property and crime and had recognized the fact

³ William Hawkins, *A Treatise of the Pleas of the Crown* (London, 1724); see preface to the first edition.

⁴ In 1675, in Massachusetts, the following crimes were punished with death: idolatry, witchcraft, blasphemy, willful murder, poisoning, bestiality, sodomy, adultery, man stealing, invasion or rebellion, children cursing or smiting parents, rebellious sons, rape, the third offence of burglary, and firing a dwelling house. See *The General Laws and Liberties of the Massachusetts Colony in New England* (London, 1675), 12, 14, 15. Connecticut added incest to the foregoing list; *The General Laws and Liberties of Connecticut Colonie* (Cambridge, 1673).

According to the Duke of York's Laws, which were in force on the Delaware from 1676 to 1682, and which had been based on an examination of the New England codes, the following offences were punished with death: denial of the true God, murder, slaying with a sword one who has no weapon, killing by lying in wait, bestiality, sodomy, kidnapping, bearing false witness to take a life, invasion and surprise of towns and smiting father or mother; *Charter and Laws*, 14-15.

⁵ William James, *The Varieties of Religious Experience* (New York, 1902), 7. In the same mood he continues: "so far as our Christian sects today are evolving into liberality, they are simply reverting in essence to the position which Fox and the early Quakers long ago assumed."

that the law itself and the manner in which it was administered was responsible for much of the crime;⁷ their frequent experiences with "English justice," both in court and in jail, especially after the passage of the Conventicle Act in 1664, and in connection with their refusal to take oaths, had given them rather pronounced views on the severity of English law, the complexities of procedure, and the penal system; consequently, they continued with demands for reform.⁸

Although the Quakers in Pennsylvania, in making their laws, were obviously working on a new theory, at variance with that extant in England or the other colonies, the evidences of a theory, other than the proof of it in the facts we have already mentioned, are amazingly meagre. George Fox occasionally wrote to the judges protesting the death penalty for stealing, advising them that such penalties were "contrary to the law of God in the old time,"⁹ and proposed instead that thieves be required to restore a multiple value of the goods stolen, though he acknowledged the validity of the death penalty for murder. John Bellers, who held land in Pennsylvania and was a disciple of Fox, agreed with the latter on the matter of punishing thieves, but carried his general ideas still further and demanded the abolition of the death penalty, on the theory that society was at least

⁶ Although Stephen states that "the revolutions of the 17th century had been conducted with an almost superstitious respect for law" (Sir J. F. Stephen, *A History of the Criminal Law of England*, I. 469) in 1652 Cromwell appointed a commission to recommend changes in the law in response to earlier agitation. In this respect see the list of grievances alleged in Lilburne's Petition in 1647: "to end the administration of interrogatories by which accused persons might be forced to inculpate themselves—to order pleadings to be conducted in English—to enact that no life be taken without the testimony of two credible witnesses—to see that prisoners had a speedy trial"; S. R. Gardiner, *History of the Great Civil War* (London, 1891), III. 72-74.

⁷ For the best discussion of this aspect of Quaker activity, see Auguste Jorns, *The Quakers as Pioneers in Social Work* (New York, 1931), 162-97. This is a translation by T. K. Brown from the author's *Studien über die Sozialpolitik der Quäker*.

⁸ George Fox was incarcerated in practically every county gaol in England; see *George Fox, Journal or Historical Account of His Life, Travels, Sufferings, Christian Experience and Labor of Love in the Work of the Ministry* (Philadelphia, 1839), *passim*; for an interesting account of the way Quakers were persecuted, see *Christopher Story: A Brief Account of the Life, Sufferings, Labors and Travels* (London, 1726), 49-61. See also A. H. Mendenhall, *Some Social Aspects of the Society of Friends in the 17th and 18th Centuries* (Univ. of Chicago Master's Thesis, 1914).

⁹ George Fox, *Journal*, I. 70-75. The Old Testament authority was much in Fox's mind; see *An Instruction to Judges and Lawyers, that they may Act and Judge as did the Judges of Old*, etc. (London, 1660).

partially responsible for the acts of a criminal, and that under the proper treatment the worst criminals could be reformed.¹⁰ His conclusions, coming at the close of the seventeenth century, are amazingly advanced and foreshadow the whole penal reform movement generally accredited to Beccaria.¹¹

William Penn was necessarily influenced by the expressed views of such a leader as George Fox and such a pamphleteer as John Bellers. Penn had been a student of government from his youth, and for a time had been trained in the law at Lincoln's Inn. He was intimate with John Locke at Oxford, and Locke had later given him the benefit of his criticism of the plan of government Penn and his company drafted in London.¹² Any account of the trial of Mead and Penn, for violation of the Conventicle Act, reveals his very thorough knowledge of English forms, particularly bills of indictment.¹³ In short, the proprietor of Pennsylvania brought to the task of establishing a criminal code in the new colony the benefit of the advanced views of these leaders of Quaker thought as well as a full knowledge of contemporary English law and procedure, and the reforms he instituted

¹⁰ John Bellers, *Essays about the Poor, Manufacturers Trade, Plantations, and Morality*; reprinted in A. R. Fry, *John Bellers* (London, 1935), 53-80. In the essay entitled *Some Reasons against Putting Felons to Death*, Bellers objects especially to the failure of the law to distinguish in its punishment between theft and murder. In the same essay he stresses the hope of reformation, as he does in an undated essay addressed *To the Criminals in Prison*; *Ibid.*, 166-67. For brief estimates of Bellers' importance, see *Ibid.*, 23, and Jorns, *op. cit.*, 168-74. The latter states that Bellers typified the Quaker attitude toward the end of the 17th century.

¹¹ Bellers anticipated Beccaria by over half a century. Beccaria's *An Essay on Crime and Punishment* made its first appearance in 1764.

¹² Notes in Locke's handwriting are to be seen on the original copy of Penn's Frame of Government in H. S. P. For a discussion of Penn's relationship with Locke and Algernon Sidney, see Hampton L. Carson, "William Penn as a Law Giver," *PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY*, XXX, 1-29.

¹³ For the full report of this trial *vide* T. B. and T. J. Howell, *State Trials* (London, 1809-1826), VI, 951 ff. Though without the benefit of formal training, Fox likewise displayed the same thorough knowledge of criminal forms; see Fox, *Journal*, II, 45-48.

For further evidence of Penn's legal background, see his *The Excellent Privilege of Liberty and Property being the birthright of the Free Born Subjects of England*. This is accounted the first legal treatise published in America; E. R. James, *A List of Legal Treatises Printed in the British Colonies and the American States before 1801* (Cambridge, 1934), 161. Penn is also accredited with having written anonymously the pamphlet entitled *The Great and Popular Objection to the Repeal of the Penal Laws, etc.*, which had to do solely with the taking of oaths and the Test Act.

were not a matter of whim, but were grounded in a clear conception of the wrongs and potential abuses he desired to right.

Along with the fact that the Quakers arrived in America with rather definitely formed ideas as to the nature of the criminal reforms they intended to inaugurate, it ought to be noted that although these reforms were undertaken under frontier conditions presenting administrative difficulties, they were undertaken among a people unusually homogeneous. Although there was a scattering of Swedes and Dutch, English Quakers had been coming into the land on the Delaware for a number of years before Penn's arrival. The exodus was greatly stimulated by the grant of 1681, and through the first quarter of the eighteenth century the colony was predominately English and Quaker.¹⁴

Because of their experience in England the early Quakers distrusted all courts, civil as well as criminal. In civil matters it seemed axiomatic to them that men in a godly frame of mind ought to be able to reconcile their differences. Consequently, arbitrators were appointed from within the meeting, and members of the meeting were expected to abide by the decision of the arbitrators.¹⁵ A similar paternalism was exercised by the meeting in matters of a minor criminal nature.¹⁶ These regulations imposed by the meeting depended for their effectiveness upon the threatened loss of salvation and the social consequences, in a Quaker community, of being disowned by the

¹⁴ Over 1400 Quakers came over in the years 1677-1681, and the emigration to the colonies after the grant to Penn was so great as to arouse much misgiving in England. The English Quakers were unquestionably the dominant group until 1725. See W. C. Braithwaite, *The Second Period of Quakerism* (London, 1919), 408-409; W. F. Dunaway, "English Settlers in Colonial Pennsylvania," *PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY*, LII. 317-41. For an analysis of all the immigration into Pennsylvania see Dunaway, *A History of Pennsylvania* (New York, 1935), 73-98.

¹⁵ *Charter and Laws*, 128. However, provision for arbitration was not new to the settlers on the Delaware; *Ibid.*, 3, 60. These earlier provisions may well reflect the influence of the Long Island Quakers.

