

Felony Law Reform in the Early Republic

T THE TIME OF INDEPENDENCE, proponents of a nascent republican legal system questioned a large part of savage English felony law, which, though incompatible with republican principles, stood in force in the American jurisdictions. Society has an urgent stake in felony law, and in the American republic the people have always directly affected it through the legislative franchise and jury service. Given the importance of felony law on the agenda of public policy, it seems strange that its history has been relatively neglected.

Legal history has remained largely outside the verge of American historiography and surely has not been a part of the syntheses that make up the taught tradition. Felony law also has not been incorporated in more specialized legal history. Two major recent works examining law change during the period of the early republic treat the criminal law only tangentially. In his brilliant analysis of the "transformation" of American law, Morton J. Horowitz argues that the abandonment of judicially determined common law crimes weakened the "natural law framework" within which the crimes had existed and helped prepare the way "to an instrumental concept of law." It would be unfair to tax Horowitz for not having more broadly treated changes in criminal law, because the substance of his book and thesis draws its evidence primarily from private law. Still, "transformation" is an embracing word. William E. Nelson chose to conceptualize law change in Massachusetts under the rubric of the "Americanization" of the common law. His work, which deals primarily with changes in civil procedure, is a major contribution. On the criminal side, the

rapid decline of prosecutions of morals offenders caught Nelson's attention. He associated it with the fashionable concept of "privatization" of society. Well enough. Such concepts will have their proper place when a comprehensive history of American law is written, but the comparative study of persistence and change in felony law would also seem essential to any understanding of the "transformation" or "Americanization" of the common law.

The record of felony law reform set out here could be incorporated into several now standard views of the Revolution and the early republic. For example, felony law reform is relevant to the inquiry, begun now so long ago, into social change associated with the Revolution. In 1793 William Bradford put it squarely there when he remarked that separation from Great Britain made possible the appeal to the humane instincts of the people that brought forth the reform, "one of the first fruits of liberty." In his seminal lectures, J. Franklin Jameson referred in passing to criminal law reform in Pennsylvania and Virginia by way of introducing the theme of growing humaneness in American thought and feeling. But the reference creates the impression that the laws represented evolution of already comparatively mild codes, and Jameson excluded it from his catalog of things immediately influenced by the Revolution. Subsequent historians have dealt only incidentally with felony law as an aspect of penal reform.

The great common denominator of recent reinterpretations of early American history has been ideology. The issue of felony reform is relevant to several clusters of ideas. In those jurisdictions where the reformers succeeded, the influence of the Enlightenment rationalists, of Montesquieu and Beccaria, is written all over the record. There

¹ Morton J. Horowitz, The Transformation of American Law, 1780-1860 (Cambridge, 1977), 9-16. William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge, 1975), chapters 3 and 6; and Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," New York University Law Review 42 (1967), 450-82. Lawrence M. Friedman, A History of American Law (New York, 1973), 248-49, has a brief comment on the relevant provisions of the state constitutions and the Pennsylvania statutes.

² William Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania . . . (Philadelphia, 1793), 20; J. Franklin Jameson, The American Revolution Considered as a Social Movement (Princeton, 1926), 76-77.

³ David B. Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," American Historical Review 63 (1957), 23-46.

is no question here of the use of European Continental ideas to add ornaments of universality to a provincial argument. Indeed, it would be difficult to find any other area where European thought had a more direct and demonstrable influence than the advocacy of humanizing the criminal law. A second, pervasive use of ideas to explain early American politics and institutions has centered on the persistent Whig concept of the virtuous republic. The central tenet of the law reformers—the protection of society with rational, deterrent penalties that aimed to redeem the convict—epitomized that concept. Yet, Gordon Wood's analysis in *The Creation of the American Republic*, which charted the development of constitutional republicanism, displays a rather ambivalent attitude concerning the manner in which the Revolutionary ideology affected the law. He does not refer to felony law reform, though it would have supported his point that Americans sought a law based on equitable principles.

Among the advocates and opponents of felony law reform, no simple dichotomy dividing Federalists and Republicans is apparent.⁶ On the side of advocacy, Federalists seem slightly more numerous, but the issue appears to have risen above politics by bringing to bear deeply held personal convictions of humanity and morality. Doubtless, Christian tenets informed some, and where they did, the matter hinged on texts chosen. Since no one any longer maintained that adulterers, witches, and defiant sons should be hanged, the Mosaic code did not figure in the argument. The entire corpus of law in the Pentateuch would embarrass those who wished to retain inherited felony law, because it did not command the death penalty for crimes against property. The bedrock for those who advocated the death penalty was the Noachic covenant, God's command, "Whoso sheddeth man's

⁴ Michael Kraus, *The Atlantic Civilization: Eighteenth-Century Origins* (Ithaca, 1949), 123-38, shows both the importation and, especially in the late 1780s and 1790s, the export from America to Europe of concepts of law reform.

⁵ Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill, 1969), 296-305. David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (Boston, 1971), 60-62, emphasizes the stimulus that Americans' awareness of their revolutionary ideas gave to the movement to reform criminal law.

⁶ Among Republicans: Jefferson, Madison, and George Clinton. Among Federalists: William Bradford, William Paterson, Philip Schuyler, John Jay, and George Keith Taylor. For New York, see Alfred F. Young, *The Democratic Republicans of New York*, 1763-1797 (Chapel Hill, 1967), 526-29.

blood, by man shall his blood be shed." With few exceptions the early reformers reluctantly accepted death as the penalty for murder rather than challenge that text. Quakers who led and sustained the felony law reform movement, like their Protestant colleagues, did not rely to any extent on exegesis of biblical text. They took the position that William Penn, and Roger Williams before him, had taken—namely, that Old Testament law had been made for a particular people, in a particular time and place. Christ had put the law in the human heart. This view freed the Quakers and their friends to let reason carry the burden of the argument.

