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Nancy J. King

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## THE ORIGINS OF FELONY JURY SENTENCING IN THE UNITED STATES

NANCY J. KING\*

Jury discretion to select sentences in felony cases was first adopted in the United States as part of the 1796 penal code of the Commonwealth of Virginia. In this code, enacted twenty years after the state's first constitution, Virginia's legislature replaced capital punishment for most felony offenses with terms of imprisonment in the new penitentiary. Felony jury sentencing made its way westward from the Old Dominion as Virginia-trained lawyers and politicians moved to Kentucky and revised the criminal law of that state in 1798. Georgia and Tennessee followed suit in 1816 and 1829, respectively.<sup>1</sup> Settlers from these states brought jury sentencing with them when they populated Arkansas, Missouri, Indiana, Illinois, Texas, and Oklahoma. Six states today still permit juries to fix sentences in felony cases.<sup>2</sup>

All of the states admitted to the Union by 1800 eventually abandoned capital punishment for most felonies in favor of discretionary terms of imprisonment. But of these states, only Virginia, Kentucky, and Georgia adopted jury sentencing. In 1786, Pennsylvania became the first state to adopt discretionary terms of hard labor and imprisonment as the primary punishment for felony offenses—delegating to judges the authority to select those terms. In 1796, Virginia opted for jury sentencing, while New York followed Pennsylvania's lead. After 1796, with both Pennsylvania's judge sentencing and Virginia's jury sentencing models to choose from, New Jersey and all of the remaining eastern seaboard states except Georgia, including Maryland and the Carolinas, chose judge sentencing.<sup>3</sup> This Article explores why,

\* Lee S. & Charles A. Speir Professor of Law, Vanderbilt University Law School.

1. See *infra* app.

2. The six states are Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 n.16 (2003) (listing state statutes).

3. See *infra* app.

despite the Pennsylvania precedent, the lawmakers in Virginia and Kentucky pioneered what was then, and remains today, an unusual delegation of sentencing authority.

## I. VIRGINIA

The adoption of jury sentencing in felony cases in Virginia was part of a larger revision of criminal law and procedure that took place in the Commonwealth during the first two decades of its existence. This revolution after the Revolution can best be appreciated by examining those aspects of the new state's criminal process that prompted penal reform.

### A. *Before the Reform*

We pick up the story in 1794, two years before Virginia's General Assembly revised the criminal law and established sentencing by juries in felony cases. Our tour of criminal justice follows a fictitious felon, John Smith, a white Virginian accused of ending a brawl by biting off the thumbs of his opponent and stamping on his face with spiked boots. Such ferocious behavior was all too frequent in the frontier regions of the Commonwealth.<sup>4</sup> At the time, being "hung by the neck until dead" was the penalty designated for all felonies, including Smith's crime of mayhem, as well as for larceny and other property offenses.<sup>5</sup> But whether the crime charged was a felony or a misdemeanor, all criminal cases began in the same place—in county court.

4. See *Commonwealth v. Blakeley*, 3 Va. (1 Va. Cas.) 129 (1800) (upholding conviction of John Blakely for biting off both of George King's thumbs); Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 67 (1983) (discussing efforts to control maiming and disfigurement in Virginia in the 1700s). Virginia had passed a statute in 1772 to punish "stamping" in order to deter loggers who would stomp on opponents' faces with spiked boots, making patterns resembling smallpox sores. See Elliott J. Gorn, "Gouge and Bite, Pull Hair and Scratch": *The Social Significance of Fighting in the Southern Backcountry*, 90 AM. HIST. REV. 18, 19 (1985). As Gorn's fascinating article documents, it was the specific objective of brawlers during this period to bite off or rip out body parts of their opponents—primarily eyeballs, ears, lips, tongues, and digits.

5. Act of Nov. 29, 1788, § 1, Oct. 1788 Va. Laws ch. 28, at 15 (clarifying that malicious maiming and wounding are felonies); Act of Dec. 19, 1792, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 68, at 182–84; see also *Scutt v. Commonwealth*, 4 Va. (2 Va. Cas.) 54 (1817). At the time, the term "felony" was synonymous with capital punishment. See *Barker v. Commonwealth*, 4 Va. (2 Va. Cas.) 122 (1817) (tracing history and use of the term felony in the Commonwealth from statehood).

## 1. Appearance Before the County Magistrate (Justice of the Peace)

After hearing from Smith's accuser, the justice of the peace in the county where Smith's fight took place would have ordered the sheriff to arrest and bring Smith before him. These lay justices were among the wealthiest of the county's population. They selected their own successors, often their own family members.<sup>6</sup> The office enjoyed "vast patronage powers,"<sup>7</sup> with accompanying opportunities for corruption. From among their own numbers, magistrates would choose who would become sheriff, a post prized for its lucrative potential. One justice could secure another's support for the "Sherif'alty" or the county clerkship by promising his colleague a share of the future "proceeds" of the office. These corrupt practices were held in contempt by the public. Grand jury presentments of this period reflected the general "decline in deference" for these "local squires." Several magistrates were charged with failing to fulfill their judicial duties or with bribery.<sup>8</sup>

With county court workloads running twenty cases per day and higher,<sup>9</sup> Smith's appearance before the county magistrate would have been a summary affair. After hearing from the suspect and witnesses,<sup>10</sup> if the magistrate thought the charge against Smith had merit, he would have enlisted a prosecuting attorney<sup>11</sup> and called for an "examining court" to consider the case within ten days.<sup>12</sup>

6. A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 239 (1981); see also F. THORNTON MILLER, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828*, at 25 (1994). Originally justices had been selected by the governor. VA. CONST. of 1776, ch. II, § 15.

7. ROBERT M. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* 2 (1972).

8. ROEBER, *supra* note 6, at 160, 174-82, 200; see also *Wallace v. Commonwealth*, 4 Va. (2 Va. Cas.) 130 (1818) (refusing to issue a writ of error (and citing analogous cases) in the prosecution of Wallace, a justice of the peace, who, for "mere malice and evil disposition," had caused John Hidman "to be put to costs and expenses," had ordered the Sheriff to bring Hidman before him to answer a complaint by a completely fictitious John Walker, and then had found Hidman guilty and assessed him costs for the proceeding); *Bedinger v. Commonwealth*, 7 Va. (3 Call) 461 (1803) (resulting in conviction of justice for buying a vote to the office of clerk of the court).

9. ROEBER, *supra* note 6, at 172-73 (noting most of these cases were debt and property disputes, that caseloads ran as high as 130 cases in a session in one county, and that "the situation worsened" in the 1790s).

10. Maureen K. Conklin, *Power in the Piedmont: Litigation and Political Culture in Eighteenth-Century Central Virginia 351-59* (1998) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (describing process in Goochland County Court).

11. ROEBER, *supra* note 6, at 184 (noting the practice of appointing a prosecutor in misdemeanor cases); Adolph Paul Gratiot, *Criminal Justice on the Kentucky Frontier 235* (1952) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the University of Kentucky Library) (noting it was established practice by the eighteenth century for the

## 2. Examining Court

The examining court, or "called" court, was unique in Virginia. A precharge screening device carried over from colonial practice,<sup>13</sup> it prevented "unnecessary trips to the capital and expedited justice for the innocent."<sup>14</sup> This assembly of at least five magistrates would have gathered at the county seat. Smith would have appeared with counsel, if any, and been offered the opportunity to speak; depositions of witnesses would have been taken.<sup>15</sup> The justices then would have had three options: (1) acquit Smith of all charges and send him home;<sup>16</sup> (2) imprison him in the county jail to await consideration by the county grand jury on misdemeanor charges; or (3) order him to be taken to

governor in Virginia to appoint a prosecuting attorney in each county, and that they eventually became "a permanent part of Virginia officialdom" and "an established practice long before Kentucky was settled during the last quarter of the same century").

12. Act of Nov. 13, 1792, § 1, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 13, at 20.

13. Conklin, *supra* note 10, at 351-59.

14. See Peter Charles Hoffer, *Introduction to CRIMINAL COURT PROCEEDINGS IN COLONIAL VIRGINIA: [RECORDS OF] FINES, EXAMINATION OF CRIMINALS, TRIALS OF SLAVES, ETC., FROM MARCH 1710 [1711] TO [1754] [RICHMOND COUNTY, VIRGINIA]*, at xxxvii (Peter Charles Hoffer & William B. Scott eds., 1984) (describing examining court); Bradley Chapin, *Felony Law Reform in the Early Republic*, CXIII PA. MAG. HIST. & BIOGRAPHY 163, 175 (1989). In 1800, the general court held that one could be indicted and tried in district court for an offense without being first examined for that offense, *Commonwealth v. Blakeley*, 3 Va. (1 Va. Cas.) 129 (1800), but the legislature soon passed an act prohibiting this. See *Commonwealth v. M'Caul*, 3 Va. (1 Va. Cas.) 271, 284 (1812) ("It is certain that this fifth section was enacted in consequence of a previous decision of the general court, that no examining court was necessary previous to an indictment for felony. The legislature considered this as an evil, and they have here provided the remedy. . . .") (citing act of Jan. 24, 1804); see also Anonymous, 3 Va. (1 Va. Cas.) 144 (1804):

[T]he district court hath not original jurisdiction to receive and sustain an indictment for felony, before the inditee hath been examined by a court of justices in the manner prescribed by law, and that after the said inditee hath been examined before a court of justices, and sent to the jail of a district court, a new indictment must be filed against him before his trial in the said court.

15. These were submitted to the district court as part of the record of proceedings because if testimony was unrecorded, the district court may have been left in doubt as to what offense was examined. *M'Caul*, 3 Va. (1 Va. Cas.) at 281-82. These proceedings, like trials, were crowded with onlookers who were "filled with pre-judgments of the prisoner's guilt or innocence." A MEMBER OF THE BAR, HINTS ON THREE DEFECTS IN THE CRIMINAL LAWS OF VIRGINIA 4 (1845) [hereinafter HINTS].

16. According to historian Kathryn Preyer, about one-third of those accused of felonious conduct were discharged by the examining courts during this period. Preyer, *supra* note 4, at 75-76 n.82 (noting of 248 persons examined between 1774 and 1795 in ten different counties on suspicion of felony, eighty-eight were discharged); see also Conklin, *supra* note 10, at 355-57 (concluding that "justices were loath to risk men's lives over . . . property crimes," and noting that they sometimes imposed a minor penalty after acquittal to insure good behavior by the accused).

jail at the district court where he would face indictment, trial, and, if convicted, possible execution.<sup>17</sup>

The state's first attorney general personally prosecuted every felony case during the first several years of the Commonwealth at the general court in Williamsburg before 1788 when felony jurisdiction was spread among the eighteen district courts. Without the examining court, he explained in one case, the power to imprison an accused in jail far away from home to await trial would have been vested "in a single justice of the peace, who might be really ignorant of the law," and would have been "liable to great abuse," and potentially "a source of great injustice and oppression." Five justices, on the other hand, "would probably not be capable of remanding a prisoner for trial, on light and frivolous grounds, and . . . might therefore be entrusted with the power of committing him to the jail of the general court for trial."<sup>18</sup>

As important as this "examination" was in protecting the wrongfully accused against unjust punishment, it did not protect him from the nightmare that followed a single magistrate's insistence on the proceeding itself. Consider the case of John Thilman, accused in 1792 by John Ellis of "feloniously tak[ing] a negro." A magistrate ordered that Thilman be arrested and jailed. He managed to procure release on bail, spent "large sums of money in his defence," and was "greatly injured in his good name, fame and reputation" before he was eventually discharged by the examining court. Notably, Virginia law left his remedy to the civil jury, and he pursued a malicious prosecution suit against his accuser, Ellis. After years of litigation, Thilman eventually secured a jury verdict of 120 pounds, only to have it overturned in 1801 by the court of appeals in Richmond. Alas, his

17. See, e.g., *John Bailey's Case*, 3 Va. (1 Va. Cas.) 258, 261 (1798) (noting that statute authorizes the examining court "only to do one of three things; viz. to consider, whether as the case may appear to them the prisoner may be discharged from further prosecution; may be tried in the county or corporation court, or must be tried by the district court.") (emphasis omitted); Conklin, *supra* note 10, at 351–59 (the "examining court" could acquit and release, or send to general court, or for less serious crime, could require the accused to appear before monthly county court, which would bind him or her over to be presented by a grand jury or to proceed to trial before a petit jury).

18. *M'Caul*, 3 Va. (1 Va. Cas.) at 290. As a judge of the general court had explained: "[T]he examining court is an additional barrier erected for the benefit of the accused. . . ." No innocent man can now be kept in jail more than ten days without a trial. And if his examining court discharges him, he can never afterwards be questioned for the same crime, two great privileges which he did not enjoy by the common law.

*Commonwealth v. Myers*, 3 Va. (1 Va. Cas.) 188, 245 (1811) (quoting Sorrell's Case).

attorney had erroneously alleged a lack of “just cause” rather than the want of “probable cause.”<sup>19</sup>

Theoretically, the examining court was to meet within ten days of the accused’s appearance. In practice, however, it was not uncommon for magistrates to fail to show up at these sessions. When the requisite number of justices failed to appear or key witnesses could not be found, everyone else was sent home with orders to return again for another try. The accused waited for the next term of court in county jail.<sup>20</sup> Postponements and cancellations due to nonattendance were frequent between 1790 and 1800. Sessions of county court were cancelled at least twenty-four times and clerks reported that many justices were not acting.<sup>21</sup>

### 3. Lesser Offenses: County Grand Juries and Juries

Had the magistrates at Smith’s examination concluded that Smith’s behavior constituted a crime less than felony, they would have bound over the charge to the county grand jury for review at its next monthly session. The bulk of criminal justice in Virginia was dispensed in this way, at the county level, with grand jury presentments tried before a justice of the peace and a petit jury.<sup>22</sup>

Misdemeanors were tried before a jury drawn from freeholders in the county, unless a change of venue was required due to extreme

19. *Ellis v. Thilman*, 5 Va. (1 Call) 3 (1801).

20. Many witnesses and jurors were fined during this period for nonattendance. ROEBER, *supra* note 6, at 174.

21. *Id.* at 173–75, 194; *see also* *Commonwealth v. Lovett*, 4 Va. (2 Va. Cas.) 74 (1817). Decades later, the situation had not improved. One Virginia attorney colorfully described this problem:

In the country, nine-tenths of these Courts fail to meet on the special day for which they are summoned. The witnesses, however, generally attend on that day, and go home, half heart-sick from their bootless errand, with a small foretaste of the troubles to come. On the regular county court day, to which, of course, the examination then stands adjourned, the odds are three to one that a continuance is granted, to the accused or the commonwealth; or that five justices cannot be got upon the bench, willing to take up and hear the cause—so that it stands over to a second term. The witnesses again go home, after a detention of perhaps two or more days, muttering curses against the court, the attorneys and the prosecution. At the second regular county court, the chances are two to one of another postponement, either formal or informal. Exeunt again, the grumbling, dispirited witnesses. At the third term, the case must be heard, or the prisoner discharged, unless one postponement has been at his instance.

HINTS, *supra* note 15, at 3 (emphasis omitted).

22. *See* CRIMINAL COURT PROCEEDINGS IN COLONIAL VIRGINIA, *supra* note 14, at xxiii; *supra* note 17.



community prejudice.<sup>23</sup> The penalty for most misdemeanors was a fine, although many also carried “stripes” inflicted by the sheriff at the whipping post near the courthouse or in the public square.<sup>24</sup> Some misdemeanors carried fixed penalties which the judge would simply pronounce without additional participation from the jury.<sup>25</sup> For other offenses, the legislature authorized a range of punishment. Sentencing authority in these cases depended upon the type of penalty. In general, juries fixed *fin*es in their verdicts while judges fixed other sentences, including any period of incarceration in jail, number of lashes at the whipping post, or hours languishing in the pillory.<sup>26</sup> This common-law division of authority was not meticulously adhered to by the General Assembly in enacting penal laws, judging from the handful of statutes departing from this rule between 1776 and 1796.<sup>27</sup>

23. For cases discussing change of venue for jury prejudice, see *Commonwealth v. M’Cue*, 3 Va. (1 Va. Cas.) 137 (1803) (holding that change of venue upon motion of prosecutor was appropriate in an assault and battery case); *Commonwealth v. Bedinger*, 3 Va. (1 Va. Cas.) 125 (1799). Although the general court later declared in 1817 that change of venue was prohibited, the option was soon restored by statute. VA. REV. CODE ch. 169, §§ 9, 15 (1819); *Commonwealth v. Wildy*, 4 Va. (2 Va. Cas.) 69 (1817).

24. See Gratiot, *supra* note 11, at 265.

25. See, e.g., *Commonwealth v. Welsh*, 4 Va. (2 Va. Cas.) 57, 58 (1817) (construing Act of 1792 to require court to impose imprisonment for six months for second conviction of retailing spirituous liquors, but only after proof that the second offense was committed after conviction for the first). The penalty for perjury prior to 1789 was the loss of both ears. See *Kirtley v. Deck*, 13 Va. (3 Hen. & M.) 388 (1809) (relating that Kirtley allegedly slandered Deck by accusing him thus: “Michael Deck has taken a false oath in Rockingham Court, . . . and I will have his ears for it[.]” and noting that “the defendant was perhaps not aware of change in the [punishment]”).

