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IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA, Appellee

v.

DEREK LEE, Appellant

BRIEF OF AMICI CURIAE THE PENNSYLVANIA PRISON SOCIETY, THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, THE AMERICAN CIVIL LIBERTIES UNION, THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, AND PROFESSOR MICHAEL MERANZE IN SUPPORT OF APPELLANT

On Appeal from the Judgment of the Superior Court of Pennsylvania
at No. 1008 WDA 2021 dated June 13, 2023, Affirming the Judgment
of Sentence of the Court of Common Pleas of Allegheny County
at CP-02-CR-0016878-2014 dated December 19, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Daftary-Kapur & Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Department of Justice Studies Faculty Scholarship and Creative Works, Spring 2020 20

Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307 (2017) 6, 7

Gov. Thomas Mifflin, *Journal of the Senate of Pennsylvania* (Dec. 8, 1792) 14

Jack D. Marietta & G.S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800* 12 (2006) 10

Jared Ingersoll, *Report: Made by Jared Ingersoll. Esq. Attorney General of Pa., Jan. 21, 1813*, 1 J. of Juris: A New Series of the Am. L.J. 1 (John E. Hall ed. 1821) 10, 16

Jeffrey Sutton, *51 Imperfect Solutions: States & The Making of American Constitutional Law* 17 (2018) 6, 7, 8

Kevin Bendesky, *'The Key-Stone to the Arch': Unlocking Section 13's Original Meaning*, 26 Univ. Pa. J. Const'l L. 208-12 (2023) ..... passim

Lindsay & Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, Philadelphia Lawyers for Social Equity, April 2021 21

Negley K. Teeters, *Public Executions in Pennsylvania, 1682-1834*, 64(2) J. Lanc. Cty. Hist. Soc. 89 (1960) 11

Roberts Vaux, *Notices of the Original, and Successive Efforts, to Improve the Discipline of the Prison at Philadelphia and to Reform the Criminal Code of Pennsylvania* 8 (1826) 11

Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141 (1985) 7, 8

The Reintegration of People Sentenced to Life Without Parole, Human Rights Watch, June 2023 20

Constitutional Provisions

INTEREST OF AMICI

Amici are the Pennsylvania Prison Society, The American Civil Liberties Union of Pennsylvania, The American Civil Liberties Union, The Roderick and Solange MacArthur Justice Center, and Professor Michael Meranze, a scholar of early American legal histories. Amici's interest in this case is to assist the Court in grounding its analysis of Section 13 on a thorough and accurate understanding of its history and meaning when it was adopted in 1790.

The Pennsylvania Prison Society, the oldest prison reform society in the world, was founded in Philadelphia in 1787 to reform the Commonwealth's penal system in accord with Enlightenment principles. For 237 years, the Society has worked to advance the health, safety, and dignity of the people who live and work in every jail and prison in the Commonwealth. Cruel punishments, in every form, are anathema to the Society's mission.

The American Civil Liberties Union of Pennsylvania (ACLU of Pennsylvania) and the national American Civil Liberties Union (ACLU) are non-profit, nonpartisan organizations dedicated to defending and expanding individual rights and personal freedoms throughout, respectively, Pennsylvania and the country. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. In recent years,

the ACLU of Pennsylvania has focused resources on promoting respect for people's constitutional rights in Pennsylvania's criminal legal systems. *See, e.g., League of Women Voters of Pennsylvania v. DeGraffenreid*, 265 A.3d 207 (Pa. 2021) (challenging proposed constitutional amendments that undermine criminal defendants' rights); *Kuren v. Luzerne Cnty.*, 146 A.3d 715 (Pa. 2016) (challenging constitutionality of indigent defense system); *J.H. v. Dallas*, 15-cv-02057-SHR (M.D. Pa., Jan. 27, 2016) (challenging prolonged wait times for incompetent criminal defendants to access treatment); *Doe v. McVey*, 513 F.3d 95 (3d Cir. 2008) (challenge to unfair application of Megan's Law supervision to out-of-state offenders). The ACLU has focused resources on similar issues, including the issue of life without parole sentences imposed on defendants convicted of felony murder. *See Sellers v. Colorado*, No. 22SC73 (S. Ct, St. of Colo. September 10, 2023) (amicus brief addressing the racially disparate impact of life without parole sentencing for strict-liability felony murder).

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur. Through its litigation efforts, RSMJC seeks to vindicate individual rights, hold people with power accountable, and demand real reform. RSMJC attorneys have led civil rights battles in areas including police misconduct, the rights of the indigent in the criminal legal system, compensation for the wrongfully convicted,

and the treatment of incarcerated people. RSMJC has served as merits counsel, amicus counsel, or amicus curiae in numerous cases around the country challenging excessive or unfair sentences, including *Sellers v. Colorado*, No. 22SC738 (S. Ct, St. of Colo. September 11, 2023) (arguing that life without parole for strict-liability felony murder violates the state constitution); *Commonwealth v. Mattis*, No. SJC-11693 (S. Judicial Ct. Mass. Nov. 11, 2022) (contending that life without parole sentences for late adolescents over age 18 violate the Massachusetts Declaration of Rights); *Scott v. Pennsylvania Board of Probation and Parole*, 256 A.3d 483 (Pa. Cmmw. Ct. 2021) (contending that life without parole sentences for felony-murder convictions violate the state constitution); and *Jones v. Mississippi*, 593 U.S. 98 (2021) (arguing that a sentencer must make a finding that a juvenile is permanently incorrigible for imposing a LWOP sentence).

Michael Meranze is a Professor of History at the University of California, Los Angeles who specializes in United States intellectual and legal history with an emphasis on early America, including the history of the American death penalty. He is the author of *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835*, an examination of the birth of the penitentiary in the context of the contradictions of the American Revolution and early Liberalism.

ARGUMENT

Article 1, Section 13 of the of the Pennsylvania Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const., art. 1, § 13. When Section 13 was adopted in 1790, Pennsylvania led the country in applying Enlightenment principles to its penal system. These principles—reducing excessive punishments, reforming individuals convicted of crimes, and deterring crimes through proportionate sentences—spurred the Commonwealth to adopt a series of revolutionary reforms in the years immediately before and after Section 13's adoption. The Commonwealth's new system, animated by "the duty of every government to endeavor to reform, rather than exterminate offenders," 15 Statutes at Large of Pennsylvania 174 (1794), was subsequently embraced by every other state, the federal government, and most countries around the world.

Section 13's prohibition on "cruel punishments"– which predates and is textually broader than the Eighth Amendment—embodied these Enlightenment principles, as Pennsylvania's framers explicitly recognized. Cruelty was then understood to mark any punishment that was disproportionately or unnecessarily severe to serve the purposes of reformation and deterrence. It should be understood the same way today.

This Court has recognized that it is "important and necessary that we undertake an independent analysis of the Pennsylvania Constitution," *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991), and this duty is paramount here. Guided by that principle, and considering the founders' historical understanding that sentencing should focus on reformation and deterrence, a sentence of life imprisonment without parole for one convicted of felony-murder is manifestly cruel. Mr. Lee, like more than a thousand other Pennsylvanians, was sentenced to die in prison for a killing that someone else committed—a homicide that Mr. Lee neither caused nor intended. His sentence turns Section 13's Enlightenment principles of restoration and proportionate deterrence on their head. This Court should independently analyze these punishments under Section 13 and hold that they are cruel.

A. Section 13's Prohibition On "Cruel Punishments" Is Independent From The Eighth Amendment's Prohibition On "Cruel and Unusual Punishments."

The framers of Pennsylvania's 1790 Constitution saw the penal system as a distinct and core concern of state government. Their analysis of the cruelty and propriety of criminal punishments focused on history, traditions, and practices unique to this Commonwealth. *See* William Bradford, *An Enquiry: How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), published in 12 Am. J. Legal Hist. 122 (1968). This Court's scrutiny of contemporary punishments

imposed in the Commonwealth should use the same touchstone. Section 13 should have independent force and meaning.

This accords with a foundational principle of our Commonwealth and our nation: state constitutions enable "rights and liberties to be effectuated to the fullest," whereas the U.S. Constitution encompasses a "negative restriction on the states' power to act in certain ways." Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers L. Rev. 202, 205 (1983). Thus, "state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*." Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017) (emphasis in original). This Court has accordingly "'on numerous occasions recognized the Pennsylvania Constitution to be an alternative and independent source of individual rights.'" *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983) (quoting *Commonwealth v. Tate*, 432 A.2d 1382, 1387-88 (Pa. 1981)).

This distinction between the protections of federal and state constitutions—and corresponding division of responsibility between the U.S. Supreme Court and this Court—makes logical sense. This Court is best situated to interpret the Pennsylvania Constitution, and Section 13 specifically, in accordance with "local conditions and traditions." Jeffrey Sutton, *51 Imperfect Solutions: States & The Making of American Constitutional Law* 17 (2018). And it is free to afford

individual guarantees that align both with Pennsylvania's deeply rooted history and its contemporary standards of decency, without the need to impose the kind of "federal discount" that arises from the U.S. Supreme Court's sweeping, nationwide jurisdiction. *Id.* at 175.

Indeed, "[t]he United States Supreme Court has repeatedly affirmed that the states are not only free to, but also encouraged to engage in independent analysis in drawing meaning from their own state constitutions." *Edmunds*, 586 A.2d at 894 (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 80-82 (1980)); *see also California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). But this Court can only fully effectuate the individual rights embedded in the Pennsylvania Constitution by treating it as a stand-alone document and not presuming that federal law dictates its meaning. *See* Liu, *supra* at 1315.

Criminal law in particular warrants independent state constitutional analysis. Criminal law falls squarely within the expertise of the states, as most criminal prosecutions take place in state courts rather than the federal system. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1150 (1985). And since most criminal prosecutions occur in state courts, proportionality within the state judicial system is

more vital than conformity with federal law. *Id.* As this Court has recognized, the Eighth Amendment is subject to "a federalism-based constraint," whereas Section 13 implies "that comparative and proportional justice is an imperative within Pennsylvania's own borders." *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1283 (Pa. 2014) (internal quotation omitted).

Ultimately, "[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same." Sutton, *supra* at 174. This Court has expressly recognized as much. *See, e.g., Edmunds*, 586 A.2d at 895-96. Of course, here, Section 13 and the Eighth Amendment are textually distinct. And just as their text and foundational purposes are distinct, Section 13 has a unique history that guarantees protections at criminal sentencing that are independent of and broader than those of the Eighth Amendment.

B. Section 13, Which Pre-Dates The Eighth Amendment, Was Intended To Preclude Excessive Criminal Punishments.

This Court has accorded special force to rights that stem from "a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681." *Edmunds*, 586 A.2d at 896. The Court has further recognized that rights "first adopted as a part of our organic law in 1776" are of "paramount" importance. *Sell*, 470 A.2d at 467. And the Court has ruled that state constitutional guarantees predating the federal Bill of Rights

warrant independent and more robust interpretations than their federal counterparts. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002); *Edmunds*, 586 A.2d at 896. Section 13 checks all these boxes.

Section 13's history shows that it merits distinct and greater force than the Eighth Amendment. In 1681, Pennsylvania was founded on Quaker ideals that rejected cruel and excessive punishments and embraced deterrence and reformation as the proper goals of punishment. Although British authorities later forced the colony to enact numerous brutal punishments, in practice the colonists resisted imposing harsh penalties. Then immediately after independence, the Commonwealth mandated "less sanguinary" and "more proportionate" punishments in its 1776 Constitution. These Enlightenment principles were implicitly incorporated into Section 13 when it was adopted in 1790. Not until a year later, in 1791, was the Eighth Amendment enacted. Thus, like the right to free expression, Section 13's Cruel Punishments Clause is "distinct and firmly rooted in Pennsylvania history and experience. The provision is an ancestor, not a stepchild" of the Eighth Amendment. *Pap's A.M.*, 812 A.2d at 603-05 & n.6 (addressing the right to free speech).

Specifically, Section 38 of Pennsylvania's 1776 Constitution required that punishments be made "less sanguinary, and in general more proportionate to the crimes." Pa. Const. of 1776, sec. 38. At the time, "sanguinary" meant "cruel." 1

Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan 1755). Thus, the 1776 Constitution endorsed the principle that excessive or disproportionate punishments were cruel.

The Commonwealth's firmly rooted history of relatively mild criminal penalties dates to its founding in 1681, when Pennsylvania adopted the most modern criminal code in Western society. It was "the mildest criminal code of any continental English colony, and one much milder than England's." Jack D. Marietta & G.S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800* 12 (2006). "The punishments prescribed in it were calculated to" achieve two ends: "to reform" and "to check a people," i.e., to deter crimes. Bradford, 12 Am. J. Legal Hist. at 134. These mild criminal laws "were often re-enacted: which is a decisive proof that they were found adequate to their object." *Id.* at 135. Pennsylvanians favored mild punishments because "[c]ruel and sanguinary punishments which had been multiplied under an ancient [British] system . . . were little adapted to people who had fled from persecution." Jared Ingersoll, *Report: Made by Jared Ingersoll. Esq. Attorney General of Pa., Jan. 21, 1813*, 1 J. of Juris: A New Series of the Am. L.J. 1, 325 (John E. Hall ed. 1821).

British authorities later forced the colony to adopt what Pennsylvanians saw as a "shocking catalogue of unjust and cruel penalties." Roberts Vaux, *Notices of the Original, and Successive Efforts, to Improve the Discipline of the Prison at*

Philadelphia and to Reform the Criminal Code of Pennsylvania 8 (1826). As Bradford explained, "the severity of our criminal law" under the British system "is an exotic plant and not the native growth of Pennsylvania." Bradford, 12 Am. J. Legal Hist. at 137. Nonetheless, "to enhance further its reputation for mildness," colonial Pennsylvanians "made provisions for softening the draconian sentences of the courts" such as the broad use of clemency and jury acquittals. Negley K. Teeters, *Public Executions in Pennsylvania, 1682-1834*, 64(2) J. Lanc. Cty. Hist. Soc. 89 (1960). And, "as soon as we separated from [Britain], the public sentiment disclosed itself, and this benevolent undertaking [of reforming criminal punishments] was enjoined by the constitution." Bradford, 12 Am. J. Legal Hist. at 137.

This was both a longstanding Quaker ideal and an emerging Enlightenment principle. All of the leading voices among Pennsylvania's framers—including Attorney General and later Pennsylvania Supreme Court Justice William Bradford, Governor Thomas Mifflin, Attorney General Jared Ingersoll, United States Supreme Court Justice James Wilson, and Thomas Paine—embraced the view that cruel punishments are those unnecessary for reformation and deterrence. *See* Kevin Bendesky, *'The Key-Stone to the Arch': Unlocking Section 13's Original Meaning*, 26 Univ. Pa. J. Const'l L. 208-12 (2023). These views endorsed the Enlightenment theories of criminal punishment espoused by Montesquieu and Beccaria. *Id.*

Indeed, the 1776 Constitution paraphrased Montesquieu, and the Legislature's 1786 penal reforms quoted him. *See* Pa. Const. of 1776, § 38; 12 Statutes at Large of Pennsylvania 280 (1786). Of Beccaria, Bradford wrote that his "humanitarian system, long admired in secret, was publicly adopted and incorporated by the Constitution of the State" upon independence. Bendesky, 26 Univ. Pa. J. Const'l L. at 237.

Montesquieu's and Beccaria's views were compatible with Pennsylvania's Quaker roots but not with the British system. Pennsylvania's commitment to making criminal laws "less sanguinary" went hand in hand with making them less British. *See* Bradford, 12 Am. J. Legal Hist. at 127-28, 133-34. Thus, unlike the Eighth Amendment—which the United States Supreme Court has interpreted as an importation of the seventeenth century British prohibition on "cruel and unusual punishments," *see Bucklew v. Precythe*, 587 U.S. 119, 130-31 (2019); *Solem v. Helm,* 463 U.S. 277, 285 (1983)—Section 13 derives from Enlightenment philosophy that Pennsylvanians saw as distinct from, and indeed irreconcilable with, British heritage.

Enlightenment era theory, Section 38 of the 1776 Constitution, and Pennsylvania's colonial history illuminate the philosophic underpinnings of Section 13's Cruel Punishments Clause. *See* Bradford, 12 Am. J. Legal Hist. at 126-27. "Pennsylvania led the country, and indeed the world, in turning

Enlightenment theories of punishment into legal guarantees, passing a series of early reform efforts that included Section 13 of the 1790 constitution." Bendesky, 26 Univ. Pa. J. Const'l L. at 213. Grounded on Pennsylvania's history and incorporating Enlightenment principles, Section 13 prohibits punishments that exceed what is necessary to deter crime and reform the offender.

C. The Framers Of The Pennsylvania Constitution Considered A Penalty To Be Cruel If It Exceeded What Was Necessary To Deter And Reform.

The Commonwealth ratified Section 13 on September 2, 1790. The plain language of the provision, as understood by every branch of Commonwealth government at the time, outlaws punishments that are not necessary to deter crime and reform offenders.

"The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). In 1790, the definition of "cruel" connoted normative and moral judgment: "1. . . . hard-hearted; without pity; without compassion; savage; barbarous; unrelenting . . . 2. [Of things] . . . destructive; causing pain." Johnson, *A Dictionary of the English Language*; *see also* 1 Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828) (similar). In applying Section 13, this Court must therefore weigh whether a criminal punishment is "barbarous" or "destructive."

Pennsylvania's framers provide clear guidance on how to evaluate such cruelty. In 1793, William Bradford reasoned that state constitutional provisions directing that "cruel punishments ought not to be inflicted . . . implicitly prohibit every punishment which is not evidently necessary." Bradford, 12 Am. J. Legal Hist. at 127. Such necessity, in turn, arises only from the purposes of reformation and deterrence. *Id.* at 126-27. And the goal of deterrence is itself limited by the principle that "every penalty should be proportioned to the offense." *Id.* at 126. Bradford's views were authoritative—he was then a Justice on this Court, had served as Pennsylvania's Attorney General from 1780 to 1791, and was later appointed by George Washington as the country's second Attorney General. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 220.

Executive, legislative, and judicial pronouncements in the years immediately before and after Section 13's adoption confirm Bradford's understanding that cruel punishments are those unnecessary to deter crimes and reform offenders. In a speech to the Senate, Governor Mifflin declared that, "we consider the prevention of crimes to be the sole end of punishment," and "every punishment, which is not absolutely necessary for that purpose, is an act of tyranny and cruelty." Gov. Thomas Mifflin, *Journal of the Senate of Pennsylvania* (Dec. 8, 1792). Governor Mifflin, incidentally, had requested Bradford's analysis quoted above, and later endorsed it by signing into law the penal code revisions that Bradford proposed.

The Legislature likewise endorsed Bradford's—and hence Montesquieu's and Beccaria's—views on the purpose of punishments. In adopting Bradford's proposed reforms four years after Section's 13 adoption, the Legislature explained that "the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and . . . these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments." 15 Statutes at Large of Pennsylvania 174 (1794). This echoed the Legislature's earlier declaration, four years before Section 13's adoption, that "it is the wish of every good government to reclaim rather than to destroy," and "the principal ends of society in inflicting [criminal punishments are] to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences." 12 Statutes at Large of Pennsylvania 280 (1786).

Subsequent events further confirmed Bradford's view. In 1812, for example, the Legislature commissioned the Attorney General to report on the Commonwealth's penal code. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 228-29. The Legislature and this Court subsequently recognized Attorney General Ingersoll's report as an authoritative overview of Pennsylvania's founding era criminal jurisprudence. *See id.* The report concluded that "'the principle upon which all criminal law rests . . . is necessity," and "[w]hen punishments are

unnecessarily severe, 'the laws themselves . . . appear to be exercised in cruelty.'" *Id.* (quoting Ingersoll, 1 J. of Juris: A New Series of the Am. L.J. 1 at 325.)

In 1825, this Court outlawed the common law punishment of tying a convict to a "ducking-stool" and submerging her underwater. In so ruling, the Court referenced Section 13 and opined that "the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments." *James v. Commonwealth*, 12 Serg. & Rawle 220, 235-36 (Pa. 1825). The evidence is therefore overwhelming that in the years surrounding Section 13's adoption, a cruel punishment was understood to include any sentence more severe than necessary to accomplish the "just" goals of reformation and deterrence.

Conspicuously absent from Section 13 is the conjunctive pairing of "unusual" with "cruel" that is found in the Eighth Amendment. "[P]rohibition of cruel punishments that need not be unusual opens the door to a broader analysis under state constitutions." William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1245 (2020). The omission of the conjunctive "and unusual" was not accidental—Pennsylvania's ban on "cruel punishments" has remained unchanged through numerous constitutional revisions since 1790. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 205. Section 13 was rooted in a uniquely Pennsylvanian concept of punishment; indeed, Bradford's analysis focused squarely on state constitutional provisions mandating that "cruel punishments ought not to be inflicted," without

reference to "cruel and unusual" punishments or the Eighth Amendment. Bradford, 12 Am. J. Legal Hist. at 127. Under Section 13, "the analysis of cruelty does not require the kind of two-track approach to constitutional limits that the Supreme Court has utilized in applying the Eighth Amendment." Berry III, *supra* at 1246. The historical understanding of "cruelty" in the Commonwealth—and not federal jurisprudence governing "cruel and unusual punishments"—is the correct framework for determining the contours of Section 13. Bendesky, 26 Univ. Pa. J. Const'l L. at 203-04. Put simply, the Eighth Amendment added a federal tolerance for cruel punishments—not shared by Pennsylvania and other states with similar Cruel Punishments Clauses—so long as those punishments were not unusual.

Finally, it bears emphasis that in 1790 the connection between social necessity and cruelty was understood to evolve with experience. Bradford explained that the social necessity of punishments is illuminated by "the further diffusion of knowledge and melioration of manners," and that "[a] few years experience is often of more real use than all the theory and rhetoric in the world." Bradford, 12 Am. J. Legal Hist. at 148. Bradford, like Pennsylvania's framers in general, thus embraced Montesquieu's view that, "'as freedom advances, the severity of the penal law decreases.'" *Id.* at 138. Attorney General Ingersoll's report echoed this understanding. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 229-30. Likewise in *James*, this Court reasoned that "time" is the "great innovator"

through which we achieve "the general improvement of society, and the reformation of criminal punishment." 12 Serg. & Rawle at 235. Whereas the United States Supreme Court did not recognize until 1958 that cruelty under the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), in Pennsylvania, this insight coincided with Section 13's adoption.

D. Mandatory Life Without Parole Sentences For Felony Murder Defendants Who Neither Kill Nor Intend to Kill Are Cruel Punishments That Undermine The Goals Of Reformation And Deterrence.

Applying the original understanding of Section 13, Mr. Lee's mandatory sentence of life imprisonment without parole is excessive. His sentence—in effect, to die in prison—is not proportional to his crime in which he neither intended to kill nor killed. His sentence does not serve, but in truth undermines, the proper purposes of deterrence and reformation. His sentence is starkly contrary to the evolving standards of decency in this Commonwealth and beyond. His sentence is, in a word, cruel. "Pennsylvanians understood cruelty as meaning anything exceeding the severity necessary for reformation and deterrence-according to contemporary, not eighteenth century, science. By the very logic of those who originally espoused it, sanctions such as mandatory life imprisonment . . . must withstand today's science, not last century's." Bendesky, 26 Univ. Pa. J. Const'l L. at 245.

Mr. Lee's sentence, like those of more than a thousand similarly situated prisoners in Pennsylvania, undermines the core purpose of reformation. By contrast, the possibility of release, including through the parole system, faithfully effectuates the goal of reformation. The Board of Probation and Parole's authority and expertise enable it to make individualized determinations as to a person's rehabilitative needs and potential for supervision in the community. The mandatory imposition of life imprisonment without the possibility of parole, by contrast, "eliminates the possibility that an individual ever rejoins society." Berry III, 98 N.C. L. Rev. at 1250. And without that possibility, a prisoner's impetus to reform and his hope to re-enter the community are extinguished from the start. Pennsylvania's second-degree murder statute thus precludes both the reformation of the prisoner and the individualized determination of proportional punishment by either the judicial branch (at the time of sentencing) or the executive branch (in the parole process). In doing so, it offends Section 13's prohibition on cruel punishments.

Experience shows that eliminating mandatory life without parole sentences does not decrease public safety. Only 2 of 174 juvenile lifers released in Philadelphia were later convicted of crimes (one for contempt and the other for robbery). Daftary-Kapur & Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Department of Justice Studies Faculty Scholarship and

Creative Works, Spring 2020, https://www.msudecisionmakinglab.com/philadelphia-juvenile-lifers. Similarly, in Maryland, 97% of prisoners released from mostly LWOP sentences have not been reincarcerated. *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, Justice Policy Institute, Nov. 2018, https://static.prisonpolicy.org/scans/The_Ungers_5_Years_and_Counting.pdf. Of 125 people released from LWOP sentences in California between 2011 and 2019, only four were subsequently convicted of a crime: one for a felony, and the other three for misdemeanors. *The Reintegration of People Sentenced to Life Without Parole*, Human Rights Watch, June 2023, https://www.hrw.org/report/2023/06/28/i-just-want-to-give-back/reintegration-of-people-sentenced-to-life-without-parole?gad_source=1&gclid=CjwKCAjw26KxBhBDEiwAu6KXtxhxxjQ7ocFhXPPm7FwIRNDJDXIRHQhCIpxmsVhiqp_Wm-79Lwmp6hoCJQ4QAvD_BwE. People in Mr. Lee's position can and do become law-abiding and valuable members of the community.

Mr. Lee's sentence likewise subverts the goal of proportional deterrence. He, his family, loved ones, and society through his absence, are paying the ultimate price for what someone else did. The punishments imposable for Mr. Lee's own conduct, considered alone, do not extend to life imprisonment. The message sent

by these mandatory sentences of life imprisonment is therefore not one of deterrence but of profound unfairness. This unfairness is especially abhorrent when considering that most of the defendants subjected to these sentences are persons of color. Lindsay & Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, Philadelphia Lawyers for Social Equity, April 2021, https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf(finding that Black Pennsylvanians are sentenced to life without parole for second-degree murder at a rate *21.2 times* higher than their White counterparts).

The mandatory sentence of life imprisonment without the possibility of parole for second-degree murder is excessive when compared to other sentences for similar and/or more morally reprehensible crimes. The draconic nature and disproportionality of mandatory life imprisonment without the possibility of parole is especially clear when compared to the penalty for third-degree murder: a *maximum* of twenty to forty years of imprisonment, imposed only after a sentencing hearing at which aggravating and mitigating evidence is considered. *See* 18 Pa.C.S. § 1102(d).

The elements of second-degree murder and the elements of third-degree murder are not dissimilar. The required malice for second-degree murder is derived from the act of committing the predicate felony, not the killing. "The malice or

intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." *Commonwealth v. Rivera*, 238 A.3d 482, 500 (Pa. Super. Ct. 2020). The malice required for third-degree murder is derived from the intent to harm the victim. *Commonwealth v. Fisher*, 80 A.3d 1186, 1195 (Pa. 2013) ("Third degree murder is not by definition an unintentional killing; it is a malicious killing without proof that the specific result intended from the actions of the killer was the death of the victim."). The criminality of third-degree murder is thus arguably worse than Mr. Lee's crime, and yet his sentence is far more severe.

Likewise, the crimes of attempted murder, solicitation to commit murder, and conspiracy to commit first-degree murder[1]—*crimes which all contain the element of a specific intent to kill*[2] —carry far lesser sentences than second-degree murder, and allow for sentencing hearings. *See* 42 Pa.C.S. § 1102 (c) ("a person who has been convicted of attempt, solicitation or conspiracy to commit murder, murder of an unborn child or murder of a law enforcement officer where serious

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[1] *See Commonwealth v. Thomas*, 2019 WL 1125552 (Pa. Super. Ct. Mar. 11, 2019) ("[T]he sentence of life imprisonment imposed for conspiracy to commit first-degree murder illegal.")

[2] *Commonwealth v. Geathers*, 847 A.3d 730, 734 (Pa. Super. Ct. 2004) ("For a defendant to be found guilty of attempted murder, the Commonwealth must establish specific intent to kill."); *Commonwealth v. Stokes*, 38 A.3d 846 (Pa. Super. Ct. 2011) ("To establish conspiracy to commit murder, the Commonwealth must show that the defendant, with the specific intent to kill, agreed with one or more persons to commit murder, or agreed to attempt to commit murder, or solicited someone to commit such crime or agreed to aid in the commission, attempt, or solicitation of such crime, and committed an overt act towards the commission of the murder.")

bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years."). In the instant case, the underlying crime of robbery, which was imputed to the killing to make it second-degree murder, alone could not result in a sentence of any more than 20 years of imprisonment. *See* 18 Pa.C.S. § 3701(a)(1)(i), (b)(1) (robbery charge in question is a first-degree felony); 18 Pa.C.S. § 1103(1) (maximum sentence for first-degree felony is 20 years). Mandatory life imprisonment without the possibility to even request leniency at the time of sentencing, is cruel, disproportionate, and does not meet the goals of deterrence and reformation when considered within the statutory sentencing scheme of arguably morally worse crimes.

Today, only ten states—including Pennsylvania—mandate life imprisonment without parole for felony murder.[3] This dwindling minority of states provides a much stronger indicator of society's evolving views against this penalty than the Supreme Court has relied on to invalidate comparable punishments. The evolving societal trend aligns with Pennsylvania's historical tradition of imposing proportionate criminal penalties. In Mr. Lee's case and so many others,

[3] *See* Arizona Rev. Stat. Ann. § 13-1105; Fla. Stat. Ann. § 775.082; Iowa Code Ann. § 902.1; La. Stat. Ann. § 14:30(C); Miss. Code. Ann. § 97-3-21; Neb. Rev. Stat. Ann. § 28-105; N.C. Gen. Stat. Ann. § 14-17; 18 Pa. Stat. and Cons. Stat. Ann. § 1102; SDCL § 22-6-1; Wyo. Stat. Ann. § 6-2-101.

Pennsylvania has departed from both society's evolving standards and its own foundational principals, imposing disproportionate and excessive punishments.

CONCLUSION

In analyzing Mr. Lee's claim, this Court should consider the unique history and text of Section 13, in which cruel punishments were those deemed in excess of that necessary to reform offenders and deter crime. Guided by this historical understanding, the Court should hold that Mr. Lee's mandatory sentence of life imprisonment without parole violates Section 13's Cruel Punishments Clause.

Respectfully submitted,
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COMBINED CERTIFICATES OF COMPLIANCE

1. Pursuant to Pa. R.A.P 127, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

2. Pursuant to Pa. R.A.P. 1115, I certify that the word count complies with the word limitation and contains 5,265 words, excluding those parts exempted by the rules.

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LIST OF APPENDICES

APPENDIX A: Jack D. Marietta & G.S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800* 12 (2006).

APPENDIX B: William Bradford, *An Enquiry: How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), published in 12 Am. J. Legal Hist. 122 (1968).

APPENDIX C: Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers L. Rev. 202, 205 (1983).

APPENDIX D: Report: Made by Jared Ingersoll. Esq. Attorney General of Pa. (Jan. 21, 1813), 1 J. OF JURIS: A NEW SERIES OF THE AM. L.J. 1, 325 (John E. Hall ed. 1821).

APPENDIX E: Roberts Vaux, *Notices of the Original, and Successive Efforts, to Improve the Discipline of the Prison at Philadelphia and to Reform the Criminal Code of Pennsylvania* 8 (Phila. 1826).

APPENDIX F: Negley K. Teeters, *Public Executions in Pennsylvania, 1682-1834*, 64(2) J. Lanc. Cty. Hist. Soc. 89 (1960).

APPENDIX G: 12 Statutes at Large of Pennsylvania 280 (1786).

APPENDIX H: Gov. Thomas Mifflin, JOURNAL OF THE SENATE OF PENNSYLVANIA (Dec. 8, 1792).

APPENDIX I: 15 Statutes at Large of Pennsylvania 174 (1794).

APPENDIX A

Troubled Experiment

Crime and Justice in Pennsylvania, 1682–1800

JACK D. MARIETTA AND
G. S. ROWE

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These criminal laws, mirroring the social views of the predominantly Quaker assembly that gave birth to them, seriously modified portions of the Duke's Laws while abolishing others. The result was the mildest criminal code of any continental English colony and one much milder than England's.[21] Murder alone was made a capital offense, although because no provision was made for treason, that offense continued to be capital under the English common law. Forfeitures, corporal punishment, and imprisonment were substituted for capital sanctions for such offenses as rape, sodomy, bigamy, and incest. A second conviction for these offenses carried with it life imprisonment. Attacks upon property, including thefts, arson, forgery, and counterfeiting, were punished by having defendants pay some multiple of the lost property. Few crimes brought lengthy incarceration. Swearing, profanity, playing cards or dice, promoting or engaging in unlicensed lotteries, and drunkenness, for instance, earned five-day sentences. Assaulting a magistrate brought one month's confinement. Challenging a person to a fight could lead to three months' incarceration if the convicted could not pay a five-pound fine. Only a conviction for incest could bring as much as one year at hard labor.[22]

Despite its apparent mildness, the Great Law held some potential for harshness. Its provisions for the punishment of criminal offenses were often unduly vague or discretionary, permitting unscrupulous or hard-minded judges to exact severe penalties.[23] For instance, at the discretion of two justices of the peace, servants assaulting their masters or mistresses were to be punished "suitable to the Nature and Circumstances of the fact." The same sentence held for general assaults and sedition. Children physically attacking their mother or father could be confined "during the pleasure" of the parents. Defamation was to be "severely Punished."[24] The assembly which met in New Castle in March 1684 took steps to curtail some of the discretion exercised by judges when it ratified a law establishing that if a statute called for whipping but failed to designate the specific number of stripes to be laid on, punishment should not exceed twenty-one lashes.[25] Still, considerable magisterial discretion remained.

In addition, safeguards were incorporated to ensure that justice would

APPENDIX B

DOCUMENTS

An Enquiry how far the Punishment of Death is Necessary in Pennsylvania

by WILLIAM BRADFORD

Editor's Introduction

THE CRIMINAL LAW IN AMERICA underwent significant changes immediately following the American Revolution. Punishments were reduced in severity and "cruel and unusual punishments," so common in the colonial period, were abolished. No longer were prisoners to sit in a pillory for hours on end or have their ears nailed to a wall and later cut off.

These changes came at different periods in the different states, but the trend definitely began in Pennsylvania. The Constitution of Pennsylvania for 1776 provided: "the penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes." (Sec. 38) The author of this particular provision is unknown. It is rather unusual that this subject was a matter of such concern to a significant number of delegates that it was incorporated into the Constitution, when so many political events were taking place which were more pressing. However, at the same time this Constitution was written, Thomas Jefferson in Virginia was likewise seeking a revision of the criminal law.

Just what steps were taken to implement this constitutional mandate is not clear, nor is it known which individuals encouraged the legislative enactments. However, William Bradford, who had served as Attorney General of the state from 1780 through 1791, and later as a justice of the Supreme Court of the state, prepared the pamphlet which is reprinted here dealing with the conditions of the criminal law during the colonial period. The main purpose of the pamphlet clearly was to indicate that the punishment should be more proportionate to the offense. This pamphlet was well received and printed in full in the Journal of the Senate for January 5, 1793,[1] and as a separate publication in the same year. However, the General Assembly had previously enacted a statute in 1786 reducing the penalty for certain capital offenses to punishment by hard labor and making some offenses bailable before the

[1] At page 38.

judges of the Supreme Court. However, this act was limited in duration to three years. In 1790 a new statute incorporating many of the provisions of the old one was enacted and various new reforms were added. This pamphlet by Bradford apparently convinced the General Assembly to make these changes permanent.

As anyone knows, a great gap exists between the letter of law and its application. The great significance of this pamphlet is that it gives a review of the operation of the criminal law in the colonial period such as is unavailable in any other source. The author had lived through some of the period and had access to members of the Bar and records which are not available to us today. The figures he gives concerning crime are unique; no similar source is known to this editor.

Although the report was received with acclaim by the General Assembly, it is now difficult to appraise its impact on the Act of 1794, which made permanent many of the reforms which had been in the previous temporary laws. Whether the pamphlet had any influence beyond the boundaries of Pennsylvania is not clear either, but it is significant that the author knew of the work of Thomas Jefferson and the Virginia legislature. This knowledge may be explained by the fact that Bradford served as Attorney General in the federal government and this information came to his attention through his associations with the group of Virginians surrounding Washington.

Another Pennsylvania institution which apparently served as a model in other states was the penitentiary located in Philadelphia. This pamphlet includes a description of the penitentiary by Caleb Lownes, a leader in establishing the institution. This part of the pamphlet, including the rules of the institution, will be published in the July issue.