Though no comprehensive history of American law at the moment of independence has been written, extant work indicates that a very large part of the common and statutory felony law of England operated in the colonies at that time. It was savage law that punished with death a long list of crimes. Earlier, Englishmen coming out to America had achieved significant reform. On a crucial issue, the Puritan colonies followed Mosaic law and by positive law abandoned the death penalty for all crimes against property. Prompted by humanitarian and rational concerns, the Quaker colonies later followed this lead and went beyond it to restrict the death penalty to murder and treason. Without explicit legislation, southern colonies followed the example as a matter of settled judicial policy. After 1660, these reforms coexisted for a time with a movement toward the formal reception of English felony law, but by the 1720s the reception had largely swallowed up the earlier law and hangings for crimes against property became common. An attempt to reform the law in England during the Commonwealth and Protectorate had been aborted by the

⁷ Genesis 9:6. Benjamin Rush was among the very few who challenged that text. See his Considerations on the Injustice and Impolicy of Punishing Murder by Death . . . (Philadelphia, 1792), 5-7. Later Hugh H. Brackenridge, associate justice of the Pennsylvania Supreme Court, also did so in his Law Miscellanies . . . (Philadelphia, 1814), 236-43.

⁸ William Penn, A Discourse of the General Rule of Faith and Practice and Judge of Controversy (London, 1673) in The Select Works of William Penn (3 vols., London, 1825), 2:9-12; and Roger Williams, The Bloudy Tenent Yet More Bloudy, in James H. Trumbull, et al., eds., The Complete Writings of Roger Williams (7 vols., New York, 1963), 4:485-88. See also Bradley Chapin, Criminal Justice in Colonial America, 1606-1660 (Athens, 1983), 6-7.

⁹ Joseph Smith, "The English Criminal Law in Early America," in *The English Legal System: Carryover to the Colonies* (Los Angeles, 1975). My work in progress, a sequel to *Criminal Justice*, strongly supports this view.

Restoration, and subsequently Parliament vastly extended the reach of the death penalty, especially for crimes against property. By the last quarter of the eighteenth century, the question of criminal law reform was not merely a parochial issue peculiar to the common law jurisdictions. As early as 1721, Montesquieu began his advocacy of reform in Persian Letters and later expanded the argument in The Spirit of the Laws. Beccaria's Crimes and Punishments appeared in 1764. The enlightened despots responded with reformed codes in Prussia, Sweden, Austria, and Tuscany. In France, the Declaration of the Rights of Man and the Citizen of 1789 set out reform principles incorporated by the penal code of 1791. Influenced in part by the Continental advocates, William Eden revived the English reform movement with the publication in 1771 of Principles of Penal Law. The main tenets of the reformers were: the purpose of criminal law was not retribution, but the prevention of crime; penalties should be certain and in most cases should aim to achieve the reformation of the convict. These principles raised the practical issues of the appropriateness of the death penalty and alternative penalties.¹⁰

The ideas of the law reformers came into the American consciousness during the decade preceding independence. Montesquieu had suggested an equation that made criminal law reform directly relevant to the American situation. Arbitrary governments supported themselves by the terror of severe sanctions; polities based in principles of liberty and consent developed humane and rational systems of criminal justice.¹¹

So stated, the idea that the principles of criminal law deserved constitutional statement won acceptance in several states. Three of the original state constitutions anticipated reform. The Maryland Bill of Rights of 1776 stated "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state." The advocates of the Pennsylvania constitution of 1776 expected that "the future legislature" would reform the criminal law. The New Hampshire con-

¹⁰ Donald Veall, *The Popular Movement for Law Reform, 1640-1660* (Oxford, 1970). For the eighteenth-century reformers, Continental and English, see Leon Radzinowicz, *A History of English Criminal Law and its Administration since 1750* (2 vols., London, 1948-1968), 1:268-354.

¹¹ Montesquieu, The Spirit of the Laws (2 vols., London, 1894), 1:80-81, 88-89.

stitution of 1784 put reform of the criminal law into the context of the enlightened rationalism and hope that had justified resistance and revolution. Reason dictated reform: "No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason." Hope led to the belief that punishment should "reform" not "exterminate."

Although Americans certainly did not hurry to embrace felony law reform during the period of constitution-making, Thomas Jefferson, Benjamin Rush, and William Bradford did publish works advocating that cause. Jefferson's work consisted of several draft statutes that he prepared in the years 1777-1779 as a member of a Virginia committee charged with a general revision of the laws. Rush published two pamphlets in the context of specific debates concerning the effect (1787) or prospect (1792) of law reform in Pennsylvania. As Attorney General of Pennsylvania, Bradford had written the reform statute of 1786. Later as Chief Justice he prepared a report for the governor on the operation of the 1786 law and made recommendations concerning its extension.¹³

Both Jefferson and Bradford regarded felony law as constituent. Jefferson referred to his draft statute as "this fundamental law." Bradford thought that such statutes "are so important that they deserve a place among the *fundamental* laws of every free country." Both men showed explicit awareness of the Continental reformers. Bradford began his influential pamphlet on the subject by acknowledging that "Montesquieu and Beccaria led the way" and then proceeded to a succinct statement of their core ideas. It is common to remark that Jefferson was in debt to Beccaria, but his notes supporting the statute refer to him only twice and then in the context of the peculiar crimes

¹² Francis N. Thorpe, ed., The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America (Washington, 1909), 1688, 2456, 3101.