26. See, e.g., Oct. 1786 Va. Laws ch. 64, at 42 (providing that “in every . . . information or indictment, the amercement which ought to be according to the degree of the fault, and saving to the offender his contenment, shall be assessed by twelve honest and lawful men”); Act of Nov. 19, 1789, § 2, Oct. 1789 Va. Laws ch. 8, at 5 (taking girl from parents punishable by any term not exceeding two years); Act of Nov. 18, 1789, § 1, Oct. 1789 Va. Laws ch. 15, at 11 (providing that possession of false token or counterfeit letter punishable by imprisonment “not exceeding one year, and setting upon the pillory, as shall be unto him or them limited, adjudged or appointed by the said court”); Oct. 1786 Va. Laws ch. 49, at 35 (permitting justices to imprison one guilty of affray for up to one month); Act of Dec. 8, 1788, § 1, Oct. 1788 Va. Laws ch. 32, at 16 (providing that for incestuous marriages “no punishment by fine shall be imposed on any person until the same shall have been assessed by a Jury duly impannelled”); see also J.A.G. DAVIS, A TREATISE ON CRIMINAL LAW, WITH AN EXPOSITION OF THE OFFICE AND AUTHORITY OF JUSTICES OF THE PEACE IN VIRGINIA 448–75 (1838); JAMES M. MATTHEWS, DIGEST OF THE LAWS OF VIRGINIA, OF A CRIMINAL NATURE, ILLUSTRATED BY JUDICIAL DECISIONS 85 (2d ed. 1871) (noting that fines are decided by juries, but the jury is not, in a case of misdemeanor, to ascertain the term of imprisonment because that, at common law, is the province of the court). Although the jury had no power to determine imprisonment in most cases, juries’ amercements translated into imprisonment for the impecunious who were forced to work off their fines. See *Commonwealth v. Chapman*, 3 Va. (1 Va. Cas.) 138 (1803). The court had the option of imposing imprisonment even if a jury failed to impose a fine. See *Commonwealth v. Frye*, 3 Va. (1 Va. Cas.) 19 (1793).

27. One of the Commonwealth’s first statutes declared that the crime of maintaining the authority of Great Britain will be punished “with fine and imprisonment, to be ascertained by a

#### 4. District Court: Grand Jury and Jury Trial

If the examining court found that Smith should have been bound over for mayhem, it would have issued a recognizance for each witness to appear at the district court on the first day of its next term. Smith would have remained in the sheriff's custody. The magistrates also would have ordered the sheriff to summon twelve "good and lawful men, freeholders . . . of the neighbourhood of the place where the [crime] shall have been committed," to make their way to the district court to serve as trial jurors.<sup>28</sup> A jury list would have been provided to Smith so that he could exercise the twenty peremptory challenges that he was allocated.<sup>29</sup> For those veniremen summoned to try Smith, the prospect of traveling from their homes in the western part of the Commonwealth to the nearest district court would surely have been unwelcome news. Though the trek to the district court was an improvement over the situation prior to 1788 when all felony proceedings took place in Richmond,<sup>30</sup> many jurors and witnesses continued to be recalcitrant and risk fines rather than endure the hardship of traveling up to one hundred miles to participate in a trial.<sup>31</sup>

jury, so that the fine exceed not the sum of twenty thousand pounds, nor the imprisonment the term of five years." Oct. 1776 Va. Laws 15. Although the legislature in 1776 had added that the act shall "be in force during the present war, and no longer[.]" in 1780 a new act was passed declaring this offense to be a misdemeanor, again giving to the jury the authority to assess the fine, and duration of imprisonment, not more than 100,000 pounds weight of crop tobacco, or five years. May 1780 Va. Laws 25–26. Other acts defined offenses for which the jury in its discretion would select fine and imprisonment as well. See, e.g., Oct. 1786 Va. Laws ch. 52, at 35 (providing that an officer who takes reward for doing his office other than that allowed by law shall pay treble damages to the party grieved and "be amerced and imprisoned at the discretion of a jury") (reenacted, Act of Dec. 19, 1788, § 1, Oct. 1788 Va. Laws ch. 83, at 49); Act of Oct. 19, 1792, § 1, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 3, at 5; Oct. 1786 Va. Laws ch. 54, at 36 (one who disturbs or arrests minister during service shall be imprisoned and amerced at the discretion of the jury). Then there was one offense for which judges were given authority to set any punishment. May 1777 Va. Laws ch. 11, at 18–19 (listing penalty for stealing bill of credit, or money, as four times restitution or to be sold as a servant for such a term as shall raise the same, up to seven years, and receiving such other punishment "as the court before whom the offender shall be convicted shall think adequate to his offence").

28. Act of Nov. 13, 1792, § 4, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 13, at 21; see *Commonwealth v. Leath*, 3 Va. (1 Va. Cas.) 151, 155 (1806).

29. See HINTS, *supra* note 15, at 7 ("One preemptory challenge,—or three, beyond all question, would most abundantly protect an accused person from the apprehended danger. The number he now enjoys, enables him almost literally to select his own jury.") (emphasis omitted).

30. See *Bedinger v. Commonwealth*, 7 Va. (3 Call) 461, 470 (1803); Preyer, *supra* note 4, at 70. The state capitol and the general court moved from Williamsburg to Richmond in 1779. See Oct. 1777 Va. Laws (9 Va. Stat. (Hening)) ch. 27, at 434 (reporter's note).

31. See HINTS, *supra* note 15, at 3 (noting that even after the district courts were established in 1788, "[t]he hardship and cost of convening all concerned in the trial, at a place distant perhaps eighty or a hundred miles from their homes . . . could not be borne"); see also MILLER,

The grand jury of the district court, drawn from residents of the district court seat,<sup>32</sup> would consider Smith's case, including the record of the examining court proceedings.<sup>33</sup> If the defendant was indicted, ideally his trial would follow immediately in the same term of court. But because of missing witnesses, the accused would often have to await the next term of court in the jail of the district court,<sup>34</sup> a place where criminals, debtors, runaway slaves, and those detained for trial were jammed together, "their Situation highly uncomfortable and unwholesome" according to one grand jury commenting on its local gaol.<sup>35</sup>

Delinquent veniremen also delayed trial after trial. The true story of the attempt to bring Abner Vance to justice for murder illustrates the difficulty of securing a functioning jury. By the time the ordeal of jury selection began, Vance had already been tried once, and had his conviction overturned. From the twelve summoned to serve as jurors in his second trial, only a partial jury could be gleaned, so the sheriff was directed to summon another forty-eight bystanders

*supra* note 6, at 27 ("[T]he districts were made up of geographical areas usually consisting of four or five counties.").

32. See Act of Nov. 29, 1792, § 1, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 12, at 17 (providing that "the sheriff of each county, where a district court is appointed to be holden, shall before every meeting of such court, summon twenty-four of the most discreet freeholders of the district" to be supplemented with "bystanding freeholders[.]" as necessary, to form the grand jury).

33. See *Commonwealth v. M'Caul*, 3 Va. (1 Va. Cas.) 271, 278 (1812) (noting clerk was responsible for creating record in examining courts). The record was brief and served to specify the offense for which the defendant had been bound over. In *Commonwealth v. Leath*, 3 Va. (1 Va. Cas.) 151 (1806), when reviewing issues raised by a motion to arrest judgment made prior to the imposition of a sentence following conviction and sentencing by jury for several stabbings, the general court found, based on the examining court record, that the prisoners had been duly examined for all of the offenses of conviction. The entire record read:

At a called court held for the town of Petersburg at the court-house on the said Tuesday, 26th February, 1805, for the examination of Peter Leath and Heartwell Leath on suspicion of felony, present Paul Nash, mayor (also the recorder and four alderman by name.) The said Peter Leath and Heartwell Leath being brought to the bar in custody of the serjeant of this town, to whose charge for the aforesaid cause they had been committed, and upon examination, divers witnesses being sworn and examined on the premises, and the prisoners not having any thing to say in their own defence, on consideration it is the unanimous opinion of the court that the said Peter Leath and Heartwell Leath should be tried for the said supposed offence at the next District Court to be held in Petersburg the 15th April next, and thereupon they are remanded to jail.

*Id.* at 152-53.

34. See, e.g., *Commonwealth v. Kearns*, 3 Va. (1 Va. Cas.) 109 (1794) (explaining that the defendant was indicted in district court in April 1793, but trial could not be had until April 1794 because the witnesses summoned for the Commonwealth could not be procured for the earlier term).

35. ROEBER, *supra* note 6, at 215 (quoting FREDERICKSBURG DISTRICT ORDERS, 1789-1805, Sept. 30, 1797).

to appear for jury service the next day.<sup>36</sup> This effort produced only seventeen more veniremen, however, prompting the court to command the sheriff to round up another forty-eight candidates. As the term came to a close, the court gave up—the defendant had thirteen peremptory challenges remaining and only seven jurors had been selected. At its next session months later, the court tried for a third time to bring Vance to trial, but watched its last hope of impaneling a jury fade away when three days of retrieval work by the sheriff yielded only three seated jurors. The case was then moved to another circuit, where Vance was finally convicted and sentenced to hang.<sup>37</sup>

Assuming twelve jurors would have eventually been selected in Smith's trial, his chances for acquittal at trial would have been high.<sup>38</sup> A number of the jurors probably would have been bystanders "whose hearts or heads [were] so soft as to make it easy for an ingenious or eloquent advocate to [have] influence[d] into them the doubt . . ." or they may have been "friends" of the defendant who had managed to "station themselves conspicuously before the sheriff's eyes."<sup>39</sup> When an acquittal was not forthcoming, a new trial often was. Jurors who could not agree were "confined during the full legal term of [the]

36. See Act of Nov. 29, 1792, § 11, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 12, at 19 (authorizing sheriff, "every day the court sits, [to] summon a sufficient number of bystanders . . . to attend the court that day, that out of them may be impanelled sufficient juries for the trial of causes depending in such courts"); Act of Nov. 13, 1792, § 4, Oct. 1792 Va. Laws (1 Va. Stat. (Sheperd)) ch. 13, at 21 (noting that sheriff may summon as many bystanders as needed to make a jury of twelve, and that all twelve may be bystanders).

37. *Vance v. Commonwealth*, 4 Va. (2 Va. Cas.) 162 (1819) (upholding judgment). Consider also *Gibson v. Commonwealth*, 4 Va. (2 Va. Cas.) 111 (1817), where the general court approved the use of two sets of summonses to get up a jury when the bystanders ran out. In *Gibson*, after challenges, the jurors, together with the bystanders, among them "Attorneys, practising in the court," fell short of the requisite twelve, so that those "who had been elected and sworn, were adjourned in the attendance of the Sheriff, till the next day, and charged not to separate" or communicate with themselves or others. *Id.* at 115–16. The sheriff that night summoned, from their homes miles from the courthouse, several additional potential jurors, and after more challenges, "at length" a jury was formed. *Id.* at 115. The legislature was moved to provide—as an incentive to public duty as well as protection for the accused—that whenever court participants were not able to assemble and hear a criminal case for three consecutive terms, the accused would be freed. Oct. 1777 Va. Laws (9 Va. Stat. (Hening)) ch. 17, § 54, at 414; VA. REV. CODE ch. 169, § 28 (1819).

38. In Richmond, it was more likely that he would be acquitted than convicted. Robert M. Saunders, *Crime and Punishment in Early National America: Richmond, Virginia, 1784-1820*, 86 VA. MAG. HIST. & BIOGRAPHY 33, 41 (1978) (noting that from 1784-1820 the conviction rate for men was only 43%).

39. HINTS, *supra* note 15, at 5 (complaining that "[s]ometimes the whole jury is composed of these ductile materials"); see also *Commonwealth v. Chapman*, 3 Va. (1 Va. Cas.) 138 (1803) (explaining that jury convicted and fined defendant \$450 for bribing the deputy sheriff to summon those named by the defendant); ROEBER, *supra* note 6, at 214 n.24 (noting complaint that dangerous felons were acquitted by idle, less-educated bystanders).

court” until they either reached a verdict or were discharged.<sup>40</sup> Individual jurors were allowed to separate only in the constant company of a deputy. This rule proved fortuitous for one John M’Caul, convicted of stealing the meaningful sum of \$17,000 from the Commonwealth’s own treasury. He was freed after it was learned that one of his jurors, allowed to visit a sick child at home for twenty minutes, had been permitted by his escort to “go upstairs to see his family” for five minutes unaccompanied.<sup>41</sup>

If the jury agreed that Smith had committed mayhem, its verdict, complete with the command that he be “hung by the neck until dead,” would have been announced and Smith would have been promptly whisked back to jail. Called before the district judges the next day and asked if there was any reason sentence of death should not be passed upon him, Smith still would have had three cards left to play before resigning himself to execution.

#### 5. “Adjournment for Difficulty” to the General Court

First, relief remained a possibility from the general court, the Commonwealth’s highest criminal tribunal. There was no appeal as of right in criminal cases, but a charge could be considered by the high court after being “adjourned for difficulty” to the general court by the judges of the lower courts. Smith could have hoped that the district court judges would agree with him that his case involved a question of law so confounding as to require the attention of the general court, and that they would arrest judgment until that question was resolved at the next sitting of the high court.<sup>42</sup> For example, one fortunate soul, Preeson Richards, escaped the hangman when the general court agreed to set aside his conviction for burglary because the indictment stated only that the grand jury was of the district of Accomack and Northampton, and that the offense was committed in the county of Northampton. It should have alleged, in addition, explained the learned jurists, that the burglary was “committed . . .

40. *Commonwealth v. Thompson*, 3 Va. (1 Va. Cas.) 319 (1813).

41. *Commonwealth v. M’Caul*, 3 Va. (1 Va. Cas.) 271, 304–06 (1812).

42. *Commonwealth v. Proctor*, 3 Va. (1 Va. Cas.) 4 (1791) (general court concluded that offense charged in indictment was not a crime, after convicted defendant had moved for arrest of judgment in district court, and case had been adjourned for difficulty to general court); *Commonwealth v. Dowdall*, 3 Va. (1 Va. Cas.) 7 (1791) (overruling plea in arrest of judgment in case where defendant “being brought up to receive the sentence of the court, . . . tendered” his arguments in arrest of judgment).

within the district composed of the counties of Accomack and Northampton."<sup>43</sup>

## 6. Sentencing and Benefit of Clergy

If Smith failed to identify a legal issue that stumped the district court judges, his next option would have been to ask for benefit of clergy. Clergy was a judicial pardon of sorts, adopted throughout the colonies along with other aspects of seventeenth-century English criminal justice. A description of the practice in the general court just prior to the establishment of the district courts illustrates well its major features. After being granted the privilege, the "jailer, 'in open court,' branded [the defendant] on the 'Brawn of the left Thumb.' If the conviction was for a homicide other than wilful murder . . . he was branded with the letter M. For all other felonies it seems that the letter T was customary."<sup>44</sup> This mark would prevent the culprit from claiming the privilege a second time, guaranteeing that his sentence for a second offense would be death. By 1774, "branding" with a cold iron was "habitual practice," prompting the author of a leading treatise on the justices of the peace in Virginia to remark:

[T]he burning in the Hand seems to be of little Use, and . . . can scarcely be called even so much as a slight Punishment, but rather a piece of absurd Pageantry, tending neither to the Reformation of the Offender, nor for Example to others; to wit, burning the Offender in the Hand with an Iron scarcely heated.<sup>45</sup>

Historians estimate that up to a third of all felons in Virginia during this time were granted clergy.<sup>46</sup> Property offenders, and women, in particular, were clergied and thus spared execution.<sup>47</sup> The life or death decision to extend clergy was not the jury's to make. Rather,

43. *Commonwealth v. Richards*, 3 Va. (1 Va. Cas.) 1 (1789). Not surprisingly, decisions like these prompted the legislature in 1804 to prohibit the reversal of convictions following jury verdicts for minor indictment defects. Act of Jan. 24, 1804, § 6, Dec. 1803 Va. Laws ch. 95, at 63.

44. Hugh F. Rankin, *Criminal Trial Proceedings in the Federal Court of Colonial Virginia*, 72 VA. MAG. HIST. & BIOGRAPHY 50, 67 (1964); see also Act of Nov. 27, 1789, Oct. 1789 Va. Laws ch. 22, at 14-15 (codifying benefit of clergy and listing crimes for which clergy was unavailable, including murder, burglary, arson, and horse theft).

45. *Id.* (quoting RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE EXPLAINED AND DIGESTED, UNDER PROPER TITLES 87-88* (1774)).

46. Jeffrey K. Sawyer, "Benefit of Clergy" in *Maryland and Virginia*, 34 AM. J. LEGAL HIST. 49, 59 (1990).

47. Tracing 147 felony defendants from 1789 to 1800, Kathryn Preyer found that, of the 41 convicted, 24 were clergied, while only 17 were sentenced to be hanged. Preyer, *supra* note 4, at 71. Given the absence of case reports at the time, it is not surprising that district judges did not agree which offenses were clergyable and which were not. See *Commonwealth v. Stewart*, 3 Va. (1 Va. Cas.) 114, 115 (1795).

the discretion to spare a convicted felon's life and to impose the more lenient sentence was unbounded, and belonged entirely to the court. Judges were also granted the discretion to order restitution for robbery and larceny.<sup>48</sup>

### 7. Pardon: The Felon's Last Resort

Smith, if denied clergy, would have had one last resort: the governor's pardon. The frequency with which felons were pardoned may be surprising to those familiar with modern clemency practices. Pardon and benefit of clergy were alternative ameliorative features of what was otherwise a horribly draconian penal system.<sup>49</sup> For example, when horse thievery was made unclergyable in 1789, and the penalty of death extended to accessories to the crime in 1792, pardons for horse stealing increased dramatically.<sup>50</sup> "[S]carce a single horse-stealer suffered death," so many were pardoned.<sup>51</sup>

### 8. The Need for Reform

Given the opportunities for derailment along the way, only an unusual case ended in execution. Three separate proceedings—examining court, grand jury, and jury trial—had to be negotiated successfully by the complaining witness, the sheriff, and the prosecuting attorney. Dozens of participants—the jurors, the witnesses, several judges, the prosecutor, and the accused—were required to travel to distant locations. At each stage, the accused could entertain real hope of avoiding punishment. It is therefore not surprising that in this period citizens with legitimate complaints of criminality preferred to take matters into their own hands. One man complained in 1783 that to travel 140 miles in order to testify against a man he suspected of stealing his horse would double the amount of the loss, and he preferred to let the matter go.<sup>52</sup> Historian Kathryn Preyer concluded in her study of criminal justice in Virginia at this time that trial in felony court was reserved for only the "most threatening suspects."<sup>53</sup>

48. Act of Dec. 12, 1792, § 1, Oct. 1792 Va. Laws ch. 14, at 43.

49. See generally Sawyer, *supra* note 46.

50. Preyer, *supra* note 4, at 73–74.

51. WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 62 (1793) (discussing Virginia), reprinted in 12 AM J. LEGAL HIST. 122, 167 (1968).

