

1915

Criminal Codes of Pennsylvania

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Recommended Citation

Lawrence Henry Gipson, Criminal Codes of Pennsylvania, 6 J. Am. Inst. Crim. L. & Criminology 323 (May 1915 to March 1916)

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THE CRIMINAL CODES OF PENNSYLVANIA.

THE LAWS OF THE DUKE OF YORK; THE LAWS OF
CHESTER (1682); THE CODE OF 1701; THE
LAW OF 1718.

LAWRENCE HENRY GIPSON.¹

Prior to the assumption of power by the English in what is now Pennsylvania, the Swedes and the Dutch, each in turn set up a government. The Swedish settlement was governed solely under the laws of Sweden, but when the Dutch gained control of the Delaware this was placed under the authority of the director and the council of New Amsterdam. The Dutch organized local governments and set up courts which seem to have been required to deal with only rather trivial matters.² But even this control was not destined to endure, for on March 12, 1664, James, Duke of York, was granted the lands of New Netherlands by the King of England, Charles II, whose forces had triumphed over the Dutch.

For a time after the transference of authority, the Delaware lands were allowed to maintain the authority of their Dutch courts, but in 1676 the district was called upon to enforce the code of laws that had been adopted March 1, 1664 at Hemsted on Long Island. This is known as the Book of Laws of the Duke of York. The preamble to this code states that the measures contained within it were "Collected out of the several laws now in force in his Majesties American Colonies and Plantations." But it was the laws of Massachusetts and New Haven especially that influenced Gov. Nicholls and his associates in the preparing of the code of 1664.³ The following enumeration of the more significant measures that comprise it will illustrate this:

Adultery: Punishment was fine or imprisonment—also a ground for divorce—together with corporal punishment.

Burglary and Highway Robbery: The penalty was branding on the forehead and whipping with an extreme penalty of death.

Capital Laws: These were to deny the true God, to commit mur-

¹Professor of History, Wabash College, Crawfordsville, Ind.

²See Loyd's, *Early Courts in Pennsylvania*, Chap. I.

³Brodhead's, *History of New York* II., 66; N. Y. Hist. Soc. Col. 1869, p. 75.

der, to slay a defenseless with a sword, to kill by lying in wait, to commit bestiality, sodomy or kidnaping, to bear false witness, to commit treason, to invade a town, to curse and smite a parent (for child over sixteen) unless under proper provocation.

Forgery: Offender to stand in the pillory for three court days.

Fornication: The penalty was fine or corporal punishment.

Lying: Offender was to be fined from ten shillings to two pounds or to be whipped or placed in the stocks.

Perjury: If this was done to obtain a double marriage the tongue was to be bored with a red-hot iron and then the offender treated as an adulterer.

The above summarized according to penalties liable to follow will give these results:⁴

Offenses involving the death penalty	12
Offenses involving branding	1
Offenses involving the boring of the tongue	1
Offenses involving corporal punishment	4
Offenses involving stocks	1
Offenses involving pillory	1
Offenses involving imprisonment	1
Offenses involving fines	3

It is unnecessary to point out that this code is mild when compared with the New England codes.

In turning now to the application of the Book of Law which was in force until 1688, it will be found that the records of the court of Upland⁵ which existed for the years from 1676 to 1681 inclusive will shed some light. It was probably a typical community of this district and its records should represent how far it was ordinarily necessary in these early Pennsylvania towns to fall back on the severer sanctions of the law. During these years the court dealt with the following breaches of the law:

Assault and Battery: There were eleven cases before the court and in each instance the offender was let-off with nothing more severe than a fine. These fines were in gilders⁶ and ranged from twenty-five to two hundred and ten.⁷

Fornication: There was one case concerning this. The offender was excused upon promise to avoid the woman in the future and to maintain the child.⁸

⁴The figures for the minor penalties cannot be made exact.

⁵See "The Record of the Court at Upland," Phila. 1860.

⁶It equalled about forty cents.

⁷Record of Upland Court, pp. 50, 60, 70, 59, 177, 180.

⁸Ibid., 50.

Slander: There were five cases of slander, the defendant in each case was either dismissed or obliged to pay a fine of not over twenty gilders.⁹

It will be seen that the offenses were minor and the attitude of the court was uniformly indulgent. The parties were often advised to depart and settle the matter between themselves in a friendly way.¹⁰ There seems to have been a total absence of any real criminal spirit in this community.

THE LAWS OF THE PROVINCE OF PENNSYLVANIA.

On March 4, 1682, William Penn was granted the lands within certain prescribed limits west of the Delaware river. That same year on May 5, a body of laws having been prepared was agreed upon in England. With this as a basis, on the 10th of December at an assembly held at Chester or Upland, the Great Law or Body of Laws for the province was ratified. This became the basis of the later provincial law.¹¹ One provision in the charter that Penn received caused no end of confusion in the early law. By this, it was necessary to submit to the Privy Council within five years after passage a transcript of all laws. Therefore, it often was very difficult to determine what actually was the law.¹² "The texts of acts passed before 1700 must be accepted with considerable reserve and it is difficult to determine just how far the more experimental features were enforced."

In passing now to consider the principal offenses and penalties attached in the Great Law, it will be observed that Penn struck out along quite new lines.

Adultery: This was punished by a public whipping and a year's imprisonment.

Bigamy: The penalty was life imprisonment.

Conscience, Liberty of: All to have this who acknowledged one God and were peaceable.

Counterfeiting: The penalty was three months' imprisonment and a fine of treble the value of the damage.

Drunkenness: There was a fine of five shillings for this.

Duelling: Punished by a fine of five pounds or three months' imprisonment.

False Witness: The penalty was the same as the person against

⁹Ibid., 101, 175, 178, 180, 181.

¹⁰Ibid., records for March 13, '76, June 13, '77, and November 13, '77.

