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## Unintended Collateral Consequences: Defining Felony in the Early American Republic

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# UNINTENDED COLLATERAL CONSEQUENCES: DEFINING FELONY IN THE EARLY AMERICAN REPUBLIC

WILL TRESS\*

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## I. INTRODUCTION

In American law, it matters if the crime *accused of* is defined as a felony rather than some lesser offense. Accused felons are generally accorded more constitutional and procedural rights than accused misdemeanants—to the benefit of the accused felon.<sup>1</sup> It also matters if the crime *convicted of* is defined as a felony, but to the detriment of the felon. The felony-murder doctrine and habitual offender laws increase the punishment given to at least some felons, and the impediments to full citizenship imposed on felons even after their sentences have been served<sup>2</sup> lead to political and economic problems for both the ex-convict and his or her community.

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<sup>1</sup> *E.g.*, presence of the defendant at trial. 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 21, at 112-13 (15th ed. 1993).

<sup>2</sup> *E.g.*, loss of voting rights and exclusion from some occupations. *Id.* at 114-15. There is a large and growing literature on collateral consequences of a conviction, which can be traced back to the drafting of the Model Penal Code in 1961. See *infra* Part III for a review of that development.

For a policy-maker seeking to affect either the rights of the accused, or the challenges faced by ex-convicts, redefining felony to make the term include more or fewer crimes would be a useful tool. Yet the dual effect of such a redefinition—increasing rights for one group while decreasing them for another—makes this a difficult task. One way to approach this conundrum is to look at the origins of the dividing line between felony and misdemeanor and to ask why it is set where it is. This Article examines how the present definition of felony was developed historically and what implications this may have for policy making in the future.

Felony is usually defined under American law in terms of the sentence imposed: a crime punished by death or incarceration, the incarceration being either in a penitentiary (place) or for more than one year (time); other crimes are misdemeanors.<sup>3</sup> A striking exception is the definition in Maryland, which perpetuates the common law: a felony is a crime that was a felony at common law, or has been so designated by statute.<sup>4</sup> While the alternative, majority definitions (place of imprisonment or time of imprisonment) are simpler and more compact, they do raise questions: Why define a crime by the place of punishment? Why choose one year as the dividing line between felony and misdemeanor? The answers to those questions are found in the early years of the American Republic when the received common law was examined in light of new ideas about punishment and the accessibility of the law. It was at that time and in response to those ideas that an American definition of “felony” was created.

In retrospect, a different choice might have been made, and the word “felony” might have been omitted from our statutory law. Surprisingly little deliberation went into developing the definition now in general use in American law. Only by looking at the context of that redefinition—especially the penal reform and codification movements—can we gain insight into how the creators of the definition would view the present controversy over the collateral consequences of a felony conviction.

Part I of this Article sets out the development of the concept of “felony,” as well as a closely related term—“infamous crimes”—in the common law. Next, it looks at two early American reform movements—penal reform and codification of the law—that together created the impetus to rewrite the criminal law and redefine felony.

Three different responses to the problem of defining felony in the American context are analyzed in Part II: the retention of the common law definition of felony in Maryland, the rejection of the term entirely in the influential code drafted for Louisiana by Edward Livingston, and its redefinition in the New York Revised Statutes of 1829—a work that provided a template for later codification efforts throughout the nation. The Article then follows the spread of the definition developed for the 1829 New York code to other jurisdictions and its later adoption in a revised form by the Model Penal Code.

Part III looks at the importance of felony as a concept in both substantive and procedural law, and it suggests ways that the historical development of the concept can inform policy choices in the present.

This Article concludes that the new definition of felony adopted in 1829 by the New York revisors reflected their pragmatic approach of choosing a middle path between the common law traditionalists, exemplified by Maryland, and the radical

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<sup>3</sup> 1 TORCIA, *supra* note 1, § 19, at 109.

<sup>4</sup> *Dutton v. State*, 91 A. 417, 419-20 (Md. 1914).

reforms enshrined in Livingston's penal code. Their choice was an expedient one, redefining an outdated term rather than writing it out of the law. Yet underlying their efforts was a belief that punishment was an instrument of moral reformation, a way of returning the convicted felon to the community as a productive citizen. Creating barriers to a convict's reentry into society with continuing civil disabilities would not have been their intention.

## II. BACKGROUND

### A. *The "fogs and fictions of feudal jurisprudence"*<sup>5</sup>

The common law concepts that the United States inherited from England at the time of the Revolution had been developing over centuries, and many had accumulated multiple meanings or connotations. Those who chose to accept or adapt a common law term to American circumstances often had to choose between meanings or reject the term entirely. The word "felony" was just such a multi-definitional term and is the focus of this Article. Another term, "infamous crime," was at common law related to "felony" but, in America, has become almost synonymous with it.<sup>6</sup> A brief review of how these terms originated and how they had evolved up to the time of the early American Republic helps to illuminate the choices faced by the American reformers.

#### 1. Felony

In its earliest known form, "felony" was not a criminal act per se but a breach of the feudal obligations between lord and vassal,<sup>7</sup> and it did not necessarily result in the death of the felon.<sup>8</sup> Moreover, serious crimes were not necessarily felonies: "A mere common crime, however wicked and base, mere wilful homicide, or theft, is not a felony; there must be some breach of that faith and trust which ought to exist between lord and man."<sup>9</sup> Since ownership of property was bound to the feudal relationship, a breach of that nexus led to a forfeiture of goods and the escheat of the fief.<sup>10</sup>

After the Norman Conquest of England, this basically feudal doctrine was reshaped into the common law concept of felony, which included the death penalty

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<sup>5</sup> *Byers v. Sun Savings Bank*, 139 P. 948, 949 (Okla. 1914) ("[T]he principles of law [in a state civil death statute] . . . had its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.").

<sup>6</sup> In some jurisdictions, for instance, it is used instead of felony to describe those crimes that create additional civil sanctions for the convict. *See, e.g.*, TENN. CODE ANN. § 40-29-101 (2006).

<sup>7</sup> JULIUS GOEBEL, JR., *FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW* 250 (1976).

<sup>8</sup> *Id.* at 237.

<sup>9</sup> 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 304 (2d ed. 1923) (1898).

<sup>10</sup> *Id.* at 303-04.

and loss of goods and land for a criminal act.<sup>11</sup> By the late twelfth century, the concept also included disinheritance of the felon's heirs through corruption of the blood.<sup>12</sup>

With the fading of the feudal order, felony lost its original meaning of disloyalty to the lord and came to mean a serious crime punishable by death. Hawkins, writing in the early eighteenth century, differentiated between felonies at common law<sup>13</sup> and those statutory crimes that are expressly called felonies or are made capital crimes.<sup>14</sup> The express words were important; a statute that punished a crime with forfeiture—but did not state that it was a felony—created “a high Misdemeanor, punishable by Imprisonment,” not a felony.<sup>15</sup> Some remnant of the feudal order remained in the crimes of treason (against the monarchy)<sup>16</sup> and petit treason (against a master by a servant, or against a husband by his wife),<sup>17</sup> both of which involved an element of disloyalty and were punishable by death.

Blackstone, looking back at the long history of the term, maintained that “the true criterion of felony is forfeiture.”<sup>18</sup> Yet, he also acknowledges a change in meaning over time: “The idea of felony is, indeed, so generally connected with that of capital punishment that we find it hard to separate them . . . .”<sup>19</sup> As the definition of felony became less definitely tied to forfeiture and the use of capital punishment became more general, the number of felonies in English law multiplied. The traditional common law felonies were nine: murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny.<sup>20</sup> Many more were added by statute. Francis Bacon, writing around 1620, listed some thirty-four felonies, including witchcraft and harboring a priest.<sup>21</sup> Blackstone lamented that, in his day, “no less than a hundred and sixty [offenses] have been declared by act of parliament[] to be felonies . . . or, in other words, to be worthy of instant death.”<sup>22</sup>

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<sup>11</sup> GOEBEL, *supra* note 7, at 278-79.

<sup>12</sup> *Id.* at 266-68.

<sup>13</sup> 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 65 (Garland 1978) (1716).

<sup>14</sup> *Id.* at 106-07.

<sup>15</sup> *Id.* at 107.

<sup>16</sup> *Id.* at 33.

<sup>17</sup> *Id.* at 87-88.

<sup>18</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 97 (Philadelphia, J.B. Lippincott & Co. 1875).

<sup>19</sup> *Id.*

<sup>20</sup> FRANCIS WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 1 (Philadelphia, James Kay, Jun. & Brother 1846).

<sup>21</sup> FRANCIS BACON, Preparation for the Union of Laws of England and Scotland, in 5 WORKS OF FRANCIS BACON 92-96 (Basil Montagu ed., London, William Pickering 1826).

<sup>22</sup> 4 BLACKSTONE, *supra* note 18, at 18.

This ambiguity in the meaning of felony did not go unnoticed by American legal commentators. Nathan Dane, a Massachusetts lawyer and legislator,<sup>23</sup> wrote in 1823 in a comprehensive treatise on American law:

[T]he word *felony*, in the process of many centuries, has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast number of different senses, that it is impossible to know precisely in what sense we are to understand this word.<sup>24</sup>

As to the choice between forfeiture and capital punishment as alternate criteria for defining felony, Dane noted that, in American law at that time, “we have many felonies, not one punished with forfeiture of estate, and but a very few with death.”<sup>25</sup>

Within a few decades, however, American commentators settled on a basic common law definition that avoided mention of either forfeiture or punishment and proved serviceable in jurisdictions that maintained the common law of crimes: the term felony includes the “classic” English felonies<sup>26</sup> plus crimes designated as felonies by statute.<sup>27</sup>

## 2. Infamous Crimes

The word “infamy” is derived from the Latin word *infamia*.<sup>28</sup> In essence, *infamia* worked to deprive the Roman citizen declared *infames* of certain civic rights, such as the ability to vote and hold public office.<sup>29</sup> This civic disability flowed from a perceived “moral imperfection” in the *infames*,<sup>30</sup> evidenced by conviction of a crime or working in a dishonorable trade (such as acting).<sup>31</sup>

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<sup>23</sup> Dane, Nathan, Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000027> (last visited Sept. 15, 2009).

<sup>24</sup> 6 NATHAN DANE, DIGEST OF AMERICAN LAW 715 (Boston, Cummings, Hilliard & Co. 1823).

<sup>25</sup> *Id.*

<sup>26</sup> See WHARTON, *supra* note 20 (citing murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny).

<sup>27</sup> *Id.* (“In this country . . . the common law classification has obtained; the principle felonies being received as they originally existed, and their number being increased as the exigencies of society prompted.”); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 376 (7th ed. Boston, Little, Brown, and Company 1882) (“[W]here no statute has defined felony, we look into the books upon common-law crimes, and see what was felony and what was not under the older laws of England.”).

<sup>28</sup> See generally A. H. J. GREENRIDGE, INFAMIA: ITS PLACE IN ROMAN PUBLIC AND PRIVATE LAW (London, Henry Frowde & Stevens & Sons, Limited 1894).