52. Preyer, *supra* note 4, at 81–82 n.104.

53. *Id.* at 81–84.

In sum, during the decades immediately following independence, sentencing in Virginia was a joint effort, a cumulation of several sequential decisions by a series of judges, juries, and elected officials. State legislators first specified the permissible penalties for a given offense as well as whether those penalties were mandatory or discretionary. The county justices of the peace, the grand jurors in district court, and finally the district court trial jury each had the opportunity to reject all charges, or to select a lesser offense carrying a different penalty. Following conviction for a felony, the district judge decided whether the offender would hang or would receive benefit of clergy. Finally, the clemency power of the governor determined the actual punishment suffered by a large proportion of the condemned. Very few were ever executed. By 1796, legislators were dissatisfied with this uneven, ineffective, and arbitrary system of crime control, and were ready for something new. They were soon to conclude that the answer was to make punishment more certain, which could in turn only be accomplished by ameliorating the harsh penalty of death for so many crimes and substituting penalties that judges, juries, and governors could consistently enforce.

### *B. Jefferson's Early Reform Efforts*

Before examining the act of 1796 that eventually substituted discretionary terms of imprisonment as punishment for most felonies, it is important to review previous failed attempts at reform. The very first General Assembly in 1776 had commissioned a Committee of Revisors—Thomas Jefferson, George Wythe, George Mason, Thomas Lee, and Edmund Pendleton—to draft the laws of the Commonwealth, including a revised criminal code.<sup>54</sup> The Committee met in Fredericksburg in January of 1777, Jefferson was asked to draft a code of criminal law, and by 1779, a revised code had been submitted to the General Assembly.<sup>55</sup>

Jefferson's proposed reforms would have stripped Virginia's district court judges of the sentencing authority that they had previously enjoyed in felony cases by granting or withholding clergy. "Let mercy be the character of the law-giver, but let the judge be a mere machine," Jefferson had reportedly written earlier in 1776.<sup>56</sup> The pro-

54. See 1 THE WRITINGS OF THOMAS JEFFERSON 43 (H.A. Washington ed., 1861) [hereinafter, JEFFERSON WRITINGS]; Preyer, *supra* note 4, at 53–85.

55. The bill is reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 147–62.

56. See Preyer, *supra* note 4, at 62.



posed bill would have eliminated the hope of either clergy or pardon, so “that none may be induced to injure through hope of impunity.”<sup>57</sup> As a substitute for hanging, clergy, and pardon, Jefferson proposed a veritable encyclopedia of eighteenth-century punishment. Specified and mandatory terms of “hard labor at public works” were designated as punishment for manslaughter and property crimes.<sup>58</sup> All death sentences for murder and treason were to be carried out within two days of sentencing, and the body of one who murdered a family member or committed petty treason would after hanging “be delivered to Anatomists to be dissected.”<sup>59</sup> Murderers who used poison would be poisoned to death.<sup>60</sup> Gibbeting was reserved for dueling.<sup>61</sup> Except for those committing murder by duel, each murderer forfeited at least half of his estate to the estate of the person slain.<sup>62</sup> Rapists suffered castration.<sup>63</sup> A woman guilty of polygamy or sodomy would have a half inch hole cut “through the cartilage of her nose.”<sup>64</sup> *Lex talionis* would have been the penalty for our man Smith—he would have lost his own thumbs for his crime of biting off those of his victim.<sup>65</sup> The bill did not speak to misdemeanors, as it was limited to “proportioning Crimes and Punishments, in cases heretofore Capital.”<sup>66</sup>

Notably, whenever the penalty for an offense in Jefferson’s proposed code was discretionary, as it was for just two offenses, the jury, not the judge, was granted the authority to determine punishment.

57. 1 THE WRITINGS OF THOMAS JEFFERSON 237 (Andrew A. Lipscomb ed., 1904) (cited in RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA* 51 n.27 (2000)).

58. Counterfeiting carried six years’ hard labor in the public works and forfeiture of all lands and goods; arson five years and triple restitution; burglary and robbery, four years and “double reparation”; horse stealing and housebreaking carried three years and restitution; grand larceny was punished with two years and restitution; petit larceny one year and reparation. 1 JEFFERSON WRITINGS, *supra* note 54, at 147–62.

59. *Id.* at 148–50.

60. *Id.* at 150.

61. *Id.*

62. *Id.*

63. *Id.* at 153–54.

64. *Id.* Gail McKnight Beckman explained:

The last penalty seems meaningless until one reflects that in ancient Egypt a similar punishment was intended to prevent the female from further alluring the male into wantonness by the attraction of her nose. This illustrates how extensive Jefferson’s knowledge of early laws was and from how many sources he was influenced.

Gail McKnight Beckman, *Three Penal Codes Compared*, 10 AM. J. LEGAL HIST. 148, 153 (1966) (footnote omitted).

65. See 1 JEFFERSON WRITINGS, *supra* note 54, at 154.

66. *Id.* at 147.

The exercise of the “pretended arts of witchcraft . . . or sorcery” meant “ducking and whipping, *at the discretion of a jury*, not exceeding fifteen stripes.”<sup>67</sup> And if our Mr. Smith had been convicted of mayhem and had already lacked thumbs, “some other part of at least equal value and estimation, *in the opinion of a jury*,” would be “maimed, or disfigured in like sort” instead.<sup>68</sup>

The bill, along with the rest of the proposed revisal of Virginia’s laws, was submitted by the Committee of Revisors in 1779, but was tabled after its submission for reasons unknown.<sup>69</sup> Not until December 1785 was it reintroduced, this time by James Madison, who shepherded the bill in the Assembly while Jefferson was in France.<sup>70</sup> It received a “respectful hearing” but was finally defeated by a single vote the week before Christmas, 1786.<sup>71</sup>

Historians have advanced a number of explanations for the failure of Jefferson’s penal reform bill.<sup>72</sup> The first is reflected in Madison’s letter to Jefferson reporting on the bill’s demise. There he states that the Assembly considered the lenient treatment of horse thieves to have gone “too much against the mood of the time” causing the bill to fail due to “rage against horse stealers.”<sup>73</sup> Jefferson himself later attributed the loss to the fact that the “reasonable world” had been satisfied with the propriety of substituting “hard labor on roads, canals and other public works” for capital punishment, “but the general idea of our country had not yet advanced to that point.”<sup>74</sup> Indeed, the legislature in the next five-year period exhibited not leniency but greater severity in its acts pertaining to crime, by remov-

67. *Id.* at 160 (emphasis added).

68. *See id.* at 154–55 (emphasis added) (footnote omitted).

69. Charles T. Cullen, *Completing the Revisal of the Laws in Post-Revolutionary Virginia*, 82 VA. MAG. HIST. & BIOGRAPHY 84 (1974). The bill may have been tabled in 1779 due to the threat of war. *Id.* at 98 (“The war had distracted the attention of the legislature when the first report was submitted in 1779. . .”).

70. Chapin, *supra* note 14, at 173; Cullen, *supra* note 69, at 85.

71. PAUL W. KEVE, *THE HISTORY OF CORRECTIONS IN VIRGINIA* 15 (1986) (the bill was “[t]wice introduced, debated at length”); *see also* Chapin, *supra* note 14, at 176 (noting that the failure of the bill was a considerable disappointment to Jefferson, for he had put great effort into it, with wide-ranging research of the philosophical literature on the subject).

72. Historian Kathryn Preyer reports:

Legislative records for the period do not report debates. Newspapers which have been examined make no mention of the subject. Searches in unpublished letters of members of the assembly have produced nothing. Legislative and executive materials, both printed and unpublished, have shed no light on this bill.

Preyer, *supra* note 4, at 70 n.65.

73. KEVE, *supra* note 71, at 15; Preyer, *supra* note 4, at 69.

74. 1 JEFFERSON WRITINGS, *supra* note 54, at 45 (autobiography).

ing the possibility of clergy for horse theft and several other offenses.<sup>75</sup>

Alternatively, opposition to Jefferson's proposals could have focused on the more extreme corporal punishments required under the bill. Jefferson himself feared as much. In his letter presenting the bill to George Wythe, he wrote that the

*Lex talionis*, although a restitution of the Common law, to the simplicity of which we have generally found it so advantageous to return, will be revolting to the humanized feelings of modern times. An eye for an eye, and a hand for a hand, will exhibit spectacles in execution whose moral effect would be questionable; and even [castration], although long authorized by our law, for the same offence in a slave has, you know, been not long since repealed, in conformity with public sentiment. This needs reconsideration.<sup>76</sup>

He later wrote in his autobiography that when the Committee had first met:

On the subject of the Criminal law, all were agreed, that the punishment of death should be abolished, except for treason and murder; and that, for other felonies, should be substituted hard labor in the public works, and in some cases, the *Lex talionis*. How this last revolting principle came to obtain our approbation I do not remember. . . . [T]he modern mind had left it far in the rear of its advances.<sup>77</sup>

Even if the corporal punishments in the bill had been acceptable, the provisions for forfeiture of estate or the elimination of pardon may have been objectionable at the time.

Another explanation, not inconsistent with others, has been advanced by historian Bradley Chapin. The penal bill was considered at the same time as another bill to restructure and reform the county court system, also originating with Jefferson's committee and championed during the same legislative session by Madison. This proposal to create assize courts was perceived by magistrates as a threat to their control over the legal and economic affairs of counties,<sup>78</sup> and would have "transferred the prosecution of felons to local grand

75. Preyer, *supra* note 4, at 73; see, e.g., Act of Nov. 18, 1789, Oct. 1789 Va. Laws ch. 11, at 6 (providing that intercourse with child under ten shall be felony without allowance of clergy); Act of Nov. 25, 1789, Oct. 1789 Va. Laws ch. 19, at 13 (providing forgers "shall be deemed guilty of felony, and suffer death as a felon without benefit of clergy."); Act of Nov. 27, 1789, § 1, Oct. 1789 Va. Laws ch. 22, at 14 (removing benefit of clergy for murder, burglary, arson, larceny from a church, robbery, and horse stealing).

76. 1 JEFFERSON WRITINGS, *supra* note 54, at 146–47 (Jefferson's Letter to George Wythe, Nov. 1, 1778, enclosing bill).

77. *Id.* at 43–44; see also KEVE, *supra* note 71, at 14.

78. ROEBER, *supra* note 6, at 192 n.66.

juries supervised by judges of the General Court on circuit.”<sup>79</sup> Because both this court reform bill and the penal reform bill threatened local judicial power in one way or another, those who had an interest in preserving the status quo may have rallied their forces to prevent either bill from passing.

Chapin also notes that the bill may have been regarded as a violation of the legislature’s command to the revisors that the committee was not to meddle with the common law except where necessary.<sup>80</sup> Yet another possibility is that the cost of building a penitentiary was more than lawmakers wanted to bear at the time. These start-up costs deterred penal reform in other southern states for years,<sup>81</sup> and they could have played a role in Virginia’s reluctance as well.

After Jefferson’s bill died in 1786, penal reform activity in Virginia lapsed again for nearly a decade, while the reform movement in other states accelerated. A brief detour from our examination of Virginia sentencing reform to events in the state of Pennsylvania will provide both context for and contrast to later events in Virginia.

### C. *Reform Succeeds in Pennsylvania*

In 1786, the same year that Virginia rejected penal reform, Pennsylvania embraced it. Supported by a coalition of Quakers, enlightened reformers, and those seeking more effective crime control, Pennsylvania’s revised criminal code of 1786 substituted imprisonment and hard labor for execution for all felonies except murder and treason.<sup>82</sup> However, the Pennsylvania statutes as enacted did not include mandatory sentences like those proposed by Jefferson. The new Pennsylvania scheme instead included a penalty range for each offense with the maximum sentence at ten years,<sup>83</sup> and vested judges

79. Chapin, *supra* note 14, at 175–76; see also MILLER, *supra* note 6, at 25–26 (discussing opposition to Madison’s court reforms by “[Patrick] Henry’s faction”); ROEBER, *supra* note 6, at 192–93 (describing Madison’s bill to reform county courts and arguing that its defeat was orchestrated by “county court partisans”).

80. Chapin, *supra* note 14, at 175.

81. See, e.g., Jack Kenney Williams, *Crime and Punishment in South Carolina, 1790-1860*, at 298 (1953) (unpublished Ph.D. dissertation, Emory University) (on file with Emory University Library).

82. Act of Sept. 15, 1786, ch. 1241, 12 Pa. Stat. 280 (Harrisburg Pub. Co. 1906).

83. New York’s penal reform in 1796 fixed fourteen years as the maximum term for all first offenses above the grade of petty larceny. ORLANDO F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845*, at 51 (1922). Life expectancy at the turn of the century was about thirty-five years, so that a fourteen-year sentence was essentially a life sentence for anyone over 18. See 4 *DICTIONARY OF AMERICAN HISTORY* 150 (rev. ed. 1976) (noting life expectancy for males in Massachusetts in 1789 at 34.5 years and in 1855 at 38.7

with the power to fix sentences within those limits and also to pardon prisoners who had evidenced “sincere reformation.”<sup>84</sup> The bill was controversial, and the provision granting to judges the authority to choose the term of punishment was the main point of contention.

The debate over the Pennsylvania bill is worth examining in some detail, for it is eerily similar to the debates today about judge or jury sentencing, over *two centuries* later. The question whether juries or judges should have primary sentencing authority was far from settled in Pennsylvania when the bill was proposed. Indeed, there were three contenders for sentencing power: juries, judges, and the Executive Council, which exercised the power of pardon. Information about this controversy comes from two sources. First, criticism of the bill appears in the published essays of Francis Hopkinson, a Republican lawyer and long-time political enemy of the bill’s most prominent supporter and rumored codrafter, Thomas McKean.<sup>85</sup> McKean was associated with the Constitutionalist party and was then serving as Chief Justice of the Pennsylvania Supreme Court. The second source of information on the bill is the debate on the bill on the floor of the legislature, reported in Philadelphia’s daily newspaper, *The Pennsylvania Packet*.

Hopkinson wrote for the *Packet* in April of 1786 under the name “Jus” to warn Pennsylvanians of the bill’s dangerous delegation of sentencing power to judges. Penalties should be definite and certain, he argued—if they were not, the discretion to select the sentence must rest with juries. His objections to judicial sentencing included: arbitrariness (“The quantum, at least, is to be determined by the particular state of mind the judge happens to be in at the time of passing sentence. Vexations and disappointments may fend his honour to court in a very ill humour, and then wo to the culprits.”);

years). The fourteen-year maximum was reduced to ten years by an amendment on the floor of the legislature. See PENNSYLVANIA PACKET, Sept. 1, 1786, at 3 (After an amendment to change the fourteen years to seven years had been defeated, another member proposed ten years instead of fourteen. This amendment “was agreed to” after supporters argued that although seven years would not be long enough to reform the worst offenders, ten years “was full enough.”).

84. Act of Sep. 15, 1786, ch. 1241, § 13, 12 Pa. Stat. 280, 288 (Harrisburg Pub. Co. 1906).

85. ROBERT LEVERE BRUNHOUSE, *THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790*, at 184 (1942) (“In the fall of 1785 a petition signed by Justices McKean and Bryan, [both Constitutionlists,] and other prominent citizens asked for changes in the law and suggested the method of punishment at hard labor ‘publicly and disgracefully imposed,’ as an innovation.”); G.S. ROWE, *THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 237-38 & n.22* (1978) (noting that Hopkinson claimed that the justices helped pen the bill); Chapin, *supra* note 14, at 168 (noting that William Bradford wrote the reform statute in 1786).

partisan favor (“There is sufficient reason to believe, that a scarlet robe is not a certain security against the operation of party influence. . . .”); dangerous centralization of power (given the power to set punishment and then pardon, “[t]he thing would have been complete if the act had given these demi-gods a power of granting religious absolution, as well as temporal restoration”); and inconsistency (“If they should award one man four weeks, and another fourteen years punishment for the same offense—for a crime of the same enormity, under all circumstances, will an action lie against them, or can they be impeached for the injustice? Surely not. . . .”).<sup>86</sup> Juries seemed to Hopkinson to be the logical choice for exercising discretionary sentencing power. Hopkinson explained that in sentencing, the “supposed law knowledge” of judges “can be of no possible use.” The authority to sentence

can no where be lodged so safely as with the jury who find the fact. The proportion of punishment, equitably due according to the nature of the offence, is not a question involved in the technical subtleties of the law; but arises from the particular circumstances of the case, . . . and an honest, impartial, and conscientious jury, are as competent to this purpose, as the most profound judge. They will necessarily have heard the state of the whole matter, with the arguments for the prosecution, and in behalf of the prisoner; and being a temporary body, accidentally brought together, and impanelled for the occasion, are more likely to do substantial justice, than a judge who is so hackneyed in criminal prosecutions. . . .

If juries were so entrusted, they would probably hold their office in higher estimation than they do now: they would spurn at the idea of their being legal machines, subject to the management of the court: and feeling themselves competent to the business, would execute their duty with dignity, propriety, and good conscience.

As juries determine the quantum of damage in a civil action, there seems to be no reason why they should not also determine the quantum of punishment in a criminal process, within such limits as the law shall prescribe.<sup>87</sup>

When the bill was eventually introduced into the legislature, Republican opponents proposed an amendment that would have eliminated judicial discretion to fix the term of sentence, and would have substituted a certain and mandatory sentence of seven years’ hard labor.<sup>88</sup> The first stated reason for the amendment was the greater

86. 2 THE MISCELLANEOUS ESSAYS AND OCCASIONAL WRITINGS OF FRANCIS HOPKINSON, ESQ. 97–99, 104–05 (1792) (emphasis omitted).