¹¹It is not to be implied that the Duke of York's Laws had no influence upon the permanent provincial law of Penn. See Loyd's "Early Courts in Penn.," 9-10.

¹²See Penn. Col. Rec. I., 18, 23. Loyd's *Early Courts in Pennsylvania*, 51-52. "If within six months the law should be declared inconsistent with the king's prerogative or sovereignty the same should be declared void, otherwise to remain in full force."

whom he witnessed had been liable to, with the loss of the right to testify.

Fornication: Marriage, fine or corporal punishment was to follow.

House Breaking: Penalty was either fourfold satisfaction and three months' imprisonment or seven years' imprisonment.

Incest: Forfeiture of one-half of one's estate, and one year of imprisonment, second offense, imprisonment for life.

Lying: A fine of two shillings and six pence was exacted.

Manslaughter: This was punishable according to the nature of the fact—life and one-half the estate were excepted.¹³

Murder: The penalty was death.

Riotous Sports: For frequenting and practicing, prizes, stage plays, masques, revels, bull baiting, cock fighting, there was a fine and ten days' imprisonment.

Rape: There followed forfeiture of one-third of one's estate with a year of imprisonment; second offense, imprisonment for life.

Robbery: The penalty was fourfold restitution and not over twenty-one stripes, or servitude or commitment to the house of correction.

Stealing: Double satisfaction for living goods with return of the same; and threefold satisfaction for dead goods and not over twenty-one stripes were to follow.¹⁴

Scolding: The penalty was three days' imprisonment. In 1693 it was added that the offender should stand "one whole hour in the most public place where such offense was committed with a gag in their month, or pay five shillings."

Sedition: This was punished by a fine of at least twenty shillings.

Servants: Fines were levied for selling a servant out of the province, harboring or trucking with one; runaway servants were to stay five days for every day away.

Sodomy and Bestiality: Forfeiture of one-third one's estate, whipping and six months in the house of correction was to follow; the second offense involved imprisonment for life.¹⁵

Stock, Stealing: This entailed treble damages; for the second offense, treble damages and six months of imprisonment; for third offense there was to be treble damages, thirty-nine lashes and banishment.

¹³Added in 1683.

¹⁴Changed in 1698 as too mild. Four-fold restitution, not over 21 stripes and wearing the letter "T" on arm for 6 months, with 39 lashes and banishment for second offense.

¹⁵Abrogated by king in 1693.

Swearing: If by God, Christ or Jesus there was a fine of five shillings or five days in gaol; if by another thing a fine of one-half the above.

The relative use of the various penalties recognized in these laws is illustrated as follows:¹⁶

Offenses involving the death penalty.....	1
Offenses involving whipping	7
Offenses involving gagging	1
Offenses involving a badge of shame	1
Offenses involving banishment	1
Offenses involving forfeiture of goods.....	3
Offenses involving imprisonment	14
Offenses involving fines	11

This humane code is remarkable in that it existed side by side with other seventeenth century codes that were loaded down with atrocious punishments for offenses that today are considered exceedingly trivial. Given this code almost paternal in its mildness, was it adequate for the situation? Did the social fabric suffer through the violence of those who did not hesitate to encounter the sanctions of such a body of law. The records of the courts held in Germantown from 1691 to 1707, that is, covering a period of sixteen years should be studied in this connection. As far as the published portions of the records show, the following offenses were dealt with by the court:¹⁷

Assault and Battery: There were three cases recorded. Fines from two to ten shillings were placed.¹⁸

Drunkenness: Four offenders were brought before the court and fines up to five shillings imposed.¹⁹

Hog Beating: This affair was settled by conciliation.²⁰

Horse, Using Without Leave: Two offenders are fined two shillings and six pence.²¹

Menacing or Obscene Language: The court dealt with four cases and fines up to twenty-five shillings were imposed. For menacing a constable a fine of two pounds and ten shillings imposed.²²

Slander: There were two cases and in each the matter was quietly settled with due apologies.²³

The sort of control exercised is shown where the court on one

¹⁶The figures would be simply the minimum.

¹⁷Hist. Col. of Penn. I., 243-258. Only extracts published.

¹⁸Ibid., I., 244, 247.

¹⁹Ibid., I., 252-3.

²⁰Ibid., I., 249.

²¹Ibid., I., 244.

²²Hist. Col. of Penn., I., 252.

²³Ibid., I., 252-3.

occasion after giving George Miller five days' imprisonment for drunkenness, ordered that the constable be paid two shillings "for serving the warrant in case of his laying a wager to smoke above one hundred pipes in one day."²⁴ The records likewise tell how Abraham op den Graeff "did mightily abuse the bailiff in open court," for which he was fined two pounds and ten shillings,²⁵ while Herman Van Bow in the case of hog beating was paid four shillings for the expense of transporting the animal to the sheriff.²⁶ In other words, here is a community free from any real criminal element. During this period there is no record of any serious offense coming before the court of Germantown. Speaking of the Pennsylvania of the seventeenth century an eminent jurist, Judge Pennypacker, says: "Gross crimes did not occur and ferocious punishments were never inflicted. During the period covered by this paper, I have found but one instance of the inflicting of the death penalty and that was for the crime of murder."²⁷

During this period of the seventeenth century only one indictment for adultery has been found;²⁸ for counterfeiting there is but one case in the provincial records;²⁹ for fornication but six cases have been cited,³⁰ in one of which a jury of women was drafted to ascertain the existence of bastardy but were unable to decide, and in another, besides a fine of fifty shillings, the woman, although then married to her co-partner in the offense, was obliged to stand at the whipping post for a quarter of an hour bearing a placard with the inscription, "I heare stand for an example to all others for committing the most wicked and notorious sin of Fornication."³¹

THE CODE OF 1701.