In the opinion of the Editors, the chief merit of this pamphlet is that it gives an insight into the application of the criminal law before the period when changes were made. For this reason, it was judged to be of sufficient interest to publish in the JOURNAL. The original copy of this pamphlet is in the Rare Book Collection of the Temple University Library, and the Editors would like to express their appreciation to its staff for making this copy available.

The Editor has made no attempt to change the text of the pamphlet. The errata have been incorporated into the text and hence this section of the original is omitted. It was felt that it was unnecessary to expand the footnotes of the author; it is left to the reader to trace sources to which Bradford refers. They all are well-known works of that period. The original pagination is indicated by the figures in brackets.

AN ENQUIRY

HOW FAR

THE PUNISHMENT OF DEATH IS NECESSARY

IN PENNSYLVANIA

WITH

NOTES AND ILLUSTRATIONS.

BY WILLIAM BRADFORD, ESQ.

To which is added,

AN ACCOUNT OF THE GAOL AND PENITENTIARY HOUSE OF PHILADELPHIA, AND OF THE INTERIOR MANAGEMENT THEREOF.

BY CALEB LOWNES, OF PHILADELPHIA.

If we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments. MONTESQ.

PHILADELPHIA:

PRINTED BY T. DOBSON AT THE STONE-HOUSE, NO. 415 SOUTH SECOND-STREET.

M,DCC,XCIII.

124

[a2] ADVERTISEMENT.

THE following memoir was written at the request, and presented to the Governor of Pennsylvania, on the third day of last December. The nature of this communication, as well as the necessity of completing it by that day, required brevity; and a more extended view of the subject, was on many accounts inexpedient. Hence, some information, which might have been proper in a work designed for general circulation, was suppressed, and the experience of other *countries was rather glanced at than explained.*

It having been thought advisable to publish this memoir in its present form, an opportunity was afforded the writer of making such additions as his other avocations would permit. Further time would have enabled him to furnish more accurate and particular information of the experience of the other States: but those who have interested themselves in this publication, think it ought not to be any longer delayed.

The additional information might have been advantageously blended with the original memoir: but as the Senate of the Commonwealth, have honored that work, by placing it on their journals, there was a propriety in keeping it distinct. The new matter is therefore thrown into the form of Notes *and* Illustrations *at the end of the memoir—a few paragraphs only, necessary to introduce the notes, being added to the text.*

[a4] *Although the world has seen a profusion of* Theory *on the subject of the Criminal Law: it is to be regretted that so few writers have been solicitous "to throw the light of experience upon it." To supply, in some measure, this defect—to collect the scattered rays which the juridical history of our own and other countries affords—and to examine how far the maxims of philosophy abide the text of experiment, have, therefore, been the leading objects of this work. The facts adduced, are stated with as much brevity, as was consistent with clearness; and, as accuracy was indispensable, none have been lightly assumed, and few without a coincidence of authorities.*

Philadelphia, Feb. 26, 1793.

AN

ENQUIRY, &c.

INTRODUCTION.

THE general principles upon which penal laws ought to be founded appear to be fully settled. Montesquieu and Beccaria led the way in the discussion, and the philosophy of all Europe, roused by the boldness of their march, has since been deeply engaged on this interesting topic. Independent of the force of their reasoning a remarkable coincidence of opinion, among the enlighted writers on this subject, seems to announce the justness of their conclusions: and the questions which still exist are rather questions of fact than of principle.

Among these principles some have obtained the force of axioms, and are no longer considered as the subjects either of doubt or demonstration. *"That the prevention of crimes is the sole end of punishment,"* is one of these: and it is another, *"That every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act."* To these may be added a third, (calculated to limit the first) which is, *"That every penalty should be proportioned to the offence."*

[4] These principles, which serve to protect the rights of humanity and to prevent the abuses of government, are so important that they deserve a place among the *fundamental* laws of every free country. The enlightened patriots who composed the first National Assembly in France, placed this check on the power of punishment, where it ought to be placed, among "the rights of a man and a citizen." They had long witnessed the ferocity of the criminal law, and they endeavoured to guard against it by declaring, in precise and definite terms, "That the law ought to establish such punishments *only* as are *strictly* and evidently *necessary*." * Few of the American constitutions are sufficiently express, though they are not silent, on this subject. That of New-Hampshire declares, "That all penalties should be proportioned to the nature of the offense, and that a multitude of sanguinary punishments is impolitic and unjust, the true design of all punishments being to reform, and not to exterminate, mankind." The constitution of Vermont enjoins the introduction of hard labor as a punishment, in order to lessen the necessity for such as are capital: and that of Pennsylvania framed in 1776, directed the future Legislature "to reform the penal laws—to make punishments less sanguinary, and, in some cases, more proportioned to the offenses." But it was in Maryland alone that the *general* principle was asserted; and, in the enumeration of their rights, we find it declared, "That sanguinary punishments ought to be avoided as far as is consistent with the safety of the state" †. The other constitutions which touch on this subject content themselves with generally declaring, "That cruel punishments ought not to be inflicted." But, does not this involve the same principle, and impli- [5] citly prohibit every penalty which is not evidently necessary?

One would think, that, in a nation jealous of its liberty, these important truths would never be overlooked; and, that the infliction of death, the highest act of power that man exercises over man, would seldom be prescribed where its necessity was doubtful. But on no subject has government, in different parts of the world, discovered more indolence and inattention than in the construction or reform of the penal code. Legislators feel themselves elevated above the commission of crimes which the laws proscribe, and they have too little personal interest in a system of punishments to be critically exact in restraining its severity. The degraded class of men, who are the victims of the laws, are thrown at a distance which obscures their sufferings and blunts the sensibility of the Legislator. Hence sanguinary punishments, contrived in despotic

* S. VIII.

† S. XIV.

and barbarous ages, have been continued when the progress of freedom, science, and morals renders them unnecessary and mischievous: and laws, the offspring of a corrupted monarchy, are fostered in the bosom of a youthful republic.

But it is pleasing to perceive that of late this indolence has not been able to resist the energies of truth. The voice of Reason and Humanity has not been raised in vain. It has already "forced its way to the thrones of Princes," and the impression it has made on the governments of Europe is visible in the progressive amelioration of their criminal codes. A spirit of reform has gone forth—the empire of prejudice and inhumanity is silently crumbling to pieces —and the progress of liberty, by unfettering the human mind, will hasten its destruction. *(a)*

[6] Happily for Pennsylvania the examination and reform of the penal laws have been considered by the Legislature as one of its most imoprtant duties. Much attention has been paid to this subject since the revolution. Capital punishments have, in several instances, been abolished; and, in others, the penalty has been better proportioned to the offence. This has been considered as the commencement of a more general reform; and, if the result of the experiment shall be found to be such as the friends of humanity wish, it has been generally expected, that the Legislature would resume the benevolent task. Proceeding with that caution, which innovation on an ancient system demands, they have paused in their labors, but it is hoped they have not abandoned the work.

What success has attended the new system of punishments is, therefore, a question interesting to humanity. Some years have elapsed since its first establishment, and we now have data sufficient to calculate its effects. To aid this important enquiry,—to review the crimes which are still capital in Pennsylvania,—and to examine, whether the punishment of death be, in any case, necessary, is the object of the present attempt.

ON CAPITAL PUNISHMENTS.

IT being established, That the only object of human punishments is the prevention of crimes, it necessarily follows, that when a criminal is put to death, it is not to revenge the wrongs of society, or of any individual—"it is not to recall past time and to undo what is already done:" but merely to prevent the offender from repeating the crime, and to deter others from its commission, by the terror of the punishment. If, therefore, these two objects can be obtained

(*a*) See NOTE I [*infra*, p. 156.]

by any penalty short of death, [7] to take away life, in such case, seems to be an authorized act of power.

That the first of these may be accomplished by perpetual imprisonment, unless the unsettled state, the weakness or poverty, of a government prevents it, admits of little dispute. It is not only as effectual as death, but is attended with these advantages, that reparation may sometimes be made to the party injured—that punishment may follow quick upon the heels of the offence, without violating the sentiments of humanity or religion,—and if, in a course of years, the offender becomes humbled and reformed, society, instead of losing, gains a citizen.

It is more difficult to determine what effects are produced on the mind by the *terror* of capital punishments; and, whether it be absolutely necessary to deter the wicked from the commission of atrocious crimes. This is the great problem, to the solution of which, all the facts I shall have occasion to mention hereafter, will be directed.

If capital punishments are abolished, their place must be supplied by solitary imprisonment, hard labor, or stripes: and it has been often urged, that the apprehension of these would be more terrible and impressive than death. This may be the case where great inequality is established between the citizens, where the oppressions of the great drive the lower classes of society into penury and despair, where education is neglected, manners ferocious, and morals depraved. In such a country—and such there are in Europe—the prospect of death can be no restraint to the wretch whose life is of so little account, and who willingly risks it to better his condition. But in a nation where every man is or may be a proprietor, where labor is bountifully rewarded, and existence is a blessing of which the poorest citizen feels the value, it cannot [8] be denied, that death is considered as the heaviest punishment the law can inflict. The impression it makes on the public mind is visible when a criminal is tried for his life. We feel it in the general expectation—in the numbers that throng the place of trial—in the looks of the prisoner—in the anxious attention and long deliberation of the jury, and in the awful silence which prevails while the verdict is given in by their Foreman. All these announce the inestimable value which is set on the life of a citizen. But the reverse of this takes place when imprisonment at hard labor is the punishment, and the minds of all present, are free from the weight which oppresses them during a trial of a capital charge. The dread of death is natural, universal—impressive: and destruction is an idea so simple that all can comprehend and estimate it: while the punishment of imprisonment and hard labor,

secluded from common observation, and consisting of many parts, requires to be contemplated or felt, before its horrors can be realized.

But, while this truth is admitted in the abstract, it cannot be denied, that the terror of death is often so weakened by the hopes of impunity, that the less punishment seems a curb as strong as the greater. The prospect of escaping detection and the hopes of an acquittal or pardon, blunt its operation and defeat the expectations of the Legislature. Experience proves that these hopes are wonderfully strong, and they often give birth to the most fatal rashness*. Through the violence [9] of the temptation the offender over-looks the punishment, or sees it "in distant obscurity." Few, who contemplate the commission of a crime, deliberately count the cost.

These circumstances make it doubtful, whether capital punishments are beneficial in any cases, except in such *as exclude the hopes of pardon.* It is the universal opinion of the best writers on this subject, and many of them are among the most enlightened men of Europe, That the imagination is soon accustomed to overlook or despise the *degree* of the penalty, and that the *certainty* of it is the only effectual restraint. They contend, that capital punishments are prejudicial to society from the example of barbarity they furnish, and that they multiply crimes instead of preventing them. In support of this opinion, they appeal to the experience of all ages. They affirm, it has been proved, in many instances, that the *increase of punishment,* though it may suddenly check, does not, in the end, diminish the number of offenders.*(b)* They appeal to the example of the Romans, who, during the most prosperous ages of the Commonwealth, punished with death none but their slaves. They appeal to the East Indians, that mild and soft people, where the gentlest punishments are said to be a curb as effectual as the most bloody code in other countries. *(c)* They appeal to the experience of modern Europe,—to the feeble operation of the

* Soon after the act to amend the penal laws was passed two persons were convicted, one of robbery the other of burglary, committed previous to it. These had the privilege of accepting the new punishment instead of the old: but, they obstinately refused to pray the benefit of the act, and submitted to the sentence of death in expectation of a pardon. The hopes of one were realized; but the other was miserably disappointed. The unavailing regret he expressed when his death warrant was announced and the horrors which seized him when he was led to execution proved, at once, how terrible is the punishment of death and how strong are the hopes of pardon!

(*b*) See NOTE II [*infra*, p. 158.]

(*c*) Montesq, B. 14. ch. 15. See NOTE III [*infra*, p. 159.]

increased severity against robbers and deserters in France,—and to the situation of England, where, amidst a multitude of sanguinary and atrocious laws, the number of crimes is greater than in any part of Europe. They cite the example of Russia,‡ where the intro- [10] duction of a *milder* system has promoted civilization, and been productive of the happiest effects: *(d)* and they applaud the bolder policy of Leopold, which has actually lessened the number of crimes in Tuscany, by the *total* abolition of all capital punishments. This instructive fact is not only authenticated by discerning travellers, but is announced by the celebrated Edict of the Grand Duke, issued so lately as 1786. *(e)* To these might be added the example of Sweden and Denmark: and indeed the more closely we examine the effects of the different criminal codes in Europe the more proofs we shall find to confirm this great truth, *That the source of all human corruption lies in the impunity of the criminal not in the moderation of Punishment.(f)*

The experience of America does not contradict that of Europe. Crimes, which are capital in one state, are punished more mildly in another: and, in the same state, offences which were formerly capital are not so at present. Such are those of horse-stealing, forgery, counterfeiting bills of credit or the coin, robbery, burglary, and some others: but, I cannot learn that these crimes have been better repressed by the punishment of death than by a milder penalty. Horse-stealing has always been treated like the other kinds of simple larceny in New England and in Pennsylvania: in all the states southward of Maryland, it is a capital crime. In the latter states the offence seems to be as common as in the former; and if the severity of the punishment has any beneficial effect, my enquiries have not been able to ascertain it. On the contrary I have the best authority for say- [11] ing, that, in Virginia, the effect is so feeble, that of all crimes this is the most frequent. New Jersey has made the experiment fairly. At first it was a felony of death: in 1769 the law was repealed: it was again revived in 1780; but after a few years experience, the Legislature was obliged to listen once more to the voice of humanity and sound policy. The unwillingness of witnesses to prosecute, the facility with which juries acquitted, and the prospects of pardon, created hopes of impunity which invited and multiplied the offense.*(g)*

In the case of forgery the balance is clearly on the side of the milder punishment. It is capital in New York, but it is not

‡ Beccaria. Voltaire 4. Black. Com. p. 10.

(*d*) See NOTE IV [*infra*, p. 160.] (*e*) See NOTE V [*infra*, p. 161.]

(*f*) Montesq. B. 6. ch. 12. See NOTE VI [*infra*, p. 162.]

(*g*) See NOTE VII [*infra*, p. 166.]

so in Pennsylvania; and, in the latter state, there have been fewer convicts of this crime than in the former. It is natural that it should be so; for the public sentiment revolting against this severity, very few have been executed: and the mischief became so apparent, that the late Attorney General thought it his duty to present a memorial to the Assembly and to re-recommend a milder punishment than death.

Another fact deserves notice. Bank bills have been several times forged in the state of New York: but in Pennsylvania this crime has never been committed, although the act which made it capital at first, was repealed above seven years ago.

Counterfeiting the continental bills of credit and uttering them knowingly, were, as far as I can learn, much more frequent in this state, where they were capital, than in Connecticut where they were not. It appears, by the annexed table, that, in the space of two years, while such bills were current, there were eighteen persons tried for these [12] crimes, of whom eleven were convicted. This is nearly equal to all the other instances of forgery, not capital, that have occurred in the long term of fourteen years. Robbery, burglary, and the crime against nature were formerly punished with death in this state: since the year 1786, they have been as effectually restrained by the gentler penalties of imprisonment and hard labor.

The experience of Maryland, and, also, of Connecticut, where a similar system has been adopted with regard to the two first of these crimes, is said to establish the same fact.*(h)*.

Hereafter there may be occasion further to illustrate this part of the subject: yet, even these facts incline us to suspect, that, in most cases to which it is applied, the terror of death (lessened as it is by the hopes of impunity) is neither necessary nor useful. May not milder penalties, strictly enforced, have as great an effect? Is there not sound wisdom in establishing a species of punishment in which the grade of criminality may be marked by a correspondent degree of severity? May we not be allowed to suspect, that any *apparent* necessity results rather from the indolence and inattention of governments than from the nature of things? and, may we not infer, that a Legislature would be warranted to abolish this dreadful punishment in all cases (except in the *higher* degrees of treason and murder) and to make, in this country, a fair experiment in favor of the rights of human nature.

In no country can the experiment be made with so much safety, and such probability of success, as in the United States.

(*h*) See NOTE VIII [*infra*, p. 167.]

In the old and corrupted governments of Europe, especially in the larger states, a reform in the criminal law has real difficulties to encounter. The multitude of offen- [13] ders—the unequal state of society—the ignorance, poverty and wretchedness of the lowest class of the people—corruption of morals—and habits and manners formed under sanguinary laws, make a sudden relaxation of punishment, in those countries, a dangerous experiment. But in America every thing invites to it: and strangers have expressed their surprise, that we should still retain the severe code of criminal law, which, during our connection with Britain, we copied from her. "I am surprized, says a late traveller through America,† that the penalty of death is not abolished in this country where morals are so pure, the means of living so abundant, and misery so rare, that there can be no need of such horrid pains to prevent the commission of crimes." That these punishments ought to be greatly lessened, if not totally abolished, is the opinion of many of the most enlightened men in America: among these I may be allowed to mention the respectable names of Mr. Jefferson, Mr. Wythe and Mr. Pendleton of Virginia, who, as a committee of revision in their report, to the General Assembly of that state, recommended the abolition of capital punishments in all cases but those of treason and murder: a proposal, which, unfortunately for the interests of humanity, was rejected in the Legislature by a single vote.

But authorities may mislead and theory may be delusive. Government is an experimental science: and a series of well established facts in our state is the best source of rational induction for us. I shall, therefore, after taking an historical view of our criminal law, proceed to examine the practical effects of the new system of punishments—(adopted in 1786, and improved by new regulations, intro- [14] duced in 1790)—of those which are still capital—and to accompany them with such observations as a course of some years experience may suggest.

Historical View of the criminal Law of Pennsylvania.

IT was the policy of Great Britain to keep the laws of the Colonies in unison with those of the mother country. This principle extended not only to the regulation of property, but even to the criminal code. The royal charter to William Penn directs, That the laws of Pennsylvania "respecting felonies, should be the same with those of England, until altered by the acts of the future Legislature," who are enjoined to make these acts "as near, as

† M. Briffot. p. 743.

conveniently may be, to those of England:" * and in order to prevent too great a departure, a duplicate of all acts are directed to be transmitted, once in five years, for the royal approbation or dissent.

The natural tendency of this policy was to overwhelm an infant colony, thinly inhabited, with a mass of sanguinary punishments hardly endurable in an old, corrupted and populous country. But the Founder of the province was a philosopher whose elevated mind rose above the errors and prejudices of his age, like a mountain, whose summit is enlightened by the first beams of the sun, while the plains are still covered with mists and darkness. He comprehended, at once, all the absurdity of such a system. In an age of religious [15] intolerance he destroyed every restraint upon the rights of conscience, and insured not merely *toleration*, but absolute *protection*,† to every religion under heaven. He abolished the ancient oppression of forfeitures for self-murder, and deodands in all cases of homicide. He saw the wickedness of exterminating where it was possible to reform; and the folly of capital punishments in a country where he hoped to establish purity of morals and innocence of manners. As a philosopher he wished to extend the empire of reason and humanity; and, as a leader of a sect, he might recollect that the infliction of death, in cold blood, could hardly be justified by those who denied the lawfulness of defensive war. He hastened, therefore, to prevent the operation of the system which the charter imposed, and among the first cares of his administration, was that of forming a small, concise, but complete code of criminal law, fitted to the state of his new settlement: a code which is animated by the pure spirit of philanthropy, and, where we may discover those principles of penal law, the elucidation of which has given so much celebrity to the philosophy of modern times. The punishments prescribed in it were calculated to tie up the hands of the criminal—to reform—to repair the wrongs of the injured party—and to hold up an object of terror sufficient to check a people whose manners he endeavoured to fashion by

* This clause, introduced into several of the charters, was considered as imposing the English statutes. The Assembly of North Carolina, in their acts, passed 1715, declare, that, "From hence it is manifest that the laws of England are our laws as far as they are compatible with our way of living and trade." A similar attempt, to introduce the British statutes, was more than once made in early times in Pennsylvania but was always steadily opposed by the General Assembly.

† If any one shall abuse or deride another for his persuasion or practice in religion, he shall be punished as a disturber of the peace. Laws, 1682. Ch. I.

provisions interwoven in the same system. Robbery, burglary, arson, rape, the crime against nature, forgery, levying war against the Governor, conspiring his death, and other crimes, deemed so heinous in many countries, and for which so many thousands have been [16] executed in Britain, were declared to be no longer capital. Different degrees of imprisonment at hard labor—stripes—fines and forfeitures, were the whole compass of punishment inflicted on these offences. Murder, "wilful and premeditated," is the only crime for which the infliction of death is prescribed; and this is declared to be enacted in obedience "to the law of God," as though there had not been any political necessity even for this punishment apparent to the Legislature. Yet even here the life of the citizen was guarded by a provision, that no man should be convicted but upon the testimony of two witnesses, and, by a humane practice, early introduced, of staying execution till the record of conviction had been laid before the Executive, and full opportunity given to obtain a pardon of the offence or a mitigation of the punishment.

These laws were at first temporary, but being, at length, permanently enacted, they were transmitted to England, and were all, without exception, repealed by the Queen in Council. The rights of humanity, however, were not tamely given up: the same laws were immediately reenacted, and they continued until the year 1718, and might have remained to this day had not high handed measures driven our ancestors into an adoption of the sanguinary statutes of the Mother Country. During this long space of thirty-five years, it does not appear that the mildness of the laws invited offences, or that Pennsylvania was the theatre of more atrocious crimes than the other Colonies. The judicial records of that day are lost: but, upon those of the legislative or executive departments and other public papers, no complaint of their inefficacy can be found; nor any attempt to punish these crimes with death. On the contrary, as these laws were temporary the [17] subject was often before the Legislature, and they were often re-enacted: which is a decisive proof that they were found adequate to their object.

Under this policy the province flourished: but during the boisterous administration of Governor Gookin, a storm was gathering over it which threatened to sweep away not only this system of laws, but, with it, the privileges of the people. The administration of government, in all its departments, had, from the first settlement of the province, been conducted under the solemnity of an attestation instead of an oath. The laws upon this subject were repealed in England, and, by an order of the Queen in Council, all officers and witnesses were obliged to take an oath, or, in lieu thereof, the affirmation allowed to Quakers in England by the statute of

William III. But the Assembly chose to legislate for themselves on this important subject; and this, together with the refusal to adopt the English statutes in other cases, had given offence. The conduct of the Assembly, in their disputes with the Governor, was misrepresented—suspicions of disaffection were propagated—the declining health of the Proprietor left them without an advocate, and his necessities threatened them with a surrender of the government into the hands of the crown.

At this moment the Quakers were alarmed with the prospect of political annihilation. It was said, that the act of 1 George I. which prohibits an affirmation in cases of qualifications to office or in criminal suits, extended to the colony and superceded the ancient laws. This construction, which was advocated by the Governor, and tended to exclude the majority of the settlers from all offices and even from the protection of the law, threw the whole province into confusion. The Governor refused to administer the affirmation as [18] a qualification for office—the Judges refused to sit in criminal cases—the administration of justice was suspended, and two atrocious murderers remained in gaol three years without trial. The Assembly were alarmed, but they resolutely and forcibly asserted the rights of the people: and Gookin was at length re-called.*

On the accession of Sir William Keith a temporary calm took place—the criminals were convicted under the *old forms of proceeding,* and executed agreeably to their sentence. A representation and complaint of this was made to the Crown; and the Assembly were panick struck with the intelligence. They trembled for their privileges—they were weary of the contest which had so long agitated them, and impatient to obtain any regular administration of justice consistent with their fundamental rights.

They had been assured by the Governor that the best way to secure the favor of their Sovereign was to copy the laws of the Mother Country,—"the sum and result of the experience of ages." The advice was pursued—a resolution to extend such of the British penal statutes, as suited the province, was suddenly entered into. An act for this purpose (containing a provision to secure the right of affirmation to such as conscientiously scrupled an oath) was drawn up by David Lloyd, the Chief Justice, and, together with a petition to the Crown, was passed in a few days.†

So anxious were they to conform, that they not only surrendered their ancient system, but left it to the British Parliament

* 2 Votes of Assembly, 150, 188, 194-5, 200, et passim.

† 2 Votes of Assembly, 224, 253-4-5, &c.

to legislate for them, in [19] future, upon this subject:† and so humbled that they departed, in their petition, from their usual stile,‡ and directed their Speaker to solicit the Vestry and some members of the Church of England to join in a similar address. The sacrifice was accepted, and the privilege of affirmation, so anxiously desired, was confirmed by the royal sanction.

Thus ended this humane experiment in legislation, and the same year, which saw it expire, put a period to the life of its benevolent Author.

The royal approbation of this act was triumphantly announced by the Governor, and such was the satisfaction of seeing its privileges secured, that the province did not regret the price that it paid.

By this act, which is the basis of our criminal law, the following offences were declared to be capital: high treason (including all those treasons which respect the coin) petit treason, murder, robbery, burglary, rape, sodomy, buggery, malicious maiming, manslaughter by stabbing, witch-craft and conjuration, arson,§ and every other felony (except larceny) on a second conviction. The statute of James I. respecting bastard children, was extended, in all its rigor, and the courts were authorized to award execution forthwith.

To this list, already too large, were added, at subsequent periods, counterfeiting and uttering counterfeit bills of credit, counterfeiting *any* current gold or silver coin, and the crime of arson, [20] was extended so as to include, the burning of certain public buildings. All these crimes, except *perhaps*, the impossible one of witch-craft, were capital at the revolution.

We perceive, by this detail, that the severity of our criminal law is an exotic plant and not the native growth of Pennsylvania. It has been endured, but, I believe, has never been a favorite. The religious opinions of many of our citizens were in opposition to it: and, as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them. During our connection with Great Britain no reform was attempted: but, as soon as we separated from her, the public sentiment disclosed itself, and this benevolent undertaking was enjoined by the constitution. This

† Persons attainted, &c. are to suffer "as the laws of England now do *or hereafter shall direct.*" Act, 1718. § VI.

‡ But the principle was saved by directing the Speaker to sign it with an exception.

§ I include arson in this list, because such was the construction of the act at the time and long after its passing. One Hunt was actually executed under it. But, on a sounder construction it being held to be a felony within clergy, this benefit was expressly taken away in 1767.

was one of the first fruits of liberty, and confirms the remark of Montesquieu,* "That, as freedom advances, the severity of the penal law decreases."

In obedience to these injunctions, the Assembly proceeded, in the year 1786, to introduce the punishment of hard labor; and the offences (formerly capital) on which its effects have been tried, are, the crime against nature, robbery and burglary.

We are now to enquire whether this punishment has been less efficacious in preventing these crimes than the punishment of death. To aid this enquiry, a table exhibiting a view of the number of persons convicted, acquitted and executed, since the year 1778, is annexed.

Of the Crime against Nature.

THIS crime, to which there is so little temptation, that philosophers have affected to doubt its [21] existence, is, in America, as rare as it is detestable. In a country where marriages take place so early, and the intercourse between the sexes is not difficult, there can be no reason for severe penalties to restrain this abuse. The wretch, who perpetrates it, must be in a state of mind which may occasion us to doubt, whether he be *sui Juris* at the time; or, whether he reflects on the punishment at all. The infamy of detection would, of itself, be a punishment sufficient to restrain any one who was not certain of being undiscovered: and what terror has any punishment to him who believes that his crime will never be known? The experiment that has been made, proves that the mildness of the punishment has not encreased the offence. *In the six years preceding the act, and while the crime was capital, there are on record two instances of it. In the same period since, there is but one.* It was impossible this last offender could be seduced by the mildness of the punishment, because at the time, and long after his arrest, he believed it to be a capital crime.

These facts prove, that to punish this crime with death would be a useless severity. They may teach us, like the capital punishments formerly inflicted on adultery and witch-craft, how dangerous it is rashly to adopt the Mosaical institutions. Laws might have been proper for a tribe of ardent barbarians wandering through the sands of Arabia which are wholly unfit for an enlightened people of civilized and gentle manners.

Robbery and Burglary.

THE salutary effects of this change in our laws are not so evident in the cases of robbery and burglary as in that of the crime against nature. On the contrary, a superficial inspection of the

* Book VI. ch. 9.

annex- [22] ed table would lead a careless observer to believe that it has tended to encourage these crimes instead of suppressing them. It is true, there were, at first, great defects in the plan and still greater in the execution: and, for some time after its adoption, it had difficulties to struggle with which nothing but the native merit of its principle could have surmounted. A detail of these is necessary to enable us justly to appreciate this new system of punishment.

It must be remarked, that about three-fourths of the convictions of robbery and burglary, stated in the table, took place in Philadelphia. In a large city like this there is always a class of men, sometimes greater and sometimes less, who live by dishonest means, and considering theft as a regular vocation, pass through all the gradations of simple larceny into the higher departments of robbery and burglary. It so happened, that about the time of passing the act for amending the penal laws, there was accumulated in the gaol of the city and county of Philadelphia a great number of persons who had been convicted of these and other infamous crimes, and were either pardoned by the mercy of the government, or had undergone the punishment (and some of them the *repeated* punishment) of the pillory and whipping-post. These wretches, hardened by the nature of the punishment they had sustained—shut up together in idleness—freely supplied with liquor—witnesses of each others debauchery—instructing the inexperienced in the arts of villainy—and mutually corrupting and corrupted by each other, were a melancholy proof of the inefficacy of our former laws, and they were well prepared to despise the new. In order to clear the gaol, and accommodate it to the operation of the new system, these offenders were, from time [23] to time, discharged, and as soon as they were at liberty they returned to their old vocation.

It is a fact well known, that among all the convicts which first fell under the correction of the new law, scarce a new face appeared. Most of those who were convicted of the two offenses in question, were sentenced to undergo an imprisonment of five, seven or ten years; and had these sentences been strictly enforced, the benefit of the new system would have been apparent, and these crimes would have become rare.

Of all offenders these are the most incorrigible. Other offences are seldom repeated: but a person once devoted to any species of theft is seldom reclaimed by any terrors he has undergone or any mercy he has received. Reformation, though not impossible, must be the work of much time. A *strict execution* of the act was, therefore, essential to its success. But it unfortunately happened, that they were scarcely convicted before many of them were again loose

upon the public. Pardons, so destructive to every mild system of penal laws, instead of being thought *dangerous*, were granted with a profusion as unaccountable as it was mischievous: and escapes, which ought to have been guarded against by the most vigilant care, were multiplied to an alarming degree. Sixty-eight different persons were convicted of these offences previous to the year 1790. Of these twenty-nine escaped and thirty have been pardoned—five executed for capital offences committed after their escape, and one killed in an affray. I doubt whether any one male offender served out the time to which he was condemned by the sentence of the court; and it is certain, that there is not, at this time, in gaol a single person *under* a sentence pronounced previous to the year 1791. When to these abuses it is added, that the system itself was de- [24] fective in requiring the criminals to be employed abroad, which gave them opportunities for intoxication, and hardened them against shame—that their labor was not equal to that which it is the lot of poverty to endure, while their fare was much better—that there were no places for solitary confinement nor power to inflict it, and no real increase of punishment for a second offence, we may readily conjecture, that the operations of the system must have been not only impeded but perverted.

The defects of the system were corrected in 1790—the execution of it has been diligently attended to by the Inspectors, and the prerogative of pardon, since it has resided in a single Magistrate, is no longer weakly exercised.

Our calculations ought, therefore, to be made on the operations of the corrected system *during the two last years*. From an inspection of the table, it is evident these crimes have greatly decreased during that period. *The convictions in those two years are, upon an average, considerably less than those in any two years which precede them.*

But, under all the difficulties which, at first, it encountered, and without allowing for re-convictions which swell the account, let us examine what has been the general effect of the system, on these crimes, since it was first adopted. Referring, therefore, to the table, and excluding the year 1778 in order to make the time previous and subsequent to the act as equal as we can, the account will stand thus:

	Before the *act.*	*Since* the *act.*
Convicted,	81	104
Convicted partially,	9	1
Acquitted,	42	20
Total tried,	132	125

[25] From this statement it appears, *that more persons were tried for these offences, while they were capital, than since the punishment has been lessened: and if we allow for re-convictions the difference will be much greater.* It is true, the number of persons convicted, in the former period, is less than that of those convicted in the latter: but in this (as well as in the number of partial acquittals) I see nothing but the humane struggles of the jury to save the offender from death. At that period the acquittals were more than *half* the number of the convictions: since the change in our laws, they do not amount to a *fourth.*—A proof how much the severity of a law tends to defeat its execution!

It is probable that the number of *these* crimes would have been less, had a greater difference been made between *their* punishment and that of simple larceny. Perhaps it might have a beneficial effect if solitary confinement and coarse fare were a *necessary* part of the punishment. At present, it forms no part of the sentence on the criminal, but is inflicted, at the discretion of the Inspectors, on "the more hardened offenders." This is so indefinite a description, that this salutary rigor may be either capriciously inflicted or weakly withheld: and, as it is not the *certain* consequence of the offence, it can be no check upon the mind of the offender.

It might be sound policy to make a distinction between the punishment of those who commit these offences, armed with dangerous and mortal weapons, and of those who do not indicate such violent intentions. Such a distinction prevails in the laws of Connecticut, and, also, in those of Milan: and I understood from the nephew of the Marquis Beccaria, while he was in America, that [26] beneficial effects had resulted from this discrimination.

These crimes are still punished with death in the first instance, when committed by any person, sentenced to hard labor, after an escape: and, also, on the second conviction, if the offender was pardoned for the first. A similar provision is found in the laws of Denmark, where robbery is not in the first instance a capital offence, and where (Mr. Howard assures us) Night Robberies are never heard of.*

It is evident, from this examination, that the principle of the new system, properly modified, coincides with the public safety as much as with the dictates of humanity. The happy result of this experiment is an encouragement to proceed still further. I have already observed, that no offenders are so incorrigible as robbers and burglars, and on few crimes could the experiment have been made with so little prospect of success as on these I have been con-

* Howard on Pris. p. 76. Williams on the Northern Gov. 1 vol. p. 353.

sidering. Succeeding in this, there is little to apprehend from extending it to other crimes, which, though still capital, are not of the deepest dye.

COUNTERFEITING THE COIN.

BY the act of 1767, the counterfeiting "of any gold or silver coin, which is, or shall be, passing, or in circulation," is made a felony of death without benefit of clergy. This not only comprehends all current *foreign* coins, but will embrace those of the United States as soon as they come into circulation.

[27] This act is more penal than even the British statutes, for it is not a capital offence in England to counterfeit any *foreign* coin *at present* current in that kingdom.* If it be necessary to guard our coin by the terrors of an ignominious death, the act, to be consistent, ought to go further. False money made in another state or beyond seas, may be imported or uttered without incurring this punishment. The offence may, therefore, in substance, be committed, and yet the penalty of the law avoided.

But there does not appear to be any necessity for so violent a remedy. It is probable this crime will be neither frequent nor dangerous. The perfection of modern coins renders its commission difficult, and, to counterfeit them with success, requires not only time and industry, but a degree of skill which few possess, and which, in this country will always ensure its possessor a respectable livelihood.

Most people are now a days sufficiently discerning to distinguish the genuine from false coin: and the Banks, established in this and many of the principal cities in America, form a valuable check upon the circulation of base money. In these it is immediately detected; and, if a quantity appears to be abroad, information of it, and of the marks which distinguish it, is immediately transmitted to every part of the state by means of the public prints: Add to this, that the practice of making payments by checks or bank notes, now so general in this city (which is the usual mart for vending base money) tends very much to lessen the mischief. There is no longer any danger that false money will shock the public confidence or embarrass the course of dealing between man and man. The [28] monstrous folly of considering this offence as an usurpation of sovereignty, and, therefore, a species of high treason, is past; and it may now be safely ranked with other base frauds against individuals. The Edict of the Duke of Tuscany considers the coining of false money as grand larceny and punishes it as such.† This crime is

* Black. Com. 89.

† §. 94.

not capital in Massachusetts, nor in Connecticut, nor in Maryland, nor in North Carolina, as far as relates to foreign coin; and to every reflecting mind, which is not still enslaved by ancient errors, the punishment of death must appear to be far beyond the demerits of the offence. Is it wise, or is it just, to confound together dissimiliar crimes, and to involve him who debases a piece of money in the same punishment with him who is guilty of deliberate murder?

There is no substantial reason for making this crime capital which does not equally apply to that of forgery. In the present state of society paper negotiations require as much protection as the coin. The latter offence, in general, is more easily committed; and, a single act of forgery, may be more injurious to the individual than many acts of counterfeiting the coin. Yet, we find, the paper of the Banks, promissory notes and bills of exchange sufficiently safe under the mild systems of our laws. It is true various acts of Assembly made it a felony of death to counterfeit and and utter the Continental bills of credit: but it has been already stated, that no beneficial consequences resulted from this severity.

Only three persons have been tried in Pennsylvania for counterfeiting the coin since the revolution, and of these two were acquitted. Positive proof of this crime is rarely to be obtained, and the [29] usual circumstances which attend its commission, as they amount to proof of an inferior offence, are seldom admitted by a jury to amount to anything more.