¹³ Benjamin Rush, An Enquiry into the Effects of Public Punishments Upon Criminals, and Upon Society (Philadelphia, 1787), and Considerations on the Injustice and Impolicy of Punishing Murder by Death; Bradford, Enquiry; Julian P. Boyd, et al., eds., The Papers of Thomas Jefferson (22 vols. to date, Princeton, 1950-), 1:325-50 (hereafter, Jefferson Papers); Kathryn Preyer, "Crime, the Criminal Law and Reform in Post-Revolutionary Virginia," Law and History 1 (1981), 53-85, contains the most detailed account of Jefferson's efforts. See also Ralph Lerner, The Thinking Revolutionary (Ithaca, 1987), 73-74.

of suicide and infanticide. He had read William Eden's *Principles of Penal Law* and entered excerpts in his *Commonplace Book*. Part of the text of Jefferson's typically felicitous preface to the statute is cast in Eden's words.¹⁴

Rather than enumerate the capital crimes in a jurisdiction, a method commonly used to judge severity, it seems more useful to identify certain clusters of crimes that either generated large numbers of executions or presented ethical dilemmas because of the nature of the act punished. Several homicides—murder, infanticide, suicide, and petty treason—form one cluster. Among crimes against property, burglary, robbery, all of the simple larcenies, and counterfeiting form another. Two non-homicidal felonies not involving property, rape and buggery, make up a third group.

Though neither Jefferson nor Bradford advocated Beccaria's recommendation that the death penalty be abolished, they restricted its use to treason and murder. The technical common law phrase "with malice aforethought" tested whether a homicide amounted to murder. Both men knew that centuries of judicial gloss or statutory enlargement had extended the definition of murder to include acts where there had been no premeditation to kill. Bradford took the common example from Michael Foster's Crown Law. "A. shooteth at the poultry of B. and, by accident, killeth a man; if his intention was to steal the poultry it will be murder: but if done wantonly it will be barely man-slaughter." Jefferson dealt with this problem in the body of his statute and excluded elevating an involuntary homicide resulting from a trespass with the provision that "no such case shall hereafter be deemed manslaughter, unless manslaughter was intended, nor murder, unless murder was intended." Bradford quoted Jefferson on the point and limited murder to "deliberate assassination." This type of thinking laid the ground for the innovative Pennsylvania statute of 1794 that distinguished degrees of murder. First-degree murder was "wilful, deliberate, or premeditated killing" or killing while

¹⁴ Boyd, et al., eds., Jefferson Papers, 1:494, 495, 496; William Eden, Principles of Penal Law (London, 1772), in James Heath, Eighteenth-Century Penal Theory (Oxford, 1963), 198; Bradford, Enquiry, 3-4.

committing or attempting to commit arson, rape, burglary, or robbery.¹⁵

English and colonial law contained atrocious provisions in the special homicides of petty treason, suicide, and infanticide. The common law regarded suicides as felons punishable by forfeiture of chattels and ignominious burial. Inquest juries generally avoided at least the forfeiture by finding insanity, but the law retained this archaic irrationalism. The notes to this head of Jefferson's statute recognized the fact of insanity and removed suicide from the list of crimes. Bradford ignored suicide.16 Petty treason, the murder of husband by wife or of master by servant, carried in the case of guilty wife or female servant the penalty of being burned to death. Blackstone offered as evidence of "the humanity of the English nation" that the hangman strangled a woman before she burned. Nevertheless, the law carried an obvious and invidious sexual discrimination objected to by both Jefferson and Bradford. Jefferson marked the special quality of all familial homicides by providing that after hanging, the body of the convict be given to surgeons for dissection, a prospect he knew to be horrendous. Bradford noted the injustice of the distinction and the barbarity of the punishment.¹⁷ The early Stuart statute against bastard infanticide was the epitome of viciousness. It altered the rules of evidence by requiring that an unmarried woman who concealed the

¹⁵ Boyd, et al., eds., Jefferson Papers, 2:496; Bradford, Enquiry, 35, 37; James T. Mitchell and Henry Flanders, comps., The Statutes at Large of Pennsylvania from 1682 to 1801 (18 vols., Harrisburg, 1896-1915), 14:174-81; Edwin R. Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," University of Pennsylvania Law Review 97 (1957), 759-77.

¹⁶ Boyd, et al., eds., Jefferson Papers, 1:496. The infamy consisted of being buried in or near the king's highway with a stake driven through the heart. Whether or not suicides should have a Christian burial was a vexed question in colonial jurisdictions. H. Halsey Thomas, ed., The Diary of Samuel Sewall 1674-1719 (2 vols., New York, 1973), 1:118, 163, 179; American Weekly Mercury, March 19-25, 1741.

¹⁷ William Blackstone, Commentaries on the Laws of England (4 vols., London, 1765-1769), 4:370; Boyd, et al., eds., Jefferson Papers, 2:494; Bradford, Enquiry, 42. For the horror with which English people viewed postmortem dissection, see Peter Linbaugh, "The Tyburn Riot Against the Surgeons," in Albion's Fatal Tree: Crime and Society in Eighteenth-Century England (London, 1975), 65-117; 25 Geo. II, c.37 (1752) mandated dissection in murder. For execution by burning in American jurisdictions, see American Weekly Mercury, Jan. 14-20, 1729 and Aug. 19-26, 1731; George C. Rogers, Jr., et al., eds., The Papers of Henry Laurens (9 vols., Columbia, 1968-1972), 7:126-27.

body of her newborn child prove that it was stillborn. Failing such proof, the act of concealment was taken as sufficient evidence to prove murder. Colonial assemblies reenacted the statute with greater frequency than any other law. In a long note, Jefferson destroyed the assumptions underlying the law. Many children were stillborn. An unmarried mother would conceal the body to avoid shame. "The effect of this law then is to make what in it's [sic] nature is only presumptive evidence of a murder, conclusive of that fact." In an even longer comment, Bradford condemned the "horrid severity" of the statute. Taken together with the more precise and limiting definition of murder, the elimination of the special homicides represented real reform, planks in a bridge being built from anomalous and severe common law to modern concepts of criminology.