<sup>29</sup> *Id.* at 105-07.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.* at 124.

At common law, the term “infamous” came to mean a person rendered incapable of being a juror or testifying in court.<sup>32</sup> There was, however, always some ambiguity as to whether it was the crime committed or the punishment suffered that created the infamy. Hawkins lists treason, felony, piracy, perjury, and forgery as crimes that would disable a person as a witness,<sup>33</sup> *as well as* any crime that was punished by the pillory, whipping, or branding.<sup>34</sup> Later cases, however, differentiate between sentencing to the pillory (a public, humiliating punishment) for an offense “contrary to the faith, credit, and trust of mankind” such as forgery, versus sentencing for a non-infamous offense such as libel.<sup>35</sup> It became commonplace to say that “it is not the nature of the punishment, but the nature of the crime and conviction, that creates the infamy.”<sup>36</sup> Yet the older connotation of infamous crime that included infamous punishment never completely disappeared. Like felony, there were two kinds of infamy, “one founded in the opinions of the people respecting the mode of punishment, the other in the construction of law respecting the future credibility of the delinquent.”<sup>37</sup>

This alternate “popular” meaning of infamous crimes, based on the mode of punishment, was also reflected in the law of defamation where per se slanderous words must either endanger the party’s life or subject him or her to infamous punishment.<sup>38</sup> The rule in defamation sometimes became conflated with that for capacity, as evidenced by an 1809 New York slander case where moral turpitude replaces threat to life: “the charge, if true, will subject the party . . . to an indictment

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<sup>32</sup> 4 JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS, TO THE END OF THE REIGN OF PHILLIP AND MARY 275 (2d. ed. Dublin, Luke White 1787). Reeves quotes an old English adage to the effect that one who is forsworn cannot be trusted: “He ne es othes worthe that enes gylty of oth braker.” *Id.*

<sup>33</sup> 1 HAWKINS, *supra* note 13, at 432.

<sup>34</sup> *Id.* It might be noted that in the case of treason, felony, and piracy—all capital offenses—the question of subsequent capacity to testify would rarely arise, at least until transportation replaced execution in some cases. *See e.g.*, James Clarke’s Lessee v. Philip Hall, 2 H. & McH. 378 (Md. 1789) where the issue was the competence of a witness who had been transported to the American colonies at a time when a sentence of transportation was used by English courts for both felonies and lesser crimes.

<sup>35</sup> R. v. Davis & Carter, (1696) 90 Eng. Rep. 1315 (K.B.).

<sup>36</sup> *See e.g.*, R. v. Ford, (1700) 91 Eng. Rep. 585 (K.B.).

<sup>37</sup> PRINCIPLES OF PENAL LAW 61 (2d ed. London, B.White & T. Cadell 1771). It was this popular meaning of “infamous” (founded in the opinions of the people) that found its way into the Fifth Amendment to the U.S. Constitution in the phrase “capital or other infamous crime.” *Id.* (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .” U.S. CONST. amend. V). This view was ratified by the Supreme Court in *Ex parte Wilson*, 114 U.S. 417 (1885), an opinion that essentially merged the definitions of felony and infamous crimes. Prior to *Ex Parte Wilson*, the courts had used the disqualified-as-witness test to decide if a crime required a grand jury indictment. *See e.g.*, United States v. Yates, 6 Fed. 861 (E.D.N.Y. 1881); United States v. Baugh, 1 Fed. 784 (E.D. Va. 1880). The Founders might have prevented this uncertainty by rephrasing the sentence to read—less elegantly—for a crime punishable by death or other *infamous punishment*.

<sup>38</sup> Ogden v. Turner, (1703) 87 Eng. Rep. 862 (K.B.).

for a crime involving moral turpitude, or subject him to an infamous punishment.”<sup>39</sup> James Kent, New York’s Chief Justice and then Chancellor of that state’s Court of Chancery,<sup>40</sup> restated the principle as “there must be not only *imprisonment* but *infamous punishment*” at risk if a statement is to be slanderous.<sup>41</sup> His list of clearly infamous punishments is: death, gallows, pillory, branding, whipping, *confinement to hard labor* and ear cropping.<sup>42</sup> Kent’s addition of imprisonment at hard labor to the list of infamous punishments reflects changes in the attitudes towards punishment in post-Revolutionary America, part of a reexamination of the old order by citizens of a new nation. The identification of one sense of the term “infamous crimes” with “corporal punishment”—like the identification of one sense of “felony” with “capital punishment”—would be a task for legal reformers in the new Republic.

*B. The Revolution is Not Over*<sup>43</sup>

The early nineteenth century was a time of social and political ferment in the United States, characterized by an “upsurge of democratic hope” in religious communities and the populace at large.<sup>44</sup> At the same time, Jacksonian democracy brought with it a practical approach towards developing new institutions<sup>45</sup> combined with a disdain for the existing legal system.<sup>46</sup> Two movements among the many sweeping the Republic at that time are especially relevant to the redefinition of felony: penal reform and codification.

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<sup>39</sup> *Brooker v. Coffin*, 5 Johns. 188, 191 (N.Y. Sup. Ct. 1809).

<sup>40</sup> Judith Kaye, *Commentaries on Chancellor Kent*, 74 CHI.-KENT L. REV. 11 (1998), available at <http://www.nycourts.gov/history/pdf/Library/Juidges/Kent.pdf>.

<sup>41</sup> NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW WITH OCCASIONAL NOTES AND COMMENTS 566 (Boston, Cummings, Hilliard & Co. 1823).

<sup>42</sup> *Id.* at 570.

<sup>43</sup> BENJAMIN RUSH, Address to the People of the United States, in FRIENDS OF THE CONSTITUTION; WRITINGS OF THE OTHER FEDERALISTS 1 (Colleen A. Sheehan & Gary L. McDowell eds., 1998). Rush’s speech begins with the observation: “The American war is over: but this is far from being the case with the American revolution. . . . It remains yet to establish and perfect our new forms of government; and to prepare the principles, morals, and manners of our citizens . . . .” *Id.* The speech ends with the declaration: “THE REVOLUTION IS NOT OVER!” *Id.* at 5.

<sup>44</sup> NATHAN O. HATCH, The Democratization of Christianity and the Character of American Politics, in RELIGION AND AMERICAN POLITICS 92, 95 (Mark A. Noll ed., 1990).

<sup>45</sup> MATTHEW A. CRENSON, THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA 3-4 (1975).

<sup>46</sup> LAWRENCE FREDERICK KOHL, POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 145, 163-65 (1989). Yet, an “overwhelming majority” of the officials in Jackson’s administration were trained as lawyers. CRENSON, *supra* note 45, at 30. For a discussion of the different criticisms leveled against the inherited legal system by lawyers and laymen, see CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT 12-15 (1981).

### 1. Penal Reform

The use of the place of incarceration to define felony resulted from a theory of punishment that divided criminal acts into those requiring reformation of the convict's character and those lesser crimes that only required a sharp reminder to obey the law. This division of crimes into those punished by prison and those punished by jail or fines came about through the work of legal and prison reformers, who convinced state legislatures to support their program of reform with new laws and new penal institutions.

Within two decades of gaining independence from England, the states of the Union had replaced execution with incarceration as the punishment for all but a few crimes.<sup>47</sup> This change was inspired by a belief that criminal behavior was the result not of some innate and unchangeable defect in the criminal but of poor upbringing and a corrupting social environment.<sup>48</sup> What had been deformed by the delinquent's past, however, could be reformed by a strictly regulated correctional environment.<sup>49</sup> Not only would such a program of reformation strengthen society by turning moral defectives into productive citizens, it would also "demonstrate the social blessings of republican political arrangements to the world . . ."<sup>50</sup>

In 1786, Pennsylvania enacted a law<sup>51</sup> that imposed imprisonment at hard labor for a specified list of crimes that had formerly been capital crimes; the term of imprisonment was "any term or time, at the discretion of the court . . . not exceeding ten years."<sup>52</sup> The change was not, however, universal since "every other felony or misdemeanor or offence whatsoever, not specifically provided for by this Act, may and shall be punished as heretofore."<sup>53</sup> And while the legislation contains some regulation of the conditions of confinement, it relies on the existing "Sheriffs or Keepers of the gaols . . . in the several counties . . ." to enforce those provisions.<sup>54</sup>

A much more elaborate penal statute was enacted in 1794,<sup>55</sup> expanding the list of crimes covered and providing sentence ranges for each crime (e.g., arson, five to twelve years in the penitentiary).<sup>56</sup> For some more serious crimes, solitary confinement—from one-twentieth to one-half of the total sentence—could be

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<sup>47</sup> 6 DANE, *supra* note 24.

<sup>48</sup> ORLANDO LEWIS, DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, at 33 (1967) ("[I]t is from the ignorance, wretchedness and corrupted manners of a people that crimes proceed." (quoting WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 43 (Philadelphia, T. Dobson 1793))).

<sup>49</sup> DAVID J. ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 78 (1971).

<sup>50</sup> *Id.*

<sup>51</sup> Act of Sept. 15, 1786, ch. XLV, 10 PA. STAT. ANN. 128.

<sup>52</sup> *Id.* § II.

<sup>53</sup> *Id.* § X.

<sup>54</sup> *Id.* § XVI.

<sup>55</sup> Act of Apr. 22, 1794, ch. CCLVII, 18 PA. STAT. ANN. 599.

<sup>56</sup> *Id.* §§ II-IX.

specified by the court.<sup>57</sup> The 1794 Act also eliminated the death penalty in Pennsylvania for all crimes except first-degree murder.<sup>58</sup> First degree murder was the only crime actually defined in the statute (murder with premeditation, or murder committed during the commission of, or attempts at arson, rape, robbery or burglary).<sup>59</sup> Other crimes retained their common law definitions.

A related movement to change the conditions of imprisonment gained momentum in 1787 with the foundation of the Philadelphia Society for Alleviating the Miseries of Public Prisons; among the founders were Benjamin Franklin and Benjamin Rush.<sup>60</sup> They were inspired by the principles of the Quakers, notably William Penn,<sup>61</sup> as well as English promoters of reform, such as John Howard and later, Jeremy Bentham.<sup>62</sup>

The first fruit of their efforts at prison reform was the Walnut Street Prison in Philadelphia, which opened in 1790 with solitary “penitentiary” cells for serious offenders and larger common cells with associated workrooms for others.<sup>63</sup> The Act authorizing the prison<sup>64</sup> added several sections governing the construction and operation of new solitary cells.<sup>65</sup> The facility soon became overcrowded, and additional penitentiaries were authorized in 1818 and 1821—without provision for group labor.<sup>66</sup> The use of hard labor in solitary confinement cells for all serious offenders became known as the “Pennsylvania System.”<sup>67</sup>

The penitentiary, however, was not the exclusive place of imprisonment in nineteenth-century Pennsylvania. While the 1794 Act prescribed “confinement . . . to be had and performed in the . . . jail and penitentiary of Philadelphia,” an 1806 Act gave judges discretion in sentencing convicts to three years or less in the penitentiary or a county jail.<sup>68</sup>

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<sup>57</sup> *Id.* § XI.