From the experience we have had it is not probable, that many will become the victims of the law: but, while it remains in our statute book, it furnishes a precedent for involving, in the same punishment, crimes which are similar in their nature and effects. I suspect this offence was overlooked at the time the reform was made in our penal laws, otherwise it would hardly have been continued in the list of capital crimes.

Of the acts respecting the crime of counterfeiting bills of credit, loan-office certificates, &c. I shall take no notice, as the offence will scarcely be committed at this day, and the law will become obsolete of itself, if it be not repealed.

RAPE.

THE infliction of death for any crime supposes the incorrigibility of the criminal. But this offence, arising from the sudden abuse of a natural passion, and perpetrated in the phrenzy of desire, does not announce any irreclaimable corruption.

Female innocence has strong claims upon our protection, and a desire to avenge its wrongs is natural to a generous and manly mind. We consult this resentment, rather than our reason, when we punish

this offence with such dreadful severity. The injury is certainly great: yet, it cannot be denied, that much of its atrocity resides in the imagination and is the creature of opinion. Why else do we estimate the degree of the offence so much by the rank, the situation, and the character of the injured party? Why does a jury frequently treat this charge so lightly as to acquit against positive and uncontradicted evidence? Or why do [30] the laws consider the violation of a female slave of so little moment as to secure the offender from punishment by excluding the only witness who can prove it? * In most cases the violation of the natural right and the real injury to the individual is nearly the same: yet, those who justify the present severity are obliged to admit, "that it is a crime peculiarly liable to vary in the degree of its atrociousness, according to the circumstances of the case, and, therefore, *peculiarly* open to the divine prerogative of pardon." † The truth is, that in many instances, the common sense of mankind revolts against the extremity of the punishment, and pardons or acquittals are the necessary consequence. It is these pardons—it is these acquittals—which create the hopes of impunity and rob the law of all its terrors. It has been as strictly executed in Pennsylvania as in most countries: yet, of eighteen persons tried since the revolution for this crime, and *positively* charged, only five have been punished.

By a table of capital convictions in Scotland from 1768, to 1782,§ it appears that only one person was convicted of this crime, and that he was pardoned.*(i)*

William Penn considered imprisonment, stripes and hard labour as a punishment adequate to this crime and sufficient to check the commission of it. The Grand Duke of Tuscany prescribes imprisonment at labor, varied as the circumstances may require. ‡ The Legislature of Vermont, so late as the year 1791, has followed the humane exam- [31] ple, and in that state death is no longer inflicted on this offence.

If any one, mistaking the end of punishment, and more intent on vengeance than the prevention of the crime, deems this chastisement too light, a visit to the penitentiary house lately erected as part of the gaol of Philadelphia, will correct the opinion. When he looks into the narrow cells prepared for the more atrocious offenders

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* Act for the gradual abolition of slavery. § 7.

† Eden's principles, 238.

§ Howard on prisons, 485.

(*i*) See NOTE IX [*infra*, p. 167.]

‡ Section 99.

—When he realizes what it is to subsist on coarse fare—to languish in the solitude of a prison—to wear out his tedious days and long nights in feverish anxiety—to be cut off from his family—from his friends—from society—from all that makes life dear to the heart—When he realizes this he will no longer think the punishment inadequate to the offence.

ARSON.

ARSON is the crime of slaves and children. Its motive is revenge, and, to a free mind, the pleasure of revenge is lost when its object is ignorant of the hand that inflicts the blow. Twelve persons have been tried for this offence in the last fourteen years: and of these, three were negro slaves—four were children, and two were vagrant beggars. The remaining three were acquitted under circumstances which made it probable the fire was accidental.

This offence may be committed so secretly that it is seldom possible to collect proof sufficient on a charge that is capital. Other crimes are committed in the presence of witnesses, or are attended with circumstances which point out the criminal: but in arson there are no eye-witnesses—the presumptive proof will seldom be *violent*, and confessions are only to be expected from the ignorance of slaves and children. These confessions (too [32] generally extorted by promises or threats) come before the jury in so questionable a shape, that they are often disregarded.

Hence the severity of the punishment, in this case, leads in a peculiar manner to impunity. The proof is so difficult that juries are justified in acquitting, and the objects convicted are such as the Executive is prompt to pardon. Of five persons convicted of this crime only one was executed.—This was a *negro* woman in a *distant* county.

The crime of arson extends only to the wilful burning of a dwelling-house, certain public buildings, or a barn having hay or corn therein. Every other species of property may be maliciously destroyed by fire, without incurring the forfeiture of life. Hence, ships and other vessels in harbour or on the stocks—hay and grain in stack or barracks—magazines of arms and provisions—store-houses of every description—mills—theatres and distilleries, are not protected by these high terrors of the law: and to burn *them* is considered merely as a misdemeanor at common law. Here then is a fair opportunity for comparison. Has the milder punishment encouraged these malicious crimes; or, has the terror of death, hung up on high, deterred offenders from the crime of arson? The following fact will answer the question. *Since the revolution twelve persons have been indicted for the crime of arson; and only two for any other species of malicious burning!*

In New Hampshire and Massachusetts this crime is not capital if committed in the day time: nor in Connecticut, "if no prejudice or hazard to the life of any person happen therefrom." To burn public vessels or magazines of provision, *in time of war,* being a species of treason, is, indeed, capital in that state: but it is not so if the same offence be committed in time of peace. I cannot [33] learn that these distinctions have any effect, or that the lesser offence is more frequent than the greater.

Upon the whole, it seems that solitude and hard labor will be a punishment, for this crime, as efficacious and more advantageous to the public, than death. The offender may be reformed and become a useful citizen, and he may be compelled to repair, by his estate or his labor, the injury he has done. This was formerly required in most cases, by the laws of William Penn; but, at present, is swallowed up by the legal maxim which merges the private in the public wrong: a maxim, invented by fiscal or feudal ingenuity, to prevent the claims of the injured party from interfering with the forfeiture to the crown and the escheat to the lord.

MALICIOUS MAYHEM, &C.

THIS offence is described in the words of the English statute, 22 & 23 Car. II. Ch. 1. commonly called the *Coventry* act. The severity of this act, which goes considerably beyond all former statutes on the subject, was occasioned by a malicious assault made upon Sir John Coventry, then one of the members of the House of Commons. Laws thus made upon the spur of the occasion, and under the emotions of indignation, are seldom founded upon the permanent principles of justice or policy.

This act has remained a dead letter in Pennsylvania. No person has been prosecuted under it, nor can I learn that the crime has ever been committed. I attribute this to the state of manners, and by no means to the nature of the penalty. On the contrary, as no prosecution has called it into public notice, it is probable that very few people know that such an act exists.

[34] New Hampshire, in legislating on this subject, has set us an example of justice and moderation. There the penalty is fine and imprisonment not exceeding seven years; and there, as well as in Pennsylvania, the offence is unknown. The same penalty is prescribed by the laws of the United States. Even in Georgia, where the attention of the Legislature has been called to it so late as 1787, the punishment, for the first offence, is the pillory and fine not exceeding one hundred pounds, half of which goes to the injured party. In Virginia and North Carolina, though it be a felony, it is not ousted, as with us, of the benefit of clergy.

MAN-SLAUGHTER BY STABBING.

The act of 1 Jac. I. usually called, the statute of stabbing, by which this offence was ousted of clergy, was extended to the province by an express reference to it in the act of 1718. This statute, which was levelled against a *temporary* mischief prevalent in England at that day—in which so much ignorance of the common law is discovered—which is so rigorous in its *literal* meaning as to involve the cases of chance medley and innocent mistake—and so obscure and ill drawn that the Judges have been divided on the meaning of almost every important word in it—ought never to have been made a permanent law of Pennsylvania. Its severity, however, has been so mitigated by judicial construction, that the soundest opinion now seems to be, "That the party indicted upon it ought not to be convicted, unless the fact, upon evidence, turns out to be murder at common law." * For this reason it has not been usual, for some years past, to indict [35] any person on this act in Pennsylvania; and, for the same reason, it ought not to remain among our laws. It is useless when rightly explained: it may be the instrument of mischief when it is perverted or misunderstood.

MURDER.

IT has been a question which has divided the philosophers of Europe, whether it be lawful, in *any* case, to take away the life of a criminal: and the negative has been advanced and ingeniously supported in our own country. † Great names are arranged on the different sides of this question: but, waving useless refinement, it seems to resolve itself into that which we are considering, *viz.* whether it be *necessary* to the peace, order and happiness of society.

Murder, in its highest degree, has generally been punished with death, ‡ and it is for deliberate assassination, if in any case, that this punishment will be justifiable and useful. Existence is the first blessing of Heaven, because all others depend upon it. Its protection is the great object of civil society and governments are bound to adopt every measure which is, in any degree, essential to its preservation. The life of the deliberate assassin can be of little worth to society, and it were better that ten such atrocious criminals should suffer the penalty of the present system, than that one worthy citizen should perish by its abolition. The crime imports extreme depravity and it admits of no reparation.

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* Foster, 301-2.

† "Observations on the injustice and impolicy of punishing murder with death," by Dr. Rush.

‡ See NOTE X [*infra*, p. 168.]

"But why should capital punishments have a more powerful effect on these than on other offen- [36] ders?" I have already observed, that the fear of death is universal and impressive: and that its beneficial effects are defeated principally by the hopes of impunity.

We have had no experience what its effect will be when it is applied to a *single* crime of such a nature as to exclude the hopes of pardon. In such a case, where an execution would be as rare as it is dreadful, the wholesome terror of the law would be wonderfully increased: and this is one reason why a less punishment should be adopted for other crimes.

If we seek a punishment capable of impressing a strong and lasting terror, we shall find it in an execution *rarely* occurring—*solemnly* conducted *(k)*—and inflicted in a case, where the feelings of mankind *acquiesce in its justice* and do not revolt at its severity.

But while I contend that this is the most powerful curb of human governments, I do not affirm that it is *absolutely* necessary, or that a milder one will be insufficient. It is possible that the further diffusion of knowledge and melioration of manners, may render capital punishments unnecessary in all cases: but, until we have had more experience, it is safest to tread with caution on such delicate ground, and to proceed step by step in so great a work. A few years experience is often of more real use than all the theory and rhetoric in the world. One thing, however, is clear. Whatever be the punishment inflicted on the higher degrees of murder it ought to be *widely* different from that of every other crime. If not different in its *nature* at least let there be some circumstance in it calculated to strike the imagination—to impress a [37] respect for life—and to remove the temptation which the villain otherwise has to prevent the discovery of a less crime by the commission of a greater.*(l)*

But while I speak thus of deliberate assassination, there are other kinds of murder to which these observations do not apply: and in which, as the killing is in a great measure the result of *accident,* it is impossible the severity of the punishment can have any effect. The laws seem, in such cases, to punish the act more than the intention: and, because society has unfortunately lost one citizen, the executioner is suffered to deprive it of another.

In common understanding the crime of murder includes the circumstances of premeditation. In the laws of William Penn, the technical phrase *malice aforethought,* was avoided; and "wilful and *premeditated* murder" is the crime which was declared to be capital. Yet murder, in judicial construction, is a term so broad and compre-

(*k*) See NOTE XI [*infra,* p. 172.]
(*l*) NOTE XII [*infra,* p. 172.]

hensive in its meaning as to embrace many acts of homicide, where the killing is neither wilful nor premeditated. "*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." Again, " A parker found a boy stealing wood in his masters ground: he bound him to his horse's tail and beat him. The horse took fright, run away and killed the boy. This was held to be murder." * In the latter case there was no design to kill; in the former not the least intention to do any bodily harm.

I am sensible how delicate a step it is to break in upon the definition of crimes formed by the [38] accumulated care of ages; but, when we consider how different, in their degree of guilt, these offences are from the horrid crime of deliberate assassination, it is difficult to suppress a wish, that some distinctions were made in favor of homicides which do not announce extreme depravity. The defect may be, in a degree, supplied by the prerogative of pardon: yet it shocks the vulgar opinion and lessens the horror of the crime whenever a *murderer* is pardoned. It has been said, "Ye shall take no satisfaction for the life of the murderer:" yet it is often necessary, as the law stands, to interpose the prerogative of mercy. Even in England, where restraints are laid upon its exercise in cases of murder, it appears, by tables * already referred to, that, of eight-one sentenced to die for this crime, seven were pardoned,—in Scotland seven out of twenty,—and in Pennsylvania about one-fourth of the whole number convicted. *Not one of these, thus pardoned, has ever been prosecuted, to my knowledge, for any other crime.*

In the report of the committee of revision to the General Assembly of Virginia, a reform is suggested so far as relates to homicide accidentally happening in consequence of a felonious or unlawful act: and it is proposed to be enacted, "That, in future, no such case shall be deemed man-slaughter unless man-slaughter were intended, nor murder unless murder were intended."

Though *assassination* has been rare in Pennsylvania, it cannot be concealed that *homicides* have been very frequent. It appears by the table annexed, that, in the last fourteen years, there have been tried for murder and manslaughter no less than one hundred persons, of whom one half were convicted, and *thirty-four* of these were for mur- [39] der. In the same space of time there were but *twenty* convicted of this latter crime in Scotland. Even in the city of London, nearly twice as populous as this state, there were but *nineteen* persons executed for murder from 1771 to 1783, a space of twelve

* Foster. 259, 292.

* See Jansen's Tables in How. Lazar. p. 483-5.

years.* In fourteen years *twenty-six* have been executed in Pennsylvania.

There is one species of murder which deserves attention. It is that of bastard children. The horrid severity of the statute of James I, introduced here, had long been mitigated by a humane *practice* of requiring some proof that the child was born alive. This practical construction is now legally authorized, and it is necessary to give, some "*probable presumptive proof* of that fact, before the strained presumption that the child, whose death is concealed, was therefore, murdered by its mother, shall be sufficient to convict the party indicted." †

But does it necessarily follow that a child, which *is* born alive, must be destroyed merely because its death is concealed? May not the child perish from want of care, or skill, in so critical a moment? A helpless woman, in a situation so novel and so alarming—alone, and, perhaps, exhausted by her sufferings—may she not be the involuntary cause of her infant's death? and, if she afterwards consults a natural impulse to conceal her shame, is not the penalty beyond the demerit of the offence? These reflections naturally arise in the hearts of jury-men; they regard these unfortunate creatures with compassionate eyes, and I have never known them convict unless there were marks of violence, or some circumstances that would amount to proof of murder at common law. The [40] punishment is ever before their eyes, and they tremble at the consequences of an irretrievable mistake. The presumptions that the child was born alive have been, not only *probable* but *violent,* and yet the act has not been enforced. *There have been fifteen women tried for child-murder since the year* 1778; *three only convicted, and, of these, two were pardoned.* Where a positive law is so feebly enforced, there is reason to suspect that it is fundamentally wrong. The error of *this* act is apparent. Proof of a crime is that which satisfies our minds of the truth of the charge. If it does not produce a *belief* of the fact laid in the indictment it is not *proof* of it—and this belief is neither in our power nor that of the law. It is absurd, therefore, to say, that this or that circumstance shall be *proof of the murder.* To make the concealment a capital crime in one thing; but, to say, that when the concealment is proved, the jury must, at all events, believe the murder to be committed—is a very different one.

In *Denmark,* women guilty of child-murder are no longer punished with death: but are condemned to work in spin-houses for life, and to be whipped annually, on the day when, and the spot where, the

* Howard, p. 484-5.

† Act to reform the penal laws. § VI.

crime was committed. "This mode of punishment, Mr. Howard assures us,* is dreaded more than death, and since it has been adopted has greatly prevented the frequency of the crime."

An attempt was made to introduce a similar alteration in the laws of *Sweden.* It was recommended by Gustavus III. in his speech at the opening of the Diet of 1786. But this innovation was warmly opposed by the Clergy: and the patriots to whose consideration it was referred were unani- [41] mous in advising the representatives of the nation to continue the punishment of death.§

There is a provision in the laws of New Hampshire, which is founded in good sense, and which, while this offence remains capital, it is desirable could be introduced here. There, the *concealment* is treated as a crime punishable by fine, imprisonment or public infamy, according to the circumstances of the case; while the proof of the *murder* remains as at common law. If, as is usually done, the indictment charges both crimes, the jury may acquit of the murder and find the prisoner guilty of the less offence.

MAN-SLAUGHTER.

THOUGH man-slaughter is not, in common acceptance, a capital crime, I mention it for the sake of making a single observation respecting its punishment.

Man-slaughter, as explained in our law-books, is exceedingly comprehensive in its nature. While its deepest shade partakes of the hue of murder, its lightest is faintly tinged with the feeble colors of carelessness and inadvertence. The punishment ought, therefore, to be such as might be varied according to the circumstances of the case: or, the different degrees of the crime should be ascertained and marked with a correspondent penalty. The former is the case in all the New England states, and the court may inflict an *infamous* punishment, or fine or imprisonment, or all or either of these as the degree of guilt requires. This was formerly the law in Pennsylvania; but now *every* person convicted of man-slaughter is sentenced to [42] be burnt in the hand—to find security for his good behaviour *during life*—and to be fined and imprisoned: and for the second offence to be hanged.

Beneficial effects resulted from an act of Assembly, passed in the year 1780, which authorized the Attorney General, with the leave of the court, to proceed against any person charged with *treason,* as

* Howard on prisons, p. 74.

§ See Journey thro' Sweden translated by Radcliffe. Catteau's View of Swed. p. 159.

for a misdemeanor only. Upon this principle, might not the Public Prosecutor be impowered to wave the felony in the lower species of man-slaughter, and to indict the defendant for an unlawful homicide, punishable as a misdemeanor at common law?

PETIT TREASON.

THIS crime, which consists in a wife's killing her husband or a servant his or her master, is punished differently from the other species of murder. A man convicted of it is to be drawn and hanged, and a woman to be drawn and *burnt*. Is not this distinction unjust, and this mode of inflicting death, handed down from ferocious ages, injurious to society from it apparent,* if not real, barbarity?

In many of the states, as well as by the laws of Congress, it is expressly enacted, That death shall *always* be inflicted by hanging the offender by the neck. We have no such act in Pennsylvania.

The distinction between petit treason and other kinds of murder is abolished by the laws of Massachusetts. Neither the enormity of its guilt, nor the supposed allegiance of the party, require a distinction more than the crime of parricide which is punished as simple murder.

[43] HIGH TREASON.

HIGH TREASON, when properly limited, has generally been considered as the highest crime and as involving in it the guilt of murder. In its true meaning it is an attack upon the sovereignty and existence of the nation.

By the acts of Congress and of several of the states * it is properly confined to the levying war and adhering to enemies, and is described in the words of the statute of Edward III:—words, whose precise extent has been settled by the judicial construction of more than four centuries. In Pennsylvania the description of this crime is more diffuse: and the act of 1782 is sufficiently severe which makes it high treason to set up a notice inviting the people to meet for the purpose of erecting a new and independent government within the bounds of the state, or even to attend at any meeting for such a purpose.

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* In practice, it is usual to strangle the woman before her body is committed to the flames. See NOTE II [*infra*, p. 158].

* In New Hampshire "to *conspire* to levy war" is high Treason: This, if applied to the *constructive* levying of war, outdoes the severity of the British Government.

CONCLUSION.

IT is from the ignorance, wretchedness or corrupted manners of a people that crimes proceed. In a country where these do not prevail moderate punishments, strictly enforced, will be a curb as effectual as the greatest severity.

A mitigation of punishment ought, therefore, to be accompanied, as far as possible, by a *diffusion of knowledge* and a *strict execution of the laws*. The former not only contributes to enlighten, but to meliorate the manners and improve the happiness of a people.

[44] The celebrated *Beccaria* is of opinion, that no government has a right to punish its subjects unless it has previously taken care to instruct them in the knowledge of the laws and the duties of public and private life. The strong mind of *William Penn* grasped at both these objects, and provisions to secure them were interwoven with his system of punishments. The laws enjoined all parents and guardians to instruct the children under their care so as to enable them to write and read the scriptures by the time they attained to twelve years of age: and directed, that a copy of the laws (at that time few, simple and concise) should be used as a school book.* Similar provisions were introduced into the laws of Connecticut, and the Select Men are directed to see that "none suffer so much barbarism in their families as to want such learning and instruction." The children were to be "taught the laws against capital offences," † as those at Rome were accustomed to commit the twelve tables to memory. These were regulations in the pure spirit of a republic, which, considering the youth as the property of the state, does not permit a parent to bring up his children in ignorance and vice.

The policy of the Eastern states, in the establishment of public schools, aided by the convenient size and *incorporation* of their townships, deserves attention and imitation. It is, doubtless, in a great measure, owing to the diffusion of knowledge which these produce, that executions have been so rare in New England; and, for the same reason, they are comparatively few in Scot- [45] land.* Early education prevents more crimes than the severity of the criminal code.

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* Laws 1682. ch. 60. 1-2.

† Laws Conn. p. 20.

* Scotland is nearly twice as populous as London; yet, by the tables referred to already, it appears, that about *thirty* criminals are executed, yearly, in London, while not quite *four* is the yearly average in Scotland. The difference between those *capitally convicted*, in two places, is much greater. How. p. 9. 483-5.

The constitution of Pennsylvania contemplates this great object and directs, That "Schools shall be established, by law, throughout this state." Although there are real difficulties which oppose themselves to the *perfect* execution of the plan, yet, the advantages of it are so manifest that an enlightened Legislator will, no doubt, cheerfully encounter, and, in the end, be able to surmount them.

Secondly—Laws which prescribe hard labor as a punishment should be strictly executed.*(m)* The criminals ought, as far as possible, to be collected in one place, easily accessible to those who have the inspection of it. When they are together their management will be less expensive, more systematic and beneficial—Their treatment ought to be such as to make their confinement an *actual* punishment, and the rememberance of it a terror in future. The labor, in most cases, should be real *hard* labor—the food, though wholesome, should be *coarse*—the confinement sufficiently *long* to break down a disposition to vice—and the salutary rigor of *perfect solitude, invariably* inflicted on the greater offenders. Escape should be industriously guarded against—pardons should be rarely, *very rarely,* granted, and the punishment of those who are guilty of a second offence should be sufficiently severe.

The reformation of offenders is declared to be one of the objects of the Legislature in reducing the punishment—But time, and, in some cases, [46] *much time,* must be allowed for this. It is easy to counterfeit contrition; but it is impossible to have faith in the sudden conversion of an old offender.

On these hints I mean not to enlarge—but they point to objects of great importance, which may deserve attention whenever a further reform is attempted.

The conclusion to which we are led, by this enquiry, seems to be, that in all cases (except those of high treason and murder) the punishment of death may be safely abolished, and milder penalties advantageously introduced—Such a system of punishments, aided and enforced in the manner I have mentioned, will not only have an auspicous influence on the character, morals, and happiness of the people, but may hasten the period, when, in the progress of civilization, the punishment of death shall cease to be necessary; and the Legislature of Pennsylvania, putting the key-stone to the arch, may triumph in the *completion* of their benevolent works.*(n)*

(*m*) See NOTE XIII [*infra*, p. 173.]
(*n*) See NOTE XIV [*infra*, p. 174.]

A Table exhibiting a View of the number of Persons convicted of all capital and certain other Crimes

Years	Crime against Nature			Robbery				Burglary				*Counterfeiting* the Coin			Rape			Arson			Murder				Manslaughter		Treason			*Counterfeiting* bills of credit		
	Acquitted	Convicted	Executed	Acquitted	Acquitted of robbery, but guilty of larceny	Convicted	Executed	Acquitted	Acquitted of burglary, but guilty of larceny	Convicted	Executed	Acquitted	Convicted	Executed	Acquitted	Convicted	Executed	Acquitted	Convicted	Executed	Acquitted	Acquitted of murder, but guilty of manslaughter	Convicted	Executed	Acquitted	Convicted	Acquitted	Convicted	Executed	Acquitted	Convicted	Executed
1779						5	4	1		3	2				1						6	1	5	4				1	1	3	5	3
1780				6		3	3	2	2	6	5				1				1	1	4		2	2			1	2	1	4	6	2
1781				3		3	3	7		10	4				2	1	1	2			1	2			1	1	1	1		3		
1782				4		15	3	3		8	4										2	1	2	2			2			1		
1783		1		1		2	2	3	2	5					1	1		2	3		2	3	5	4	1							
1784				4		7	5	4		8	8				1						3		1		2					1		
1785		1	1	2				2	3	4	2				1	1	1				7	1	5	5	1							
1786		..	..	..	....	..	..	1	2	10						3	1				4				3							
						7		3		4																						
1787				1		6		5		7									1				3	2	1							
1788		1		2		7		3		14	1	1	1	1	1	1					3				1							
1789				1	1	22	1	2		5		1									3		6	6								
1790				1		11				5					1			2			2	2	3			2						
1791						2				6															1	1						
1792				1		3				5						2	2	1			1	1	2	1	1	1						
Total		3	1	26	1	93	21	37	9	100	26	2	1	1	9	9	5	7	5	1	38	11	34	26	12	5	4	4	2	12	11	5

I. The Table states the number of *Offenders* not of *Convictions*; therefore, where a person appears to have been twice convicted of the same crime, at the same sessions, no notice is taken of it in the table.

II. In the convictions of 1782, several attainders, by outlawry, are included: the robberies committed being matter of public notoriety.

III. The dotted line separates those offences of the year 1786, which were previous to the act to amend the penal laws, from those which were subsequent to it.

NOTES AND ILLUSTRATIONS

NOTE I. Page 5.

IT was a favorite opinion of Dr. Jebb, *"That no effort is lost,"* and the success which has attended these endeavours to moderate the rigor of the Criminal Law, tends to confirm it. A slight review of the effects which the dissemination of these principles have had upon the governments of Europe will not be foreign to the object of this work, and must be consolatory to the friends of humanity.

Forty years ago the execrable practice of *torture* was general on the continent of Europe, and it was considered to be as necessary in the administration of justice as capital punishments are at present. Against this cruel institution all the powers of reason and ridicule were exerted: and the folly as well as the wickedness of it has been so happily exposed, that it has either been wholly suppressed, or has become so disreputable as seldom to be exercised. The King of *Prussia* set the example of abolishing it in Germany, and the Duke of *Tuscany* in Italy; and the example was soon followed in Saxony and in Poland. It was suppressed throughout all *Russia* in 1768, though not without some opposition from the prejudices of the people. In *Geneva* it has not been used since the year 1756; and it was totally abolished in *Sweden* in 1773. Maria Theresa *tacitly* suppressed, and the late Emperor Joseph, formally prohibited it in the *Austrian* dominions. Louis XVI. about the same time restricted its exercise in *France*. The revolution has utterly abolished it in that country as well as in *Avignon*, where it was exercised with so much severity that the goaler there informed Mr. *Howard*, in 1786, that he had seen drops of blood mixed with sweat on the breasts of some who had suffered the torture. Even in *Spain* the practice though not formally abolished, is generally reprobated, and in some of the provinces is no longer used. The *Chevalier de Bourgoanne* informs us, that a few years ago an ecclesiastic named Castro, undertook a formal apology for it; but that his book was received with universal indignation and was fully refuted by a gentleman of the law, who, in fact, only expressed the moderate sentiments of the first tribunals of the kingdom, and of the reasonable part of the nation.

Those, whose imaginations have realized the scenes which were formerly exhibited in a *torture chamber*, will consider the destruction of this monster as no inconsiderable cause of triumph. See Bourg. Trav. 1 vol. 286-7. Howard on Pris. 154 &c. Lazaretto's. 66. 53. 2 Coxe's Trav. 83. 392. 4. Biblioth. Philos. 205.

Though I have selected this striking instance, it is but a small part of the effects produced by this diffusion of light and truth.

To *this* is to be attributed the *general* reformation in the civil and criminal code of Russia. The celebrated "Instructions" of the Empress, written with her *own* hand, and deposited with so much care in the gilded vase at Petersburg—What are they, but the principles scattered through the writings of the philosophers of Europe, and often expressed in their *very words?* It was the same cause which produced the reformation of the criminal law at Vienna in 1785. "The Court (says Baron Reisbach, speaking of the Codex Theresianus) became ashamed, at the time when all Europe was making an outcry about humanity, the abolition of capital punishments, &c. of a statute book which had nothing in it but halters, gibbets, and swords"—and a reform was immediately begun.

The amelioration introduced into the laws of Sweden by *Gustavus* III. begin to be generally known.——We now perceive in that country "the character of a government which listens to the voice of humanity;" and it is easy to trace the source of this reform to those philosophical writings whose maxims were so strongly impressed on his mind, that he did not forget them in the last moments of his life. As to *Tuscany,* it is acknowledged, that the abolition of capital punishments and the whole system of *Leopold,* was introduced with the design of putting the principles of *Beccaria* to the test of experiment.

In *Spain,* the triumphs of reason have not been wanting. Various steps have been taken under the auspices of *Count d' Aranda,* to narrow the Jurisdiction and humanize the proceedings of the inquisition, and with such success, that some years ago there was an expectation "that the moment was at hand when this hydra, which philosophy had condemned long before, was to be destroyed." ——Attempts were also made in the year 1783 to reform the criminal law of the other tribunals of the kingdom. The council of Castile proposed this, and a committee was appointed to carry the proposal into effect. But what has been the result I have not been able to learn.

England contenting herself with the superior wisdom, humanity, and justice of her laws in all respects but one, and too fond of *"the ancient order of things,"* has alone remained stationary. The nation indeed is fully sensible of the evil which attends a multitude of sanguinary laws and the *government* itself begins to be alarmed with the magnitude of the mischief. Judge Blackstone was active in prosecuting a reform, and Lord Ashburton, it is said, was prevented by his death from bringing forward in parliament a plan for that purpose. A disposition to establish penetentiary houses has been discovered, and this rational expedient will probably be adopted when the Botany Bay scheme has been sufficiently tried.

The fermentation of the public mind in Europe excited by greater objects will prevent for a while any attention to this subordinate subject: but a reform in the government will in the end hasten that which is so much wanted in the criminal law. It is impossible that error can long resist the gentle, but continued impression of reason. The stroke of truth on public prejudice will be finally irresistible. It resembles that of a grain of sand falling on unannealed glass. Feeble as it seems to be—and slow and invisible as its operations are, no human power can prevent its effects, or preserve from destruction the object on which it falls. See Reisbach's Trav. 1 vol. p. 106. Bourg. 1 vol. 320. 1. 186. Jebb on Prisons. Parl. Regist. vol. 18. p. 521.

NOTE II. Page 9.

[*An increase of punishment may suddenly check, but does not in the end diminish the number of offenders.*]—This principle is well illustrated by Montesquieu. To the facts adduced by him in support if it, the following may be added. In 1752, the British parliament passed an act for the better preventing the horrid crime of murder; by which, in order *"to add further terror to the punishment of death,"* it was directed that the body of the criminal should be delivered at Surgeons Hall, to be dissected and anatomized. This expedient, it is said, carried some terror with it at first, but, we are assured, that this prejudice is now pretty well worn off. 1 vol. Wenderb. View, p. 78. This is confirmed by Sir S. T. Jansen, who on comparing the annual average of convictions for 23 years previous and subsequent to that statute, found that the number of murders had not all decreased. See his Table in Howard's Lazar.

I am sorry to perceive that this useless, and perhaps pernicious, expedient has been introduced into the laws of the United States. An anatomical professor might have found reasons for its adoption, but the single object of the legislature was or ought to have been to prevent the crime. See Debates Cong. 7 April 1790. Not wholly foreign to this subject is the following striking passage in the Rights of Man: "It may, perhaps be said, that it signifies nothing to a man what is done to him after his death: but it signifies much to the living. It either tortures their feelings or hardens their hearts; and in either case it teaches them how to punish when power falls into their hands. Lay then the axe to the root, and teach governments humanity. It is their sanguinary punishments which corrupt mankind." Rights of Man, 1 Part p. 33.

NOTE III. Page 9.

Facts from which principles are to be deduced ought to be well established. I am therefore obliged to observe that Montesquieu appears to have taken up that alluded to in the text, without sufficiently examining into its truth. The passage in the Spirit of Laws is thus: "The people of *India* are mild, tender, and compassionate. Hence their legislators repose great confidence in them. They have established very few punishments, and these are not severe nor rigorously executed." This is founded on the authority of Le P. Bouchuel in his collection of edifying letters. A similar account is given by other European writers. The authors of "Travels into Europe, Asia, and Africa," published in 1782, says, "The Hindoos are naturally the most inoffensive of mortals. There is a wonderful mildness in their manners, and also in their laws, by which the murder of a human creature and of a cow, (one of the sacred animals) are the only crimes which are punished with death." 1 vol. p. 332. These accounts are very different from those of the ancients, who represent the punishment of crimes in *India* as extremely rigorous: and since the Bramins have been prevailed upon by the address of Mr. Hastings, to communicate the Hindoo code to the world, we find that the ancients were right in their representations. There is a profusion of capital punishments prescribed in that code, and the cruel manner of inflicting them, bears the stamp of remote and barbarous ages. This difference is, in some measure reconciled, by Mr. Halhed, the translator of the Hindoo code, in his preface to that work. Speaking of the chapter on theft, his words are, "This part of the compilation exhibits a variety of crimes punished by various modes of capital retribution, contrary to the general opinion adopted in Europe, that the Gentor administration was wonderfully mild and averse to the deprivation of life. One cause for this opinion might be, that since the Tartar Emperors became absolute in India, the Hindoos, (like the Jews in captivity) though in some respects permitted to *live* by their own rules, have, for reasons of government, been in most cases prohibited from *dying* by them." p. 62. Be this as it may, little can be inferred from the example of so peculiar a people, who are more governed by manners and religion, than by laws; otherwise it might be observed, that those of the superior cast or tribe, are expressly exempted from *capital*, though they are subjected to other punishments: and there is no good ground to believe, that this exemption ever corrupted the heart or tempted to the commission of crimes. See Spirit Laws. B. 14. ch. 15. Raynel vol. 1. Sketches Hist. Hindost. 300. 1. Hindoo Code. 1777. passim. Roberts. Ind. 263.

In *China,* where the population is computed at 60 millions, a strict administration of justice is said to supersede the necessity of many capital punishments. We are told that no crimes are punished with death, except treason and murder; and that in this extensive country, not more than 10 persons are executed in a year. Sullivans Philos. Raps. 156. There *is* reason to believe that the laws of China are at once mild and efficient: But the accounts we have of that people are imperfect and contradictory. See on this subject Montes. B. 19 ch. 17. B. 6. ch. 9. Duhalde's Hist. vol. 1. Encyclop. art. China.

NOTE IV. Page 10.

Blackstone in his Commentaries, Montesquieu, and others, cite with approbation the conduct of the Empress Elizabeth, who upon her accession to the throne of *Russia,* in 1741, made a vow that no one should be put to death during her reign. But as there were no fixed and ascertained punishments substituted in the room of death, and as that defect was often supplied in that arbitrary government by the infliction of capricious and cruel tortures, it seems rather to have been a weak affectation of clemency, than a beneficial reform: and it was not successful in the prevention of crimes. See note X. The present Empress proceeded with more wisdom, In 1768 she convoked an assembly of deputies from all parts of the Empire, and laying before them her "Instructions," which contain an epitome of the principles advanced by the best writers on this subject, has by their assistance given to the nation a complete code of civil and criminal laws, the first part published in 1775, the latter in 1780. By these the penalty of death is abolished in all cases but that of treason: and definite and certain punishments are prescribed for every offence. Some of these are of such a nature, that humanity has gained little by the change: but *in general* the beneficial effects of the new system are very evident. That empire has of late been an object of attention to intelligent travellers, and we have as much authentic information of the internal state of *Russia* as of other European countries. Upon an attentive examination of their accounts, I do not discover, that the suppression of capital punishments has in any degree tended to encourage crimes: on the contrary, that country is constantly increasing in civilization and happiness, and the people are as secure in their persons and property, as they were under the bloody code which formerly prevailed. There have been no complaints of the inefficacy of the new regulations as there were of those under the administration of Elizabeth, and before the establishment of the present system.

The severity with which the punishment of the Knoot is sometimes inflicted on atrocious criminals, may be thought necessary on account of the remaining barbarism of a part of the people—or may arise from a defective execution of the laws on smaller offences, and particularly from what Mr. Howard tells us, p. 86. That in Russia there is little or no attention paid to the *reformation* of prisoners. Yet when we consider that under all these defects,—in so extensive a country—where the population is computed at 22 millions of people, and a considerable part of those still rude—the government is able to repress crimes (except in a single case) without the *terror of death,* we must admit that it is seldom *necessary,* and ought rarely to be inflicted. See 4 Blacks. 18. 1 Coxes Trav. 521. 2 ditto. 77-93. 217. William's View &c. 2 vol. 255.

NOTE V. Page 10.

As the example of *Tuscany* appears to be the most instructive one I meet with, and is generally cited as *conclusive* in support of these principles—I have endeavoured to ascertain the fact with as much accuracy as possible.

