

The Open Court

A MONTHLY MAGAZINE

Devoted to the Science of Religion, the Religion of Science, and the Extension of the Religious Parliament Idea

Founded by EDWARD C. HEGELER

VOL. XXXVII (No. 6)

JUNE, 1923

No. 805

CONTENTS

	PAGE
<i>Frontispiece:</i> TABLE OF THE TWELVE GREAT GODS OF OLYMPUS.	
<i>The Evolution of American Criminal Jurisprudence as Illustrated by the Criminal Code of Pennsylvania.</i> HARRY ELMER BARNES.....	321
<i>The Human Striving and the Categories of Science.</i> BENJAMIN GINZBURG..	339
<i>The Miracle of the Flood of Pena Blanca.</i> GEORGE BALLARD BOWERS.....	347
<i>A Helping Hand to China.</i> GILBERT REID.....	353
<i>A Menace to Civilization.</i> HAROLD BERMAN.....	360
<i>Sovereignty.</i> SMITH W. CARPENTER.....	367
<i>The Cosmic Five, Seven and Twelve. (Part II.)</i> LAWRENCE PARMLY BROWN.	373

The Open Court Publishing Company

122 S. Michigan Ave.

Chicago, Illinois

Per copy, 20 cents (1 shilling). Yearly, \$2.00 (in the U.P.U., 9s. 6d.)

Entered as Second-Class Matter March 26, 1887, at the Post Office at Chicago, Ill., under Act of March 3, 1879. Copyright by The Open Court Publishing Company, 1923.

FIVE HELPFUL BOOKS

Dramatization in the Church School

By Elizabeth Erwin Miller

A volume for all church directors who are interested in training their teachers to make better use of the dramatization method of religious teaching.

\$1.25, postpaid \$1.35

A teacher-training text

The Moral Life of the Hebrews

By J. M. Powis Smith

The story of human progress and development as recorded in the Old Testament. It is an objective presentation of facts which show morals and religion to have been long inseparable.

\$2.00, postpaid \$2.10

The Teaching of Jesus A Source Book

By Ernest D. Burton

Jesus' own teaching, as well as, for comparison, that of his contemporaries. The Gospel passages quoted are translated into modern English, and valuable extra-Gospel source material is presented for the first time.

\$2.00, postpaid \$2.10

What Jesus Taught

By A. Wakefield Slaten

A book to make better understood the actual teaching of Jesus as presented in the Gospels of Mark, Matthew, and Luke. It is a study of imperishable values dealing with Jesus' views in regard to all problems of civilization.

\$1.50, postpaid \$1.60

World-Friendship Through the Church School

By John Leslie Lobingier

A definite program of ten lesson-outlines for promoting the broadened mental attitudes leading to a world-outlook.

\$1.25, postpaid \$1.35

A teacher-training text

THE UNIVERSITY OF CHICAGO PRESS

5832 Ellis Avenue

Chicago, Illinois



TABLE OF THE TWELVE GREAT GODS OF OLYMPUS.

THE OPEN COURT

A MONTHLY MAGAZINE

Devoted to the Science of Religion, the Religion of Science, and
The Extension of the Religious Parliament Idea.

VOL. XXXVII (No. 6)

JUNE, 1923

No. 805

Copyright by the Open Court Publishing Company, 1923

THE EVOLUTION OF AMERICAN CRIMINAL JURISPRUDENCE AS ILLUSTRATED BY THE CRIMINAL CODE OF PENNSYLVANIA

BY HARRY ELMER BARNES, PH.D.

I. INTRODUCTION.

THE evolution of criminal jurisprudence in modern times is one of the most interesting aspects of the development of intellectual and social history. It illustrates the changing social attitudes with respect to the control of social and anti-social behavior, and well exemplifies the changing intellectual attitudes with respect to these types of behavior that are taken into cognizance by criminal jurisprudence. In general, the evolution of criminal jurisprudence has shown a general tendency away from the close interrelation of religion and criminal jurisprudence toward a gradual secularization, the attitude toward the criminal and his treatment coming gradually to be viewed in the light of its relation to social protection and well-being.

In choosing a state whose criminal code will perhaps illustrate as well as any the evolution of American jurisprudence, Pennsylvania has been taken because of its prominence in American criminal jurisprudence and prison reform, and because it admirably exemplifies well-nigh every stage through which the development of American criminal law has passed.

II. THE CRIMINAL CODES OF COLONIAL PENNSYLVANIA.

It will be unnecessary in this place to deal in detail with the criminal code of colonial Pennsylvania before 1776, as this has been made the subject of a special study in another article.¹ We will

¹ See my article on "The Criminal Codes and Penal Institutions of Colonial Pennsylvania," in *Bulletin of the Friends' Historical Society of Philadelphia*, Vol. 11, 1922, Nos. 1 and 2.

here briefly summarize the essential facts with respect to the colonial jurisprudence of Pennsylvania. The first criminal code of Pennsylvania was that introduced in 1676, which embodied the contemporary severe English and Puritan theories and practices with respect to the treatment of crime. It provided for some eleven capital crimes, and prescribed either fines or corporal punishment for the lesser crimes and misdemeanors. In 1682, this original severe criminal code was replaced by a far different body of law, namely, the Quaker Code, which was introduced by William Penn, embodying the same unique liberality that had just previously been introduced in the Quaker criminal code of West Jersey. The Quakers were very much opposed to the shedding of blood, and, hence, there was but one capital crime provided for in the Quaker code of 1682, namely, pre-meditated murder. Another unique aspect of this Quaker criminal code of the colony of Pennsylvania was the fact that for crimes other than capital the earlier usual procedure of prescribing corporal punishment or fines was replaced by the practice of imprisonment at hard labor. This Quaker innovation of the 17th century is usually regarded by historians of criminology and penology as the first general appearance of imprisonment as a method of treating the criminal.

