‘An Extraordinarily Beautiful Document’: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment

Jutta Brunnée and Stephen J. Toope

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“An Extraordinarily Beautiful Document”:
Jefferson’s Bill for Proportioning Crimes and Punishments and
the Challenge of Republican Punishment

Markus Dirk Dubber

Introduction

It is generally supposed that the American Revolution spawned a wave of humanitarian reforms of the criminal law in light of the animating principles of the Revolution, notably a deep respect for the rights of individuals, including those convicted of crime, and a republican commitment to the ideal of self-government. That was not the case.

In fact, the Founding Fathers showed no interest in the criminal law as a problem of governmental power, though they did have occasion to consider its usefulness in suppressing dissent in the young republic. They instead took the power to punish for granted, as an obvious aspect of the states’ all-encompassing power to police their internal affairs. There was no republican theory of criminal law, no American criminal law that shed the deeply hierarchical and preconstitutional nature of English criminal law in favor of enlightened, or at least revolutionary, principles of justice. American criminal law instead remained a vestige of a quasi-patriarchal system of criminal law, in which the sovereign disciplines wayward members of his state household if, and as, he sees fit, without meaningful constraints on his punitive discretion.

There was no American Beccaria, no American Bentham (or Eden), no American Feuerbach, not even an American Voltaire. While there were occasional calls for criminal law reform, they rarely went beyond vague urgings to move beyond the proverbial “Bloody Code” of England. Actual changes in the law were limited to reducing the number of capital offenses (from 180 or so to a dozen or a handful, depending on the state) and then building prisons to house the convicts whose lives were spared as a result.

No comprehensive vision of a republican criminal law was ever laid out. Even the meager proposals to restrict, but not to eliminate, capital punishment were oddly divorced from the political ideals of the American Revolution. They were unoriginal, arepublican, and ultimately apolitical. They added nothing to the ideas, or the specific reform proposals, that had become commonplace in Europe—including in England itself—since at least the mid-18th century. The one explicit provision in the bill of rights dealing with the problem of punishment, the Eighth Amendment’s prohibition against “cruel and unusual punishments,” adopted without debate and repeated as constitutional “boilerplate” in state constitution after state constitution, was lifted straight from the English Bill of Rights of 16891 (which itself was based on Magna Carta2), a source that

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1 Professor of Law & Director, Buffalo Criminal Law Center, SUNY Buffalo. Thanks to Rob Steinfeld for many helpful discussions and suggestions.

2 Compare “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (English Bill of Rights) with “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (8th Amendment). The Eighth Amendment was not the only provision in the Bill of Rights to be adopted without debate. See Leonard Levy, Origins of the Fifth Amendment 411 (1968).
not only predated the American Revolution but was as English a document as could be found. And whatever theoretical veneer was used to cover the pedestrian, uninspired, and unambitious reform proposals of the time consisted of unexplored citations to Beccaria’s bestseller On Crimes and Punishments, which first appeared in 1764, and soon appeared in several English translations. No effort was made to connect Beccaria’s deterrence theory of punishment to republican principles. No suggestion was made that his views on criminal law were either particularly suited to American political ideals or, for that matter, inconsistent with the English system, or any other monarchy, however despotic and however devoid of anything resembling Magna Carta. (Bentham, the obsessive English systematizer of Beccaria’s thought, certainly didn’t find any such inconsistency, nor did P.J.A. Feuerbach, the drafter of the influential and deterrence-based Bavarian criminal code of 1813.)

Proposals for criminal law reform in the early republic, however, were not only unoriginal and arepublican. More important, they were apolitical. To the extent that those convicted of criminal offenses—as opposed to, say, criminal suspects, who did enjoy various procedural protections (see, e.g., amendments IV-VI to the federal constitution), all of which, however, were also unoriginal and arepublican in that they were, quite consciously, taken from English common law, as the rightful extension of the full rights of Englishmen to Americans, who had been shamelessly denied these rights by a corrupt monarch/parliament for too long—attracted the attention of reform minded Americans, they were regarded as objects of pity, rather than as legal subjects. Religion was, in the end, the driving force behind actual reform. While Magna Carta and Beccaria might appear in general calls for criminal law reform, the main engine behind the construction of prisons, the most visible change in American criminal law after the revolution, was Christian benevolence, not a sense of justice. What little American criminal law reform there was, was a private act of Christian charity, rather than a public performance of political obligation. It was not a recognition of offenders’ individual rights, or of principles of equal justice, but sprang from the belief that those wretched

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2 Magna Carta ch. 20 (“A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his livelihood, and a merchant in the same way, saving his merchandise, and a villein shall be amerced in the same way, saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.”); see also id. chs. 21-22. The ius commune of the time apparently also recognized proportionality and the offender’s resources as considerations relevant for the imposition of fines. R.M. Helmholz, Magna Carta and the ius commune, 66 U. Chi. L. Rev. 297, 326-27 (1999).


4 For a typical example, see William Bradford’s well-known 1793 Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania: ‘The general principles upon which penal laws ought to be founded appear to be fully settled. Montesquieu and Beccaria led the way in the discussion . . . . [A] remarkable coincidence of opinion, among the enlightened writers on this subject, seems to announce the justness of their conclusions: and the questions which still exist are rather questions of fact than of principle.” William Bradford, An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania 3 (Philadelphia: Dobson 1793); see also Report of the Board of Inspectors of the Prison for the City and County of Philadelphia in the Year 1791, at 54 (Beccaria’s “opinions have the force of axioms in the science of penal law”); see generally Paul Spurlin, Beccaria’s Essay on Crimes and Punishments in eighteenth-century America, 27 Studies on Voltaire and the Eighteenth Century 1489 (Geneva: Institut et Musée Voltaire 1963).
creatures who, succumbing to the temptations of sin or (particularly in the case of, some, debtors) merely falling on hard times, committed crimes were God’s children, too. The central institution in the reform of American criminal law in the late 18th century was not the government (state or federal), but the Philadelphia Society for Alleviating the Miseries of Public Prisons. The main proponents of reform were not republicans (or federalists), nor Whigs (or Tories)—they were Quakers (and members of a smattering of other Christian denominations, including Unitarians and Methodists); they were not affiliated with political parties but with churches.

Most notable, however, is not that American criminal law reforms in the wake of the revolution were unoriginal, arepublican, and apolitical—but that they were largely nonexistent. They were nonexistent precisely because the question of state punishment for crime was regarded as neither political, nor republican, nor original. While the European enlightenment recognized that the invention of autonomy, and the discovery of the self-governing subject, required a new justification for punishment, the American revolutionaries who announced the birth of a new American science of politics based on the ideal of self-government, continued to view punishment as an entirely unproblematic exercise of sovereign power over offenders who were literally at the mercy of the state. The same revolutionaries who went to war under the banner of “no taxation without representation” denied convicted offenders the vote. The same revolutionaries who railed against outlawry, attainder, and “corruption of blood” in English law, and included an explicit prohibition of bills of attainder in the federal constitution, had no qualms about retaining provisions disenfranchising criminal offenders. Between 1776 and 1821, eleven state constitutions explicitly denied persons convicted of certain offenses the right to vote. By 1868, that number had grown to twenty-nine.

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5 U.S. Const. art. I, sec. 9. Note, however, that this provision is generally interpreted as motivated by separation of powers concerns, rather than as a protection of offenders’ rights. On this reading, it was legislative attainders that the drafters meant to prohibit, rather than attainders in general (and judicial ones in particular); bills of attainder were prohibited, not attainder itself. United States v. Brown, 381 U.S. 437, 440 (1965) (“an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature”).

The Founding Fathers’ rejection of attainder also was not as categorical as one might think. While Jefferson’s Bill for Proportioning Crimes and Punishments in Cases Hereofore Capital, to be discussed in greater detail below, provided that “[n]o attainder shall work corruption of blood in any case,” it did not reject attainder in all cases. In fact, Jefferson himself in 1778 drafted a bill of attainder against “a certain Josiah Philips labourer of the parish of Lynhaven and county of Princess Anne” for treason, providing that “it shall be lawful for any person with or without orders, to pursue and slay the said Josiah Philips and any others who have been of his associates or confederates at any time . . . , or otherwise to take and deliver them to justice to be dealt with according to law provided that the person so slain be in arms at the time or endeavoring to escape being taken.” See The Papers of Thomas Jefferson, vol. 2, at 189-93, 506-07 (Julian P. Boyd, ed., Princeton: PUP 1950).

Police and Law

To appreciate how Americans of the early republic thought—or did not think—about the question of state punishment, it is helpful to invoke two modes of governance that were prevalent in political thought at the time, but fell from view over the course of the nineteenth century: police and law. Americans conceptualized punishment as a question of police, rather than of law. Punishment as an exercise of the power to police, however, was not subject to the principles constraining government through law. The principles often bundled under “the rule of law” did not apply to state action in general, but to state action in the form of law. Police actions, by contrast, were by definition, and often by design, exempt from these principles, which ultimately derived from a political conception that viewed the state as the guarantor of the rights of its autonomous constituents, who consented to the exercise of state power against themselves.