General Lee, who viewed the different governments of Europe with the eye of a philosopher, and whose residence at Vienna furnished him with the best means of information gives us this account: "When the present Grand Duke acceded to the Ducal throne, he found in Tuscany the most abandoned people of all Italy, filled with robbers and assassins. Every where for a series of years previous to the government of this excellent Prince were seen gallows, wheels, and tortures of every kind; and the robberies and murders were not at all less frequent. He had read and admired the Marquis of Beccaria, and determined to try the effects of his plan. He put a stop to all capital punishments, even for the greatest crimes; and the consequences have convinced the world of its wholesomeness. The galleys and slavery for a certain term of years, or for life, in proportion to the crime, have accomplished what an army of hangmen with their hooks, wheels, and gibbets, could not. In short, Tuscany from being a theatre of the greatest crimes and villanies of every species, is become the safest and best ordered state of Europe. Lee's Memoirs, p. 53.

Dr. Moore, whose writings have so happily united profound observation with amusing bagatelle, imputes the frequency of Murder in Italy to the laxity of the police, the number of sanctuaries, and the ease with which pardons are obtained—that is, to the *hopes of impunity.* "As soon, say he, as asylums for such criminals are abolished, and justice is allowed to take its natural course, that foul stain will be entirely effaced from the national character of

the modern Italians. This is already verified in the Grand Duke of Tuscany's dominions. The edict which declared that churches and convents should no longer be places of refuge for murderers,—(and the same edict abolished the penalty of death)—has totally put a stop to the stilleto; and the Florentine populace now fight with the same blunt weapons that are used by the common people of other nations." Vol. 4. Lett. 43.

To these might be added the testimony of de Archenholtz, and other writers: but the most direct and satisfactory evidence that the *abolition* of capital punishments has not impaired the public safety, is derived from the edict of 1786.

This was the completion and *formal* establishment of a system which before that period had been considered as an *experiment.* In the introduction, the Grand Duke states, that on his accession he began the reform, by moderating the rigor of the old law, and abolishing the pains of death: and that he had waited until "by *serious examination and trial* of the new regulations," he should be able to judge of their tendency. He then proceeds: "With the utmost satisfaction to our paternal feelings, we have at length perceived, that the *mitigation of punishments,* joined to the most scrupulous attention to prevent crimes, and also a great *dispatch* in the trials together with a *certainty* and *suddenness* of punishment to real delinquents, has, instead of increasing the number of crimes, considerably diminished that of the smaller ones, *and rendered those of an atrocious nature very rare:* we have, therefore, come to a determination not to defer any longer the reform of the said criminal laws."

These well established facts go far to prove that a *strict administration of justice is sufficient to repress crimes without a severity of punishment:* and if we contrast the situation of Tuscany with that of the rest of the Italian states or other countries, where sanctuaries abound, it will establish the converse of the proposition, and prove that it is the *impunity* of the criminal alone which governments ought to dread.

How frequent assassinations have been in Italy is well known: and Mr. Townsend informs us, that in consequence of this impunity they abound in many parts of Spain. "In the last sixteen months, says he, they reckon seventy murders (in Malaga) for which not one criminal has been brought to justice; and in one year, as I am credibly informed, 105 persons fell in the same manner." 3 vol. p. 18.

NOTE VI. Page 10.

[*The source of all human corruption lies in the impunity of crimes, not in the moderation of punishments.*]——The soundness of this principle may be demonstrated by the example of *other* Euro-

pean countries, as well as of Russia and Tuscany; and will be further illustrated if we contrast *their* situation with that of England.

It appears that the severity of the ancient criminal laws in *Sweden* has been of late so greatly mitigated, that all writers agree, they are now remarkable for the moderation of their punishments. We learn from Mr. Coxe, that many offences which in other countries are considered as capital, are there chastised by whipping, condemnation to bread and water, imprisonment and hard labour. More than 120 strokes of the rod are never inflicted, nor is a criminal sentenced to *bread and water* longer than 28 days. 2 vol. 392.

But Mr. Catteau, who published his *"View of Sweden"* so late as 1789, resided long in that country, and had the best sources of information. "The criminal laws (says this elegant writer) which are followed by the Swedish tribunals, display a striking character of humanity and justice; and for this they are indebted principally to the reformation they have undergone in the present reign. These laws establish an exact proportion between the crime and the punishment: *that of death is not yet entirely abolished;* but in several cases, banishment, whipping, paying a fine, and labouring at the public works, are substituted in its stead. Criminals condemned to die, are generally beheaded: severer punishments are appointed for those crimes, which shock humanity by their atrocity; but of these there are few instances in Sweden." P. 158.

So far is this mildness of the laws from injuring the public welfare, that the character of the whole nation seems to be meliorated by suppressing the *frequency* of capital punishments. "Though Sweden is covered with rocks, woods, and mountains, its inhabitants are mild and peaceable. Theft, murder, robbery, and atrocious crimes in general, are very uncommon amongst them; and even in war they do not appear to be sanguinary." Ib. p. 325.

In *Denmark,* as has been already mentioned, robbery is never punished with death, except when committed by a convict who has escaped from the public labour, to which he was condemned. But the administration of justice is *strict;* and the consequence is, that robberies, burglaries, and other gross crimes, are very rare, even in the capital. "Night robberies, says Mr. Howard, are never heard of in Copenhagen." Pris. p. 76.—Mr. Williams in his View of the Northern Governments mentions the same fact and attributes it "to the good police and the difficulty of escaping out of the island." 1 vol. p. 353. What is this but acknowledging that it is the *certainty* and not the *severity* of the punishment which prevents offences!

In Vienna, the late Emperor Joseph began the reform, not by abolishing the penalty of death, but by an universal requisition to

the judges *to be mild in their sentences, and never to inflict capital punishments without necessity.* This mode of submitting the guilty to the descretion of the judges (which now prevails in Maryland, in most cases of felony, without clergy, and formerly did in New Jersey, in that of horse-stealing) seems liable to many objections. Moderate penalties, however, were by this means *generally* introduced at Vienna; and it is a fact well authenticated, that aided by a strict police, they have been found sufficient. Atrocious crimes are seldom committed. Reisb. Trav. II. vol. p. 106.

The punishment of hard labour, which is the correction inflicted (and inflicted with great mildness) upon all crimes in *Holland,* except those of a very high degree, is attended with the most beneficial effects. These result principally from the excellent management which prevails in the *Rasp and Spin Houses.* Mr. Howard paid particular attention to these wise and benevolent institutions, and he informs us, that many have been reformed, and have come out of the Rasp Houses sober and honest; and that some have even chosen to continue to work in them after their discharge. The great object attended to in these *bettering* houses (as they are very properly called) is to reclaim and reform the criminal; and the consequence is, that by checking the young offender in his first attempts, gross crimes are prevented. Accordingly we find that executions are very rare, the annual average in *all the United Provinces,* being from 4 to 6.

In Amsterdam, which contains above 250,000 people, there were but six persons executed in the twelve years preceding 1787. I find that there were in the same time no less than 572 persons hanged or burnt, in London and Middlesex; and of these at least three fourths were under twenty years of age. Even the smaller offences do not greatly abound in Holland: and the success of these mild institutions confirms the great principle which is the motto of this work. See the Tables in How. Laz. p. 256, 7, 8. How. on Pris. p. 66. 45. do. Laz. 74. r8 Parl. Reg. 522.

Let us now examine the situation of England where an opposite principle is adopted, and where the terror of death is on all occasions resorted to as the surest means of preventing crimes.

Blackstone in his Commentaries stated the number of capital crimes, (that is, of felonies ousted of clergy) at 160. Since that time they seem to have increased: for in 1786, Capel Loft enumerates and states them as follows:

Felonies without clergy 176

Felonies within clergy ..... 65. Jebb on Pris. 96.

Amidst this multitude of sanguinary laws, atrocious crimes are very frequent; and the severity of the punishment, by being familiar, is no longer an object of terror, and by exciting hopes of impunity, has become the parent of crimes. "I cannot tell, (says Dr. Goldsmith) whether it is from the number of our penal laws or the licentiousness of our people, that this country should shew more convicts in a year than *half of the dominions* of Europe united." Wenderborn, an intelligent German, who lately visited England, assures us, that the punishment of death is more frequently inflicted in England than *in all Europe together,* in the same space of time. Hence it is, that executions lose all their terrors which attend them in other countries. I. vol. p. 75. The author of *Thoughts on Executive Justice,* thus describes the situation of England in 1785: "No civilized nation, that I know of, has to lament, as we have, the daily commission of the most dangerous and atrocious crimes; insomuch that we cannot travel the roads, or sleep in our houses, or turn our cattle into the fields, without the most imminent danger of thieves and robbers. These are increased in such numbers, as well as audaciousness, that the day is now little less dangerous than the night." P. 4. One of the English prints, 9 November 1784, says, "If robbers continue to increase as they have done for some time past, the number of those who rob will exceed that of the robbed."

These representations are confirmed by the declarations of the Solicitor General and Mr. Townsend, in the house of commons in the same year. They affirm, that in the course of the winter, *every day* furnished some fresh account of daring robberies, or burglaries being committed; that few persons could walk the streets at night, without fear, or lie down in safety in their beds; for that gangs of 6, 8, 10, or 12 persons together, made it a practice to knock at doors, and immediately to rush in and rob the house. 18 Parl. Reg. p. 83. 521. Compare this with the situation of Copenhagen, where night robberies are never heard of."

The number of persons executed in England, may be seen in the tables already referred to. In the Lent Circuit only, no less than 286 persons were capitally convicted in 1786, and the annual amount of those transported is from 960 to a thousand.

It is needless to make observations on these striking facts which prove conclusively, that the severity of the laws instead of preventing, is frequently the cause of crimes. The humanity of mankind revolts at a strict execution of them, and the hopes of impunity become a source of temptation. To this, Mr. Howard, among others, traces the mischief: "and yet, (he adds) many are brought by it to an untimely end, who might have been made useful to the state." Laz. 221. No one will deny the justice of this last observation, when

they learn from the mouth of the Solicitor General of England, "That of those who are executed, eighteen out of twenty do not exceed 20 years of age." 18 Parl. Reg. 22.

It is difficult to conceive how a free, humane, and generous people should have so long endured this weak and barbarous policy; or why America should be fond of retaining any part of a system, as ineffectual as it is severe!

NOTE VII. Page 11.

Horse-stealing is a crime which naturally irritates a nation of farmers: and when they are provoked by its *frequency* they are apt to call for a punishment neither proportioned to the offence nor calculated to prevent it.

This crime became so prevalent in *Pennsylvania,* during the confusions of the war, which interrupted the regular administration of justice, that the assembly thought it necessary to increase the punishment of it. They would have extended the penalty to death itself, had not the late Judge Bryan, at that time a member of the legislature (who to a sound understanding added a familiar acquaintance, with all the philosophy of jurisprudence) strenuously opposed it. He made it evident to the good sense of the country members, who were intent upon this punishment, that the severity of the act would defeat its execution, and that a milder penalty would be a more effectual restraint. The subsequent experience of Pennsylvania compared with that of New Jersey (where in the same year the penalty of death was resorted to) fully proves the soundness of this opinion.

I know not any government in Europe which punishes this offence with death, in the present day, except that of England; and even there, the humanity of the nation has almost virtually abolished it. Of ninety persons, who in the space of 23 years, were convicted at Old Baily, previous to 1771, there were but 22 executed, which is less than a fourth. See Jansens Tables. The multitude who escape for want of prosecution, or by the tenderness of juries, is much greater; and it is *now* so common to grant a reprieve, that a well informed writer affirms, that the chance of obtaining it is as *one to forty in favour of the thief!* Thoughts on Ex. Just. p. 42. One reason of this may be, that many persons consider it as unlawful to inflict the punishment of death, in any case of simple theft, since it is warranted by no part of the law given to the Jews.

A similar difficulty in enforcing a punishment so disproportionate to the offence, has been experienced in some parts of America: and it will every day become more and more apparent in those states, which still retain this unnecessary severity. I have very

respectable authority (that of the Attorney General of the United States) for saying, "that within the last ten years, *pardons* for horse-stealing have multiplied in Virginia: and while the convicts might by law put to hard labor, or executed at the will of the executive, scarce a single horse-stealer suffered death, unless he had repeated the crime, or was under some very obnoxious circumstances."

NOTE VIII. Page 11.

It may be considered as improper to appeal to the example of Maryland, where these crimes are still felonies of death, without benefit of clergy. But as the Court have it in their *discretion* to adjudge every such offender to hard labour, instead of pronouncing the sentence of death; the latter is so rare, that *(as to every purpose of terror or example)* it may be considered as abolished. The punishment of hard labor, continually offered to the public eye, will be considered as the only penalty prescribed by the laws; and no offender will count upon a greater severity, even if he be convicted.

There is reason to *believe,* that this mild administration of justice has not produced any increase of crimes—although the method of treating the male convicts, does not appear to be the most unexceptionable. How the fact is, I have no information sufficiently accurate and particular, positively to affirm. Measures have been taken to procure it, and if it arrives in time, it shall be added in a postscript.

Whether the task of deciding, *at discretion,* on the life or death of a fellow creature, should be imposed on any Court, and how far such a power is consistent with the spirit of a republic, which is a government of laws and not of men, may deserve consideration. The *degree* of the punishment must necessarily be left to judicial discretion: but its *nature* ought, as far as possible, to be ascertained by the laws. See Acts Maryl. Nov. Sess. 1789.

NOTE IX. Page 30.

There is scarce any crime which escapes punishment so often as that of rape. In support of this, I appeal to the following facts in addition to those mentioned in the text.

Between the years 1720 and 1732, there were 24 persons tried for this crime at Old Bailey. Of all these only two were convicted; one of them, the infamous Col. Charters, who was pardoned; the other, a servant boy, aged *fifteen,* who was hanged. Select Trials, &c, 1 & 2 vol.

Jansens Tables do not state the number of acquittals: but they prove this fact, That in 23 years, no more than 9 persons were convicted of rape, and of these there were executed—Two!

Though it is not in my power to state the relative number of persons convicted or acquitted of this crime in other states, I have such information as satisfied me that the severity of the punishment produces in America the same effects which attend it in England and Scotland.

Mr. Randolph, who held the office of Attorney General in Virginia, many years, informs me, that "thus much may be safely affirmed, that the proportion of the *acquitted* to the *charged* in that state was *very great* leaving but *few* convicts. It seemed as if something more than *usual* tenderness for life, operated with the juries on these occasions; and they appeared to lay aside their natural abhorrence of the act, to seize the smallest symptoms of innocence!"

NOTE X. Page 35.

The practice of punishing murder with death, has been so general among civilized nations, that some writers have considered it as sanctioned by the *universal consent* of mankind, and as *absolutely necessary* for the safety of society. It is certain, however, that it has been dispensed with in many countries at different periods: and a review of the best authenticated facts of this kind (obscured as some of them may be, by the mist of time) will not be useless. Taken together they will impress upon our minds these two important truths—*That the penalty of death is not in its own nature necessary* —and yet *That it is dangerous, rashly to abolish it!*

The most ancient instance on record, is that of Sabaco, king of Egypt. The account is to be found in *Herodotus* and *Diadorus Siculus:* That of the latter, translated by Booth, is thus: "A long time after him one Sabach, an Ethiopean, came to the throne going beyond his predessors in his worship of the gods and kindness to his subjects. Any man may judge his gentle disposition in this, that when the law pronounced the severest judgment, I mean sentence of death, *he changed the punishment,* and made an edict that the condemned person should be kept to work in the town, in chains, by whose labour he raised many mounts and made many commodious canals." p. 34. He thought (says Mr. Goguet) that Egypt would draw more profit and advantage from this kind of punishment, which, being for life, appeared to him equally adapted to punish crimes *and to repress them.*" What its effects were is not so evident: but the ancients speak in terms of approbation of this clemency: and it is certain, that during his long reign of 50 years, Sabaco did not see cause to alter it: and his successor Anysis, seems to have continued it. This example is cited with approbation, by Sir Tho. Moore, Puffendorff, Grotius, and other modern writers. See Diod. Sic. L. I.

ch. 65. Puff. b. 8. ch. 3. §23. Goug. Orig. Laws, 3 vol. p. 15. 1st Rollin Ant. Hist. 90.

"Among the *Persians* it was not lawful either for a private person to put any of his slaves to death, or for the Prince to inflict *capital punishment* upon any of his subjects for the first offence; because it might rather be considered as an effect of human weakness and frailty than of a confirmed malignity of heart." 2d Rollin Ant. Hist. p. 221.

Rome furnishes us with a more brilliant and better authenticated example. It is well known that soon after the expulsion of the Decemviri the *Porcian* law ordained, that no *citizen* of Rome should be put to death. In the happy ages of the republic, his country was everything to a Roman, and banishment the heaviest of punishments!—For the space of 200 years, from the establishment of equal liberty to the end of the second Punic war, penalties short of death were found sufficient for the government of Rome. Simple in their manners—frugal—unacquainted with luxury, and intent upon conquering the world, these proud republicans had neither leisure nor inclination for the commission of crimes. Livy, more than once triumphs in this moderation of punishments, and no historian has hinted that during the period I have mentioned, they were inadequate to their object!

But we must remember at the same time, that capital punishments were found necessary in the *camp*, and while they were denied to the *magistrate*, were absurdly trusted to the direction of a *master* and a *parent*. See 4 Gibbon's Hist. ch. 44. Quarto.

When Rome lost her liberty, a profusion of capital punishments ensued; and under the Emperors, the hands of the executioner were every day stained wtih the blood of the citizen. But in the decline of the Eastern Empire, an opinion grew up, that it was unlawful to shed *Christian* blood: and capital punishments were sometimes suppressed *without substituting any efficient check* in their place. To mutilate an offender and then turn him loose, was but to provoke him to the commission of new crimes. Hence they became frequent —insurrections multiplied—and the throne tottered from the shameful imbecillity of the laws. Anastatius, it is said, punished no crimes at all: and Mauritius, Isaac Angelus, and others, by *rashly* suppressing the punishment of death among so corrupted a people, endangered their own safety and that of their subjects. See Rise and Fall of Rom. Emp. p. 212. Spir. Laws B. 6. ch. 21.

The conduct of *Alexius Comnenus*, an enlightened Prince, distinguished equally for his talents and virtues, deserves a closer inspection; and I regret that I have no sources of information sufficiently particular to ascertain the effects of his regulations. I only

learn from Mr. Gibbon, "That during his reign of 25 years, the penalty of death was abolished in the Roman Empire: a law of mercy most delightful to the humane theorist, but of which, the practice in a large and vicious community is seldom consistent with the public safety. Severe to himself, indulgent to others, chaste, frugal and abstemious, he despised and moderated the stately magnificence of the Byzantine Court, so oppressive to the people, and so contemptible to the eye of reason. Under such a prince, innocence had nothing to fear, and merit every thing to hope: and without assuming the tyrannical office of Censor, he introduced a gradual, but *"visible reformation in the public and private manners* of Constantinople." V Gibb. Hist. Decline and Fall, &c. ch. 48.

The punishments inflicted on those who conspired against him, were confiscation of goods, and banishment. 6 Univ. Hist. 617.

The only countries in modern Europe, in which murder is not punished with death, are Russia and Tuscany. It has already been mentioned that the Empress Elizabeth made a vow, that she would put no one to death. This clemency has been much celebrated, and *Blackstone* enquires "Was the vast territory of all the Russia's worse regulated under the late Empress than under her more sanguinary predecessors?" But Mr. Williams assures us, that the *abuse* of this clemency became so intollerable, that the senate requested Catharine II to re-establish the law, which ordained that *certain* crimes should be punished with death. North. Gov. vol. I. p. 255. This appears to have been complied with: as the same author mentions an instance of four villains being condemned to be broke upon the wheel for murder, p. 266. The punishment of death, however, is now formally retained only in the case of high treason: yet, in that prescribed for murder, it virtually subsists. Though no one is litterally sentenced to die, many are knooted to death. This punishment, says Mr. Howard, is often dreaded more than death, and sometimes the criminal has endeavored to bribe the executioner to kill him. It seldom causes immediate death, but death is often the consequence of it. Pris. 86. 2d Coxe's Trav. 82. Tho' all felons are liable to undergo the knoot, yet it is inflicted with this peculiar severity on murderers, "who never receive any mitigation of their punishment." To this is added the slitting of the nostrils, and branding on the cheek with hot irons. This horrid method of torturing the body, attended with such consequences, may well be dreaded more than the mere loss of life, and I cannot consider it as any moderation of the punishment. It is probably owing to the remaining barbarism of some parts of Russia, that this severity is thought *necessary:* and the abuse of the clemency of the former reign has been attributed to this circumstance. 2d Will. North. Gov. 232.

But what shall we say to the example of Tuscany? There, not only are *the pains of death* abolished, but every kind of *cruel* punishment is prohibited. The beneficial effects have been stated: and General Lee says, "It is a known fact that since the adoption of this plan, there have been but two murders committed: one by a little boy of eleven years old, in a stroke of passion; and the other, not by a native *Italian* subject, but by an Irish officer." Memoirs, p. 53. But the point of time to which he refers is not ascertained.

It were desirable to know how far that police which the Grand Duke calls "a vigilant attention to prevent the commission of crimes," extends, and whether it coincides with the general liberty of the subject. If it be such as was established by Spinelli at Rome, or as is in use at Vienna and Madrid, it could not be tolerated in a free country. D'Archenholtz's, Italy, §8. p. 161. 1 Reisb. Trav. p. 244.

As that part of the edict which abolishes the penalty of death, contains the reasons upon which it is founded, and is little known in this country, I shall here insert it.

"We have seen with horror the facility with which, in the for-
" mer laws, the pain of death was decreed, even against crimes of
" no very great enormity; and having considered that the object of
" punishment ought to consist—in the *satisfaction* due either to a
" private or a public injury—in the *correction* of the offender, who
" is still a member and child of the society, and of the state, and
" whose reformation ought never to be despaired of—in the *security*
" (where the crime is very atrocious in its nature) that he who has
" committed it shall not be left at liberty to commit any others—
" and finally, in the *public example;* and that the government, in the
" punishment of crimes, and in adapting such punishment to the
" objects, towards which alone it should be directed, ought always
" to employ those means, which, whilst they are the *most efficacious*,
" are the *least hurtful* to the offender; which efficacy and modera-
" tion *we find* to consist more in condemning the said offender to
" hard labor, than in putting him to death; since the former serves
" as a lasting example, and the latter only as a momentary object
" of terror, which is often changed into pity; and since the former
" takes from the delinquent the possibility of committing the same
" crime again, but does not destroy the hope of his reformation, and
" of his becoming once more an useful subject; and having con-
" sidered besides, that a legislation very different from our preced-
" ing one, will agree better with the *gentle manners* of this polished
" age, and chiefly with those of the people of Tuscany, we are come
" to a resolution to abolish, and we actually abolish forever, by the
" present law, the pain of death, which shall not be inflicted on any
" criminal," &c. Sect. 51.

NOTE XI. Page 36.

Those who have been witnesses to the solemn manner in which executions are conducted in some parts of Europe, speak of the impression arising from *that* circumstance as wonderfully strong. Dr. Moore describes such an execution which he was present at in Rome, and mentions in strong language *how deeply* the populace were affected by it! See Letter 44, vol. 4. Mr. Howard, remarked the same thing in Holland: and accounting for the few executions which take place in United Provinces, says, "one reason of this, I believe, is the *awful solemnity* of executions which are performed in the presence of the magistrates, with great order and seriousness, and *great effect* upon the spectators. Pris. 45 p.

Whoever will contrast this with the manner in which executions have been heretofore conducted among us, will readily perceive that though we exhibit this terrible spectacle, we do not derive from it all the benefits it was designed to produce.

NOTE XII. Page 37.

"In Russia, says Montesquieu, where the punishment of robbery and murder is the same, they always murder." He speaks here of the reign of Elizabeth: but the mischief seems to have continued for some time after Catherine II. ascended the throne. Mr. Richardson, who was in Russia in 1770, mentions the practice as existing at that day. "Robberies, (says he) are here very frequent and barbarous, and constantly attended with murder." Richards. Anecd. p. 323.

This circumstance was not unattended to; and in her *instructions*, § 86. The Empress declares 'that it is the last injustice to punish in the same manner the robber, who contents himself with robbing, and him, who not only robs, but murders at the same time." Accordingly the new code has drawn this necessary distinction. Robbers are sent to public labour in Siberia, while murderers, besides undergoing the knoot, are branded in the face with hot irons, kept in chains, or have their nostrils torn: and except upon a general or particular amnesty, *they receive no mitigation.* See 2d Coxe's Trav. 86 & passim.

I believe this discrimination in the punishment has put a stop to the evil complained of before it was introduced: for among all the later writers on the state of Russia, I find no one who hints that any such practice prevails at present in that Empire. See some excellent observations on the necessity of this discrimination, 4th Blackst. Com. 10 Montesquieu, B. 6. ch. 16.

NOTE XIII. Page 45.

I firmly believe that the success of all punishments by hard labour and solitary confinement, must finally depend upon the wisdom of the regulations, which shall be established in the gaols of penitentiary houses, and upon the prudence and attention of those, to whom the management of the prisoners is committed. Some useful hints upon this subject lie buried, under a variety of other matter, in Mr. Howard's Treatise on Prisons and Lazarettos: and it is much to be regretted, that no well digested plan for the *interior* management of those places of confinement, has hitherto been published. The best substitute is an account of such plans as are now in use: and Mr. Caleb Lownes, one of the inspectors of the gaol of Philadelphia, (to whose humane zeal and attention, in the discharge of this voluntary duty, the public are much indebted) has undertaken to give a detail of the regulations adopted in the gaol, and penitentiary house in this place, and of the management and employment of the convicts. The more minute the information is, the more useful and interesting it will be, when our sister states turn their attention to the revision and reform of their criminal laws. In hopes that this event is not very distant, I shall here add a few principles on this subject, collected from the facts, or observations of Mr. Howard.

First. That houses for convicts at labour, ought to be in or near a large town or city, and easily accessible to those who have the inspection of them. This last circumstance seems to be of the utmost importance.

Second. Mr. Howard uniformly found those houses best managed, when the inspection was undertaken without *mercenary views*, and solely from a sense of duty, and a love to humanity. So reputable is this humane task in Germany, that at Frankfort, the house of correction is inspected by the *Ladies*. Pris. 128. Lazar. 71.

Third. Steady, lenient, and persuasive measures, were always found to be the best means for preventing escapes; and far preferable to rough usage, which often made the prisoners *desperate*. Laz. 206. Pris. 39.

Fourth. The great object to be attended to (especially with young offenders) ought to be to *reclaim and reform them*. Many facts prove, that this is not so difficult as some persons apprehend. Their *earnings* must therefore be a secondary consideration; and if the house does not maintain itself, *(as in many places it will not)* that circumstance ought not to be regarded. To promote this object of reformation, the *young* offenders ought to be separated from those who are *old* and *hardened*.

Fifth. In order to hold out a real object of terror, *solitary confinement,* on coarse diet, should be the *invariable* portion of every *old* or *great* offendre. This, however, it is best to inflict at intervals, and seldom longer than 20 or 30 days at a time. The observations of Mr. Howard on this subject, deserves attention, and with them I close this note.

"The intention of *solitary confinement,* (I mean by day as well as by night) is either to reclaim the most *atrocious* or *daring criminals*——to punish the *refractory* for crimes committed in prison——or to make a *strong* impression, in a *short time,* upon thoughtless and irregular apprentices, or the like. It should, therefore be considered by those who are ready to commit, for a *long time,* petty offenders to absolute solitude, that such a system *is more than human nature can bear,* without the hazard of distraction or despair: and that, for want of some employ in the day, health is impaired, and a habit of idleness and inability to labor in future, is in danger of being acquired. The *beneficial* effects on the mind of such a punishment, are *speedy* proceeding from the *horror* of a vicious person's being left entirely to his own reflections. This may wear off by a *long continuance,* and a sullen insensibility may succeed." Laz. p. 169. in notis.

NOTE XIV. Page [45]

A revision of the criminal laws of Pennsylvania, at present occupies the attention of the Legislature. Those who wish to know the progress that has already been made in this great work, may find it in the following resolves, which, on the 22d instant (February) were entered into by the senate.

Resolved, That for all offenses (except murder of the *first* degree) which are made capital by the existing laws of Pennsylvania, the punishment shall be changed to imprisonment at hard labor, varying in *duration* and *severity,* according to the degree of the crime.

Resolved, That the crimes, at present classed under the *general* denomination of Murder, be divided into murder of the *first* and murder of the *second* degree: the latter punishable with imprisonment, at hard labor, or in solitude, or both, for any time not exceeding 21 years.

Resolved, That all murder, perpetrated by poisoning, or by lying in wait, or by any kind of wilful, premeditated, and deliberate killing, shall be deemed murder in the first degree: and all other kinds of murder, shall be deemed murder in the second degree: and the jury, before whom any person shall be indicted for murder, if

they find the party guilty thereof, shall ascertain whether it be murder in the first or second degree.

Resolved, That all claims to dispensation from punishment by benefit of clergy, or benefit of the act of assembly, entitled, "An act for the advancement of justice, and the more certain administration thereof," shall be forever abolished, and a definite punishment be prescribed for all offences, at present deemed clergyable: the punishment for the *second* offence, to be the same in its *nature*, but in a higher *degree*.

Resolved, That a committee be appointed to bring in a bill, supplementary to the penal laws of this state, for the purpose of carrying the preceding resolutions into effect.

The committee who brought in these resolutions, reporting, "That they have doubts at present, whether the terrible punishment of death be in any case justifiable and necessary in Pennsylvania; and are desirous that the public sentiment on this important subject may be more fully known," and therefore offering the following resolution, the same was adopted by the senate, viz.

Resolved, That the revision and amendment of the laws, respecting murder of the first degree, be specially recommended to the early attention of the next Legislature.

We may, therefore hope, that Pennsylvania will soon give to her sister states, an example of humane legislation, which may tend, in its consequences, to meliorate the condition of mankind.

Feb. 26, 1793.

APPENDIX C

EXPOUNDING THE STATE CONSTITUTION

Alan B. Handler

Associate Justice, Supreme Court of New Jersey

"[I]t is a constitution we are expounding."[1]

Perhaps more than anyone else who has served on this Court, Justice Pashman has helped impart vigor into our state constitution as an independent source for recognizing and protecting individual rights. At a time when one senses that the United States Supreme Court has been reluctant to extend the individual protections of the federal constitution any further, Justice Pashman has strongly responded to the call for state courts to reexamine their responsibility in the interpretation and development of constitutional doctrine and to assume a more significant role in the securing of constitutional rights.[2] The renaissance of state courts in the constitutional life of our country is a salutary development, especially since, as Justice Brennan has observed, "it is the state courts at all levels, not the federal courts, that finally determine the overwhelming number of the vital issues of life, liberty and property that trouble countless human beings of this Nation every year."[3]

Indeed, Justice Pashman has been a harbinger of this new season in the law. He has not been content simply to follow federal precedent, especially when that precedent has failed to provide adequate protection for personal liberties. Instead, he has quite persistently urged us to use the state constitution as an affirmative and positive force to guarantee the rights of our own citizens. Perhaps more noteworthy and of even greater significance has been Justice Pashman's blend of foresight with insight. He has placed himself almost invariably in the vanguard of evolving state constitutional doctrine and has been able to predict with remarkable frequency the trend that our decisions would follow. The strength of his feelings and the power of his opinions have often been self-fulfilling.

Justice Pashman's influence upon our evolving constitutional doctrine is unmistakable. Recently the Court expressly departed from the federally established mode of analysis used in determining the scope of protection of fundamental rights under the equal protection clause.[4] In contradistinction to the rigid two-tiered equal protection analysis

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.)

2. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491-95 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874-77, 910-11 (1976); Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L.L. REV. 271, 285 (1973); *see also Developments In The Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

3. Brennan, *Introduction, Chief Justice Hughes and Justice Mountain*, 10 SETON HALL L. REV. xii (1979).

4. *See* Right to Choose v. Byrne, 91 N.J. 287, 309-10, 450 A.2d 925, 936-37 (1982).

traditionally employed and ever increasingly criticized,[5] we adopted a balancing approach, an analytical tool almost inevitably more protective of individual rights and freedoms than the traditional approach since it avoids "divert[ing] a court from the meritorious issue."[6] While this approach had been foreshadowed in some of our earlier cases,[7] it is more than coincidental that this view found definitive and insistent expression in Justice Pashman's opinions.[8]

Similarly, in the area of individual privacy rights, Justice Pashman's opinions relied upon the state constitution to provide more expansive protections than those afforded by the federal constitution. Thus, in *State v. Saunders*,[9] the Court struck down a fornication statute on grounds that it violated the right to privacy under both the federal and state constitutions. Writing for the majority, Justice Pashman noted:

> It is now settled that the right of privacy guaranteed under the Fourteenth Amendment has an analogue in our State Constitution, *N.J. Const.* (1947), Art. I, par. 1. . . . Although the scope of this State right is not necessarily broader in all respects . . . the lack of constraints imposed by considerations of federalism permits this Court to demand stronger and more persuasive showings of a public interest in allowing the State to prohibit sexual practices than would be required by the United States Supreme Court.[10]

Justice Pashman further expanded upon this theme in his majority opinion in *In re Grady*.[11] There, the Court held that the right to choose among procreation, sterilization, and other methods of contraception is an important privacy right which courts must endeavor to preserve. Justice Pashman wrote that:

> governmental intrusion into privacy rights may require more persuasive showing of a public interest under our State Constitution than under the federal Constitution. . . . Thus, we . . . find that the right to be sterilized comes within the privacy rights protected from undue governmental interference by our State Constitution. Such a choice that bears so vitally upon a matter of deep personal privacy may also be considered an integral aspect of the "natural and inalienable" right of all people to enjoy and pursue their individual well-being and happiness.[12]

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5. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 673-74 (10th ed. 1980).

6. 91 N.J. at 308-09, 450 A.2d at 936 (quoting Robinson v. Cahill, 62 N.J. 473, 491-92, 303 A.2d 273, 282-83, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973)).

7. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

8. E.g., Levine v. State Dep't of Institutions & Agencies, 84 N.J. 234, 283-85, 418 A.2d 229, 255-57 (1980) (Pashman, J., dissenting); Matthews v. Atlantic City, 84 N.J. 153, 164-67, 417 A.2d 1011, 1017-19 (1980) (Pashman, J.); Taxpayers Ass'n v. Weymouth Township, 80 N.J. 6, 42-44, 364 A.2d 1016, 1036-37 (1976) (Pashman, J.); Planned Parenthood of New York City v. State, 75 N.J. 49, 57-61, 379 A.2d 841, 845-47 (1977) (Pashman, J., concurring).

9. 75 N.J. 200, 381 A.2d 333 (1977).

10. *Id.* at 216-17, 381 A.2d at 340-41 (citations omitted).

11. 85 N.J. 235, 426 A.2d 467 (1981).

12. *Id.* at 249-50, 426 A.2d at 474 (citations omitted).

In a different setting, he similarly saw the state constitution as providing the basis for recognizing and protecting the privacy and associational rights of individuals against intrusion or restraint through municipal zoning ordinances.[13]

With this repeated emphasis on the state constitution as an independent source for protecting individual rights, it somehow seems fitting that Justice Pashman used two of his last opinions to articulate his philosophy on this important subject matter. In both *Right to Choose v. Byrne*[14] and *State v. Hunt*,[15] the majority stressed the value of uniformity in federal and state constitutional interpretations. I wrote separately in *Hunt* to express my view that resort to the state constitution as an independent source for protecting individual rights is most appropriate when supported by sound reasons of state law, policy, or tradition.[16] Justice Pashman responded in both cases that the "New Jersey Constitution provides the citizens of this state with a fully independent source of protection of fundamental rights and liberties."[17]

In Justice Pashman's view:

> The benefit of uniform federal constitutional rights is not that all citizens in the country are protected to precisely the same degree: it is that there is a certain minimum of liberty and security that may not be infringed by any state government whether or not it possesses its own constitutional protections. Beyond that minimum, states are free to adopt constitutional charters that protect the citizens of that state even further from oppression by state government.[18]

Thus, he advised that "[o]ur state constitution must be interpreted on its own merits, and the liberties it protects are in no way limited to the extent to which they are protected by the federal constitution."[19]

Justice Pashman's opinion in *Right to Choose*, perhaps more than any of his other efforts, reflects the extent to which he espouses the belief that our state constitution stands as an explicit affirmation of fundamental rights and liberties. In *Right to Choose* the majority held that the guarantee of equal protection implicit in article I, paragraph 1 of the New Jersey Constitution demanded that all medically necessary therapeutic abortions be paid for through the state Medicaid statute and that any contrary result would be an unconstitutional discrimination triggered solely by the exercise of a fundamental right.