Rape and buggery provide the major examples of non-homicidal felonies not involving property. Distinguishing sodomy and bestiality as species of the genus buggery, Jefferson stripped bestiality of its criminality, noting that because "it can never make any progress," it could not injure society. His search of English law led him to recommend a savage penalty for rape and sodomy. Almost a century before, William Penn also had read the ancient statutes and had chosen to assign the old Norman punishment of castration for rape. Jefferson adopted this penalty for rape and sodomy. That these enlightened, humane men could recommend such a punishment remains inexplicable. The Pennsylvania statute of 1786 had removed buggery from the capital list but had continued to punish rape with hanging. Since the whole code was up for revision in 1793 when Bradford wrote his pamphlet, he made an argument against the criminality of bestiality. He doubted that the mental state of a person

¹⁸ Boyd, et al., eds., Jefferson Papers, 2:494; Bradford, Enquiry, 39-41. Rates of indictment and conviction in cases of bastard neonaticide had been declining steadily in the eighteenth century. Peter C. Hoffer and N.E.H. Hull, Murdering Mothers: Infanticide in England and New England 1558-1803 (New York, 1981), chapter 3; and Hull, Female Felons: Women and Serious Crime in Colonial Massachusetts (Urbana and Chicago, 1987), 30, 33-34, 46-47, 58, 132-38.

¹⁹ Boyd, et al., eds., Jefferson Papers, 2:497; Mitchell and Flanders, comps., Statutes at Large of Pennsylvania, 2:7, 8, for punishing a second rape conviction and a married man guilty of sodomy or bestiality with castration. The Pennsylvania law was disallowed by Privy Council: see W. Noel Sainsbury, et al., eds., Calendar of State Papers, Colonial Series, American and West Indies, 1704-05 (26 vols., London, 1860-1926), 277.

committing the act could be *sui Juris* and rejected the Mosaic precedent as perhaps appropriate "for a tribe of ardent barbarians wandering through the sands of Arabia" but "wholly unfit for an enlightened people of civilized and gentle manners." As to rape, Bradford noted the particular difficulties associated with the crime. The status and reputation of the victim caused the law to be applied erratically. Juries acquitted in the face of undeniable evidence, and the crime had been "peculiarly" the object of pardons, thus robbing "the law of all its terrors" and creating "hopes of impunity." Bradford would have sent convicted rapists to the narrowest imprisonment reserved for the most "atrocious offenders."

Practical reform of felony law hinged on finding rational penalties for burglary, robbery, and counterfeiting. In all jurisdictions these crimes produced a large percentage of felony convictions and hangings. During the seven years prior to the passage of the statute of 1786, burglary and robbery accounted for 68 percent of the felony convictions and 72 percent of the hangings in Pennsylvania. Though the loss of the superior court records makes it impossible to be precise, entries in the *Virginia Gazette* indicate that these two crimes also accounted for a large percentage of Virginia executions. Jefferson retained the common law calendar of crimes involving all forms of theft and provided punishments of hard labor in the public works ranging from five years, to one and restitution. The Pennsylvania law of 1786 also imposed the penalty of hard labor for a fixed term of years.²¹

Since the thirteenth century, counterfeiting the coin of the realm had been an exotic treason. Because mostly foreign coins circulated in the colonies, many of them extended their felony law to cover that crime. Between 1696 and 1734, the rapidly increasing use of paper money and various forms of commercial paper caused Parliament (1696-1734) to pass eighteen distinct statutes making forgeries of such paper felonies of death. Most colonies followed this lead and

²⁰ Bradford, *Enquiry*, 20-21, 29-31.

²¹ William Roscoe, Observations of Penal Jurisprudence and the Reformation of Criminals... (London, 1819), 25-30, for Pennsylvania statistics; Marian Dargan, Crime and the Virginia Gazette, 1736-1775 (Albuquerque, 1934), 22-35; Hugh F. Rankin, Criminal Trial Proceedings in the General Court of Colonial Virginia (Charlottesville, 1965), 148-60; Boyd, et al., eds., Jefferson Papers, 2:499-502; Bradford, Enquiry, 21-26.

raised forgery of public bills of credit and commercial paper to the capital level. By 1776 counterfeiting had become a common felony, with criminals operating through intercolonial networks sometimes with transatlantic connections. An epidemic of counterfeiting came with the Revolutionary war, and the new states responded with savage laws. The work of Virginia revisers illustrates the prevailing sense of emergency. In #64, his draft reform statute, lefferson reduced the penalty for all forms of counterfeiting to six years at hard labor and forfeiture of lands and chattel. Statute #65, drafted by Jefferson and enacted by the Assembly in 1779, made forging or passing bills of credit, treasury notes, loan office certificates, or payment vouchers a felony of death. The law underscored the emergency by changing drastically the traditional method of prosecuting such crimes. Jefferson offered no explanation of these diametrically opposed laws, but it seems obvious that the milder provisions of #64 suggest he looked forward to the end of the war, and that with #65, Jefferson dealt with a present crisis. In recommending that counterfeiting the coin be stricken from the death list, Bradford observed that more refined techniques of minting had made the crime very difficult. The state had previously reduced the penalty for counterfeiting bills of credit and other public paper, and Bradford believed that the "offence will scarcely be committed at this day," an opaque comment refuted by later crime statistics.²²