The Quaker criminal code of Pennsylvania was, unfortunately, short-lived. The Quakers refused to take an oath, and the British government refused, in turn, to accept the criminal code of the Quakers in Pennsylvania. Finally, in 1718 the Quakers, in order to secure the right of affirmation, instead of oath-taking, surrendered their criminal code and agreed to accept a criminal code similar in attitude and content to that of the earlier code of 1676, and based, like this earlier code, upon English attitudes and precedents. In this code of 1718 the following crimes were declared to be capital: treason, murder, man-slaughter 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. Larceny was the only felony which was not made a capital crime. A generation later, counterfeiting was made a capital crime, there thus being some fourteen capital crimes in the criminal code with which Pennsylvania finished the colonial period. It was this situation which confronted the Pennsylvania legislators when the colony separated from Great Britain and set up an independent government in 1776.

III. THE REFORM OF THE CRIMINAL CODE, 1776-1829.

There were two main causes for the reform of the barbarous provincial criminal code when Pennsylvania obtained its independence. The first was the feeling that the code of 1718 was not a native colonial and national product, but that it was the work of a **foreign country, forced upon the province by taking advantage of its early religious scruples and divisions.** Especially was this the view taken by the Quaker element in Philadelphia and eastern Pennsylvania. Therefore, it was natural that a reaction against the English criminal jurisprudence should be one of the first manifestations of national spirit after 1776. The second chief cause of reform was the growth of enlightenment and criticism abroad. The movement represented by Montesquieu, Voltaire, Diderot, Beccaria, Paine, Bentham and others had affected the leaders of colonial thought in Pennsylvania to such an extent that reform would probably have been inevitable without the strong local impulses which existed at home. This background of the reform of criminal jurisprudence in Pennsylvania has been well summarized by one of the ablest contemporaries of, and participants in, the movement, William Bradford, justice of the supreme court of Pennsylvania, attorney-general of the United States and designer of the reformed Pennsylvania penal codes of 1790 to 1794. Writing in 1793, he thus explained the transformation of the criminal codes of Pennsylvania:

We perceive, by this detail,² 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 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."³

It was natural that when the American reaction against English jurisprudence took place in Pennsylvania, it should take the form

² This passage follows immediately after a sketch of criminal jurisprudence in provincial Pennsylvania. Bradford's death in 1795, at the age of forty, was a great blow to American jurisprudence. His achievements up to that point incline one to surmise that with anormal life he would have quite displaced Edward Livingston as the greatest of early American legists.

³ William Bradford, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania, With Notes and Illustrations*, Philadelphia, 1793, p. 20. References are to the London reprint of 1795.

of a return to the doctrines and practices of Penn. The new state constitution of September 28, 1776, directed a speedy reform of the criminal code along the line of substituting imprisonment for the various types of corporal punishment. It was stated that :

The penal laws as heretofore used, shall be reformed by the future legislature of the State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.

To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary ; houses ought to be provided for punishing by hard labor, those who shall be convicted of crimes not capital ; wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labor.⁴

The absorption of attention and energy by the military struggle with England prevented any immediate reform of the criminal code, but on September 15, 1786, an act was passed which aimed to carry out the provisions of the constitution of 1776.⁵ The juristic conceptions of the framers of the act were expressed in the following paragraph :

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 for 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 on the minds of others as to deter them from committing the like offences, which it is conceived may be better effected by continued hard labor, publicly and disgracefully imposed on persons convicted of them, not only in 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. . . .⁶

It was enacted, accordingly, that every person henceforth convicted of robbery, burglary, sodomy or buggery, instead of suffering the death penalty, should forfeit all property to the state and serve a sentence of not to exceed ten years at hard labor in the jail or house of correction in the county or city where the crime was com-

⁴ *Constitution of 1776*, Chapter II, Sections 38-9.

⁵ *The Statutes at Large of Pennsylvania*, Vol. XII, p. 280.

⁶ *The Statutes at Large of Pennsylvania*, Vol. XII, pp. 280-81.

mitted.⁷ Horse stealing was penalized by full restitution to the owner, the forfeiture of an equal amount to the state and imprisonment at hard labor for a term not to exceed seven years.⁸ Simple larceny, over twenty shillings, was to be punished by full restitution, forfeiture of like amount to the state and imprisonment at hard labor for not over three years.⁹ Petty larceny, under twenty shillings, was to receive a like punishment, except that the maximum term of imprisonment was limited to one year.¹⁰ It was further decreed that a mother could be convicted of the murder of a bastard child unless it could be shown that the child was born alive.¹¹ Finally, any other crimes not capital, in the earlier code, but punishable by "burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in or upon the pillory, whipping or imprisonment for life," should thereafter be punished by imprisonment at hard labor for not more than two years.¹² In this manner there disappeared from the statute books the most brutal and revolting phases of the criminal jurisprudence and procedure of the colonial period, although the death penalty was still retained for some ten crimes.