With the year 1700 a new era began in the history of criminal law and procedure in Pennsylvania. The Newcastle code of that year—but which was formally ratified the following year—exhibits marked departure from the Laws of Chester.³² Mutilations, branding and whippings stand out prominently among the other sanctions.³³ When this body of law was submitted to the Privy Council a large number of the acts were repealed by this body in 1705, but in that same year

²⁴Ibid., I., 243, 249, 252.

²⁵See reference 1.

²⁶Ibid., I., 244.

²⁷Pennypacker's *Pennsylvania Colonial Cases*, 179. See this volume for Penn. cases prior to 1700.

²⁸Ibid., 71.

²⁹Penn. Col. Rec. I., 85.

³⁰See Pennypacker's *Colonial Cases*, index.

³¹Rec. of Chester County Court. Hazard's Register, V., 158.

³²See Statutes at Large II., 1-140.

³³The code was drawn up under the direction of Penn.

there was a general re-enactment of the main body of the law.³⁴ The following represent perhaps the more significant changes that the codification of 1700 has to offer over the laws adopted in 1682:

Adultery: From 1700 to 1810 for the third offense there was a penalty of twenty-one lashes, seven years' imprisonment and the branding of the letter "A" on the forehead.³⁵

Arson: This was punished by life imprisonment.³⁶

Assault and Battery: For assaulting a parent six months' imprisonment and thirty-one lashes were inflicted.³⁷

Bigamy: From 1705 the penalty was thirty-nine lashes, imprisonment for life and total or partial confiscation. In 1786 branding was added.³⁸

Burglary: See later act.³⁹

Drunkenness: The same penalty as in 1682.⁴⁰

Duelling: From 1700 to 1779 the fine was twenty pounds or three months' imprisonment.⁴¹

Fornication: From 1700 there was a penalty of ten pounds or of twenty-one stripes or marriage.⁴²

House Breaking: Twenty-one stripes, six months' imprisonment and fourfold satisfaction, or servitude inflicted. If done at night branding with the letter "T" and twelve months in gaol were added.⁴³

Incest: There was a forfeiture of one-third of one's estate.⁴⁴

Murder: Besides death there was the forfeiture of one-half the estate.⁴⁵

Riotous Sports: Practically the same penalties as in 1682.⁴⁶

Rape: This entailed forfeiture of one-third the estate, thirty-one lashes and seven years in gaol. Second offense involved castration and branding the letter "R" on the forehead. For negro raping white, a death sentence.⁴⁷

Robbing: By the law of 1705-6 this was punished by branding

³⁴Fifty-three out of one hundred and four acts were repealed in council. Most of these, however, were re-enacted with modifications.

³⁵Statutes at Large II, 6, 180.

³⁶Ibid., II, 184.

³⁷Ibid., II, 13.

³⁸Laws of Penn. (1810) I, 30, note (t).

³⁹Statutes at Large III, 203-4.

⁴⁰Ibid., II, 99.

⁴¹Ibid., II, 51.

⁴²Ibid., II, 6, 180.

⁴³Ibid., II, 11, 173.

⁴⁴Ibid., II, 8, 179.

⁴⁵Ibid., II, 14, 172.

⁴⁶Ibid., II, 5, 186, 360. A laboring man was fined 20 shillings for playing at games.

⁴⁷Ibid., II, 7, 79, 235, 178. Repealed and when re-enacted in 1703 castration was omitted.

on the forehead the letter "T," with life imprisonment for the second offense.⁴⁸

Scolding: The law of 1700 provided a fine of five shillings or imprisonment for five days at hard labor or standing gagged in a public place.⁴⁹

Swearing: See the act of 1682.

Sodomy and Bestiality: By the act of 1700 this brought life imprisonment, whippings and in the case of a married man, castration.⁵⁰

The above summarized according to the penalties liable to follow will show more clearly the marked change in the character of the laws in force at one time or another in the period between 1701 and 1718, from the laws of 1682:⁵¹

Offenses involving the death penalty	2
Offenses involving branding	5
Offenses involving castration	3
Offenses involving whipping	8
Offenses involving forfeiture	4
Offenses involving servitude	1
Offenses involving gagging	1
Offenses involving imprisonment	12
Offenses involving fines	6

THE LAW OF 1718.

By the Law of May 31, 1718, "An Act for the Advancement of Justice and More Certain Administration Thereof," it was declared—"foras-much as some persons have been encouraged to transgress certain statutes against capital crimes and other enormities," because the statutes of Parliament did not extend to this province—that those committing certain acts should incur the same penalties, disabilities, and forfeitures, as persons incur convicted by the laws of Great Britain.⁵² This law made felonies of death, under certain circumstances: arson, the doing away with a bastard child or concealing the fact of its death, burglary, murder, the malicious mutilation of a man, petit treason, misprison or treason, and in the case of petit treason according to the laws of England the offender was to be drawn and burnt. Besides this, bestiality, manslaughter, rape, robbery, sodomy and witchcraft were made felonies punishable according to the statutes of Parliament.

⁴⁸Statutes at Large II., 175; Ibid., III., 202.

⁴⁹Ibid., II., 85. Repealed in 1705 and not re-enacted.

⁵⁰Ibid., II., 8, 183; III., 202. Repealed and re-enacted in 1705 with castration clause omitted.

⁵¹This does not cover a number of acts involving fines and imprisonment. Other forms of punishment were used at discretion by the courts.

⁵²Statutes at Large III., 199. Laws of G. B. provided death for all these felonies in express words but witchcraft. I. Jas. I. c. 12.