At the time, law and police represented two distinct, and radically different, modes of governance. Police was thought of as the householder’s authority over members of his household reproduced constructively at the level of the political sovereign, regarded as the pater patriae, governing the state as his quasi-family. In Blackstone’s definition, quoted word for word in scores of American texts, including court opinions, until the 1960s, “the public police and oeconomy” meant

the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.7

Law, by contrast, was thought to consist of those abstract rules that govern the relationship among equal persons, or citizens. This was a revolutionary and potentially radical notion. The sovereign-as-pater familias who guides, and corrects, his familia was no longer. The “head of state” was removed, leaving the body to govern itself or, more precisely, leaving the body to govern itself under the rule of law. “In America, the law is king,” in Thomas Paine’s words.8

From the perspective of police, then, punishment appears as a question of household discipline, employed by the superior sovereign against his inferior disobedient subject. As such, it is—at best—subject to self-imposed and -policed limitations of prudence, expedience, and perhaps mercy, but not of justice.9

8 Thomas Paine, Common Sense (1776).
9 On the distinction between prudence and justice, see Adam Smith’s Lectures on Justice, Police, Revenue and Arms, delivered at Glasgow in the 1750s and early 1760s, where he differentiated between “political regulations” founded “upon the principle of justice” and upon the principle of “expediency,” the latter being “calculated to increase the riches, the power, and the prosperity of a State.” Introduction, Adam Smith, Lectures on Jurisprudence I, 3 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978) (quoting Dugald Stewart, Account of the Life and Writings of Adam Smith, LL.D.). Smith regarded jurisprudence as “the theory of the general principles of law and government,” which had “four great objects”: “Justice, Police, Revenue, and Arms.” The object of “Justice” in turn was “the security from injury”; “Police” by contrast concerned itself with “cheapness of commodities, public security, and cleanliness.” Adam Smith, Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of
Moreover, as a question of police, punishment is at best a technical matter, and as such is neither particular interesting nor important, at least to a revolutionary/political philosopher. Adam Smith identified four “objects of Police”: “the cheapness of commodities, public security, and cleanliness.” He found only the first worth his attention, devoting the Wealth of Nations to the more general subject of “the opulence of the state.” The latter two were, in his mind, “too minute.”

As a matter of public safety, punishment as police is concerned with the disposal of human threats and thus is no different in kind than the establishment and maintenance of a dog licensing scheme or, perhaps, the control, disposal, and destruction of dangerous or stray animals. As a matter of public health (or “cleanliness”), punishment as police concerns itself with disposing human waste or, less dramatically, “purifying the circulation” of the community.

As a matter of household discipline, punishment as police raised issues relating to the proper management of human, and nonhuman, resources, the subject of traditional “economics.” These traditional concerns—how should the wise, good, competent householder treat his wife, (male/female/minor/adult) children, slaves, dogs, cattle?—were precisely the questions that the modern science of politics had abandoned as uninteresting and irrelevant. Now that state power derived from the consent of the governed and that the objects of power were also its ultimate subjects, the question of the mechanics of managing the state’s human resources was no longer the only, or even the central, question of politics, but a subsidiary one that could be delegated to bureaucrats and state technocrats. Governance as household discipline was not the subject of laws; it was a matter of discretion the rules of which might occasionally be distilled in directives, guidelines, and missives.

To say that government by police is not subject to the rule(s) of law is not to say that it is not subject to rules, or at least guidelines, of any kind. After all, these rules occupied the minds of classical economists (in the private sphere) and classical political thinkers (in the public sphere) for millennia, and generated guidebooks of governance as diverse as Marcus Aurelius’s Meditations, Machiavelli’s The Prince, and, in colonial America, slave owners’ “plantation manuals and rule-books, . . . enforced with whipping and other punishments, including death.”

There have always been good ways of running a (quasi-)household, and bad ones; and there have always been good householders, and bad ones. The rules governing the

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10 Adam Smith, Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of Glasgow by Adam Smith Professor of Moral Philosophy, in Lectures on Jurisprudence 396, 398 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. 1978).
11 William Roscoe, Observations on Penal Jurisprudence and the Reformation of Criminals 152 (London: Cadell, Davies & Arch 1819) (“A Penitentiary is . . . in the community, what the lungs are in the human body, an organ for purifying the circulation, and returning it, in a healthy state, to perform its office in the general mass.”).
12 Marcus Aurelius, The Meditations (George Long trans. 1991) (167 A.D.)
management of households large and small, public and private, however, are not principles of legitimacy, or of right; instead, they are guidelines of prudence, or of efficiency. They allow one to evaluate the quality, or competence, of the householder; they say nothing about the legitimacy, or justice, of his management. They are business principles, not legal principles. They focus on the subject of governance, not on the object, and maintain a categorical distinction between the two. In government by police, there is a manager, and there are the managed, there is a governor, and there are the governed. The objects of government were not conceived of as bearers of rights, who were entitled to respect as persons capable of self-government, but as resources in the hands of the subject of government; they were part of the householder’s household, along with other resources, human and nonhuman.

Within this view of government as economics, or household management, punishment was discipline or correction for offenses against the peace of the (quasi-)household, and therefore ultimately against the (quasi-)householder. Private household discipline in turn was subject to rules enforced by the public householder. Even in medieval law, the lord’s authority to discipline his serf did not extend to depriving him of “life or limb,” or “slaying or maiming” him, at least in theory.\(^\text{15}\)

The limitation of the micro householder’s authority over his family-household itself reflected the householder’s integration into the sovereign’s state-household. The lords were thus reduced to the status of overseers who enjoyed disciplinary authority over their charges only within the limits set by the macro householder. An excessively violent lord was subject to the sovereign householder’s discipline as a bad overseer, or administrator. A fourteenth century text explains that “the king now had a kind of ‘fee sutyl en noun de seigneurie’ in each man, so that the lord became a sort of mesne between the king and the serf whom he ought to treat ‘pur lui enprower e ne nie dampner.’”\(^\text{16}\)

The traditional remedy for the loss of life or limb was, fittingly, an appeal in the royal courts, in the nature of a complaint by the king’s man that the lord had exceeded his disciplinary authority over him.\(^\text{17}\) Excessive discipline violated the peace of the king’s macro household, to which both discipliner and disciplined belonged. An appeal against a lord in the royal courts thus served as a, presumably painful, reminder of his equality with the villein vis-à-vis their common master. Consider, in this regard, an eighteenth century missive from the English king to his Virginia colony, in which the king expresses his displeasure with the failure to prosecute masters who had killed their slaves: “at the time, the Slave is the Master’s Property he is likewise the King’s Subject, and that the King may lawfully bring to Tryal all Persons here, without exception, who shall be suspected to have destroyed the Life of his Subject.”\(^\text{18}\) The implications of extending royal protection to slaves—and villeins—for the inferior status of masters was as clear to English lords in the twelfth century as it was to Virginia plantation owners in the eighteenth. Southern plantation owners, in fact, often thought of themselves as manor

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\(^{17}\) Id. at 135-36.

\(^{18}\) Arthur P. Scott, Criminal Law in Colonial Virginia 202 (1930).
lords, and as such “[n]ot only . . . assume[d] control over their households and slaves, they resented and opposed the intrusion into their own affairs . . . .”

Taking the life of a member of the king’s macro household affected the king’s householder authority in two ways. It deprived the king of a resource, an object of household governance. What’s more, it assumed a power—in fact, the most awesome power—reserved for the supreme paterfamilias, the power of life and death. If anyone had the authority to take the life (or limb) of a member of the household, it was the king (whether or not he enjoyed that power courtesy of yet another, and yet more powerful, householder, God). Faced with the fact of death, the very least the king could do to exercise his prerogative over life and death, the ius vitae necisque of the Roman paterfamilias, after the fact so to speak, was to apply it to the person who had assumed it, the offender. Whether he pardoned him or disciplined him, in one way or another, through physical pain or monetary fine, was entirely within his discretion.

It should be noted that if, conversely, the serf harmed his lord, he was subject to whatever discipline the lord deemed appropriate or, if the lord proved incapable of enforcing his authority in this way, to corporal punishment imposed by a court, usually including whipping. If he killed his lord, he was guilty of petit treason, punishable by execution with any number of qualifications, including drawing, quartering, dismemberment, and public display of the severed head. As we will see shortly, in America these punishments survived until the late eighteenth century, with the crime of petit treason not being abolished until well into the nineteenth century.

Whatever limitations the macro householder imposed on the micro householder discipline of members of his household thus themselves reflected the police nature of the system of punishment. The householder’s power to discipline was empathically not limited by any rights possessed by the objects of his discipline. The only protection against abuse by one householder could come from another, superior, householder. The householder’s householder, the ultimate sovereign, was subject to no higher (earthly) authority, though he nonetheless might, in his wisdom, choose voluntarily to subject himself to certain restraints, should he desire to be considered, or consider himself, “good.”

Even if, in wielding the patriarchal power to police, the sovereign was not subject to external principles of justice, he might feel himself guided by considerations of parental love, or perhaps Christian charity. The patriarchal underpinnings of punishment were rarely made explicit by commentators at the time, who instead preferred to speak in terms of a general obligation to pity the damned souls of wretched criminals, without setting out why private considerations of religious duty, which might be of interest to one person but not to another, should affect state action, particularly in a state committed to the separation of church and state.