The important act of April 5, 1790, establishing the Pennsylvania system of imprisonment in solitary confinement, while primarily a law concerned with penal administration, specified the penalties for crimes committed, but this part of the act simply repeated the specifications of the law of September 15, 1786.¹³ The act of September 23, 1791, while chiefly devoted to the details of criminal procedure,¹⁴ made some advances with respect to ameliorating the severity of the criminal code. It repealed the death penalty for witchcraft,¹⁵ and ordered that there should be no more branding, whipping or imprisonment at hard labor imposed for adultery or fornication. These crimes were to be punished by a fine of not more than fifty pounds and imprisonment for three to twelve months.¹⁶

The next great step in the progressive reform of the criminal code of Pennsylvania came in an act of April 22, 1794,¹⁷ but before analyzing the contents of this act it will be useful and interesting to

⁷ *Ibid.*, p. 281.

⁸ *Ibid.*, pp. 281-2.

⁹ *Ibid.*, p. 282.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 283.

¹² *Ibid.*, p. 283.

¹³ *Statutes at Large*, Vol. XIII, pp. 511-15.

¹⁴ *Ibid.*, Vol. XIV, pp. 128-31.

¹⁵ *Ibid.*, p. 132.

¹⁶ *Ibid.*, pp. 133-4.

¹⁷ *Ibid.*, Vol. XV, pp. 174-181.

examine the chief doctrines of the able and influential pamphlet, published by William Bradford in 1793, on the desirability of reducing the number of capital crimes in Pennsylvania.¹⁸ This work is most important in a number of ways. In the first place, it summarizes and indicates the sources of the doctrines of the jurist who drafted the revised penal code of Pennsylvania, as passed by the legislature during the years 1786 to 1794.¹⁹ In the second place, it was very influential in bringing about the acceptance by the legislature of the law of 1794 reducing the category of capital crimes in Pennsylvania to that of murder in the first degree alone. Finally, as the product of the ablest legal mind in America at the time, it attracted wide attention at home and in Europe, and furnished the reformers with a valuable instrument for aiding in their assaults upon the old order in criminal jurisprudence.

Throughout the work, Mr. Bradford gave evidence of the fact that the works of Montesquieu, Beccaria and Blackstone were not only the chief source of his own conviction that the mitigation of the criminal laws was an indispensable and immediate necessity, but that he regarded them as the main inspiration which had produced the newer and more humane conceptions in criminal jurisprudence.²⁰ At the outset, Mr. Bradford laid down the dictum that the only object of punishment is the prevention of crime.²¹ The purpose of the death penalty, then, must be solely to prevent the person executed from the commission of another crime and to deter others from committing crime through fear of death. If these ends can be accomplished by other modes of punishment, then the death penalty is unjustifiable.²² Mr. Bradford contended that solitary confinement at hard labor would accomplish all that had been claimed for the death penalty.²³ He showed that history proves that mild penalties do not encourage the commission of crime nor severe penalties deter from criminal action. The example of Rome and England demonstrates this conclusively. Rome never imposed the death penalty except upon slaves, and yet it was much more orderly than England with its unprecedentedly long list of capital crimes.²⁴ The experience of America has been similar to that of Rome and England.²⁵

¹⁸ Bradford, *op. cit.* References, as above, to London edition of 1795.

¹⁹ The total abolition of the death penalty had been urged by Dr. Benjamin Rush in 1786-7. Roberts Vaux, *Notices*, p. 33. *A Statistical View of the Operation of the Penal Code of Pennsylvania*, 1817, pp. 3-4. *The Pennsylvania Journal of Prison Discipline and Philanthropy*, Vol. II, Number 3, pp. 205-10.

²⁰ Bradford, *op. cit.*, pp. 3, 49-80.

²¹ *Ibid.*, p. 6.

²² *Ibid.*, pp. 6-7.

²³ *Ibid.*, pp. 7-8.

²⁵ *Ibid.*, pp. 10ff.

²⁴ *Ibid.*, p. 9.

Mr. Bradford then turned to a scientific examination of the effect of the ameliorating law of September 15, 1786, in Pennsylvania, upon the commission of those crimes which were removed from the list of capital offences. He concluded that, when all disturbing influences were eliminated, the results revealed the fact that the number of commissions of these crimes was less in the six years after 1786 than in the six years previous to that time.²⁶ Mr. Bradford stated that he believed that society might safely dispense with the death penalty in the case of all crimes except premeditated murder and high treason, and it might be that, sooner or later, the progress of intelligence would be sufficient, so that capital punishment might be wholly abolished.²⁷ His conclusion is significant:

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 auspicious 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 keystone to the arch, may triumph in the completion of their benevolent work.²⁸

Mr. Bradford had the satisfaction of seeing his theories enacted into law in the act of April 22, 1794, "for the better preventing of crimes, and for abolishing the punishment of death in certain cases." It was declared that,

It is the duty of every government to endeavor to reform, rather than to exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety.²⁹

Accordingly, it was enacted,

That no crime whatsoever, hereafter committed, except murder in the first degree, shall be punished with death in the State of Pennsylvania.³⁰

It was specified that murder in the first degree would be constituted by all premeditated murder and by all murder committed in attempting rape, arson, robbery or burglary. All other types of murder were to constitute murder in the second degree.³¹ The death penalty

²⁶ *Ibid.*, pp. 20ff.