¹⁶ MS. Minutes of Friends Philadelphia Yearly Meeting (Fourth Street Meeting House, Philadelphia), I. 11, sale of rum to Indians forbidden (Aug. 5, 1685); marriage of father and son to two sisters discountenanced; remarriage after first wife had been absent for eight years forbidden (Sept. 8, 1687); remarriage ten months after first wife's decease advised against as being "too hasty and indecent" (Sept. 18, 1700). At another time when it was complained that two Friends had circulated the scandalous report that one of the young wives of the Meeting had "acted as though she were drunk," a committee was appointed and the matter settled without recourse to any court; E. Mischener, *Retrospect of Early Quakerism* (Philadelphia, 1860), 184.

meeting. For the broad application of Quaker theory, as the Quakers thought it might be worked in society in general, we must turn to the laws they passed.

The only limitation imposed upon Penn with regard to any laws that might be passed, according to the terms of the charter granted by Charles II in 1681, was that they "bee consonant to reason and not repugnant or contrarie to the lawes of England."¹⁷ To insure their being so, all laws had to be submitted to the Lords of Trade and became permanently effective only on being approved within five years, or being permitted to become a law by lapse.¹⁸ The Lords of Trade did not interpret this limitation to mean that punishments under the law were to be exactly as they had been in England, and the liberality of their view plus the confusion in the submission of the laws to the authorities in England during the first twenty years of the province's history, resulted in the Quakers having an almost free hand in the establishment of their criminal code. The outlines of that code were established within one year of Penn's arrival in the colony.¹⁹ The laws passed at that time fulfilled the promise of the *Laws Agreed Upon in England*; they were mild and they were simply and directly expressed. No complicated English statutes were grafted in full onto the code, as was later to be the case. Murder alone was made a capital offence; however, since no provision was made for the punishment of treason, the English punishment of death persisted. The serious offences of rape, sodomy, bigamy, and incest, all capital crimes in England,²⁰ were for the first offence punished with combinations of forfeiture, whipping, and imprisonment, and for a second offence punished with imprisonment for life. The loss of property by theft, or

¹⁷ *Charter and Laws*, 84.

¹⁸ *Ibid.*, 84, 85.

¹⁹ Most of these laws were passed at the first session of the Provincial Assembly held at Chester, December 7, 1682. Of sixty-one laws passed at that time, twenty-six dealt with criminal offences of varying seriousness. See *Charter and Laws*, 107-123. In the following March, of the eighty-one laws passed only eight were criminal statutes, indicating that for the time being the colonists felt their criminal code was reasonably complete. *Ibid.*, 127-55. Until the reconsideration of the laws under Fletcher there were but a few penal statutes, mostly to punish varied forms of stealing.

²⁰ For rape, see W. Hawkins, *op. cit.*, 108; for sodomy, *Ibid.*, 6; for bigamy, *Ibid.*, 110. Incest was made capital by statute in 1650, but after the Restoration, according to Blackstone, was "left to the feeble coercion of the spiritual court"; *Commentaries on the Laws of England* (G. Sharswood, ed., Philadelphia, 1896), II. 372.

arson,²¹ or as a result of deceit, such as forgery or counterfeiting,²² was punished by requiring the culprit to pay some multiple of the value of the property lost. Offences that were or might lead to a breach of the peace were discouraged with the threat of a fine or whipping. A number of moral offences such as drunkenness, swearing, lying, and playing certain games were punished with fines. Prisons were to be workhouses.

This relatively mild code, with some alterations in the direction of harshness under Fletcher, continued until the end of the seventeenth century. One of the reasons given for relieving Penn of control of his colony in 1692 had been that "the publick peace and administration of justice is broken and violated."²³ Fletcher had objected that many of the colonial laws were repugnant to the laws of England.²⁴ Consequently as soon as was convenient after the province had been returned to him in 1696, Penn set about reconsidering the entire criminal code of the colony, lest his lands be taken from him again. The preamble of an Act passed in 1698, just before the general revision of the laws was undertaken, suggests not only what was to be the trend of the revision, but that perhaps the social draftsmen of the "Holy Experiment" had veered too much in the direction of clemency. In that preamble it is stated that, "the several punishments mentioned in the said laws being so easie that they have not answered

²¹ Arson was a capital offence in England. See Hawkins, *op. cit.*, 105. We have already noted that it was capital in both Massachusetts and Connecticut.

²² Counterfeiting gold or silver coins was punishable in England as high treason, with death; Hawkins, *op. cit.*, 46.

²³ Commission to Benjamin Fletcher to be governor of Pennsylvania; *Charter and Laws*, 542. However, the Assembly remonstrated that this was not so; *Pa. Col. Recs.*, I. 414.

²⁴ Fletcher had stated: "I doe affirm that many and most of your laws are not consonant to the laws of England, nor have they been duly executed"; *Pa. Col. Recs.*, I. 415. However, he objected specifically only to the laws against sodomy, rape, arson, stealing hogs and cattle, and manslaughter. In reconsidering the laws, the Assembly, therefore, left these offences unprovided for, with the consequence that in this respect the unamended English law came into force, and the penal code was left harsher. For the debate between Fletcher and the Assembly see *Votes and Proceedings* (Philadelphia, 1754), I. pt. 1, 69-84. For the Assembly's petition to Fletcher, see *Charter and Laws*, 188-91. For the reduced set of laws, *Ibid.*, 192-220.

Fletcher realized that the colonists had changed many of the laws (*Pa. Col. Recs.*, I. 415), consequently his limited objection, coupled with the fact that the Privy Council and Attorney General apparently examined the laws and registered no disapproval, is quite significant as a reflection of the English attitude toward amelioration of the English penal code. This aspect of the English viewpoint has never been developed.

the good end proposed in making thereof, for that many dissolute persons, notwithstanding the said laws, have committed divers thefts and robberies within this government."²⁵ The legislators apparently felt that the punishments for other offences were also too "easie" to be effective, and, in the code drafted in 1700, the Quakers temporarily abandoned their early humane theories with regard to punishment.²⁶ Rape was punished with thirty-nine lashes and seven years imprisonment and the forfeiture of the entire estate of a single man and one third the estate of a married man; a second offence was punished with castration and branding with the letter R on the forehead.²⁷ Sodomy was punished with the cruel punishment of imprisonment for life with a whipping administered every three months if the offender were single, with castration if he were married.²⁸ A third offence of adultery was punished not as before by requiring the offender to wear the letter A sewn on a garment, but by having it branded on the forehead.²⁹ Anyone unable to pay damages resulting from arson was to "be sold to the behoof of the injured party."³⁰ A first offence of stealing at night merited branding, a second offence imprisonment for life.³¹ Punishments for lesser offences were generally increased.³² There was little of redemption in these punishments and the records are silent as to any moving cause for these departures. In addition to the one we have already suggested, an over zealousness on Penn's part to adopt a code acceptable in England, a possible interpretation is

²⁵ *Charter and Laws*, 274.

²⁶ Penn gave the Quaker dominated Assembly *carte blanche* "to see what laws are fitt to be left out and what to be made"; *Pa. Col. Recs.*, I. 596. For the discussion of these laws between Penn and the Assembly see *Ibid.*, I. 624 and *Votes and Proceedings*, I. pt. 1, 124-25.

²⁷ *Statutes at Large of Pennsylvania* (Harrisburg, 1896), II. 7. These volumes will hereafter be cited as *Statutes at Large*; Volume I, intended to cover the period from the arrival of Penn to 1700, has never been published.

²⁸ *Ibid.*, II. 8. While rape and sodomy were most abhorrent crimes to the Quakers, it is difficult to understand why they desired to punish these offences with castration, a punishment foreign to English law. The inspiration for this penal innovation was probably the Southern slave statutes by which these same offences were not uncommonly punished with castration, and which statutes were extended to Pennsylvania at this time. See *infra*, footnote 47.

²⁹ *Ibid.*, II. 5.

³⁰ *Ibid.*, II. 12.

³¹ *Ibid.*, II. 11.

³² *E.g.*, the fine for duelling was increased from £5 to £20, *Ibid.*, II. 51; the fine for sedition was raised from £1 to £5, *Ibid.*, II. 14.

that the increased exportation of criminals to the colony, along with the great number of indentured servants, who were always a social problem, may have made necessary a harsher code. However, the more extreme punishments were permitted to continue for but a few years, since in 1705 we had the rather unusual spectacle of the English Privy Council disallowing laws of the Quaker province because of their unusual cruelty—the laws involving castration because it was “a punishment never inflicted by any law in any of Her Majesty’s dominions,” and the laws providing enslavement because “selling a man is not a punishment allowed by the laws of England.”⁸³ The objectionable laws were amended and the code as then established, harsher than the original Quaker code but milder than the law in either England or the neighboring colonies, continued until 1718.