87. *Id.* at 101–02 (emphasis omitted).

88. PENNSYLVANIA PACKET, Sept. 1, 1786, at 2.

deterrent power of certain punishment. A proponent of the amendment explained:

That this power must go to the judges is very singular, and is highly prejudicial to this country . . . now if we make the power of the judge discretionary, our liberty is in a poor situation. . . . [W]e should not leave it in the breast of any judge or jury to determine the punishment; but let the offender read for himself, and know what he has to expect.<sup>89</sup>

Speaking against the amendment, supporters of the bill argued that “circumstances might happen to heighten or mitigate” offenses, “different, nay even the same crimes, require different degrees of punishment. . . . [B]ut the power of determining . . . must be left somewhere or other.”<sup>90</sup> This power had to rest with the judges, the bill’s supporters argued, because the only other option—jury sentencing—was an inferior alternative. Nowhere would this discretion be “so proper (having such full information) as [with] the judges: leave it to juries, and you then make them both judges and jury.”<sup>91</sup> “I would by no means wish to have it left to the jury to determine the punishment,” explained one, “because their time for considering is short, and they have no official character to lose; but the judge has time for consideration, and has every tie [*sic*] to preserve his impartiality.”<sup>92</sup> Another supporter dismissed the idea of jury sentencing as preposterous: “[B]y no means” should the discretion to select sentences be “left to a jury, who would differ so widely from a number of accidental causes in crimes of a similar nature, that it would reflect dishonor upon the state: nor are they responsible for any part of their conduct, which the judges are.”<sup>93</sup>

Republicans attempted another argument, and proposed lodging the discretionary power in the Executive Council, which “ha[s] long had and exercised this power; for whenever the sentence of the law has been too severe, council had and did mitigate it. . . . [In] all free governments the judges should pronounce what the law was, and not their own private opinion of what is right.”<sup>94</sup> The Executive Council at the time was controlled by Republicans, while the bench was populated with Constitutionalists.<sup>95</sup> A supporter of the bill replied:

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. According to historian Robert Brunhouse:

I see no reason why the punishment should not be in the power of the court: they are bound by the law; and cannot go beyond its provision: the crime may deserve the highest degree of punishment, and they are confined and cannot punish further than fourteen years. Sir, the discretionary power there given is necessary; for though council have and always will have the power to remit the punishment of the criminal, yet as they cannot ascertain the evidence without much trouble (during which they will have to leave affairs of a more national concern) . . . if the court was to fix the time that the punishment should continue, application to council would then be unnecessary.<sup>96</sup>

The Republicans tried yet another tack to gather support for their amendment, arguing that granting judges sentencing discretion “was placing the judges in a very disagreeable situation; for as the criminal knows his sentence depends altogether upon them, he will take every method of teasing them into a mitigation.”<sup>97</sup> This allegation of corruption prompted one of the bill’s supporters to get testy: “it was well known that the bill under consideration did not come from the judges; that it came from another quarter, and he hoped it was not a party matter nor never would be.”<sup>98</sup> He added that juries were more likely to acquit if the penalty was fixed; “but if the judge has the power of quadrating the punishment to the crime, the jury’s humanity will then not be affected.”<sup>99</sup> The amendment to eliminate judicial discretion and substitute mandatory terms was then defeated by a narrow margin, with twenty-six in favor and thirty-four against.<sup>100</sup>

The defeat of this amendment settled the issue, although debate on various aspects of the bill continued for days.<sup>101</sup> In a last effort to

The Republicans generally wanted to set a definite term of years for the punishment of given offenses which the judges would be required to impose when sentencing offenders. If there were good reasons why the full sentence should not be served, then the offender could resort to the Executive Council which had the pardoning power. The Constitutionalists, on the other hand, insisted that there should be a discretionary power vested in the court whereby light punishment might be meted out at once if the case seemed to merit it. One point was clear in the minds of the assembly men; the Republicans were unwilling to lodge a discretionary power in the hands of the supreme court which was dominated by their rivals, the Constitutionalists. Council was in the hands of the Republicans and their opponents were just as loath to confer powers, which in turn became favors, on that body.

BRUNHOUSE, *supra* note 85, at 184.

96. PENNSYLVANIA PACKET, Sept. 1, 1786, at 2.

97. *Id.* at 3.

98. *Id.*

99. *Id.*

100. *Id.*

101. Republicans continued to refer to the potential abuse the bill invited, arguing that if the sentence “be left in the power of the magistrates it would be an object with the thieves to make friends with them, and share the spoil.” *Id.*; see also Michael Meranze, *The Penitential Ideal in*



enlist additional opposing votes, one Republican legislator argued that it “will hardly ever be the case” that the judges “are above suspicion.”

[Judges] are not immortal; and we do not know who may succeed them. . . . [A] mitigating power should not be given them: the judges should be confined to pronounce the law only, and not make it. . . . The law affixes the sentence, and the jury determine[s] whether [the accused] has committed the crime deserving of it.<sup>102</sup>

Shortly thereafter the bill passed, fifty-seven to four.<sup>103</sup>

The new reformatory penal philosophy demanded not mandatory penalties, rigidly applied to each and every offender, but discretionary ranges, allowing a more perfect calibration of punishment to the varied culpability and reformatory capacity of those who violate even the very same statutory prohibition. An effort to substitute mandatory penalties for lesser crimes as well was defeated after one legislator argued there was “no reason why the court should be limited in the punishment of trivial crimes when they are unbounded in those of a higher nature.”<sup>104</sup> Even a provision requiring mandatory sentences for habitual offenders was rejected as too binding on judicial discretion.<sup>105</sup> In Pennsylvania, it was the judiciary, not the jury or the pardoning Council, who would perform this calibration.

To the great consternation of the reformers, Pennsylvania’s first experiment with public labor backfired. The resulting spectacle of gangs of drunken, profane, and violent prisoners forced to labor in chains in the streets soon proved disastrous.<sup>106</sup> By 1790, the legislature had substituted the penalty of solitary confinement and labor within the walls of Pennsylvania’s Walnut Street jail, which had been newly remodeled to accommodate the latest penal philosophy.<sup>107</sup> No

*Late Eighteenth Century Philadelphia*, 108 PENN. MAG. HIST. & BIOGRAPHY 419, 429 (1984) (noting that opponents of the bill recommended that sentencing discretion rest either with the Executive Council or with juries).

102. PENNSYLVANIA PACKET, Sept. 11, 1786, at 3.

103. *Id.*

104. *Id.*

105. PENNSYLVANIA PACKET, Sept. 4, 1786, at 2 (Explained one critic of this provision, “The power is discretionary in the judges on the first offence, and why should it not be in the second?”).

106. See CALEB LOWNES, AN ACCOUNT OF THE ALTERATION AND PRESENT STATE OF THE PENAL LAWS OF PENNSYLVANIA (1799) (The 1786 act “had a very opposite effect from what was contemplated. . . . The disorders in society, the robberies, burglaries, breaches of prison, alarms in town and country—the drunkenness, profanity and indecencies of the prisoners in the streets, must be in the memory of most.”); NEGLEY K. TEETERS, THEY WERE IN PRISON: A HISTORY OF THE PENNSYLVANIA PRISON SOCIETY, 1787-1937, at 22–26 (1937).

107. For more on the evolution of penal philosophy in Pennsylvania during this period, see LEWIS, *supra* note 83, at 25–32.

effort, however, was made after 1786 to restore mandatory sentences or withdraw from judges their sentencing authority. From 1786 on, in Pennsylvania the power to select punishment terms within legislated ranges remained with judges.<sup>108</sup>

#### D. Virginia Follows Pennsylvania, with a Twist

Most of the provisions drafted by committee members Jefferson, Wythe, and Pendleton before 1779 were revised again, introduced, and enacted in 1792, but the penal code was not among the bills submitted to the Assembly in the early 1790s.<sup>109</sup> By the time the Virginia legislature again considered penal reform, it was 1796. The 1796 bill was championed by George Keith Taylor of Prince George's County.<sup>110</sup> Taylor, Virginia's "father of penal reform," was a descendant of a celebrated Quaker clergyman of Pennsylvania, and, like Jefferson himself, a protégé of George Wythe.<sup>111</sup> The Assembly passed Taylor's bill just before Christmas in 1796. Apparently, as Jefferson later surmised, public opinion had "ripen[ed], by time, by reflection, and by the example of Pennsylvania."<sup>112</sup> The Assembly earmarked \$30,000 for the new penitentiary house.<sup>113</sup> Its construction was completed in 1800.<sup>114</sup>

Like Jefferson's earlier bill, Taylor's penal reform bill abolished clergy and replaced capital punishment with other penalties for felonies, but retained death as a punishment for first-degree murder.<sup>115</sup> There were several significant differences, however, between the 1796 and the 1779 bills.

108. For a fascinating empirical account of sentencing in Philadelphia from 1795 to 1829, see Batsheva Spiegel Epstein, *Patterns of Sentencing and Their Implementation in Philadelphia City and County, 1795-1829* (1981) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the University of Pennsylvania library).

109. The revival of 1792 included the passage of eighty-six bills between October 17 and December 28, 1792. Charles Cullen noted that the Assembly rejected only five other bills submitted by the revisers. Of the rejected bills that he lists, none concerned crime or punishment. Cullen, *supra* note 69, at 97.

110. KEVE, *supra* note 71, at 3.

111. Edward Wyatt, IV, *George Keith Taylor, 1769-1815, Virginia Federalist and Humanitarian*, 16 WM. & MARY Q. (2d ser.) 1 (1936). Taylor was a lawyer trained under George Wythe at William & Mary, who later married a sister of John Marshall. *Id.*

112. 1 JEFFERSON WRITINGS, *supra* note 54, at 47.

113. Nov. 1796 Va. Laws ch. 2, § 19, at 6.

114. See KEVE, *supra* note 71, at 20. New York expended \$200,000 to build Newgate, its first prison. LEWIS, *supra* note 83, at 44.

115. Nov. 1796 Va. Laws ch. 2, at 4-9. The 1796 act covered enumerated felonies only. It was not until 1800 that the legislature declared that *all* crimes formerly punished by execution

Historian Kathryn Preyer reports that Taylor's bill as submitted would have provided jury trials for slaves.<sup>116</sup> This provision was removed, however, and the act as passed extended no new benefits to slaves. Unlike free blacks, who until 1832 were provided the same process provided to whites,<sup>117</sup> slaves continued to be tried for their crimes by magistrates, without juries.<sup>118</sup> Sentences included death and whipping, but not imprisonment. "[L]oss of freedom was hardly a punishment for a person who had no freedom, and fines could not be assessed against a person who had no money."<sup>119</sup> Additionally, white Virginians would have considered confinement and labor in the penitentiary to be a wasted effort for those who they deemed had no virtue to restore.<sup>120</sup> Many slaves sentenced to die received clergy and

were to be punished by imprisonment. Act of Jan. 25, 1800, § 1, Dec. 1799 Va. Laws ch. 58, at 30.

116. Preyer, *supra* note 4, at 77 (citing "Virginia State Library House of Delegates, Loose Papers, 1796"). Taylor himself reportedly was a slaveholder who litigated on behalf of slaves for their freedom. Wyatt, *supra* note 111, at 11.

117. JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA, 1619-1865*, at 103-04, 06 (1913); *see also* KEVE, *supra* note 71, at 46, 50 (noting that the existence of blacks seems to have been given no thought in the original prison planning; that there was no segregation of blacks and whites in prison; and that superintendents argued that the presence of blacks was a bad influence on white convicts); MATTHEWS, *supra* note 26, at 84:

The term of confinement in the penitentiary or in jail, of a white person convicted of felony, where that punishment is prescribed, and of a free negro convicted of felony in a circuit court, when that punishment is to be inflicted, shall be ascertained by the jury; and if a free negro be convicted of felony in a county or corporation court, shall be ascertained by such court, so far as it is not fixed by law.

(citing "1 R.C. p. 619, § 12. Acts 1847-8, p. 123, § 18").

Free blacks alone were punishable for certain offenses, however, and suffered different penalties. In 1823, the legislature provided that free blacks convicted of crimes previously punishable with imprisonment for more than two years were thereafter to be "whipped, transported, and sold into slavery beyond the limits of the United States." RUSSELL, *supra*, at 105-06. This law was repealed four years later, but only after thirty free blacks were transported and sold into slavery. PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865*, at 318 (1988). Sentence differentials for blacks and whites remained in place through 1865, except from 1848 to 1860 when the statute imposed equal minimum sentences. KEVE, *supra* note 71, at 52; RUSSELL, *supra*, at 106.

118. Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537, 550 (1974) ("The great protection of trial by jury, so dear to the common law, gave less security to slaves than to whites." Some suggested, however, "that trial by magistrates was actually a boon to the slave, since the justices were far more select than a jury and one dissenting vote would result in acquittal."). Of course, slaves were primarily punished by their owners in private. KEVE, *supra* note 71, at 12.

119. KEVE, *supra* note 71, at 11.

120. *See id.* at 4:

The new humanitarian institution of the penitentiary "did not fit well with the presence of slavery"; there was a stress between the two which required continual efforts to reconcile the principles of imprisonment with the questions of how to punish those persons who already had no real freedom that could be restricted, no property that could be attained, no civil rights that could be abridged.

were returned to their owners.<sup>121</sup> Others were transported after commutation by the governor.<sup>122</sup> Planters were reimbursed by the state for slaves transported or executed.<sup>123</sup> They sometimes provided vigorous defense for their slaves in court.<sup>124</sup> The basic outline of the criminal justice process for slaves remained unchanged until the Civil War. In 1857, in the courthouse for Appomattox County, counsel for Reuben, a slave charged with murdering another slave, argued that the lack of indictment or trial by jury violated his rights under the Fifth and Sixth Amendments. The justices rejected the claim and Reuben was promptly hanged.<sup>125</sup> Only eight years later, just a short distance away from the room in which Reuben was condemned, Robert E. Lee would surrender forever Virginia's hope of preserving the institution of slavery.

Most of the remaining departures from Jefferson's bill tracked Pennsylvania's model. In contrast with the corporal punishments in Jefferson's bill, Taylor's bill imposed imprisonment at hard labor as the penalty for most offenses.<sup>126</sup> Castration, *lex talionis*, ducking, and the like were all absent. For example, our fictitious felon Smith's crime of mayhem would have been punished by confinement in the penitentiary for a term not less than two nor more than ten years, and

121. SCHWARZ, *supra* note 117, at 24–28 (noting that by the 1780s full pardons for slaves increased dramatically, and “reduction of felony charges to misdemeanor verdicts continued, as did the numerous grants of benefit of clergy . . .” partly because owners sent trained attorneys to represent their slaves); Conklin, *supra* note 10, at 361–65. The abolition of benefit of clergy in 1796 did not extend to slaves. Clergy instead persisted until 1848—slaves continued to plead for benefit of clergy for the more than sixty offenses. *Id.*

122. KEVE, *supra* note 71, at 47. Philip J. Schwarz, in his article, *The Transportation of Slaves from Virginia, 1801-1865*, 7 *SLAVERY & ABOLITION* 215, 215–19 (1986), relates that in the 1780s and 90s, slaves condemned to hang were regularly pardoned, but the pardon was conditioned upon the owner selling the pardoned slave out of the state. Transportation was cheaper than execution because the state was reimbursed for the cost of paying the owner the condemned slave's market value, which was determined by the judge who pronounced a sentence. He relates the 1838 story of how John, sentenced to be hanged for attempted rape of a white woman, was reprieved, taken to prison for six months, and sold to a slave trader who promised but failed to take John and twenty-six other slaves out of the country, selling them instead in New Orleans. “Transports” were held temporarily at the penitentiary. SCHWARZ, *supra* note 117, at 28; see also KEVE, *supra* note 71, at 48, 55 (noting that four rooms designated for holding transports were built at the penitentiary after 1824).

123. KEVE, *supra* note 71, at 47–49.

124. *Id.* at 14; SCHWARZ, *supra* note 117, at 23.

125. SCHWARZ, *supra* note 117, at 289–90.

126. Nov. 1796 Va. Laws ch. 2, §§ 4–11, at 4–5 (providing high treason, 6–12 years; arson, 5–12 years; rape, 10–21 years; second-degree murder, 5–18 years; robbery or burglary, restitution and 3–10 years; horse stealing, restitution and 2–7 years; larceny up to four dollars, restitution and 1–3 years; petty larceny, restitution and 6 months to 1 year; forgery and counterfeiting, 4–15 years and “such fine as the court shall adjudge”; maiming, 2–10 years and “a fine not exceeding one thousand dollars, three fourths whereof shall be for the use of the party grieved”; voluntary manslaughter, 2–10 years (second offense 6–14 years)).

a fine not to exceed \$1,000.<sup>127</sup> Taylor's bill also reflected the lessons learned by Pennsylvanians after their experiment with public labor backfired.<sup>128</sup> Instead of mandating public labor as Jefferson's bill had, Taylor's bill provided for solitary confinement and quiet industry inside a penitentiary.<sup>129</sup> Taylor's bill also followed the lead of Pennsylvania in adopting discretionary sentence ranges within which a sentence would be selected for each offender, rather than a single punishment for all who commit a certain offense. Indeed, this substitution of discretionary terms of imprisonment in the penitentiary for former modes of punishment was soon to sweep the nation. By 1838, all but five of the twenty-six states had established their own penitentiaries.<sup>130</sup>

There was one crucial difference between the revised criminal code in Virginia and that of Pennsylvania, however. In Virginia, juries, not judges, were given the power to select the sentence within the legislature's designated range.<sup>131</sup> As we have seen, prior to the act, the district court judges in Virginia, like judges in Pennsylvania before that state's penal reform, exercised significant sentencing discretion in felony cases, picking and choosing those who would be executed and those who would receive clergy. These same judges, then, would have been the logical repository for sentencing authority when the legislature changed the nature of the penalty from execution and clergy to imprisonment. Moreover, magistrate judges, not juries, had traditionally selected terms of imprisonment in misde-

127. *Id.* § 10, at 5.