<sup>58</sup> *Id.* § I.

<sup>59</sup> *Id.* § II. All other kinds of murder are second degree. *Id.*

<sup>60</sup> Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 45-48 (1921).

<sup>61</sup> LEWIS, *supra* note 48, at 10-15.

<sup>62</sup> John Howard, an indefatigable campaigner for prison reform, published the first edition of his STATE OF THE PRISONS in 1777, with a revised and expanded edition in 1784. He was unsuccessful in his attempt to build England’s first penitentiary. See EDGAR GIBSON, JOHN HOWARD 117-18 (1902). Bentham’s PANOPTICON, A PROPOSAL FOR A NEW TYPE OF PRISON—along with two separate POSTSCRIPTS—was published in 1791.

<sup>63</sup> LEWIS, *supra* note 48, at 25-37.

<sup>64</sup> Act of Apr. 5, 1790, ch. 1516, 1790 Pa. Laws 511.

<sup>65</sup> *Id.* at 515-23. The motivation for instituting solitary confinement was expressed as: “[I]t is hoped that the addition of unremitted solitude to laborious employment as far as can be effected will contribute as much to reform as to deter.” *Id.* at 511.

<sup>66</sup> Barnes, *supra* note 60, at 48-49.

<sup>67</sup> *Id.* at 49.

<sup>68</sup> Act of Mar. 21, 1806, ch. 2649, 1806 Pa. Laws 239.

Other states, following Pennsylvania's lead, enacted statutes that reformed penal laws and authorized new prison construction, usually in the same Act. In 1796, the Virginia legislature directed the Governor to purchase land for a penitentiary and, in the same Act, substituted imprisonment for capital punishment for all crimes other than pre-meditated murder.<sup>69</sup> Proponents cited the example of Pennsylvania, as well as principles of republican government, in support of the statute.<sup>70</sup>

Also in 1796, New York State passed "[a]n Act making alterations in the criminal law of this State and for erecting State prisons,"<sup>71</sup> which abolished forfeiture except for treason, prescribed incarceration rather than execution for all crimes other than treason or murder, and left it to the judge to decide between imprisonment at hard labor or in solitude, or both.<sup>72</sup> Since the change in sentencing preceded the actual construction of a state prison, the Act provided that "the convict shall be confined to imprisonment in the gaol where such convict now is, until the State prisons . . . shall be ready. . . ."<sup>73</sup> The prison constructed under the authority of this legislation (in an as yet undeveloped section of New York City) housed prisoners eight to a cell, with enforced solitude at meals and group labor at prison industries of various types.<sup>74</sup> This system of enforced silence and prison industry—with the later amendment of solitary sleeping cells in cell blocks—became known as the "Auburn System" after the Auburn Prison in western New York State.<sup>75</sup> The Pennsylvania System (labor in solitary confinement) and the Auburn System (silent, congregate labor with separate sleeping cells) were competing models for prisons in the United States through the mid-nineteenth century.<sup>76</sup>

This revolution in the aims and means of punishment, motivated by a belief in the moral redemption of the criminal, changed the consequences of a criminal conviction but not the definitions of crimes. Like other sentencing reform statutes of the period, the New York Act of 1796 prescribed sanctions for "felonies" without defining that term.<sup>77</sup> That task fell to those who sought to organize and rationalize the law into codes.

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<sup>69</sup> See Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 76 (1983).

<sup>70</sup> *Id.* at 78.

<sup>71</sup> Act of Mar. 26, 1796, ch.30, 1796 N.Y. Laws 669.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 674-75. In contrast, Massachusetts delayed implementation of sentencing reform until the opening of the State prison in 1805. See Adam J. Hirsh, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1250 (1982).

<sup>74</sup> LEWIS, *supra* note 48, at 43-47.

<sup>75</sup> *Id.* at 77-88.

<sup>76</sup> Barnes, *supra* note 60, at 55-58.

<sup>77</sup> *Id.* at 39-40.

## 2. Codification

A patch-work system of poorly organized and hard to locate statutes had created discontent with the legal system in post-Revolutionary America. This discontent was strengthened by uncertainty as to which portions of the common law tradition had made the transition from pre- to post-Independence. “It was . . . a time when statute law was, at best, inaccessible and the common law was often little better than slippery darkness.”<sup>78</sup>

The problem of making statutes findable had been addressed with varying degrees of success since colonial times.<sup>79</sup> The chosen solution was to reprint the session laws of the jurisdiction, usually in chronological order, with repealed and obsolete laws omitted. Such a compilation was usually called a “revision” of the laws, a well-defined term in American law until the 1820s.<sup>80</sup> Such compilations were, of course, out-of-date as of the next legislative session and had to be supplemented or republished at regular intervals. Also, such collections did not include the common law applicable to the jurisdiction.<sup>81</sup>

A more thoroughgoing approach was proposed by advocates of codification that, in the nineteenth century, meant an “ambitious undertaking to provide a complete and authoritative body of general principles covering most areas of human conduct arranged in logical order.”<sup>82</sup> A model of such a code was available from antiquity in the Institutes of Justinian.<sup>83</sup> A more contemporary European model was available in the civil and penal codes issued in France under Napoleon.<sup>84</sup>

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<sup>78</sup> COOK, *supra* note 46, at 12 (1981).

<sup>79</sup> See EDWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 73-82 (1990).

<sup>80</sup> COOK, *supra* note 46, at 24. Today there is no uniform practice in naming statutory compilations; the titles given to state enacted laws include, in addition to the popular “code”: “Revised Statutes” (Oregon, Missouri, Louisiana, Maine, Arizona, Kentucky), “Consolidated Statutes” (Pennsylvania, New York), “Compiled Statutes” (Illinois), “Compiled Laws” (Michigan), and “Revised Laws” (Nevada). These various names are given to very similar works: subject arrangements of enacted laws of general application currently in force, with annotations to case law and commentary.

<sup>81</sup> The four volumes of Pennsylvania laws edited by Alexander Dallas between 1793 and 1801, however, did contain notes to court decisions that construed statutory language. SURRENCY, *supra* note 79, at 77. For an attempt to clearly differentiate between a compilation, a revision, and a code, see L. Dee Mallonee, *Revised Statutes and Codes*, 48 AM. L. REV. 37, 37-38 (1914).

<sup>82</sup> SURRENCY, *supra* note 79, at 82.

<sup>83</sup> While many lawyers were classically educated, there was at least one English translation available since colonial times: *THE FOUR BOOKS OF JUSTINIAN’S INSTITUTIONS, TRANSLATED INTO ENGLISH, WITH NOTES* (George Harris trans., London, C. Barthurst & E. Withers 1756).

<sup>84</sup> The civil code, promulgated in 1804, was available in English translation by 1811. *THE CODE NAPOLEON, VERBALLY TRANSLATED FROM THE FRENCH* (Bryant Barrett trans., London, W. Reed 1811); the penal code of 1810 was also available in English by 1811. *PENAL CODE OF THE FRENCH EMPIRE* (London, J. McCreery 1811). A review of the French codes published in the *North American Review* listed French editions of the civil and penal codes from 1809 and 1812 respectively. *Code Napoleon*, 20 N. AM. REV. 393 (1825).

Codification of the law also had a champion—the English philosopher and reformer, Jeremy Bentham, whose writings were widely read and discussed in the United States.<sup>85</sup> Bentham’s goal for codification was to make the law “clear and simple enough for the ‘plain’ man to be capable of grasping it. . . . [and] made accessible to the citizen.”<sup>86</sup> In his *Principles of the Penal Code*<sup>87</sup> Bentham sought a logical order by categorizing crimes by the person or interest injured (public, private, one’s self) with further subdivisions within these categories. This “scientific” organization of the law would replace the arbitrary and confusing system of the common law.<sup>88</sup> Once such a code was established, Bentham insisted, nothing outside the code would be considered law; there would be no judge-made law even to interpret the code.<sup>89</sup>

This radical antipathy to common law jurisprudence had several prominent proponents in the United States,<sup>90</sup> but there were many more lawyers and judges committed to the common law tradition. The high water mark for the radical reformers was Edward Livingston’s authorship of a Benthamite legal code for Louisiana that, however, was not enacted.<sup>91</sup>

The codification movement bore less radical but more enduring fruit with the revision of statutory laws in a number of states, revisions on a more ambitious scale than the earlier chronological compilations.<sup>92</sup> Most notable was the New York revision of 1829<sup>93</sup> that had national influence,<sup>94</sup> especially in penal law. At least one innovation of the New York revisors—the redefinition of felony—had long lasting repercussions.

### III. THE DEFINING MOMENT

Those who took up the task of recasting or replacing the mix of patchwork statutes and common law crimes with a systemized penal code faced questions not only about which crimes should be punished and how. They also needed to define terms that were ambiguous in the common law, such as “infamous crime” or

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<sup>85</sup> See George M. Hezel, *The Influence of Bentham’s Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States*, 22 BUFF. L. REV. 253 (1972); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098 (1978).

<sup>86</sup> Terry DiFilippo, *Jeremy Bentham’s Codification Proposals and Some Remarks on Their Place in History*, 22 BUFF. L. REV. 239, 242 (1972).

<sup>87</sup> JEREMY BENTHAM, *Principles of the Penal Code*, in *THE THEORY OF LEGISLATION* 239, 240-41 (C.K. Odgen ed., 1931).

<sup>88</sup> Hezel, *supra* note 85, at 256.

<sup>89</sup> COOK, *supra* note 46, at 77.

<sup>90</sup> See Maxwell Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830*, 11 AM. J. LEGAL HIST. 234 (1967); Hezel, *supra* note 85.

<sup>91</sup> See *infra* Part II.B.

<sup>92</sup> See SURRENCY, *supra* note 79, at 84-85.

<sup>93</sup> *Id.* at 86.

<sup>94</sup> See COOK, *supra* note 46, at 167-68.

“felony.” The definition of “infamous crimes” was complicated by the use of the term in its popular (“infamous punishment”) sense in the Fifth Amendment to the federal Constitution.<sup>95</sup> In the case of “felonies,” they needed to decide if the felony/misdemeanor classification should be retained, and if retained, how defined. If they accepted Blackstone’s assertion that the “true criterion of felony is forfeiture,”<sup>96</sup> then the term was essentially meaningless in American law since, as Dane<sup>97</sup> pointed out, by the 1820s, forfeiture subsequent to conviction had virtually disappeared in the United States<sup>98</sup> with public opinion condemning forfeiture as being “an unnecessary and hard punishment of the felon’s posterity.”<sup>99</sup>

If, on Blackstone’s other hand, they chose to equate felony with capital punishment, they needed to reconcile this not only with the diminishing use of the death penalty in the United States at that time,<sup>100</sup> but also the growing movement to abolish capital punishment altogether. Although associated—at least initially—with the Quakers,<sup>101</sup> the movement attracted, among others, the most prominent of the codifiers, Edward Livingston, whose proposed criminal code for Louisiana abolished the death penalty and was preceded in 1822 by a denunciation of capital punishment<sup>102</sup> that was widely circulated and reviewed.<sup>103</sup>

Livingston’s solution to the problem of defining felony was to jettison the term entirely. A different—and ultimately more influential—approach, taken by the Committee to Revise the Laws of New York, was to redefine the term to include both capital crimes and those punished by terms in the penitentiary.<sup>104</sup> The New

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<sup>95</sup> “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” U.S. CONST. amend. V. The federal courts in the early Republic interpreted this language in light of the common law regarding the exclusion of witnesses—up until the 1885 Supreme Court decision in *Ex parte Wilson*, 114 U.S. 417 (1885). See Reuben Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 HARV. L. REV. 299, 301 (1923).