Four years later a law concerning counterfeiting provided that any person forging a provincial note should be set upon the pillory and have both his ears cut off and be publicly whipped thirty-one lashes, pay all damages besides one hundred pounds. In default of payment he was to be sold for a term of not over seven years.⁵³ This law of 1722 might be taken as representing a culminating point, as it were, in the increasing rigidity of the penal legislation in Pennsylvania. For, as a rule, the laws from then on were inclined to be of a milder tone.⁵⁴

In summarizing the offenses according to penalties, incurred for the period following the act of 1722, the following results will appear:⁵⁵

Offenses involving the death penalty	12
Offenses involving branding ⁵⁶	5
Offenses involving loss of ears	1
Offenses involving whipping	8
Offenses involving servitude	2
Offenses involving forfeiture	13
Offenses involving imprisonment	12
Offenses involving fines	5

By the foregoing tables it will be noticed in comparing the laws passed in 1682, in 1700, and in 1718-1722, that the laws become progressively more severe as to their sanctions. This leads to the question as to why it was so. It will not, however, be within the compass of this paper to discuss the various causes that contributed to severer construction of the penal laws in Pennsylvania in the two later periods. The problem that must be dealt with is that of their application and enforcement. How far it was found necessary to apply these remedies is an interesting but difficult question. It will in this case be necessary to depend almost entirely upon the minutes of the Provincial Council, which extend from 1683 down to 1775. "Down until 1685 it was the only court for the trial of serious crimes, when that jurisdiction was conferred on the provincial court."⁵⁷ From then on it was customary for the clerk of the supreme court to deliver into the hands of the council a record of those found guilty of felonious offenses in a

⁵³Ibid., III., 331.

⁵⁴This statement should be understood as not denying the fact of harsh legislation after 1722. In 1762 and in 1772 arson was made capital. For other acts than those found in the law of 1718, see Statutes at Large, chap's 236, 652. In 1780, robbery was made capital, Ibid., chap. 878.

⁵⁵This does not cover a number of acts involving fines or commitment. Ducking was employed occasionally at least later on in the century (Col. Rec. XII., 235), and there is at least one instance of drawing and burning for the crime of petit treason. (See *Penn. Gazette* for Sept. 23, 1731, and also Loyd's *Early Courts in Pennsylvania*, 91. The stocks were employed.

⁵⁶In certain cases those convicted of a felony of death could plead benefit of clergy and receive branding instead. See Statutes at Large III., 207-8.

⁵⁷Charter and Laws of Penn., 165.

superior court. Whenever a court of oyer and terminer was held a jail delivery took place. Under these circumstances the Council sat as a board of pardons and was ready to receive petitions for pardons and reprieves.⁵⁸ In cases of capital punishment, the Council issued a warrant for the same. Therefore, the records of this body should give information as to the more serious offenses committed during the period of its existence.

For sake of convenience and as a basis for comparison this period extending over ninety-two years could be divided roughly into three thirty-year periods. How often and with what result were the sanctions of the law appealed to during each of these periods?

From March 10, 1683, when the Council held its first meeting, until September 27, 1715, or a period of over thirty years, but three offenses of a serious nature according to the records came before the Council, one a case of counterfeiting in 1683,⁵⁹ and two cases of alleged witchcraft in 1683 and 1701 respectively.⁶⁰ In the first case the defendant was fined forty pounds and sentenced to recompense all who should within one month bring in any of the base coin. With reference to the cases for witchcraft, the defendants in each instance were discharged because of insufficient or trivial evidence.

Now taking the next period of thirty years from September 27, 1715 to September 27, 1745, the minutes of the Council indicate that there were among other offenders sentenced by the superior courts one who was condemned to death for arson,⁶¹ fourteen for burglary,⁶² one for counterfeiting,⁶³ six for murder,⁶⁴ two others for causes not stated,⁶⁵ and one "for divers horrid, complicated crimes,"⁶⁶ making a total of twenty-four at least who were convicted of capital crimes.⁶⁷

During the last period from September 27, 1745, to September 27, 1775, there is record that thirty-nine at least were condemned to death for burglary;⁶⁸ seven were convicted of counterfeiting, five of

⁵⁸See Penn. Col. Rec., V., 155, for a good illustration of the procedure.

⁵⁹Ibid., I., 29, 24, 8mo, 1683 and p. 32.

⁶⁰Ibid., I., 40, 27, 12mo, 1683; II., 20, 21, 3mo, 1701.

⁶¹Ibid., IV., 243-4.

⁶²Ibid., III., 109-10, 240, 370, 390, 591; IV., 47, 329-330. The first case in which the convicted actually suffered death after condemnation for burglary was in 1736. See Col. Rec. III., 47.

⁶³Penn. Col. Rec. III., 109-10. This was the first instance in which the death penalty was enforced for counterfeiting in Penn.

⁶⁴Ibid., III., 30, 45, 429.

⁶⁵Ibid., III., 193.

⁶⁶Ibid., III., 193.

⁶⁷For instance, in 1731 a woman for petit treason was drawn and burnt. See Penn. Gazette, Sept. 23, 1731.

⁶⁸Penn. Col. Rec. V., 155-6, 506, 601; VIII., 336; IX., 173-4, 244, 334, 513, 549, 626, 666, 734; X., 56, 61, 94, 172, 228, 258.

whom were condemned to death;⁶⁹ five were sentenced for horse stealing, three of whom were condemned to death;⁷⁰ eleven were convicted of murder,⁷¹ and four condemned to die for rape, giving a total of sixty-two who were convicted of felony of death offenses during this period.⁷²

But while the judges were doing their duty in enforcing the law strictly, the provincial council was apt to act on the side of clemency. Many with a death sentence hanging over them were reprieved and banished or given an unconditional pardon. As an example of this tendency there were five recorded instances in which women were condemned to death for the murder of bastard children, but in no case was the sentence carried out.⁷³ Of the fifty-three criminals sentenced for burglary under the law of 1718, it would appear that warrants were issued for the execution of but twenty-two, of the ten convicted counterfeiters, three were hung; and of the five horse thieves, one suffered death.