Jefferson's proposal failed in the House of Burgesses. The Assembly had approached the work of the revisers piecemeal until 1785, when James Madison tried to guide the remaining draft statutes through to enactment. During the session of 1786 Madison wrote to Jefferson in Paris that the bill would "meet with the most vigorous attack" and expressed doubt that it would pass. After the bill failed by a single vote, Madison wrote that the "rage ag[ains]st Horse stealers" defeated it. The editors of Jefferson's papers thought that punishments of castration and disfigurement defeated the bill, but since it was

²² Radzinowicz, *History of English Criminal Law*, 1: 642-50; Boyd, et al., eds., *Jefferson Papers*, 2:498-99, 507-10; Bradford, *Enquiry*, 26-29. For the endemic nature of counterfeiting in the later colonial period, see Kenneth Scott, *Counterfeiting in Colonial America* (New York, 1957). From 1794 to 1816 counterfeiting consistently ranked as the third most common serious crime in Pennsylvania (larceny ranked first and burglary second).

amended in committee, it would seem to have been a simple matter to have changed those penalties. The Pennsylvania Assembly enacted both of the bills advocated by Bradford. The pioneer law of 1786 broke the barrier to reform by eliminating the death penalty for two common crimes against property—burglary and robbery. The 1794 statute limiting capital crime to first-degree murder became a model for criminal law reform in the American states. A variety of factors appear to explain these different results.²³

However proud Virginians may have been of their own traditions, they remained largely ignorant of their early legal history. Since the installation of royal government in 1624, Virginia felony law had been based in a commission of over and terminer issued to the governor and councilors. As judges of the General Court, they maintained their exclusive jurisdiction in capital cases and made a vigorous and successful effort to have their jurisdiction ratified in the supplementary royal charter of 1675. Except when required by local circumstances (e.g., slavery), the Virginia Assembly never enacted a significant body of statutory criminal law. Motivated prior to 1660 by practical, common sense considerations, the General Court had effected de facto reform by refusing to sentence people to death for crimes against property. By 1700 the court abandoned the experiment and regularly applied to its full rigor the English law in cases of burglary and robbery, and occasionally in grand larcenies. There is no evidence that Jefferson had knowledge of indigenous seventeenth-century experience with less severe felony law. He owned a large collection of manuscript Virginia statutes, but they could not reveal the nature of the earliest felony law in his own jurisdiction, because the law had been developed by judicial selection and discretion, not legislation. An attempt has been made to connect his work as a reviser with Puritan legal concepts, but the argument is not convincing.²⁴ Others

²³ Boyd, et al., eds., *Jefferson Papers*, 2:505; William T. Hutchinson, et al., eds., *The Papers of James Madison* (15 vols. to date, Chicago, 1962-), 9:267; Mitchell and Flanders, comps., *Statutes at Large of Pennsylvania*, 12:280-81, and 15:174-81.

²⁴ Edward Dumbauld, *Thomas Jefferson and the Law* (Norman, 1978), 144-56, notes similarities with William Sheppard, *England's Balme* (London 1656), and makes the connection from Jefferson's statement that in 1774 he "rummaged over" Rushworth for precedents of that time.

were aware of William Penn's role as a law reformer; Jefferson left no evidence that he knew of early Quaker law.

Virginia legislators set the Committee of Revisors a limited task, to review the statutes and eliminate redundant or obsolete laws, a work undertaken on several previous occasions. Although Jefferson saw a broader opportunity, the revisers set as a basic rule that "The Common Law [was] not to be med[d]led with, except where Alterations are necessary." In drafting #64 Jefferson appeared to keep within this rule. Forced to look backwards, he wrote the bill squarely in the tradition of the common law and its commentators. He supported his text in the manner of Coke, Hale, Hawkins, and Blackstone with elaborate citations drawn from English legal history. But traditional form could not conceal the fact that the drastic reduction of capital crimes amounted to fundamental change. A deputy disposed to oppose the bill could have justified a negative vote on the ground that it far exceeded the intent of the Burgesses in establishing the committee.

In the winter of 1786, #64 became entangled with a related bill creating a system of assize or circuit courts. Although the deputies clearly regarded the court bill as the major issue of the session, #64 shared its central feature, the reduction of the authority of the county justices. Virginia had developed unique procedure in felony cases, a process that assigned the critical decisions concerning prosecution to the justices of the peace. In normal common law practice, after examination, a justice either let an accused person to bail or committed him to await a county grand jury decision about prosecution. Since the late seventeenth century and formally after 1705, Virginians suspected of felony had appeared before an examining or "called" court where the bench of justices decided whether and upon what charge the person would be prosecuted. Virginians appearing at these sessions knew that the justices had three options—to send them home acquitted, bind them to appear at the county court on a lesser charge, or put them on the road to Williamsburg and a possible meeting with the hangman. The called court gave county justices a potent weapon to reinforce the deference due them. The assize bill would have

²⁵ Boyd, et al., eds., Jefferson Papers, 2:325.

transferred the prosecution of felons to local grand juries supervised by judges of the General Court on circuit. Even if the called court survived, #64 would have taken away the ultimate discretion of the justices in crimes against property, a sharp limitation. The assize bill and Jefferson's reform felony statute each failed of passage by a single vote the week before Christmas, 1786. In February, Madison wrote to Jefferson: "Our old bloody code is by this event fully restored."²⁶