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13. State v. Baker, 81 N.J. 99, 103, 113-14, 405 A.2d 368, 369-70, 374-75 (1979) (Pashman, J.).

14. 91 N.J. 287, 450 A.2d 925 (1982).

15. 91 N.J. 338, 450 A.2d 952 (1982).

16. *Id.* at 363-67, 450 A.2d at 964-66 (Handler, J., concurring).

17. *Hunt*, 91 N.J. at 358, 450 A.2d at 962 (Pashman, J., concurring). *Accord Right to Choose*, 91 N.J. at 332, 450 A.2d at 948-49 (Pashman, J., concurring in part and dissenting in part).

18. *Right to Choose*, 91 N.J. at 331, 450 A.2d at 948 (Pashman, J., concurring in part and dissenting in part).

19. *Id.* at 333, 450 A.2d at 949.

In his concurring and dissenting opinion, Justice Pashman stated that he would have gone further and would have held that the state was similarly required to fund a woman's choice to obtain an elective, non-therapeutic abortion. He expressed the belief that "[t]he freedom to choose whether or not to bear a child is of such fundamental importance that . . . our Constitution affirmatively requires funding for abortions for women who choose them and cannot otherwise afford them."[20]

Justice Pashman's conclusion in *Right to Choose* necessarily embodies his philosophy that the state constitution is an affirmative grant of rights and liberties to be effectuated to the fullest, as opposed to its federal counterpart, which is a negative restriction on the states' power to act in certain ways.[21] Indeed, this perception of the substantive rights secured by the state constitution is the basis for Justice Pashman's conclusion that the courts have a correlative remedial duty to enforce those rights, which duty is as powerful as the rights themselves.

Justice Pashman well understood that the rights recognized in the state constitution can be directly enforced by the judiciary even in the absence of implementing legislation.[22] In Justice Pashman's view the extraordinary vigor of the state constitution shapes the judicial duty. As he stated in his separate concurring and dissenting opinion in *Robinson v. Cahill IV*,[23] "[w]e, too, are bound by the mandates of the [state] Constitution." He reiterated this conception of the Court's constitutional responsibility later in the same chain of litigation, stating that "[i]n exercising this remedial power [to impose a statewide property tax] . . . the Court . . . would seek compliance by the State with an obligation which is clearly mandated by the Constitution."[24] Indeed, he considered that a "[f]ailure to undertake necessary judicial initiative would clearly constitute an abandonment of our own responsibility."[25] This view was stated with the same intensity in his concurring and dissenting opinion in *Oakwood at Madison, Inc. v. Township of Madison:* "When constitutional rights have been violated and the responsible governmental agencies have failed to correct the violation, courts have *a duty* to provide effective relief by taking whatever reasonable steps are necessary to right the wrong."[26]

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20. 91 N.J. at 324, 450 A.2d at 944.

21. *See id.* at 331-32, 450 A.2d at 948-49 (Pashman, J., concurring in part and dissenting in part).

22. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 76-77, 389 A.2d 465, 475-76 (1978) (Pashman, J.); King v. South Jersey Nat'l Bank, 66 N.J. 161, 193-94, 330 A.2d 1, 18-19 (1974) (Pashman, J., dissenting).

23. 69 N.J. 133, 174, 351 A.2d 713, 734-35 (1975).

24. Robinson v. Cahill, 70 N.J. 155, 176-77, 358 A.2d 457, 468-69 (1976) (referred to as Robinson v. Cahill VI).

25. *Id.* at 177, 358 A.2d at 468.

26. 72 N.J. 481, 572-73, 371 A.2d 1192, 1238 (1977) (Pashman, J., concurring in part and dissenting in part) (emphasis in original).

Whether in the recognition or the protection of individual rights and liberties, Justice Pashman has continually implored us to engage in independent state constitutional analysis.[27] In *Hunt,* he wrote: "Where this Court perceives that the federal constitution has been construed to protect the fundamental rights and liberties of our citizens inadequately, it cannot shrink from its duty to act."[28] And his parting words in *Right to Choose* were perhaps the most revealing. "The New Jersey Constitution is not an empty gesture. It is the bedrock of liberty in this State. We must uphold it."[29]

This expression is strongly reminiscent of the intonation of Chief Justice Marshall in *McCulloch v. Maryland,*[30] sweeping aside all doubt as to the probity of the judicial action: "[I]t is a constitution we are expounding."[31] For Justice Pashman, it is *our* constitution the New Jersey Supreme Court is expounding. If we can divine the verdict of judicial historians with respect to our own constitution, perhaps it will be said of Morris Pashman what occurred to Oliver Wendell Holmes, Jr., when commenting upon John Marshall—that a great man can "represent . . . a strategic point in the campaign of history, and part of his greatness consists of his being *there.*"[32]

While some choose to follow a more cautious course where state constitutional interpretation is involved, jurists and scholars have all most certainly been sensitized by Justice Pashman's strong beliefs that we must look to our state constitution to protect the rights of our citizens. His views and convictions, presenting a rare amalgam of generous impulse and legal insight, will undoubtedly remain a profound and catalytic influence upon the evolution of state constitutional doctrine.

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27. *See, e.g.,* State v. Carpentieri, 82 N.J. 546, 572-73, 414 A.2d 966, 979-80 (1980) (Pashman, J., dissenting).

28. 91 N.J. at 358, 450 A.2d at 962 (Pashman, J., concurring).

29. 91 N.J. at 333, 450 A.2d at 949 (Pashman, J., concurring in part and dissenting in part). My slightly variant perception regarding the use of the state constitution to delineate the scope of protected rights does not preclude me from admiring Justice Pashman as an astute seer as well as effective proselytizer in this delicate area. I recently wrote separately in *Hunt* for the purpose of explicating my views as to when it is appropriate to use the state constitution to reach a result different from that obtained pursuant to the federal constitution. I wrote, in particular, that some of the relevant criteria enunciated to guide courts in this difficult task—pre-existing state law, long-standing traditions, matters of particular state interest or local concern, and public attitudes—are relevant but malleable concepts. *See Hunt,* 91 N.J. at 363-68, 450 A.2d at 964-67 (Handler, J., concurring). Though Justice Pashman and I have differed in our respective articulations of the appropriate approach in such cases—and the Justice has resisted any suggestion that these separate judicial ideologies can, and probably will, merge in many cases—there is full agreement between us on the most essential premise, i.e., that the state constitution exists as an independent and deep source of individual liberties. *Compare* State v. Schmid, 84 N.J. 535, 558, 423 A.2d 615, 627 (1980) (Handler, J.) *with Right to Choose,* 91 N.J. at 332-33, 450 A.2d at 948-49 (Pashman, J., concurring in part and dissenting in part).

30. 17 U.S. (4 Wheat.) 316 (1819).

31. Id. at 407.

32. O.W. HOLMES, *John Marshall, in* SPEECHES 88 (1934) (emphasis in original).

APPENDIX D

THE

JOURNAL OF JURISPRUDENCE:

A NEW SERIES OF

THE AMERICAN LAW JOURNAL.

BY JOHN E. HALL, ESQ.

VOL. I.

PHILADELPHIA:
M. CAREY AND SON—CHESNUT STREET.

1821.

John Rambo keepe the child, if laid to him at the said Bridgett Cocke's deliverie; and further adjudge the said John Rambo to pay costs of suite, according to law.

Peter Cocke, elder, was, for swearing in the open face of the court "by God," fyned five shillings.

The high sheriff, for his absence from the court, and for making the court and countrie stay and waite for him, fyned in the sum of tenn shillings.

The court adjourned to the 3d day of February 1685—6.

REPORT,

Made by Jared Ingersoll, Esq. Attorney General of Pennsylvania, in compliance with a resolution of the legislature, passed the 3d of March, 1812, relative to the penal code. Communicated to the legislature, January 21, 1813.

The penal law of Pennsylvania, unlike that of other governments, was disfigured in its early stages by no sanguinary provisions. At the establishment of the code, under the proprietary government, the errors of former systems were sacrificed to a spirit of humanity. Cruel and sanguinary punishments, which had been multiplied under an ancient system, were little adapted to a people who had fled from persecution. For a long catalogue of offences, amendment was attempted where death had been inflicted. A wiser policy determined to preserve rather than to destroy; and, by substituting imprisonment at hard labor, to reform the offender by severe, but temporary punishment. It reserved as a last resort the punishment of death, which was provided against wilful and premeditated murder alone. And even this exception was so carefully guarded from abuse, that the concurring testimony of two witnesses was made a pre-requisite to conviction; and the same merciful temper which had established the code, introduced also the necessity of receiving the sanction of the governor before the execution of the sentence. Crimes of a less dangerous and destructive tendency; robbery, burglary, arson, every thing short of murder, were punishable by hard labor, fines, forfeitures and stripes. A code so congenial to the spirit and situation of those for whom it was designed, would not fail to produce the happiest consequences. The colony grew in population and respectability; few temptations existed to the commission of crimes, every inducement prompted to obedience to the laws. A period of advancement was thus reached in a moment which it has required nearly two centuries to regain; for the jealous policy of Great Britain, fearful of the effects of self-legislation, even in affairs that local knowledge alone could direct, destroyed this humane and salutary system, and substituted in its room the ill-

adapted edicts of the mother country. Various offences, before punishable with imprisonment, were now visited with death. On the 31st May, 1718, an act was introduced, entitled "An act for the advancement of justice and more certain administration thereof." This was calculated to meet the wishes of a sovereign who enjoyed no community of sentiment with the people, governed at the distance of three thousand miles. Its provisions, therefore, indicate rather the will of the governing power, than the policy or inclination of those who were to obey. With them it was a measure of necessity, not of choice; the yoke imposed by authority, not the rule cheerfully acquiesced in by willing obedience.

This act has been termed "the basis of our criminal law." A supplement was passed on the 21st of February, 1767, which extended still further the severity of the former law, providing the punishment of death for burning dwelling-houses, out-houses, barns or stables, and also for forging and counterfeiting *any* coin of gold or silver. No sooner had the revolution secured the independence of the state, than attempts were made to correct the errors of the penal law; the constitution directed the effort, and the legislature were prompted to obey.

On the 15th of September, 1786, an act was passed taking away from several offences the punishment of death, and changing in others the nature of the penalty from public corporal pain to hard labor. Laws were respectively passed on the 27th of March, 1789, the 5th of April, 1790, and the 23d of September, 1791, evincing the strong disposition of the legislature to prepare the people for a total reform. Cruel and unnatural corporal punishment, which tended only to harden and confirm the criminal, had been abolished for all inferior offences; and at length reason and humanity overcame prejudice, and on the 22d of April, 1794, the punishment of death was abolished in all cases whatever, except murder of the first degree, and imprisonment at hard labor and in solitude was substituted. A work so honorable in its conception has been no less successful in operation. Not only has the progress of vice been arrested within this commonwealth, but other states have fashioned their penitentiary system upon the model of Pennsylvania; and the mildness of her code, after subduing, by the effect of its example, the rigor of the laws of several of her sister states, has passed across the Atlantic and awakened the attention of European legislators. The foundation having been thus laid, and the punishment of imprisonment in solitude and at hard labor imposed for the higher offences, it is a matter of sincere gratification that so little remains to be done to complete the work. If the end has not been completely attained, the effort has failed from no inadequacy of ability in those who devised or those who have administered the laws, but rather from the novelty of a design, as original as it was comprehensive and humane. Notwithstanding its general excellence, errors will find their way into the purest system of criminal jurisprudence. Laws which were adapted to one period,

will become inapplicable to another. A change of society, which accompanies the progress of time, will discover new wants and require new provisions; and the mere advancement of knowledge and experience will suggest amendments that in unimproved society would never have been contemplated. A revisal of the penal law indicates neither negligence in its framers, nor vices in the code. Theoretic politicians have suggested the propriety of such a measure at definite intervals, without regard to specific errors actually in existence, but as the most effectual method to prevent their occurrence. An eloquent writer proposes that once in every century a committee should be appointed to revise the criminal law, that the growth of evil may be arrested before it can have made any fatal advancement. The rapid increase of population in Pennsylvania will justify a revision at intervals less remote, and the legislature will readily perceive the benefits that must arise from a frequent recurrence to this salutary practice.

To consolidate the various penal laws, it became necessary to revise every act of assembly, from the establishment of the province. More perhaps may be included in the act herewith reported than the legislature by their resolution contemplated, or than it may be convenient and proper to combine in one law. The whole however is presented, that an opportunity may be given to select such parts as may with advantage be comprehended in one act, or a selection may be made, and a division take place of the whole under the following titles:

1. *The punishment of crimes.*
2. *The suppression of vice and immorality.*
3. *The regulation of criminal proceedings.*
4. *The regulation of jails and the penitentiary.*

If the mode of recovering penalties, merely pecuniary, were altered from the common law principle, that whenever imposed unless specially provided for it must be by indictment, to a suit within the proper jurisdiction, the penal law would be considerably abridged; and the inconvenience and delay which the strictness of legal proceedings in criminal cases require, would be avoided. To apportion the useful kind of punishment, which has so successfully been introduced into this state, to the several inferior offences; to revise obsolete and severe laws, which had their existence before this punishment was introduced; to regulate proceedings in criminal cases with as little form as possible for the attainment of justice; to regulate and apportion pecuniary and other penalties according to the nature and circumstances of the offence; and, finally, to connect and simplify the various laws, and present to the legislature a comprehensive view of the whole system, is all that is necessary.

TREASON.

The act of the 28th January, 1777, abolished the statute law of England relating to treason, as unsuited to the form of our govern-

APPENDIX E

18 (3

NOTICES

OF THE

ORIGINAL, AND SUCCESSIVE EFFORTS,

TO IMPROVE THE DISCIPLINE

OF THE

PRISON AT PHILADELPHIA,

AND

TO REFORM THE CRIMINAL CODE OF

Pennsylvania:

WITH A FEW OBSERVATIONS ON THE PENITENTIARY SYSTEM.

BY ROBERTS VAUX.

"The penal law should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind."....BLACKSTONE'S COM. B. IV. C. I.

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Eastern District of Pennsylvania, to wit:

BE IT REMEMBERED, That on the thirteenth day of January, in the fiftieth year of the Independence of the United States of America, A. D. 1826, KIMBER & SHARPLESS, of the said district, have deposited in this office the title of a Book, the right whereof they claim as Proprietors, in the words following, to wit:

"Notices of the original, and successive efforts, to improve the discipline of the prison at Philadelphia, and to reform the criminal code of Pennsylvania: with a few observations on the penitentiary system. By Roberts Vaux. "The penal law should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind."....Blackstone's Com. B. iv. C. i."

In conformity to the Act of the Congress of the United States intituled, "An act for the Encouragement of Learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;"—And also to the act, entitled, "An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.

NOTICES, &c.

It will not, at this enlightened period, be denied, that one of the first duties, as well as the true policy, of every government, is to adopt measures *for the prevention of crime;* nor that the most powerful instrument for effecting this important object is *universal education.*

To make men familiarly acquainted with their religious and moral obligations, and with the influence of these great principles, when habitually observed, upon their individual respectability and happiness; and to develop their physical and intellectual resources, and direct them to the attainment of the certain rewards of honest industry and sober economy; have uniformly been found the most effectual means of interesting every member of society in its good order and welfare, and of enabling all to estimate justly the ennobling privileges of virtue and independence.

When, after the rude age in which offences were avenged at the will and by the power of the injured party, governments at length became

the arbiters of private wrongs, had plans been devised for improving the minds of men, rather than for inflicting upon them the most barbarous punishments for transgression, what an infinite waste of blood, by wanton and debasing cruelties, would have been prevented, in every country of ancient and modern Europe.

History establishes the fact, that accelerated improvement has every where attended the mitigation of penalties; and that, in proportion as the laws have become less sanguinary and vindictive, crimes have decreased in number and atrocity.

The code of Alfred, which was a master-piece of judicial polity, set a just value on the life of man: and a tender regard for that temporal existence, which Deity only can confer, has never impaired the security of person or of property, nor diminished the power or dignity of governments that have been cautious in shedding human blood. On the contrary, the administration of justice is more uniform and certain, and social order better preserved, when punishments are mild and sure.

The great law given by Penn, upon the banks of the Delaware, has been not less remarkable for its beneficial influence upon the character and condition of society, in the Western hemisphere, than was the code of Alfred, enacted on

the shores of the Thames, upon those of Britain and of Europe.

The Pennsylvania lawgiver, regardless of most of the statutes of England which had been in force down to the reign of Charles the Second, employed his highly gifted mind in incorporating, with the frame of his government, a criminal code, which he believed to be judicious and practical; and although its provisions have since undergone some changes in form, its great features have remained, not only to distinguish and adorn the land of his affection, then contemplated by him as the "*seed of a nation*," but to extend its benefits to the remotest confines of the American confederacy.

The admirable system of the founder of Pennsylvania, from its first promulgation to the present hour, has carried conviction to the understandings of the most enlightened and distinguished men in America and in Europe, who have never ceased to bestow the highest commendation on the individual who possessed the wisdom to devise, and the firmness to avow, principles, which are calculated to enlarge the dominion of reason and humanity, and to place the institutions of society upon the broad and sure foundation of the Christian religion. These philanthropic principles, however, were too much in advance of the age in which they were

embodied, to receive the sanction of the parent government; but, notwithstanding their repeal by the Queen and Council, the same laws were re-enacted by the freemen of the Province, and remained in operation until the death of their benevolent author, in 1718.

During thirty-five years' application of this mild system, no evidence exists, that offences were of a more flagitious nature, or of more frequent occurrence, than in the neighbouring Colonies, where rigorous penalties were inflicted: on the contrary, it is believed, that its efficacy was acknowledged to contribute, in an enviable degree, to the prosperous administration of Pennsylvania.

Under the rule of Sir William Keith, and other successive Governors, the sanguinary laws of the mother country again prevailed, and gradually brought about all the evils characteristic of the criminal law, up to the period of the revolution.

Although the excellent code of Penn ceased with his existence, the exalted sources of religion and reason, whence it was derived, were happily beyond the control of human caprice and power. His example encouraged other minds, happily imbued with the same principles, to devote themselves to the production of similar results, in more modern times.

To those meritorious pioneers, most of whom have gone down to the grave, Pennsylvania is largely indebted for the reformation of her criminal jurisprudence; and their faithful and disinterested labours deserve to be recorded, for the information and instruction of present and future generations, since they exhibit the unostentatious triumph of benevolence over the errors and prejudices of centuries.

In order to unfold the nature of the difficulties to be encountered in the first attempt to change the penal code of Pennsylvania, and to show how arduous was the task of the original volunteers in this interesting cause, it will be necessary to exhibit the principal criminal offences then known to the law, and the punishments annexed to them respectively. They were,

Murder, Treason, Robbery, Burglary, Rape, Arson, The crime against nature, Malicious maiming, Manslaughter, Counterfeiting bills of credit, or the current coin.	Death, by hanging.

Various minor offences were punished by whipping, the pillory, cropping, branding with a hot iron, and public labour with chain and ball attached to the prisoner, &c.

Of this shocking catalogue of unjust and cruel penalties, few men, it may be supposed, would have the resolution to undertake the removal, especially when the actual condition of the prison, and the mode of treating the prisoners, are considered; for it must be kept in mind, that for nearly all the crimes which have been enumerated, it was proposed to commute the punishment for solitary confinement and hard labour.

The first individual, unconnected with the administration of the criminal laws, who appears to have given attention to the inhabitants of the jail, then situated at the south-west corner of High and Third streets, was a benevolent and independent citizen,* residing in that neighbourhood; who, before the revolutionary war, was in the practice of causing wholesome soup, prepared at his own dwelling, to be conveyed to the prisoners and distributed among them. This fact indicates the wretched condition of the objects of his liberality, as it cannot be presumed that such an interposition would have taken place, but from a full conviction of its absolute necessity.—

* *Richard Wistar;* he died in 1781, aged 54 years.

Whether this circumstance led to a more general notice of the state of the jail and of its inmates, cannot now be ascertained, but it is highly probable it had an influence in producing the first association, formed in any country, for investigating the condition of prisoners, and for affording them relief, as the natural and happy precursor of the important changes in punishments, which, as will hereafter be seen, was subsequently effected by an institution of similar character.

On the 7th of February, 1776, a society was formed, under the name of "*The Philadelphia Society for assisting distressed Prisoners.*" A considerable number of citizens became members of it, and paid an annual subscription of ten shillings, each. The managers of this body afforded some relief during a short career, which, from the following record, (the only one known to exist,) appears to have terminated in about nineteen months. "*The British army having entered the city of Philadelphia in September,* (1777,) *and possessed themselves of the public jails, no further service could be rendered, nor was any election held this month, for the appointment of new managers, so that the Philadelphia Society for assisting distressed Prisoners, was dissolved during this memorable period.*"

Signed, "RICHARD WELLS, *Sec'ry.*"

During the remainder of the war, this good work was necessarily suspended, except that the Convention of Pennsylvania proclaimed, that an alteration should be made in the penal laws of the Commonwealth—a measure which grew out of the new form of the government.

The first amelioration of the criminal code, as subsisting before the revolution, was accomplished by an act of assembly, passed on the 15th of September, 1786, when robbery, burglary, and the crime against nature, were made punishable with servitude, at hard labour, instead of death. This dawn of legislative mercy to criminals in Pennsylvania, deserves to be as gratefully commemorated as it was then joyfully hailed.

On the 8th of May, 1787, a number of citizens assembled at the German School House, on Cherry street, and constituted themselves "*The Philadelphia Society for alleviating the miseries of Public Prisons.*" Their motives and purposes are thus explained, in the preamble and synopsis of the constitution.

"I was in prison and ye came unto me."

"——— and the King shall answer, and say unto them, verily I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."

Matthew xxv. 36, 40.

"When we consider that the obligations of benevolence, which are founded on the precepts

and example of the author of Christianity, are not cancelled by the follies or crimes of our fellow creatures; and when we reflect upon the miseries which penury, hunger, cold, unnecessary severity, unwholesome apartments, and guilt, (the usual attendants of prisons,) involve with them, it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries. By the aids of humanity, their undue and illegal sufferings may be prevented; the links which should bind the whole family of mankind together, under all circumstances, be preserved unbroken; and such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness. From a conviction of the truth and obligation of these principles, the subscribers have associated themselves," &c.

Officers:—A President, two Vice Presidents, two Secretaries, a Treasurer, four Physicians, an electing and an acting Committee. Contribution of each member, ten shillings* per annum. The principal duties of the acting committee were to visit the public prisons, or such other places of confinement as were ordained by law, at least once

* Reduced to one dollar annually in 1792.

every week; to inquire into the circumstances of the persons confined; to report such abuses as they should discover; to examine the influence of confinement or punishment upon the morals of the persons who were the subjects of them. They had authority to draw on the treasurer for such sums of money as should be necessary to carry on the business of their appointment. The physicians, to visit the prisons when called on by the acting committee, and give their advice respecting such matters as were connected with the preservation of the health of persons confined, &c.

On the day of the adoption of this constitution, the society elected its officers and committees, who proceeded to an immediate fulfilment of their important and benevolent duties.

It is much to be regretted, that the first minutes of the acting committee, which contained, doubtless, a mass of intelligence which would now be deeply interesting, cannot be found. Recourse has therefore been had to a few of the venerable persons, who, after a lapse of almost forty years, survive to relate some of the occurrences connected with their early labours in this field of beneficence and patriotism. Their representations of the condition of the jail, and of those confined in it when their visits commenced, are truly appalling. A brief sketch of

these will serve to prove at once the immense difficulties of the undertaking, and the moral courage which must have been exerted to overcome them. The prison, as already stated, was at the corner of High and Third streets, then nearly in the centre of the population of the city. It is said to have been an injudiciously contrived building, with a subterraneous dungeon for prisoners under sentence of death.—What a spectacle must this abode of guilt and wretchedness have presented, when in one common herd were kept, by day and by night, prisoners of all ages, colours, and sexes! No separation was made of the most flagrant offender and convict, from the prisoner who might perhaps be falsely suspected of some trifling misdemeanor;—none of the old and hardened culprit, from the youthful and trembling novice in crime;—none even of the fraudulent swindler, from the unfortunate and possibly the most estimable debtor; and when intermingled with all these, in one corrupt and corrupting assemblage, were to be found the disgusting object of popular contempt besmeared with filth from the pillory—the unhappy victim of the lash streaming with blood from the whipping post—the half naked vagrant—the loathsome drunkard—the sick suffering with various bodily pains—and too often the unaneled malefactor, whose precious hours

of probation had been numbered by his earthly judge.

Some of these deplorable objects, not entirely screened from the public eye by ill constructed walls, exposed themselves daily at the windows, through which they pushed out into the street bags and baskets, suspended upon poles, to receive the alms of the passenger whose sympathy might be excited by their wails of real or affected anguish, or if disappointed, they seldom failed to vent a torrent of abuse on those who were unmoved by their recitals, or who disapproved of their importunity. To increase the horror and disgust of the scene, the ear was continually assailed by the clank of fetters, or with expressions the most obscene and profane, loudly and fiercely uttered, as by the lips of demons.

The keeper derived his appointment from the Sheriff of the city and county of Philadelphia; and had been for many years retained in office, on account of his supposed competency for a charge so disagreeable, as to excite neither desire nor competition on the part of persons better qualified to occupy the station. Indeed the circumstances, under which the incumbent had been long connected with criminals, caused him to be suspected of a more intimate knowledge of the depredations committed in the city, than

comported with that unblemished reputation which ought to belong to such an officer. Whether justly suspected or not, certain it is, that he viewed the first interference of the members of the society, as altogether improper and unnecessary, and contrived to interpose every possible obstacle to the prosecution of their plans; a deportment which went far to confirm the unfavourable opinions entertained of his character. An anecdote, related by one of the acting committee, exhibits at once the dispositions of the jailer, and a specimen of the arts to which he resorted for deterring the members of that body from the discharge of their duties. The gentleman alluded to was a clergyman,* who, believing that benefit would result to the prisoners from an occasional sermon, called on the keeper to inform him of his intention to preach "on the following Sunday." This proved most unwelcome intelligence to the keeper, who instantly declared that such a measure was not only fraught with peril to the person who might deliver the address, but would involve also the risk of the escape of all the criminals, and the consequent pillage or murder of the citizens. To this the clergyman answered, that he did not anticipate such a result, and for himself he did not

* The late William Rogers, D. D.

apprehend even the slightest injury. Leaving, however, the keeper utterly unconvinced, he waited upon the Sheriff, who, on being told what had passed, issued a written order to the jailer, to prepare for the intended religious service. At the appointed time the clergyman repaired to the prison, and was there received with a reserve bordering on incivility. The keeper reluctantly admitted him through the iron gate, to a platform at the top of the steps leading to the yard, where a loaded cannon was placed, and a man beside it with a lighted match. The motley concourse of prisoners was arranged in a solid column, extending to the greatest distance which the wall would allow, and in front of the instrument prepared for their destruction, in the event of the least commotion. This formidable apparatus failed to intimidate or obstruct the preacher, who discoursed to the unhappy multitude for almost an hour, not only unmolested, but, as he had reason to think, with advantage to his hearers, most of whom gave him their respectful attention, and all behaved with much greater decency than he expected. This sermon, it is asserted, was the first ever delivered to the whole of the prisoners in Philadelphia, and perhaps it preceded every attempt of the kind in any other city. Be that as it may, the duty in this case was performed under very

extraordinary circumstances. Not long afterwards, when Bishop White, the President of the society, was about to officiate in the same prison, the keeper, with similar designs, very significantly advised him to leave his watch on the outside of the gate-way, lest it should be purloined; but the intimation was disregarded, and the service administered without molestation. Another proof of the violent and sturdy opposition which the members of the society must have habitually encountered, in their intercourse with the jail, from the refractory temper of a man who could even set at naught the sovereignty of the state, is found in the following extract from the minutes:—"*Although an order was issued, three days since, by the Supreme Executive Council, that Barrack Martin (a negro under sentence of death, but who had been pardoned,) should be released from his irons, yet they had not been removed.*"

Notwithstanding the discountenance of the jailer, a subject rather of ridicule than anger, the members of the acting committee persevered in visiting the prison, alleviating the miseries of its inhabitants, and at the same time making themselves acquainted with all the iniquity of the system which it was the purpose of the society to expose and reform.

As the public attention became gradually

awakened to the arduous labours of the few founders of the society, they were encouraged in their noble aims by accessions to their number, and by donations in money. As early as the third meeting, it is recorded that John Dickinson, late President of the State, proposed transferring certain ground rents for the benefit of the institution.

At the ensuing sitting, the members were gratified by the reading of a letter from Dr. John Coakley Lettsom, of London, to Dr. Benjamin Rush, giving an account of journeys then recently performed by the celebrated John Howard along the borders of the Mediterranean, whither he went to promote the relief of prisoners. The instruction communicated in this epistle renders it worthy of preservation.

"On Howard's return from Turkey, he refused any public honours, which put a stop to the increase of the fund under his name; out of fifteen hundred pounds subscribed, above five hundred pounds have been reclaimed. Of the appropriation of the residue we cannot yet conclude, but my ideas will appear from the Gentleman's Magazine enclosed, in which I have grafted part of thy letter. Though Howard absolutely refused the public honour, he seemed highly gratified by the spirit of the nation, and truly sensible of the grateful sense of his labours. I was closeted with him three hours, soon after his return, and though I have introduced to him persons of fashion, title, and respect, he remains immoveably fixed against all entreaties to admit of public honour. He has not published any account of his Asiatic tour, as it must be illustrated with at least thirteen plates, and he remained here scarcely a month

before he set off for Ireland, in which kingdom he is now employed in visiting the prisons; but his papers, he informed me, were in readiness for the press. Happily he had duplicates of his remarks, and these were kept in different trunks; with these he travelled safely through different regions, till he arrived in Bishop's Gate street, London, and just as he got out of the stage to take a hackney coach, into which he was removing his trunks, one was stolen, and has never since been recovered: besides a duplicate of his travels, it contained twenty-five guineas and a gold watch. A friend of mine who visited Newgate the next day, was told by a convict (such intelligence and communications have they) that the papers were all burnt. Of the lazaretto at Marseilles, he had no duplicates, and luckily the drawings were in the preserved trunk. Howard told me he valued them so highly, that had they been stolen, he would have returned to Marseilles to acquire new ones. To enter this place is forbidden to strangers, and it was by a singular stratagem that he got in nine days successively, without being discovered. Having heard at Marseilles that an English protestant was confined in a prison at Lyons, into which the intrusion of a stranger was always punished with confinement to the galleys for life, the difficulty of access only stimulated the enthusiasm of Howard. He learned, as well as he could, the different turnings and windings that led to the prisoner he more particularly wished to visit. Howard is a little man, of extenuated features, who might pass for a Frenchman. He dressed himself like a Frenchman, with his hat under his arm, and passed hastily by twenty-four officers, and entered the very apartment he wished to see, without suspicion. He disclosed the secret to an English minister at Lyons, who advised his immediate departure, as he would inevitably be discovered if he remained at Lyons all night. He therefore departed hastily and got to Nice. When he arrived at Paris it was almost eleven o'clock at night; he had concluded to depart at three in the morning, by the Brussels stage, and to the inn he sent his baggage, and hoping to get an hour or two's sleep, he went to bed. He had scarcely fallen asleep before his room door was forced open, and in stalked a formal dressed man, preceded by

a servant bearing two lighted candles, and solemnly interrogated him in French to this purpose:—Are you John Howard? I am, replied the Englishman. Did you travel with such a person? I do not know any thing of him, said Howard. The question was again repeated, and the same reply (but with some warmth) was given to it. The personage left the candles on a table and departed: immediately Howard dressed himself and stole to the Lyon's hotel; he heard of two messengers in pursuit of him, but he arrived at Brussels undiscovered.

"At Vienna he purposed to remain two days, but the Emperor Joseph, hearing of his arrival, desired to see him; but as he had found his prisons upon a bad plan, and badly conducted by persons in high trust, Howard evaded an interview at first; but Joseph sending him a message that he should choose his own hour for an interview, the Englishman consented to the Emperor's request. The moment that Howard was announced, he quitted his secretaries and retired with him to a little room, in which there was neither picture nor looking-glass. Here Joseph received a man who never bent his knee to, nor kissed the hand of, any monarch; here he heard truths that astonished him, and often did he seize hold of Howard's hand with inexpressible satisfaction and approbation. "*You have prisoners,*" said Howard, "*who have been confined in dungeons without seeing day light for twenty months, who have not yet had a trial, and should they be found innocent, your majesty has it not in your power to make compensation for the violated rights of humanity.*" To the honour of this great prince be it remembered, that alterations were made in the prisons before Howard's departure."

The first public appeal of the institution, for pecuniary assistance, was, with equal delicacy and eloquence, made on the 16th of August, 1787, in the following terms:

"*To the Friends of Humanity.*

"The Society for alleviating the miseries of Public Prisons, beg leave to solicit the attention of the public to the objects of their institution.

"From the weakness and imperfection of all governments, there must necessarily exist in every community certain portions of distress, which lie beyond the reach of law to prevent or relieve. To supply this deficiency in Philadelphia this society was instituted, and if a judgment be formed of its future usefulness from the success that hath attended its first efforts, there is reason to believe it will prove a blessing to our city, not only as the means of relieving distress, but likewise of preventing vice. The funds of the society at present are confined to an annual subscription from each of its members, and a ground rent of fourteen pounds, the donation of John Dickinson, Esq. These sums are by no means equal to the numerous objects and extensive wishes of the society. They have therefore taken this method of soliciting further benefactions from their fellow citizens. To a people professing Christianity, it will be sufficient only to mention that acts of charity to the miserable tenants of prisons are upon record among the first of Christian duties. From the ladies, therefore, whom heaven has blessed with affluence, and the still greater gift of sympathy—from gentlemen, who acknowledge the obligations to humanity—from the relation of our species to each other in a common and universal Father—and from the followers of the compassionate Saviour of mankind, of every rank and description, the Society thus humbly solicits an addition to their funds.

"Signed by order.

"WILLIAM WHITE, *President.*"

The law of 1786, although in many respects less sanguinary than the former enactments, contained some provisions, the execution of which led to most injurious consequences. It directed that a certain description of convicts should be employed in cleaning the streets of the city and repairing the roads in its neighbourhood; and authorised the keeper of the jail *to shave the heads* of the prisoners, and otherwise to distin-

guish them by *an infamous dress.* In this very objectionable manner they were brought before the public. The sport of the idle and the vicious, they often became incensed, and naturally took violent revenge upon the aggressors. To prevent them from retorting injuries still allowed to be inflicted, they were encumbered with iron collars and chains, to which bomb-shells were attached, to be dragged along while they performed their degrading service, under the eye of keepers armed with swords, blunderbusses, and other weapons of destruction. These measures begot in the minds of the criminals and those who witnessed them, disrespect for laws executed with so much cruelty, and did not fail to excite the early notice of the society. A committee was therefore appointed "*to inquire into the effects of the lately enacted penal law on the criminals, now at work in our streets, and also its influence on society,*" who speedily reported an essay of a memorial, which being approved, twenty-four members were deputed to procure to it the signatures of the citizens.

"To the Representatives of the Freemen of the Commonwealth of Pennsylvania, in General Assembly met.

"The Representation and Petition of the subscribers, citizens of Pennsylvania.—

"Your petitioners have viewed with pleasure the act of a former Assembly, for the reforming of the penal laws of the state, by rendering them "*less sanguinary and more proportionate to*

crimes," and though your petitioners conceive that the good ends thereby intended, have not hitherto been fully answered, yet they presume to suggest that the mode of punishment adopted in the "*act for amending the penal laws*," will be more likely to answer the desired purpose, by means of some amendments; a few of which your petitioners beg leave to lay before the house.

"The punishment of criminals by "hard labour *publicly* and disgracefully imposed," as indicated in the preamble to the law, your petitioners wish the house would be pleased to revise, being fully convinced that punishment by more *private* or even *solitary* labour, would more successfully tend to reclaim the unhappy objects, as it might be conducted more steadily and uniformly, and the kind and portion of labour better adapted to the different abilities of the criminals; the evils of familiarizing young minds to vicious characters would be removed, and the opportunities of begging money would be prevented; for although the criminals are forbid to have money in their possession, yet no penalty is inflicted on persons furnishing them therewith.

"Your petitioners also would wish to recommend to the attention of the house the very great importance of a separation of the sexes in the public prisons—and that some more effectual provision be made for the prohibition of spirituous liquor amongst the criminals, the use of which tends to lessen the true sense of their situation, and prevents those useful reflections which might be produced by solitary labour and strict temperance.

"Your petitioners therefore respectfully request the house will be pleased to take the penal law under their consideration, and make such provision thereon as may more effectually answer the good and humane purposes thereby originally intended."