<sup>96</sup> 4 BLACKSTONE, *supra* note 18.

<sup>97</sup> 6 DANE, *supra* note 24.

<sup>98</sup> However, forfeiture was not ancient. New York, for instance, had confirmed forfeiture for crimes in 1788, 1788 N.Y. Laws 666, only to bar it—except for treason—in 1796, 1796 N.Y. Laws 670. Other types of forfeiture, including *in rem* forfeiture of specific property, remained in effect. See James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 779 (1977).

<sup>99</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 317 (New York, O. Halsted 1827).

<sup>100</sup> See 6 DANE, *supra* note 24.

<sup>101</sup> David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 AM. HIST. REV. 23, 28 (1957).

<sup>102</sup> See 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 35-59 (New York, Patterson Smith 1873) [hereinafter 1 COMPLETE WORKS].

<sup>103</sup> Lengthy reviews of the 1822 report appeared in the *United States Law Journal*, *Penal Jurisprudence*, 1 U.S. L.J. 259, 259-80 (1823), and the *North American Review*, *Punishment of Crimes*, 10 N. AM. REV. 235, 235-59 (1823).

<sup>104</sup> See *infra* Part II.C.

York approach was widely influential due to its adoption by the newly formed states in the West.<sup>105</sup>

Another solution was to retain some version of the common law definition adapted to American circumstances, resisting the movement to codify the criminal law. Maryland, firmly in the common law camp, followed this path.

#### A. Persistence of the Common Law: Maryland

Codification was not universally viewed as beneficial or even necessary, especially among the common law-trained lawyers.<sup>106</sup> Resistance to the calls for legal reform was one way of responding to them and would produce a different result from those jurisdictions that embraced reform. Maryland was one state where the winds of change blew lightly in the early 1800s. Colonial Maryland's proprietary form of government had led to an impasse between the Lord Proprietor and the legislature, and this limited the amount of legislation passed in colonial times. This situation left the development of felony law to the courts of the Colony.<sup>107</sup> Maryland did pass an act to set penalties for crimes in 1809.<sup>108</sup> As in other states, the act included instructions for the operation of the state penitentiary, which was then still under construction.<sup>109</sup> The criminal sentences portion of the Act was modeled on the Pennsylvania Act of 1794,<sup>110</sup> but it retained capital punishment as the sole punishment for two crimes: "first-degree murder," and instigation of a slave revolt.<sup>111</sup> The terms "felon" and "feloniously" were used in passing, but without definition.

Maryland resisted systematic codification until 1860<sup>112</sup> when the state enacted its first subject arrangement of laws, repealing all former legislation.<sup>113</sup> The 1860 Code

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<sup>105</sup> See *infra* Part II.D.

<sup>106</sup> See COOK, *supra* note 46, at 103-05.

<sup>107</sup> See BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660, at 17 (1983).

<sup>108</sup> 1809 Md. Laws ch. 138. The prison regimen resembles the early stages of the Pennsylvania system: solitary hard labor. *Id.* § 30.

<sup>109</sup> *Id.*

<sup>110</sup> Act of Apr. 22, 1794, ch. 257, 18 PA. STAT. ANN. 599.

<sup>111</sup> 1809 Md. Laws ch. 138, §§ 2, 4. This was included under the larger division of high treason, which could be punished either by death or imprisonment for six to twenty years.

<sup>112</sup> Maryland was not, however, the last of the original thirteen states to adopt a comprehensive code of laws. Pennsylvania, because of a constitutional impediment, did not adopt an *official* code until 1972. *Purdon's Pennsylvania Statutes Annotated*, which served as the state code, was entirely a commercial enterprise with organization and numbering supplied by the publisher. See Charles W. Rubendall II, *The Constitution and the Consolidated Statutes*, 80 DICK. L. REV. 118, 118-19 (1975).

<sup>113</sup> 2 THE MARYLAND CODE, PUBLIC GENERAL AND PUBLIC LOCAL LAWS (Baltimore, John Murphy & Co. 1860). In *The Maryland Code*, articles, and subjects within articles, were arranged in alphabetical order. Five sets of revised statutes, with statutes in chronological order, had been issued since colonial times, but without any effort at systemization. See THE LAWS OF THE PROVINCE OF MARYLAND (Philadelphia, Andrew Bradford 1718); LAWS OF MARYLAND AT LARGE, WITH PROPER INDEXES (Thomas Bacon ed., Annapolis, Jonas Green 1765); 1 THE LAWS OF MARYLAND (William Kilty ed., Frederick Green.1799-1800); 5 THE

listed crimes alphabetically, but with no section on definitions, leaving in place the common law definitions.<sup>114</sup> Section 181, “Sentence,” provides a catch-all sentence range of eighteen months to five years for felonies not otherwise covered in the Code, but no list or definition for felony was provided.<sup>115</sup>

A definition for felony *was* developed in Maryland—over time—by the courts. The cases arose from indictments that charged defendants with committing a crime “feloniously” when that crime was not a common law felony (i.e., not arson), nor explicitly made a felony by statute. In *State v. Black*,<sup>116</sup> the court reversed a conviction for burning a haystack (a statutory crime under the 1809 Act, which describes the crime as “willfully burning . . . any stack . . . of hay . . .”).<sup>117</sup> The indictment, however, stated that the act was done “feloniously, unlawfully, willfully and maliciously.”<sup>118</sup> In reversing, the court held that “neither at the common law, nor by the act of 1809 . . . is the act of burning a stack of hay a felony.”<sup>119</sup>

The opinion in *Black* omits any mention of the sentence prescribed by the 1809 Act for burning a haystack: either death or imprisonment in the penitentiary for three to twelve years,<sup>120</sup> making the crime—at the court’s discretion—a capital one. A later court dealing with substantially the same statutory language in the 1878 Revised Code<sup>121</sup> relied on *Black* to hold that when the “punishment of death is in the discretion of the Court . . . such offences [sic] are misdemeanors.”<sup>122</sup>

Maryland’s definition of felony was given its mature form in *Dutton v. State*,<sup>123</sup> a case involving a death sentence for attempted rape, where the defendant had not been arraigned. The Court held that an attempted felony was a misdemeanor (and not an infamous crime requiring arraignment) despite the possible sentence, writing:

The distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies, and others misdemeanors has never existed in this State, but *here only those are felonies which were such at common law, or have been so declared by statute*. The fact that a crime is punishable in the penitentiary or is “infamous” does not make it a felony in this State.<sup>124</sup>

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LAWS OF MARYLAND (Thomas Harris, William Kilty, & John N. Watkins eds., Annapolis, Jonas Green 1820); 3 THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND (Clement Dorsey ed., Baltimore, Toy 1840).

<sup>114</sup> 2 MARYLAND CODE, *supra* note 113.

<sup>115</sup> 1809 Md. Laws, ch. 138, § 11.

<sup>116</sup> *State v. Black*, 2 Md. 376, 380 (Md. 1852).

<sup>117</sup> 1809 Md. Laws, ch. 138, § 5.

<sup>118</sup> *Black*, 2 Md. at 378-79.

<sup>119</sup> *Id.* at 379.

<sup>120</sup> 1809 Md. Laws, ch. 138, § 5.

<sup>121</sup> MD. CODE ANN., GEN. LAWS art. 72, § 33 (West 1878).

<sup>122</sup> *Gibson v. State*, 54 Md. 447, 453 (Md. 1880) (alteration in original).

<sup>123</sup> *Dutton*, 91 A. at 417.

<sup>124</sup> *Id.* at 419-20 (emphasis added).

This formulation is quite similar to that in Wharton's 1846 *Treatise on the Criminal Law*.<sup>125</sup> The explicit divorce of the felony designation from the sentence, however, was an innovation, as was the recognition of (potentially) capital misdemeanors. Maryland remains a common law state, with statutes in many instances prescribing penalties while leaving the definition of the crime to the courts.<sup>126</sup> The definition of felony is still the one developed over time by the courts using the common law method. In other parts of the country, however, reformers sought faster and more thoroughgoing changes.

*B. A Benthamite on the Bayou: Livingston's Penal Code*

Edward Livingston lived an interesting life.<sup>127</sup> A practicing lawyer in New York City, he served three terms as a U.S. Congressman representing New York.<sup>128</sup> Subsequently, he was simultaneously Mayor of New York City and the U.S. District Attorney for New York.<sup>129</sup> When a subordinate stole customs revenues, Livingston took on the losses as a personal debt, then set off for New Orleans—which had only been recently acquired from the French—to rebuild his fortune.<sup>130</sup> During the War of 1812, he obtained amnesty for the pirate, Jean Lafitte, and befriended General Andrew Jackson.<sup>131</sup> He served in the Louisiana legislature (where he was selected to author a penal code), then was elected to the U.S. Congress—this time from Louisiana.<sup>132</sup> He was Jackson's Secretary of State, and later, his ambassador to France.<sup>133</sup>

Livingston's great and lasting fame came from his authorship of a penal code for Louisiana, even though it was never enacted in that state.<sup>134</sup>

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<sup>125</sup> WHARTON, *supra* note 20.

<sup>126</sup> CHARLES E. MOYLAN, JR., *CRIMINAL HOMICIDE LAW* 31 (2002).

<sup>127</sup> A brief account of his life can be found in A. E. Wilkinson, *Edward Livingston and the Penal Codes*, 1 *TEX. L. REV.* 25, 25-37 (1922). Two book-length biographies have been published: CHARLES HAVENS HUNT, *LIFE OF EDWARD LIVINGSTON* 1 (1864), and WILLIAM B. HATCHER, *EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT* 1 (1940). Greater detail on his work on the Penal Code can be found in Ginger Roberts, *Edward Livingston and American Penology*, 37 *LA. L. REV.* 1037 (1977). His papers are archived at Princeton, and a short biographical note and chronology of his life is on their website. *Edward Livingston Papers*, <http://diglib.princeton.edu/ead/getEad?eadid=C0280&kw=> (last visited Sept. 4, 2009).

<sup>128</sup> Wilkinson, *supra* note 127, at 28.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 28-29.

<sup>131</sup> *Id.* at 31-32.

<sup>132</sup> *Id.* at 34, 36.

<sup>133</sup> *Id.* at 35.