William Penn and his associates had accepted the radical Protestant concept that law had didactic purposes and should be stated positively and clearly. Several factors combined to assure that the Quaker criminal codes would be based on reform principles. Quakers had suffered much at the hands of English judges. The Penn-Mead trial and Bushell's Case dramatized the hazards of common law crimes as well as the efficacy of the jury as a check to overzealous prosecutors.²⁷ Quaker leaders were aware of and influenced by the English law reformers. George Fox, for example, published two pamphlets urging criminal law reform. Friends rejected Mosaic law with its retributive purpose and, as Roger Williams had before, looked to St. Paul for guidance. Extended to the criminal law, their pacifist principles made the deliberate decision to take human life repellant. Beginning with the "Laws Agreed Upon in England" and extending into The Great Law as well as the codes of the Jerseys, Friends limited the death penalty to treason and murder. Since their faith led them to believe that criminals could be redeemed, they provided for periods of incarceration for crimes against property. They envisioned prisons that would literally be houses of correction where the work of reclaiming lives could be done.²⁸

²⁶ The examining courts are described and analyzed in Peter C. Hoffer's introduction to Hoffer and William B. Scott, eds., *Criminal Court Proceedings in Colonial Virginia* . . . [Richmond County, 1710-1754] (Athens, 1984), xxv-xliv; for the political contest over the assize courts, see A.G. Roeber, *Faithful Magistrates and Republican Lawyers* (Chapel Hill, 1981), 192-202; and Hutchinson, et al., eds., *Papers of James Madison*, 9:267.

²⁷ The People's Ancient and Just Liberties Asserted, in the Tryal of William Penn and William Mead, with An Appendix, by way of Defence for the Prisoners (London, 1670); Bushell's Case (1670), in Thomas B. Howell, ed., A Complete Collection of State Trials . . . (34 vols., London, 1809-1828), 6:999-1010.

²⁸ Richard S. Dunn and Mary Maples Dunn, eds., *The Papers of William Penn* (5 vols. to date, Philadelphia, 1982-), 2:211-27, for "Laws Agreed Upon"; John B. Linn, ed., *Charter to William Penn and the Laws of the Province of Pennsylvania Passed between the Years*

As an incident of the larger London policy of eliminating the private colonies, the Privy Council brought Pennsylvania law under strict and hostile scrutiny during the 1690s. Very much aware of the government's negative attitude, Penn returned to Philadelphia in 1699 and supervised a general revision of the laws. Of the 105 laws passed, Privy Council nullified 52 in 1706, among them acts representing every aspect of the criminal justice system. Subsequently, Privy Council continued to harass Penn by annulling a series of acts establishing the courts, and in Governor Charles Gookin's time the system broke down completely when Quaker judges and jurors were barred from the system over the issue of the affirmation. Historians of Pennsylvania law have long been aware of the ultimate compromise—that Chief Justice David Lloyd and Governor William Keith agreed in 1718 to trade the admission of the affirmation for the enactment of English felony law.²⁹ But copies of Penn's early laws survived to be described seventy-five years later by William Bradford as "a small, concise, but complete code of criminal law . . . animated by the pure spirit of philanthropy."30 Bradford and his associates could think that independence had created the opportunity to return to the native tradition and that the state constitution of 1776 had given them a mandate to try.

Bradford worked in an environment that encouraged reform. Philadelphians routinely responded to a wide variety of public problems by forming voluntary associations to improve conditions. Several of these organizations figured directly in the law reform movement. In 1787 Benjamin Rush read his paper on the effects of public punishments to the Society for Political Inquiries, which met for that occasion

¹⁶⁸² and 1700... (Harrisburg, 1879), 107ff. for The Great Law; for the Jersey codes, see Aaron Learning and Jacob Spicer, eds., The Grants, Concessions, and Original Constitutions of the Province of New Jersey (Philadelphia, 1752), 233-55, 391-435.

²⁹ Sainsbury, et al., eds., Calendar of State Papers, Colonial Series, American and West Indies, 1701, 4-5, 24, 195, 209, 226-28, 307-9, 328-30, 371, 374, 388, 405-8, 515; 1702-03, 21, 50, 112; 1703, 460, 463; 1704-05, 276, 281, 597, 612, 633, 637-38, 643; House of Lords Manuscripts (8 vols., London, 1900-1923), 5:81-92, 313-14; Mitchell and Flanders, comps., Statutes at Large of Pennsylvania, 2:53-159; Pennsylvania Colonial Records (16 vols., Harrisburg, 1852-1853), 2:611-29, and 3:33-34; Pennsylvania Archives (eighth series, 4 vols., Harrisburg, 1931), 2:1167-206, 1257-73.

³⁰ Bradford, Enquiry, 15.

at Benjamin Franklin's house. The preamble of the Society's by-laws amounted to a prescription for reform. It noted that Pennsylvanians had been "Accustomed to look up to those Nations from whom we have derived our Origin, for our Laws." In consequence, they had kept "with undistinguishing Reverence, their Errors . . . and have grafted, on an Infant Commonwealth, the Manners of ancient and corrupted Monarchies." ³¹

The operation of the reform statute of 1786 led to the formation of another society. By eliminating the death penalty for burglary and robbery, the law guaranteed an increase in prison population. Convicts. identified by shaved heads and distinctive dress, were put to work cleaning the streets and repairing the roads in and around Philadelphia. Out in public "The old and hardened offender [was] daily in the practice of begging and insulting the inhabitants—collecting crouds [sic] of idle boys, and holding with them the most indecent and improper conversation." For reasons not apparent, the state's president and council aggravated the situation by granting pardons freely with the result that crime appeared to increase. Rather than abort the experiment with reformed felony law, citizens formed the Philadelphia Society for Alleviating the Miseries of Public Prisons. Largely as a result of the Society's activities, the Walnut Street jail had been transformed by 1790 into the first modern American state prison. It is no exaggeration to say that by making long-term incarceration possible and giving it purpose, the Society saved the experiment in felony law reform. The Pennsylvania experience shows that it took a stronger spring than Enlightenment rationalism to launch felony law reform. The colonial past suggested that only religion could be the propelling force. The Philadelphia Society embodied that force. Friends doubtless furnished the main support for the Society, but other Protestants labored for its cause. Ouakers Roberts Vaux and Richard Vaux provided leadership through two generations; Episcopal bishop William White served as its president for nearly half a century.32

³¹ The title page, Rush, An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society.