The most important single act in the criminal legislation of colonial Pennsylvania was the law of 1718 entitled, “An act for the advancement of justice and the more certain administration thereof.”⁸⁴ This law was not passed because of any overwhelming dissatisfaction with the substantive law as it then existed, but only incidental to an effort to settle the constitutional question of the validity, under English law, of a trial by jurors in criminal cases who had been affirmed but not sworn.⁸⁵ The colonists were again prompted by the very practical thought that an Act legalizing affirmation, but also “adopting such statutes of England to the province as may be proper to our present circumstances, where our laws are deficient,”⁸⁶ would be much more favorably considered by the Lords of Trade. After obliquely disapproving the changes in the common law made by Penn, the preamble of the Act assumes the accent of a modern political document to urge the necessity of importing the common law in all its

⁸³ Report of the Attorney General to the Lords Commissioners for Trade and Plantations; *Statutes at Large*, II. 484-97. The law against stealing was objected to as being too severe because it included fraudulent taking, not a felony in England; *Ibid.*, II. 491. Other objections were that the laws were too loosely drawn or too broad or indefinite. See also the speech of Governor Evans to the Assembly, Oct. 1705; *Notes and Proceedings*, I. pt. 1, 50.

⁸⁴ This Act will be found in *Statutes at Large*, III. 199-214.

⁸⁵ Governor Keith had attended the trial of two notorious brigands at Chester who boasted they could not be legally convicted because Quakers served on the jury. Keith made a speech justifying affirmation which later came to the attention of the Assembly; April 15, 1718, Penn MSS., Assembly and Provincial Council, 30, H. S. P.

⁸⁶ *Notes and Proceedings*, II. 233-34.

rigor as "the birthright of English subjects." The Act, citing English statute for authority, then established twelve felonies punishable by death and made more stringent the punishment of larceny. An ameliorating force was injected into the statute, however, by a provision for the pleading of benefit of clergy in a number of capital felonies, and the provincial code was continued less harsh than that of England by the provision that larceny was to be punished by flogging, imprisonment or branding, and not with death. There were no significant changes in the criminal code after the passage of this Act. The changes that were made, with one exception, were in the direction of severity. The recognition of the offence of petty larceny saved many small offenders from the harshness of the existing law,³⁷ but the increased counterfeiting that followed on the issuance of large quantities of paper money was punished by hanging without benefit of clergy,³⁸ and the legislators attempted with like harshness to deter the violence characteristic of the years between the passage of the Stamp Act and the Revolution, by removing the benefit of clergy from arson,³⁹ and by making the burning of the State House, schools

³⁷ *Statutes at Large*, III. 246. The Act recognized petty larceny and provided for the summary trial before two magistrates of the larceny of goods under five shillings value, with a maximum punishment of fifteen lashes, twenty shillings fine and "if able," restitution to the owner. However, the Act was passed because many petty thieves had been unable to support themselves in prison pending trial, and the resulting mitigation was incidental to this chief concern, the avoidance of a public charge.

For some reason the Act was not considered by the Board of Trade until 1740, long after it had become a law by lapse. At that time Mr. Fane, solicitor for the Board, approved because the discretionary power of the magistrates was reasonably restrained and because the person charged could, on giving security, have a trial at Quarter Sessions. Report of Mr. Fane to the Lords Commissioners of Trade and Plantations, Feb. 5, 1739/40, *Statutes at Large*, III. 496.

³⁸ *Statutes at Large*, VIII. 339. This Act was passed in 1773 and punished the counterfeiting of any paper currency with death. Early currency Acts had threatened counterfeitters of the issue with having both ears cut off on the pillory, receiving thirty-nine lashes, forfeiting £100 and paying double damages to any party injured, and, if unable to pay, being sold for seven years or until satisfaction was made; *Statutes at Large*, III. 331, 406. Two similar Acts in 1757 punished such counterfeiting with death without benefit of clergy, but this Act was general; *Ibid.*, V. 294, 303. As the offence became more objectionable severe laws were the only deterrents whose efficacy the legislators considered.

³⁹ *Statutes at Large*, VII. 90. The colonists were here following English precedent. Arson, because it was doubly harmful, killing people as well as destroying property, was considered at one time akin to treason. It had been excluded from clergy, by inference, by the English statute 4 and 5 P. and M. c. 4 and expressly by 9 Geo. I c. 22.

or libraries,⁴⁰ refusing to remove from Indian lands,⁴¹ going around in disguise,⁴² and riotous assembly⁴³ all capital offences without benefit of clergy. This inclination toward increased severity is true of practically all the punishments set for offences after the first quarter of the eighteenth century.⁴⁴

With the passage of the criminal Act of 1718 even a partial critic must conclude that the Quaker ideal had dimmed, and that the "Holy Experiment," insofar as it concerned itself with penal reform, had failed. The only reason given for making the laws more harsh was that the milder laws had not successfully deterred crime. This would not have been sufficient for Fox or Bellers. A part of their ideal had been the redemption of criminals. But in the province a very real situation was being faced; felons were being transported to the

⁴⁰ *Statutes at Large*, VIII. 183. The earlier laws had punished arson with death only where dwelling houses were involved. The same Act attempted to discourage the malicious and rather childish badgering that was so typical of the pre-revolution years by threatening persons who broke off door-knockers or lead or copper spouts with a fine of £25 and twenty-one lashes. Breaking down signs before houses or places of business was punished with a fine of £10 and fifteen lashes.

⁴¹ *Statutes at Large*, VII. 152. Though passed in 1768 this Act was intended to give teeth to the Proclamation of 1763.

⁴² *Ibid.*, VII. 350-53. This Act was aimed particularly at a group of brigands called "Black Boys" because they blackened their faces for purposes of disguise and roved the frontier robbing, stealing and rescuing felons from jail.

⁴³ *Ibid.*, VI. 325-28. The Act was temporary, continuing for only one year (1764), but was repeated in 1771; *Ibid.*, VIII. 5, 120, and 1774; *Ibid.*, VIII. 366. If twelve or more people assembled and refused to disband on being required to by a justice or sheriff, they were to be adjudged guilty of a felony and punished with death without benefit of clergy.

⁴⁴ Running a lottery or showing a play or even building a stage was punished with the exorbitant fine of £500 (*Statutes at Large*, V. 445-48). Here their new faith in the deterring force of harsh punishments reduced them to absurdity. However the Act was disallowed in 1760 (*Ibid.*, V. 720-22).

The fine for selling rum to the Indians was increased from £5 to £20 (*Ibid.*, III. 310) and hunting on land not purchased from the Indians or trading with the Indians through other than authorized commissioners was punished with a £50 fine or one year's imprisonment (*Ibid.*, V. 320; VI. 46-50, 283). Attempting settlement on land not purchased from the Indians was punished with a fine of £500 (*Ibid.*, VII. 152). Any minister or magistrate marrying a Negro was fined £100, and a white cohabiting with a Negro under pretense of marriage, £30 (*Ibid.*, IV. 59-64). Peddlers selling without a license were penalized £50 in Philadelphia, £10 elsewhere (*Ibid.*, IV. 141). Jockeys and horse dealers not properly licensed were fined £50 (*Ibid.*, V. 65) and people knowingly bringing infected persons into the province were fined £100 (*Ibid.*, VIII. 369).

These were mostly serious offences that ought to have been discouraged, but observe the single philosophy behind the legislation: if the threatened blow is severe enough, man will not break the law. They failed to realize that they were fast forgetting how to measure their blows.

colony; the poor of England, the social misfits, were coming over in increasing numbers as indentured servants; racially different groups were making their presence felt, the Welsh, the Germans, the Scots-Irish; unsettled frontier conditions, while not affecting seriously the type of legal institutions ultimately established, did breed a disregard for laws which those conditions made somewhat ineffective. In their dilemma the colonists took inspiration from the only law they knew, that of England. Forty years after, they probably thought of it as the "good old law of England." The philosophy of that law continued to be the dominant philosophy of the legislators of the colony until after the Revolution. In the development of a criminal code in Pennsylvania every change made after the establishment of the first code by the Quaker founders was made in the direction of harshness, and after 1718 a conscious effort was made to make the colonial code as nearly like that of England as possible, and the Quaker ideal may be said to have been abandoned.⁴⁵

The number of persons whose lives were taken in Pennsylvania for violations of the criminal code and the offences for which they were actually punished cannot be accurately stated because the records are incomplete.⁴⁶ The offences punishable by death may, however, be simply stated. Until 1718, provided the offenders were white,⁴⁷ only premeditated murder and treason were punished with death, and, though there were no cases to test the exact definition of treason, by reference it did not include counterfeiting because it was provided for otherwise. By the Act of 1718 twelve offences were made punishable

⁴⁵ An examination of the laws makes this conclusion inevitable, although the Quakers did not lose their control of legislation until 1756; Dunaway, *op. cit.*, 125-27.