<sup>134</sup> Acclaim came from both within the United States and abroad. Jeremy Bentham reciprocated Livingston's great esteem. Roberts, *supra* note 127, at 1055. Thomas Jefferson wrote that Livingston's name would join those of the great "sages of antiquity." Letter to Edward Livingston (Mar. 25, 1825), in 16 *WRITINGS OF THOMAS JEFFERSON* 112, 113 (Thomas Jefferson Memorial Ass'n ed., 1903). The adulation was not universal. Livingston, while

Prior to its acquisition by the United States, Louisiana had been governed by the civil law traditions of France and Spain. Despite an influx of common-law lawyers after annexation, the territory managed to retain its civil law tradition and enact the Digest of Civil Law modeled on the Code Napoleon of 1806.<sup>135</sup> Criminal law, however, was governed by a territorial act passed in 1805 that incorporated the English common law of crimes.<sup>136</sup>

Although Livingston had been trained in the common law tradition, when he was entrusted by the Louisiana legislature with drafting a penal code, he turned to the principles of Jeremy Bentham<sup>137</sup> and the example of the 1810 French penal code<sup>138</sup> for guidance. While he corresponded widely in preparing his Code,<sup>139</sup> Livingston worked alone in writing it.<sup>140</sup>

The product of this effort was a complete system of laws organized into separate codes on crimes and punishments, criminal procedure, evidence (applicable to both criminal and civil trials), and corrections. A “book” of definitions was appended to define technical terms used in the several codes.<sup>141</sup> The organization of offenses in the *Code of Crimes and Punishments* was by interest or person affected (e.g.,

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Secretary of State, was the target of an especially lurid bit of political vituperation: “[H]e is a man of splendid abilities, but utterly corrupt. He shines and stinks like rotten mackerel by moonlight.” WILLIAM CABELL BRUCE, 2 JOHN RANDOLPH OF ROANOKE 1773-1883, at 197 (1922).

<sup>135</sup> Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 419-21 (1996).

<sup>136</sup> Act of May 4, 1805, Acts Passed at the First Session of the Legislative Council of the Territory of Orleans, ch. 50, § 33. No definition of felony was provided in this act, but the term was translated into French (all acts were printed in facing page translations) as “*crime capital*.” *Id.* § 28.

<sup>137</sup> See Kadish, *supra* note 85, at 1101. For other intellectual influences on Livingston’s work see Gail McKnight Beckman, *Three Penal Codes Compared*, 10 AM. J. LEGAL HIST. 148, 161-62 (1966).

<sup>138</sup> The influence of the French code is reflected in the organization of Livingston’s *Code of Crimes and Punishments* with its introductory sections on persons subject to the code, and a general discussion of punishments, as well as the use of continuously numbered sections throughout. The division of crimes under the *Code Pénal* was: *delits* (misdemeanors) punishable by simple imprisonment for 6 days to 5 years, and *crimes*, punishable by death, deportation, imprisonment at hard labor, loss of civil status, or the pillory. Code Pénal de 1810, [http://ledroitcriminel.free.fr/la\\_legislation\\_criminelle/anciens\\_textes/code\\_penal\\_de\\_1810.htm](http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm) (last visited Sept. 4, 2009).

<sup>139</sup> Livingston mentions a few of his correspondents in his 1822 Report to the legislature. 1 COMPLETE WORKS, *supra* note 102, at 8. A more extensive list can be seen in the hand list of letters under the rubric “Papers Relating to the Penal Code, Criminal Jurisprudence, and Related Topics” at the Princeton archive site. Edward Livingston Papers, *supra* note 127.

<sup>140</sup> After spending two years completing a full version of the Code, Livingston lost the entire work product in a fire; it took another two years to recreate the Code. See Wilkinson, *supra* note 127, at 36.

<sup>141</sup> The list of definitions integrated into the code seems to be Livingston’s innovation; this at least was his opinion. EDWARD LIVINGSTON, *Introductory Report to the Code of Crimes and Punishments*, in 1 COMPLETE WORKS, *supra* note 102, at 228.

Offences against the sovereign power of the state—Title II, or Title XX—Offences against individuals in their profession or trade), similar to the French code.<sup>142</sup>

Livingston used the term “offence” to mean an act forbidden by the penal code.<sup>143</sup> Each offense was treated in a separate section containing a definition of the offense and a prescribed punishment.<sup>144</sup> He recognized a distinction between offenses: “crimes”—punishable by imprisonment plus solitary hard labor or loss of civil rights—and “misdemeanors” that were offenses punishable by simple imprisonment and fines.<sup>145</sup> If loss of a civil right was included in the penalty, the code specifies either a period of suspension or total forfeiture.<sup>146</sup> One right that was not forfeitable was that of testifying, since “such a disqualification would be a most serious punishment to persons whose property, reputation, or life, might depend on the testimony of the person disqualified, but could be none to him.”<sup>147</sup> The “infamous crimes” of the common law had no place in Livingston’s plan, and the term is not used.

The distinction between crimes and misdemeanors plays little role in the *Code of Crimes and Punishments*; there it was only used to distinguish between those offenses which must be prosecuted by indictment (crimes) and those lesser offenses which can be prosecuted by information.<sup>148</sup> The difference becomes crucial in the *Code of Reform and Prison Discipline*. Here, misdemeanors are punished in a House of Detention that allows communication between prisoners, and “the imprisonment is intended more for punishment than reformation.”<sup>149</sup> Crimes, on the other hand, “suppose in the offender a depravity and corruption of mind which requires the application of reformatory discipline as well as punishment.”<sup>150</sup> Reformation of the inmate’s character seems to have required a term of at least one year; sentences in the code vary from one year to life for imprisonment in the penitentiary. “Simple imprisonment” in the House of Detention, on the other hand, could be anything from ten days (unauthorized opening of a sealed letter)<sup>151</sup> to two years (abducting a female

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<sup>142</sup> EDWARD LIVINGSTON, *A Code of Crimes and Punishments*, in 2 COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 37, 453 (Patterson Smith 1968) (1873) [hereinafter 2 COMPLETE WORKS].

<sup>143</sup> *Id.*

<sup>144</sup> Edward Livingston, *A Book of Definitions*, in 1 COMPLETE WORKS *supra* note 102, at 652.

<sup>145</sup> 1 COMPLETE WORKS, *supra* note 102, at 24.

<sup>146</sup> For example, impeding a news investigation was punishable by four years suspension of political rights. EDWARD LIVINGSTON, *A Code of Crimes and Punishments*, in 2 COMPLETE WORKS, *supra* note 142, art. 240, at 69-70 (Patterson Smith 1968) (1873). Forging or destroying a public record was punishable by forfeiture of political rights. *Id.* art. 245, at 71.

<sup>147</sup> 1 COMPLETE WORKS, *supra* note 102, at 225-26.

<sup>148</sup> 2 COMPLETE WORKS, *supra* note 142, art. 25, at 18. This, of course, is the “infamous crimes” in the Fifth Amendment sense, but without the use of that terminology.

<sup>149</sup> 1 COMPLETE WORKS, *supra* note 102, at 545.

<sup>150</sup> *Id.* at 547.

<sup>151</sup> 2 COMPLETE WORKS, *supra* note 142, art. 621, at 166.

for an unwelcome marriage).<sup>152</sup> Ultimately, it was the place and manner of incarceration that was important, not the length of the sentence.

Livingston's system of penal laws was built from first principles, rather than revising and systemizing existing laws.<sup>153</sup> It was a code in the Benthamite sense, comprising all the law in a unified format with no room for judge-made law:

Courts are expressly prohibited from punishing any acts or omissions which are not forbidden by the plain import of the words of the law, under the pretence that they are within its spirit. It is better that acts of an evil tendency should for a time be done with impunity, than that courts should assume legislative powers . . . .<sup>154</sup>

There was no place in his code for court-made law, and none for “fogs and fictions.” The word felony does not appear in the *Code of Crimes and Punishments*, nor in the *Book of Definitions*.<sup>155</sup> Both of Blackstone's definitions (forfeiture or capital crime) are inapplicable to Livingston's code, since neither forfeiture nor capital punishments are authorized.<sup>156</sup> And, the use of a common law term with all its history and case law development would have been antithetical to Livingston's goal of creating a purely legislative system of laws.

Livingston presented the complete code to the Louisiana legislature in 1825.<sup>157</sup> Having been elected to the U.S. Congress by this time, he was unable to work for enactment in person. His insistence on abolishing the death penalty probably doomed passage in any event. The code, although widely discussed and acclaimed, was never enacted.<sup>158</sup> One place that it received particular attention was New York state.

#### *C. A Committee of Young Men: New York Revised Statutes of 1829*

In 1824, the New York legislature decided it was time for a revision of the state's statutes along the lines of the previous revisions done in 1801 and 1813—“mere compilations of existing statutes in chronological order.”<sup>159</sup> After some initial turnover in the group of revisors, the project of revision was finally placed in the hands of three lawyer-politicians from western and up-state New York: Benjamin F.

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<sup>152</sup> *Id.* art. 459, at 122.

<sup>153</sup> Livingston felt free to invent entirely new areas of law, such as making it a crime to interfere with freedom of the press. *Id.* art. 239, at 69. Enhanced penalties were imposed if done by a public official to avoid exposure. *Id.* art. 240, at 69-70.

<sup>154</sup> *Id.* art. 8, at 15.

<sup>155</sup> *See generally id.*

<sup>156</sup> For Livingston's full argument against the death penalty see 1 COMPLETE WORKS, *supra* note 102, at 190-240.

<sup>157</sup> Wilkinson, *supra* note 127, at 34, 36.

<sup>158</sup> Except, apparently, in Guatemala. *Id.* at 37.

<sup>159</sup> SURRENCY, *supra* note 79, at 86. One of the men initially named to the task, ex-Chancellor James Kent had, in fact, worked on the 1801 revision. WILLIAM ALLEN BUTLER, THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS 6-9 (New York, Banks & Bros. 1889). Kent, however, declined the appointment. *Id.* at 7.

Butler,<sup>160</sup> John Duer,<sup>161</sup> and—somewhat later—John C. Spencer.<sup>162</sup> They were from the same milieu as Edward Livingston<sup>163</sup> but almost a full generation younger.