³² A contemporary account of the origins of the Society with its by-laws written by the keeper of the Walnut Street jail—Caleb Lownes, An Account of the Alteration and Present

Regardless of its emotional quality, Pennsylvanians appear to have dealt with felony law reform at a level above politics. The statute of 1786 had been enacted by liberal Constitutionalists under the original, radical 1776 constitution. The promise of that law had been fulfilled in 1794 by a conservative government under the constitution of 1790. Jefferson's reform proposal had failed because it became entwined with an old, acerbic political issue, the competence and autonomy of the Virginia justices. There the legislators made the law even more harsh, primarily by removing the benefit of clergy from a series of traditional felonies.³³ Four years later the legislature reversed course and adopted the main features of the Pennsylvania law. The reasons for this abrupt change are not apparent.³⁴ The one surviving piece of evidence is a speech delivered by George Keith Taylor in the House of Delegates. Having made the standard argument of the reformers, Federalist Taylor connected his case to republican ideology. Because man in the state of nature had no right to take life except when his own was imminently threatened, it followed that governments founded in social compact could not legitimately have that power. He appealed to the pride of Virginians by urging them not to be the last to embrace a policy of humanity and virtue. Further, the reform could be had without public expense because the labor of prisoners would pay the costs of the system. He anchored his argument in the Pennsylvania system with statistics showing that reform promised lower crime rates. In this day of sophisticated analysis, it appears naive to argue that a single rhetorical effort could change basic public policy. But it was a strong speech, and the House of Delegates had it printed to explain their votes to constituents.³⁵

Enquiry. The quote is from ibid., 77. For the Society's development, Roberts Vaux, Notices of the Original and Successive Attempts to Improve the Discipline of the Prison at Philadelphia and to Reform the Criminal Code of Pennsylvania (Philadelphia, 1826).

³³ William W. Hening, The Statutes at Large; Being a Collection of all the Laws of Virginia . . . (13 vols., Philadelphia, 1809-1823), 13:30-32; Samuel Shepherd, The Statutes at Large of Virginia (3 vols., Richmond, 1835), 1:110-14, 146-48.

³⁴ Shepherd, Statutes at Large of Virginia, 2:5-16. In "Crime, the Criminal Law and Reform in Post-Revolutionary Virginia," Preyer speculates that passage of the reform statute may have been influenced by low rates of conviction under the harsh law, by confidence in the stability of the republic, by the end of importation of British convicts, and, of course, by the Pennsylvania example.

³⁵ George Keith Taylor, Substance of a Speech . . . on the bill to Amend the Penal Laws of

A survey of the statutes in other early American jurisdictions shows felony law made up of a jumble of surviving indigenous laws and customs, tenacious adherence to English common and statutory law. and acceptance of Enlightenment rationalist concepts. There were a few nearly common denominators. For example, even the most conservatively inclined states amended the law in relation to the special homicides of petty treason and bastard infanticide by providing that these acts be tried by the rules applicable to ordinary murder. Regardless the infrequency of convictions under the old rubrics, the removal of the invidious classification remains there as a small victory for the principle of equality before the law. Most states also reduced buggery and sodomy to a lesser level of criminality. Another principle that made headway was the establishing of degrees of heinousness in some crimes against property. Several states limited the death penalty of those convicted of burglary, robbery, and arson to life-threatening cases—armed robbery or burglary and firing of an occupied dwelling at night. Viewing the bodies of law overall, the states fall into disparate categories.

In 1796 three states—New York, New Jersey, and, as has been noted, Virginia—enacted reform statutes that restricted the death penalty to treason and murder. The New York law amounted to abrupt reversal of policy. As recently as 1788 in New York, the legislators had enacted codes that essentially restated the savage old law. The Pennsylvania act of 1794 provided a powerful, visible example. As early as 1791, the Philadelphia Society for Alleviating the Miseries of Public Prisons had begun to keep other states informed of their system by writing regularly to the governors. Pennsylvania had made a concrete American model of Beccaria's major tenets. First as governor and then while serving as associate justice of the United States Supreme Court, William Paterson had been requested by the legislators to make a general restatement of New Jersey law. When Paterson came to the criminal law, he informed them that consolidation of existing law was unsatisfactory. That law needed "thorough reform." Working closely with the legislature, Paterson produced the

the Commonwealth (Richmond, 1796), argued the case directly from the social compact at pp. 7-11; Edward A. Wyatt, "George Keith Taylor, 1769-1815, Virginia Federalist and Humanitarian," William and Mary Quarterly, 2nd series, 16 (1936), 1-18.

draft that became the reform statute of 1796.36 During the 1790s, New York City generated a large number of humanitarian societies. Active in several of these associations, the Quaker businessman Thomas Eddy became the force behind criminal law and penal reform. His visits to Philadelphia's Walnut Street prison made the Pennsylvania connection palpable. General Philip Schuyler accompanied Eddy on one of these trips and became the sponsor and advocate of reform legislation at Albany.³⁷ With an important exception relating to slavery, Maryland installed the Pennsylvania plan in 1809.³⁸ Massachusetts approached the problem very conservatively. The revision of 1785 retained the death penalty for murder, robbery, burglary, rape, buggery, and arson. A general restatement in 1804-1805 provided imprisonment for buggery and limited death in robbery and burglary as a penalty for convicts who had been armed with a dangerous weapon. Connecticut had never received any significant part of English law. Reform there gradually replaced corporal punishment for most serious crimes against property with incarceration.³⁹ Three states—North and South Carolina and Rhode Island—continued to mandate the death penalty for most traditional felonies well into the nineteenth century, although Rhode Island removed sodomy from the capital list and all three provided lesser penalties for counterfeiting.40

³⁶ Laws of the State of New-Jersey; Revised and Published under the Authority of the Legislature (Newark, 1800), 208-22; John E. O'Connor, "Legal Reform in the Early Republic: The New Jersey Experience," American Journal of Legal History 22 (1978), 95-105.