128. See *supra* note 106 and accompanying text.

129. Jefferson himself, by that time, had changed his mind about the rehabilitative effects of shaming prisoners through public works. See KEVE, *supra* note 71, at 15.

130. U.S. HOUSE OF REPRESENTATIVES, 25TH CONG., REPORT OF THE SPECIAL COMMITTEE, APPOINTED AT THE SESSION OF 1838, ON THE SUBJECT OF THE PENITENTIARY SYSTEM 5 (1838). The special committee also reported:

Branding, whipping, the pillory, stocks, cropping and imprisonment in common jails, tend only to harden the convict and entirely destroy what little of virtue and feeling there may be left in his guilty bosom. Instead of being deterred from the commission of crime, he is turned loose on society, without shame and without remorse, with feelings of deep and dark revenge for the injury and cruelty which he has suffered. On the other hand, the punishment inflicted by the Penitentiary system is mild, though more effectual, and may be graduated to suit every shade of crime and every age, habit and character of the culprits. . . . When restored to the world, he has no vindictive feelings to gratify. He has received no brutal treatment at the hands of the law. No mark of eternal infamy has been stamped on his person.

*Id.* at 4.

131. Nov. 1796 Va. Laws ch. 2, § 15, at 5 ("The jury before whom any offender may be tried, shall decide upon, and in their verdict ascertain the time within the respective periods prescribed, during which such offenders shall undergo confinement in the gaol and penitentiary house herein after mentioned, according to the directions of this act.").

meanor cases. When discretionary punishment was extended from misdemeanor to felony cases, it would have been logical to allow judges to maintain this function. Indeed, this was the path taken by Pennsylvania, New York, and New Jersey, each of which substituted the prison cell for the noose before the turn of the century and retained sentencing authority in the bench.<sup>132</sup> For Virginia's legislature to give to juries the authority to select a term of imprisonment was a decisive shift of power away from judges. The mystery is—why?

### E. *Why Juries and Not Judges?*

Historians researching Virginia's penal reform of 1796 have unearthed very little information about the rationale for the changes from the original 1779 reform bill. They have found no record of how the later bill came to be introduced by Taylor, how much, if at all, Taylor drew upon Jefferson's original 1779 version or consulted with Jefferson himself, or whether Taylor or other assemblymen engaged in a debate like the one in Pennsylvania over the proper locus of sentencing authority.<sup>133</sup> Taylor himself, in his lengthy and impassioned floor speech delivered in a desperate effort to save the bill, does not even mention who would set the sentence under his proposal. Instead, his speech was concerned primarily with the inability of the existing laws to deter crime due to the universal reluctance to impose the death penalty for minor crimes and with the proven success of more certain punishment.<sup>134</sup>

The explanation for the choice of jury over judge could be quite simple: Taylor merely could have expanded the idea already captured in those two provisions of Jefferson's earlier bill that delegated to juries the authority to select a sentence. Alternatively, Taylor, a Federalist later appointed to the federal bench as one of John Ad-

132. See *infra* app.

133. Kathryn Preyer summed it up this way:

Details about the evolution and passage of this legislation are as elusive as for Jefferson's proposal almost 20 years before. No debate is reported in the Journal of the House of Delegates and none has been located elsewhere. The bill passed the House on Dec. 7 by a vote of 95–66 and the Senate on Dec. 15, no vote being recorded. Blocs of opposition votes in the House centered in Grayson and Pittsylvania counties to the west along the North Carolina border but as a whole the vote may illustrate the localized force of particular domestic issues in Virginia referred to by. . . .

Preyer, *supra* note 4, at 76 n.85.

134. George Keith Taylor, *Substance of a Speech Delivered in the House of Delegates of Virginia, on the Bill to Amend the Penal Laws of This Commonwealth* (1796).

ams's "midnight judges,"<sup>135</sup> may have preferred to keep sentencing power from the Republicans on the district court benches,<sup>136</sup> just as the Republicans in Pennsylvania tried to deny sentencing power to their enemies on the bench, the Constitutionalists. But even if Taylor's motives can be understood, what explains the legislature's agreement to the new arrangement?

A.G. Roeber's history of Virginia's early justice system suggests that the choice of jury rather than judge as sentencer would have been popular at the time because of the widespread distrust of the judges who staffed the district court bench. Virginians clearly distrusted their county justices of the peace. They derided magistrates as "self-perpetuating oligarchies unsympathetic to republican ways, and not particularly concerned with republican virtue either."<sup>137</sup> It is possible, of course, that this sort of contempt was directed only at lay magistrates, and that it did not extend to those judges who would have sentenced in felony cases had Virginia followed Pennsylvania's lead. For example, Jefferson's earlier remarks about limiting judges to the function of a "mere machine" and his decision to allow juries to choose penalties for two offenses in the 1779 proposal both suggest that he distrusted even felony court judges at that time.<sup>138</sup> But, if so, his attitude and the attitudes of his peers seems to have softened by 1796. Indeed, in later years, Jefferson drew a sharp distinction between the untrained lay justices of the peace, whom he despised as undemocratic and unlearned,<sup>139</sup> and those jurists who sat as judges of the general and district court. The high court judges, the very best of the Virginia bench and bar, were selected by the legislature for their superior ability. They had studied the recently published laws of the

135. Wyatt, *supra* note 111, at 14; *see also* MILLER, *supra* note 6, at 53 (describing George Keith Taylor as a leader on the Federalist side in the debates over the Virginia Resolution of 1798).

136. *See* ROEBER, *supra* note 6, at 204–16 (discussing the politics of judges serving on the District Court in the late 1790s). F. Thornton Miller describes the population of the benches:

The state judicial machinery was created and put in place only to be filled often by the very same people the reformers had opposed. Many had been appointed to the General Court in the 1780s by a legislature that Henry and his party [anti-Federalists] had dominated and they continued to be able to control this body on particular issues.

... Most of the eight judges who, in different sessions in the next several years, presided over the district court at Prince Edward County courthouse had been in Henry's party—which had opposed court reform.

MILLER, *supra* note 6, at 28–29.

137. ROEBER, *supra* note 6, at 184, 220–21.

138. *See supra* note 56 and accompanying text.

139. Gratiot, *supra* note 11, at 146.

Commonwealth,<sup>140</sup> and were liberally educated and trained in the law. Many were law graduates of William & Mary, where George Wythe and Jefferson himself had established the nation's first professional education program for lawyers in 1779.<sup>141</sup> Jefferson looked forward to the day when all of the Commonwealth's judges would have received such training, and he was not alone in his views.<sup>142</sup> More of these professionally trained lawyers were elected to the legislature during this period, including Taylor himself.<sup>143</sup> It was at least possible that Taylor and a majority of those in the Assembly in 1796 had more confidence in the new judicial elite than they had in the lay judiciary.

In any event, whatever growing trust there was in the new class of men elevated to the bench of the Virginia district court, it had yet to penetrate the public mind. According to Roeber, "[o]ther Virginians trusted less in a cerebral republican elite than in their own local common sense attitudes."<sup>144</sup> He noted that by 1800, "[p]ublic perception of the threats posed to a republican society fixed not on the old county court but rather on the rising elite of lawyers and judges."<sup>145</sup> Indeed, some district court judges openly expressed their distrust of

140. William Walter Hening had just completed the first published set of laws in 1795, and Judge St. George Tucker was laboring away on his edition of *Blackstone's Commentaries* so as to diffuse the science of law throughout the Commonwealth. TIMOTHY S. HEUBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890*, at 12 (1999); ROEBER, *supra* note 6, at 217, 246.

141. ROEBER, *supra* note 6, at 167; James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and the Legal History of the South*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 3*, 16 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984).

142. ROEBER, *supra* note 6, at 167-68, 216, 220-21, 224-25; *see also* 1 JEFFERSON WRITINGS, *supra* note 54, at 211-12 ("I hope to see the time when the election of judges of the Supreme Courts shall be restrained to the bars of the General Court and High Court of Chancery. . ."); HEUBNER, *supra* note 140, at 12 (Jefferson believed, as did George Wythe, that "in order to secure a legal culture compatible with the ideals of the Revolution, Virginia required a professionally trained bench and bar, composed of men both technically skilled and liberally educated.")

143. ROEBER, *supra* note 6, at 240 (noting the increasing number of lawyers in the Assembly).

144. *Id.* at 171.

145. *Id.* at 240. Roeber observes that the Republican lawyers had succeed[ed] in establishing a streamlined court system, and the luster of the superior court bench and bar had attracted large numbers of young Virginians to seek their fortunes in the practice of law. But the lawyers had not quite succeeded in convincing Virginia farmers and planters that the older, moral vision of law rooted in concepts of natural justice had survived the rise of the legal profession.

. . . . [T]he complaints of ordinary Virginians expressed in the newspapers and discovered by lawyers seeking election seem to suggest that the typical attorney cared very little about the moral bases of law.

*Id.* at 254-55. "[F]or some Virginians the success of republican lawyers in erecting a more efficient state court system was too high a price to pay for the bettering of decisions that were almost impossible to get from the county courts after 1783." *Id.* at 252.



jurors, thinking them unworthy of the task.<sup>146</sup> No doubt this sort of attitude would have caused many Virginians to wonder whether they could rely on the judgment of judges to reflect the public will in sentencing or in other matters.<sup>147</sup> The choice to confer the power of sentencing on the jury rather than the judge is a sign that the elites on the bench, of whatever party, Republican or Federalist, had not won the confidence of a majority in the Assembly.

While distrust of judges appears to be a promising explanation for Virginia's move to jury sentencing in 1796, it is ultimately inadequate. Several features of Virginia law seem inconsistent with widespread distrust of judicial sentencing authority. The entrustment of sentencing authority to juries was remarkably halfhearted. Despite dissatisfaction with county justices of the peace, the 1796 act changed neither the penalties nor the process for misdemeanor charges. Virginia's magistrates continued to fix jail terms and all penalties other than fines in these cases.<sup>148</sup> Perhaps a sizeable number of legislators would have preferred a bill that proposed jury sentencing for minor crimes in 1796, but were persuaded that judicial sentencing could be tolerated so long as the power of judges was limited to imposing short terms of incarceration nearby in the local jail. Or, perhaps they were reluctant to risk losing the votes of magistrates who were then serving in the legislature and who would have been protective of their authority.<sup>149</sup> Or, perhaps the legislature was not ready to take this sort of step before a drafting committee had thoroughly examined misdemeanor sentencing. The bill it did adopt had originated in Jefferson's committee, which had studied only those crimes then punishable by death. Whatever the reason, the sharing of sentencing power between magistrate judge and juries for minor

146. *Id.* at 225.

147. *Id.* at 258–59. “The . . . tradition in the South and the West that distrusted lawyers and felt more at home with laymen administering the law declined after 1896 as a politically potent force in American life.” *Id.* at 258. However, “Virginia could never celebrate fully the rise of lawyers, bankers, merchants, and other moderns, because the culture of the Old Dominion was one that had long been suspicious of such people.” *Id.* at 259.

148. See *supra* note 26. Juries continued to set fines in misdemeanor cases. See, e.g., Act of Feb. 26, 1819, § 47, 1819 Va. Laws ch. 21, at 30; *Commonwealth v. Alexander*, 14 Va. (4 Hen. & M.) 522 (1808) (affirming the conviction of a justice of the peace found guilty for misbehavior and the jury's amercing him the sum of fifty dollars); *Commonwealth v. Chapman*, 3 Va. (1 Va. Cas.) 138 (1803) (reporting that jury convicted and fined defendant \$450 for bribing deputy sheriff to induce him to summon people the defendant named); *Jones v. Commonwealth*, 5 Va. (1 Call) 555 (1799) (reversing a joint fine of £106 for assaulting a magistrate, noting that fines must be set by the jury according to the degree of fault and the estate of the offender).

149. In 1796, the influence of county justices serving in the Assembly was still significant, although waning. ROEBER, *supra* note 6, at 240.

crimes persisted well after 1796. In its subsequent revisions and additions to the criminal code, the legislature continued to delegate misdemeanor sentencing power to magistrates.<sup>150</sup>

The shift to jury sentencing in 1796 also did not apply in cases of escaped offenders. The act provided that such an offender was subject to "suffer such additional corporal punishment, not extending to life or limb, as the court in which such offender shall have been convicted, shall adjudge and direct."<sup>151</sup> Judges were also given the power to impose fines up to \$1,000 for forgery and counterfeiting.<sup>152</sup>

Discretion was soon to be granted to judges in setting the punishment for repeat offenders as well.<sup>153</sup> The 1796 act included mandatory punishment for certain designated repeat offenders: life imprisonment for those offenders who committed, for the second time, a felony punished at the time of the 1796 act with death, and twenty-five years' imprisonment for those who committed an offense then capital after escape from the penitentiary or after having been pardoned.<sup>154</sup> But as of 1819, many repeat offenders were sentenced at the discretion of the judge. All of those alleged to be repeat offenders were entitled to a trial in the court in Henrico County, where the penitentiary was located, if they contested the allegation. Later, this statute became known as "the Comeback law," for it applied only to those who had "come back" to the penitentiary.<sup>155</sup> If the defendant contested the allegation of prior conviction, a jury would determine its accuracy. After the practice of branding offenders had been

150. See, e.g., MATTHEWS, *supra* note 26, at 85:

The term of confinement in jail, of a person found guilty of a misdemeanor, where that punishment is prescribed, shall be ascertained by the court, and the amount of the fine, where the punishment is by fine, shall, except where it is otherwise provided, be assessed by the jury, so far as the term of confinement, and the amount of the fine, are not fixed by law.

(citing "Acts 1847-8, p. 123, § 19").

151. Nov. 1796 Va. Laws ch. 2, § 42, at 9:

If any such offender sentenced to hard labour, shall escape, he or she shall on conviction thereof, suffer such additional confinement and hard labour, agreeably to the directions of this act, and shall also suffer such additional corporal punishment, not extending to life or limb, as the court in which such offender shall have been convicted, shall adjudge and direct.

See also *Commonwealth v. Ryan*, 4 Va. (2 Va. Cas.) 467 (1825) (explaining that escape must be prosecuted by indictment).

152. Nov. 1796 Va. Laws ch. 2, § 9, at 5.

153. Like misdemeanors, the provision of tougher sentences for repeat offenders was not addressed at all in Jefferson's original bill.

154. Nov. 1796 Va. Laws ch. 2, § 24, at 6.

155. Note, *Recidivism and Virginia's "Come-Back" Law*, 48 VA. L. REV. 597, 601 n.35 (1962).

abandoned, but before identification techniques such as fingerprinting were developed, resolving the issue of whether or not a defendant was the same person named in a court record required a full-fledged trial including witnesses.<sup>156</sup> If the jurors agreed that indeed the felon before them had committed his crime after already having been sentenced for a felony once before, the stubborn lawbreaker, with proven resistance to the reformatory influences of the penitentiary, would be subject to a much stiffer sentence than that assessed by his jury in the district court. The repeat offenders who had committed the most serious crimes faced mandatory life sentences, but if an offender's last crime was punishable by less than five years—and this covered a large number of crimes—the offender would face ten to twenty years' imprisonment. As all other penitentiary sentences were set by juries, it would have made sense to have entrusted this high-stakes sentencing to the “comeback” jury. Surprisingly, the Assembly lodged the power to set repeat offender sentences with the bench.<sup>157</sup> Possible explanations include the following: (1) the legislature assumed that a great number of repeat offenders would admit their past crimes, obviating the need for a jury to determine identity, and that to have insisted that juries be assembled solely for the purpose of sentencing an offender was too costly; or (2) hardened criminals simply did not deserve the same degree of protection afforded first-time offenders.

Another curious enclave of judicial sentencing discretion was a provision of the 1796 act requiring that the portion of an offender's sentence spent in solitary confinement would be determined by the judge, not the jury. A judge could decree that anywhere between one-twelfth and one-half of an offender's stay be spent in solitary confinement on a “low and coarse diet.”<sup>158</sup> This decision was a

156. For the fascinating story of the evolution of identification techniques, including their use in identifying convicted criminals, see SIMON A. COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* (2001).

157. Note, *supra* note 155, at 598–99; see VA. REV. CODE ch. 171, §§ 14, 16 (1819) (providing, according to Section 14, that “every such offender, being thereof lawfully convicted, shall be punished by confinement in the said jail and penitentiary-house, for a period of not less than ten nor more than twenty years”; and according to Section 16, that “if the said jury shall find, that the said convict is the same person mentioned in the said records of conviction, or if the said convict in open court, shall acknowledge, after being duly cautioned, that he is the same person mentioned as aforesaid, then the said superior court of law shall pronounce sentence upon the said convict, of confinement in the said jail and penitentiary-house as is herein provided”).

158. Nov. 1796 Va. Laws ch. 2, § 22, at 6; see also CONWAY ROBINSON, *3 PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA* 283 (1839) (pointing out that the provision about

powerful one, given that the conditions in solitary confinement contributed to an outrageously high mortality rate in the first decades of the penitentiary. Solitary confinement was celebrated by penal reformers as providing prisoners the opportunity to turn around their lives. In practice, those in solitary confinement often lost their lives instead. In unheated, unlit, stone cells, the air poisoned by fumes from the nearby city sewage swamp, “[w]ater oozed from the walls, men’s feet froze, and several prisoners went mad.”<sup>159</sup> Many died. The proportion of prisoner deaths to prisoner admissions reported annually rose from about 5% to nearly 80% in the first quarter-century,<sup>160</sup> although the length of sentences remained, for the most part, shorter than ten years<sup>161</sup> and up to one-half of the prisoners received pardons.<sup>162</sup> Children of sixteen and younger were housed there as well as there was no separate facility for juveniles.<sup>163</sup> A mandatory minimum term of solitary confinement that could be increased by the judge was not abandoned until 1838.<sup>164</sup>

Foreshadowing the present-day erosion of jury sentencing due to plea bargaining, the 1796 act also gave the court in murder cases the authority to “determine the degree of the crime, and to give sentence accordingly” when a defendant was “convicted by confession.”<sup>165</sup> Although the penalty for first-degree murder was not discretionary,

the judge ascertaining the portion served in solitary confinement was later held to apply to all convictions).

159. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH* 38 (1984) (“The surviving inmates emerged from their solitary cells to join other prisoners in the workshops, where they made leather goods for the state militia and nails and shoes for sale outside the walls.”).

160. KEVE, *supra* note 71, at 59.

161. *See, e.g.*, SCHWARZ, *supra* note 117, at 216.

162. KEVE, *supra* note 71, at 44 (noting that one-half to one-sixth received a pardon, and that military service was a condition of pardon during Civil War).

163. *Id.* at 10.

164. In 1824, the legislature raised the minimum to one-eighth of the sentence in solitary, and never less than six months. Act of Mar. 9, 1824, § 12, Dec. 1823 Va. Laws ch. 10, at 18. Solitary confinement was “dispensed with, except so far as may be necessary for the proper discipline and good government of the institution” in 1838. Act of Apr. 6, 1838, § 1, Jan. 1838 Va. Laws ch. 26, at 36-37.

165. Nov. 1796 Va. Laws ch. 2, § 2, at 4; VA. REV. CODE ch. 171, § 2 (1819). Conway Robinson explained:

It has been already mentioned that the jury before whom any person indicted for murder shall be tried, if they find such person guilty thereof, are to ascertain in their verdict whether it be murder in the first or second degree. The statute further provides that if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

3 ROBINSON, *supra* note 158, at 280 (footnote omitted) (emphasis added).

this crime being the single offense “punished with death” in the new code, the penalty for second-degree murder was any term between five and eighteen years in the penitentiary. It is not known how many defendants confessed to homicide at the time.<sup>166</sup>

Interestingly, the distrust of judges that may have prompted legislators to favor jury sentencing was not shared by the jurors themselves in many cases. In the years leading up to the 1796 act, Virginia jurors did not seem eager to exercise the authority that they possessed to determine punishment. Reported decisions of the general court demonstrated a curious phenomenon—juries would return special verdicts, finding the facts only and “pray[ing] the advice of the court” about whether guilt or innocence would follow from those facts.<sup>167</sup> These questions of law were in turn “adjourned for difficulty” to the general court. The verdicts in these cases suggest that the juries quite willingly delegated the guilt/innocence decision to the court. Sometimes, the decision left to the court by the jury was inconsequential in terms of penalty—for example, the choice between one felony or another, such as the difference between manslaughter and murder.<sup>168</sup> In other cases, the jury left to the judge the decision of whether the accused would be condemned for a capital offense or be acquitted outright. For example, a jury declined to decide the fate of William Williams, tried for stealing a slave out of the possession of his owner, and preferred to allow the court to make the final call. The defendant had stolen “Solomon” out of the possession of Thomas

166. Curiously, the rule in misdemeanor cases apparently was that the jury would sentence even in cases of confession. See Oct. 1786 Va. Laws ch. 64, at 15 (providing that the amerement for any trespass or misdemeanor “shall be assessed by twelve honest and lawful men, either those by whom the offender shall have been convicted, in case of a verdict, or those who shall be impannelled for that special purpose, where judgment shall be given against him upon the argument of a demurrer, or by his confession or default”); Act of Feb. 26, 1819, § 47, 1819 Va. Laws ch. 21, at 30.

167. *Commonwealth v. Crane*, 3 Va. (1 Va. Cas.) 10 (1791).

168. One jury delivered this “decisive” verdict:

[I]f the court should be of opinion that the prisoner is guilty of murder, then we of the jury do find the prisoner is guilty of murder; and if the court shall be of opinion that the prisoner is not guilty of murder, but guilty of manslaughter, then we the jury do find the prisoner not guilty of murder, but guilty of manslaughter.

*Id.* at 13. The trial court adjourned for difficulty the case to the general court, which found the prisoner guilty of murder. *Id.* at 14.

In another the case, the jury, after retelling in detail its findings of fact, concluded: “And if upon the whole matter, the court shall be of opinion that the said Robert Mitchell is guilty of murder, then we the jury find the said Robert Mitchell guilty of murder; otherwise we the jury find the said Robert Mitchell guilty of manslaughter only.” *Commonwealth v. Mitchell*, 3 Va. (1 Va. Cas.) 116, 116–19 (1796). The general court found the defendant not guilty of murder and allowed the manslaughter verdict to stand. *Id.* at 119.

Edwards, who was not his owner, but who had hired Solomon for a year from his owner, Elizabeth Edwards. The jury in its verdict stated: "Now if the possession of the said Thomas Edwards be the possession of the said Elizabeth Edwards in law, we find the prisoner guilty of the felony, with which he stands charged, otherwise we find him not guilty."<sup>169</sup> Another jury left it to the court to decide the effect of two different spellings of the first name of one of the men whose signature the defendant allegedly forged:

We of the jury find the prisoner Christian Kearns, guilty of transferring the certificate specified in the indictment, knowing it to be forged; if the court shall be of opinion . . . that the variance between the name of Bolling Starke, . . . and the name of Bowling Starke . . . is not material; otherwise we find him not guilty thereof.<sup>170</sup>

This abdication of power in criminal cases—call it reverse-nullification for lack of a better term—continued after the penal reform act took effect. Special verdicts reported in general court decisions regularly left to judges whether a defendant would be hung, imprisoned, or spared.<sup>171</sup> For example, a verdict from 1812 read:

We of the jury find that the prisoner at the bar, John Thomas, did, contrary to the order of nature, penetrate the body of a mare of Joshua Doing; but it is impossible for us to say whether he did, or did not emit his seed into the body of the said mare, or elsewhere; and if the court shall be of opinion that the said fact of penetration, without the fact of emission, constitutes the crime of buggery, then we find the prisoner guilty, and ascertain the term of his imprisonment five years in the penitentiary house; otherwise we find him not guilty.<sup>172</sup>

Another jury sentenced a horse thief to five years, but left the jurisdictional issue to the court. The jury would have found the defendant

169. *Commonwealth v. Williams*, 3 Va. (1 Va. Cas.) 14 (1792) (finding for defendant).

170. *Commonwealth v. Kearns*, 3 Va. (1 Va. Cas.) 109, 112 (1794) (finding for defendant).

171. In a case involving the same issue as in *Williams*, see *supra* note 169 and accompanying text, the verdict read, "if the law is against him, we find him guilty; if the law is not against him, we find him not guilty." *Commonwealth v. Hays*, 3 Va. (1 Va. Cas.) 122, 122 (1798). The general court found the defendant not guilty of stealing a slave from the possession of his owner because the slave was a runaway. *Id.* at 123; see also *Bedinger v. Commonwealth*, 7 Va. (3 Call) 461, 461 (1803) (noting jury's verdict of guilty of misdemeanor if court construes communication as offer to buy vote for Clerk of Court).

172. *Commonwealth v. Thomas*, 3 Va. (1 Va. Cas.) 307, 307 (1812). The matter, adjourned for difficulty to the general court, was resolved against the defendant. *Id.* at 307-08; see also *Warner v. Commonwealth*, 4 Va. (2 Va. Cas.) 95, 95-96 (1817) (The jury found the defendant guilty of bigamy and fixed the term of his imprisonment in the penitentiary at one year, "subject, however, to the opinion of the Court on the following questions" and then listed three questions concerning what proof is required of the first marriage. If these questions were answered in a certain way, the jury would find the defendant not guilty.).

guilty, but only if the court concluded that the crime, committed by a Virginian against another Virginian in the District of Columbia, could be lawfully prosecuted in Virginia.<sup>173</sup> It is impossible to gauge how widespread such special verdicts were, but their regular appearance suggests that jurors themselves were willing to give up even their power to acquit and defer to judicial authority.

Finally, another development, albeit years after the passage of the 1796 act, seems particularly incongruous with a theory that Virginia's legislators did not trust judges with sentencing power. Although throughout the South in the first half of the nineteenth century state legislatures (including those with jury sentencing) limited judicial power by adopting term limits and popular elections, this change never took place in the Commonwealth of Virginia.<sup>174</sup> That the General Assembly was not forced by Virginians to give over to the people its power to choose judicial officers could be a sign that the people were not so dissatisfied with those on the bench that they felt it essential to maintain direct control over the judicial officers' transgressions.

All of this suggests not a hardened preference for jury over judge, but instead a deep ambivalence over whether the bench was growing more trustworthy or more treacherous. The contrast then between the experience of Virginia and that of Pennsylvania is not as stark as a simple comparison of the two acts suggests. Both states first had to leave behind mandatory penalties and codify discretionary ranges of punishment. And in both states the choice of judge or jury as the appropriate authority to choose within those ranges was not obvious. Pennsylvania's decision to lodge that discretion in the judge rather than in the jury was the result of a hard-fought political battle, while Virginia's decision to embrace jury rather than judicial sentencing was long-delayed, notably incomplete, and quite likely influenced by party politics as well.

173. *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 173 (1819). Conway Robinson wrote:

A verdict sometimes does not find the defendant either guilty or not guilty, but finds certain facts and submits them to the court for its opinion on them. When a verdict is found of this special nature, it must contain all the facts which are necessary to enable the court to pronounce for or against the defendant.

3 ROBINSON, *supra* note 158, at 271 (citing cases).

174. See Ely & Bodenhamer, *supra* note 141, at 17. The "democratic impulse" to limit terms of the judiciary, which started as early as 1812 in Georgia, never took hold in Virginia, but it did in Kentucky. See *id.*

Existing sources suggest that the adoption of penal reform and jury sentencing was not nearly as controversial in at least one of the states first to choose who would select imprisonment terms—the new state of Kentucky. In contrast to the debates in Virginia and Pennsylvania, there was little doubt which choice Kentucky would make.

## II. KENTUCKY

### A. *Prior to Reform*

The region we know now as Kentucky was for many years part of the Commonwealth of Virginia. Virginia's District of Kentucky became a state in 1792, but only after some foot dragging by Congress. Those who delayed the recognition of Kentucky's statehood in Congress were not eager to do any favors for the "perverse republicans of the western wilderness," whose independent spirit had led eleven of the fourteen delegates to the Virginia convention of 1788 from the Kentucky region to vote against ratifying the federal Constitution.<sup>175</sup>

The founders of Kentucky's legal system were lawyers trained in Virginia who brought with them the law they knew best, including criminal law and procedure, complete with capital punishment for all felonies.<sup>176</sup> Credit for the framing of Kentucky's first constitution of 1792 is often given to a Virginian, George Nicholas, the most well regarded lawyer in Kentucky at the time and its first attorney general.<sup>177</sup> (He, too, had received his legal training at William & Mary

175. Lucius P. Little, *Legislation Concerning Kentucky: History of Important Measures of the State of Virginia and of the United States Pertaining to Kentucky, and of Kentucky Since Its Statehood*, in *THE LAWYERS AND LAWMAKERS OF KENTUCKY* 20, 22 (H. Levin ed., 1897). But see GEORGE L. WILLIS, SR., *KENTUCKY CONSTITUTIONS AND CONSTITUTIONAL CONVENTIONS: A HUNDRED AND FIFTY YEARS OF STATE POLITICS AND ORGANIC-LAW MAKING* 15-16 (1930) ("There seems from the books to have been no such delay in acting by Congress as some historians comment upon. For it was the next winter or on February 14, 1791, that Congress did enact the asked-for legislation providing that the District of Kentucky should become a State on June 1, 1792. . .").

176. JOAN WELLS COWARD, *KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING* 12-47 (1979); Gratiot, *supra* note 11, at 258, 275-76.

177. W.M. Beckner, *Kentucky While a Part of Virginia and the Administration of the Law Therein*, in *THE LAWYERS AND LAWMAKERS OF KENTUCKY*, *supra* note 175, at 7, 15; R.C. Richardson, *Court of Appeals: An Historic Outline from the Date of Its Organization with Character Sketches of Its Judges, Reference to the Most Important Questions Heard and Decided, and Reminiscences of Its Bar*, in *THE LAWYERS AND LAWMAKERS OF KENTUCKY*, *supra* note 175, at 44, 48; *The Louisville Bench and Bar*, in *THE LAWYERS AND LAWMAKERS OF KENTUCKY*, *supra* note 175, at 161, 215-16. Together with other Virginia lawyers, Nicholas was primarily responsible for framing the laws and institutions of the new state. See



under George Wythe.)<sup>178</sup> In its first constitution, Kentucky adopted all Virginia law that was not repugnant to its provisions,<sup>179</sup> and by 1798, Kentucky criminal justice suffered from the same problems that its mother state had experienced, only greatly amplified. As historians have so colorfully and carefully documented, criminal justice in early Kentucky courts was far from swift and sure.

Magistrates wielded enormous power over the lives of Kentucky's settlers,<sup>180</sup> and, as was true of the justices in Virginia, few of them were trained in the law and many were suspected of corruption and accused of malfeasance.<sup>181</sup> In 1792, the legislature removed patronage power from county courts. No longer could these judges choose the sheriff, clerk, and their own successors.<sup>182</sup> To discourage malicious prosecutions, prosecutors were required to reimburse the defendant for costs of prosecution, including the costs of the defendant's attorney, fees to witnesses, and pay for jurors if the defendant

COMMONWEALTH OF KY. LEGIS. RES. COMM'N, HISTORICAL DEVELOPMENT OF KENTUCKY COURTS, RESEARCH PUBLICATION NO. 63, at 28 (1958) [hereinafter HISTORICAL DEVELOPMENT] (The drafters of the first Kentucky constitution "turned to Virginia for a plan, and patterned our court system after the one then existing in the parent-commonwealth.")

The "private and professional characters" of Kentucky's first lawyers "were modeled after those members of the bar in Virginia under whom they had as a general rule 'studied' their profession." Beckner, *supra*, at 18. For more on the Virginia lawyers who founded Kentucky's laws, see COWARD, *supra* note 176, at 12; Beckner, *supra*, at 18; Gratiot, *supra* note 11, at 105-40.

178. Gratiot, *supra* note 11, at 110.

179. 1 HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY ix (Wm. W. Gaunt & Sons, 1983) (1804).

180. In 1796 any magistrate could issue a warrant to apprehend any person charged before him with any criminal offense, "which in the opinion of such justice, ought to be examined into. . . ." HARRY TOULMIN, A COLLECTION OF ALL THE PUBLIC AND PERMANENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY WHICH ARE NOW IN FORCE 331 (1802) (Act of Dec. 17, 1796, § 1).

181. IRELAND, *supra* note 7, at 7-8, 14. Between 1792 and 1796, Fayette County records show the average term for magistrates at less than two years, although the turnover slowed after 1799. *Id.* at 9-10. Typically the justices met monthly at the county seat. *Id.* at 10-11. Justices owned nearly nine times as much land, seven times as many slaves, and two and a half times as much other taxable property as the average white male adult in their counties. *Id.* at 12-13. Magistrates often voted to oust those of their own accused of malfeasance. IRELAND, *supra* note 7, at 118-19; see also *id.* at 15, 114-15 ("Between 1792 and 1851, almost a fourth of the members of the lower house and a fifth of the upper house of the legislature were magistrates," a situation that generated "periodic spasms of opposition," and accusations of self-dealing in raising their own fees.). The practice of office selling was established, and "the collusion of county courts in these venal practices prompted efforts at reform" and "growing public disenchantment over county government." *Id.* at 79-95. Robert Ireland speculated that the only income some magistrates received was from the illegal sale of various county offices. *Id.* at 7-8; see also VINCE STATEN, LAW AT THE FALLS: HISTORY OF THE LOUISVILLE LEGAL PROFESSION 15 (1997) (relating a case in which a grand jury indicted its county magistrates for not providing proper weights and measures).

182. IRELAND, *supra* note 7, at 2-3 (noting patronage powers were restored with the new constitution of 1799).

was cleared by the grand jury, examining court, or petty jury.<sup>183</sup> Reluctant prosecutors at the county level were outgunned by more competent and better-prepared defense attorneys.<sup>184</sup> Assaults frequently resulted in penny fines; thefts were seldom prosecuted and almost never resulted in a conviction.<sup>185</sup>

County jails that then existed were "leaky" arrangements with little security.<sup>186</sup> Debtors were held with those accused of serious crimes and those serving short sentences in jail.<sup>187</sup> Some of those accused of crimes were allowed to escape when the odds were slim that they would ever reimburse the public treasury for the costs of prosecution should they be convicted.<sup>188</sup> Those who did not escape languished in jail for up to two years while their families became impoverished, and witnesses died or disappeared.<sup>189</sup>

The hardship of traveling to felony proceedings was even worse for Kentuckians than for Virginians. Prior to the establishment of a separate judicial district for Kentucky, "two hundred miles of mountainous desert" stood between the Kentucky settlements and Rich-

183. Gratiot, *supra* note 11, at 260.

184. Robert M. Ireland, *Law and Disorder in Nineteenth-Century Kentucky*, 32 VAND. L. REV. 281, 283-85 (1979) (noting that few wanted to serve as prosecutor in Kentucky and listing reasons). One court explained:

To prevent vexatious prosecutions for petty misdemeanors, by those who would willingly convert the process of the Commonwealth into an engine of malice and private resentment, provided they could stand behind the curtain secure from costs, it has been enacted among other things that "the name and surname of the prosecutor, and the town and county in which he shall reside, with his title and profession, shall be written at the foot . . . of every bill of indictment for any trespass or misdemeanor, before it be presented to the grand jury. . . ." And it is further provided that the prosecutor shall be subject to cost in case the prosecution is not effectual or the indicttee is in any matter acquitted.