A COMPARISON OF THE CRIMINAL LAW OF COLONIAL CONNECTICUT AND PENNSYLVANIA.

The two preceding chapters have summarized the most salient features of the criminal codes in force at various times in Connecticut and Pennsylvania during the colonial period. The present chapter will be devoted to an analysis of these bodies of law in an endeavor to grasp what significance may lie in their application and evolution. In making a comparison of the criminal law in these colonies it will be important to take into consideration the sources of these codes, their dependence for validity upon the will of the king of England as expressed in his Privy Council, the extent to which the colonies applied the laws of Great Britain, the manner of administering justice, and the comparative severity of the law as it was applied from time to time in either colony with the direction of its evolution.

As has been previously pointed out, Massachusetts furnished an ideal for the colonies in Connecticut. But in some respects the latter really surpassed her in willingness to depart from the common law and set up the Mosaic law as the ultimate source of all justice. "If possible these colonies departed even further than Massachusetts from the common law in their system of popular courts, absence or radical modification of the jury trial, discretion of the magistrate, and in the

⁶⁹Ibid., III., 109-10; V., 119, 125, 268; IX., 666; X., 50, 172, 257-8.

⁷⁰Ibid., V., 75, 104. The earliest instance was in 1756; Ibid., VII., 172.

⁷¹Ibid., V., 294, 621; VIII., 336; IX., 384, 387, 549, 601; X., 172.

⁷²This is a minimum number.

⁷³See Statutes at Large, Chap. 236, Sec. 5. (12) Penn. Col. Rec. X., 43-4.

case of New Haven, that clear and unequivocal assertion of the binding force of divine law as a common law in all temporal matters, as a guiding rule in civil and criminal jurisdiction."⁷⁴

TABLE No. I.

A TABLE ILLUSTRATING THE COMPARATIVE SEVERITY OF THE CONNECTICUT AND PENNSYLVANIA CODES.

OFFENSES INVOLVING	Conn. of 1650	N. Haven of 1656	D. of York's 1664	Chester of 1682-3	Penn. of 1701	Penn. of 1718-22	Conn. of 1784
Death.....	16	18	12	1	2	12	5
Branding.....	2	2	1		5	5	3
Boring of Tongue.....		1 (Law of 1658)	1				
Nailing of Ears to Pillory.....							1
Loss of Ears.....	2					1 (Law of 1722)	
Castration.....					3		
Whipping (1).....	7	4	4	7	8	8	13
Forfeiture.....				3	4	13	3
Banishment.....		1		1			
Servitude.....		1			1	2	
Gagging.....				1	1		
Badge of Shame.....	1	2		1			3
Pillory (1).....	1	1	1				2
Stocks (1).....	3	2	1				1
Imprisonment.....	1	3	1	14	12	12	5
Fines.....	22	17	3	11	6	5	11

(1) It should be understood that the magistrates exercised in both of these colonies large powers of discretion with reference to the choice of a minor penalty. Although not mentioned in the codes, ducking, the stocks and pillory were employed in Pennsylvania.

In examining the Code of 1656, the desire of the New Haven settlers to adhere to the letter of the Pentateuch in organizing the government and administering the law is shown through the fact that with every important regulation is joined the appropriate citation from the Mosaic law as the ultimate source of authority. This followed the plan in the Massachusetts *Body of Liberties*.

Under the Duke of York, the law applied in what later was Pennsylvania was largely inspired by the codes of Massachusetts and New Haven. But with the coming of Penn a new era began in the legal system of that region. Out of his own bitter experiences with the English law came certain conceptions of justice which he hoped

⁷⁴Reinsch: Colonial Common Law, in Select Essays in Anglo-American Legal History I., 387.

to see realized in the new world.⁷⁵ While still in England, he had drawn up a fundamental body of laws and the Great Law of Chester adopted in 1682 was expressive of these juristic ideals. The code

TABLE No. II.

TABLE ILLUSTRATING THE PUNISHMENT OF SPECIFIC OFFENSES IN THE CONNECTICUT AND PENNSYLVANIA CODES.

Key. Only the more serious punishments are here considered. Where the law provides different punishments according to the gravity of the offense, each is indicated. (B) for banishment; (D) for death; (F) for forfeiture; (M) for mutilation, branding, castration, boring with hot iron, etc.; (S) for servitude; and (W) for whipping, which is often but a phase of a more drastic penalty.

OFFENSES INVOLVING	Conn. 1650	New Haven 1656	York's 1664	Chester 1682-3	Penn. 1701	Penn. 1718- 1722	Conn. 1784	Penn. 1786
Adultery.....	D	D			M	M	M	
Arson.....					D-F			D
Bastard, concealing death.....						D-F		
Bestiality.....	D	D	D	F	M	D-F		
Blasphemy.....	D	D						
Burglary.....	M or	M or	M or		W. B. or S	D-F	D	D
Cursing Parents.....	D	D	D					
Denying God.....			D					
False Testifying.....	D	D	M or D				M	
Idolatry.....	D	D						
Incest.....		D			F	F		
Kidnapping.....	D	D	D					
Manslaughter.....					D-F	M-F		
Misprison of Treason.....						D-F		
Mutilation of Another.....						D-F		
Murder.....	D	D	D	D	D-F	D-F	D	D
Perversion by Woman.....		D						
Petit Treason.....						D-F		
Profanation.....		D						
Rape.....	D	M (?)			F, M or D	D-F	D	D
Rebellion.....	D	D						
Robbery.....	M	M or D		B	M	D-F	D	D
Slaying by Lying in Wait.....			D					
Slaying Thru Anger.....		D						
Slaying Thru Guile.....	D							
Slaying With a Sword.....			D					
Sodomy.....	D	D	D	F	M	D-F		
Stubbornness by Child.....	D	D						
Treason.....	D	D	D				D	
Witchcraft.....	D	D				F		

⁷⁵See Clarkston: *Memoirs of the Private and Public Life of William Penn.*

was an extreme departure from the spirit of the laws both of Great Britain and of New England. If, as was true, the source of the New England law was the Pentateuch it might almost as truly be said that the source of Penn's code of 1682 was the Sermon on the Mount. The accepted theory that the colonists brought with them and adopted so much of the common law as was applicable to their condition is not wholly borne out by the facts,⁷⁶ and it would seem that Penn had an actual repugnance for the common law severities.