⁴⁶ All capital cases were tried before the Provincial Court, or, as it was later termed, the Supreme Court, or before justices from those courts on regular circuit or on special commissions of Oyer and Terminer. None of the records for these courts for the 17th century have survived.

For the 18th century the records are only fragmentary. A Docket of the Supreme Court in the office of the Prothonotary in Philadelphia includes scattered minutes for the period 1720-1730. A Superior Court Appearance Docket covering the years 1740-1779, and a Supreme Court Miscellaneous Docket covering the years 1743-1749, also in the Prothonotary's office, consist of cases which properly should have been tried in quarter sessions, but over which the Supreme Court, for one reason or another, assumed jurisdiction.

There are also two manuscript minutes of courts of Oyer and Terminer buried in the quarter sessions minutes; in the Minutes of the Court at Sussex, H. S. P., there are the minutes for a Special Court of Oyer and Terminer for Nov. 1705; and a manuscript docket covering Philadelphia, Bucks, and Chester counties for Nov. 1730, is in Provincial Papers, IV. 30, State Archives, Harrisburg.

by death,⁴⁸ counterfeiting being then conceived to be high treason as in England, and in the years between then and the Revolution six more offences were added.⁴⁹ Actually the only offences for which the death penalty was imposed were murder,⁵⁰ rape,⁵¹ arson,⁵² burglary,⁵³ robbing,⁵⁴ horse-stealing,⁵⁵ counterfeiting,⁵⁶ and one execution for "divers horrid complicated crimes."⁵⁷ The punishment in all these cases was hanging, save in one case of husband-murder when the wife was burned to death.⁵⁸

By far the greater number of these capital offences occurred during the last third of the near-century we have under discussion, and that is as should have been expected. During the early period most of the population were of a very pious religious sect whose only offences in England had been a stubborn insistence on holding religious meetings and refusing to take oaths or remove their hats in the presence of a temporal judge. Though we can establish but a single capital punishment before 1715,⁵⁹ felonies punishable with death appear in the records a number of times and, if we are to judge by their tone, there is no reason to suppose that the first colonists were at all reluctant to impose the death sentence for murder.⁶⁰ But not until the middle of the eighteenth century did the increased population, increased prosperity, increased urbanization and increased excitement, attendant

⁴⁹ An Act in 1701 (*Statutes at Large*, II. 77-79) placed the trial of offences committed by Negroes in the hands of two specially commissioned justices of the peace before a jury of six freeholders. Murder, buggery, burglary, and rape of a white woman were made capital if committed by a Negro; attempted rape was punished with castration; and stealing, carrying weapons, and gathering together, with whipping. The punishment for attempted rape was subsequently changed to whipping, branding, and banishment (*Ibid.*, II. 235). None of the records of these special courts have survived, but there is no reason to believe that these punishments were not enforced. Before 1701 Negroes were in theory to be treated before the law just as whites, but their punishment for the most part seems to have been left to the masters, though there were some prosecutions of Negroes before the quarter sessions. See Minutes of Bucks County Court (at Doylestown, hereafter referred to as Bucks Min.) for Oct. 1688, Mar. 1688/89, Sept. 1703; and Minutes of the Chester County Court (West Chester, hereafter referred to as Chester Min.) for Dec. 1698.

⁴⁸ High treason, including offences against the king's government and counterfeiting, murder, sodomy, rape, robbery near a highway by putting in fear, woman killing her bastard child, killing by stabbing, premeditated mayhem, witchcraft, burglary, arson (*Statutes at Large*, III. 199-214).

⁴⁹ Counterfeiting gold or silver coins, counterfeiting paper money, burning State House, schools or libraries, refusing to remove from Indian lands, going armed in disguise, riotous assembly.

first on the war with France and then on differences between the colony and England, create a situation that made for increased crime.

Although the courts showed no reluctance to convict persons, either male or female, of offences for which the penalty was death, there were two mitigating forces present and functioning in the colony. The first and most important was the governor, who, by the charter, was granted power to pardon all crimes save murder and treason.⁶¹ The governor exercised this power through his council and invariably acted upon the recommendations of the judges who tried the culprits. In the same way where appeals were taken to England or colonial officials desired royal instruction the governor might grant a reprieve until the royal will were known. Of one hundred and forty-one recorded convictions in capital cases before the Revolution, forty-one were pardoned and twenty-six reprieved. Many of the pardons, especially in the early years of the harsher period, were granted on condition

⁶⁰ *Pa. Col. Recs.*, III. 45 (June, 1718), 429-30 (May, 1732); V. 612 (May, 1753); VII. 558 (June, 1757); VIII. 337 (May, 1759); IX. 235 (Dec., 1764), 282 (Sept., 1765), 384 (April, 1767), 387 (May, 1767), 402 (Dec., 1767), 545 (Sept., 1768), 549 (Oct., 1768), 601 (June, 1769), 631 (Dec., 1769), 678 (June, 1770), 745 (July, 1772); X. 65 (Dec., 1772), 110 (Dec., 1773), 129 (Dec., 1773), 172 (April, 1774); Supreme Court Docket, 77 (June, 1722); Provincial Papers, IV. 30 (Nov., 1730); *Pennsylvania Gazette*, Sept. 9-23, 1731.

In one of these cases, although the judges and the attorney general advised that the facts amounted only to manslaughter, the jury brought in a verdict of willful murder. The record explains: "It appeared a sudden heat and falling out between him and his wife, and before he could cool or the heat or passion abate, he gave her a kick or two which bruised her, and broke some inward blood vessel, so that she soon expired. It appeared they were in perfect love and harmony an hour before this falling out" (*Pa. Col. Recs.*, VII. 558).

⁶¹ *Ibid.*, X. 43 (April, 1772).

⁶² Supreme Court Docket, 77, Chester (June, 1722). A boy had burned his master's house and let the latter's children burn to death. For an account of the hanging, see *American Weekly Mercury*, Aug. 16-23, 1722.

⁶³ *Pa. Col. Recs.*, IV. 47 (April, 1736); V. 155, 158 (Nov., 1747), 506 (Feb., 1750), 566 (April, 1752); VII. 559 (June, 1757); VIII. 335, 336 (May, 1759); IX. 5-6 (Nov., 1762), 173 (April, 1764), 333 (Oct., 1766), 398 (Oct., 1767), 513 (May, 1765), 666 (April, 1770), 671 (May, 1770), 698, 734 (June, 1770); X. 50 (June, 1772), 129 (Dec., 1773), 172 (April, 1774).

⁶⁴ *Ibid.*, IX. 334 (Oct., 1766); X. 50 (June, 1772).

⁶⁵ *Ibid.*, VII. 172 (June, 1756). Since many had been condemned under the law but none executed, the council advised the governor to order the execution, but "Mr. Chew discovered an error in the record of the conviction," so no order was issued at the time. Two others were ordered executed, then pardoned (*Ibid.*, IX. 384 (April, 1767), 698 (Nov., 1770)).

that the guilty party leave the province never more to return,⁶² or, if the culprit were a slave or bonded servant, that he be transported to some other than an English colony.⁶³ The governor and council, in the years when the law of 1718 was first being enforced, revealed an aversion to the imposition of the death penalty. Despite eight convictions for burglary during the first sixteen years of the law's existence, not until 1736 was a culprit ordered executed, the council in the mean time finding extenuating circumstances in the youth of the prisoner, in a recommendation from the judges, or in the prisoner's being great with child. However, no reluctance to hanging prisoners can be discerned after that date save for the offence of horse-stealing, for which the council pardoned all but one of the three ordered executed. The council also indicated an unwillingness to hang women; of the fifteen found guilty of capital offences, ten were pardoned or banished from the colony, and in a number of cases, where men and women were found guilty together, the men were

⁶² One was convicted for high treason under the Act of 1718 (*Ibid.*, III. 109-10; Supreme Court Docket, 77, Oct., 1720) and two under the subsequent counterfeiting statute (*Pa. Col. Recs.*, IX. 666, Apr., 1770; X. 172, April, 1774).