Such was the modest, but forcible application which the society was instrumental in bringing before the representatives of the people of this Commonwealth, and to this measure Pennsylva-

nia owes all the subsequent improvements in her prison discipline and penal laws, which have attracted the approving notice of statesmen and philanthropists, throughout the civilized world.

The society had by this time acquired so respectable a standing as to insure to it a powerful influence, which was strenuously exerted on every occasion, to press its generous and judicious plans to completion.

To enlarge its knowledge of efforts in some respects similar to its own, in Europe, a correspondence was commenced with the indefatigable Howard, to whom the following communication was addressed:

"*Philadelphia, January* 14, 1788.

"To John Howard.

"The Society for alleviating the miseries of Public Prisons, in the city of Philadelphia, beg leave to forward to you a copy of their constitution, and to request, at the same time, such communications from you upon the subject of their institution, as may favour their designs.

"The Society heartily concur with the friends of humanity in Europe, in expressing their obligations to you for having rendered the miserable tenants of prisons the objects of more general attention and compassion, and for having pointed out some of the means of not only al-

leviating their miseries, but of preventing those crimes and misfortunes which are the causes of them.

"With sincere wishes that your useful life may be prolonged, and that you may enjoy the pleasure of seeing the success of your labours in the cause of humanity, in every part of the globe, we are, with great respect and esteem, your sincere friends and well wishers.

"Signed by order of the Society.

"WILLIAM WHITE, *President.*"*

The meeting at which this letter was adopted, in order to disseminate information calculated to enlighten the community respecting its favourite purpose, instituted a committee to print, and gratuitously distribute, a pamphlet which had recently appeared, entitled "*Thoughts on the construction and polity of Prisons,*" copies of which were ordered to be presented to each member of the council and assembly of the state. On

* Of the usefulness of this society, the benevolent Howard thus expresses himself in one of his published works:—"Should the plan take place during my life, of establishing *a permanent charity* under some such title as that at *Philadelphia,* viz: "*A Society for alleviating the miseries of Public Prisons,*" and annuities be engrafted thereupon, for the above mentioned purpose, I would most readily stand at the bottom of a page for five hundred pounds; or if such society shall be instituted within three years after my death, this sum shall be paid out of my estate."

the same occasion a resolution of the Supreme Executive Council was submitted, asking the society to confer with a deputation, which had been chosen by the former body, on the subject of the condition of the jail of the city and county of Philadelphia; which request was promptly met, and a large committee accordingly appointed. At the joint meetings of the delegates, several interesting and important discussions took place, and a general view of the subjects under notice being prepared, the succeeding paper was furnished to the council.

"In consequence of a minute of the Supreme Executive Council, 20th November, 1788, laid before a special meeting of the Society for alleviating the miseries of Public Prisons, a committee was appointed to take the said minute into consideration, and to give such information to Council as the nature of the minute requires, which committee, having several times met, agree to make the following representation:

"That in the article of clothing few complaints arise respecting the condemned criminals, but amongst the greater number confined in prison previous to trial, there frequently happen cases of great want, many of the prisoners being destitute of shirts and stockings and warm covering, partly owing to the length of time before trial, and partly to the easy access, by various means, to spirituous liquors, for which their clothes are disposed of. Clothing distributed by the society to the apparently most destitute, has, in many instances, been quickly exchanged for rum. No provision being made by law for relieving these distressed objects, or for preventing the abuses of charitable donations, it is at present an evil without a remedy, though it is conceived that a kind of prison dress might be adopted by law, and as easily preserved from sale as those of the convicts.

"In the article of diet an allowance is made by law to the

working criminals, and no complaints have come to the knowledge of the society on that head. To those who are committed for trial, the half of a four-penny loaf only is daily allowed, but no provision is made for persons who are committed as witnesses, amongst whom cases of great distress have appeared to the society. A stranger, accidently present at the commission of a criminal action, but without friends to enter security for his appearance as witness, is committed to jail, for the benefit of the community, and suffers more than the actual criminal, and what adds greatly to this grievance, he is afterwards detained for his fees;—and whilst on this subject, the committee would wish to suggest the very great hardship of a prisoner's being detained for his fees after being legally acquitted of the crime for which he had been committed.

"In cases where women are imprisoned, having a child, or children, at the breast, they have only the allowance of a single person, except what arises from the casual supplies of charity, to which the society have contributed, by a distribution to the most necessitous of both sexes, of upwards of one hundred gallons of soup weekly during the last winter and spring.

"With respect to lodging, it appears that no provision of any kind is made by law, the prisoners lying promiscuously on the floor, unless supplied by their friends. In some jails in England, mentioned by the humane Howard, they are accommodated with strong cribs, and supplied, at stated times, with clean straw. On the first institution of the society, in their visits to the jail, they found that the men and women had general intercourse with each other, and it was afterwards discovered that they were locked up together in their rooms at night; but through the remonstrances of the committee on the impropriety of the practice, the women were, at length, removed into a different part of the prison—the apparent consequence of which was, that from the number of about thirty or forty, at first, in confinement, they have been reduced to four or five; for it was said to be a common practice for the women to procure themselves to be arrested for fictitious debts, in order to gain admission among the men—a constant and steady adherence to this mode of separation, the committee are of opinion, will be

of great utility. The present mode of burning fuel in the rooms, in open chimneys, with the very scanty allowance, subjects the unhappy prisoners to great misery, in the severity of winter;—if stoves could be introduced, this might be, in some measure, abated.

"The minute of council calls for information of the quantity of spirits consumed in the jail—but it is not in the power of the committee to give a satisfactory answer on this head. The visiting committee were once informed that twenty gallons had been introduced in one day, at the time the prison keeper stopped selling, on account of the prosecution and fine imposed. Since that time, the visiting committee have never had reason to believe that the prisoners have met with any difficulty in purchasing spirits at the bar; and the debtors have frequently complained that they would not have liberty to buy liquors at any other place, but were obliged to pay in the jail half a dollar for a quart, and eight pence for a gill. To obtain money to purchase spirits, great irregularities, and even outrages, are committed by the prisoners, by not only selling their own clothes, but forcibly stripping others on their first admission in jail, which, though a custom of long standing, by the name of *garnish*, is oftentimes productive of great subsequent sufferings.

"In reply to the general query respecting the mode of conducting the business of the jail, the committee beg leave to remark, that there are three great evils which call for attention, viz: the mixture of the sexes—the use of spirituous liquors—and the indiscriminate confinement of debtors and persons committed for criminal offences.

"The first during the temporary separation, had an evident beneficial effect, as already remarked: how far the practice is steadily continued, is not in the power of the committee to ascertain, as the regular attendance of the visiting committee has been, for some time, withheld, on account of some discouragement and obstacles they met with; but, from the experience they have had, they are fully convinced that it is both practicable and beneficial.

"The sale of spirituous liquors has ever appeared to the visiting committee as greatly contributing to the enormities pre-

vailing amongst the prisoners. If it was practicable to put a total stop to the resort of visiters to the criminals, many of the evils complained of might be remedied; for, there is too much reason to believe, that an improper correspondence and intercourse is held between dishonest people out of the jail and the confined criminals, and that schemes of robbery and concealment are there concerted. The laws hitherto in force against selling spirituous liquors in jail, are either eluded, or the penalty too small to prevent the practice.

"During the many visits paid to the jail by the committee of the society, they could not pass by unnoticed the frequency of many of the criminals intermixing with the debtors, and having the free use of that part of the jail originally appropriated solely for the debtors—of which many of the debtors complained, and at times conceived their lives were endangered. Some of them have informed the committee that they would have given useful information respecting the introduction of liquors, &c. but were deterred from a fear of the criminals, and were not without apprehension that they might give offence to the prison keeper, and induce him to treat them with severity. Particular cases have come to the knowledge of the committee, where debtors, by mixing with the criminals, have formed connexions which ultimately led to their being convicts themselves. There is too much reason to believe that numerous connexions have been formed in this way, to the total ruin of many unfortunate prisoners, who have been compelled to associate with men of infamous morals. But even where this unhappy consequence hath not ensued, it proves a situation of pain and distress to the feeling mind, and often subjects the innocent prisoner to personal abuse and loss of property. Under this head it may be proper to remark, that children, both in the jail and work-house, are frequently suffered to remain with their parents, whereby they are initiated, in early life, to scenes of debauchery, dishonesty, and wickedness of every kind.

"The female convicts are at present kept in the work-house, where, for want of proper apartments, they are allowed to associate with girls and young women, confined therein by their masters and mistresses, for sale, or temporary punishment, by which dangerous intercourse many unhappy creatures, who are per-

haps only confined by the caprice of their owners, are gradually seduced from their original innocence.

"A large portion of the jail is at present unoccupied, or in the use of the prison keeper and his family, so that the necessary separations might be easily provided for.

"Respecting the employment of the convicts, the committee are of opinion, that on inquiry it will appear that a large portion of their time is unemployed, and the committee have been informed by the prison keeper, that it was deemed a greater punishment to be detained in the prison than to work in the streets, and that in some cases he prevented their going out to work, alleging that they were too desperate to be in the street, which seems strongly to indicate the necessity of providing solitary labour in the prison. On the whole, as a matter of the utmost moment to the well being, safety, and peace of society, as well as of the greatest importance to the criminals, the committee think it their duty to declare, that from a long and steady attention to the real practical state, as well as the theory of prisons, they are unanimously of opinion, that solitary confinement to hard labour, and a total abstinence from spirituous liquors, will prove the most effectual means of reforming these unhappy creatures, and that many evils might be prevented by keeping the debtors from the necessity of associating with those who are committed for trial, as well as by a constant separation of the sexes.

(Signed,)

"WILLIAM WHITE,
R. WELLS,
B. WYNKOOP,
THOMAS WISTAR,
S. P. GRIFFITTS,
JOHN KAIGHN,
WILLIAM ROGERS,
C. MARSHALL,
"JOHN CONNELLY,
JAMES COOPER,
CALEB LOWNES,
BENJAMIN THAW,
T. HARRISON,
WM. LIPPINCOTT,
GEO. DUFFIELD."

"*Philadelphia, December* 15, 1788."

Endorsed,

"*Delivered the* 16*th, at the Council Chamber. Present, Samuel Miles and R. Willing.*"

This representation proved highly beneficial, and in the following year, 1789, the society was engaged in digesting a plan for the permanent improvement of prison discipline, which being completed, was communicated to the proper authorities for consideration.

The legislature, having given, in 1790, the form of law to the propositions made to it by the society, for the regulation of the jail, submitted to the Mayor and Aldermen, who were clothed with the power of appointment, a list of the names of citizens deemed qualified for the new and important office of *Inspectors of the Prison*, who were accordingly chosen.

A new era then commenced in the management of the jail. Invested with ample authority, the inspectors exerted it, to carry into effect all the measures which the observation and experience of the society had shown to be necessary.

The prison on Walnut and Sixth streets,* which, during the revolution, had been alternately used by the American and British armies, as a depot for prisoners of war, was put in a condition adapted to this interesting change of affairs. The sexes were separated and engaged in various employments. Convicts and untried prisoners were not permitted to associ-

* The building of this jail commenced in 1773.

ate; the former were comfortably clothed, and fed on coarse, but wholesome diet. A principal keeper and assistants were appointed, and their duties regulated. Jail fees and garnish, the sale and use of ardent spirits, with the long catalogue of abuses which had hitherto disgraced the prison, were immediately abolished.

The criminal side of the jail being thus organized, and the experiments going on successfully, the society had an opportunity to examine the state of the debtors' apartment, a building on Prune street, adjoining the Penitentiary on the south. Heretofore nothing better had been accomplished for persons confined for debt, than their removal from the disgusting mass of felons, among whom they were kept in the old jail. Several gentlemen were charged with the duty of examining this department of the prison, especially with a view to ascertain the propriety of restricting the keeper's power, and of effecting a "*separation of the sexes in the day time as well as at night.*" This committee prepared a memorial to the legislature, which was adopted. The result of the application is thus noticed on the minutes of the society, in October, 1791:—"*The committee appointed to inquire into the situation of the debtors' apartment reported, that the assembly, at the late session, had passed an act, which, although it did not extend*

so far as to meet the wishes of the society entirely, yet afforded considerable relief in the premises."

In 1792, the legislature undertook a thorough revision of the penal laws, and made such alterations as were consonant with the public sentiment, by that time fully prepared for a more humane system of criminal jurisprudence, than had before been adopted in any age or country. The society which had so largely contributed to this great result, happily found a powerful co-adjutor in the late William Bradford, Attorney General of the state, who published in this year, a work entitled "*An Inquiry how far the punishment of death is necessary in Pennsylvania: with notes and illustrations.*" This excellent essay attracted superior attention, and produced more important effects, as coming from the pen of a profound lawyer, in whose too early death, a few years afterwards, Pennsylvania justly mourned the loss of one of the wisest and worthiest of her sons.

During the year 1793, the society did little more than attentively observe the progress of the new system, and by its acting committee, administer to the wants of untried prisoners, for whose relief no legal provision existed. But, towards the close of that year, rendered memorable by the pestilential fever which spread terror and

death amongst the inhabitants of Philadelphia in a degree before unequalled, several of the active members of this institution, who seem to have been prepared by their benevolent career to lend efficient succour to the afflicted, were by feelings of sympathy detained in the city during that awful visitation, and indefatigably engaged in relieving the sick and destitute.

For services like those, rendered to suffering humanity on that melancholy occasion,

> "When hopeless anguish poured its groan,
> And lonely want retired to die,"

mankind would appear to owe an inextinguishable debt of gratitude, had not the Author of all goodness connected inseparably with the exercise of the benevolent affections of the heart, joys and consolations which are greatly superior, even here, to any good that man can bestow, and which must hereafter confer such happiness as fadeth not away.

An extensive correspondence was opened and carried on in 1794, between the society and the executives of several of the states of the union, which tended to diffuse much information relative to its labours, and led to the adoption of reform in the penal laws in other parts of the continent.

From this time until 1798, the minutes fur-

nish nothing more than notices of the attention of the acting committees, of which one instance is selected. "*The state of the criminal laws is such as to render their interference seldom necessary among those prisoners under sentence, but that among those of other descriptions many cases have occurred which have required and obtained their particular attention; and not a few have been relieved by pecuniary and other aid, which, affording much satisfaction, they are requested to continue their visits to the prisons, and use exertions for the promotion of the objects of this association.*"

A question of some consequence was discussed at this time, as to the propriety of establishing schools in the jail; and further attention was given to the laws relative to imprisonment for debt. A sum of money to carry the former object into operation, and a memorial to the legislature concerning the latter, were agreed upon at the ensuing meeting.

It appears, that in 1799 and 1800, some relaxation in the police of the prison was observed, which induced prompt measures on the part of the society for restoring to the system its original vigour; and this was effected by its interposition. A report, manifesting great research into every department of the jail, as well concerning its management as its fiscal affairs, was made by

a committee, which, in conclusion, holds this language:—"*They are also of the judgment, that there is in general a great impropriety in abating any part of the sentence passed on the prisoners, either by lessening the solitary confinement to which they are condemned, or promoting their pardon, by application to the Governor. They likewise think it improper to mix, with convicts confined to labour, any other prisoners not sentenced to the like punishment.*"

Continuing devoted to this interesting cause, the society again, in 1801, approached the legislature in the following manner:

"To the Senate and House of Representatives of the Commonwealth of Pennsylvania—

"The Memorial of the Philadelphia Society for alleviating the miseries of Public Prisons,

RESPECTFULLY REPRESENTS:

"That your Memorialists have contemplated with pleasure the progress made by former legislatures in preventing crimes, and reforming criminals, and, encouraged by the ready attention heretofore shown to their applications, are emboldened to call the notice of the legislature to the present state of our Prisons.

"When the reform was made in our penal laws in the year 1790, although the principles were plainly laid down, yet it was not expected that the practical part could be suddenly or completely effected. It was then in some degree a matter of experiment. An experiment, however, though imperfectly made, which has not only increased our internal security, but has been so far approved of as to be adopted in several of our sister states.

"Being ourselves fully convinced of the propriety both of these principles and this practice, we now wish briefly to solicit your attention to a most essential part of this humane and rational plan for preventing crimes and reforming criminals. Ever

since the present establishment of the Prisons we have wished to make the fair experiment of solitude and labour on the convicts. Every year's experience has shown us, that in the present state of the Prison, such an attempt, however desirable, is impracticable.

"We are therefore induced to request that you will devise such means as may appear to you most adequate, to separate the convicts from all other descriptions of prisoners, in order that a full opportunity of trying the effects of solitude and labour may be afforded.

"Signed by direction of the Society.

"WM. WHITE, President."

"*Philadelphia, 12th mo.* 14, 1801."

Two years afterwards, the necessity for an additional prison became evident, and a brief view of the actual condition of the penitentiary house, with other motives for the measure, were thus presented in a joint address from the society and the inspectors of the jail.

"To the Senate and House of Representatives of Pennsylvania:—The Memorial of the Philadelphia Society for alleviating the miseries of Public Prisons, and of the Inspectors of the Prison of the City and County of Philadelphia,

"RESPECTFULLY REPRESENTS:

"That in reforming the penal laws of this State the legislature of Pennsylvania contemplated the reclaiming of criminals, as well as preventing crimes; and with this view, adopted the mode of punishing criminals by solitary confinement at hard labour, under such regulations as appeared best calculated to impress strongly on the minds of the convicts, the connexion of suffering with the transgression of the laws. At the time of this reform, the jail of the city and county of Philadelphia, was considered as sufficiently large to carry this benevolent design of the legislature into effect, and to leave suitable room for the con-

finement of vagrants, prisoners for trial, &c. A period of more than twelve years has elapsed since this reform came into operation, and in the course of that time the number of prisoners of various descriptions has increased to such a degree, owing to the jail of Philadelphia being by law the general place of custody for all the convicts of the state, and likewise to the substitution of long periods of confinement instead of capital punishment, that the said prison is no longer capable of containing them in such a way as to answer the intention of the legislature. The number of vagrants, &c. has so much increased, that it is a matter of great difficulty to keep them in order, and impracticable to keep them regularly at labour. The prisoners who are detained for trial, run-away servants and apprentices, are through necessity confined in the same apartment with the vagrants, and the intercourse between such persons crowded together may easily be conceived to be most destructive to the morals of the whole, insomuch that when they are released from prison they are likely to come out intimately acquainted with the arts of villany, and combined with an extensive association of persons of similar character to make depredations on the public. The great uumber of vagrants, untried prisoners, &c. produces hurtful effects on the convicts, as the latter are, for want of room, obliged to be kept in too large numbers in one apartment, by which the amelioration of their morals is either prevented or greatly impeded, the keeping of them attended with greater hazard; and they have more opportunity of laying plans of escape; their labour is rendered less productive than it might be, aud the idea of solitude is nearly obliterated.

"The health of the city is much endangered by having so many people crowded together in one house. Notwithstanding the great attention to cleanliness, the jail fever made its appearance there during the last winter. Whether under the present arrangements, it will be practicable to prevent its breaking out again, and in case of such an event, extending its effects beyond the prison walls, it is impossible to determine.

"Another house or set of buildings appears to be necessary, where the vagrants might be suitably classed and compelled to hard labour.—In such proper apartments these prisoners might, under suitable regulations, be kept at labour so productive as

might at least defray the expense of their keeping or maintenance: this, to the idle and disorderly would be such an object of terror, that the number of them would probably soon be lessened.

"By such arrangement also, the prisoners for trial, servants, and apprentices, could be suitably classed and taken care of, without being made necessary companions of abandoned characters; which is unavoidable in the present state of the prison; whilst the convicts, by having the whole of the present building allotted for them, could be subdivided into smaller classes—more effectually secluded from any confederacy with those out of doors—more easily managed, and have a fairer chance of improving their morals; and while their minds would have fewer objects to distract them, they might become more docile; and while their labour would be rendered more productive, they would be confirmed in those habits of industry which are calculated to render them useful, both to themselves and society.

* * * * * * * *

"Placed, as we are, in a situation to observe the salutary effects of solitude and labour, in preventing crimes and reforming criminals, we trust you will, as heretofore, receive our application with indulgence, and therefore again respectfully submit to your consideration, the propriety of granting another building, for the purpose of making such separation amongst the prisoners as the nature and wants of this truly benevolent system require."

This request was favourably received, and an act passed, authorising the erection of a Bridewell, since located on Mulberry and Broad streets.

In 1809, the society appropriated funds for the purchase and establishment of a library, for the convicts in the Walnut street jail; the committee who had charge of the subject having reported, that "*they believed the time of the prisoners might be usefully passed, on the first day of the*

week, in reading the scriptures and other religious books." A few members were specially appointed to the superintendence of this matter, and they began the experiment by supplying the requisite number of Bibles and Testaments. Two years elapsed when this further notice of the subject was recorded:—"*Bibles and Testaments have been furnished, and some of the prisoners seem inclined to peruse them; it is hoped benefit has resulted from the measure, but the committee is not prepared to give an opinion, as to the utility of introducing any other books.*"

In 1813, the secretaries were appointed "*to correspond with such persons as were engaged in the conduct of penitentiaries, instituted in different states of the Union, in which the humane and improved system of penal laws was enforced, and especially to ascertain the influence thereof on the subjects of such treatment, as well as the effects produced thereby on the general condition of society.*" This correspondence elicited information, more or less satisfactory, of the success of penitentiaries which had been established in ten of the states.

In 1816, "*A Statistical view of the operation of the penal code of Pennsylvania, &c.*" was prepared by a committee of the society, and printed and distributed under its direction.

Although chiefly confined to the mitigation of

the sufferings of those wretched beings, who, increasing with the population of the city and its suburbs, were found every year in great numbers, as vagrant and untried prisoners, at the Bridewell, the members of the society were always regardful of the penitentiary system itself, and embraced every occasion to assist in its most effectual operation. Such feelings and views led, in the early part of 1818, to the presentation of this petition:

"To the Senate and House of Representatives, &c.

"The Memorial, &c.

"Respectfully Showeth:

"That in the year 1787, an association was formed by a number of the inhabitants of Philadelphia, for the purpose of lessening the evils and miseries of prisons, and of promoting an amelioration of the penal laws of this state, under the title of "*The Philadelphia Society for alleviating the miseries of Public Prisons*," which society have continued their attention to the subject until the present time, and have the satisfaction, in common with their fellow citizens, of witnessing considerable improvement in the management of the prison in this city. But the progress of which, they apprehend, is obstructed, and many other evils experienced by the necessity of crowding into that establishment great numbers of convicts from all parts of this populous state. They therefore respectfully request the legislature to consider the propriety and expediency of erecting penitentiaries in suitable parts of the state, for the more effectual employment and separation of the prisoners, and of proving the efficacy of solitude on the morals of those unhappy objects.

Signed on behalf of the Society.

WILLIAM WHITE,
THOMAS WISTAR,
SAMUEL P. GRIFFITTS,
JOSEPH CRUKSHANK.

About the same time, a letter was received from Stephen Lushington, L. L. D. a member of the British Parliament, written at the instance of the London Society for the improvement of Prison Discipline, and requesting the opinion of the Philadelphia Society, as to the effects of the penitentiary system here. The answer which was given to that communication is as follows:

"To the Committee of the Society in London for the Improvement of Prison Discipline.

"The subject of your interesting letter of 'Nov. 26th, 1818,' has claimed our deliberate consideration.

"Although the attempt has been made amongst us, to lessen the commission of crime, not by the death of the offender, but by inflicting the punishment of privation, solitude, and labour; yet the penitentiary system, arising out of this change in our penal code, has not, from divers causes, been so effectually carried into operation as to produce all the results which reason and benevolence had fondly anticipated.

"From the experience already acquired on this important subject, and especially during the few first years, when the exertions of the society were more actively employed in the direction of the system, we feel no hesitation in declaring, that the deficiencies which may have appeared, are not to be ascribed to the system itself, but to the difficulties which have occurred in reducing it to practice. *Amongst the chief of these has been the impracticability of confining the convicts to solitary labour.* This has been owing in some measure to the construction of the building in which they are placed; it being the same which was used for the confinement of criminals previously to the improvement of the penal code.

"Hitherto, all the convicts of this widely extended state have been sent to the penitentiary in this city; which practice, besides other disadvantages, is attended with this injurious one, that a convict from a remote part, whose term has expired, is

discharged in this populous city, most probably unacquainted with any of its inhabitants, except such as may have been his associates in the prison, at a great distance from his home, without friends, and without money, but with many temptations before him; under these discouraging circumstances it is not at all surprising, that he should recur to his former habits.

"But a better state of things is opening to our view. An additional penitentiary is building at Pittsburg, on the Allegheny river, 300 miles west of Philadelphia. An act of the Legislature of Pennsylvania, it is hoped, will be passed, authorising the erection of another building in the city and county of Philadelphia, for carrying the penitentiary system into full operation. When this prison is erected, and not till then, will the experiment of preventing crime, without taking life, have been fairly tried.

"We feel great satisfaction in your exertions in this dignified cause; and hope you will not be discouraged by any partial considerations, from continuing to co-operate with us, in endeavouring to establish the beneficent principle, that the prevention of crime, and the reformation of the offender, is the object of punishment. And whatever may have been the fears and resentments of those times, which produced the too generally prevailing system, of lightly multiplying criminal offences, and of inflicting death, and other odious punishments; let us indulge the pleasing hope, that this system of ignorance and barbarism will no longer continue to the disgrace of the nations and governments, who are now arrived at the highest state of civilization, and who profess to be actuated by the benign and salutary influences of Christianity.

"Respectfully,

"WILLIAM WHITE, *President.*"

In 1821, another and the last effort was made, to impress the general assembly with the necessity of a penitentiary in this section of the state.

"To the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met.

"The Memorial of the Philadelphia Society for alleviating the Miseries of Public Prisons,

"RESPECTFULLY REPRESENTS,"

"That it is now nearly forty years since some of your Memorialists associated for the purpose of alleviating the miseries of public prisons, as well as for procuring the melioration of the penal code of Pennsylvania, as far as these effects might be produced through their influence.

"In the performance of the duties which they believed to be required of them by the dictates of Christian benevolence, and the obligations of humanity, they investigated the conduct and regulations of the jail, and likewise the effects of those degrading and sanguinary punishments, which were at that period inflicted by the laws of this Commonwealth. The result of these examinations was a full conviction, that not only the police of the prison was faulty, but the penalties of the law were such as to frustrate the great ends of punishment, by rendering offenders inimical, instead of restoring them to usefulness in society.

"With these impressions, alterations in the modes of punishment, and improvements in prison discipline, were from time to time recommended to the Legislature, by whose authority many changes were adopted, and many defects remedied.

"These reforms, from the nature of existing circumstances, were, however, of comparatively limited extent, but as far as the trial could be made, beneficial consequences were experienced.

"Neighbouring states, and remote nations, directed their attention to these efforts, and, in many instances, adopted the principles which had influenced the conduct of Pennsylvania.

"At the time of making the change in our penal code, substituting solitude and hard labour, for sanguinary punishments, the experiment was begun in the county jail of Philadelphia, rather than the execution of the laws should be deferred to a distant period, when a suitable prison might be erected. Under all the inconveniences then subsisting, the effects produced were such as to warrant a belief that the plan would answer the most sanguine wishes of its friends, if it could be properly tried. But the construction of that prison, and its crowded condition, being the only penitentiary used for all the convicts of the state, leave

but slender hopes of the accomplishment of the humane intentions of the Legislature.

"Your Memorialists believe, that they discover in the recent measures of the Commonwealth, a promise, which will fulfil the designs of benevolence in this respect. The edifice now in progress at Pittsburg for the reception of prisoners, constructed upon a plan adapted to strict solitary confinement, will go far towards accomplishing this great purpose; and your Memorialists are induced to hope, that the same enlightened policy which dictated the erection of a state prison in the western, will provide for the establishment of a similar one in the eastern part of the state.

"Reasons of the most serious and substantial nature might be urged, to show the absolute necessity which exists for a penitentiary in the city and county of Philadelphia, whether we regard the security of society, or the restoration of the offenders against its laws. It will not be necessary here to recite the alarming proofs which might be adduced in support of their opinions, but refer to the documents herewith furnished, which exhibit the actual condition of the prison.

"Your Memorialists, therefore, respectfully request, that you will be pleased to take the subject under your serious consideration, and if you judge it right, to pass a law, for the erection of a penitentiary for the eastern district of the state, in which the benefits of solitude and hard labour may be fairly and effectually proved.

"Signed by order and on behalf of the Society.

"WILLIAM WHITE, *President.*
WILLIAM ROGERS, *Vice President.*
THOMAS WISTAR, *do.*
NICHOLAS COLLIN,
SAMUEL POWEL GRIFFITTS,
JOS. REED,
ROBERTS VAUX."

"Attest.

"CALEB CRESSON, *Secretary.*"

This memorial was sent to the legislative bo-

dies, accompanied by documentary evidence to confirm its statements, and it was deemed so important as to require the appointment of a committee to attend at the seat of government. Dr. William Rogers, one of the Vice Presidents of the Society, and Samuel R. Wood, an active member, who was at that time also one of the inspectors of the prison, performed this valuable service. The appeal, enforced with much ability by this respectable and well informed deputation, proved successful, and a law passed providing for the erection of the desired edifice.

During the last four years, several interesting subjects have claimed the attention of the society; among which may be enumerated, the practicability of establishing a house of refuge for juvenile offenders, and of an asylum for the temporary employment of convicts discharged from jail without friends, or without the means of subsistence—the propriety of legislative interposition to prevent the evils of imprisonment for small debts and petty offences—the lawfulness of confining unruly apprentices in the cells at the mere instance, and during the pleasure, of their masters—and, finally, the alleged oppressive and illegal conduct of magistrates towards the ignorant and dependent classes of the community.

In the prosecution of its objects, the society

has thus far expended, in alleviating the miseries of public prisons, and in publications made at different times to illustrate and enforce its opinions, about five thousand dollars, derived from donations and the annual contributions of its members; the whole number of whom, in thirty-nine years, has been two hundred and eighty-seven, exclusive of thirty-six corresponding members, residing in other parts of the United States, and in Europe.

Of the thirty-seven individuals present when the society was established, but seven are living; of these, Bishop White, (who has been President ever since its origin) Isaac Parrish, Thomas Wistar, Dr. Samuel Powel Griffitts, and Zachariah Poulson, only continue members of the institution. With this remnant of its founders are associated seventy other persons, now composing the society.

This rapid sketch of the services of the "*Philadelphia Society for alleviating the miseries of Public Prisons,*" is acknowledged to present a very inadequate view of its merits; but its own acts, so far as the record of them has been preserved, however imperfectly exhibited, speak for themselves. Of the time and reflection which

have been devoted to the subject, and of the solicitude and responsibility necessarily incurred, from the magnitude and novelty of the undertaking, no just idea can be formed.

Interruptions innumerable, arising from perverseness and prejudice, must have painfully thwarted the best laid plans and most disinterested aspirations, to say nothing of the risk of health and of life by exposure to the foul atmosphere of jails, and to the ferocious tempers of their depraved occupants.

If the sovereigns of Prussia and Tuscany, of Russia and Austria, of Sweden and France, who successively abolished the punishment by *torture*, which prevailed on the continent of Europe within less than a century past, received universal respect, even while permitting many other execrable features of their unmerciful codes to subsist; and if such learned jurists and speculative philosophers as Monstesquieu, Blackstone, and Beccaria, who, during the same period, shed from their closets valuable lights upon the nature and end of punishment, and the penal laws, are justly entitled to the renown they enjoy, surely the faithful page of history will not fail to attract the higher admiration and warmer gratitude of posterity towards that beneficent band who, although destitute of political power and distinction, have unremittingly laboured with an

active philanthropy, little surpassed, on many occasions, by that of Howard, or of Jebb, to carry into execution and to perfect the plans of an humble proprietor of this once inconsiderable province—plans not only antecedent to any formed in Europe, but embracing in their far more benevolent principles, future blessings to the whole human family.

OBSERVATIONS

ON THE

PENITENTIARY SYSTEM.

Of the soundness of the theory upon which the penal laws of Pennsylvania are founded, it is believed there can be no doubt.

The success which attended the administration of them, when individuals made it a point of duty and of conscience to apply their time and talents to the subject, is equally striking and undeniable.

Like all other human institutions, however, the system suffered to a certain extent, from the declension of those pure and fundamental principles in which it originated, and by which, in recent times, its operations have not been so eminently controlled. These remarks have not been dictated by any disposition to offend, but by a dispassionate consideration of facts, which will be candidly admitted and lamented by most persons, if not by all, to whom they may seem unkindly to apply. The mode of governing the penitentiary has undergone so many changes since its establishment, and the responsibility has

become so much extended and divided, as to render it almost impossible to effect certain objects indispensable to the prosperity of the establishment. New interests have arisen, and motives, alien to the primitive designs of its founders, have made such inroads upon its character as almost to threaten its demolition. But let it not be supposed that the beautiful edifice, constructed by the hands of reason, humanity, and justice, is no longer worthy of admiration, because a part of its foundation may have been undermined, some of its chaste proportions altered, or a few of its fair columns defaced, by well meant but mistaken efforts to amplify its dimensions.

The circumstances alluded to have had no little influence in impeding, if they have not rendered stationary or retrograde, the great movement of reform, which Pennsylvania for her own sake commenced, and which, had she been entirely successful, would have furnished a more instructive lesson to the world.

Another prominent reason, however, may be assigned for her failure to ensure the happiest results of the penitentiary system, as originally projected. The prison, which was planned and erected so long ago as 1773, for the use of the city and county of Philadelphia alone, has, ever since the reformation of the code, been the only

receptacle for all the convicts of the state; and until lately, it was made to accommodate also the untried prisoners and vagrants of this populous district. Altogether unsuited to such ends, by the contracted scale of its apartments and yards, it has for many years past, owing to the number of prisoners necessarily crowded together by day and by night, become a school of corruption.

The classification of offenders, one of the most important features of the plan as originally suggested, has been thus in a great measure frustrated. The same circumstances have also furnished a pretext for not rigidly carrying into effect the sentence of *solitary confinement and hard labour*, though it is believed that this valuable part of the system has often been improperly dispensed with, to the prejudice of the convicts, as the legislature never empowered those who govern the prisons, to diminish the penalties of the law.

At various times also, within the last seventeen years, the labour of the prisoners was directed to such branches of industry as were intended to yield the largest profit to the penitentiary; and whenever such schemes were in vogue, all other considerations were postponed. Instead of seclusion, so far as it was practicable, and other wholesome discipline, such projects

induced relaxation, and the grand object was not so much the punishment and reform of the criminals, as a pecuniary balance, at the year's end, in favour of the institution; a result which it is said has never appeared upon a full exhibition of the accounts.

The frequent exercise of the power of pardon, almost always at the suggestion of the inspectors, has been extremely detrimental. This indulgence has lessened the certainty of punishment, and weakened the terrors of the law in the minds of the most audacious of its violators, since, from a policy not destitute of plausibility, but which cannot prudently be unfolded, that description of culprits has most largely partaken of the executive clemency.

A multitude of other causes of minor importance might be detailed, which have contributed to cast a shade over the penitentiary system; but the evil is mainly attributable to the few which have been assigned, any one of which indeed is almost adequate to account for the result.

The annexed tables will prove, that crimes have gradually diminished from the period when penitentiary punishments were begun and inflicted in the spirit which conceived them. They will likewise show, that offences have accumulated in a much greater ratio than the popula-

tion, as the fair morning of penal reformation became overcast.

In 1787, when the first energetic measures were adopted for ameliorating the condition of prisoners and mitigating the severity of the laws, the number of convictions was 105. In 1788, 98—1789, 125—1790, 109.

In 1791, 1792, 1793, 1794, and 1795, as the new order of things began to be felt, the convictions amounted to only 394; and during the thirteen following years, when it was fairly in operation, the results were eminently successful, the maximum in any one of these years not exceeding 194, at which it was stated in 1808. From this time to the first of January, 1825, a term of seventeen years, the increase of convictions was very great. In 1809, they rose to 206—in 1811, to 304—and in 1816, to 433. On the 31st of December, 1825, the whole number of convicts in the prison was 620. It is moreover remarkable, that the offences which produced the convictions in the last mentioned term of years, were generally of a higher grade than those which had previously occurred under the more favourable administration of the penitentiary.

Pennsylvania being thus deeply interested in the question of the abandonment or ultimate triumph of her beneficent plan, is now making

the most judicious and liberal arrangements for a final experiment. If the means necessary to give complete effect to her criminal jurisprudence, have been lamentably delayed, the energy she displays at this crisis will, it is hoped, amply redeem her supineness.

The penitentiary at Pittsburg is nearly finished; that in the vicinity of Philadelphia may, in two* seasons more, be ready for the reception of convicts. These buildings are different in construction, though both are designed for the solitary confinement of the prisoners. It is perhaps well that uniformity of structure did not obtain in regard to them, as experience will most fairly prove their comparative utility and fitness, to serve as a model for the prison that may hereafter be erected in the centre of the state.