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21 Note that English criminal law still struggled to legalize this discretion in the late nineteenth century. Cf. The Queen v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (court convicts defendants on the ground that necessity is no defense to murder, as a matter of law, precipitating their royal pardon, as a matter of mercy).
For a noteworthy exception, consider the following argument from an early nineteenth century English essay, which attempts to derive an opposition to capital punishment (the favorite reform project of the day) from the patriarchal nature of government:

Cicero calls his country “Parens communis”—what should we think of a parent who corrects his child by putting him to death?

“The case of a civil ruler and his subject,” says a sensible and energetic writer, “is much like that of a father and his minor son. If the son behave himself unseemly, the father may correct him. If after all due admonitions, and corrections, the son should prove to be incorrigible, the father may expel him from his family, and he may disinherit him; but may not kill him. All civil as well as parental punishments ought to be mild, humane, and corrective; not vindictive, inhuman, and extirpating. They ought to be merciful, not rigorous; proportionate to the crime, not excessive; and tend to the reformation of the delinquent, but not to his destruction; and should be inflicted with reluctance, love, and affection; not with passion, hard-heartedness, and asperity. The highest encomium that can be bestowed on good rulers is when we style, them the fathers of their subjects, and the protectors of their rights.”

This passage hits many of the notes often associated with patriarchal punishment, i.e., punishment as police. The punisher is the father (or at least the parens). The punished is not only a member of his family, but a minor, thus twice inferior to the head. Crime is analogized to “unseemly behavior” and punishment to “admonitions” and “corrections.” A distinction is drawn between types of offenders, with the “incorrigible” ones being singled out for special treatment—expulsion. Glossing over the practice of noxal surrender, in which the pater familias instead of paying reparation turned over an offending member of his familias so that the victim may exact whatever punishment (including death) he deemed appropriate, the argument suggests that the rejection of capital punishment flows directly from the very nature of “paternal punishment.” Note, however, the flexible nature of the injunctions generated in this way. Paternal punishments ought to be mild, merciful, reformative, and—importantly—“proportionate to the crime;” they should be inflicted with love, “not with passion, hard-heartedness, and asperity.” The normative import of these prudential guidelines stems not from a grounding in principles of justice, or the rights of the punished, but from the image of the “good ruler[]” and, presumably, whatever interest in others’ contemporaneous or posthumous approval the ruler happens to muster.

Also noteworthy is the fundamental confusion between the realm of police and of law, of prudence and of justice, or rather the denial of the existence of a distinct realm of law in the first place. For the “good rulers” are not only “fathers of their(!) subjects,” but also “protectors of their rights.” Here even the “rights” of the patriarch’s “subjects”—a term used to mark the inferiority of household members vis-à-vis the householder, rather than their status as self-governing persons, or legal subjects—are within the protection of the householder. Even the rights of the punished are internal to the household, rather than the source of external constraints on the householder’s power. The language of rights is (still) the language of police.

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The reference to “proportionate” punishment deserves attention if only because calls for proportionality in punishment were common among those who concerned themselves with matters of criminal law reform at the time (see, for instance, Jefferson’s *Bill for Proportioning Crimes and Punishments*, discussed in detail below). For now, suffice it to say that calls for proportionality as rule of thumb are not inconsistent with a view of punishment as police. To see the connection between police and proportionality, it’s useful to consider the question of proportionality alongside the final, and most fundamental, limitation identified in the quoted passage, that punishment “should be inflicted with reluctance, love, and affection; not with passion, hard-heartedness, and asperity.”

In short, proportionality as a guidepost of police—unlike proportionality as a requirement of law—does not arise from any right of the punished. Instead it reflects the punisher’s judgments of expedience or, at the margins, his utter inability to make such judgments, which results in a judgment by the macro householder that he is unfit to manage a micro household.

As a matter of expedience, the punisher-householder may well decide to adopt a general rule of proportionality when meting out discipline. If his interest lies in deterring future acts of ill discipline, he may well feel that punishments should be roughly proportionate to offenses insofar as excessive anticipated punishments (the anticipated pain of which significantly outweighs the anticipated pleasure associated with the offense) might have an undesired chilling effect on desirable behavior. Similarly, even if excessive inflicted punishment might succeed in deterring undesirable behavior (and only that), it might prove to be inexpedient because it may reduce the punished’s productivity, and therefore the welfare of the household, the maximization of which a good householder seeks. (Note, however, that excessive punishment would not be inexpedient simply because it is unnecessary to have the desired deterrent effect. The unnecessary suffering of the punished by itself is, unlike in Beccarian/Benthamite theory, of no interest.) Similarly, the householder might decide, with Bentham, that matching the quality of punishment and crime will enhance the punishment’s efficacy. Bentham distinguished between various forms of this type of proportionality, including “The same Instrument used in the Crime as in the Punishment,” “For a Corporal Injury a similar Corporal Injury,” “Punishment of the Offending Member,” and “Imposition of Disguise assumed.” So arson should be punished by proportionate, and analogous, burning, carefully calibrated to the offender’s act:

> It would be necessary carefully to determine the text of the law, the part of the body which ought to be exposed to the action of the fire; the intensity of the fire; the time during which it is to be applied, and the paraphernalia to be employed to increase the terror of the punishment.23

 Forgery likewise was to be punished by stabbing the offender with the tool of his trade:

> The hand of the offender may be transfixed by an iron instrument fashioned like a pen, and in this condition he may be exhibited to the public previously to undergoing the punishment of imprisonment.24

24 Id.
In some, extraordinary, cases policing may be so ineffective, and the connection between means and end so unfathomably remote (as evidenced, for instance, by a tendency to inflict grossly disproportionate—and therefore counterproductive—punishments) that one might suspect incompetence on the part of the policer (rather than, say, incalcitrance on the part of the policed). While inexpediency by itself ordinarily remains comfortably within the householder’s margin of discretion without compromising his supreme authority, extreme inexpediency may—at least in theory—amount to evidence of unfitness on the part of the householder, or quasi-householder. In colonial America, for instance, the master in his management of the slave as of any other resource within his household was presumed to act for the well-being of his household, the plantation. This presumption, however, was not irrebuttable—in theory if not in practice—and in this limited sense the master’s police power was not entirely unlimited.\(^\text{25}\)

Significantly, this limitation derived not from the slave’s status as a person endowed with rights, but instead sprang from the nature of the police authority itself. Moreover, the enforcement of these limits upon the micro householder’s authority in turn constituted an exercise of the police power of the macro householder, the state sovereign—in this case the English king. From the king’s perspective, the master enjoyed authority over his household only by delegation of the king’s supreme police authority over every members of his royal household, which included slave and master alike.\(^\text{26}\)

Policers thus could prove themselves unfit to police, and better suited to being policed themselves. Evidence of this unfitness came in two basic forms. First, the policer could prove himself incapable of discharging his duty to maximize the welfare of the household through behavior evincing bad faith. Second, even a policer acting in good faith could lose police authority if he proved simply incapable of preserving his household. This failure might then justify the state’s assumption of householding authority in loco parentis.\(^\text{27}\)

For our purposes, the first limitation on the householder’s disciplinary authority is particularly relevant. In the context of the family, for example, the father’s right to discipline members of his household was specifically limited to measures undertaken in “good faith” and “prompted by true paternal love.” “[P]arental control and custody” was justified “on the theory of the child’s good, rather than the parent’s.”\(^\text{28}\) By contrast, punishment out of “malice” was not permissible, for it was motivated not by concern for the welfare of its object, or of the family as a whole. Self-gratifying cruelty was impermissible.\(^\text{29}\) Similar rules applied to the use of correctional measures in quasi-households. A military officer, for instance, was entitled to enforce obedience, even by

\(^{25}\) Arthur P. Scott, Criminal Law in Colonial Virginia 299 (Univ. of Chicago 1930) (“almost unlimited”).

\(^{26}\) This limitation upon the power of one householder thus presumes the superior power of another. This limitation, in this sense, is itself an exercise of the power to police.

\(^{27}\) See supra text accompanying notes ___–___.


\(^{29}\) State v. Black, 60 N.C. 262 (1864).
whipping, unless it turned out his “heart is wrong,”30 which is just another way of saying that he acted out of malice.31

Restrictions on the means of correction reflected restrictions on its end. The use of measures “so great and excessive to put life and limb in peril, or where permanent injury to the person was inflicted” provided evidence of that “malicious and wrongful spirit” which marked the policer as unfit for his supervisory post.32 In the context of discipline on board of a ship, as enforced by the captain against his crew, “clear and unequivocal marks of passion on the part of the captain,” punishment “manifestly excessive and disproportionate to the fault,” and, for our purposes most interesting, the use of “unusual or unlawful instruments,” likewise revealed that the disciplinary measure wasn’t in fact disciplinary at all, but motivated by the policer’s self-regarding interest in gratifying an evil impulse.33

Note that from the perspective of these traditional limitations upon the policer’s power over his inferiors, the prohibition of “cruel and unusual” punishment appears as an internal limitation upon the state’s power to police, inherent within the power itself. This is perhaps not surprising given that, as we’ve seen, the Eighth Amendment was copied from two decidedly preconstitutional English documents, the English Bill of Rights of 1689, and a proportionality limitation appeared already in Magna Carta, not to mention the ius commune.