Counterfeiting was the most variously punished of all offences. For years there was no statutory punishment and the offence was punished almost at the whim of the judges (*Ibid.*, I. 86-88, where two offenders were fined £40 and £10 and a third given one hour in the stocks. They were guilty of having coined "Spanish bits and Boston money" and their defense was that "all their money was as good silver as any Spanish money.") As just noted, under the Act of 1718 and two subsequent statutes the offence was punished with death. At other times it was punished with a six months' imprisonment (Supreme Court Appearance Docket, II, April, 1752; *Ibid.*, V, April, 1769) to which was sometimes added an hour in the pillory and a fine (*Pa. Col. Recs.*, V. 119, Sept., 1747; York Min., Oct., 1770). Then, as has been observed, it was punished with thirty-nine lashes, having the ears cut off, and a fine.

⁶³ *Pa. Col. Recs.*, III. 193 (Oct., 1722).

⁶⁴ *Pennsylvania Gazette*, Sept. 9-23, 1731. A man and woman were ordered executed for the murder of the woman's husband. At the execution, "the man seemed penitent, but the woman appeared hardened. It was designed to strangle her dead before the fire should touch her, but its first breaking out was in a stream which pointed directly upon the rope that went around her neck, and burnt it off instantly, so that she fell alive into the flames and was seen to struggle." This is the only record of a burning in Pennsylvania.

This offence was petit treason according to the common law and was punished, in the case of a woman, with being drawn and burned; Hawkins, *op. cit.*, I. 87-88; Blackstone, *op. cit.*, II. 469-70.

⁶⁵ *Pa. Col. Recs.*, I. 252-53 (Mar., 1688/89). A reprieve had been granted pending Penn's consideration of the matter. He was in England at the time, but replied that "he was pleased to direct that ye murderous womans sentence should proceed, ye case being notorious and barbarous," and the council so ordered.

executed and the women reprieved or conditionally pardoned.⁶⁴ However, where the offence was vicious and the prisoner showed no signs of repentance the council recommended the issuance of an order of execution.⁶⁵

A second mitigating force was the right to benefit of clergy in a few offences. This hangover of medieval privilege was first established in the colony by the Act of 1718.⁶⁶ Originally designed in England to save clerics from being punished by the temporal courts, it was soon seized upon as a device for relieving the common law of some of its rigor, and the early clerical test of requiring the one who pleaded his clergy to read a verse from the Bible soon degenerated into the recitation of a so-called "neck verse" from a Bible, advertently opened at the proper place. The culprit was then branded and imprisoned for a term instead of being hung. The absurdity of a double standard for the literate and the illiterate was apparent to the colonists and the Act of 1718 merely required that a person convicted of a felony of death, for which the benefit of clergy had not been denied, plead the benefit of the statute, whereupon he was branded upon the brawn of the left thumb, with an M in case of murder and with a T for all other felonies, and then incarcerated for a period of not less than six months or more than two years. The statute, however, could be

⁶⁴ *Ibid.*, II. 11, 18 (Feb., 1701/02), question raised as to how a Negro who had killed a young Englishman should be tried; Sussex Min., Nov., 1705, indictment for murder; *Pa. Col. Recs.*, June, 1710, in connection with the operation of the forfeiture statute we learn of the detention of a master for the murder of his apprentice; *Ibid.*, II. 612-15, 618-19 (June-Nov., 1716), uncertainty as to the effect of affirmation in Chester jail "for a murder."

⁶⁵ *Charter and Laws*, 83.

⁶⁶ *Pa. Col. Recs.*, III. 240 (Oct., 1724), 370 (Dec., 1730), 591 (Apr., 1735); IV. 329 (May, 1739); V. 75 (June, 1747).

⁶⁷ *Ibid.*, IV. 243 (Sept., 1737); VIII. 58 (Mar., 1758); X. 94 (Sept., 1773), 172 (Apr., 1774).

⁶⁸ *Ibid.*, IV. 47; IX. 666, 734.

⁶⁹ *Ibid.*, IX. 235, 282; X. 172.

⁷⁰ *Statutes at Large*, III. 206. The benefit of the statute was frequently pleaded, though as the century progressed it was denied in one or more offences until it lost its mitigating possibilities. Though first established by the Act of 1718, there is evidence that the colonists were conscious of their right to the benefit, before that date because in 1703 the provincial judges directed a question to the council asking by what method they should administer the benefit of clergy, in the absence of an ordinary, the ecclesiastical official who presided at the canonical trial in England; *Pa. Col. Recs.*, II. 87. For a discussion of benefit of clergy in England, see Blackstone, *op. cit.*, II. 365-73.

pleaded but once, and the branded thumb was an indelible record of those who had claimed its benefits.

/ A possible third mitigating influence were the jurors themselves.⁶⁷ Quite frequently in prosecutions for murder the juries returned verdicts of not guilty of the murder but guilty of the lesser offence of manslaughter⁶⁸ or felonious killing,⁶⁹ in which cases the defendants could plead the benefit of the statute of 1718. The juries also frequently voided the forfeiture clauses of the statutes by finding that the defendant "hath no goods or chattels, at the time of the felony or ever afterwards."⁷⁰ Pardon likewise thwarted the operation of these forfeiture statutes.⁷¹

Life imprisonment, although established in the colony as punishment for many of the early felonies that were felonies of death in England, was never a very practical punishment and was rarely resorted to.⁷² During the early period all the manpower available was needed in settling the colony, and what jails they had were inadequate, either from the standpoint of permanence or habitability, for life imprisonment. Jail breaks were easily engineered and were constantly

⁶⁷ After the jury had found a party guilty the court might mitigate the punishment because the defendant was a woman, or because of extenuating circumstances in the case itself. The laws permitted the courts considerable latitude and where they did not the courts took it. Prisoners who pleaded guilty and submitted were also generally treated more leniently.

⁶⁸ Supreme Court Docket, 85 (April, 1728); Provincial Papers, IV. 30, Chester (Nov., 1730). In one case the jury simply found the facts and let the court decide whether it was murder, manslaughter, or death by misadventure; Supreme Court Docket, 90 (Sept., 1728).

⁶⁹ *Ibid.*, 79 (Feb., 1724/25).

⁷⁰ *Ibid.*, 79, 85. However, forfeitures were not unknown; see *Records of the Courts of Chester County* (Philadelphia, 1910), 202 (June, 1690); this work will hereafter be referred to as *Chester Records*;—incest between father and daughter, punished with forfeiture of half the father's estate and one year's imprisonment; *Pa. Col. Recs.*, in connection with murder statutes; Provincial Papers, IV. 30 (Nov., 1730), for uttering false coin, "imprisoned for life and to lose all his goods and the profit of his lands during his life."

⁷¹ Supreme Court Docket, 81, Philadelphia (Oct., 1726), for "killing casually and by misfortune," a forfeiture of defendant's goods ordered, but released on security "until he had purchased his pardon of ye governour"; *Ibid.*, 82, Chester (May, 1727), for "shooting by misfortune," his goods and chattels ordered forfeited to the king, but he produced a pardon from the governor.

⁷² But see Provincial Papers, IV. 30 (Nov., 1730), life imprisonment for passing false coin; and Supreme Court Docket, 77 (Oct., 1720), where for the same offence the culprit received a life term and a fine of £500.

occurring.⁷³ A recognition of the futility of this form of punishment may well have seriously induced the colonists in 1718 to resort to capital punishment. These same reasons made imprisonment for a period less than life impractical, so there were relatively few short term imprisonments in Pennsylvania.⁷⁴ The jails were used mostly to hold for trial offenders who could not obtain, or were refused, bail. The rigors of a jail sentence, however, are pointedly indicated in the punishment for adultery. Offenders were given a choice of serving one year in jail or paying a fine of £50, yet in every case save one,⁷⁵ and there were many such prosecutions, the fine was paid though £50 was a very considerable sum of money.

/ Banishment was a more common serious punishment.⁷⁶ In effect, however, it was not nearly so severe as would have been a like sentence in England; while culprits so sentenced lingered within the province at pain of death, there was always the land to the west open to them, in which case they were consigned to a fate no more hazardous than that faced by innocent, law-abiding pioneers, who voluntarily sought

⁷³ Notice of jail breaks and rewards for escaped felons appear frequently in the records. See *Pennsylvania Gazette*, Sept. 23, 1731; Feb. 29, 1731/32; July 24, 1732; *Pa. Col. Recs.*, X. 88, 99, 257.