²⁷ *Ibid.*, pp. 35ff.

²⁸ Bradford, *op. cit.*, p. 46.

²⁹ *The Statutes at Large of Pennsylvania*, Vol. XV, p. 174.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 175.

for murder in the first degree was to be inflicted "by hanging by the neck."³²

In addition to this remarkable reduction of capital crimes, the act provided reduced penalties for the crimes which were eliminated from the list of those punishable by death. The following were the penalties prescribed: *murder in the second degree*, imprisonment of from five to eighteen years; *manslaughter*, imprisonment for from two to ten years, with from six to fourteen years for a second offence; *murder or concealment of the death of a bastard child*, imprisonment up to five years or a fine at the discretion of the court; *high treason*, imprisonment for from six to twelve years;³³ *arson*, imprisonment from five to twelve years; *rape*, imprisonment for from ten to twenty-one years; *malicious maiming*, imprisonment for from two to ten years and a fine up to one thousand dollars, three-fourths of which was to go to the party injured; *counterfeiting*, imprisonment from four to fifteen years and a fine up to one thousand dollars.³⁴ "Benefit of clergy" was "forever abolished."³⁵

It was provided that if a person be convicted a second time of a crime which was capital on September 15, 1786, he should be confined for life in the solitary cells of the Walnut street jail, unless the inspectors saw fit to remove him from these cells.³⁶ The only exception to this rule was in case the second offence was committed after escaping or being pardoned; in such instances the penalty for a second commission of the crime was to be imprisonment for twenty-five years.³⁷ With some minor revisions, especially in the Act of April 23, 1829, this law of 1794 remained the basis of the criminal code of Pennsylvania until the systematic revision of the code in 1860.

A slight increase in the severity of the penal code was produced by an act of April 4, 1807. The act of September 15, 1786, had decreed a punishment of not to exceed two years' imprisonment for those crimes, not capital in 1786, but which had been punished by the brutal forms of corporal punishment and by imprisonment for life. This act of April 4, 1807, raised the maximum limit for these crimes to seven years imprisonment, though it specified that this increase should not apply to bigamy, accessory after the fact in a

³² *Ibid.*, p. 180.

³³ The fact that high treason was not made a capital crime may in some degree be explained by the fact that the "Whiskey Rebellion" in Pennsylvania was at its height in 1794.

³⁴ *The Statutes at Large of Pennsylvania*, Vol. XV, pp. 175-181.

³⁵ *Ibid.*, p. 177.

³⁶ *Ibid.*, pp. 178-9.

³⁷ *Ibid.*, p. 179.

felony, or the reception of stolen goods.³⁸ From this time until the act of April 23, 1829, there were no important alterations in the criminal code of Pennsylvania.³⁹

IV. THE REVISION OF THE CRIMINAL CODE IN 1829.

A resolution of the legislature, passed March 23, 1826, directed the appointment of three commissioners to revise the criminal code of the state.⁴⁰ Charles Shaler, Edward King and T. J. Wharton were appointed to perform this important task. They laid their report before the legislature on December 20, 1827.⁴¹ The commission made no attempt at a complete new codification of the criminal law of the state, as they felt that their authorization did not extend to this limit and the time allotted was not sufficient to the completion of so extensive a task.⁴² Rather they aimed at "loping off relics of barbarism," giving a better definition of crimes and eliminating obsolete statutes.⁴³ One of the most original and valuable innovations introduced was the practice of specifying only the maximum sentence and leaving the minimum to the discretion of the court.⁴⁴ This procedure was defended with ingenuity and convincence.⁴⁵ In some cases, the commissioners thought it wise to extend the maximum, and their defence of this step is interesting as indicating that the struggle between prison reformers and the conservatism of the judiciary is not merely an incident of the present day. They stated that,

In some instances, the punishment allotted to offences, appears hardly commensurate with the specified crimes, and this, whether we consider these punishments with practical men, as a means of prevention, or consider penitentiaries with some modern theorists, as mere schools of reform.⁴⁶

On the whole, however, the revision was a work of great skill and ability and the failure of the legislature to adopt it was a severe blow to the progress of criminal jurisprudence in Pennsylvania. Not until 1860 was a criminal code provided which attained the level of excellence and modernity reached in the report of 1827. The reason

³⁸*Acts of the General Assembly of Pennsylvania, 1806-7, p. 134.*

³⁹For a list of the penal laws of Pennsylvania from 1700 to 1812, see Bioren's edition of the *Laws of the Commonwealth of Pennsylvania, Vol. V, 1812, Index, pp. 270-72.* An able revision of the penal code by Jared Ingersoll, in 1813, was rejected by the legislature.