Accepting the view that neither the early Puritan codes nor the first of the Quaker codes was inspired by the common law, it is important to determine, if possible, how far English law was regarded as a subsidiary system when not replaced by colonial statutes. The early codes of Connecticut colony proper are not explicit as to what law shall hold in cases not provided for by colonial legislation but the New Haven Code of 1658 definitely directs that all matters which may come up that are not covered by the laws of the colony shall be decided according to the word of the Scripture.⁷⁷ However, later on in Connecticut, when the vigor of the early Mosaic ideal waned, there was at work a tendency to recognize here and there the binding force of the common law, so that in the latter part of the eighteenth century it was laid down with apparent general approval that "the common law of England we are to pay great deference to, as being a general system of improved reason and a source from whence our principles of jurisprudence have been mostly drawn."⁷⁸ The English statute law, however, was not applied in Connecticut.⁷⁹ But in turning to Pennsylvania the case is different. According to the terms of the charter granted to Penn by Charles II., it was provided that the laws of property and of crimes in the province should be the same as the laws of England until altered by the proprietor.⁸⁰

But the Quakers showed great reluctance in the earlier period about applying the harsh sanctions set up by the mother country and hence busied themselves with law-making and otherwise set themselves against the application of the laws of Great Britain, declaring through their superior court that English statute law could not be applied.⁸¹ This sentiment gradually passed away and in the next century by the Act of May 31, 1718, a large body of English law was

⁷⁶Loyd: *Early Courts in Pennsylvania*, 13. For an opposite view see Story, J., in *Van Ness v. Packard*, 2 Peter's Reports (U. S.) 144 (1829).

⁷⁷See the N. H. Col. Rec. II., 575.

⁷⁸Wilford v. Grant in 1 Kirby's Reports (Conn.) 114.

⁷⁹See Documents relating to the Colonial History of N. Y., Vol. 31 (1707).

⁸⁰See Penn's charter in Laws of Duke of York.

⁸¹For further facts see Sharswood: *The Common Law of Pennsylvania*, in the Penn. Bar Assoc. Rep. I., 332-6.

expressly made applicable to Pennsylvania, "because the statutes of Parliament did not extend to this province." Thus it came about that both the English statute and common law were made use of by provincial Pennsylvania.⁸² But while Pennsylvania became thus dependent upon English law, Connecticut, according to Quarry in 1707, was virtually independent of England in all legal matters, exercising her own will about the application of any body of outside law.⁸³ And in another respect Connecticut was advantageously situated in comparison to Pennsylvania, for the latter colony was obliged to submit all laws to the Privy Council for ratification.⁸⁴ This should constantly be kept in mind when making any observation with reference to the criminal law in force in Pennsylvania. Connecticut could follow her own natural tendencies in legal matters, while the law enforced in the Pennsylvania colonial courts was either such law as was agreeable to the sentiment of those in authority in England or the English law itself.⁸⁵ This, needless to say, had a powerful influence upon the character of the criminal law of Pennsylvania. The mere fact that over one-half of the laws embraced in the code adopted by the colony in 1701 were disallowed by the Queen in Council in 1705-6 shows that there was apt to be much uncertainty on the part of provincial authorities as to how far they would be allowed to carry out their own ideas as expressed in law. And, apparently in despair, in 1718 they accepted a large body of English statutory law.

In the criminal procedure of the courts in the two colonies, marked contrasts are evident. This is especially true when comparing with Pennsylvania New Haven colony before its absorption by Connecticut. In the latter there was neither trial by jury nor any right of appeal from the decision of the General Court, in the former colony trial by jury was customary but not imperative, should the parties elect to leave the case to the bench.⁸⁶ The right to appeal to the Privy Council was also enjoyed by those living in the proprietary colony and often those condemned sought pardon or reprieve from that body. No such hope lay with the convicted in the Puritan colony. The Pennsylvania courts in the seventeenth century employed conciliation⁸⁷ and for a time enjoyed a unique institution connected with the court called the "common peace-makers" who were yearly appointed

⁸²See Statutes at Large III., 199.

⁸³See his report to the House of Lords, printed in Documents Relating to the Col. Hist. of N. Y., Vol. 31.

⁸⁴See Penn's charter in Duke of York's Laws.

⁸⁵In practice, laws disallowed were frequently re-enacted with the slightest changes. See Statutes at Large II. for examples.

⁸⁶See *Proprietor v. Wilkins* in Pennypacker, 89.

⁸⁷See Upland Court Records for the following dates: March 13, 1676-7, June 13, 1677, and Nov. 13, 1677.

by the judges. Their arbitrations according to the laws were to be as valid as the judgments of the courts of justice.⁸⁸ The following case for assault and battery in the Chester county court in 1687 will illustrate the type of awards rendered by these peace-makers: "Samuel Rowland shall pay the lawful charges of this court, and give the said Samuel Baker a Hatt and so discharge each other of all manner of differences from the beginning of the world to the present day."⁸⁹ The "common peacemakers," however, gave way before the eighteenth century to a system of arbitration. Since then arbitration has prevailed in Pennsylvania as a permanent feature of her legal system. The rigidity with which the law was enforced in Connecticut gave little opportunity for conciliation or arbitration to get a footing.