From the perspective of police, cruel and unusual punishment is prohibited because it reveals an improper, self-regarding, motive.34 And indeed the cruel and unusual punishments clause has been interpreted to prohibit correctional measures inflicted out of “malice or sadism”35 in another quasi-household, the prison. In matters of internal prison discipline, good faith on the part of the warden, or other correctional officers, is presumed. Disciplinary sanctions are presumed to have been motivated by a concern for the welfare of their object (the prisoner), or at least of the prison community as a whole. A prison official who punishes with “malice or sadism,” however, has proved himself unfit for police authority.36 By contrast, a less permissive standard (“deliberate indifference”), and one does not turn on the policer’s character and fitness, is applied to actions taken in the course of executing legal punishments prescribed by the legislature and applied by the judiciary.37 Here the correctional officer is not acting as a micro

31 Id.; see also Com. v. Eckert, 2 Browne 249 (Ct. of Quarter Sessions Pa. 1812) (malice evidence of “a depraved or wicked heart”).
32 State v. Mabrey, 64 N.C. 592, 593 (1870).
34 For a similar interpretation of the constitutional prohibition against ex post facto laws, see Calder v. Bull, 3 U.S. 386, 389 (1798) (ex post facto lawmaking “stimulated by ambition, or personal resentment, and vindictive malice”).
36 The malice test still can be seen reflected, more or less clearly, in attempts to circumscribe the disciplinary power of householders, actual and quasi, in various contexts. See, e.g., White v. Frank, 855 F.2d 956 (2d 1988) (tort of “malicious prosecution”); Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure § 13.5 (1999) (due process defense of “vindictive prosecution”); Ingraham v. Wright, 430 U.S. 651, 677 (1977) (malicious corporal punishment inflicted by teachers upon students).
37 Estelle v. Gamble, 429 U.S. 97 (1976). In both cases, the overarching issue is whether the measure involved the “unnecessary and wanton infliction of pain.”
householder intent on maintaining order within his household. He instead is giving effect to a judgment of law, and thus functions as an instrument of the law rather than as a keeper of “good police.” The prison official’s authority in this—legal—function is more carefully circumscribed: In executing a legal sentence, the guard confronts the inmate not as a (superior) policer faces the (inferior) policed within the hierarchy of a household. Instead, the inmate in this context appears as an object of law, i.e., as a person, and therefore on equal footing with those charged with putting the legal judgment into effect.  

There was of course nothing original or republican about the patriarchal police model of government. On the contrary, the revolution was a complete and utter rejection of the idea of police. The revolution was based on ideals of self-government, equal rights, and personhood, which were not only entirely inconsistent with the deeply hierarchical police model of government, but arose out of a critique of that very model. Americans were tired of being policed by the English sovereign-householder. They didn’t mind taxation; they went to war over taxation without representation.

It is all the more puzzling that they would see nothing problematic in retaining a system of criminal law as police that treated criminal offenders exactly the way they had been treated by the King of England. The solution to the puzzle lay in the fact that they saw criminals as radically different (or as irrelevantly similar), not as autonomous legal subjects but as objects of police discipline. More generally, once they took over power it turned out that they didn’t object to government as police as long as they were doing the policing. Hence the continued subjugation, and disenfranchisement of women, paupers, and, of course, slaves.

But at least the police model frames the problem of government in general, and of punishment in particular, as a problem of state action. The police model may elevate household governance to the macro level, but it does not deny its public nature—a police action is by definition a state action, even if it is one beyond the scope of legitimation. The same cannot be said for criminal law reform proposals couched in religious terms. Churches, of course, were also traditionally regarded, and governed, as households. And perhaps religion-based criminal law reforms can be seen as attempts to improve the governance of wayward souls as members of a particular church. But the American state was no church and none of the proponents of religion-based criminal law reform suggested otherwise. Moreover, membership of criminal offenders in a particular church (or any church) was not a prerequisite, explicit or implicit, for their qualification as objects of reform. Still, it is worth noting that the particular nature of the reforms proposed, and implemented, tended to reflect the church membership and religious beliefs of their advocates. In fact, one might think of the prison reforms pushed by

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38 And yet, even in this legal context, the prison inmate remains in the custody and charge of the warden, much as every “inmate” of a Teutonic household was under the power of the householder. Paul Vinogradoff, Foundations of Society (Origins of Feudalism), 2 Cambridge Medieval History 630-54 (1913). Prison officials not only prevent the inmates from escaping, but they also are responsible for their well-being. The prison makes its inmates entirely helpless, and thereby places them at the mercy of their keepers. To show “deliberate indifference” toward inmates thus constitutes a violation of the warden’s duty of care, as a failure to provide the necessary conditions for the execution of legal punishment against persons. Unlike in the case of prison discipline, however, the point here is not to maintain order in the prison household, but to make a particular mode of legal punishment, imprisonment, possible.

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adherents of various Christian denominations (Quakers, Unitarians, Methodists) as attempts to construct prisons as churches—and even families—comprising the inmates and their guards (and ministers), with each church-family reflecting the theological precepts of the respective denomination. But while (constructive) membership in a church, and subjection to its governance, might have been the intended result of religion-based reform proposals, it was not a prerequisite of it. Offenders attracted the attention of religious reformers not as fellow church members but as Christian brothers (and sisters), as fellow children of God. Private charities, rather than the state or even churches, took up their plight. The reformers didn’t view themselves as superior to the objects of their charity. “There but for the grace of God go I” was the driving sentiment, reflecting a sense of equality not based on equal political rights, but on common fallibility. The 1787 “constitution” of the Quaker-dominated Philadelphia Society for Alleviating the Miseries of Public Prisons, the most successful of the crime charities, is very instructive in this regard:

When we consider that the obligations of benevolence, which are founded on the precepts and example of the author of Christianity, are not cancelled by the follies of crimes of our fellow-creatures; and, when we reflect upon the miseries which penury, hunger, cold, unnecessary severity, unwholesome apartments, and guilt, (the usual attendants of prisons) involve with them, it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries, by the aids of humanity, their undue and illegal sufferings may be prevented: the links, which should bind the whole family of mankind together under all circumstances, be preserved unbroken: and, such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow-creatures to virtue and happiness.

This “benevolence” and “compassion” toward “our fellow-creatures” was entirely Christian. As such it was private, rather than public, discretionary, rather than obligatory, religious rather than political, and had nothing to do with either police or law. Criminal law reform thus was not the state’s concern, but a matter of individual conscience.

While the details of Christian charity (and the variations among the denominations) may be safely ignored in the present context, the role of benevolence and compassion is worth considering in greater detail. The Christian reformer identifies with the offender—he regards him as a “fellow-creature,” or more precisely as fellow child of God. He does not identify with him as a fellow citizen, a fellow person, or a fellow holder of (equal) rights. The identification is religious: it is entirely apolitical and arepublican. The offender has no political or legal claim to the Christian reformer’s attention; he is but the happy beneficiary of the reformer’s Christian charity.

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41 Constitution of the Philadelphia Society for alleviating the Miseries of Public Prisons (May 8, 1787), in Reform of Criminal Law in Pennsylvania: Selected Enquiries 1787-1819, at 105 (New York: Arno Press 1972). See also William Roscoe, Observations on Penal Jurisprudence and the Reformation of Criminals 176-77 (London: Cadell, Davies & Arch 1819) (reform “is founded on Christian principles, and applies the precepts of our religion to the conduct of our lives [and] considers a criminal as an unfortunate fellow-creature, led on to guilt through a great variety of causes, but capable by kindness, patience, and proper discipline, of being reformed and restored to society”).
42 Note also the identity of reformer and offender in contrast to omniscient and omnipotent God. Hugo Grotius, De Jure Belli ac Pacis, bk. 2, chap. 20, sect. 4 (Amsterdam, 1625).
This faith-based charity is entirely private and entirely discretionary. As such, it can dissipate at any moment. It may not only be temporary and fickle, it may also be arbitrary or discriminatory. In fact, the reformers’ zeal waned fairly quickly after the objects of their most intense compassion, debtors, were first housed separately from other inmates and then freed of criminal sanctions altogether.\textsuperscript{43} Once the prisons had been emptied of the good prisoners, those “worthy characters . . . reduced by misfortune,” leaving only the bad ones, the “wretches who are a disgrace to human nature,”\textsuperscript{44} it might have been considerably more difficult to muster the requisite compassion. The distinction between the two groups of prisoners also roughly coincided with distinctions of social class, with the debtors’ (former?) social class more closely resembling that of the reformers.\textsuperscript{45}

The nature of the identification with the punished is of great significance. Any normative judgment, including—most important in the present context—the ascription of criminal responsibility, requires empathy, i.e., putting oneself in the shoes of the object of one’s judgment.\textsuperscript{46} Empathy in turn presupposes the recognition of a relevant point of identification with the other as well as the willingness to identify with him in fact. Without identification between judge and judged, and between punisher and punished, punishment becomes an exercise of heteronomous oppression, which merely reaffirms the inferiority of the punished, thus excluding him from the class of persons capable of self-government, i.e., the political community of citizens. It becomes an alegitimate act of police beyond the realm of justice.