⁴⁰*Acts of the General Assembly, 1825-6, p. 413.*

⁴¹*Report of the Commissioners on the Penal Code, 1828, p. 105.*

⁴²*Ibid., pp. 93-4.*

⁴³*Ibid., pp. 94-5.*

⁴⁴*Report of the Commissioners on the Penal Code, pp. 98-100.*

⁴⁵*Ibid.*

⁴⁶*Ibid., pp. 96-7.*

for the failure to adopt the code is a part of the story of the struggle over penitentiary systems. The same commissioners had been directed to draw up rules for the regulation of the new state penitentiaries and they had reported in favor of the Auburn system.⁴⁷ This led to the opposition of the Philadelphia Society for Alleviating the Miseries of Public Prisons, and in the three-cornered conflict which ensued between the penal code commissioners, the commissioners charged with building the Eastern Penitentiary, and the prison society, the legislature ended by rejecting the revised penal code as well as the recommendation of the Auburn system.⁴⁸

Instead of the code recommended by the commissioners, the legislature, by an act of April 23, 1829, adopted a revision which was much less thorough and systematic than the commissioners had suggested.⁴⁹ It followed the precedent of the code of 1794 in prescribing maximum and minimum penalties for the first offence of the specified crimes, and the recommendation of the commissioners of 1827 in usually prescribing only the maximum penalty for the second conviction. On the whole, the revision, while constituting no departure in juristic doctrine from the code of 1794, did produce a considerable reduction in the length of the term of imprisonment specified for the various crimes. This was, no doubt, due to the optimism at the time with respect to the remarkable reformatory virtues of the Pennsylvania system of solitary confinement at hard labor.

In the first place, it was ordered that in all cases where imprisonment was the penalty imposed this should be carried out in solitary confinement at hard labor.⁵⁰ The following penalties were imposed for the crimes enumerated: *high treason*, for the first offence, imprisonment of from three to six years, and for the second offence, imprisonment for not to exceed ten years; *murder in the second degree*, for the first offence, imprisonment of from four to twelve years, and for the second offence, imprisonment for life; *manslaughter*, for the first offence, imprisonment of from two to six years, and for the second offence, imprisonment for from six to twelve years; *mayhem*, for the first offence, imprisonment of from one to seven years, and for the second offence, imprisonment for not to exceed fourteen years; *rape*, for the first offence, imprison-

⁴⁷ *Ibid.*, pp. 77-82.

⁴⁸ *The Pennsylvania Journal of Prison Discipline and Philanthropy*, Vol. I, Number 1, 1845, pp. 8-12.

⁴⁹ *Laws of the General Assembly, 1828-9*, pp. 341-54. This code is also reproduced in Richard Vaux's *Brief Sketch of the Eastern Penitentiary*, pp. 36-42.

⁵⁰ *Laws, 1828-9*, pp. 341-2.

ment of from two to twelve years, and for the second offence, imprisonment for life; *sodomy* and *buggery*, for the first offence, imprisonment of from one to five years, and for the second offence, imprisonment for not to exceed ten years; *kidnapping*, for the first offence, imprisonment of from five to twelve years, and for the second offence, imprisonment for twenty-one years; *arson*, for the first offence, imprisonment of from one to ten years, and for the second offence, imprisonment for not to exceed fifteen years; *burglary*, for the first offence, imprisonment of from two to ten years, and for the second offence, imprisonment for not to exceed fifteen years; *robbery*, for the first offence, imprisonment of from one to seven years, and for the second offence, imprisonment for not to exceed twelve years; *horse-stealing*, for the first offence, imprisonment of from one to four years, and for the second offence, imprisonment for not to exceed seven years; *forgery*, for the first offence, imprisonment of from one to seven years, and for the second offence, imprisonment for not to exceed ten years; *perjury*, for the first offence, imprisonment of from one to five years, and for the second offence, imprisonment for not to exceed eight years.⁵¹ It was further specified that for all crimes not enumerated the penalties should remain as prescribed in earlier laws.⁵² Such was the relatively mild penal code under which the Pennsylvania system began its complete operation, as it had made its beginnings under the codes of 1786, 1790, and 1794.⁵³

V. THE ABOLITION OF IMPRISONMENT FOR DEBT.

The failure of the penal code commissioners of 1828 to provide Pennsylvania with a relatively systematic and enlightened code of criminal jurisprudence has already been discussed. It has been shown that the recommendation of the commissioners were rejected primarily because they insisted in attaching to the revised criminal code, as a sort of a "rider," a set of provisions directing the adoption of the Auburn system of prison administration. The friends of the Pennsylvania system considered the sacrifice of the newly proposed criminal code less of an evil than the loss of their cherished penological principles and defeated the bill through lobbying with the judiciary committee of the state legislature. Not until 1860 was the ambition of the commissioners realized in the enactment of a new

⁵¹*Laws of the General Assembly, 1828-9, pp. 342-4.*

⁵²*Ibid.*, p. 345.

⁵³As the basis of a comparison, see the admirable summary of the criminal codes of the period in the *Fourth Annual Report of the Prison Discipline Society of Boston, 1829, pp. 31-54.*

criminal code. In the interval between 1828 and 1860, however, one important advance was made in the modernizing and humanizing of one phase of jurisprudence which was until relatively recent times divided between civil and criminal law, namely, imprisonment for debt.