Given the peculiar legal procedure in each colony as above described, what distinctions existed between the character of the laws passed by Connecticut and Pennsylvania? Certainly from the modern point of view Penn's Great Law of Chester was by far the most enlightened. There is a total absence of that spirit of revenge which seems to have been a mainspring of the criminal legislation of that period. A striking comparison can be made between it and another seventeenth century code, the body of law adopted by New Haven in 1656. According to the former, murder alone was declared capital,⁹⁰ but the New Haven code contained eighteen offenses which could entail this penalty. The Great Law, in addition, did not recognize branding, the boring of the tongue with a red hot iron and the loss of ears as proper forms of punishment; whipping was the only severe bodily punishment that could be generally employed in serious cases; banishment was authorized for one offense; forfeiture, for three; while imprisonment for life became an extreme penalty for three of the high crimes. Blasphemy, idolatry, kidnaping, the cursing of a parent, the stubbornness of a child, profanation of the Lord's day and witchcraft drastically dealt with in New Haven colony were scarcely considered in the Great Law,⁹¹ which, however, was concerned with counterfeiting, duelling and incest—crimes that in turn were unnoticed by the Puritan code. Such Connecticut laws as those against heresy, inveigling, the keeping of bachelor house, the smoking of tobacco, the giving of hot water in quantity, the drinking of more

⁸⁸Created by an act in 1683. 71 Duke of York's Laws, 133.

⁸⁹Baker v. Rowland. Chester Co. Rec., 3 days, 1 week, 8 mos., 1687. Quoted by Lewis in *Pennsylvania Courts of the Seventeenth Century*, Penn. Bar Assoc. Rep. I., 365.

⁹⁰According to Penn's charter, treason and murder could not be pardoned by the provincial council.

⁹¹The Code of Chester provided that profanity was to be punished by a fine of 5 shillings or 5 days in gaol.

than one-half pint of wine, have no counterparts in the Quaker proprietary legislation, but the law of the latter providing for the gagging of scolds was not contained in the New Haven code or that of Connecticut.⁹² It is evident from the above that the Puritans went much further than the Quakers in attempting to regulate the habits of individuals. Intolerance of all manner of nonconformity whatsoever was expressed in the legislation of the former while the latter practically limited themselves to checking those acts on the part of individuals which today are generally considered a menace to public morals or safety. The Puritan by the law of 1682 could maintain undisturbed his peculiar views if he lived in Pennsylvania, but a Quaker in 1658 who talked of his brotherly love in New Haven might run the risk of having his tongue bored through with a red hot iron.⁹³

At the end of the seventeenth century very important changes took place in the laws of Pennsylvania. Penn's remarkable code of 1682 gave way to a code which exhibited an altogether different spirit. Adultery, housebreaking, rape and robbery were punished with branding; rape, bestiality and sodomy might entail castration, and the raping of a white by a negro was a capital crime. The law passed in 1718 went much further, placing twelve offenses in the list of capital crimes and providing for forfeiture with thirteen enumerated felonies,⁹⁴ while two years later counterfeiting was made punishable by the loss of the offender's ears. In fact, the law of Pennsylvania became in some respects as severe if not more severe than the far-famed Blue Laws of New Haven. While blaspheming, false witnessing, idolatry, the cursing of a parent, the stubbornness of a child, kidnaping and profanation did not gain recognition as heinous offenses in the laws of provincial Pennsylvania, the Law of 1718 made certain crimes capital which were not specifically mentioned in the early Connecticut codes: viz., arson, concealing the death of a bastard child, manslaughter,⁹⁵ petit treason, misprison of treason, and the stabbing of a man when lying in wait. Counterfeiting, also not mentioned in the laws of the latter, was held to be high treason in Pennsylvania by the court in 1720, several suffering death thereby, although the law of

⁹²The Duke of York's Laws provided for a fine of 12d. for smoking on the streets, the fines to go for buying fire buckets.

⁹³See Duke of York's Laws for laws passed at Chester in 1682 regarding liberty of conscience; N. H. Col. Rec. II., 238-41.

⁹⁴The penalties were provided by the following English statutes: 1 Jas. I. c. 11, Vol. 7; 5 El. c. 17, Vol. 6; 16 Car. I. c. 4, Vol. 7; 22 & 23 Car. 2. c. 1, p. 7, Vol. 8; 12 H. 7 c. 7, Vol. 4; 18 El. c. 7, Vol. 6; 5 & 6 Ed. 6 c. 10, Vol. 5; 1 Jas. 1 c. 12, Vol. 7.

⁹⁵Manslaughter is mentioned in the Code of 1650, but only to exonerate the accused under certain circumstances. Con. Col. Rec. I., 539.

1722 provided for the loss of the ears of the offending party.⁹⁶ In Pennsylvania burglary, bestiality, murder, robbery, rape and sodomy were made felony of death offenses, which not only brought death but a forfeiture of goods. This was not true with reference to New Haven, where forfeiture was not employed.⁹⁷ Burglary and robbery in New Haven were only punished by death at the third conviction, while rape was not a capital crime. From the above facts it appears that Pennsylvania had at one time a much milder, and at another time, in many respects a severer, code than existed in colonial Connecticut.

The direction of the evolution of the criminal law in Connecticut during the colonial period has been illustrated through the code that was in force at the close of the period. In Pennsylvania the progress of the law in the direction of greater harshness has been traced, and it now remains to show what tendencies it developed during the latter part of the eighteenth century. This will serve as a basis of comparison with the later criminal law of the former colony.