³⁷ [Thomas Eddy], An Account of the State Prison or Penitentiary House, in the City of New-York (New York, 1801), 9-14; M.J. Heale, "Humanitarianism in the Early Republic: The Moral Reformers of New York, 1776-1825," American Studies 2 (1960), 161-75; W. David Lewis, From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848 (Ithaca, 1965), 3-5.

³⁸ Clement Dorsey, The General Public Statutory Law . . . of the State of Maryland from the Year 1692 to 1839 . . . (3 vols., Baltimore, 1840), 1:572-88. The exception was raising a Negro insurrection.

³⁹ The Public Statute Laws of the State of Connecticut (Book I, Hartford, 1780 . . . to Feb. 28, 1807) (3 vols., Boston, 1807), 1:22-36, 249-50, 329-32; Richard Gaskins, "Changes in the Criminal Law in Eighteenth-Century Connecticut," American Journal of Legal History 25 (1981), 330-42; The General Laws of Massachusetts (2 vols., Boston, 1823), 1:115-36, 148-49, 152-53, 501-3.

^{*}O The Public Laws of the State of Rhode-Island and Providence Plantations (Providence, 1822), 339-51; Revised Code of North Carolina Enacted by the General Assembly at the Session of 1854 . . . (Boston, 1855), 203-26; Friedman, History of American Law, 250.

Although the example provided by the United States gave little support to reform, the governor and judges of the Northwest Territory had anticipated most of the states and limited capital crime to treason and murder in the first code adopted at Marietta in 1788.41 The original federal criminal statute (1790), "An Act for the Punishment of Certain Crimes Against the United States," provided the death penalty for treason, murder, piracy and robbery within the maritime jurisdiction, and counterfeiting or knowingly uttering counterfeit federal securities. After what appears to have been a desultory debate centering on motions to eliminate postmortem dissection of condemned murderers and to reduce the penalty for uttering bogus securities, the motions failed and the bill passed. 42 This original statute obviously did not define all of the crimes that could be committed against the government, and this deficiency led to a sustained controversy over the issue of federal common law crimes.⁴³ So far as can be determined, no advocate of such a jurisdiction ever claimed that substantive English felony law could be enforced in federal courts without a congressional statute. The case most relevant to this essay, U.S. v. Smith (1797), involved counterfeit notes of the Bank of the United States, a crime not defined by federal statute. Avoiding the common law issue, the judges advanced a technical argument that based jurisdiction and judgment in the Constitution, the Judiciary

⁴¹ Theodore C. Pease, ed., The Laws of the Northwest Territory (Collections of the Illinois Historical Society 17 [Springfield, 1925]), 13-21.

⁴² Debates and Proceedings in the Congress of the United States, 1789-1825 (42 vols., Washington, 1849-1856), 1:1519-22; Richard Peters, ed., The Public Statutes at Large of the United States of America... (5 vols., Boston, 1848), 1:112-19. The statute defined robbery as the same as "if committed within the body of a county" which the courts interpreted as meaning that the common law definition applied. United States v. Palmer (1818), 3 Wheaton 610.

⁴³ Recently there has been sustained interest and disagreement over the issue. The first thorough modern treatment is Julius Goebel, Jr., Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 1: Antecedents and Beginnings to 1801 (New York, 1971), 608-61. For the disagreement over the nature and extent of federal common law jurisdiction in criminal matters, see the following articles in Law and History Review 4 (1986): Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," 223-65; Robert C. Palmer, "The Federal Common Law of Crime," 267-323; and compare Stephen B. Presser, "The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer," 324-335.

Act of 1789, and a Massachusetts statute punishing forgery.⁴⁴ The following year, Congress passed "An Act to punish frauds committed on the Bank of the United States." The act obviously shows a congressional preference for statutorily defined criminal law, and it also may have addressed the issue central to this essay. Though the law labelled counterfeiting the bank notes a "felony," it provided penalties of fine and imprisonment—suggesting that Congress may have been influenced by the wave of felony law reform that had swept the states two years before.⁴⁵

These examples of how felony law might help illuminate more general issues are drawn primarily from the jurisdictions in which the reformers succeeded. Evidence in the states that clung to the old bloody codes is hard to come by, but it seems fair to conclude that voters and legislators in those states could not be influenced by rational or humane arguments. Unfortunately, the experience in the jurisdictions where felony law reform failed seems more persistent and relevant to our present situation. As late as the 1830s, the opponents of the anti-gallows movement "fell back for ultimate justification upon the Noachic covenant and the instinctual 'sentiment' of blood for blood." An opinion poll taken early in 1987 found that 86 percent of Americans favored capital punishment, but that only 33 percent believed that it deterred crime. This leaves a huge balance of over half of the American people committed to the death penalty on principles of revenge.

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⁴⁴ Federal Cases (30 vols, St. Paul, 1894 1897), 27 1147, where the case is misdated

⁴⁵ Peters, Statutes at Large, 1 473 74

⁴⁶ Davis, "The Movement to Abolish Capital Punishment in America, 1787 1861," 23

⁴⁷ The Christian Science Monitor, April 23, 1987