Throughout the colonial period, many successive attempts had been made to relieve the condition of "distressed debtors," but the courts never adopted a liberal interpretation of the laws, and imprisonment for debt persisted far down into the period of the commonwealth. One of the most grievous sources of evil revealed in the Walnut street jail by the Philadelphia Society for Alleviating the Miseries of Public Prisons was the mode of treating debtors in 1787-1790, and from 1818 to 1835 a separate prison on Arch street had been set aside for the incarceration of debtors and witnesses. The first important progressive legislation in this sphere was contained in an act of April 4, 1792, which was designed to do away with the evils of the extortionate fee system which had been in vogue down to that time. This act provided that the keeper of the debtors' apartment in the Philadelphia jail was to be granted a fixed salary of five hundred dollars, which was to supersede all fees hitherto allowed to him or his subordinates.⁵⁴ The basis of a general bankruptcy act was laid by a law of April 4, 1798, which provided, "That the person of a debtor shall not be liable to imprisonment for debt, after delivering up his estate for the benefit of his creditors, unless he has been guilty of fraud or embezzlement."⁵⁵ This liberal act met the fate of its predecessors and imprisonment for debt continued with little change. The first decisive step was taken in an act of February 8, 1819, which commanded that, "No female shall be arrested or imprisoned for, or by reason of any debt contracted after the passing of this act."⁵⁶ The degree to which imprisonment for debt persisted may be seen from the fact that on June 16, 1836, a long and elaborate act was passed defining and prescribing the civil and criminal procedure in debtors' cases.⁵⁷ The final act abolishing imprisonment for debt in Pennsylvania was passed on July 12, 1842. In a most fundamental sense, this act and the many similar ones which were passed throughout the country in this same general period were, as Professor Carleton has so well shown, the product of the wave of indignation that swept over the country and demanded the abolition of this, along with the many other undemocratic fea-

⁵⁴*The Statutes at Large of Pennsylvania*, Vol. XIV, pp. 267-9.

⁵⁵*Ibid.*, Vol. XVI, pp. 98-106.

⁵⁶*Acts of the General Assembly*, 1818-19, p. 57.

⁵⁷*Laws of the General Assembly*, 1835-6, pp. 729-41.

tures of American society and politics. The movement was an incident of the development of the Jacksonian democracy and of the rise of the organization of the industrial proletariat.⁵⁸

In a more immediate sense, it was the outgrowth of a vigorous campaign of invective directed against the antiquated laws on this point by Louis Dwight in the annual reports of the Boston Prison Discipline Society, from 1830 to 1845. In no phase of prison reform was Dwight more active than in agitating for the abolition of imprisonment for debt. In Pennsylvania, his efforts were ably seconded by the Philadelphia Society for Alleviating the Miseries of Public Prisons, this being about the only field in which they could work in harmony and agreement with the leader of the Boston society. The act of 1842, which was entitled, "An Act to Abolish Imprisonment for Debt and to Punish Fraudulent Debtors," provided that:

From and after the passage of this act, no person shall be arrested or imprisoned on any civil process issuing out of any court of this commonwealth, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract, excepting in cases for contempt, to enforce civil remedies, action for fines or penalties, or on promises to marry, or moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment, in which cases the remedies shall remain as heretofore."⁵⁹

VI. THE CRIMINAL CODE OF 1860.

By 1858, the anachronisms in the existing penal code and the confusion resulting from the successive additions to the act of 1829, which had itself been little but an amendment of the codes of 1790-94, made further acquiescence in the existing penal code no longer possible, and on April 19th of that year the legislature resolved,

That the Governor of this Commonwealth be and he is hereby authorized and required to appoint, by and with the advice and consent of the Senate, three competent citizens, learned in the laws of this commonwealth, as commissioners to revise, collate and digest

⁵⁸ Frank Carleton, "The Abolition of Imprisonment for Debt in the United States," in *The Yale Review*, Vol. XVII, pp. 338-44. Cf. J. R. Commons (ed.), *A History of Labor in the United States*, Vol. I, pp. 296ff.

⁵⁹ *Laws of the General Assembly*, 1842, pp. 339ff. For complete or nearly complete lists of laws dealing with imprisonment for debt in Pennsylvania, see *The Statutes at Large*, Vol. IV, pp. 183-4, note, and G. W. Pepper and W. D. Lewis, *Digest of the Laws of Pennsylvania*, 1896, Vol. I, p. 2313. For a discussion of the abolition of debt in Pennsylvania, see W. C. Heffter, *The History of Poor Relief Legislation in Pennsylvania, 1682-1913*, pp. 202-4.

all the acts and statutes relating to or touching the penal laws of the commonwealth.⁶⁰

The commissioners appointed by Governor W. F. Packer to carry out this revision of the penal code were John C. Knox, David Webster and Edward King.⁶¹ Judge King (1794-1873) had been one of three commissioners on the revision of the penal code in 1828, and he had the opportunity to put his juristic ideas and principles into practice after an interval of thirty-two years. It is generally agreed that the code of 1860 was mainly the work of Judge King, the most eminent of Pennsylvania authorities on the law of equity and for years President Judge of the criminal court of Philadelphia county.⁶²