Only the identification with the punished as a fellow potentially autonomous citizen is consistent with the legitimation of punishment in light of republican principles. Other types of identification, such as among “fellow-creatures” or children of God or Quakers or merchants or Philadelphians, are irrelevant even if they may improve the punished’s plight, at least in the short run. Similarly, the refusal to identify with some offenders—be they labeled “wretches who are a disgrace to human nature,” “incorrigible” offenders, or “persons, who are guilty of enormous crimes”\textsuperscript{47}—precludes legitimation of their punishment.

Given the immense difficulty of this identification in cases of horrific crime, legitimating punishment of the most odious offenders presents, paradoxically, the greatest, not the least, difficulty. As we’ll see, even those who had an inkling of the special and novel challenge punishment posed in a republican government as a rule fell well considerable short of this task.

Having discussed the two prevalent approaches to the question of crime and punishment prevalent during and after the American Revolution, patriarchal police and Christian charity, which were unoriginal, arepublican and—in the latter case—also apolitical, and utterly failed to comprehend, never mind address, the dramatic challenge

\textsuperscript{46} Dubber, Right to Be Punished.
of devising a legitimate system of criminal law in the new republic, we will now turn to
the first and best effort to derive a system of criminal law from the basic principle of
political legitimacy driving the foundation of the American Republic, self-government or
autonomy: Thomas Jefferson’s Virginia “Bill for Proportioning Crimes and Punishments
in Cases Heretofore Capital” of 1779.

That effort was a spectacular, and telling, failure.

Jefferson

Jefferson’s bill fell short in several respects. One is apparent on its face: The bill was
limited in scope, dealing with punishments, not with crimes or principles of criminal
liability, and only with punishments for a very few offenses at that, namely capital ones.
This limitation is often obscured by the fact that Jefferson’s bill tends to be cited as “A
Bill for Proportioning Crimes and Punishments.” Its full title is “A Bill for Proportioning
Crimes and Punishments in Cases Heretofore Capital.” Jefferson’s ambition did not
exceed those of other reform proponents of the time: he was largely content to reduce the
number of capital offenses from the universally criticized “Bloody Code” with its 180
capital crimes, without however proposing to do away with capital punishment
altogether.48

Most important, the bill made no serious effort to achieve the goal of “deduc[ing]
from the purposes of society” a principle of proportionate punishment—never mind a
comprehensive system of republican criminal law—despite its preamble’s promise to the
contrary. Rather than setting out a republican approach to criminal law consistent with
the political principle of self-government that alone could legitimate state action,
Jefferson ended up drawing on medieval Anglo-Saxon dooms to retain such penalties as
ducking and whipping, while making general reference to the need to deter potential
offender through “long-continued spectacles” of penal servitude, to “reform” offenders
“committing an inferior injury,” and to “exterminate” anyone “whose existence is
become inconsistent with the safety of their fellow citizens,” albeit only as “the last
melancholy resource.”

In the end, then, the substance of Jefferson’s bill provides a sketch of punishment as a
matter of good governance, rather than as a matter of right, confirming the conclusion
that the architects of the new republic thought of punishment as a matter of police, rather
than of law, to the extent they devoted any thought to the issue at all. It did not lay the
foundation for the continuing process of critique in light of principles of justice without
which republican punishment cannot be legitimated.

Jefferson was well familiar with the distinction between governance by police and by
law. Among the bills Jefferson drafted for the Virginia Committee for the Revision of
the Laws, which also included the punishment proportionality bill (no. 64), was “A Bill
for Amending the Constitution of the College of William and Mary and Substituting
More Certain Revenues for Its Support” (no. 80). This bill called for, among other
things, the establishment of a chair of “law and police” as one of eight professorships at
the College of William & Mary, the first holder of which was Jefferson’s former teacher

48 English criminal law, as the Governor of New Jersey, William Paterson, put it in 1793 “is written in
blood, and cannot be read without Horror.” See John E. O’Connor, Legal Reform in the Early Republic:
The New Jersey Experience, 33 Am J Legal Hist 95, 99 (1978)
and fellow revisor, George Wythe. The chair was to cover both “municipal” and “oeconomical” law. Municipal law, or law in the narrow sense, included “common law, equity, law merchant, law maritime, and law ecclesiastical.” “Oeconomical law,” or police, encompassed “politics” and “commerce.”

This aspect of Jefferson’s reform of William and Mary has received scant attention. One noteworthy exception is Herbert Baxter Adams who, writing in 1887, rightly emphasized the parallels between Jefferson’s reform and continental police academies. By the late nineteenth century, however, the distinction between police and law had been lost to such an extent that Adams found it necessary to explain the notion of police to his readers:

This was much the same as the modern science of administration, which is just beginning anew to creep into our university courses in America. What the German would call Polizeiwissenschaft, and what the Greeks termed πολιτική, was taught for nearly a century at the college of William and Mary under the head of “police.” That name would probably suggest nothing but constabulary associations to most college faculties in these modern days.

While the proportionality bill in the end remained mired in a prerevolutionary, prerepublican concept of punishment as police, it began with high ambitions of placing the punitive power of the state on principles of law. As Jefferson reports in his Autobiography, he felt upon his return from the Inaugural Congress to his home state of Virginia that

our whole code must be reviewed, adapted to our republican form of government, and, now that we had no negatives of Councils, Governors & Kings to restrain us from doing right, that it should be corrected, in all it’s parts, with a single eye to reason, & the good of those for whose government it was framed.

As the leading member of the revision committee, which also included Wythe, Edmund Pendleton, George Mason, and Thomas Lightfoot Lee, he had an opportunity to put this plan into action. At a meeting on 13 January, 1777, the committee settled certain basic principles of form and substance and divided up the work. Jefferson took responsibility for revising the first of three periods of statutory law and the law of descents. Mason originally was assigned the criminal law, among other things. Upon Mason’s resignation from the committee shortly after the meeting, Jefferson added the criminal law to his list of things to do.

50 Herbert Baxter Adams, The College of William and Mary, 1 Contributions to American Educational History no. 1 (U.S. Board of Education, 1887). Adams advocated the creation of an American civil service academy dedicated to the study of police, or “scientific politics and good administration.” Id. at 79. He was particularly taken with the École Libre des Sciences Politiques in Paris and the Prussian Statistical Bureau in Berlin, “a training school for university graduates of the highest ability in the art of administration, and in the conduct of statistical and other economic inquiries that are of interest and importance to the Government.” Id. at 80.
51 Id. at 39 n.1
Although they did not exclude it from their comprehensive revision enterprise, neither Jefferson nor his fellow revisors expressed any particular interest in republican criminal law reform. According to Jefferson’s Autobiography, the committee members assembled only a short and vague list of “leading principles” to guide the revision of Virginia’s criminal laws:

On the subject of the Criminal law, all were agreed that the punishment of death should be abolished, except for treason and murder; and that, for other felonies should be substituted hard labor in the public works, and in some cases, the Lex talionis.

Mason’s notes, the only surviving record of the 1777 meeting, are somewhat more extensive on the subject (perhaps because the criminal law was among his responsibilities), at least in that they specify in somewhat greater detail which noncapital punishment was to attach to some of the formerly capital crimes (“Forfeiture, Fine, Labour in public-works, such as mines, Gallies, Saltworks, Dock-Yards, Founderies, and public manufactories.”). At the same time, they contain no reference to the lex talionis, an omission that is all the more surprising given Jefferson’s remarkably strict adherence to this principle in the Bill and his later complaint that he was forced to do so in light of the committee’s specific instructions on this point.

Otherwise the Bill follows Mason’s notes, though it does dispense with pardons altogether, an issue the committee decided to “defer to be consider’d at the next meeting.” Opposition to the pardon power of the executive was widespread at the time as it was regarded by many as a vestige of the sovereign king’s prerogative. An alternative to its outright abolition was its transfer from the executive to the legislature, as the representation of the new American sovereign, the people. Here too it is noteworthy that Jefferson, upon his assumption of the governorship in 1779, himself made frequent use of the pardon as his executive prerogative; he regularly issued conditional pardons for

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53 For (later) calls for republican reform more specifically focused on criminal law, see Kathryn Preyer, Crime, the Criminal Law and Reform in Post-Revolutionary Virginia, 1 Law & Hist. Rev. 53, 78 (1983) (In Jefferson’s own Virginia, George Keith Taylor, speaking in support of criminal law reform after Jefferson’s bill had failed, “charged his colleagues with passively submitting to a system ‘calculated to awe and crush the humble vassals of monarchy,’ and urged them to revise the criminal law ‘to comport with the principles of our government.’”); William Bradford, An Enquiry how far the Punishment of Death Is Necessary in Pennsylvania 5 (Philadelphia: Dobson 1793) (William Bradford, in a well-known abolitionist speech in 1793 before the Philadelphia Society for Alleviating the Miseries of Public Prisons, complained that “laws, the offspring of a corrupted monarchy, are fostered in the bosom of a youthful republic.”); Christopher Adamson, Wrath and Redemption: Protestant Theology and Penal Practice in the Early American Republic, 13 Crim. Just. Hist. 75, 93-94 (1996) (Thomas Eddy, a wealthy Quaker pushed for the establishment of penitentiaries in New York in the 1790s on the ground that New York’s colonial criminal law reflected “monarchical principles” and was “imperfectly adapted to a new country, simple manners, and a popular form of government.”).