Before the penitentiaries can be used, a great work is to be performed by the legislature. A thorough revision of the criminal laws is indispensably necessary, to adapt them to that kind

* If the legislature, at its present session, appropriate the sum required to finish the prison, it can be completed this year; but it will not be fit for use until the latter part of 1827. The cells ought to be thoroughly dry before they are inhabited.

of imprisonment to which the new buildings are appropriate.*

As every thing will depend upon never failing in any case to punish by solitary confinement, the greatest wisdom will be required in apportioning the time of its infliction to the offence.

All former experience, not only here, but in other states where attempts have been made to imitate our example, has taught, that common intercourse between prisoners is not only fatal to their reformation, but inefficacious in lessening or preventing crime.

Those who have had an opportunity of visiting prisons, or who have bestowed the least reflection upon the subject, must be convinced that the indiscriminate association of their inmates is productive of evil in many respects. The effect of such intercommunication, in one

* It is respectfully suggested, whether this service cannot be more satisfactorily accomplished by a commission of three or five individuals, who, under the authority of the legislature, could prepare, during its recess, an essay of a system of penal laws, and regulations for the government of the new penitentiaries, to be submitted at the next session of the general assembly.

It would be worthy of Pennsylvania to bring to this great task some of her ablest minds. Such intellect and knowledge of the subject as have been displayed by Edward Livingston, in his admirable code of criminal jurisprudence, composed for the state of Louisiana, show what may be achieved by the adoption of adequate means, and furnish an example which ought not to be disregarded.

sense, *puts all crime upon a level;* for while the same confinement is generally assigned to individuals undergoing various terms of punishment, there can be no wholesome lesson impressed upon the minds of any concerning the different degrees of guilt. The burglar and highwayman fare no worse than the petty thief, except in the *nominal* duration of their confinement; and what terror can there be in the punishment of the former which will deter the latter offender from extending the sphere of his wickedness when cast again upon society? Even longer detention in prison is rarely felt, since the continual admission of fresh convicts, or of old ones returned, brings in constantly news for the amusement of the detained felons, or intelligence which enables them, when released, to meet abroad their former comrades, and to renew their depredations.

The culprit who is sentenced for a short time, is moreover sure to serve it out, whilst he who has committed some high transgression, and has been judicially condemned to suffer the greatest length of punishment, *seldom escapes a pardon.* What must be the influence of the knowledge of these facts upon vicious men, whether in or out of the jail? Surely that the greater depredation is preferable, since it involves no more risk

of detection than the less, and is rarely visited with severer penalties. Is it credible that reformation of offenders, or a diminution of their numbers, can result from circumstances like these? So different is their effect, that without exaggeration it may be said, a hundred leave the jail in a state of increased depravity of mind, for one that retires from its walls improved.

If then a part of the duty of every people professing Christianity is to endeavour to improve the condition of their criminals, whilst undergoing condign punishment, and to deter others effectually from transgression, by the known character and certain infliction of the penalties of the law, these objects can be accomplished only by carrying rigidly into execution the principle of seclusion. But society will not be released from all its obligations, in merely shutting up the prisoner by himself; his mind ought thenceforth to be treated with as conscientious a regard to the removal of its disease as if he were affected with a physical malady, requiring for its extirpation the utmost medical skill.

Some persons entertain the erroneous opinion that solitary confinement should be resorted to only for the punishment of enormous crimes, or in cases of conviction for repeated offences.

Solitude* promises even more for the recovery of the novice in transgression, than of the accomplished and hardened criminal; and for the reasons already offered, any other distinction by the legislature, than the duration of the term of imprisonment, is greatly to be deprecated.

Confinement in separate cells has been objected to, as cruel in the extreme; and it is alleged that the intellects of those who may be subjected to it, will become disordered. It is answered, that punishment is intended to be what its name implies; and as for the apprehended derangement or imbecility of mind, cases have not been quoted to establish that theory, whilst instances, showing that no such consequences have followed this mode of treatment, even when means were employed less advantageous than those now provided, might be readily adduced.

The solitary chambers at the penitentiary in progress near Philadelphia, are on the surface of the ground, judiciously lighted, ventilated, and adapted in every other way, to protect the health

* If every person committed to prison could be supplied with a private apartment, until convicted, or discharged by due course of law, incalculable benefits would be produced. The system will not be complete unless this arrangement be made, and when the penitentiaries are finished and used, it will be worthy of consideration, whether the Bridewell cannot be altered, so as to accomplish this desirable end.

of the prisoner; each cell is to have a yard, where, or in the cell itself, which is also sufficiently commodious, labour may be performed, if it shall be so ordered, in particular instances.

When the laws shall be made conformable to the new plan of keeping criminals, and such regulations for the internal government of the penitentiaries shall be enacted, as the nature of those establishments requires, another task not less difficult than any which may precede it, will be the selection of persons qualified for the all-important trust of superintending the prisoners. It is probable that a body will be created similar to the existing board of inspectors, from whom, as serving without pecuniary recompense, more cannot be expected than the exercise of a general control over the prison, situated at such a distance from the city as to preclude their minute and frequent interference.

Upon the principal keepers, to whom some other designation might be applied, must devolve the responsibility of giving full and lasting effect to the grand experiment. Those officers should be a chief manager and matron, qualified as well by decision and firmness of mind, mixed with gentleness, as by good education and sound religious character. Though the appointment of a female officer in a jail be

novel,* yet it ought not to be considered less proper, since, for various reasons that might be given, it would produce very important advantages to the women convicts. The requisite number of subordinates in every department ought of course to be provided, and all of them liberally and proportionably compensated.

It would appear, then, from what has been advanced respecting the new penitentiaries, that the cardinal points in the penal code are—

First. The criminal laws plainly and clearly expressed, showing the offence and its degree of punishment; and these laws to be universally diffused among the people.†

Second. The duration of punishment, fixed,

* Since this essay was prepared, a friend put into my hands a London newspaper, containing some extracts from a late report of the managing committee to the commissioners of the *Bridewell at Glasgow*, which, after acknowledging the value of the example furnished in Pennsylvania concerning prisons, adds, that "*the females occupy a separate building, under the control of* OFFICERS OF THEIR OWN SEX; *a most important provision to guard against the total loss of modesty and decorum, which the employment of males in the like capacity is likely to cause.*"

† The following is one of the wise provisions of *the great law* given by William Penn at Upland, in 1682. "And be it further enacted by the authority aforesaid, that the laws of this province from time to time shall be published and printed, that every person may have the knowledge thereof; *and that they shall be one of the books taught in the schools of this province, and territory thereof.*"

as accurately as human fallibility will permit, to the nature of every offence.

Third. Solitary confinement, in all cases.

Fourth. The whole term of the sentence to be exacted, excepting in cases where it shall be made to appear to the satisfaction of the governor, that the party convicted was innocent of the charge.*

Fifth. Moral and religious treatment of convicts.

Sixth. The character of the persons to whom the administration of the penitentiaries shall be committed.

Lastly. Certainty, rather than severity of punishment.

When the positive security of society shall have been provided for, by penitentiaries placed under such management as has been suggested, it may become a question with the Legislature, whether, for the penalty of death now imposed

* I am aware of the constitutional right vested in the Governor, to pardon at his pleasure; but in this interesting matter, a unanimous expression of the legislative wish that in order to make a fair trial of the improved system, he would only exercise his power in the cases mentioned, might be regarded by him and prove highly beneficial.

on murder in the first degree, imprisonment during life may not be substituted. There is an aversion in Pennsylvania from inflicting death; and the difficulty of convicting when the crime is so great as to be visited with that punishment, is such as to defeat in many instances the purposes of justice. The prisoner who has deliberately extinguished the life of a fellow creature, may, for want of that clear evidence which our humane judges and juries rightfully require, receive, in place of the merited sentence, some very inadequate punishment, or escape altogether. The moralist and the lawgiver ought moreover to reflect maturely upon the deplorable fact, that public executions rarely, if ever, produce any other than the most pernicious effects upon society. If, however, this awful penalty must be retained, it is worthy of serious inquiry, whether it ought not, in every instance, to be visited upon the unhappy culprit within the jail yard. The execution might be safely entrusted to the sheriff and his officers, with a commission of twelve judicious citizens, to be specially appointed for the purpose by the governor. The dreadful ceremony would thus be performed with becoming solemnity, and the public only know that the victim was launched into eternity, by the tolling of the bell of the penitentiary at the moment of the sacrifice.

This small contribution to the stock of information already possessed by the citizens of Pennsylvania, is concluded with the expression of an ardent hope, that this favoured commonwealth may soon have the happiness to perfect the system of criminal jurisprudence and prison discipline, which boasts its origin within her borders.

TABLES,

Exhibiting the number of criminals imprisoned in the jail at Philadelphia, from the year 1787 to the beginning of the year 1825, with the offences for which they were convicted, &c.

There were convicted, sentenced, and brought into the penitentiary of the city and county of Philadelphia, during the year 1787, one hundred and five persons, for the following offences, viz:

Burglary,	13
Forgery and Counterfeiting,	4
Keeping disorderly bawdy houses,	3
Larceny,	72
Misdemeanor,	3
Robbery,	3
Receiving stolen goods,	7
Total,	105

Convicted during the year 1788.

Assault and Battery,	1
Burglary,	10
Forgery,	1
Horse stealing,	3
Larceny,	68
Misdemeanor,	8
Robbery,	3
Receiving stolen goods,	3
Shooting with intent to kill,	1
Total,	98

Convicted during the year 1789.

Assault and Battery with intent to rob and kill,	3
Burglary,	22
Cheating and Defrauding,	1
Harbouring convicts,	1
Horse stealing,	2
Keeping disorderly bawdy houses,	2
Larceny,	75
Misdemeanor,	4
Passing counterfeit money,	1
Robbery,	6
Receiving stolen goods,	8
Total,	125

Convicted during the year 1790.

Burglary,	5
Cheating,	2
Counterfeiting,	1
Horse stealing,	2
Robbery,	5
Keeping disorderly houses,	3
Larceny,	86
Misdemeanor,	2
Receiving stolen goods,	3
Total,	109

Convicted during the year 1791.

Burglary,	4
Bigamy,	1
Defrauding,	1
Forgery and Uttering,	4
Horse stealing,	3
Keeping tippling houses,	1
Larceny,	58
Passing counterfeit money,	1
Robbery,	2
Receiving stolen goods,	3
Total,	78

Convicted during the year 1792.

Burglary,	7

Forging and Uttering,	3
Horse stealing,	4
Larceny,	38
Misdemeanor,	1
Manslaughter,	3
Passing counterfeit money,	1
Receiving stolen goods,	2
Robbery,	4
Total,	63

Convicted during the year 1793.

Accessary to Burglary,	1
Burglary,	2
Horse stealing,	9
Larceny,	28
Passing counterfeit money,	2
Picking pockets,	1
Receiving stolen goods,	2
Total,	45

Convicted during the year 1794.

Assault and Battery with intent to commit a rape,	2
Bigamy,	1
Burglary,	2
Forging, uttering, and passing,	5
Horse stealing,	7
Keeping disorderly houses,	2
Larceny,	71
Murder, 2nd degree,	2
Total,	92

Convicted during the year 1795.

Arson,	1
Burglary,	2
Buggery,	1
Bigamy,	1
Concealing the death of bastards,	2
Forging, counterfeiting, and uttering,	10
Horse stealing,	8
House breaking,	2
Keeping disorderly houses,	5
Larceny,	72
Misdemeanor,	3
Receiving stolen goods,	4
Rape,	1
Robbery,	4
Total,	116

Convicted during the year 1796.

Assault and Battery with intent to kill,	1
Burglary,	1
Conspiracy,	2
Counterfeiting and Uttering,	3
Horse stealing,	16
Disorderly houses,	4
Larceny,	105
Murder, 2nd degree,	5
Manslaughter,	1
Misdemeanor,	2
Receiving stolen goods,	1
Riot,	2
Robbery,	1
Rape,	1
Total,	145

Convicted during the year 1797.

Burglary,	2
Concealing the death of bastard,	1
Counterfeiting and passing,	9
Horse stealing,	15
Larceny,	81
Murder,	1
Manslaughter,	1
Perjury,	1
Receiving stolen goods,	3
Total,	114

Convicted during the year 1798.

Arson,	1
Burglary,	5
Bigamy,	1
Conspiracy,	2
Passing counterfeit money,	6
Horse stealing,	12
Larceny,	90
Murdering and concealing the death of bastards,	2
Misdemeanor,	1
Manslaughter,	1

Rape,	1
Total,	122

Convicted during the year 1799.

Arson,	1
Burglary,	2
Burning prison,	3
Breach of health laws,	1
Conspiracy,	2
Concealing the death of bastard,	1
Forging and Uttering,	6
Horse stealing,	3
Disorderly houses,	3
Larceny,	115
Manslaughter,	1
Murder, 2nd degree,	2
Misdemeanor,	2
Receiving stolen goods,	3
Total,	145

Convicted during the year 1800.

Attempt to commit a rape,	1
Bigamy,	1
Burglary,	6
Concealing the death of bastard,	1
Conspiracy,	2
Horse stealing,	5
Disorderly bawdy house,	1
Larceny,	81
Misdemeanor,	1
Receiving stolen goods,	2
Highway robbery,	3
Rape,	1
Passing counterfeit money,	1
Total,	106

Convicted during the year 1801.

Arson,	1
Burglary,	2
Cheating,	1
Forgery,	1
Horse stealing,	7
Larceny,	123
Murder, 2nd degree,	2
Misdemeanor,	2
Perjury,	1
Receiving stolen goods,	10
Robbery,	1
Total,	151

Convicted during the year 1802.

Arson,	1
Assault and Battery with intent to murder,	1
Burglary,	2
Concealing the death of bastards,	2
Forging and Uttering,	4
Horse stealing,	12
Disorderly bawdy house,	1
Larceny,	79
Murder, 2nd degree,	2
Manslaughter,	1
Receiving stolen goods,	1
Total,	106

Convicted during the year 1803.

Arson,	7
Assault and Battery,	1
Adultery,	1
Burglary,	9
Counterfeiting,	1
Concealing the death of bastard,	1
Cheating,	1
Conspiracy,	2
Forgery,	1
Horse stealing,	3
Disorderly bawdy houses,	1
Larceny,	82
Misdemeanor,	2
Murder, 2nd degree,	5
Receiving stolen goods,	4
Total,	121

Convicted during the year 1804.

Assault and Battery with intent to murder,	3
Arson,	6
Burglary,	5
Buggery,	1
Cheating,	1

Concealing the death of bastard,	1
Conspiracy,	3
Forgery and passing counterfeit money,	6
Horse stealing,	3
Disorderly bawdy houses,	3
Larceny,	93
Murder, 2nd degree,	2
Manslaughter,	4
Perjury,	1
Receiving stolen goods,	5
Misdemeanor,	3
Total,	140

Convicted during the year 1805.

Assault and Battery,	5
Assisting a prisoner to escape,	1
Burglary,	6
Buggery,	1
Concealing the death of bastards,	2
Forgery and Passing,	3
Horse stealing,	3
Disorderly bawdy house,	1
Larceny,	84
Cheating,	1
Conspiracy,	7
Misdemeanor,	4
Manslaughter,	1
Murder, 2nd degree,	1
Receiving stolen goods,	2
Robbery,	2
Total,	124

Convicted during the year 1806.

Assault and Battery,	5
Arson,	1
Burglary,	6
Bigamy,	1
Concealing the death of bastards,	2
Forging, Counterfeiting, and Passing,	5
Horse stealing,	5
Disorderly bawdy house,	1
Larceny,	144
Misdemeanor,	1
Manslaughter,	4
Murder, 2nd degree,	4
Receiving stolen goods,	2
Robbing the mail,	1
Total,	182

Convicted during the year 1807.

Assault and Battery with intent to murder,	3
Attempt to effect the escape of prisoners,	1
Arson,	1
Burglary,	20
Cheating,	1
Concealing the death of bastard,	1
Forgery,	6
Horse stealing,	5
Larceny,	96
Misdemeanor,	3
Mayhem,	1
Manslaughter,	2
Murder, 2nd degree,	2
Receiving stolen goods,	5
Robbery,	2
Total,	149

Convicted during the year 1808.

Assault and Battery with intent to murder,	11
Assault and Battery with intent to ravish,	3
Burglary,	5
Conspiracy,	5
Forging and passing counterfeit money,	10
Horse stealing,	3
Disorderly bawdy houses,	6
Larceny,	137
Misdemeanor,	3
Murder, 1st degree, and hanged,	2
Murder, 2nd degree,	1
Nuisance,	1
Robbery,	5
Rape,	2
Total,	194

Convicted during the year 1809.	
Assault and Battery,	23
Arson,	2
Burglary,	2
Forging and Counterfeiting,	8
Fornication,	1
Horse stealing,	7
Incest,	1
Disorderly bawdy houses,	8
Larceny,	147
Misdemeanor,	5
Perjury,	1
Riot,	1
Total,	206

Convicted during the year 1810.	
Assault and Battery,	24
Arson,	1
Adultery,	1
Burglary,	11
Bigamy,	1
Burning Grain,	1
Conspiracy,	1
Forgery,	10
Forcible Abduction,	1
Fornication and Bastardy,	4
Horse stealing,	4
Disorderly houses,	6
Kidnapping,	1
Larceny,	159
Misdemeanor,	2
Manslaughter,	4
Murder, 2nd degree,	1
Poisoning,	1
Robbery,	3
Total,	236

Convicted during the year 1811.	
Assault and Battery,	44
Arson,	1
Burglary,	13
Bigamy,	1
Conspiracy,	4
Fornication,	1
Forgery,	7
Horse stealing,	3
Disorderly bawdy houses,	12
Larceny,	200
Misdemeanor,	2
Manslaughter,	4
Murder 2nd degree,	1
Receiving stolen goods,	1
Riot,	5
Robbery,	4
Rape,	1
Total,	304

Convicted during the year 1812.	
Assault and Battery,	28
Arson,	3
Burglary,	9
Forgery,	3
Horse stealing,	5
Bawdy house,	1
Larceny,	170
Misdemeanor,	8
Murder 2nd degree,	4
Riot,	6
Robbery,	2
Total,	239

Convicted during the year 1813.	
Assault and Battery,	26
Arson,	1
Burglary,	12
Blasphemy,	1
Conspiracy,	2
Forgery and Passing,	8
Fornication and Bastardy,	1
Disorderly bawdy houses,	7
Larceny,	177
Misdemeanor,	6
Manslaughter,	1
Murder 2nd degree,	4
Riot,	4
Receiving stolen Goods,	1
Robbery,	1
Total,	252

Convicted during the year 1814.	
Assault and Battery,	9
Attempt to Counterfeit,	1
Arson,	3
Burglary,	2
Conspiracy,	3

Forgery and Passing,	10
Horse Stealing,	1
Disorderly bawdy house,	1
Larceny,	168
Misdemeanor,	2
Manslaughter,	5
Murder 2nd degree,	3
Nuisance,	3
Perjury,	2
Riot,	1
Rape,	2
Robbery,	6
Total,	222

Convicted during the year 1815.

Assault and Battery,	38
Arson,	3
Adultery,	1
Burglary,	13
Forging, Uttering, &c.	8
Fornication and Bastardy,	2
Horse stealing,	7
Disorderly bawdy houses,	17
Larceny,	266
Misdemeanor,	4
Murder 2nd degree,	4
Riot,	5
Receiving stolen goods,	6
Rape,	2
Robbery,	2
Total,	378

Convicted during the year 1816.

Assault and Battery,	50
Assisting a prisoner to escape,	1
Adultery,	1
Arson,	2
Burglary,	4
Cheating,	1
Conspiracy,	9
Forging, counterfeiting and passing,	22
Fornication and Bastardy,	3
Gaming,	1
Horse stealing,	10
Disorderly bawdy houses,	15
Larceny,	290
Misdemeanor,	8
Mutiny,	3
Murder (hanged,)	1
Perjury,	2
Receiving stolen goods,	3
Riot,	1
Rape,	1
Robbery,	2
Manslaughter,	3
Total,	433

Convicted during the year 1817.

Males.

Arson,	7
Assault and Battery,	12
Burglary with intent to ravish,	1
Burglary,	14
Conspiracy,	5
Deserting family,	3
Disorderly bawdy houses,	2
Forgery,	8
Gaming,	1
Horse stealing,	7
Highway robbery,	2
Larceny,	194
Manslaughter,	2
Misdemeanor,	4
Receiving stolen goods,	3
Riot,	12
Tippling house,	3
Passing counterfeit notes,	9
	289

Females.

Larceny,	41
Assault and Battery,	7
Disorderly bawdy houses,	9
Misdemeanour,	1
	58
Total,	347

Convicted during the year 1818.

Males.

Burglary,	16
Horse stealing,	10
Larceny,	183
Arson,	3
Manslaughter,	3

Murder 2nd degree,	1
Robbery,	3
Forging and passing counterfeit money,	12
Misdemeanor,	4
Disorderly bawdy houses,	3
Receiving stolen goods,	5
Perjury,	2
Assault and Battery,	2
	247

Whites 176, Blacks 71,

White Females.

Larceny,	30
Murder of her bastard child,	1

Black Females.

Larceny,	21
Disorderly bawdy houses,	2
	54
Total,	301

Convicted during the year 1819.

Males.

Burglary,	20
Larceny,	220
Assault and Battery with intent to ravish,	3
Murder 2nd degree,	5
Robbery,	5
Horse stealing,	12
Misdemeanor,	7
Manslaughter,	2
Forgery,	6
Receiving stolen goods,	2
Arson,	2
Rape,	1
Assault and Battery with intent to murder,	3
Conspiracy,	1
Exposing private parts,	2
Attempt to poison,	1
Attempting Burglary	1
Mayhem,	1
	294

Females.

Larceny,	52
Kidnapping,	1
Disorderly bawdy houses,	6
	59

Whites 21, Blacks 38.
Total, 353

Convicted during the year 1820.

Males.

Robbery,	7
Larceny,	156
Burglary,	16
Rape,	2
Manslaughter,	4
Assault and Battery,	2
Perjury,	4
Forging, passing, &c.	6
Murder 2nd degree,	4
Horse stealing,	7
Conspiracy,	3
Kidnapping,	1
Misdemeanor,	2
Receiving stolen goods,	1
	215

Whites 120, Blacks 95.

Females.

Bigamy,	1
Larceny,	25
Receiving stolen goods,	1
Misdemeanor,	1
Burglary,	1
Arson,	1
	30

Whites 9, Blacks 21.
Total, 245

Convicted during the year 1821.

Males.

Larceny,	188
Burglary,	16
Horse stealing,	10
Manslaughter,	3
Robbery,	2
Murder 2nd degree,	6
Bigamy,	1

Conspiracy,	5
Forgery,	6
Arson,	1
Sodomy,	1
Receiving stolen goods,	2
Assault and Battery,	3
Perjury,	3
Rape,	1
	248

Whites 175, Blacks 73.

Females.

Larceny,	50
Receiving stolen goods,	1
Disorderly bawdy houses,	2
Burglary,	1
Concealing the death of a bastard child,	1
	55

Whites 18, Blacks 37.

Total, 303

Convicted during the year 1822, two hundred and seventy-two males, and fifty-eight females, from the following counties, viz:—

Allegheny,	5
Adams,	2
Bedford,	1
Bucks,	1
Bradford,	2
Berks,	3
Beaver,	1
Chester,	16
Dauphin,	3
Fayette,	3
Franklin,	3
Huntingdon,	1
Lancaster,	8
Mercer,	2
Montgomery,	4
Northampton,	1
Philadelphia,	198
Somerset,	1
Union,	1
Westmoreland,	1
Washington,	5
Wayne,	1
York,	9
Total,	272

And of the following offences.

Murder 1st degree, (hanged)	1
Murder 2nd degree,	3
Manslaughter,	2
Assault and Battery with intent to kill,	2
Rape,	2
Assault and Battery with intent to ravish,	2
Burglary,	9
Robbery,	4
Mayhem,	1
Forgery,	4
Passing counterfeit bank notes,	19
Horse stealing,	7
Conspiracy,	1
Bigamy,	1
Larceny,	211
Receiving stolen goods,	3
Total,	272

Whites

Under 21 years	21
21 to 30 "	86
30 " 40 "	39
over 40 "	36

Blacks

Under 21 years	24
21 to 30 "	38
30 " 40 "	18
over 40 "	10
Total, males	272

Females convicted from the following counties, viz:—

Washington,	3
Philadelphia,	54
York,	1
Total,	58

And of the following offences,

Perjury,	1
Conspiracy,	2

Burglary,	2
Accessary to Burglary,	2
Disorderly bawdy houses,	4
Arson,	1
Larceny,	44
Receiving stolen goods,	2
Total,	58

Whites.

Under 20 years,	2
20 to 30 "	8
30 to 40 "	7
Over 40 "	3

Blacks.

Under 20 years,	5
20 to 30 "	19
30 to 40 "	8
Over 40 "	6
Deaths during the year 1822,	30
Discharged by pardon,	71
Ditto by serving out their time,	138
	239

Deaths and their ages.

Whites.

Under 21 years,	1
21 to 30 "	3
30 to 40 "	7
Over 40 "	3

Blacks.

Under 21 years,	1
21 to 30 "	8
30 to 40 "	6
Over 40 "	1
Total number of deaths 1822,	30

There have been convicted, sentenced and received into the Penitentiary, during the year 1823, two hundred and sixty-six males, and sixty-five females from the following counties, viz:—

Allegheny,	7
Bradford,	1
Bedford,	2
Bucks,	4
Berks,	2
Butler,	1
Chester,	11
Cumberland,	2
Centre,	4
Crawford,	1
Dauphin,	3
Delaware,	1
Fayette,	6
Franklin,	3
Green,	1
Huntingdon,	2
Indianna,	1
Lancaster,	9
Luzerne,	1
Lehigh,	2
Montgomery,	7
Mifflin,	3
Northumberland,	1
Philadelphia,	180
Perry,	1
Tioga,	1
Union,	1
Westmoreland,	2
Washington,	3
York,	3
Total,	266

Of the following offences:

Assault and Battery with intent to commit Sodomy,	1
Assault and Battery with intent to ravish,	4
Burglary,	18
Buggery,	1
Conspiracy,	1
Forgery,	4
Horse stealing,	13
Larceny,	196
Manslaughter,	2
Murder 2nd degree,	4
Rape,	1
Passing counterfeit bank notes,	13
Misdemeanor,	1
Receiving stolen goods,	1
Arson,	6

Whites.

Under 21 years,	34
21 to 30 "	71
30 to 40 "	41
Over 40 "	28
	174

Blacks.

Under 21 years,	19
21 to 30 "	42
30 to 40 "	16
Over 40 "	15
	92

Females convicted during the year 1823, from the following counties, viz:

Montgomery,	1
Bucks,	1
Philadelphia,	61
York,	1
Westmoreland,	1
Total,	65

And of the following offences:

Arson,	1
Burglary,	1
Passing counterfeit notes,	3
Perjury,	1
Receiving stolen goods,	4
Larceny,	55

Whites.

Under 21 years,	5
21 to 30 "	10
30 to 40 "	6
Over 40 "	5
	26

Blacks.

Under 21 years,	14
21 to 30 "	20
30 to 40 "	4
Over 40 "	1
	39

Deaths during the year,	41
Discharged by pardons,	73
Discharged by serving out their time,	198

Whites.

Under 21 years,	3
21 to 30 "	3
30 to 40 "	3
Over 40 "	5
	14

Blacks.

Under 21 years,	1
21 to 30 "	12
30 to 40 "	8
Over 40 "	6
	27

The number of convicts remaining in the Philadelphia penitentiary the 1st day of January 1825, is 482 males, and 77 females.

There have been convicted, sentenced, and brought into the penitentiary, during the year 1824, two hundred and twenty seven males and sixty females, from the following counties, viz:—

Allegheny,	3
Beaver,	2
Bucks,	2
Berks,	4
Bedford,	3
Butler,	1
Bradford,	3
Chester,	3
Centre,	2
Delaware,	2
Erie,	5
Franklin,	4
Fayette,	2
Indianna,	4
Luzerne,	2
Lancaster,	7
Mercer,	1
Montgomery,	4
Northampton,	2

Pike,	1
Philadelphia,	152
Somerset,	2
Union,	2
Washington,	3
Westmoreland,	5
York,	6
Total,	227

And of the following offences:

Larceny,	163
Burglary,	16
Horse stealing,	4
Assault and Battery with intent to ravish,	1
Counterfeiting coin,	4
Assault and Battery with intent to murder,	4
Bigamy,	1
Forgery,	2
Passing counterfeit notes,	15
Receiving stolen goods,	2
Arson,	3
Assault and Battery with intent to rob,	2
Assisting a prisoner to escape,	1
Bawdy house,	1
Perjury,	1
Adultery,	1
Robbery,	3
Murder 2nd degree,	1
Manslaughter,	2
Total,	227

Females convicted, 1824, from the following counties, viz:

Philadelphia,	56
Bucks,	1
Northampton,	2
Allegheny,	1
	60
Total,	287

And of the following offences:

Larceny,	53
Passing a forged note,	1
Conspiracy,	2
Concealing the death of bastards,	2
Receiving stolen goods,	1
Bawdy house,	1

Whites.

Under 21 years,	2
21 to 30 "	8
30 to 40 "	9
Over 40 "	3
	22

Blacks.

Under 21 years,	6
21 to 30 "	24
30 to 40 "	6
Over 40 "	2
	38

Ages of the Males.

Under 21 years,	50
21 to 30 "	90
30 to 40 "	64
Over 40 "	23
	227

Total—SEVEN THOUSAND THREE HUNDRED AND NINETY-SEVEN.

The foregoing tables were prepared under the direction of my friend SAMUEL R. WOOD, whose knowledge of the subject, acquired during several years' service as one of the Inspectors of the Prison, facilitated the inquiry. This acknowledgement is due for his kindness.

FINIS.

APPENDIX F

JOURNAL OF THE
LANCASTER COUNTY
HISTORICAL
SOCIETY

PUBLIC EXECUTIONS IN PENNSYLVANIA 1682 TO 1834 With ANNOTATED LISTS OF PERSONS EXECUTED; AND OF DELAYS, PARDONS AND REPRIEVES OF PERSONS SENTENCED TO DEATH IN PENNSYLVANIA 1682 TO 1834

BY DR. NEGLEY K. TEETERS

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Table of Contents

EARLY PENAL LEGISLATION IN THE COLONY

On March 15, 1688, Judith Roe of Kent County — now a part of Delaware but at the time one of the "Lower Counties" of the Province of Pennsylvania — was publicly hanged for murder — victim, motive and weapon unknown. William Penn, president of the Provincial Council, but out of the country at the time, refused her a pardon because she was a "murtherous woman and her crime notorious and barbarous."[1] Her brother, Joseph Richardson, had begged for a pardon but without success.

Whether this woman was the first person to be executed in the Province cannot be accurately ascertained but so far as the data available indicate, she holds this dubious distinction.[2] From that date down to April 10, 1834, when public executions were abolished, slightly more than 250 persons were taken from county jails to some local spot and hanged before large crowds of spectators.[3] One hundred thirty-eight others were spared this degradation through the favor of the governor's pardon.

Much has been written of the humane features of the Great Law of William Penn adopted on December 7, 1682 at Upland. As is well known, premeditated murder only was labeled capital. Penn's code, so unusual in the colonies at the time, was regarded as the wonder of the age. But only in a few years it was deemed necessary to draw up another much more drastic. Thus the Newcastle Code, created by Penn himself in 1700 and ratified in 1701, introduced such penalties as mutilations, brandings, floggings and even castration for certain offenses.[4] Commenting on this amazing metamorphosis in penal philosophy, Professor Lawrence Gipson, long a student of colonial Pennsylvania writes:

> From prosecuting cases of larceny, slander, swearing, Sabbath breaking, assault and battery, drunkenness, the selling of rum to the Indians, and immorality . . . the authorities at the close of the century and from then on were called upon to deal with burglaries, counterfeiting, highway robbery, petit treason, horse stealing, rapes, homicides, infanticides, and murders.[5]

As early as May 1697 Penn wrote to the Colonial Council from London that persistent rumors reaching him complained not only of crimes in low places but even among those who were charged with serious responsibilities in the colony. He wrote: "There is no place more overrun with wickedness, Sins so very Scandalous, openly Committed in defiance of Law and Virtue; facts so foul I am forbid by common modesty to relate ym."[6] And, as Professor Gipson records: "Pennsylvania was called in 1698 'Ye greatest refuge and shelter for pirates and rogues in America.' "[7]

Another facet of the ambivalence of the provincial fathers was the concern they felt for crimes committed by Negroes. As early as 1693 the courts of Quarter Sessions were empowered to direct constables

> . . . against the tumultuous gathering of Negroes whom they should find gadding abroad . . . without a ticket from their Mr. or Mris. [sic] or not in their company, or to carry them to gaole, there to remain the night & that without meat & drink to cause them to be publickly whipped next morning with 39 lashes well laid on their bare backs for which their said Mr. or Mris. should pay 15d to the whipper.[8]

Presumably following the example of the southern colonies in dealing with crime among Negroes, the Pennsylvania Council, in 1701, passed an act which placed the trials of Negroes in the hands of two specially designated justices of the peace before a jury of freeholders who had power to "hear, try, and determine" the offenses of "murder, manslaughter, buggery, burglary, rapes, attempts of rapes, and other high and heinous enormities and capital offenses."[9] All of these offenses, when committed by Negroes, were made capital. None of the records of these special courts remains so we can only surmise what penalties were imposed and enforced.

Surprisingly enough our own records show no Negroes subjected to the death penalty until "Joe" and "Caspar" were executed in Philadelphia some time in November 1762, and one "Phoebe" in Chester County in March 1764, all for burglary. The owner of Phoebe, one Joseph Richardson, was compensated £55 for the loss of his slave since an act passed on March 5, 1725/6 called for an appraisal "value" of slaves executed, with owners to be paid out of the public treasury.[10] No doubt the owners of "Joe" and "Caspar" were also compensated for their losses. It is difficult to believe that some Negro slaves were not executed prior to the above dates especially since legislation to compensate owners was enacted so many years earlier. In addition, in neighboring Quaker West Jersey several Negroes were executed for assaultng their masters as well as for the commission of serious felonies.

The drastic code of 1701 proved to be so repugnant to the Mother Country that its repeal was ordered by the Crown within a few years. As Herbert Fitzroy writes:

> The more extreme punishments were permitted to be continued 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 of Her Majesty's dominions," and the laws providing enslavement because "selling a man is not a punishment allowed by the Laws of England."[11]

We have no way of knowing whether castration was actually resorted to by the courts since, of the dockets surviving, no case has thus far been revealed.

In 1718 the colony went all out in setting up a sanguinary code. On May 31 "AN ACT FOR THE ADVANCEMENT OF JUSTICE AND MORE CERTAIN ADMINISTRATION THEREOF," designating thirteen capital crimes, was passed. These were: various degrees of treason, murder, manslaughter by stabbing, serious maiming, highway robbery, burglary, arson, sodomy, buggery, rape, concealing the death of a bastard child, advising the killing of such a child, and witchcraft.[12]

With a few additions to the list of capital offenses[13] there were no significant changes made in the penal code until a reforming era was ushered in by the passage of the Act of September 15, 1786. This act reduced the number of capital offenses and provided for the placing of most convicted felons on the public streets and highways to perform public works. The era reached its zenith in the famous Act of April 22, 1794. This progressive piece of legislation recognized only one capital offense, that of premeditated murder. *It is significant also because it was the first to be adopted in this country to distinguish between first and second degree murders.*

Provincial Pennsylvania, to enhance further its reputation for "mildness," made provisions for softening the draconic sentences of the courts. These were, first, the pardoning power vested in the governor save for murder and treason which were in the hands of the Crown, and second, the *benefit of clergy*. The pardoning power was delegated by the governor in most instances to his council, aided often by the recommendations of the courts where the culprits were convicted. The governor also had the power to stay an execution until the case was adjudicated by royal instruction.

In our list of pardoned persons condemned to death, many were granted the grace provided they would leave the colony. Some, however, were not apprized of their good fortune until they were "under the gallows." For instance, Isaac Bradford, doomed to die on July 2, 1737, along with two others, one a woman, was pardoned provided he "did the office of executioner" on his companions in misery. This "very hard choice," so stated by the local newspaper, apparently did not bother Bradford too much because he escaped the noose. Another case, that of John Benson, condemned to death for robbery was reprieved "under the gallows" in Philadelphia when two companions in crime were executed May 12, 1764. The local paper stated:

son's Daily Advertiser, Philadelphia, March 20; also the thinly disguised fictional account appearing in George Lippard's The Quaker City, or the Monks of Monk Hall, Philadelphia, 1845, I, 428-434; see also, Source H, 3-20 for account of his crime, also infra p. 141.