*Commonwealth v. Hutcheson*, 4 Ky. (1 Bibb) 355 (1809) (citations omitted). This loser-pays system for county prosecutors persisted well into the nineteenth century. *See, e.g.*, *Commonwealth v. Gore*, 33 Ky. (3 Dana) 474 (1835) (Peter C. Updike was "induced to become the prosecutor . . . at the . . . request of Ross, the injured party," who said that "he never would permit any person to suffer by being his friend" and "that he felt morally bound to pay [Updike] any costs he might incur" as the result of a failed prosecution.); *Commonwealth v. Cunningham*, 15 Ky. (5 Litt.) 292 (1824) ("Lest indictments of this kind should be made the ministers of passion, and be used for vindictive purposes, it was thought expedient by the legislature to subject them to some restrictions, one of which is, the subscribing the name of the prosecutor." Security may be required, as well, so "that on the final judgment of acquittal, the prosecutor should be subject to costs.")

185. Gratiot, *supra* note 11, at 319-27.

186. *Id.* at 286-89.

187. WILLIAM C. SNEED, A REPORT ON THE HISTORY AND MODE OF MANAGEMENT OF THE KENTUCKY PENITENTIARY, FROM ITS ORIGIN, IN 1798, TO MARCH 1, 1860, at 149 (1860) (noting that from 1792 to 1821, debtors could be imprisoned, but that after 1796, counties were required to build county prisons for those who were not incarcerated in the penitentiary).

188. Gratiot, *supra* note 11, at 260.

189. Ireland, *supra* note 184, at 288.

mond, where felony grand juries and jury trials were held.<sup>190</sup> Much of Kentucky was wilderness, a place where lawyers, like all frontier residents, risked death in hostilities with Indians, robbery on the roads, and piracy on the rivers. (The first, but not last, scalping of a lawyer in Kentucky was reported in 1783.)<sup>191</sup> Only the hardest of victims, witnesses, and jurors would consider it worthwhile to make this sort of journey in order to secure a guilty verdict. The establishment of a felony court in the District of Kentucky in 1783<sup>192</sup> reduced the distance somewhat, but for most Kentuckians, until circuit courts were created closer to home in 1802,<sup>193</sup> the trip to the sole court with felony jurisdiction could be prohibitively expensive.<sup>194</sup>

Qualified grand and petit jurors were sometimes difficult to find. Trial juries were too often packed with defense sympathizers, and the defendant's generous allotment of peremptory challenges assisted in securing favorable juries.<sup>195</sup> Historian Robert Ireland tells of one defendant who bribed four juries in succession, each one unable to agree on a verdict; the governor finally ordered the defendant released.<sup>196</sup>

190. Gratiot, *supra* note 11, at 44.

191. STATEN, *supra* note 181, at 14–15; *see also* Gratiot, *supra* note 11, at 13–14, 278–79 (noting that robbery was committed on long roads between towns over unsettled land, travelers were shot dead for their money, and pirates robbed those on the Ohio River).

192. WILLIAM C. RICHARDSON, AN ADMINISTRATIVE HISTORY OF KENTUCKY COURTS TO 1850, at 5–6 (1983) (citing statutes); Beckner, *supra* note 177, at 12–13; William E. Bivin, *The Historical Development of the Kentucky Courts*, 47 KY. L.J. 465, 473 (1959) (noting that even though there were six districts, each with a judge and each granted criminal jurisdiction by the 1795 constitution, criminal cases were held only in Frankfort because of inadequate district jails). The first district court was held in Harrodsburg, and then later moved to Danville. Gratiot, *supra* note 11, at 46. Later, all criminal jurisdiction was vested in the Frankfort District due to “[t]he custom of conducting criminal trials in one place in order to insure the accused a fair trial before the best judges available and by the best jurymen” and also to free the other district courts to address other matters. *Id.* at 64. After the Circuit Court Act of 1802, cases were cognizable in any circuit court. *Id.* at 91–98.

193. RICHARDSON, *supra* note 192, at 7, 12.

194. Gratiot explained:

Until the enactment of the Circuit Court law in 1802 the trek of the sheriff, venire and witnesses from the county where the crime was committed to the place of trial was both expensive and time consuming. The expense varied according to the distance and the number of individuals making the trip. In 1793, the expenses of a venire, sheriff and six witnesses traveling from Scott County to . . . Lexington amounted to seven pounds, three shillings, and eight pence.

Gratiot, *supra* note 11, at 238–39. Costs for a trial entourage from Green County cost the Commonwealth more than thirty-one pounds. *Id.* at 239.

195. *Id.* at 238–44 (also noting complaints by lawyers that sheriffs did not select proper jurors and took bribes from interested veniremen, and that bystanders were idle and seldom sober); *see also* Ireland, *supra* note 184, at 291 (noting that jury packing was widespread).

196. Ireland, *supra* note 184, at 291.

Grants of clergy were generous.<sup>197</sup> Pardons, too, were frequent,<sup>198</sup> though sometimes arriving at the last possible moment. In 1794, one lucky fellow named Wilcox, convicted of passing counterfeit bank notes, was wheeled under the gallows in a wagon before an audience of thousands. He had just finished saying a tearful goodbye to his family when “he rec’d his reprieve from the Governor, to the satisfaction of many of the spectators, tho’ not near all. . . .”<sup>199</sup> Ireland found that prosecutors in the 1800s rarely responded to pardon petitions, or even knew who was petitioning for pardon,<sup>200</sup> and that fines were remitted by the governor so routinely that prosecutors complained that they did not get enough income from fines to recoup their costs.<sup>201</sup> The situation made Kentucky a “paradise where [felons] could carry on their nefarious operations with impunity.”<sup>202</sup>

Understandably, some Kentuckians preferred to rely on what justice they could muster close at hand, rather than suffering the expense, delay, and uncertainty of formal legal proceedings. In Jefferson County, three brothers who “resolved themselves into a court” to try a “diminutive red-headed” runaway servant, concluded that he was guilty and “ought to be hung” for robbing the three of them, but instead of executing him, they returned him to his master.<sup>203</sup> According to another historian, although the law allowed a defendant to plead guilty and be sentenced by the court, few defendants exer-

197. Gratiot observes:

If the verdict was guilty the prisoner usually was remanded to jail to await the formal pronouncement of sentence by the court on a date later during the term. When that day arrived the defendant “was again led to the Bar in custody of the jailor” and the judges asked him if he had “anything to say why the court should not now proceed to give Judgment. . . .” If the defendant had nothing to say the court proceeded to sentence him to hang if he had been convicted of a non-clergyable felony. He was then remanded to jail to await the date of execution. If the crime for which he was convicted was clergyable, he usually claimed benefit of clergy, was burned in the hand by the jailor in the presence of the court, and discharged.

Gratiot, *supra* note 11, at 252–53.

198. *Id.* at 263.

199. *Id.* at 267.

200. Ireland, *supra* note 184, at 296 (noting that pardons were granted often to enable ex-convicts to vote); see also SNEED, *supra* note 187, at 151–59 (Of all 324 prisoners admitted during the years of 1800-1815, “[131] received executive clemency by pardon, . . . some after serving only a short portion of their sentences, but the majority of them only a few days before the expiration of the term of their sentences,” which restored them to citizenship.).

201. This led the legislature to limit the governor’s ability to remit fines. Ireland, *supra* note 184, at 294 (noting that before the new constitution of 1850, Kentucky governors spent most of their time either appointing civil and military officers or pardoning criminals and remitting fines).

202. Gratiot, *supra* note 11, at 44.

203. Beckner, *supra* note 177, at 10.

cised this option.<sup>204</sup> Certainly, demanding trial by jury in the district court afforded a better chance of escaping punishment.

### B. Penal Reform in 1798

The shift to discretionary terms of imprisonment, selected by juries, was less rocky than it had been in Virginia. Kentucky's first proponent of penal reform was John Breckenridge, who was a member of the Virginia House of Delegates in the early 1780s and was yet another student of George Wythe at William & Mary. He had moved to Kentucky in 1793, where he was elected to the new state's legislature.<sup>205</sup> Breckenridge petitioned the legislature that year asking that penalties be made proportionate to offenses. He argued that "it was the certainty of punishment rather than the severity of penalty which would serve as a deterrent to the commission of crime," and that the legislature must "remedy a system which permitted the forfeiture of human life for petty offenses," unjustified by "time, prescription or necessity."<sup>206</sup>

In 1793, the cause was taken up by Kentucky Attorney General William Murray in his report to the Senate. He argued that the failure to graduate penalties in proportion to the offenses was the key flaw in Kentucky's criminal law, rendering it "contrary to humanity" as well as "to justice and policy."<sup>207</sup> His appendix reportedly listed eighty capital crimes then in force.<sup>208</sup> Murray condemned these capital penalties as irrational as well as disproportionate. Horse stealing was a capital crime without benefit of clergy, but the theft of cattle, sheep, or hogs, though triple in value, was clergyable. The reformers could have accomplished certainty and moderation of punishment with mandatory penalties, but the view that individual

204. Gratiot wrote:

[T]he writer has never encountered such an instance in any of the Kentucky records. . . .

In the greater majority of criminal cases brought to trial in the Kentucky of this period the accused entered a plea of not guilty and put himself "upon God and his country." This meant that a jury would be impanelled to try the case.

Gratiot, *supra* note 11, at 237–38.

205. Paul Knepper, *The Kentucky Penitentiary at Frankfort and the Origins of America's First Convict Lease System, 1798-1843*, 69 *FILSON CLUB HIST. Q.* 41, 44 (1995). This John Breckenridge should not be confused with his son or grandson, who were also well known Kentuckians. See Gratiot, *supra* note 11, at 420–29.

206. Gratiot, *supra* note 11, at 424–25.

207. *Id.* at 426.

208. Gratiot, *supra* note 11, at 425. O.F. Lewis pegged the number of capital felonies at a more modest twenty-six. See LEWIS, *supra* note 83, at 253.

defendants may require different punishments even when they commit the very same crime had taken hold. Murray, unlike Breckenridge, argued that reformation of the offender should be one of the aims of the state. Like Taylor in Virginia, he maintained that shaming by public labor undermined reformation. Virtue could only be restored to criminals by following a policy of confining them “to solitary labor for times proportioned to their offences,” a policy that had proven successful in Pennsylvania.<sup>209</sup>

A significant barrier remained, holding up reform for several more years. The gallows, pillory, branding iron, and whipping post were cheap; building a secure penitentiary required revenue the state did not have.<sup>210</sup> It may have been this concern that led conservatives in the state senate to allow the penal reform bill passed by the House in 1794 to die. Three years later, after Virginia had succeeded in reforming its penal law, the clamor for reform in Kentucky had grown louder. One such expression occurred in a pardon petition on behalf of one James Brown, who had been convicted and sentenced to death for circulating ten pounds of counterfeit coins. In their petition, the “sundry inhabitants of Mason county” hoped that the governor’s duties “would permit him to mitigate the rigour of the law which the prejudices and imperfections of human nature have so far prevented from being modeled on principles more moderate and humane.”<sup>211</sup> In 1797, most of the petitions for the twelve souls facing capital punishment who were pardoned by the governor had been signed by the very judges who had imposed the sentences.<sup>212</sup> In charging his grand jury in October 1797, Judge Coburn urged the jurors to use their influence among their fellow citizens to help create a sentiment more favorable to reform and to ask their representatives in the Assembly to pass a reform bill.<sup>213</sup> By the end of the year, the governor declared to the legislature that “immediate revision” of the criminal law was

209. Gratiot, *supra* note 11, at 426. Writing under a pseudonym, “Aristides,” Breckenridge wrote to the *Kentucky Gazette* in 1794, calling attention to the alarming increase in crime: for twelve years there had been a court of criminal jurisdiction, but the capital penalty for offenses against property had been imposed in only two cases. “Experience had revealed that the ‘current’ of public opinion had to be ‘strong’ before a sufficient number of laymen could be assembled to form a jury which would ‘convict a man of an offense against property’ involving the death penalty.” Aristides argued that Kentucky must follow Pennsylvania reforms. If it could not afford it at that time, “money could be raised by loan or public subscription.” *Id.* at 427–29.

210. *Id.* at 426–27.

211. *Id.* at 430.

212. *Id.* at 430–31 (five free persons, seven slaves).

213. *Id.* at 431.

essential to remedy “the glaring disproportion we have established, between punishments and crimes—a disproportion so disgusting to humanity, and so derogatory from the honor of a republican government.”<sup>214</sup>

In January 1798, reform finally succeeded. Breckenridge himself was responsible for drafting the bill and securing its passage.<sup>215</sup> Although the state had only about \$7,000 set aside for construction of the prison, he had found a way around the fiscal burden that the switch to imprisonment would impose on the state. The bill was designed to make imprisonment self-supporting.<sup>216</sup> Breckenridge argued that once the penitentiary was built and occupied, convicts would receive instruction in trades, the party injured would receive reparation determined by the jury in its verdict, and the state would be reimbursed for its expense—the penitentiary would not be a financial burden for the state.<sup>217</sup> The keeper’s pay depended entirely upon the net profits of the establishment, furnishing “the strongest imaginable guarantee that the convicts should not become a burden to the State.”<sup>218</sup> He maintained that state outlays for the past three years of prosecutions had been a total loss, with only rare executions and a rising crime rate.<sup>219</sup> Only after an unsuccessful attempt to institute private subscriptions for the penitentiary did the act pass.<sup>220</sup> The dubious distinction of being the penitentiary’s first prisoner fell to John Turner, who was sentenced to serve two years for horse stealing, and was admitted to the penitentiary on September 23, 1799.<sup>221</sup>

Kentucky’s reform act of 1798, like Virginia’s, deprived trial judges of the discretionary power over the actual sentence, which they had previously possessed. Breckenridge lifted the preamble to Jefferson’s proposed bill from 1779 for the preamble to the Kentucky

214. *Id.* at 432.

215. Gratiot, *supra* note 11, at 433.

216. LEWIS, *supra* note 83, at 253–54 (“Popular subscriptions of money or one acre of land—which might be sold to bring in cash—were asked about the year 1796, with which to build the prison.”).

217. Knepper, *supra* note 205, at 44–46.

218. SNEED, *supra* note 187, at 181.

219. Gratiot, *supra* note 11, at 435–36.

220. COWARD, *supra* note 176, at 84–85 (calling penal reform a “tug-of-war between idealism and economy” and noting that “[f]or three subsequent legislative sessions, the General Assembly wrangled over the amount to appropriate for the building and the jailer’s salary”).

221. SNEED, *supra* note 187, at 26–28 (quoting judgment for the first convict admitted to the penitentiary, signed by Judge Coburn of the Lexington District Court, and noting that the keeper was paid for boarding Turner from Sept. 23 to Dec. 23, 1799).

act.<sup>222</sup> Kentucky's act, like Virginia's, abolished clergy and provided that the "jury before whom any offender may be tried, shall decide upon, and in their verdict ascertain the time within their respective periods prescribed, during which such offenders shall undergo confinement in the jail and penitentiary house herein after mentioned, according to the directions of this act."<sup>223</sup> "Since the jury decided what the sentence should be in each case, there was no opportunity for the trial judge to exercise any arbitrary authority with respect to the sentence itself."<sup>224</sup>

### C. *Why Juries and Not Judges?*

Kentucky's shift to jury sentencing in felony cases is in two respects less mysterious than Virginia's. First, Kentucky's lawmakers naturally looked to Virginia's innovation in sentencing as a model for their own sentencing statute, just as they did in other areas of the law.<sup>225</sup> No evidence has been uncovered indicating that they ever considered a judge sentencing scheme. Second, both before and after Breckenridge's bill was passed, Kentuckians departed from Virginia's law or practice in ways that suggested that the distrust of judges was more pronounced in Kentucky than it was in the Old Dominion.

Specifically, the contradictory pockets of judicial sentencing power that persisted in Virginia were not found in Kentucky. Special verdicts by which the juries would leave a defendant's fate to the bench, frequently used in Virginia, were authorized but rarely used in

222. *Id.* at 18.

223. TOULMIN, *supra* note 180, at 350 (Act of Dec. 20, 1800, § 15).

224. Gratiot, *supra* note 11, at 195. Sentences were provided as follows: Treason, 6–12 years; arson, 5–12 years; rape, 4–12 years; sodomy 2–5 years; second-degree murder, 5–18 years; robbery or burglary, restitution plus 3–10 years; horse stealing, restore animal or value and 2–7 years; larceny over \$4, restitution plus 1–3 years; forgery, 4–15 years and fine not exceeding \$1000 as determined by the court; maiming, 2–10 years and fine not exceeding one thousand (3/4 of which is to be paid to the victim). *Id.* at app. C.

Not until December 1801 did the legislature appoint a committee of revisors to codify the laws of Kentucky. 1 TOULMIN & BLAIR, *supra* note 179, at ix. In 1804 a three-volume "review of the criminal law" by Toumlin and Blair was published "under the authority of the Legislature."

225. Gratiot, *supra* note 11, at 436–37 (noting that "it is impossible to discover whether the opposition to the new act was strong"); see also Paul Knepper, *Thomas Jefferson, Criminal Code Reform, and the Founding of the Kentucky Penitentiary at Frankfort*, 91 REG. KY. HIST. SOC'Y 129, 135–38 (1993); Gratiot, *supra* note 11, at 433 ("Neither the Breckinridge nor the Jefferson Papers in the Library of Congress throw any light on the influence Jefferson might have exerted, although it is certain that they were corresponding during this period.").



Kentucky.<sup>226</sup> In 1830, these verdicts were condemned by Kentucky's high court.<sup>227</sup> After 1819 repeat offenders were sentenced in Virginia at the discretion of the judge. In Kentucky they faced either mandatory terms, leaving no discretion for the judge, or sentencing by jury.<sup>228</sup> A thief who stole a second time was to receive a term of incarceration twice as long as he had received for his first offense, but only after a jury had found in its verdict what his first sentence had been.<sup>229</sup> A hog-stealer who repeated his crime was sentenced at the discretion of the jury, from six months to three years.<sup>230</sup>

In Kentucky, but not in Virginia, slaves as well as free blacks were tried and sentenced by juries.<sup>231</sup> Kentucky juries, not judges, selected the amount of restitution owed a victim of a felony, while in Virginia judges fixed restitution.<sup>232</sup> Even prison discipline was dispensed by juries in Kentucky, with the law calling for inmates of the penitentiary who quarreled with each other to "suffer such punish-

226. Gratiot, *supra* note 11, at 255 (noting that although the jury could return a special verdict stating facts but leaving to the court the conclusions of law to be drawn from those facts, this sort of verdict was rarely returned).