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57 James Wilson, _________
offenders under sentence of death provided they worked in the lead mines or other public works.58

At the outset it is important to place the bill within the context of the revision project as a whole. The bill was, after all, not an isolated effort to reform the criminal law of Virginia. It was one of 126 bills prepared by the committee of revisors and, as we’ve noted, Jefferson only took on the subject of criminal law after Mason’s resignation. It would therefore be a mistake to read it as an outgrowth of Jefferson’s particular interest in, or concerns about, the criminal law of his home state. Other subjects were much closer to his heart, including “the law of Descents,” which “fell of course within my portion,” as well as bills dealing with freedom of religion, freedom of the press, and public education. Jefferson’s bills calling for the abolition of entail and primogeniture, which he regarded as aristocratic remnants that were inconsistent with the principles of a republic of equal self-governing citizens (modeled after his beloved image of Anglo-Saxon society before the Norman conquest). The contrast between these bills and the proportionality bill could not be starker. The former provide a powerful illustration of what Jefferson was capable of when he was indeed committed to “review[ing]” an area of the law and “adapt[ing]” it “to our republican form of government.” By contrast, the proportionality bill is uninspired and undermotivated: Jefferson cared deeply about lines of descent, and not so much about criminal punishment.59

It is also important to recognize that the bulk of the 126 bills comprising the “revision of the laws” addressed mundane affairs of government and were no more ambitious than the proportionality bill. Bills such as those “directing the course of descents,” “for the more general diffusion of knowledge,” and “for establishing religious freedom,” were the exception, not the rule. The proportionality bill was flanked by bills “concerning guardians, infants, masters, and apprentices” (no. 60), “to enable guardians and committees to perform certain acts for the benefit of those who are under their care” (no. 61), “for the restraint, maintenance and cure of persons not sound in mind” (no. 62), “for registering births and deaths” (no. 63), on one end, and by bills “for punishing persons of guilty of certain forgeries” (no. 65), “concerning treasons, felonies and other offences committed out of the jurisdiction of this commonwealth” (no. 66), “concerning truces, safe conducts, passports, licenses, and letters of marque” (no. 67), on the other. In fact, the vast majority of the bills dealt with matters of police, rather than of law, including

- military discipline (no. 5)
- poor relief (no. 32)
- strays (no. 39)
- horned cattle, horses, deer (nos. 41-43)
- licenses for tavern owners and attorneys (nos. 45, 97)
- public roads and ferries (nos. 46, 47)

59 Jefferson also showed great interest in providing for freedom of the press and of religion. Neither his draft constitution for Virginia (1776) nor his subsequent proposals for a bill of rights for the federal constitution includes any mention of an analogue to the prohibition of cruel and unusual punishments; both, however, contained provisions guaranteeing freedom of the press and of religion. See David N. Mayer, The Constitutional Thought of Thomas Jefferson 155 (Charlottesville 1994) (discussing Jefferson’s correspondence with Madison in the early 1780s about the proposed federal bill of rights).
“mill-dams and other obstructions of water courses” (no. 48)
 burial of dead bodies on board ships (no. 49)
 public store-houses (no. 50)
 slaves, servants, runaways, mulattoes, aliens (nos. 51-54, 56)
 the sale of “unwholesome meat or drink” (no. 76), the spread of small pox (no. 77), and quarantine (no. 78)

A bill dealing with the disposal of criminal offenders as a question of police fit bar better into this typical (diverse, bureaucratic, mundane, comprehensive yet incomplete, unsystematic, ahuman) list of police regulations than the occasional right-based bill providing that no one should be compelled “to frequent or support any religious worship, place, or ministry whatsoever” and that “all men shall be free to profess, and by argument to maintain, their opinions in matters of religion,” which has attracted the lion’s share of historians’ interest among the revision bills prepared by Jefferson.

The proportionality bill, by contrast, has been largely ignored by historians. It did not pass; but then neither did the much-analyzed (and -praised) religious freedom bill. A better explanation is that the bill was anachronistic, haphazard, incomplete, and altogether disappointing. Jefferson simply showed very little interest in the subject of criminal law. With nothing to say about the substance of the bill, he turned to its form. The best thing that could be said about his effort was that it was beautiful to look at. In the words of Dumas Malone, the great Jefferson biographer, the manuscript of the bill is “an extraordinarily beautiful document”:

[Jefferson] attached notes in Anglo-Saxon characters, in Latin, old French, and English, attesting the meticulous carefulness of his procedure. [He] placed them in columns, parallel with the text, after the manner of his old law book, Coke upon Littleton; and, as in the work of the old master, they frequently encroach upon the text. The penmanship is beautifully clear, and no other document that Jefferson ever drew better exhibits his artistry as a literary draftsman.

Jefferson’s “conscious imitation of the form of old legal treatises” went so far as to affect his spelling. As Julian Boyd, the distinguished editor of Jefferson’s papers, points out:

[I]n the first part of [the manuscript] TJ spelled the word ‘forfeit’ as he was accustomed to do; he changed suddenly to ‘forfiet,’ going back to the beginning of [the manuscript] to alter the spelling from ‘forfeit’ to ‘forfiet.’ From that point on . . . the word is spelled ‘forfiet’ as if it had always been TJ’s habit to do so.

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62 No records of, or newspaper reports on, the debate on the bill are available. [Preyer 69-70] Madison suggested, however, that the consideration of the entire revision project came to a halt when deliberations reached the proportionality bill. [Preyer 69]
63 Dumas Malone, Jefferson and His Time, vol. 1 (Jefferson the Virginian), at 269-70 (1948) (commenting on A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital (1778)).
Boyd goes on to note that in the exfoliation of notes and citations, drawn from classical authors and the ancient Anglo-Saxon laws, as well as such modern penologists as Beccaria, TJ was not so much creating a memory-saving device as he was yielding to the temptation to indulge in pedantic ostentation . . . . This mass of notes and citations, as well as the labored and artificial imitativeness in the form of the MS, may be partly responsible for [Malone’s] judgment that ‘during the years 1776-1779, he have more time to this bill than to all the rest together’ . . . .

Boyd’s overall assessment of the bill is harsh, refreshingly straightforward, and also very quotable:

The preamble of this Bill stated in superb language the enlightened ideas of Beccaria and others; but the terms of the law that TJ proposed did little more than restate generally accepted practices concerning capital offenses. In respect to crimes of mayhem, the reliance upon the *lex talionis* [by providing that the maimer “be maimed or disfigured in like sort’] contrasts shockingly with the liberal thought of the age.

Jefferson himself seems to have sensed the bill’s failure. Already in 1778, before the bill was presented to the legislature as part of the revision package, he wrote to Wythe that the talionic principle, which plays such a central role in the bill, is “revolting to the humanised feelings of modern times.” In his Autobiography he professed that “[h]ow this … revolting principle came to our approbation, I do not remember.” While he told Wythe that he had followed “the scale of punishments settled by the Committee,” there is, as we have seen, no mention of an agreement on the talionic principle in general or on specific talionic penalties in the only surviving record, Mason’s notes.

Jefferson did not care for criminal law, nor did he know very much about it, nor did he have any ideas about how to reform it. So he procrastinated and engaged in the contemporary equivalent of playing with fonts and margins and footnotes, and then—to waste further time—prepared a copy of the manuscript thus generated. The only use he had for the criminal law reform bill was to practice his penmanship.

For inspiration, on both substance and form, he turned to “the old master,” his beloved Coke. To copy Coke’s habit of writing marginal comments so extensive and independent of the main text as to amount to a second, parallel, text was one thing. To also copy the *substance* of Coke’s 17th century work was another. That Jefferson would consult Coke to learn about the substance of criminal law was no accident. Jefferson learned his common law from Coke, whom he admired as a true master of the common law. As he put it in a letter to his friend Madison in 1826:

You will recollect that before the revolution, Coke Littleton [referring to Coke’s first institute, criminal law being treated in the third] was the universal elementary book of law students, and a sounder whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties.
Jefferson thus read—and copied—Coke not only because it was the trusted authority on the common law, but also because he shared what he considered Coke’s whigism, which he contrasted with Blackstone’s “toryism”:

[W]hen his black-letter text, and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students’ hornbook, from that moment, [the legal] profession. . . began to slide into toryism.67

In Jefferson’s view, Blackstone’s Commentaries, unlike “the deep and rich mines of Coke, Littleton,” had been “perverted . . . to the degeneracy of legal science.”68 Rather than digest the common law and capture its gnarly detail and what Jefferson saw as its stubborn, and always fact bound and therefore restrained, commitment to the preservation of the liberties of Englishmen, the Commentaries pretended to systematize and scientize the material, with “elegance” but also without the Whig’s fundamental distrust of central authority hidden behind an apparently abstract, and objective, system of legal principles.