4. For rape, second offense; sodomy and bestiality by a married man; Statutes at Large, II, 8, 183; III, 202; repealed and re-enacted in 1705 with castration omitted; see Lawrence H. Gipson, "The Criminal Codes of Pennsylvania," J. of Amer. Inst. of Crim. Law & Crimin., VI, 3 (1915) 323-344; citation, 330.
5. Ibid., 341.
6. CR I, 527, February 9, 1697/8.
7. Loc. cit., 341.
8. CR I, 380, July 11, 1693.
9. Statutes at Large, II, 77-79; see also, Fitzroy, loc. cit., 242-269, especially 254, fn. 47. For a contrast with colonial East and West Jerseys see Henry B. and Grace M. Weiss, An Introduction to Crime and Punishment in Colonial New Jersey, Trenton: The Past Times Press, 1960.
10. Ashmead, History of Delaware County, 1884, 165. Later "Negro" Jack Durham's master, Andrew Long of Southampton Township, Franklin County, was compensated $80 when his slave was executed for rape on July 8, 1788; see I. H. McCauley, Historical Sketch of Franklin County, 1878, 58-60; and, following the execution of "Negro" Dan Byers at Bellefonte, Centre County on December 13, 1802, his owner was compensated in the amount of $214; see John Blair Linn, History of Centre & Clinton Counties, 1883, 44-5.
11. Loc. cit., 250.
12. As enumerated by Harry Elmer Barnes, The Evolution of Penology in Pennsylvania, Indianapolis: Bobbs, Merrill, 1927, 39. This act will be found in Statutes at Large, III, 199-214. For an explanation why this drastic code was introduced and adopted, see Barnes 37-8. A word about witchcraft is in order. There were only three cases of alleged witchcraft, all prior to 1718 when the offense was made capital. The first two were those of Margaret Matson and Getro Hendrickson (CR I, December 27, 1683, 94-6) with no decision except that bonds had to be posted to keep the peace; and a third, that of Robert Guard and his wife who were accused of being witches "by malicious persons" (John Richards, Butcher and wife Ann); however the case was dismissed, the evidence being too flimsy (CR II, March 21, 1701, 20). These cases are discussed briefly by John Fanning Watson in his Annals I, 265-6, 274-5 (Elijah Thomas edition, 1857).
13. Counterfeiting was made capital by the Acts of September 21, 1756 and February 21, 1767. Other offenses made capital were riotous assembly, Statutes at Large VI, 325-8; refusing to remove from Indian lands, S.L. VII, 152 (1768); going around in disguise, S.L. VII, 350-2 (aimed at "Black Boys" who blackened their faces and roved the frontier robbing, stealing, and rescuing felons from jail; see Fitzroy, loc. cit., 252 f.n. 42); burning the State House, libraries or other public buildings, S.L. VIII, 183. It is important to note that, contrary to general belief, horse stealing was never made a capital crime (see page 109). Robbery was not made capital until 1780 (See S.L. X, 110). For Act of September 15, 1786, see S.L. XII, 280-3; for an analysis of the act, see Barnes, 107. For the Act of April 22, 1794, see S.L. XV, 174-181 and for analysis, Barnes, 107-110.
14. For news story of the Bradford case, see the American Weekly Mercury, June 30 - July 7, 1737; the two executed at the time were Catherine Connor and Henry Wildeman, both for burglary. For the Benson case, see the Pennsylvania Gazette, May 17, 1764, page 2; those executed at the time were Handenreid and John Williams.
15. The one receiving the pardon was Jacob Dryer; the one executed was Robert Elliott; for the Elliott case, see p. 135.

APPENDIX G

of Pennsylvania exclusive of pew rents and other free contributions belonging to the aforesaid congregation, which said money shall be received by the said trustees and disposed of by them for the purposes and in the manner hereinbefore described and directed.

Passed September 11, 1786. Recorded L. B. No. 3, p. 140, etc.

CHAPTER MCCXLI.

AN ACT AMENDING THE PENAL LAWS OF THIS STATE.

(Section I. P. L.) Whereas by the thirty-eighth section of the second chapter of the constitution of this commonwealth it is declared, "That the penal laws as heretofore used should be reformed by the legislature of this state as soon as may be and punishments made in some cases less sanguinary and in general more proportionate to the crimes." And by the thirty-ninth section that, "To deter more effectually from the commission of crimes by continued visible punishment of long duration, and to make sanguinary punishment less necessary, houses ought to be provided for punishing by hard labor those who shall be convicted of crimes not capital, wherein the criminal shall be employed for the benefit of the public or for reparation of injuries done to private persons."

And whereas it is the wish of every good government to reclaim rather than to destroy, and it being apprehended that the cause of human corruptions proceed more from the impunity of crimes than from the moderation of punishments, and it having been found by experience that the punishments directed by the laws now in force as well for capital as other inferior offences do not answer the principal ends of society in inflicting them, to wit, to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences, which is conceived may be better effected by continued hard labor, publicly and disgracefully imposed on persons convicted of them, not

only the manner pointed out by the convention, but in streets of cities and towns, and upon the highways of the open country and other public works.

[Section I.] (Section II. P. L.) Be it therefore enacted and it is hereby enacted by the Representatives of the Freemen of the Commonwealth of Pennsylvania in General Assembly met and by the authority of the same, That the pains and penalties hereinafter mentioned shall be inflicted upon the several offenders who shall from and after the first day of November next commit and be legally convicted of any of the offences hereinafter enumerated and specified in lieu of the pains and penalties which by law have been heretofore inflicted, that is to say, every person convicted of robbery, burglary, sodomy or buggary, or as accessory thereof before the fact, shall forfeit to the commonwealth all and singular the lands and tenements, goods and chattels whereof he or she was seized or possessed at the time the crime was committed, and at any time afterwards until convicted and be sentenced to undergo a servitude for any term or time at the discretion of the court who passes the sentence not exceeding ten years in the public gaol or house of correction of the county or city in which the offence shall have been committed and kept at such labor and fed and clothed in such manner as is hereinafter directed.

[Section II.] (Section III. P. L.) Provided always and be it further enacted by the authority aforesaid, That no person accused of any of the aforesaid crimes shall be admitted to bail but by the judges of the supreme court or some or one of them, nor shall he or she be tried but in the supreme court or in a court of oyer and terminer and general goal delivery held in and for the county wherein the offence shall have been committed, and that peremptory challenges shall be allowed in all such cases, wherein they have been heretofore allowed by law: But no attainder hereafter shall work corruption of blood in any case, nor extend to the disinherison or prejudice of any person or persons other than the offender.

[Section III.] (Section IV. P. L.) And be it further enacted by the authority aforesaid, That every person convicted of horse stealing or as accessory thereof before the fact, shall restore

the horse, mare or gelding stolen to the owner or owners thereof, or shall pay to him, her or them, the full value thereof, and also pay the like value to the commonwealth, and moreover undergo a servitude for any term not exceeding seven years in the discretion of the court before which the conviction shall be and shall be confined, kept to hard labor, fed and clothed in the manner as is hereinafter directed; every person convicted of simple larceny to the value of twenty shillings and upwards or as accessory thereof before the fact, shall restore the goods or chattels so stolen to the right owner or owners thereof or shall pay to him, her or them the full value thereof or so much thereof as shall not be restored, and moreover shall forfeit and pay to the commonwealth the like value of the goods and chattels stolen, and also undergo a servitude for any term of years not exceeding three, at the discretion of the court before which the conviction shall be, and shall be confined, kept to hard labor, fed and clothed in manner hereinafter directed.

(Section V. P. L.) And whereas by the ninth section of the first chapter of the constitution it is declared, "That in all prosecutions for criminal offences a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial by an impartial jury of the country without the unanimous consent of which jury he cannot be found guilty." Since which declaration it is not proper that persons accused of small or petty larcencies should be tried and convicted before two magistrates or justices of the peace without the intervention of a jury.

[Section IV.] (Section VI. P. L.) Be it therefore enacted by the authority aforesaid, That the act of assembly, entitled "An act for the trial and punishment of larceny under five shillings [1] be and the same is hereby repealed, and that if any person or persons shall hereafter feloniously steal, take and carry away any goods, or chattels under the value of twenty shillings, the same order and course of trial shall be had and observed as for other simple larcenies, and he, she or they, being thereof le-

[1] Passed Feb. 24, 1720-21. Chapter 243.

gally convicted, shall be deemed guilty of petty larceny, and shall restore the goods and chattels so stolen or pay the full value thereof to the owner or owners thereof, and also forfeit and pay the like value to the commonwealth and be further sentenced to undergo a servitude for a term not exceeding one year in the discretion of the court before which such conviction shall be, and be confined, kept to hard labor, clothed and fed in manner hereinafter directed. And every person convicted of bigamy or of being an accessory after the fact in any felony, or of receiving stolen goods knowing them to have been stolen, or of any other offense not capital for which by the laws now in force burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping or imprisonment for life, is or may be inflicted, shall instead of such parts of the punishment, be fined, and sentenced to undergo in like manner, and be confined, kept to hard labor, fed and clothed, as is hereinafter directed for any term not exceeding two years, which the court before whom such conviction shall be, may and shall in their discretion think adapted to the nature and heinousness of the offense.

[Section V.] (Section VII. P. L.) And be it further enacted by the authority aforesaid, That robbery or larceny of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, certificates on loan on the credit of this commonwealth or of all or any of the United States of America shall be punished in the same manner as robbery or larceny of any goods or chattels.

(Section VIII. P. L.) And whereas by the eight section of the act of assembly, entitled "An act for the advancement of justice and more certain administration thereof,"[2] it is enacted, that if any woman shall endeavor privately to conceal the death of her child, which by being born alive, should by the law be deemed a bastard, so that it may not come to light, whether it were born alive or not, and be convicted thereof, she shall suffer death as in case of murder, "except such mother can make proof by one witness at the least, that the child, whose death was by

[2] Passed May 31, 1718. Chap. 236.

her so intended to be so concealed, was born dead;" whereby the bare concealment of the death is made almost conclusive evidence of the child's being murdered by the mother or by her procurement.

[Section VI.] (Section IX. P. L.) Be it therefore declared and enacted by the authority aforesaid, That from and after the publication of this act the constrained presumption that the child whose death is so concealed was therefore murdered by the mother, shall not be sufficient evidence to convict the party indicted without probable presumptive proof is given that the child was born alive.

[Section VII.] (Section X. P. L.) And be it further enacted by the authority aforesaid, That every other felony or misdemeanor or offence whatsoever not specially provided for by this act may and shall be punished as heretofore.

[Section VIII.] (Section XI. P. L.) And be it further enacted by the authority aforesaid, That the malefactors sentenced to hard labor as aforesaid in punishment of their crimes may and shall be employed not only in the gaols and houses of correction of the respective counties wherein they shall be confined, but also in repairing and cleaning the streets of the cities or towns, in making, repairing and amending the public roads or highways, in fortifications, mines, and such other hard and laborious works within the county where they shall have been convicted, and for the benefit of such county as by the courts before whom they were convicted in their discretion shall be directed: And during the term of their condemnation shall at the public expense of such county be fed on such course wholesome food as may be sufficient for them and shall have such lodgings as defend them from the inclemencies of the weather (and the males have their heads and beards close shaven at least once in every week) and be clothed in habits of course materials, uniform in color and make and distinguished from all others used by the good citizens of this commonwealth and also have some visible mark on the outer garment designating the nature of the crime for which sentenced, that so they may be marked out to public note as well while at their ordinary occupations as when attempting to make their escapes.

(Section XII. P. L.) And to the end that the opulence of the offender or of his friends or the indiscreet bounties of individuals may not disarm the public justice or alleviate those sufferings which making part of the punishments intended by the law should be incurred equally by all, and also to render escapes more difficult, their keeper shall take particular care that no such malefactor use or receive any clothing other than what shall be provided by the public as is before directed, nor receive, nor have in their own keeping any weapon, [arms], money or other property, nor have attendants of their own, and all artitcles so prohibited to them and found in their custody or use shall belong to him or her who shall give information thereof to the said keeper and demand delivery to be made by him, which the said keeper is hereby directed to deliver accordingly under the penalty of ten pounds. And the sheriff of the proper county to whom the said malefactors shall be committed in execution of their sentence shall from time to time with the approbation of the justices of the court of quarter sessions of the proper county in open court appoint so many keepers of the said malefactors as shall be necessary whose wages shall be ascertained and allowed by the said court and paid by the treasurer of the county out of the moneys in his hands raised for the use of the said county by a warrant drawn by the said sheriff and at least one of the commissioners of the proper county, and that the duty of the said keepers shall be to superintend and direct their labors, manage and attend to their clothing, diet and lodging, and take care that they be safely kept, and the better to effect this purpose they shall have authority to confine in close durance apart from all society all those who shall refuse to labor, be idle or guilty of any trespass, and during such confinement to withhold from them all sustenance except bread and water, and also to put iron yokes around their necks, chains upon their leg or legs or otherwise restrain in irons such as shall be incorrigible or irreclaimable without such severity.

[Section IX.] (Section XIII. P. L.) And be it further enacted by the authority aforesaid, That the court of quarter sessions of the county wherein the malefactors labor shall have

power either ex-officio or upon information against any such keeper for partiality or cruelty to call before them such keeper, together with the material witnesses and inquire into his conduct, and if it shall appear that he has been guilty of gross partiality or cruelty, it shall and may be lawful for the said court to suspend or remove him, and the judges of the supreme court when sitting in banc or any of the judges when upon the circuit either on their own motion or on complaint made by any other may take original cognizance of the misbehaviours of any keeper and remove him from office if they see cause and in case of suspension or removal of all or any of the said keepers either by the justices of the quarter sessions or the judges of the supreme court, the sheriff of the proper county with the approbation of the justices of the quarter sessions of the same county shall and he is hereby authorized and directed to appoint other keeper or keepers in the room of such as shall have been so suspended or removed.

[Section X.] (Section XIV. P. L.) And be it further enacted by the authority aforesaid, That every of the said keepers shall be exempted from being in the militia and from all fines and duties on that account. And if any malefactor shall escape from his or her keeper or absent himself or herself from his or her labor without good cause, to be judged of by the court whereby he or she was condemned, the term of his or her servitude shall by the order of such court made on record be lengthened two days for every one he or she shall be absent.

(Section XV. P. L.) And whereas many young persons from habits of idleness and intemperance and from want of a pious education are drawn unwarily into the commission of crimes and are apprehended and brought to punishment before they become so hardened as to be void of shame or beyond the hope of being reclaimed.

[Section XI.] Be it further enacted by the authority aforesaid, That the keepers aforesaid shall endeavor as much as in them lies to separate as well those who are confined to labor within doors, as those that shall be employed without in such manner as that the old and hardened offenders be prevented from mixing with and thereby contaminating and eradicating

the remaining seeds of virtue and goodness in the young and unwary, and the men from an improper intercourse with the women.

[Section XII.] (Section XVI. P. L.) And be it further enacted by the authority aforesaid, That the sheriffs or keepers of the gaols and the keepers of the work-houses or houses of correction in the several counties of this state shall once in every three months or oftener if required, furnish the commissioners of their respective counties with a complete calender or list of all persons committed to their respective custody under sentence of such servitude, together with the names of their crimes, the term of their servitude, in what court condemned, the ages and description of the persons of such as shall appear to be too old and infirm or otherwise incapable to undergo hard labor out of the gaols or work-houses, and the said commissioners shall at the charge of the proper county provide for the clothing and the food hereinbefore directed for them, and also such articles and materials of labor and manufacture as shall be most suitable for the employment of all those who are capable of labor or manufacture, and deliver the same to the said gaoler, sheriff or other work-house keeper, taking a receipt therefor, and that the sheriff, gaoler and work-house keeper shall render an account quarterly or oftener if required to the commissioners of the work done by the said malefactors and dispose of the same in such manner as the commissioners shall direct. And the said commissioners are hereby authorized from time to time to draw orders or give their warrants on the treasurer of the proper county for the advance of such sums as they shall thing reasonable and necessary for carrying this act into execution, and all expenses and charges incurred or to be incurred by virtue of this act shall be levied and raised as other county charges are, and be accounted for in like manner.

(Section XVII. P. L.) And in order to encourage those offenders in whom the love of virtue and the shame of vice is not wholly extinguished to set about a sincere and actual repentance and reformation of life and conduct so as at the expiration of their terms of servitude they may become useful members of society.

[Section XIII.] Be it further enacted by the authority aforesaid, That upon the application of any of the said malefactors or any other in their behalf it shall and may be lawful for the court in which they were convicted at and before the expiration of their servitude to make inquiry as well of the sheriff, gaoler or keeper of the work-house or house of correction as of the keeper and keepers and others concerning the conduct and behaviour of such applicant during his or her servitude, and, if it shall appear thereupon to them that such person hath labored faithfully without attempting an escape and evidenced by a patient submission to the justice of their punishment a sincere reformation, then and in such case the said court shall grant to every such person a certificate thereof which shall also be recorded without fee in the proceedings of such court, and shall thereupon operate as a discharge from all claims and demands of the party injured and also as a pardon of the guilt and infamy of the offence, and give him or her a new capacity and credit.

[Section XIV.] (Section XVIII.) And be it further enacted by the authority aforesaid, That the profits arising from the work, labor and services of malefactors in pursuance of this act shall be applied towards the payment of the fees of their prosecutions and the expenses which shall accrue in making the necessary provision for clothing, maintaining and keeping them, and if there should be any surplus, the same shall be paid into the treasury for the use of the proper county.

[Section XV.] (Section XIX. P. L.) And be it further enacted by the authority aforesaid, That this act shall be in force and take effect within this commonwealth from and after the first of November next.

[Section XVI.] (Section XX. P. L.) Provided nevertheless and be it further provided by the authority aforesaid, That if any person shall be convicted in any county within this state of any offence which had been committed before the publication of this act and for which he or she by the laws now in force would be liable to suffer the pains of death that if such convict openly pray the court before which such conviction shall be had, that sentence be passed upon him or her according to the provisions of this act for like offence, that then and in such

case the court shall pass like sentence against such convict and to similar effect and not otherwise as if the offence of which such person shall be so convicted had been committed after the first of November next.

[Section XVII.] (Section XXI. P. L.) Be it further enacted by the authority aforesaid, That this act shall be in force and have effect as to the therein offences mentioned and provided for, which shall have been committed within three years from and after the first day of November next, and to the end of the next succeeding session of the general assembly and no longer.

(Section XXII. P. L.) Provided nevertheless, That the force and operation thereof as to the person or persons who shall so offend within the same terms shall not be vacated nor affected thereby, but the same sentences and every of them shall be pronounced, remain valid and be executed in their full extent on all and every such person and persons notwithstanding the expiration of the term last aforesaid.

(Section XXIII. P. L.) And whereas it may so happen that there may be but one or few offenders convicted and sentenced to hard labor and other punishment in pursuance of this act within any county, whereby the burden upon the same county may be needlessly great and it would further the good designs of the legislature in making the foregoing alterations in the penal laws of this commonwealth, and lessen the charges of carrying the provisions of this act into execution, if in proper cases the said offender or offenders may be removed to some other county or counties there to be imprisoned and treated according to their several sentences:

Therefore:

[Section XVIII.] Be it enacted by the authority aforesaid, That the president or vice president in council upon application for that purpose made by the commissioners of any county within this commonwealth at their discretion may if they think proper authorize and direct by warrant under the less seal the removal of any convict or convicts by virtue of this act from any one or more of the counties of this commonwealth to any other of the counties of the same, there to be held, imprisoned, kept at labor, fed and treated in the same manner as if they had

severally remained in the county where they or either of them was or were convicted; and the commissioners of the county to which any such convict or convicts shall be so removed as aforesaid shall have authority to draw an order or orders from time to time or as often as it shall be necessary upon the treasurer of the county from whence any convict or convicts shall have been so removed for all expenses which shall or may accrue in removing, feeding and clothing such convict or convicts, which order or orders the treasurer of the proper county from which such convict or convicts was removed shall accept and pay.

Passed September 15, 1786. Recorded L. B. No. 3, p. 112, etc. See the Acts of Assembly passed March 27, 1789, Chapter 1409; April 5, 1790, Chapter 1516.

CHAPTER MCCXLII.

AN ACT FOR ALTERING AND AMENDING AN ACT ENTITLED "AN ACT TO REGULATE THE GENERAL ELECTIONS OF THIS COMMONWEALTH AND TO PREVENT FRAUDS THEREIN."[1]

(Section I. P. L.) Whereas it was enacted and provided in and by an act of general assembly of this commonwealth published on the thirteenth day of September last, entitled "An act to regulate the general elections of this commonwealth and to prevent frauds therein," with design to prevent the committing of irregularities and abuses during the night time, that the general elections of this commonwealth shall begin on the second Tuesday in the month of October annually between the hours of ten o'clock in the forenoon and one o'clock in the afternoon of the same day and the poll whereof shall be carred on without interruption or adjournment until the hour of seven o'clock in the afternoon of the same day, other than the elections to be holden for the city and county of Philadelphia, the poll whereof shall be carried on without interruption or adjourn-

[1] Passed Sept. 13, 1785. Chap. 1175.

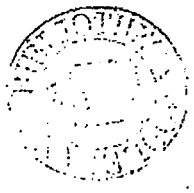
APPENDIX H

JOURNAL

OF THE

SENATE

OF THE



COMMONWEALTH

OF

PENNSYLVANIA.

COMMENCING

On TUESDAY, the fourth Day of DECEMBER,

IN THE YEAR OF OUR *LORD* ONE THOUSAND SEVEN HUNDRED AND NINETY-TWO, AND OF THE *INDEPENDENCE* OF THE *UNITED STATES* OF *AMERICA* THE SEVENTEENTH.

PHILADELPHIA:

PRINTED BY ZACHARIAH POULSON, JUNIOR, IN FOURTH-STREET, NEAR THE UNIVERSITY.

anſwers, together with a very accurate and liberal report from the Inſpectors of the priſons of Philadelphia, to your wiſdom and humanity; in hopes that meaſures may be deviſed, to encreaſe the ſecurity of the community, and to meliorate the condition of the unfortunate. As education indirectly unites with the courts of juſtice, in producing an habitual obedience to the authority of the laws; and in preſerving the peace and order of ſociety; it will not be improper here to expreſs a wiſh, that the eſtabliſhment of public ſchools, contemplated by the conſtitution, may receive a favorable attention; for, conſidered merely as a matter of policy, it is better to prevent, than to puniſh, offences; and the diffuſion of knowledge, elevating the ſentiments, and confirming the virtue, of the people, is the ſafeſt, the beſt inſtrument, that government can employ.

" It muſt be flattering to the judgment, and grateful to the humanity, of the Legiſlature, to learn, from ſatisfactory evidence, that the experiment in rendering the penal laws of Pennſylvania leſs ſanguinary, has been attended with an obvious decreaſe of the number and atrocity of offences. I ſhall, therefore, take an early opportunity of communicating to you, a ſtatement of the facts and obſervations relating to the ſubject, which a Judge of the Supreme Court (lately the Attorney General) has made, in compliance with my requeſt; and which, as the reſult of conſiderable experience and deliberation, merits particular regard. Such, indeed, have already been the wholeſome effects of the new ſyſtem, that, if, while we conſider the prevention of crimes to be the ſole end of puniſhment, we, alſo, admit, that every puniſhment, which is not abſolutely neceſſary for that purpoſe, is an act of tyranny and cruelty, it has now become a duty to proſecute the buſineſs of reform; and, I am perſuaded, you will find, that, without affecting the juſt diſtribution of penalties, in proportion to the reſpective tranſgreſſions, a mitigation of puniſhment may be ſafely, and even beneficially, extended, to many, if not to all, of the offences, except High Treaſon and Murder, for which the law ſtill denounces the forfeiture of life.

" You will perceive, from documents that will be laid before you, that the conſtitution of the office of the Wardens of the Port, requires a radical reviſion; and that regulations are neceſſary to obviate the cauſe of certain diſputes, which have recently taken place between the merchants and the pilots, reſpecting the pay of the latter; and the continuance of which might have proved prejudicial to the trade of Philadelphia. I am not apprized how far Congreſs has it in contemplation to legiſlate on theſe ſubjects; but leſt you ſhould deem it expedient to exerciſe your power over them immediately, I have procured, in aid of your enquiries, a ſtatement of the pilotage allowed at ſome of the principal ports within the United States.

" The Health-office becomes, alſo, more and more important, as our commerce extends, and the emigrations to America encreaſe. In addition, therefore, to my former repreſentations, I am led to obſerve, that inconveniences, which have been actually felt, point out the neceſſity of a proviſion to prevent, in future, the introduction of emigrants, and others, infected with any peſtilential diſeaſe; who, for the very purpoſe of evading the exiſting law, may be diſcharged within the precincts of a neighbouring ſtate; but being, in fact, deſtined for Pennſylvania, immediately travel hither by land. The eſtabliſhment of an hoſpital for invalid mariners, to be ſupported by a

fund

APPENDIX I

respective district so convened, shall cause the said general return to be delivered to the sheriff of the county in which they shall be thus convened, and shall also cause a duplicate thereof, signed and sealed in the same manner, to be deposited in the office of the prothonotary of such county.

[Section VI.] (Section VI, P. L.) And be it further enacted by the authority aforesaid, That such sheriff, having received the said return, shall, within forty days after such election, deliver or safely transmit the same to the governor, who shall thereupon declare, by proclamation, the name of the person or persons to him returned as duly elected in each respective district, and shall thereafter, as soon as conveniently may be, transmit the returns so to him made, to the house of representatives of the United States.

Passed April 22, 1794. Recorded L. B. No. 5, p. 275, &c.

CHAPTER MDCCLXXVII.

AN ACT FOR THE BETTER PREVENTING OF CRIMES, AND FOR ABOLISHING THE PUNISHMENT OF DEATH IN CERTAIN CASES.

Whereas the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments. And whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety. Therefore:

[Section I.] (Section I, P. L.) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That no crime whatsoever, hereafter committed (except murder in the first degree) shall be punished with death in the state of Pennsylvania.

(Section II, P. L.) And whereas the several offenses which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment.

[Section II.] Be it further enacted by the authority aforesaid, That all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

[Section III.] (Section III, P. L.) And be it further enacted by the authority aforesaid, That every person liable to be prosecuted for petit treason, shall in future be indicted, proceeded against and punished, as is directed in other kinds of murder.

[Section IV.] (Section IV, P. L.) And be it further enacted by the authority aforesaid, That every person duly convicted of the crime of high treason, shall be sentenced to undergo a confinement in the gaol and penitentiary house of Philadelphia, for a period not less than six nor more than twelve years, and shall be kept therein at hard labor, or in solitude, and shall in all things be treated and dealt with as is prescribed by an act, entitled, "An act to reform the penal laws of this state,"[1] or by the provisions of this act; that every person duly convicted of the crime of arson, or as being an accessory thereto, shall be sentenced to undergo a similar confinement, for a period not less than five nor more than twelve years, under the same conditions as are herein expressed in the first clause of this section; that every person duly convicted of the crime of rape, or as being accessory thereto before the fact, shall be sentenced to undergo a similar confinement, for a period not less than ten years nor

more than twenty-one years, under the same conditions as are herein expressed in the first clause of this section; that every person duly convicted of the crime of murder of the second degree, shall be sentenced to undergo a similar confinement, for a period not less than five years nor more than eighteen years, under the same conditions as are herein expressed in the first clause of this section.

[Section V.] (Section V, P. L.) And be it further enacted by the authority aforesaid, That every person who shall be convicted of having, after the passing of this act, safely forged and counterfeited any gold or silver coin, which now is or hereafter shall be passing or in circulation within this state, or of having falsely uttered, paid, or tendered in payment, any such counterfeit or forged coin, knowing the same to be forged and counterfeit, or having aided, abetted or commanded the perpetration of either of the said crimes, or shall be concerned in printing, signing or passing any counterfeit notes of the bank of Pennsylvania, North America, or the United States, knowing them to be such, or altering any genuine notes of any of the said banks, shall be sentenced to undergo a confinement in the gaol and penitentiary house aforesaid, for any time not less than four nor more than fifteen years, and shall be kept, treated and dealt with in the manner aforesaid, and shall also pay such fine as the court shall adjudge, not exceeding one thousand dollars.

[Section VI.] (Section VI, P. L.) And be it further enacted by the authority aforesaid, That whosoever, on purpose and of malice aforethought, by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off the nose, ear or lip, or cut off or disable any limb or member of another, with intention, in so doing, to maim or disfigure such person, or shall voluntarily, maliciously, and of purpose, pull or put out an eye, while fighting or otherwise, every such offender, his or her aiders, abettors, and counsellors, shall be sentenced to undergo a confinement, in the gaol and penitentiary house aforesaid, for any time not less than two nor more than ten years aforesaid, and shall also pay a fine not exceeding one thousand dollars, three fourth parts whereof shall be for the use of the party grieved.

[Section VII.] (Section VII, P. L.) And be it further en-

acted by the authority aforesaid, That whosoever shall be convicted of any voluntary manslaughter hereafter committed, shall be sentenced to undergo an imprisonment at hard labor and solitary confinement in the gaol and penitentiary house of Philadelphia, for any time not less than two nor more than ten years, and to give security for his or her good behavior during life, or for any less time, according to the nature and enormity of the offence, shall be sentenced to undergo an imprisonment at hard labor and solitary confinement, in the gaol and penitentiary house aforesaid, for any time not less than six nor more than fourteen years.

[Section VIII.] (Section VIII, P. L.) And be it further enacted by the authority aforesaid, That wheresoever any person shall be charged with involuntary manslaughter happening in consequence of an unlawful act, it shall and may be lawful for the attorney general or other person prosecuting the pleas of the commonwealth, with the leave of the court, to waive the felony, and to proceed against and to charge such person with a misdemeanor, and to give in evidence any act or acts of manslaughter, and such person or persons, on conviction, shall be fined or imprisoned, as in cases of misdemeanor; or the said attorney general, or other person, prosecuting the pleas of the commonwealth, may charge both offences in the same indictment, in which case the jury may acquit the party of one, and find him or her guilty of the other charge.

[Section IX.] (Section IX, P. L.) And be it further enacted by the authority aforesaid, That all claims to dispensation from punishment by benefit of clergy, or benefit of the act of assembly, entitled, "An act, for the advancement of justice, and more certain administration thereof,"[1] shall be, and hereby are, forever abolished; and every person convicted of any felony heretofore deemed clergyable, shall undergo imprisonment at hard labor and solitary confinement in the gaol and penitentiary house aforesaid, for any time not less than six months and not more than two years, and shall be treated and dealt with as is directed in the act to reform the penal laws of this state, except in those cases where some other specific penalty is prescribed by

the act aforesaid to reform the penal laws of this state, or by this act.

[Section X.] (Section X, P. L.) And be it further enacted by the authority aforesaid, That every person convicted in any county in this state, other than Philadelphia county, of any crime (except murder of the first degree) which now is, or on the fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy, or of knowingly uttering counterfeit coin, or of being concerned in printing, signing or passing any counterfeit notes of the banks of Pennsylvania, North America or of the United States, knowing them to be such, or of altering any of the genuine notes of either of the said banks, shall, as soon as possible, be safely removed and conveyed by the sheriff, and at the expense of the commonwealth, to the gaol and penitentiary house aforesaid, and therein be kept during the term of their confinement, in the manner and on the terms mentioned in the thirty-fourth section of the act entitled, "An act to reform the penal laws of this state";[1] and every sheriff who shall neglect to remove and safely deliver at the gaol aforesaid such convict, shall forfeit and pay the sum of one hundred dollars, to be recovered in any court of justice, and applied, one-half to the use of the county in which the offence was committed, the other half to such persons as shall sue for the same.

[Section XI.] (Section XI, P. L.) And be it further enacted by the authority aforesaid, That every person convicted of any of the crimes last aforesaid, and who shall be confined in the gaol and penitentiary house aforesaid, shall be placed and kept in the solitary cells thereof, on low and coarse diet, for such part or portion of the term of his or her imprisonment as the court, in their sentence, shall direct and appoint.

Provided, That it be not more than one-half nor less than one-twelfth part thereof. And that the inspectors of the said gaol shall have power to direct the infliction of the said solitary confinement, at such intervals and in such manner as they shall judge best.

(Section XII, P. L.) Whereas it is of importance that the nature of the offence, and the former character and conduct of

the convict should be known by the said inspectors, and their successors in office.

[Section XII.] Bt it further enacted by the authority aforesaid, That whensoever any person shall be convicted of any crime which, on the fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, shall be removed from any county to the gaol and penitentiary house aforesaid, the court before whom such conviction is had, shall, within forty days after such offender is removed from the said county, make and cause to be transmitted to the said inspectors, a report or short account of the circumstances attending the crime committed by such convict, particularly such as tend to aggravate or extenuate the same, and also what character the said convict appeared on the trial to sustain, and whether he had at any time before been convicted of any felony or other infamous crime, which report the said inspectors shall cause to be entered in books or registers to be provided for that purpose.

[Section XIII.] (Section XIII, P. L.) And be it further enacted by the authority aforesaid, That if any person convicted of any crime which, on the said fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy, shall commit any such offence a second time, and be thereof legally convicted, he or she shall be sentenced to undergo an imprisonment in the said gaol and penitentiary house at hard labor during life, and shall be confined in the said solitary cells, at such times and in such manner as the inspectors shall direct; and if any person sentenced to hard labor and solitary confinement, by virtue of this or any former act, shall escape, or be pardoned, and after his or her escape or pardon shall be guilty of any such offence, as on the said fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy, such person shall be sentenced to undergo an imprisonment for the term of twenty-five years, and shall be confined in the solitary cells aforesaid, at the discretion of the said inspectors.

[Section XIV.] (Section XIV, P. L.) And be it further enacted by the authority aforesaid, That if any person shall hereafter be convicted of any crime committed before the passing of

this act, he or she shall be sentenced to undergo such pains and punishment, as by the laws now in force are prescribed and directed, unless such convict shall openly pray the court, before whom such conviction shall be had, that sentence may be pronounced agreeably to the provisions of the act for the like offence, in which case the said court shall comply with the said prayer, and pass such sentence on such convict as they would have passed had the said offence been committed subsequent to the passing of this act.

[Section XV.] (Section XV, P. L.) And be it further enacted by the authority aforesaid, That every person convicted of murder of the first degree, his or her aiders, abettors and counsellors, shall suffer death by hanging by the neck.

[Section XVI.] (Section XVI, P. L.) And be it further enacted by the authority aforesaid, That no person indicted for any crime, the punishment whereof is altered by this act, shall lose any peremptory challenge, to which he or she would have been entitled had this act not been passed, nor be liable to be tried before any court other than the supreme court, or court of oyer and terminer, in the county where the fact was committed.

[Section XVII.] (Section XVII, P. L.) And be it further enacted by the authority aforesaid, That if any woman shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by the law be a bastard, so that it may not come to light whether it was born dead or alive, or whether it was murdered or not, every such mother, being convicted thereof, shall suffer imprisonment at hard labor in the county gaol of the county where the fact was committed, or in the gaol and penitentiary house aforesaid, for any time not exceeding five years; or shall be fined and imprisoned, at the discretion of the court, according to the nature of the case; and if the grand jury shall, in the same indictment, charge any woman with the murder of her bastard child, as well as with the offence aforesaid, the jury by whom such woman shall be tried, may either acquit or convict her of both offences,

or find her guilty of one and acquit her of the other, as the case may be.

[Section XVIII.] (Section XVIII.) And be it further enacted by the authority aforesaid, That the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted of the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury, that she did wilfully and maliciously destroy and take away the life of such child.

[Section XIX.] (Section XIX, P. L.) And be it further enacted by the authority aforesaid, That the several acts of assembly of this commonwealth and such parts thereof, so far as the same are repugnant to or supplied by this act, and no further, shall be, and hereby are, repealed.

[1]Passed April 5, 1790, Chapter 1516.
[1]Passed May 31st, 1718, Chapter 236.
[1]See Ante.
Repealed by the Act of Assembly passed March 31, 1861, Chapter 376, P. L. 1860, p. 452.

CHAPTER MDCCLXXVIII.

AN ACT TO ENABLE THE GOVERNOR OF THIS COMMONWEALTH TO INCORPORATE A COMPANY, FOR MAKING AN ARTIFICIAL ROAD FROM THE BOROUGH OF LANCASTER TO THE RIVER SUSQUEHANNA, AT OR NEAR WRIGHT'S FERRY.

Whereas the improvement of roads and highways is of the first importance to the interest of agriculture and commerce, and the rapid progress of the improvement of the road from Philadelphia to Lancaster evinces a laudable spirit of enterprise among the good people of this state, and affords a reasonable ground of expectation that an extension of the same road westward may be effected. Therefore:

[Section I.] (Section I, P. L.) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by