⁷⁴ But see *Chester Records*, 202 (June, 1690), one year for incest; *Pa. Col. Recs.*, II. 108 (Oct., 1703), three months for forgery remitted; *Chester Records*, 157 (June, 1689), twelve months hard labor for adultery; *Ibid.*, 56 (June, 1685), fourteen days for abusing a magistrate; Bucks Min., June, 1687, fined fifteen gilder and fifteen days' imprisonment for swearing three oaths; Philadelphia Min., Dec., 1770. (These records are in the office of the clerk of the Quarter Sessions at City Hall, Philadelphia); *Ibid.*, Mar., 1770; *Ibid.*, Mar., 1771, commitments of from one to six months for stealing; Supreme Court Appearance Docket, II, April, 1752; *Ibid.*, V. April, 1769; *Pa. Col. Recs.*, V. 119 (Sept., 1747), six months in jail for counterfeiting; York Min., July, 1765 (these records are in the court house at York); Bucks Min., Sept., 1751, one month and pillory for passing counterfeit bills; *Ibid.*, March, 1753, fine and three months imprisonment for keeping a disorderly house; Supreme Court Miscellaneous Docket, April, Sept., 1749, a woman imprisoned three months for receiving stolen goods.

A list of prisoners in the Philadelphia jail for July, 1751, shows that twenty-four were incarcerated for murder, theft, horse stealing, picking pockets, counterfeiting, cheating, assault, bigamy, and abuse, while six were confined for fees and one for good behavior; see Miscellaneous Court Papers of Philadelphia, H. S. P., V. 38.

⁷⁵ Chester Min., Nov., 1741.

⁷⁶ *Chester Records*, 208 (June, 1690). Banishment became the punishment for horse stealing in 1698 upon the second offence, when the horse was not returned; *Charter and Laws*, 275. See *Pa. Col. Recs.*, V. 75 (June, 1747) where the defendant was given twenty-one lashes and fined £30 for horse stealing, but was forgiven the fine and ordered to depart from the province.

a similar life. As we have noted, the governors frequently imposed banishment as the price of a pardon.

We have already noted a number of offences which in the intention of the legislature were to be punished with some form of mutilation. Although for four years there were laws on the statute books punishing sodomy and a second offence of rape with castration, there is no record of such a barbarous punishment ever having been exacted. Branding, however, was not uncommon.⁷⁷ When such branding was in mitigation of a death sentence it probably lost some of its cruelty even to the culprit; however, though the anguish of this punishment might sometimes have been lessened by burning the flesh lightly, there is no evidence that in Pennsylvania, as was the case in some Southern colonies, that the punishment was ever made nominal by branding with a cold iron. A mutilation that likewise left the offender marked for life, but that fortunately was not common, was cutting off the ears.⁷⁸ This was done while the prisoner was in the pillory, presumably to dispense with the necessity of holding him.

These cruel punishments, most of which had their inspiration in the English code, were not the common punishments in Pennsylvania. The favorite method of punishing was by whipping. It was the method best adapted to frontier conditions; it was expeditious, following immediately on the sentence; it was extremely painful and was therefore a punishment to be avoided;⁷⁹ and the fact that floggings were public gave this penalty a further deterrent quality. However, it had the virtue of releasing the culprit for work to be done within a reasonable time, and it was especially attractive to the propertied magistrate, because, unlike imprisonment, it did not burden the taxpayers with the costs of maintenance. The lashes were always ordered to be

⁷⁷ As already noted, all who successfully pleaded benefit of clergy were branded. Branding had also been made part of the punishment for a second offence of rape, a third offence of adultery, and a first offence of stealing at night, but there are no records of the punishment having been inflicted for such offences.

⁷⁸ York Min., Oct., 1770, for raising a two shilling note to ten shillings and attempting to pass it, the offender was punished, in addition to having his ears cut off, with one hour in the pillory, thirty-nine lashes, and a fine of £100. This was also the penalty for entering a building at night to commit a felony, but was never exacted; *Statutes at Large*, VIII. 183.

⁷⁹ Some notion of which the dread in which a whipping was held is to be gathered from a case in Philadelphia in 1743 in which a Negro, brought to the whipping post "took out his knife and cut his throat before the crowd, so that he died immediately"; Watson, *Annals of Philadelphia*, I. 309.

"on the bare back well laid on," and floggings generally took place at the public whipping post, immediately after the adjournment of court, though they might be delayed until the next market day. In Philadelphia the procedure was sometimes varied by ordering that the offender, chained to the tail of an ox cart which was driven through the streets of the city, be given a certain number of lashes at designated corners.⁸⁰ In one case a vagabond who had been convicted of "being an imposter" was ordered to be given ten lashes from the constable at Lancaster, then passed from constable to constable, receiving ten lashes in each township, until he reached the southern boundary of the colony.⁸¹ The number of lashes administered varied very much depending upon the nature of the offence. Punishment for stealing, which was the most frequently prosecuted offence in the colony, invariably included twenty-one lashes along with restoration of the goods, or their value to the owner, and the payment of a fine equal to the value of the goods to the governor. Second offenders received thirty-nine lashes,⁸² and third offenders from forty to fifty lashes.⁸³ A first offence of horse-stealing merited thirty-nine lashes.⁸⁴ Sometimes the floggings were spaced and the culprits given twenty-one

⁸⁰ Philadelphia Min., June, 1773, judgment that the prisoner "be whipped at the cart tail one square of the city of Philadelphia with five lashes on his bare back at each corner"; Philadelphia Miscellaneous Court Papers, H. S. P., V. 24 (Oct., 1736), "21 lashes at the cross corners of High, Chesnut and Walnut"; *Ibid.*, 12 (Aug., 1730), "be whipped 39 lashes at six corners of the city." See also *Chester Records*, 203 (June, 1690), 39 lashes "at the carts tayl."

⁸¹ Lancaster Min., Aug., 1736.

⁸² Philadelphia Min., Dec., 1770; *Ibid.*, June, 1772; Philadelphia Miscellaneous Court Papers, H. S. P., IV. 14, 17 (Oct., 1770), with commitment to the county jail for from one to six months in some cases; Philadelphia Min., Dec., 1770; *Ibid.*, Mar., 1770; *Ibid.*, Mar., 1771, and a period in the pillory in others; Chester Min., Aug., 1767; Philadelphia Min., Dec., 1769; *Ibid.*, June, 1772; *Ibid.*, Dec., 1772.

⁸³ Philadelphia Min., June, 1771; *Ibid.*, Mar., 1772; *Ibid.*, Mar., 1773; Lancaster Min., May, 1736.

⁸⁴ Although late in our period culprits were hung for horse stealing, a serious offence in a frontier community, during the early years the punishment was much lighter. Lancaster Min., May, 1734, fined one shilling; Philadelphia Miscellaneous Court Papers, H. S. P., V, Nov., 1724; Oct., 1736; Dec., 1739; Bucks Min., March, 1733, ten lashes. In a number of cases it was punished as ordinary stealing with twenty-one lashes, restitution, and a fine; Chester Min., Aug., 1723; Lancaster Min., Aug., 1737; Philadelphia Miscellaneous Court Papers, II. Jan., 1738/39; Bucks Min., Dec., 1750; Cumberland Min., Jan., 1751/52 (these records are in the court house at Carlisle); York Min., July, 1758. In a number of cases a first offender received thirty-nine lashes; Chester Min., Nov., 1768; York Min., April, 1769; Cumberland Min., Jan., 1771; Philadelphia Min., Dec., 1769; Dec., 1770.

lashes on two days, a day apart.⁸⁵ While most assaults were punished with fines, assault with intent to ravish was discouraged with from fifteen to thirty-nine lashes.⁸⁶ In one case of sedition an offender with an apparent penchant for permutations and combinations, who had said, "God curse George, curse damn George, god damn King George," was promptly meted twenty-one lashes.⁸⁷ Perjury was punished with from fifteen to thirty lashes.⁸⁸ In the case of fornication and bastardy offenders were given a choice between receiving twenty-one lashes or paying a fine of £10.⁸⁹ Though this must have been somewhat of a Hobson's choice for the poor, the number who chose to pay the fine is mute evidence of the colonial estimation of the punitive qualities of flogging. The number of women who received whippings is perhaps accounted for by the fact that many of the delinquents were servant girls. Colonial chivalry apparently did not require a paramour to pay the alternative fine.

The great mass of less serious offences, however, were punished with fines. This mode of punishment was especially satisfactory to the landed magistrates and the legislators, who saw not only crime but also their own tax rates reduced as the number of offences fined in the courts increased. In general fines were lighter in the seventeenth century and increased as the provincial period progressed. Like flogging, fining had the punitive virtues of being a real hardship as money was scarce and of being immediately effective. In bursts of enthusiasm

⁸⁵ Chester Min., Aug., 1731, stealing; Cumberland Min., Jan., 1768, counterfeiting.

⁸⁶ Chester Min., Aug., 1723; Nov., 1751; May, 1753; May, 1766; Philadelphia Miscellaneous Court Papers, H. S. P., V. 12. The whipping was accompanied by two hours in the pillory. In severe cases of ordinary assault the court met violence with violence and administered whippings of from ten to forty lashes. See Lancaster Min., Feb., 1749/50, 10 lashes; Philadelphia Miscellaneous Court Papers, H. S. P., IV. Oct., 1730, 15 lashes; Chester Min., Aug., 1741; Feb., 1743, 21 lashes; *Ibid.*, Nov., 1727, 31 lashes and £20 and to be sold for five years; *Ibid.*, Feb., 1751/52, 39 lashes.