Confronted with the assigned task of updating a patchwork of uncoordinated statutes, Duer and Butler decided that the time was right to create a more rational and organized body of statutory law “by adopting a new and more scientific method.”<sup>164</sup> Their plan, presented to the legislature in 1825, proposed to “reduce all acts relating to the same subject, into one, . . . render[ing] the statutes more concise, perspicuous, and intelligible” with the “whole written law [arranged logically] under appropriate titles . . . .”<sup>165</sup> The revisors were successful in persuading the legislature to expand the original mandate to accomplish those goals,<sup>166</sup> and the code was fully completed—and previous statutes repealed—in December 1828.<sup>167</sup> This reorganization and rewriting of the existing statutory law would be called *The Revised Statutes of the State of New-York*. Despite the name, it was clearly a code in the modern, if not the Benthamite, sense of the word. The criminal law portion of

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<sup>160</sup> Butler was born in 1795 in Columbia County, New York. 2 *DICTIONARY OF AMERICAN BIOGRAPHY* 356 (Alan Johnson & Dumas Malone eds., 1958). After a “scanty” education in a local school, he studied law and became a partner in the firm of Martin Van Buren. *Id.* He was District Attorney for Albany County when appointed a revisor. *Id.* He was later a state legislator and Attorney General under Andrew Jackson. *Id.*

<sup>161</sup> Duer was born in Albany, New York. 3 *DICTIONARY OF AMERICAN BIOGRAPHY* 485 (Alan Johnson & Dumas Malone eds. 1959). Despite an “intermittent and scanty” education, he studied law in the office of Alexander Hamilton, then practiced law in Orange County, New York, before being elected to the state constitutional convention in 1821. *Id.* at 485-86. The abilities he displayed at the convention led to his appointment as a revisor. *Id.* at 486. He was later a U.S. District Attorney and judge in New York City. *Id.*

<sup>162</sup> Spencer was born in 1788 in Hudson, New York. 9 *DICTIONARY OF AMERICAN BIOGRAPHY* 449 (Dumas Malone ed., 1964). The best educated of the revisors, he attended the recently established Union College in Schenectady, New York, then studied law in Albany while working as secretary to the governor of the state. *Id.* He opened a practice in the (then) frontier region of Ontario County, New York, where he held a number of political offices culminating in one term in the U.S. House of Representatives, then several terms in the state legislature, where he was appointed as a revisor. *Id.* He later served as Secretary of State for New York State and served as Secretary War and Secretary of the Treasury under President John Tyler. *Id.* at 450.

<sup>163</sup> Livingston was born in 1764 in Columbia County, New York, and then schooled in Albany before attending the College of New Jersey (Princeton) in 1799. 6 *DICTIONARY OF AMERICAN BIOGRAPHY* 309 (Dumas Malone ed., 1961). Duer and Livingston were well acquainted; Duer’s older brother, William, was in practice with Livingston in New York City and later followed him to New Orleans. 3 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 161, at 488.

<sup>164</sup> *Introduction to APPENDIX, CONTAINING EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS*, in 3 *THE REVISED STATUTES OF THE STATE OF NEW-YORK* 403, 403 (Albany, Packard & Van Benthuysen 1836).

<sup>165</sup> *Id.* at 404 (quoting Letter from John Duer & Benjamin F. Butler to Samuel J. Wilkin, Chairman (Feb. 4, 1825)).

<sup>166</sup> *Id.* at 408-10.

<sup>167</sup> *Id.* at 420.

the code was organized primarily by type of punishment, with non-capital felonies subdivided by interest affected:

Title 1.—Of crimes punishable with death.

Title 2.—Of offences against the person, punishable by imprisonment in a state prison.

Title 3.—Of offences against property, punishable by imprisonment in a state prison.

Title 4.—Of offences affecting the administration of justice, punishable by imprisonment in a state prison.

Title 5.—Of offences against the public peace and public morals, and other miscellaneous offences, punishable by imprisonment in a state prison.<sup>168</sup>

It was not, like Livingston's penal code, written from first principles.<sup>169</sup> In writing the criminal law portion of their code, the New York revisors found Livingston's work useful, "[b]ut the different state of society, for which our labors are intended . . . have prevented the adoption of many provisions suggested by [Livingston]."<sup>170</sup> Despite the extensive reorganization and editing—and in some instances "rounding out" of existing provisions—the Revised Statutes of 1829 was described as a reworking of existing statute law.<sup>171</sup> Even more importantly politically, the code did not attempt to supplant the common law, a prospect against which "the whole body of the [legal] profession was arrayed."<sup>172</sup> Most of the titles and subdivisions in their criminal laws were, in fact, taken from Blackstone,<sup>173</sup>

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<sup>168</sup> AN ACT CONCERNING CRIMES AND PUNISHMENTS; PROCEEDINGS IN CRIMINAL CASES; AND PRISON DISCIPLINE, in 2 THE REVISED STATUTES OF THE STATE OF NEW-YORK, pt. II, ch. VII, 655 (Albany, Packard & Van Benthuysen 1829).

<sup>169</sup> The following illustrates this difference in approach: Livingston defines, elucidates, and parses the meaning of the crime of robbery through nine sections of his code (about a page) including language that "[t]he audacity of an open infringement of the laws, and the alarm and danger it creates, are the characteristics of this species of theft." 2 COMPLETE WORKS, *supra* note 142, at 176. The New York code devotes one section to first degree robbery (fear of immediate injury), and another to second degree robbery (threat of future injury); the stilted language of both sections was copied from prior statutes. AN ACT CONCERNING CRIMES AND PUNISHMENTS, pt. IV, ch. I, tit. 3, art. 5, §§ 55-56, *supra* note 168, at 677. The use of common law antecedents and prior statutory language throughout the New York code reduced the need for lengthy explanations.

<sup>170</sup> *Introduction to* APPENDIX, CONTAINING EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS, *supra* note 164, at 420.

<sup>171</sup> John T. Fitzpatrick, *The Revised Statutes of New York*, 19 LAW LIBR. J. 72, 77 (1926).

<sup>172</sup> BUTLER, *supra* note 159, at 21.

<sup>173</sup> *Introduction to* APPENDIX, CONTAINING EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS, *supra* note 164, at 417.

making the project more acceptable to common law jurists and lawyers.<sup>174</sup> This compromise between radical reform and common law conservatism managed—at least partially—to satisfy both camps, while establishing a model for the rest of the nation.<sup>175</sup>

The revisors' amalgamation of old statutory language, common law principles and innovation is reflected in their treatment of felony. Title 7 of the Code's chapter on criminal law is entitled General provisions concerning crimes and their punishment; sections 30 through 35 are devoted to definitions. Section 30 reads:

The term "felony," when used in this act, or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a state prison.<sup>176</sup>

It might be supposed that the revisors had a source for this definition somewhere in New York statutory or case law, but the *Reports of the Revisers* state otherwise:

The term *felony* originally imported an offence for which the offender forfeited his *fief*, his lands and tenements, goods and chattels. Such forfeitures have long been abolished, and the term has really no signification in our law. It is frequently used in statutes, and it is therefore desirable to give it a definite meaning. The definition proposed is conformable to the common understanding.<sup>177</sup>

They retained the term because—conservatively—they wished to avoid too much rewriting of existing statutes. On the other hand, they felt free to create a definition because one was lacking. Their appeal to "common understanding" is unconvincing, at least if they meant common among the legal community. Wharton's definition of classic plus statutory felonies<sup>178</sup> would have been the most likely candidate for a "common understanding" at the time, and the courts of New York still looked to English common law to define felony.<sup>179</sup> It is probable, though unstated, that by

<sup>174</sup> Their retention of the death penalty for some crimes likely had the same motive.

<sup>175</sup> COOK, *supra* note 46, at 167-69.

<sup>176</sup> AN ACT CONCERNING CRIMES AND PUNISHMENT, pt. IV, ch. I, tit. 7, § 30, *supra* note 168, at 702.

<sup>177</sup> APPENDIX, CONTAINING EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS, in 3 THE REVISED STATUTES OF THE STATE OF NEW-YORK 421, 836-37 (Albany, Packard & Van Benthuysen 1836) (citations omitted).

<sup>178</sup> See WHARTON, *supra* note 20.

<sup>179</sup> In a charge to the jury in 1820, Cadwallader Colden, then mayor of New York City, stated "we cannot ascertain what constitutes a felony or a larceny without appealing to the common law of England." WILLIAM SAMPSON, TRIAL OF ROBERT M. GOODWIN 169 (New-York, G.L. Birch & Co. 1820). Colden, born in 1769, was well educated and an experienced lawyer and politician; he served in both the state legislature and the U.S. Congress. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 806 (Joint Committee on Printing ed., 1989), available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000604>. The mayor sitting as judge of a trial court was a peculiarity of New York law derived from both medieval English and Dutch antecedents. See SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 45-51 (Richard B. Morris ed. 1935).

“common understanding” they meant Blackstone’s alternate definition for felony: a crime punishable by death. But, since capital punishment was much less frequently employed than in Blackstone’s day, they added “or imprisonment in the state prison” to cover all serious crimes, those crimes which evidenced the moral corruption that a period of reformation in the penitentiary regime was designed to correct.<sup>180</sup>

By rejecting the formal common law definition of felony (forfeiture), and adapting the informal one (capital punishment) to the state of the law in the early Republic, the revisors created a new American definition of felony that found widespread acceptance throughout the country.

In another striking example of this method of adapting common law concepts to American circumstances, “infamous crime” was given virtually the same definition as “felony” in section 31 of the 1829 Code:

Whenever the term “infamous crime,” is used in any statute, it shall be construed as including every offence punishable with death or by imprisonment in a state prison, and no other.<sup>181</sup>

Here, the revisors chose to define the term in its constitutional rather than its evidentiary sense, and they used the popular (“infamous punishment”) meaning of the term, rather than the formal common law one (“witness disqualification”).<sup>182</sup> Since all of the infamous punishments listed by Kent,<sup>183</sup> except death and imprisonment, had been abandoned in New York by that time, these remaining two became the punishments that defined “infamous crimes” in the 1829 Code. National acceptance was slower for this definition than for that of felony. When, in 1885, the Supreme Court decided *Ex parte Wilson*<sup>184</sup> and merged the definitions of “felony” and “infamous crimes” (imprisonment at hard labor) for purposes of the Fifth Amendment, the Court noted that it was common practice in the lower courts to

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Edward Livingston presided while mayor and had published judicial opinions. JUDICIAL OPINIONS DELIVERED IN THE MAYOR’S COURT OF THE CITY OF NEW-YORK IN THE YEAR 1802, at 7 (D. Longworth 1980) (1803).

<sup>180</sup> See, e.g., AN ACT CONCERNING CRIMES AND PUNISHMENTS pt. IV, ch. I, tit. 7, § 30, § 31 *supra* note 168, at 702.

<sup>181</sup> AN ACT CONCERNING CRIMES AND PUNISHMENT, pt. IV, ch. I, tit. 7, § 31, *supra* note 168, at 702.

<sup>182</sup> Felons were, in fact, disqualified as witnesses under the Revised Statutes, but the statute uses conviction of a *felony* rather than of an *infamous crime* as the disqualifying event. AN ACT CONCERNING CRIMES AND PUNISHMENT, pt. IV, ch. I, tit. 7, §23, *supra* note 168, at 701. This language, however, was added by the legislature. The revisors had originally restricted disqualifying crimes to perjury and subornation of perjury; in the revisors notes they echo Livingston’s argument that excluding the testimony punishes the party seeking to introduce the testimony, not the witness. APPENDIX, CONTAINING EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS, pt. IV, ch. I, *supra* note 164, at 835-36.

<sup>183</sup> Death, gallows, pillory, branding, whipping, confinement to hard labor, and ear cropping. DANE, *supra* note 41.