Apart from the specific penalties imposed by the code some of its outstanding features were the following. It was drawn up in an admirably systematic manner, even if some of the divisions may have been too logical and artificial, a fault inherent in all attempts to classify criminal acts. The two most novel and progressive features of the code were the consistent practice of prescribing only the maximum penalty for the several offences and leaving the minimum to be fixed at the discretion of the sentencing court, and the courageous abolition of the monstrous and barbarous distinction between grand and petit larceny, which still remains embalmed in the statute books of many American commonwealths—a curious but oppressive relic of medieval juristic conceptions. The only reactionary anachronism introduced was that contained in the law imposing a penalty for blasphemy. This stipulated that,

If a person shall wilfully, premeditatedly and despitefully blaspheme, or speak losely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth, such person, on conviction thereof, shall be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three months, or either, at the discretion of the court.⁶³

The following were the penalties imposed for the more important crimes. In the field of crimes against the state, *treason* was punished by a fine not exceeding two thousand dollars and impris-

⁶³ *Laws of the General Assembly*, 1860, p. 392.

⁶⁰ "The Revised Penal Code of Pennsylvania," reprinted from *The American Law Register*, August, 1860, pp. 1-2.

⁶¹ "The Revised Penal Code of Pennsylvania," *loc. cit.*, pp. 2-3.

⁶² *Ibid.* It is significant that down to the present time all the great revisions of Pennsylvania criminal law have been primarily the work of some one man in each epoch. The enlightened Quaker codes of the late seventeenth century were prepared by William Penn; the notorious code of 1718 was compiled by David Lloyd, though he cannot be entirely blamed for its contents; the notable revisions of 1786 to 1794 were the work of William Bradford, Jr., inspired by the spirit of Benjamin Rush; the slightly revised code of 1829 was drawn up by Thomas Bradford, Jr., with the aid and advice of Roberts Vaux and S. R. Wood.

onment for a period not to exceed twelve years. *Misprison of treason* was penalized by a fine of not to exceed one thousand dollars and imprisonment for not more than six years.⁶⁴

The following penalties were prescribed for crimes against public morals and decency: *blasphemy*, as above; *sodomy* and *buggery*, a fine not to exceed one thousand dollars and imprisonment for not more than ten years; *bigamy*, a fine of not more than one thousand dollars and imprisonment for not more than two years; *adultery*, a fine of not more than five hundred dollars and imprisonment for not more than one year; *fornication*, a fine of not more than one hundred dollars; *incest*, a fine up to five hundred dollars and imprisonment for not more than three years.⁶⁵

Crimes against persons were dealt with in the following manner: *murder in the first degree*, "death by hanging by the neck"; *murder in the second degree*, imprisonment for not more than twelve years for the first offence and life imprisonment for the second offence; *voluntary manslaughter*, a fine of not more than one thousand dollars and imprisonment for not more than twelve years; *mayhem*, a fine of not more than one thousand dollars and imprisonment for not more than five years; *rape*, a fine of not more than one thousand dollars and imprisonment for not more than fifteen years; *kidnapping*, a fine of not more than two thousand dollars and imprisonment for not more than twelve years; *assault and battery*, a fine of not more than one thousand dollars and imprisonment for not more than one year, both or either at the discretion of the court.⁶⁶

The punishments decreed for offences against personal property were as follows: *robbery*, a fine of not more than one thousand dollars and imprisonment for not more than ten years; *assault to rob*, a fine of not more than one thousand dollars and imprisonment for not more than five years; *larceny*, a fine of not more than five hundred dollars and imprisonment for not more than three years.⁶⁷

The punishment prescribed for offences against real property follow: *burglary*, a fine of not more than one thousand dollars and imprisonment for not more than ten years; *arson*, without a person in the dwelling house, a fine of not more than two thousand dollars and imprisonment for not more than five years, and with a person in the dwelling house, a fine of not more than four thousand dollars and imprisonment for not more than twenty years.⁶⁸

⁶⁴ *Ibid.*, p. 385.

⁶⁵ *Ibid.*, pp. 392-5.

⁶⁶ *Ibid.*, pp. 402-8.

⁶⁷ *Ibid.*, pp. 408-15.

⁶⁸ *Ibid.*, pp. 415-20.

Finally, with respect to offences against the coin and forgery, the following penalties were prescribed: *counterfeiting*, a fine of not more than one thousand dollars and imprisonment for not more than five years; *forgery*, the same as for counterfeiting.⁶⁹

The only capital crime, then, in the code of 1860 was murder in the first degree, as in all codes from 1794 to 1860. A revised code of criminal procedure was also prepared by the commissioners and accepted by the legislature.⁷⁰ In their long and able report the commissioners presented an elaborate exposition, explanation and defence of their work which was of great assistance in securing its enactment into law.⁷¹

That the report and the codes were considered of a high order by authoritative contemporary critics is evident from the following comment in one of the leading law reviews of the time:

The report, as a whole, is a most masterly production, and reflects infinite credit upon the ability, learning, industry, and faithfulness of the Commissioners, and will prove an enduring monument to their fame. It is deserving of careful study in all its details, not only by those who are engaged in the practice of criminal law, but by the legislator, and by all who are interested in penal legislation and the entire subject of crimes and punishments. Pennsylvania may now congratulate herself upon possessing a system of penal laws worthy of her advanced civilization, and adapted to the wants of her extended and varied population.⁷²

VII. THE CONTEMPORARY MOVEMENT FOR A SYSTEMATIC REVISION OF THE CRIMINAL CODE.

While there is little doubt that the laudatory strain in the above quotation was justified, in view of the relative condition and level of criminal jurisprudence at that time, the progress in the level of criminal law in the last half century is evident from the following incisive criticism passed upon this code of 1860 by Professor William E. Mikell, Dean of the Law School of the University of Pennsylvania, one of the most eminent of American authorities on criminal jurisprudence, in general, and on the criminal law of Pennsylvania, in particular:

⁶⁹ *Ibid.*, pp. 420-25.