And so instead of consulting the newfangled and dangerously facile and ambitious Blackstone, Jefferson got his criminal law from the modest Coke who focused on the past, rather than the present, never mind the future. The result was a bill that amounted to a willful unsystematic replication of Coke’s “learned and authoritative ‘jumble,’” sans the learning and the authoritativeness. The bill didn’t just draw on medieval law. Much of it consists of quotations from medieval law texts in the “margins,” so much of it in fact that it qualifies as a replica of a medieval legal document. Coke is cited and quoted no fewer than twenty-two times; Bracton’s thirteenth-century tract De legibus et consuetudinibus Angliae ten times; Hale’s seventeenth-century criminal law treatise seventeen times; and, last but not least, Anglo-Saxon dooms from the ninth and tenth centuries (in the original Anglo-Saxon) twenty-five times.69 By comparison, Blackstone is cited (never quoted) eleven times, mostly in string cites along with other sources, which is a remarkably small number given the Commentaries’ dominance as the leading treatise and textbook on the common law at the time.70

Just as remarkable, the entire bill contains only four minor string cites to Beccaria, none of which have anything to do with Beccaria’s celebrated theoretical argument in On Crimes and Punishments.71 (Montesquieu and Pufendorf score only one cite each.) Boyd’s harsh words about Jefferson’s bill, therefore, are not quite harsh enough. To say that Jefferson’s copious notes drew “from classical authors and the ancient Anglo-Saxon laws, as well as such modern penologists as Beccaria” is at least misleading insofar as it obscures the relative irrelevance of the latter compared to the former. Counting charitably, the four citations to Beccaria are dwarfed by the seventy-four citations to “classical authors and the ancient Anglo-Saxon laws.”

67 1-2.
68 10-11
69 The medieval quotations in the bill are so extensive that the editor of Jefferson’s papers had to employ the services of one “Professor Robert K. Root, Princeton University, for transcription of the Anglo-Saxon text. . . .”
70 See, e.g., Robert A. Ferguson, Law and Letters in American Culture 11 (1984) (Commentaries “rank second only to the Bible as a literary and intellectual influence on the history of American institutions”).
While Boyd is correct to point to the Dr. Jekyll-Mr. Hyde nature of the bill, whose benighted substance has nothing to do with its benign (if not entirely enlightened) preamble, it is both less and more than a restatement “in superb language [of] the enlightened ideas of Beccaria and others.” Jefferson makes no reference to Beccaria, or to his principle of “greatest happiness of the greatest number” which drives his penology (and Bentham’s). Instead the preamble contains hints of what a republican criminal law might set out to achieve, or how a republican criminal law might be legitimated, even if it does not suggest what a legitimate republican criminal law might actually look like. (What follows the preamble makes it clear that Jefferson had no idea how to meet this challenge. He could not have believed that cribbing Coke and the Laws of Aethelstan and Cnut was the answer.)

Before taking a closer look at Jefferson’s preamble, the remainder of the bill deserves at least a quick look. Some highlights will suffice, since Boyd’s judgment requires little elaboration. The death penalty was retained for treason (high and petit) and murder. Other capital punishments were replaced by sentences of hard labor. Jefferson detailed what he had mind for the “malefactors condemned to labour for the Commonwealth” in a separate bill (no. 68):

> Malefactors... shall be employed to row in the gallies of the commonwealth, or to work in the lead mines, or on fortifications or such other hard and laborious works, for the behoof of the commonwealth, as by the Governor and Council, in their discretion, shall be directed: And during the term of their condemnation... shall have their heads and beards constantly shaven, and be clothed in habits of coarse materials, uniform in color and make, and distinguished from all others used by the good citizens of this commonwealth; that so they may be marked out to public note as well while at their ordinary occupations, as when attempting to escape from the public custody.  

The bill provided for castration as the punishment for “rape, polygamy, or sodomy” (a woman instead was to suffer “cutting thro’ the cartilage of her nose a hole of one half inch diameter at the least”). Murder by poison was punished by poisoning. 73 Maiming, as we’ve seen, was punished by maiming in kind. 74 Murder by dueling was punished by hanging, the dead body then to be placed in a gibbet—with further punishment for anyone who removes it, and instructions to replace it. 75 Petit treason—the ultimate police

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72 513. The bill wasn’t passed. In his Autobiography, Jefferson writes that he later had second thoughts about this proposal, after an experiment in exhibiting prisoners “as a public spectacle” had proved unsuccessful in Pennsylvania. 515.
73 Kathryn Preyer notes that poisoning was generally associated with homicides committed by slaves and that it was the only type of homicide punishable by death in kind. Kathryn Preyer, Crime, the Criminal Law and Reform in Post-Revolutionary Virginia, 1 Law & Hist. Rev. 53, 64 (1983). Note also that, as Coke points out, “of all felonies, murder is the most hainous, [a]nd of all murders, murder by poysoning is the most detestable.” 47.
74 “Whosoever on purpose and of malice aforethought shall maim another, or shall disfigure him, by cutting out or disabling the tongue, slitting or cutting off a nose, lip or ear, branding, or otherwise, shall be maimed or disfigured in like sort: or it that cannot be for want of the same part, then as nearly as may be in some other part of at least equal value and estimation in the opinion of a jury...”
75 Trying to account for the brutal punishment for dueling, Preyer speculates that “unrestrained, unregulated individual combat might rend the bonds of social unity within the governing class and threaten social stability.” Preyer 66. This explanation would be inconsistent with the preamble’s limited view of criminal law as designed to protect citizens’ “lives, liberties, and property” (discussed below) since the loser in a duel would be just as dead as any other homicide victim, with the exception that he had consented to his death (and thus seemingly entitling the winner to mitigation, if anything, not aggravation in punishment). It
offense of killing one’s householder—was retained as a crime separate, and more serious, than murder, punishable by hanging, followed by dissection by “Anatomists.” (There were several petit treason cases in eighteenth century Virginia, all of them against slaves, resulting in horrific punishments.) Other humiliating punishments such as ducking, whipping, and the pillory, were retained, for offenses including witchcraft (!) and larceny.

Not all the medieval laws copied in the bill served to increase the severity, and brutality, of punishments. Prison escape, for instance, was not a crime in and of itself (except for the escapee’s outside helpers); according to Jefferson’s marginalia, it was “doubtful” whether breach of prison was a felony at common law. Jefferson’s gloss on this rule it consistent with the police model of punishment in that it focuses on the punisher’s bad character, rather than on the punished’s rights, and presumes the punished’s inability to govern himself in the face of the “law of nature”:

It is not only vain, but wicked, in a legislator to frame laws in opposition to the laws of nature, and to arm them with the terrors of death. This is truly creating crimes in order to punish them. The law of nature impels every one to escape from confinement....

Jefferson also proposed, or rather retained (as he saw it), restitution to the victim as a sanction in property offenses, in addition to a sentence to hard labor. Although Jefferson does not make this point in his marginalia, this latter feature of the bill is consistent with a view of criminal law that moves beyond the traditional police-based conception. In the traditional view, the object of criminal law was to maintain the householder’s peace, which eventually was transformed into the “public” peace, once the “people” replaced the “king” as sovereign, at least in theory. Offenses against the householder’s peace were offenses against the householder and his ability to maintain his peace, which was synonymous with that of his household. Challenges to his authority were met with reassertions of that authority, if the householder deemed it necessary to take disciplinary action. Alternatively, with the peace reestablished and the offender acknowledging his superior authority through properly contrite behavior, or perhaps the payment of an amercement, or the fulfillment of some other discretionary condition (such as, say, working in the lead mines), the householder might decide to extend his mercy and refrain from further punishment.

This view of criminal law is utterly incompatible with a republican system of government, which is based on the equality of all constituents of the political community and recognizes self-government, manifested through consent, as the only legitimation for coercive state action against any of these constituents. Under this view, a crime is the violation of one person’s right by another person, and the state’s right to punishment is restricted to the protection of one person’s right against violation by another.

would be more consistent, however, with a view of punishment as police, which would regard the blatant interference with the sovereign’s monopoly of violence a particularly serious and egregious offense against his (or its) authority. Harsh punishment, and particularly demeaning punishment, for micro householders who engage in dueling (mere household members would simply fight, not duel, one another) thus would put them in their (inferior) place, reasserting the sovereign’s supremacy.

76 See Arthur P. Scott, Criminal Law in Colonial Virginia 161-62 (1930).
77 502.

23
Restitution of the loss suffered by one person, the “victim,” at the hands of another, the “offender,” is compatible with this, republican view of criminal law, which regards the person, not the state-householder, as the paradigmatic victim of every criminal offense. In fact, one way of framing the challenge of republican government is to ask why, and under what circumstances, state punishment is legitimate if restitution is possible, i.e., if the victim’s injury can be remedied without the infliction of punitive pain on the offender.