<sup>184</sup> *Ex parte Wilson*, 114 U.S. 417 (1885). Acting on a *habeas corpus* petition from a prisoner who had been convicted on the basis of an informant (not a grand jury indictment), and sentenced to 15 years at hard labor, the Court held that “a crime punishable by imprisonment for a term of years at hard labor is an infamous crime.” *Id.* at 429.

interpret the Constitution's "infamous crime" to mean crimes that would disqualify the convict to be a witness.<sup>185</sup>

Another feature of the 1829 Code that was to have an impact on the future development of the concept of felony was the clear divide between the length of sentences for felonies and misdemeanors. Because jails lacked the reformative programs of the state prisons, the revisors stipulated that no imprisonment in a county jail would exceed one year.<sup>186</sup> This made a sentence of more than one year and a sentence of incarceration in the penitentiary equivalent—an automatic felony sentence. Eventually, some jurisdictions used the "more than one year" length of sentence instead of the place of incarceration to define felony, and this became the definition used in the *Model Penal Code*.<sup>187</sup>

The definitions of crimes in the *Revised Statutes of 1829* were carried forward into New York's Field Codes in the 1860s and on into the twentieth century.<sup>188</sup> New York retained the 1829 definition of felony in its penal code until 1965, when a new code strongly influenced by the Model Penal Code was enacted, and felony was redefined by length of sentence (more than one year) rather than by place of incarceration.<sup>189</sup> The influence of the revisors' work extended far beyond New York. "As the newer states were admitted to the Union many of them adopted the New York Revised Statutes with but minor changes to suit local conditions; others adopted great parts of them verbatim."<sup>190</sup> Over time, most United States jurisdictions used either the place of incarceration or its derivative, the length of sentence, to define felony.

#### D. *How the West Was Won*

In 1857, Francis Wharton wrote in his *Treatise on the Criminal Law*:

In this country, with a few exceptions, the common law classification has obtained; the principal felonies being received as they originally existed, and their number being increased as the exigencies of society prompted. In New York, however, felony, by the revised statutes, is construed to mean an offence for which the offender, upon conviction, shall be liable by law to be punished by death, or by imprisonment in a state prison.<sup>191</sup>

<sup>185</sup> *Id.* at 425.

<sup>186</sup> APPENDIX, CONTAINING EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS, pt. IV, ch. I, *supra* note 164, at 807.

<sup>187</sup> *See* Part E *infra*.

<sup>188</sup> N.Y. PENAL CODE § 5 (1865); *see also id.* § 3 at 3; John W. Mac Donald, *The Classification of Crimes*, 18 CORNELL L. Q. 524, 524-36 (1932-1933). David Dudley Field, the eponymous champion of New York's Field Codes, was inspired by Livingston's work but shared the pragmatism of the 1829 revisors. Beckman, *supra* note 137, at 168.

<sup>189</sup> Act of July 20, 1965, ch. 1030, 1965 NEW YORK LAWS 2347. On the influence of the *Model Penal Code* on the 1965 code see Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469 (1964).

<sup>190</sup> Fitzpatrick, *supra* note 171, at 78.

<sup>191</sup> FRANCIS WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 112 (4th ed. Philadelphia, Kay & Bro. 1857).

One hundred years later, the comparable text in *Wharton's Criminal Law* read:

In many states the distinction between a felony and a misdemeanor generally is whether the defendant may be imprisoned in the state penitentiary or executed on the one hand, or whether he may be only fined. In the former case the offense is a felony, while in the latter it is merely a misdemeanor.<sup>192</sup>

The New York definition had become the norm. The convenience of enacting a code wholesale, along with the prestige of New York's legal tradition, made adoption of the Revised Statutes an easy solution for new states with an urgent need for laws, and little in the way of legal tradition to draw on.<sup>193</sup> Often the process of dividing territories into states sped up the adoption of New York-modeled laws: Michigan enacted a code based on the Revised Statutes; Wisconsin's laws were based on those of Michigan; those of Minnesota were based on those of Wisconsin.<sup>194</sup> The adoption of New York's Field codes in California and other western states spread the felony definition originally developed for the 1829 code even farther.<sup>195</sup>

Ohio, in an excess of patriotic fervor, had abrogated the English common law in 1806,<sup>196</sup> despite the absence of a body of statute law to take its place.<sup>197</sup> When a comprehensive statute on major crimes was enacted in 1815,<sup>198</sup> the word "felony" did not appear anywhere in the act; offenses were divided into crimes, misdemeanors, and high misdemeanors.<sup>199</sup> The prescribed punishment for all crimes, including misdemeanors, was imprisonment in the penitentiary at hard labor, with

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<sup>192</sup> 1 RONALD A. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* 58 (1957).

<sup>193</sup> SURRENCY, *supra* note 79, at 90-91.

<sup>194</sup> *Id.*

<sup>195</sup> California's penal code of 1872 was modeled on a draft of the New York code prepared by David Dudley Field and others. Rosamond Parma, *History of the Adoption of the Codes of California*, 22 *LAW LIBR. J.* 8, 19 (1929). As amended in 1874, Section 17 of the Penal Code read:

A felony is a crime which is punishable with death or by imprisonment in the State Prison. . . . When a crime, punishable by imprisonment in the State Prison, is also punishable by fine or imprisonment in a County Jail, in the discretion of the Court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the State Prison.

ACTS AMENDATORY OF THE PENAL CODES PASSED AT THE TWENTIETH SESSION OF THE LEGISLATURE, ch. 196, 455 (1873-74). The broad discretion given to the courts by the additional "also punishable" provision—creating so-called "wobbler" crimes—remains a source of controversy to this day. See Loren Gordon, *Where to Commit a Crime if You Can Only Spare a Few Days to Serve the Crime: The Constitutionality of California's Wobbler Statutes as Applied in the State Today*, 33 *SW.U. L. REV.* 497 (2004).

<sup>196</sup> Act of Jan. 2, 1806, 1806 Ohio Laws 38.

<sup>197</sup> David A. Johnston, Ohio Legislative Serv. Comm'n, *PROPOSED OHIO CRIMINAL CODE* 24 (1971).

<sup>198</sup> Act of Jan. 27, 1815, ch. 28, 1815 Ohio Laws 85.

<sup>199</sup> *See id.*

“misdemeanor” sentences ranging from a minimum of six months (destroying bank notes)<sup>200</sup> to a maximum of 21 years (statutory rape).<sup>201</sup> A definition for “felony” crept into Ohio law in 1869 when the legislature adopted a “Code of Criminal Procedure.”<sup>202</sup> A final catch-all title (confusingly named “Acts Repealed”) included three definitions: “writing,” “oath,” and “felony.”<sup>203</sup> The definition for felony reads: “The term ‘felony’ signifies such an offense as may be punished by death or imprisonment in the penitentiary. Any other offense is denominated a misdemeanor.”<sup>204</sup> The New York definition of felony had started to be adopted even in states with existing legal traditions. This trend would continue.

#### *E. A Final Adjustment*

When the U.S. Congress set about revising the federal criminal laws in the early twentieth century, a Special Joint Committee on the Revision of the Laws noted that “[m]ore than thirty-five States in the Union . . . have defined felonies as offenses punishable by imprisonment in the penitentiary.”<sup>205</sup> However, since federal law (as interpreted by the Supreme Court) limited imprisonment in the penitentiary to sentences in excess of one year, they settled on the *term* of imprisonment rather than the *place* of imprisonment to define felony.<sup>206</sup> This revised definition was enacted as section 335 of Chapter 321, “An Act to codify, revise, and amend the penal laws of the United States”: “[a]ll offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”<sup>207</sup>

It was this definition, rather than that of the 1829 New York code, which was chosen for inclusion in the *Model Penal Code*. In drafting Section 1.04 of the MPC, the Committee favored duration of sentence over place of incarceration because they believed it would avoid confusion caused by un-repealed, non-MPC provisions in a

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<sup>200</sup> *Id.* at 93.

<sup>201</sup> *Id.* at 87.

<sup>202</sup> 1869 Ohio Laws 287. Despite the name, this was not a code in the usual sense but a comprehensive statute on a single—albeit broad—subject. Ohio’s first official revised edition of its statutes was in 1879, followed by a systematic codification of laws in 1910. Willard Campbell, *History of Code Revision in Ohio*, 26 OHIO BAR 375, 376 (1953), *reprinted in User’s Guide*, OHIO REV. CODE ANN., OHIO CONST. art. I § 1, xlvi (Baldwin 2004).

<sup>203</sup> 1869 Ohio Laws 332, 324.

<sup>204</sup> 1869 Ohio Laws 324. Current Ohio law provides default definitions for felony and misdemeanor based on length of sentence (more than one year versus no more than one year), but allows for statutory variations: “Regardless of the penalty that may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a misdemeanor.” OHIO REV. CODE ANN. § 2901.02 (West 2009).

<sup>205</sup> S. REP. NO. 60-5220, at 13 (1908).

<sup>206</sup> *Id.* (citing *Ex parte Karstendick*, 93 U.S. 396 (1876)).

<sup>207</sup> Act of March 4, 1909, Pub. L. No. 60-350, ch. 321, § 335, 35 STAT. 1088, 1152 (1909) (codifying, revising, and amending the penal laws of the United States).

state's code.<sup>208</sup> To support the choice of one year as the dividing line, they point out the need for "a minimum period of approximately this duration . . . to apply any substantial program of treatment."<sup>209</sup>

The influence of the *Model Penal Code* in state code revisions and codifications<sup>210</sup> has made the use of the "in excess of one year" definition of felony common in the United States, although many jurisdictions still use place of imprisonment. The fifteenth edition of *Wharton's Criminal Law*,<sup>211</sup> published in 1993, defines felony this way: "[a]n offense which is punishable by death is of course a felony. An offense which is not punishable by death is a felony if it is punishable by imprisonment for more than one year<sup>212</sup> or by imprisonment in the state prison."<sup>213</sup>

Defining felony in terms of the punishment, rather than by ancient tradition or a theoretical model based on moral depravity or harm inflicted, has the advantage of simplicity. But, once the penal system no longer offers the hope of redeeming the convict, the consequence of using this definition subverts the more general intent of the New York revisers: to base the felony/misdemeanor distinction on the reforming program of the penitentiary system. Of course, the definition of felony is of concern only if the felony/misdemeanor distinction makes a difference to the accused or convicted criminal—or to society generally.

#### IV. ANALYSIS

##### A. *Does Felony Matter?*

Despite their acceptance of Blackstone's definition of felony (and their belief that the term had become antiquated), the New York revisors felt compelled to supply a definition for felony because of its presence in many statutes then in effect. This is still true today. The felony/misdemeanor distinction applies in both substantive and procedural law—varying by jurisdiction. The distinction is important in the felony murder doctrine, which holds that one who, in the commission or attempted commission of a felony, causes another's death is guilty of murder.<sup>214</sup> It is also of

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<sup>208</sup> MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) § 1.04, at 70-71 (1985). The Committee's commentaries cite an Iowa case, *State v. Di Paglia*, 71 N.W.2d 601 (1955), where a conflict in statutes led to the prisoner being condemned to ten years in a county jail. *Id.* at 71 n.9.

<sup>209</sup> AM. LAW INST., MODEL PENAL CODE 23 (Council Draft No. 1, 1953).

<sup>210</sup> See Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427-28 (1968); MODEL PENAL CODE, *Forward* to 10A U.L.A. 5 (2001).