⁷⁰ *Ibid.*, pp. 427-58.

⁷¹ "The Revised Penal Code of Pennsylvania," *loc. cit.*, pp. 4ff. The complete documentary sources for this revision are contained in the following: *Report of the Commissioners Appointed to Revise the Penal Code of the Commonwealth of Pennsylvania*, Harrisburg, 1860, pp. 129, and *The Penal Laws of Pennsylvania, Passed March 31, 1860*, Harrisburg, 1860, p. 79.

⁷² "The Revised Penal Code of Pennsylvania," *loc. cit.*, p. 26. For a list of the criminal laws repealed by the code of 1860, which constitutes a fair index to the previous criminal law of Pennsylvania, see *Laws of the General Assembly*, 1860, pp. 451-8.

Perhaps, in the true sense of the term, there is no criminal "code" in Pennsylvania. The whole body of criminal law has never been reduced to a written code in this state in the sense in which this has been done in some of the States of the Union in which jurisdictions there are no crimes except those specifically prescribed. . . .

Viewing the code, however, as a whole, there is an utter lack of principle in the grading of crimes as felonies or misdemeanors, either according to the moral heinousness of the offence or the severity of the punishment. . . .

The work of the commissioners who framed the Code of 1860 shows an utter lack of consistent theory not only of grading the crimes as felonies and misdemeanors, but also in grading the punishment fixed for the various crimes. . . .

In the case of almost every crime denounced by the code fine and imprisonment are associated. In most cases the penalty provided is fine and imprisonment, in some it is fine or imprisonment. In a few cases imprisonment alone without a fine is prescribed, and in a few others, it is a fine alone without imprisonment. We seek in vain for any principle on which the fine is omitted, where it is omitted; or for a principle on which it is inflicted in addition in some omitted; or for a principle on which it is inflicted in addition to imprisonment in some cases, and as an alternative to imprisonment in others. . . .

The Pennsylvania code has no general section on attempts, but in a haphazard manner, in providing for some crimes, provides for the attempt to commit the same, and in some cases has no provision for such attempts. A study of those cases in which provision for punishing the attempt is made, shows an entire absence of any theory or principle in assessing the punishment. . . .⁷³

The criminal code of 1860 has never been systematically revised and remains to the present day the basis of Pennsylvania's criminal jurisprudence. It has been modified by many additions and amendments, but these alterations have contributed rather to greater confusion than to clarity and modernity. Professor Mikell also calls attention to this point:

The writer has attempted to point out in this paper some of the more glaring and interesting defects in the code. He has by no means exhausted them. There is a great need for a complete revision of the code. It is a jumble of inconsistent theories; a great many sections are badly drawn, others are obsolete; many are inconsistent, many are in conflict; there is much overlapping due to different acts having been passed at different times covering in part the same subject matter, so that it cannot be told whether a given crime should be punished under one section or another prescribing a different punishment.⁷⁴

⁷³*The Journal of Prison Discipline and Philanthropy*, March, 1918, pp. 89-91.

By 1917 the condition of the penal code of Pennsylvania as regards anachronisms, conflicts and points of confusion had become much like that which existed in 1860, and an act of July 25, 1917, directed the governor to appoint five commissioners to

. . . revise, collate, and digest all the acts and statutes relating to or touching the penal laws of the Commonwealth in such a manner as to render the penal code of Pennsylvania more efficient, clear, and perfect, and the punishments inflicted on crimes more uniform and better adapted to the suppression of crime and the reformation of the offender.⁷⁴

Governor Brumbaugh, accordingly, appointed the commissioners and they are now engaged upon the task of revision which presents an opportunity for constructive and progressive juristic reform unequalled since the days of William Bradford, Jr., as the scientific background of criminal jurisprudence has made more progress since 1860 than it had between the time of Draco and 1860. As a member of the commission charged with the revision, Professor Mikell has given above some notion of the task and at least a slight indication of the promising spirit in which it will be attacked.⁷⁵ The commissioners appointed drafted a revised code, but the Legislature thus far (March, 1923) refused to accept their work and bring Pennsylvania criminal jurisprudence up to the level of modern juristic science and penal practice.

⁷⁴ *Ibid.*, p. 92.

⁷⁵ *Laws of the General Assembly*, 1917, pp. 1188-9.

⁷⁶ The following commissioners were appointed by Governor Brumbaugh to revise the criminal code, Edwin M. Abbott, William E. Mikell, George C. Bradshaw, Clarence E. Coughlin and Rex N. Mitchell.