⁸⁷ Philadelphia Miscellaneous Court Papers, H. S. P., V. 34 (Dec., 1739).

⁸⁸ Bucks Min., June, 1742; Dec., 1747. During the 18th century this serious offence was punished under the statute fining lying half a crown. *Charter and Law*, 116; see Bucks Min., June, 1689; Oct., 1699; Chester Min., Dec., 1690.

⁸⁹ This became the fixed alternative by the end of the 17th century and the records are full of these cases. Before that there was considerable confusion, and, though the offence was of a moral nature, it was treated quite mildly with punishments of a few lashes or light fines; Bucks Min., April, 1685; June, 1695; March, 1696; a putative father was fined £3; *Chester Records*, 148, 158, the mother received ten stripes, the father a fine of £1. In general during the early period the woman was punished more severely, despite the fact that in addition she was usually burdened with the care of the child, since support orders did not become a usual part of the father's punishment until after 1700.

over this form of punishment the legislature sometimes fixed excessively high fines of £500 for certain offences such as operating a lottery, acting plays on the sabbath or selling ammunition to the Indians, but, though there were prosecutions, these fines were never exacted.⁹⁰ It will be recalled that the legislators used this same handy device to discourage the property destruction that marked the protests against the Stamp Act. As we have already indicated, the fines in the very numerous larceny cases depended on the value, or some multiple of the value of the thing stolen, depending upon whether it were a first, second, or third offence. These fines varied from as low as six pence to over £800.⁹¹ Other offences were fined in varying amounts, according to the colonial estimate of their seriousness. Every imaginable type of offence was fined, and when the grand juries presented offences for which there was no statutory provision the courts fixed whatever fine they felt was fitting. It would be impossible in a paper of this length to catalogue them, but a sprinkling of instances from the various types of offences fined might not be without interest. Assault and battery, and there were many such cases, were usually fined in sums ranging from six pence to £100, depending upon the seriousness of the assault; rioting was fined from six pence to £70; rescue was fined £5; trespass was fined from one shilling to £50, and injured parties still had their private actions; one found guilty of "carelessly and heedlessly running over a woman" was fined five shillings; speaking seditious words was fined £35; abusing the magistrates, and in this robust time they received much abuse, was discouraged with fines as high as £50; adultery was fined £50; selling liquor without a license merited a fine of £5; maintaining a disorderly house was fined as high as £50, a bawdy house £25; "practicing geomancy or divining

⁹⁰ *Statutes at Large*, V. 445-48; VI. 319. Settling on land not purchased from the Indians was fined a like amount, and for this offence and selling ammunition the offender received additionally a whipping and one year's imprisonment; *Ibid.*, VII. 260. Selling goods to the Indians illegally was punished with a fine of £50, selling them rum, £20; *Ibid.*, III. 310; V. 320. A minister marrying a white and black was to be fined £100; persons knowingly bringing an infected person into the province, £100; peddlers selling goods in Philadelphia without a license, £50; erecting weirs or building dams across certain streams or cutting the ropes used by ferrymen, and ferrymen refusing to lower their ropes so that others could pass were all fined £50; *Ibid.*, IV. 59, 141, 194; VII. 7; VIII. 305, 369.

⁹¹ Chester Min., May, 1762. The object stolen was not indicated but the offender was required to make restitution of £355 and pay a fine of £85. The value of the thing stolen was estimated by two assessors appointed by the court. For the procedure, see Chester Min., Feb., 1720 and Nov., 1747; Bucks Min., Dec., 1721 and Sept., 1725.

with a stick" was fined £5; tying burning straw to a horse's tail was discouraged with a fine of £1; swearing and drunkenness were common and were fined five shillings.⁹² The highest fine actually imposed for a single offence, not provided for by statute, was a fine of £500 for spiking a cannon during the Stamp Act difficulties.⁹³ These fines were ultimately paid to the governor for the purposes of carrying on the government and constituted a considerable part of the revenues. The tendency throughout the period to increase the fines was apparently received without complaint, partly perhaps because some of the increase was not real, due to currency inflation.

The problem of punishing indentured servants or the very poor was solved in a different way. Neither of these groups had money to pay fines, and while incarceration would have punished it also would have withdrawn manpower from use and would have resulted in a charge on the community for maintenance. Both of these results were to be avoided, especially the latter, by a Quaker bench not unmindful of the tax rates. Consequently, when a servant committed an offence the master was permitted to pay the fine, in return for which the court extended the term of the indenture of the offending servant. The period of further servitude depended somewhat on the amount of accumulated costs and charges, but was generally calculated in the master's favor, and usually amounted to about two years.⁹⁴ Though the practice was objected to by the Privy Council as being a punishment unknown to the English law, poor people unable to pay their fines were sold into servitude in Pennsylvania. However, it was a punishment reserved for the more serious but not vicious crimes, like counterfeiting, and was generally for a term of from four to five years.⁹⁵

⁹² But see Bucks Min., April, 1685, where swearing three oaths was punished with a fine of fifteen gilders and fifteen days imprisonment on bread and water.

⁹³ Supreme Court Appearances Docket, IV, April, 1766.

⁹⁴ See Bucks Min., Sept., 1691; Oct., 1699; Chester Min., May, 1723, two years added; Feb., 1719/20; Nov., 1720. In the latter case a servant accumulated costs and charges of £7-1-6, for which he was ordered to serve fifteen months after the expiration of his indenture. But a servant girl fined forty shillings for bastardy was required to work one additional year for her master who paid the fine; Chester Min., Sept., 1697.

⁹⁵ Chester Min., Nov., 1723; Aug., 1727; Lancaster Min., Aug., 1729; Philadelphia Miscellaneous Court Papers, H. S. P., V. 17 (Nov., 1732); York Min., Oct., 1770, sold for four years. Note the order in Cumberland Min., Oct., 1760, that the sheriff sell two persons for five years and "the money to be disposed of as follows; first to pay legal fees; second, costs of several prosecutions, and remainder if any, to be remitted to the governour."

During the seventeenth century various forms of humiliation were a common form of punishment. In the close communities of the early colonial period, in the religious atmosphere of the Quakers, it was very effective. The mildest form the punishment took was to require the offender to stand in the market place on a certain number of market days wearing a placard describing the offence. It was resorted to mostly to punish offences of adultery and counterfeiting.⁹⁶ Contemptuous behaviour toward a magistrate or court official was sometimes punished by exacting an apology in open court.⁹⁷ Common scolds were either gagged or ducked.⁹⁸ The most common of these humiliating punishments, and one used as part punishment for a number of serious offences throughout the period of this paper, was the pillory.⁹⁹ In addition to punishing the offender, if he were at all sensitive to the gaze of passersby, it brought him to the attention of the populace, that they might be on their guard in dealing with him

⁹⁶ *Pa. Col. Recs.*, I. 86-88 (Oct., 1683); *Chester Records*, 176 (Oct., 1687); Chester Min., Nov., 1750; Aug., 1769; Cumberland Min., Jan., 1774; Philadelphia Min., Mar., 1778; Supreme Court Appearances Docket, II. Sept., 1754; for counterfeiting, required to wear placard on breast describing offence on two court days; *Chester Records*, 280 (Mar., 1693), a wife was required to stand at the common whipping post wearing the following: "I heare stand for an example to all others for comiting the most wicked and notorious sin of Fornication." See the *American Weekly Mercury*, Mar. 16-23, 1721, where for "contempt of ye king" an offender was required to spend two hours in the pillory wearing a placard reading: "I stand here for speaking contemptuously of my Sovereign Lord King George," and Chester Min., Feb., 1755, where an offender was to wear a placard reading: "I stand here for speaking seditious words against the best of kings."

⁹⁷ *Chester Records*, 176 (Oct., 1689), for writing scandalous papers about one of the justices required that the offender "should here in publick acknowledge in particular his fault and crimes." Chester Min., May, 1718, an offender apologized, "I am sorry I have spoken slightly of J. J.'s evidence against L. T. I do acknowledge my foolishness in so doing, desiring if it be your pleasure to pass by my indecent expression, hoping to be more lawful for the time to come."