<sup>211</sup> 1 TORCIA, *supra* note 1.

<sup>212</sup> *Id.* at 109 (citing statutes from Minnesota, New Hampshire, New York, Rhode Island, and the Model Penal Code).

<sup>213</sup> *Id.* (citing statutes from Arizona, California, Florida, Idaho and Wisconsin).

<sup>214</sup> There are several variations of this doctrine in American law: limiting it to only certain felonies, adding requirements of proximate or legal causation, or requiring that the underlying felony be independent of the homicide. 2 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* 446-47 (2d ed. 2003). For a more detailed historical perspective on the doctrine (which, like

great consequence in the application of enhanced sentencing laws (also known as habitual offender, recidivist, and “three-strikes” statutes) that increase a convict’s sentence based on prior criminal acts.<sup>215</sup>

Wharton lists warrantless arrest, presence of the defendant at trial, and the number of permitted peremptory challenges as attributes distinguishing felonies and misdemeanors.<sup>216</sup> The drafters of the Model Penal Code would add to that list: “jurisdictional competence of the courts, requirement of a grand jury indictment, availability of bail, size of the jury, right to waive a jury, requirement of a unanimous verdict, and rules regarding deposition of witnesses.”<sup>217</sup> From a civil libertarian point of view, most of these consequences of defining a crime as a felony would lead to a preference for a low threshold within the definition. The more crimes that are felonies, the better, since this would extend constitutional and procedural protections to more suspects.

On the other hand, increasing the number of crimes defined as felonies would expose more convicted criminals to harsher sentences under the felony-murder rule and habitual criminal statutes. Additionally, there has been a growing recognition over the last several decades of the serious social, economic, and political problems caused by the “collateral consequences” of a felony conviction: civil disabilities imposed on convicts independently of their criminal sentence. These problems were first addressed systematically in 1961 with the drafting of Article 306 of the Model Penal Code, “Loss and Restoration of Rights Incident to Conviction or Imprisonment.”<sup>218</sup> The measures in Article 306, which focus primarily on restoring civil rights after the convict is released from prison, were motivated by the belief, still alive in the 1960s, that corrections worked. Civil disqualifications were seen as “a major correctional problem, since the rehabilitative efforts of the correctional people are thwarted at every turn by the, in effect, societal rejection of the prisoner, even after the correctional people think that he has made real progress.”<sup>219</sup> “Collateral Consequences of a Criminal Conviction” were also discussed in a task force report supplementing the widely publicized 1967 report of the President’s Commission of Law Enforcement and Administration of Justice.<sup>220</sup>

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felony, is rooted in English common law) see Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today’s Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1 (2006).

<sup>215</sup> For a jurisprudential critique of enhanced sentencing laws see Ahmed A. White, *Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705 (2006). A thorough treatment of California’s three strikes law, the most widely known and discussed of the enhancement laws, can be found in FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

<sup>216</sup> I TORCIA, *supra* note 1, at 110-13.

<sup>217</sup> MODEL PENAL CODE AND COMMENTARIES, *supra* note 208, at 69 n.5.

<sup>218</sup> MODEL PENAL CODE § 306, 10A U.L.A. 748-55 (2001).

<sup>219</sup> Herbert Wechsler, Remarks Regarding Civil Disqualifications For Convicts (May 19, 1961), in AM. LAW INST., PROCEEDINGS, 38TH ANNUAL MEETING 288 (1961).

<sup>220</sup> *President’s Commission on Law Enforcement and Administration of Justice*, TASK FORCE REPORT: CORRECTIONS 88-92 (1967).

In 1970, the staff of the Vanderbilt Law Review published a massive compilation of state and federal laws creating civil disabilities and loss of benefits for convicts.<sup>221</sup> The consequences they identified were categorized as: loss of citizenship, loss of voting rights, loss of the right to hold public office, loss of the ability to serve as a juror or court-appointed fiduciary, and loss of the capacity to litigate, testify, and make contracts; they also list the loss of employment opportunities and economic benefits such as pensions and workmen's compensation.<sup>222</sup> Recent scholarship has gone beyond looking at the consequences for the convict by examining the social and economic costs of conviction on families of convicts and the communities they live in.<sup>223</sup>

In 2004, the American Bar Association published new standards covering collateral sanctions,<sup>224</sup> noting that "[t]he collateral consequences of conviction have been increasing steadily in variety and severity for the past twenty years, and their lingering effects have become increasingly difficult to shake off."<sup>225</sup> In contrast to the Model Penal Code's emphasis on post-incarceration restoration of civil status, the ABA Standards call for limiting civil sanctions for convicts, addressing their imposition at sentencing, and prohibiting post-release discrimination.<sup>226</sup> In light of these concerns, it would seem that at least some social and economic goals would be better served by setting the threshold for felony higher, thereby reducing the number of convictions that entail barriers to successful reentry of the convict into society.

However, the libertarian interest in extending protections to the suspect, and the liberal interest in promoting social justice are at odds here. The Model Penal Code and ABA Standards seek to balance these competing interests by limiting or removing the collateral civil sanctions, rather than by reducing the number of crimes that are classified as felonies. It may, however, be useful to consider a different approach and look at what outcomes we might see if either Livingston's criminal code or a modified common law definition of felony had prevailed nationally.

#### B. Possibilities

Livingston's criminal code for Louisiana proved too radical a departure from existing law and was never enacted. Livingston, of course, did not use the word

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<sup>221</sup> *Special Project: Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 929-1241 (1970). Updated information on this topic can be found on the website of the Sentencing Project at <http://www.sentencingproject.org>. See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (June 2008), <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>.

<sup>222</sup> *Special Project*, *supra* note 221, at 931-34.

<sup>223</sup> See, e.g., Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671 (2003); Deborah H. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006).

<sup>224</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS (3d ed. 2004).

<sup>225</sup> *Id.* at 8.

<sup>226</sup> *Id.* at 1.

“felony” in his code.<sup>227</sup> However, his integrated approach to penal law provided for collateral consequences to be combined with incarceration and customized for each crime.<sup>228</sup> This is a similar approach to that suggested by ABA Standard 19-2.1, which calls for legislation to tie particular collateral sanctions to particular offenses.<sup>229</sup> Such an integrated and thoroughgoing reform would certainly be an effective solution to the collateral consequences problem. But such a dramatic break with the past is—as Livingston discovered—difficult to achieve.

Maryland departed from the national trend towards codifying the criminal law by staying in place, and the persistence of a modified common law definition of felony presents some interesting opportunities. In Maryland, the legislature can designate a crime as either a misdemeanor or a felony, *irrespective of the sentence imposed*. This idiosyncratic common law approach allows the felony designation to be reserved for crimes the State considers especially serious, while permitting tougher sentences generally if this meets the needs of the legislature. An example of how this might work can be found in a recent addition to Maryland’s statute on second degree (simple) assault.<sup>230</sup> The basic crime of second degree assault is a misdemeanor punished by imprisonment up to ten years and a fine. The newly inserted provision is for second degree assault on a law enforcement officer; it is designated a felony, but carries the same sentence as the misdemeanor—ten years imprisonment and a fine.<sup>231</sup> While a statutory scheme that assigns the sentence and designation as felony or misdemeanor separately can lead to piecemeal and inconsistent results, it also allows for fine distinctions as to which acts merit the full consequences (including collateral consequences) of a felony conviction. It would also allow the legislature to be tough on crime with longer sentences without adding to the burden on ex-convicts reentering society, and their families.

In the great majority of states, of course, the enacted definition is that derived from the New York Revised Statutes of 1829. The revisors, faced with the need to supply content to a concept emptied of meaning by the penal reform movement, chose a definition based on those reforms: a crime that merits the reformative program of the penitentiary. Using the definition of felony to restrict the rights of convicts with collateral consequences after their release was never their intent. It is

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<sup>227</sup> EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 285-93 (Philadelphia, James Kay, Jun & Co. 1833).

<sup>228</sup> *Id.* A judge or juror accepting a bribe would lose the political right to both vote and hold office. *Id.* at art. 138. A perjurer would lose political *and* civil rights, including the right to act as an attorney and the right to serve on a jury. *Id.* at art. 191.

<sup>229</sup> ABA Standard 19-2.1 reads:

Standard 19-2.1 Codification of collateral sanctions: The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction’s criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.

ABA STANDARDS, *supra* note 224, at 21.

<sup>230</sup> MD. CODE ANN., CRIM. LAW § 3-203 (LexisNexis 2002 & Supp. 2007).

<sup>231</sup> The fine is also doubled for assault on an officer, but this is minor compared to the upgrading of the offense to a felony.

easy to imagine, therefore, that those earnest young men, who believed in the redemptive power of corrections, would be troubled by the institutionalized social stigma attached to a felony conviction. As their intent was to return productive citizens to the community, it is likely that they would disfavor a system that burdens the released convict with additional disabilities. Given the definition of felony by the punishment imposed, that intent might be better served by increasing the threshold for felony from one year to—perhaps—five years.<sup>232</sup>

In raising the bar on felonies, however, the problem of dual effect remains: decreasing the number of convicted felons affected by collateral consequences also decreases the number of accused felons subject to procedural and constitutional protections. This might be avoided by, conceptually, reestablishing the distinction between “felony” and “infamous crime,” with disabilities attaching to felonies, and constitutional and procedural protections attaching to infamous crimes. The two terms could then be associated with different thresholds—e.g., five years or more for felonies, and one year or less for infamous crimes.<sup>233</sup> Limiting the number of felonies in a state would not affect this constitutional protection and other safeguards linked to infamous crimes.

#### V. CONCLUSION

In post-Revolutionary America, those who took up the task of adapting the laws inherited from the colonial era had to contend with demands for reform as well as resistance from those comfortable with common law jurisprudence. Criminal law was just one part of that transformation, and the definition of felony was one small part of the criminal law. But, the choices made in creating that definition are illustrative of the process, and the definition is important in its own right because of the importance of the concept of felony in the current debate over collateral consequences. The gradual evolution of the common law in Maryland and Edward Livingston’s attempt to entirely supplant it in Louisiana were at opposite ends of the spectrum of legal reform. The approach of the New York revisors—codifying and revising but not rejecting the common law—proved highly successful and adaptable to the needs of newly admitted states and, eventually, to other states seeking to codify their laws.

How “felony” is defined makes a difference for the accused and convicted criminal and for society. Redefining it to raise the bar on felonies would be one way to change the lives of ex-convicts and the communities to which they eventually return, and one which fulfills the intent of the creators of the original definition. Redefining it in a way that separates the concepts of felony and infamous crime would do so without impairing important safeguards for the accused.

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<sup>232</sup> The United Kingdom, which abandoned the felony-misdemeanor distinction in 1967, uses a sentence of five years or more as a dividing line between greater and lesser offenses. Criminal Law Act, 1967, c. 58 (Eng.).

<sup>233</sup> In Maryland, for example, the right to a unanimous jury verdict is extended to “all criminal prosecutions rather than just felonies. MD. CONST. Decl. of Rts. art. XXI.