Arson, according to the law of 1718, was made a capital felony, and in 1772 the provisions of this act were extended to apply to the burning of the State House or a church;⁹⁸ but by 1810 punishment was regularly commuted to confinement at hard labor; burglary, made a felony by the law of 1718, was by 1810 regularly commuted to confinement at hard labor;⁹⁹ murder, by an act of 1780, no longer entailed forfeiture;¹⁰⁰ manslaughter, a felony of death offense in 1718, was in 1780 punished by imprisonment for not over two years and by a fine at the discretion of the court;¹⁰¹ rape was in 1810 still punished according to the law of 1718;¹⁰² robbery, a felony by the law of 1718, was by a law of 1780 made a capital offense;¹⁰³ sodomy and bestiality in 1810 were punished by confinement at hard labor, while the law of 1705 concerning incest, which involved forfeiture of one-third of one's estate, remained in force until 1860.¹⁰⁴

The examination of the Connecticut code of 1784 showed much the same departure from the spirit of the earlier laws. In the case of each colony imprisonment for long periods at hard labor took the place of the death penalty in a majority of instances, and in the case

⁹⁶See Penn. Col. Rec. III., 109-10, and Chapter II of this paper.

⁹⁷The term *forfeiture* in the New Haven code means a simple fine. As an example, for gaming the offender was to forfeit 5s. and for inveigling, 40s.

⁹⁸Laws of Commonwealth of Penn., Chap. 652.

⁹⁹Ibid., Chap. 1505.

¹⁰⁰Ibid., Chap. 778.

¹⁰¹Ibid., Chap. 778.

¹⁰²Ibid., I., 133.

¹⁰³Ibid., Chap. 978.

¹⁰⁴Statutes at Large II., 121.

of Pennsylvania forfeiture as a penalty was falling into disuse. But branding was resorted to by both colonies up until a late date. By a law of 1786 Pennsylvania held that bigamy should be punished by branding on the hand in addition to thirty-nine lashes and imprisonment for life, while in Connecticut adultery, bigamy and manslaughter entailed branding, and perjury was punished by nailing the ears to the pillory. But the days of the petty regulation of the habits of the people had passed away and the laws of these colonies at the close of the period were rapidly converging by reserving respectively their sanctions not for offenders of moral and religious customs which are personal rather than general in their effects, but for those who by fraud or violence strike at the general social order. In the case of Pennsylvania it was a slow swinging back toward the spirit of the code of Chester.

Criminal legislation as a rule takes place, not so much in anticipation of certain contingencies but in order to grapple with a certain situation, or to prevent the repetition of certain acts that have lately transpired. The surprising growth in the severity of the criminal law in Pennsylvania came through an endeavor on the part of Penn and his successors to control a situation that year by year seemed to become increasingly serious. From prosecuting cases of larceny, slander, swearing, Sabbath breaking, assault and battery, drunkenness, the selling of rum to Indians, and immorality, which apparently constituted almost the only types of offenses in seventeenth century Pennsylvania,¹⁰⁵ the authorities at the close of that century and from then on were called upon to deal with burglaries, counterfeiting, highway robbery, petit treason, horse stealing, rapes, homicides, infanticides and murders. Pennsylvania was called in 1698, "Ye greatest refuge and shelter for pirates and rogues in America."¹⁰⁶ Penn wrote about this time that he had heard that no place was more overrun with wickedness than Philadelphia where things were done "so very scandalous, openly committed in defiance of law and virtue, facts so foul, I am forbid by common modesty to relate them." Indeed, there is some significance in the fact that both Connecticut and Pennsylvania were led in the eighteenth century to make robbery punishable with death in the first instance, that each maintained rape as a capital offense and that Pennsylvania punished counterfeiting as high treason and in 1718 fell back upon the terrible penalties of the English law. In other words, it is hard to escape the conviction that there existed a criminal element and a criminal spirit in these communities in the eighteenth

¹⁰⁵See Pennypacker: *Pennsylvania Colonial Cases*, 179. Lewis: *Pennsylvania Courts in the Seventeenth Century in Penn. Bar Assoc. Rep. I.*

¹⁰⁶*Col. Rec. of Penn. I.*, 519.

century which was not in evidence during the early decades of their existence. The early Puritan and Quaker communities exhibited a good deal of naughtiness oftentimes of a disgusting nature, but as time passed they came to harbor notorious offenders whose atrocious crimes were often limited simply by the degree of opportunity for perpetrating them.

The following is a summary of the more important conclusions that seem to be justified from a comparative study of the criminal law of colonial Connecticut and Pennsylvania.

1. The early Connecticut codes attempted to regulate many of the most personal habits of thought and action and provided unusual punishments for violations.

2. The New Haven code of 1656 was the most drastic body of law enacted in colonial Connecticut.

3. New Haven colony, in addition, more rigidly applied its law than did its sister Puritan colony of Connecticut.

4. The most enlightened code to be found in either colonial Pennsylvania or Connecticut was Penn's code adopted in 1682.

5. The criminal law of Pennsylvania after 1718 was in many respects harsher than the law established at any time either at New Haven or at Hartford.

6. The severe sanctions introduced into the Puritan and Quaker codes, at various times, perhaps checked to some extent, but did not prevent, the perpetration of crime.

7. There appears to have existed in eighteenth century Pennsylvania and probably also in Connecticut of that period a criminal element and a criminal spirit that was not in evidence in these colonies during the seventeenth century. In the case of Pennsylvania, it is difficult to escape the conclusion that there was an actual, almost progressive, increase in the general spirit of lawlessness and violence down to the time of the Revolution.

8. Puritanism had a more tenacious hold upon the public life of Connecticut than did Quakerism, in Pennsylvania. In the latter colony throughout the eighteenth century, the Quaker element seems to have been submerged by an influx of population which refused to be controlled by such legal arrangements as expressed the ideals of this sect.

9. However, by the beginning of the nineteenth century it had become clear that the principles underlying the Quaker codes rather than those which had animated the Puritan codes, must ultimately triumph not only in Pennsylvania and in Connecticut but throughout the American nation. This already has been largely brought about by reason of the powerful modifying and tempering influence that these principles have exerted upon the English common law.

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