⁹⁸ In 1683 the punishment was changed from a fine or imprisonment to a fine or gaging for an hour, and in 1700 to gagging for a period at the discretion of the magistrates. The latter law also provided that such cases should be tried summarily by the justices with the consequence that records of these convictions have not survived. In 1717 we find the following presentment from a Philadelphia grand jury: "Whereas it has been frequently and often presented by several former grand jury's for the city the necessity of a ducking stool and house of correction for the just punishment of scolding drunken women as well as divers other profligates in the place who are become a public nuisance and disturbance to this town in general, therefore we do earnestly again present the same to this court"; *Ancient Rec. Philadelphia (MS.)*, 38 (Jan., 1717). I cannot discover that there ever was a ducking stool. One lone common scold prosecution in 1769, in which it was adjudged that the offender "be publickly ducked in the river Delaware at the end of Market Street" would suggest that there was none at that date; *Philadelphia Min.*, Sept., 1769.

in the future. Requiring certain offenders to wear brightly colored letters on their arms for given periods served the same purpose.¹⁰⁰ The change, after 1718, from requiring culprits to wear felt arm bands, to branding them either on the forehead or brawn of the thumb, rather dramatically indicates the complete change that had taken place in the theory of punishment. There was little thought of redemption in requiring an offender to go through life with a letter branded in the center of his forehead.

An indirect punishment found in the records, especially burdensome to the poor, was the costs that accumulated in every case, whether parties were found guilty or innocent. The fee system prevailed and charges were made according to elaborately drawn statutes. All of the court and police officials were maintained in this manner, so that every service was separately charged for, summoning the grand jury, drawing up the indictment, summoning the petit jury, attorney general's fee, serving subpoenas, and even a fee to the turnkey if the party were jailed.¹⁰¹ Judgment, even where the parties had been found not guilty, invariably included an order of commitment "until fees and charges are paid."¹⁰² The accumulated charges and fees averaged about £3 in any case that went to trial, and increased if the offender resisted trial or carried the case by appeal to the Supreme Court, because of the necessity of issuing additional writs, and the higher charges in the higher court. There were two ways in which these costs could be reduced, if the offender pleaded guilty, in which case all costs of the trial were avoided, or if the officials forgave their fees, which they seemed not unwilling to do in particularly hard cases.

It has been impossible in this short paper to suggest the full import

⁹⁹ The pillory was used to punish counterfeiting; Chester Min., Aug., 1742; Nov., 1750; Aug., 1769; Cumberland Min., Jan., 1774; Jan., 1776; Philadelphia Min., Mar., 1778; York Min., Oct., 1770; passing counterfeit bills, Supreme Court Miscellaneous Docket, Sept., 1746; Lancaster Min., May, 1731; Cheating, Chester Min., May, 1753; Feb., 1755; assault with intent to ravish, Philadelphia Miscellaneous Court Papers, H. S. P., V. 12. In the last mentioned case a fine of ten shillings was substituted for two hours in the pillory.

¹⁰⁰ The law was most specific. For stealing, upon pain of banishment, the offender was to wear a badge "upon the outer part of the left arme betwixt elbow and shoulder at all times . . . from sun rising unto sun setting, not less than four inches in length each way, and an inch in breadth, of a different colour from the outer garment either red, blue or yellow, as the Court shall direct"; *Charter and Laws*, 275. For cases in which the penalty was imposed, see Bucks Min., Oct., 1699; Chester Min., May, 1702.

of these records of the peoples' courts of early Pennsylvania. As a life-time of devotion may be caught in a phrase of an ancient will, "and to Deborah, my dear, dear wife," or all the suffering of settling a new world epitomized in a sentence from an early letter, "what myself and family did endure in that removal, I wish neither you nor yours may ever be put unto," so it is with the entries in these records. It was a rugged, boisterous age, and nowhere are these qualities more starkly reflected than in the pages of the court minutes. When a constable and some women appeared with a warrant for the examination of a woman suspected of "bringing forth a bastard child and murdering the same," we find the following record of what transpired: "Upon their telling the occasion of their coming, the sd. Barbara, starting up in her bed and catching a knife out of the wall, swore if any of the

¹⁰¹ Detailed accounts of these fees are rare, but for a reasonably typical specimen see Bucks Min., June, 1743:

Calling and recording default		.9
Rule for process 1/Cap 1/Signing 1/		3.0
Entering Sherifs ret. c. c. 1/ent. appearance 9		1.9
Arraign and pleading		1.6
Entering indictment 9 Com. 9		1.6
Continuing bill and taxing 1/9		2.6
Subpoena for witness 9/ sign 1/		1.9
		<hr/>
		12.9

Sheriff

serving capias and ret.	5.6	
mileage	3.8	
serving subpoenas	.9	
mileage	3.8	
Cause in court	10.0	
Turnkey	2.6	1.6.1
Attorney General		18.0
Bench and Cryer		4.9
		<hr/>

Total fees £3-1-7

See also Bucks Min., Dec., 1750, costs of £4-2-10; Sept., 1750, £4-8-7; Sept., 1751, £3-12-5; Mar., 1753, £14-9-3; Chester Min., Feb., 1720/21, £3. In addition the court might allow the prosecutor a certain amount for his loss of time, and to cover any disbursements he may have made; Chester Min., Nov., 1718, prosecutor allowed £3-18-6; Bucks Min., Mar., 1753, prosecutor allowed £5-14-6.

¹⁰² Of the twenty-four persons incarcerated in the Philadelphia jail in July, 1751, six were confined because they were unable to pay their fees. See Philadelphia Miscellaneous Court Papers, H. S. P., V. 38.

women touched her she would have their hearts blood. Her brothers Gabriel and Lacey and her sister Enochson, with knives and staves in their hands, swore the death of man or woman that should touch their sister."¹⁰³ And violence was not unknown before the courts. The settlers were British subjects vitally conscious of their rights, and the judges before whom they appeared were neighbors and farmers, with larger farms perhaps, but untrained in the law and essentially plain people like themselves.¹⁰⁴ They often addressed the judges as they would have addressed them in the market square, and did not hesitate to speak out if they felt they had been done an injustice. Some of these scenes took quite an abusive turn. A citizen of Germantown "coming into the court behaved himself very ill, like one that was last night drunk and not yet having recovered his wits. He railed most grievously on the recorder and bailiff as persons not fit to sit in a court; he challenged Peter Shoemaker, one of the judges on the bench, to come forth, and other like enormities. . . . After abundance of foul language, when the court bid the sheriff bring him out, he went himself crying 'You are all fools.'"¹⁰⁵ Some of these outbursts were punished with fines but on the whole the courts were quite tolerant.

To summarize briefly—during the seventeenth century, because of the Quaker influence, the colony functioned under a criminal code more mild than that of England or any of the other colonies, and incorporated a policy of redemption quite novel to the criminal law.

¹⁰³ Chester Min., June, 1697.

¹⁰⁴ The English system of requiring a certain number of the magistrates to be "of the quorum" or trained in the law, never prevailed in Pennsylvania. As the urbanization of the colony progressed, more and more of the justices were tradesmen or merchants. See, "A Brief Account of Pennsylvania in a Letter to Richard Peters, Esq. In Answer to some Queries of a Gentleman in Europe," by Lewis Evans; March 16, 1753, in H. S. P.: "'Tis a government without rewards or punishments adequate to merit or iniquity. The inhabitants of American birth are not very eager in pursuit of learning except where it be a trade. At this time nine tenths of the Justices of the Peace have never read fifty pages of Law before they had their commissions, though they are also Judges of the Court of Common Pleas, but they are mostly trading people and if they don't understand Law, they do expediency."

¹⁰⁵ Minutes of the Court of the Borough of Germantown, Nov., 1704, in H. S. P., 46. For a further example, see *Ibid.*, May, 1695, 14, where an offender when asked why he sold beer above the statutory price replied that "he did not know of such a law," and when questioned further why he sold more than a gill of rum or a quart of beer to one person in half a day, rather bravely answered that "they being able to bear more he could or would not obey that law." But his business was suppressed.

With the turn of the century, however, avowedly because the milder punishments were not successfully deterring crime, there was noted a tendency to increase the penalties, which culminated in the famous Act of 1718, but which continued as a tendency until the Revolution. There was a marked increased severity in the punishment of acts of violence after the Stamp Act disorders of 1765. At no time in Pennsylvania were offences against property as severely punished as in England, and though some of the cruel punishments of the English laws were incorporated into the law of the province they can hardly be said to have been frequently prosecuted. Likewise the severe punishments for second and third offences, though they make shocking reading, were in fact rarely enforced. However, a leaven was working in the people, and though the legislators had resorted only to increased severity as a means of deterring crime, the reforms in the criminal code of Pennsylvania made in 1783 would seem to indicate that part of the recent revolt had been against a code that had become increasingly English and increasingly harsh, as the century had unfolded. But that is without the history of the province and so without the province of this paper.

Philadelphia

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