Elsewhere Jefferson is very clear about his view of the role of government in a republic, although he did not draw any explicit conclusion for a republican system of criminal law. In 1816, for instance, he argued that “[n]o man has a natural right to commit aggression on the equal rights of another; and this is all from which the laws ought to restrain him . . . .”79 In fact, he advocated an early version of Mill’s harm principle, when he remarked that “[l]aws provide against injury from others; but not from ourselves”80 and that “[t]he legitimate powers of government extend to such acts only as are injurious to others.”81 Jefferson mustered this argument in support of his calls for religious freedom and freedom of expression (“[I]t does no injury to my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”82), without however connecting it to the broader question of the legitimacy of state punishment, or the scope of criminal law.

The perfect place to explore the foundations, and limitations, of state punishment was, of course, the preamble to his criminal law bill. While Jefferson did not manage to present a coherent view of republican criminal law, the preamble does contain a number of suggestive remarks that deserve comment.

Jefferson begins by acknowledging that crime “frequently happens,” a welcome recognition that must be the starting point for any account of criminal law. To the extent it considers questions of legitimacy at all, contemporary political theory, by contrast, has had nothing to say about the challenge of punishment because it has consciously limited itself to questions of ideal theory under conditions of perfect compliance.83 The problem of punishment, however, arises only in the event of non-compliance. Already in a 1776 letter to Pendleton, Jefferson rejects “[t]he fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted on by some . . . .”84 In other words, Jefferson realized that even if an ideal theory had been developed, and implemented, the problem of crime would not cease to exist, leading—in his mind—to the need for retaining a system of punishment even after the establishment of a republic government. He went on to explain, however, that his ambitions in reforming such a system of punishments were strictly limited. “It is only the sanguinary hue of our penal laws which I . . . object to. Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime.

79 75-76.
80 The proportionality bill does away with forfeiture as punishment for suicide, though on the ground “[t] Suicide injures the state [!] less than he who leaves it with his effects.” 496.
81 162.
82 Id.
84 I. 505
Death might be inflicted for murther and perhaps for treason . . . Rape, buggery &c. punish by castration.”

A republican system of punishment, Jefferson continued in the preamble, must be “deducible from the purposes of society,” the “principal” purpose being to “secure enjoyment” of men’s “lives, liberties and property.” Crimes, however, are “violations on the lives, liberties and property of others.” The criminal law’s function is to “restrain” and “repress” them.

Here are the rudiments of a republican theory of crime and the scope of criminal law. Victims of crime are individual persons. The state is authorized, and in fact obligated, to protect the basic rights of its constituents (life, liberty, property), if necessary through the use of punishments. These serve a repressive, rather than a retributive, function.

The state’s punitive power, however, does not extend beyond the protection of the “lives, liberties, and property” of its constituents. It does not, as we’ve seen, reach beliefs or even acts that are not harmful to others, nor does it reach conduct that is harmful only to the actor.

Repression of crime can be achieved in three ways: deterrence, reformation, and incapacitation (“exterminat[i]on”). So having offenders perform hard labor in public would transform them into “living and long continued spectacles to deter others from committing the like offences.” Reformation is also “an object worthy the attention of the laws.” Incapacitation is reserved for those “whose existence is become inconsistent with the safety of their fellow citizens.”

Crimes are committed by “wicked and dissolute men resigning themselves to the dominion of inordinate passions.” Offenders are referred to, twice each, as “members of society” and “fellow citizens.” Among offenders the person “committing an inferior injury” must be distinguished from others. He “does not wholly forfiet the protection of his fellow citizens, but, after suffering a punishment in proportion to his offence is entitled to their protection from all greater pain.” From this entitlement derives the requirement of proportionality (“a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments”).

Jefferson doesn’t explain what distinguishes the good offender from the bad one, a problem of differentiation that continues to befuddle penologists to this day. (A version of this distinction figured prominently not only in the Philadelphia prison reform movement of the late 18th century, but also, in a slightly more differentiated version, has been central to treatmentist penology since its inception in the late 19th century.) It would seem that “wicked” offenders would be incorrigible. Those who are (only) “dissolute,” however, might have a better chance of correction. Their reformation presumably would have them throw off the “dominion” of “inordinate passions,” and exercise their capacity for self-government, by drawing on their reason or, perhaps, passions, provided they are ordinate; one such passion might be benevolence (or perhaps even a sense of justice), which was central to Jefferson’s view of personhood. This reading of the nature of crime, and of criminals, would be consistent with the widespread

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85 Property vs. pursuit of happiness in Declaration of Independence.
86 Dubber, The Right to Be Punished; Liszt (Marburg Program).
87 For samples, see David N. Mayer, The Constitutional Thought of Thomas Jefferson 72, 73, 76, 77, 85, 104 (Charlottesville 1994).
disenfranchisement of offenders, on the ground that they were not in a position to exercise their capacity for self-government (along with paupers, servants, slaves, and women), though some might have held instead that they lacked the capacity altogether (in which case it would be difficult to make sense of punishment as rehabilitation or correction since there would be nothing to correct).

Capital punishment runs afoul of this requirement of proportionality to the extent it exterminates those who might be reformed and thereby “weaken[s] the state by cutting off . . . useful members.” It also forecloses the aforementioned opportunity for deterrence through the use of public labor as an alternative punishment for corrigible offenders. What’s more, “cruel and sanguinary laws” are self-defeating; instead of deterring, they arouse the benevolence of others “to withhold prosecutions, to smother testimony, or to listen to it with bias.”

Jefferson does not call for the abolition of capital punishment. Specifically, he makes no mention of Beccaria’s celebrated argument that capital punishment violates the social contract because no one has agreed, or may agree, to subject himself to death:

> Did any one ever give to others the right of taking away his life? . . . If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself, which he certainly must have, if he could give it away to another?88

In fact Jefferson, as we have noted already, retains not only capital punishment but corporal punishment as well. The upshot of the preamble, then, is

> For rendering crimes and punishments therefore more proportionate to each other: Be it enacted by the General assembly that no crime shall be henceforth punished by deprivation of life or limb [!] except those hereinafter ordained to be so punished. [emphasis added]

In the end, Jefferson’s interest in the preamble was not to provide a legitimation of punishment in general, even if one could be pieced together along the lines suggested. As his letter to Pendleton makes clear, punishment in his mind was simply necessary to provide “sufficient security to the state against the commission of crimes,” without exploring the connection between “the security of the state” and the protection of its constituents against violations of their rights. Rather than legitimating punishment as a whole, Jefferson was content to address the problem of excessive punishment. Most important he recognized this as a problem worth consideration because certain offenders retained their status as fellow citizens or members of society despite their crime.

This is a crucial recognition and frames the problem of punishment as a question of politics in general, and one of law (as opposed to police) in particular. Not only is punishment justified in terms of protecting the rights of persons as legal subjects (rather than of enforcing the authority of the sovereign); it is also constrained by the recognition that not only victims, but offenders as well, are legal subjects endowed with the same rights the protection of which justifies their punishment.

Jefferson’s view of punishment as a political problem, however, remained limited. It did not include those offenders, wicked or incorrigible, or both, who had inflicted more than “an inferior injury” and thereby had revealed themselves to exist beyond the border of the political community. These outlaws, “whose existence is become inconsistent with
the safety of their fellow citizens,” were subject to being “cut[] off” from the state. Their execution posed no political problem; at best it might engage the public’s benevolence when, as “the last melancholy resource,” they are “exterminated.” If Jefferson had been so inclined, he might have pointed out that outlawry too was a familiar feature of medieval English law—and one he did not hesitate to employ when appropriate.89

Conclusion

Jefferson was right. For radical law reform in light of republican principles, most importantly the fundamental principle of self-government, there was no time like the present:

Our rulers will become corrupt, our people careless. . . . It can never be too often repeated, that the time for fixing every essential right on a legal basis is while our rulers are honest, and ourselves united.90

In the case of criminal law, this opportunity was missed. It is no accident that Jefferson wrote these cautionary words in the context of a discussion of freedom of religion, one of his central concerns. Neither Jefferson, nor anyone else of his generation, recognized, or addressed, the full force of the new republican challenge to the legitimacy of the state’s inflicting punitive pain on the very persons from whom it derives its legitimacy, of depriving those of life, liberty, and property (and limb) whose “lives, liberties, and property” it exists to preserve.

While the preamble to his Bill for Proportioning Crimes and Punishments in Cases contains some hints about how a republican system of criminal law might be legitimated, the bill itself was a complete failure, an empty reprise of medieval dooms.

No other attempt to come to grips with the problem of republican punishment has been undertaken, never mind succeeded. The moment had passed. Edward Livingston’s system of penal codes (including a Code of Crimes and Punishments, a Code of Procedure, a Code of Evidence, a Code of Reform and Prison Discipline, and a Book of Definitions), completed some fifty years later (in 1826) already was too far removed from the revolutionary drive to question the legitimacy of every form of state action under the new republican regime. Livingston hoped to succeed where Bentham, his admired English master had failed, who had bombarded American legislatures, governors, and presidents with codification offers for years, none of which bore fruit.91 His codes (“framed on the great principle of utility!”92) resembled Bentham’s in rigorously utilitarian approach, in detail, scope, and length. They also met the same fate: none of them was enacted.93

89 See above—Jefferson’s bill of attainder against Josiah Philips.
90 Notes on the State of Virginia, query xvii (1781).
91 See Kadish.
92 Livingston 175.
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