227. See *Montee v. Commonwealth*, 26 Ky. (3 J.J. Marsh.) 132, 151 (1830).

228. TOUMLIN, *supra* note 180, at 352 (Act of Act of Dec. 20, 1800, § 24).

229. R.S. ROSE, 2 KENTUCKY CRIMINAL LAW PROCEDURE AND FORMS 1336, § 2061 (1918):

On the trial of an indictment for larceny, where former convictions are also alleged, the defendant is not entitled to a separate finding on the guilt or innocence of the main charge, but the jury should be required to find, under appropriate instructions, the fact of former convictions, and fix the increased penalty. . . . [The jury] should in their verdict say for what period of time [defendant] was so sentenced to confinement in the penitentiary.

Section 1130, providing double punishment for a second conviction, required jury to fix punishment. See also *In re Channels*, 100 S.W. 214, 214 (Ky. 1907).

230. 1 TOUMLIN & BLAIR, *supra* note 179, at 292 (quoting Act of 1801, § 17).

231. *Doram v. Commonwealth*, 31 Ky. (1 Dana) 331 (1832) (The court held, in the case of a free black defendant, that "the act of 1808 should be interpreted as dispensing with a jury; and therefore it . . . conflicts with the *supreme law of the land*" guaranteeing the accused "trial by an *impartial JURY* of the vicinage."); *Id.* ("A free man cannot be sold, even for an instant, unless a jury of his peers shall have passed condemnation upon him."); Flanagan, *supra* note 118, at 545 ("Kentucky slaves had the right to a jury trial. . ."). Although both the free and enslaved blacks were afforded juries, slaves did not benefit from the revised penalties in the act of 1798. They suffered under the same double standard as in Virginia. Lucius Little observed:

The punishment of slaves for penal offenses and crimes was limited to death and stripes. For various offenses for which white offenders were confined in the penitentiary the slave was punished at the whipping-post; while as to other crimes by white persons for which the punishment was also penal confinement the slave suffered death.

Little, *supra* note 175, at 37.

232. Gratiot, *supra* note 11, at 271 (noting that an 1805 statute settled that when a defendant was convicted and sentenced for theft, the trial judge was not free to decree an award of restitution, but instead, questions of fact were to be decided by a jury, and the jury was to determine value of any property in question).

ment (within the prison) as should be awarded by an impartial jury, but not over four lashes or 10 hours of solitary confinement.”<sup>233</sup> The provision that gave Virginia judges the discretion to set sentences in cases of confession did not exist in Kentucky. Perhaps most telling of all, magistrates in Kentucky had no discretionary sentencing authority in minor crimes, as they did in Virginia. It was the county *jury* that selected a misdemeanor’s sentence when the penalty was not mandatory, both before and after the reform act of 1798.<sup>234</sup> Eventually, Kentucky shifted from a judiciary appointed by the governor<sup>235</sup> to one elected by the people,<sup>236</sup> while Virginia has remained to this day one of the few southern states without popular judicial elections.<sup>237</sup>

It is not entirely clear what accounts for this heightened wariness of the bench in Kentucky.<sup>238</sup> It could simply have been a response to poor and corrupt judges. One judge of the court of appeals in 1806 confessed that he had for years been on Spain’s payroll in connection with navigation of the Mississippi, a treasonous association.<sup>239</sup> As in Virginia, some magistrates simply ignored their duties. Robert Ireland notes that this problem became more acute in the second half

233. LEWIS, *supra* note 83 at 255.

234. For example, the punishment for selling a vote for any office was amercement and imprisonment at the discretion of a jury; those convicted of riots and routs could be jailed “for so long a time as shall be limited by a jury, and have paid such amercement as the same jury shall assess”; “going with force and arms before courts” led to fines and imprisonment at the discretion of a jury; altering brands was fined at the discretion of a jury up to fifty pounds and imprisoned for up to six months. TOULMIN, *supra* note 180, at 369–73 (Act of Dec. 19, 1801, §§ 28, 32, 33, 37); *see also* Commonwealth v. Watkins, 6 Ky. (3 Bibb) 21, 22 (1813) (“[I]n all cases where the penalty imposed shall exceed five pounds, or shall be *uncertain*, the trial shall be by jury, who shall find the amount of the penalty or forfeiture incurred.”) (emphasis added).

235. Bivin, *supra* note 192, at 474–75 (noting that the constitution of 1799 created a court system with judges appointed for life).

236. The 1849 constitution provided for popular election of judges. HISTORICAL DEVELOPMENT, *supra* note 177, at 19.

237. *Supra* note 174 and accompanying text. There is little doubt that if the people of Kentucky distrusted judges, their opinions would be clearly understood by their assemblymen. Kentuckians in the 1790s were capable of expressing their political views with unmistakable passion. An apt illustration took place in the state’s capitol during that period. Frankfort residents, angry that their United States Senator, Thomas Marshall, had voted for Jay’s treaty in late 1794,

undertook to duck him in the Kentucky river. They had him at the water’s edge and were about to put him under, when he suggested that it was customary always to allow the candidate for baptism to relate his experience; and he claimed the privilege. The humor of the request struck the crowd, and they gave the senator a hearing. His address was so powerful that one by one his persecutors slipped away and allowed him to return to his home in peace!

Beckner, *supra* note 177, at 17.

238. COWARD, *supra* note 176, at 153–57 (reporting vehement and intense antijudiciary feelings in the state legislature from 1797 to 1799).

239. Beckner, *supra* note 177, at 14.

of the nineteenth century. He writes that one judge reportedly told the residents of one county to “go to hell” and never held court at all.<sup>240</sup> (The legislature attempted to penalize judges who failed to hold court in 1852 and again in 1881, but its efforts were struck down as unconstitutional by other judges, not surprisingly.) Lay judges, in particular, were considered by Kentuckians to be vulnerable to manipulation and error.<sup>241</sup>

Alternatively, Kentucky’s judges may have been no worse than those in Virginia, or Pennsylvania for that matter. Instead, the distrust of judges in Kentucky may have been an outgrowth of the population’s frontier mentality. In any event, the state stuck with its choice of jury as sentencer. Directly after the penitentiary was built, Kentucky’s legislature, mindful of its investment, appointed a board of inspectors for the institution. Only five years later, the board in its report to the legislature took “the liberty of recommending to the Legislature some changes in the law, which they conceive would make the system more perfect.”<sup>242</sup> Number six on this list was the following: “That the time of confinement of a convict ought to be vested with the court, and not with the jury, as heretofore, in order to produce uniformity.”<sup>243</sup> The board was not the only voice complaining about jury sentencing in Kentucky at the time. Others lamented that juries were too soft on criminals, and that they imposed sentences that were too light.<sup>244</sup> Despite these complaints, even those from the legislature’s own appointed advisors, sentencing authority has not been returned to the bench in Kentucky. It remains with the jury today.

## CONCLUSION

Several of the explanations that modern commentators on jury sentencing have offered for the adoption of jury sentencing are not supported by the findings here. Contrary to suggestions that jury sentencing was adopted by states in their first criminal laws,<sup>245</sup> Virginia for its first twenty years as a state allowed judges to exercise what sentencing discretion there was in felony cases by granting or

240. Ireland, *supra* note 184, at 287.

241. Gratiot, *supra* note 11, at 196.

242. SNEED, *supra* note 187, at 54.

243. *Id.* at 55.

244. Ireland, *supra* note 184, at 294.

245. Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790–91 (1999).

withholding the benefit of clergy. Kentucky did the same for nearly a decade.

Nor was the adoption of jury sentencing for felony offenses a simple story of *preserving* the power that jurors already wielded through their verdicts of guilt or innocence prior to the establishment of the penitentiary.<sup>246</sup> Sentencing authority in these early states was not held by the jury alone. Judges shared sentencing authority in misdemeanor cases. And although jurors then, as today, would have had *de facto* power to set the sentence by convicting or acquitting when an offense carried a mandatory penalty, capital punishment for felony offenses was not truly mandatory at all. Instead, judges had the authority to extend the benefit of clergy to convicted felons, and did so in a significant proportion of cases. Moreover, governors routinely pardoned defendants who had been condemned to death. Sentencing authority was the sum of legislated penalty, jury verdict, clergy, and pardon. This was well understood by Thomas Jefferson when he drafted his penal reform bill of 1779. He knew that changing statutory penalties without also abolishing clergy and pardon would leave what appeared to be certain punishment upon conviction as uncertain as ever. The Pennsylvania legislature in 1786 understood this, too, as it debated whether the exercise of sentencing discretion should rest with the Executive Council in the form of pardon, with judges, or with juries. The complex relationship between legislature, jury, judge, and executive in sentencing was as real two hundred years ago as it is today.<sup>247</sup> The jury possessed *de facto* power to sentence prior to penal reform in Virginia and Kentucky, but that power coexisted with the explicit statutory power of judges and governors to determine actual punishment.

It has also been suggested that juries were selected to impose sentences because they were more likely to know the defendant and better understand his capacity for reformation or criminality.<sup>248</sup> Jurors were supposed to be drawn from the vicinage of the crime, but

246. See, e.g., Iontcheva, *supra* note 2, at 323 (arguing that historically juries held sentencing power through their verdicts of guilt and innocence: "More than factfinders, juries decided the fate of the defendants they convicted.").

247. The pardoning power has perhaps declined more than the others, as evidenced by the reaction of some to Governor Ryan's blanket commutation of death sentences in Illinois. "'I think the state has a very strong argument that the governor was acting outside his power,' said Alan Raphael, a capital appellate defender who teaches constitutional law at Loyola University Chicago. 'It is the courts that sentence and not the governor.'" Molly McDonough, *Balance of Power: Prosecutors Challenge Historic Commutation of 171 Death Sentences*, ABA J. EREPORT, (Jan. 17, 2003) ¶ 6, at <http://www.abanet.org/journal/ereport/j17challenge.html>.

248. Iontcheva, *supra* note 2, at 317, 318–20.

in practice bystanders often made up a significant portion, if not the entirety, of the panel.<sup>249</sup> Not only did bystanders supplement whatever veniremen could be imported from the place where the crime was committed, but in Kentucky the defendant was often a stranger even to that community. The Kentucky frontier was a place of new arrivals, transients, and unknowns. Most of the offenders sentenced to the Kentucky penitentiary during its first years were from out of state.<sup>250</sup>

Moreover, the origins of jury sentencing also appear unrelated to any tendency to allow juries to decide issues of law.<sup>251</sup> Other than the ubiquitous authority to allow clearly guilty felons to walk away “scot-free,” law and fact finding were rigidly separated in Virginia and Kentucky courts both before and after the penal reform acts that granted juries the power to select terms of imprisonment in felony cases.<sup>252</sup> In Virginia, jurors themselves frequently declined to decide questions of law, returning special verdicts so that judges could be the arbiters of life and limb.

Jury sentencing in Virginia, and then in Kentucky, also did not arise from mistrust of “Crown-appointed judges,” as at least one commentator has argued.<sup>253</sup> Virginians and Kentuckians had been functioning with American judges for some time before making the shift to jury sentencing. If jury sentencing was perceived as protection for citizens against judicial power in felony cases, it shielded them from a new class of homegrown jurists trained in American law by American lawyers, and appointed to the bench by their own elected officials.

The legislative choice of jury or judge as sentencer in Pennsylvania, Virginia, and Kentucky appears to have turned at least partly upon factors other than the relative merits of judges and juries as reliable assessors of punishment. In Pennsylvania, what debate there

249. Compare *supra* notes 36–37 and accompanying text, with MILLER, *supra* note 6, at 30 (describing Virginia district court juries in Prince Edward County and concluding that “it was a justice of familiarity, where the judges, the grand and petit jury members, the attorneys, and the litigants all knew each other”).

250. SNEED, *supra* note 187, at 224 (stating that in 1830, Kentucky having been just recently settled, only twenty-four of the state’s ninety prisoners were native Kentuckians); see also LEWIS, *supra* note 83, at 253.

251. Iontcheva, *supra* note 2, at 319–23.

252. ROEBER, *supra* note 6, at 167–73. Also note the majority opinion, later withdrawn for lack of jurisdiction, in *Commonwealth v. Garth*, 30 Va. (3 Leigh) 761 (1827).

253. Iontcheva, *supra* note 2, at 316–17; see also Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 970 (1967) (attributing the empowerment of juries in the early states to bitter experience with English and colonial judges).

was over sentencing authority reflected the power struggles between the two parties controlling the legislature at the time. Republican forces in the Pennsylvania legislature who distrusted the Constitutionals on the bench were not powerful enough to block the delegation of new sentencing authority to judges. In order to deny their enemies sentencing power, jury sentencing was floated by the Republicans as one of several options, but it never had a realistic chance of success. Politics, too, may have played a role in Virginia, where the bill granting juries the power to sentence was championed by a Federalist, who had little reason to be wary of elitist judges in the abstract (becoming one later himself), but who could well have distrusted the many Republicans who served on Virginia's district court bench at the time. Indeed, Virginia law did not reflect a rejection of judge as sentencer *per se*. Virginians were quite content to allow judges rather than juries to determine punishment in a number of ways inconsistent with a strong preference for the democratic judgment of a jury over the professional decisions of the judiciary. Kentucky's experience suggests that settlement patterns and legal heritage were prime determinants of that state's sentencing policy, as its preference for jury over judge sentencing was lifted from Virginia law by the new state's lawyers, most of whom were steeped in Virginia's legal traditions.

Given this relatively untidy history, one should at least be hesitant to assume that legislators in states adopting jury sentencing after 1796 first considered carefully the pros and cons of placing sentencing power in the hands of the jury rather than in the hands of the judge, and then deliberately chose jury sentencing for its greater democratic potential. It is of course possible that a popular democratic spirit motivated the choice of jury over judge in these later states, but it is also possible that, as in Pennsylvania, political power struggles between the party with control of the bench and its rivals may have determined the choice. It is also possible that legislators may have merely replicated for their new states the sentencing system they knew the best without seriously considering other options, Kentuckians copying Virginia law providing a probable example. Indeed, the narrow westward path that jury sentencing carved across the nation suggests that the jury sentencing model followed Virginia-trained lawyers and the settlers they influenced, while in the North, the Pennsylvania system became the norm. These and other hypotheses must await further research. Only detailed exploration of the legisla-

tive history of the jury sentencing provisions adopted later in other states will reveal just how and why felony jury sentencing developed after its emergence in Virginia and Kentucky more than two centuries ago.

## APPENDIX: SENTENCING AUTHORITY FOR SELECTED STATES\*\*

**Alabama:** Alabama adopted jury sentencing in a limited form. Its code of 1807 followed the common-law rule of allowing juries to set fines but not imprisonment. The state legislature soon allowed the jury to set, in addition to fines, the term of imprisonment for manslaughter but not for other felonies.<sup>254</sup> By 1841, Alabama had built its state penitentiary and had revised its criminal code.<sup>255</sup> The new code specified that juries would set fines, the jail terms for some specified misdemeanors, and penitentiary terms for a handful of non-capital felonies (circulating incendiary papers; destruction of property; second-degree murder; lynching; harboring runaway slaves; concealing slaves guilty of capital offenses; counterfeiting). Section 20 of the 1841 act provided that “in all cases the court shall prescribe the term of imprisonment both in the penitentiary and county jail, unless it shall be expressly directed otherwise.” The state eventually added several crimes to the list of crimes subject to jury sentencing.<sup>256</sup>

\*\* This list does not include all of the states that adopted judge sentencing with discretionary terms of imprisonment, such as Rhode Island, Delaware, Massachusetts, and Mississippi, nor states that adopted jury sentencing later on in the nineteenth century, including Texas, Indiana, Illinois, Arkansas, Oklahoma, and West Virginia. West Virginia, in particular, is often overlooked in the litany of states with jury sentencing at some point in their history. West Virginia, like Kentucky, grew out of the Virginia legal tradition and used jury sentencing for several decades. For cases illustrating jury sentencing from West Virginia, see, for example, *State v. Cain*, 20 W. Va. 679 (1882) (fourteen years for second degree murder); *State v. Sites*, 20 W. Va. 13 (1882) (two years for breaking and entering); *State v. Conners*, 20 W. Va. 1 (1882) (five years for grand larceny); *State v. Meadows*, 18 W. Va. 658, 660 (1881) (quoting statute providing that for assault without malicious intent, the offender, “shall at the discretion of the jury either be confined in the penitentiary not less than one nor more than five years or be confined in jail not exceeding twelve months and fined not exceeding \$500.00”); *State v. Hurst*, 11 W. Va. 54 (1877) (quoting statute providing that incarceration term for false pretenses be set by jury be from one to five years); *Lemons v. State*, 4 W. Va. 755 (1870) (two years for horse theft); *Bales v. State*, 3 W. Va. 685 (1868) (one year for larceny); *Moody v. State*, 1 W. Va. 337 (1866) (jury set five-year term for robbery).

254. See *Hawkins v. State*, 3 Stew. & P. 63 (Ala. 1832).

255. An Act Regulating Punishments under the Penitentiary System, 1841; Hilda Jane Zimmerman, *Penal Systems and Penal Reforms in the South Since the Civil War* 21 (1947) (unpublished Ph.D. dissertation, University of North Carolina) (on file with author).

256. See *Phillips v. State*, 130 So. 2d 822 (Ala. 1961) (robbery); *Gregory v. State*, 180 So. 562 (Ala. 1938) (carnal knowledge of girl); *Weatherford v. State*, 43 Ala. 319 (1869) (rape); *Turner v. State*, 40 Ala. 21 (1866) (horse theft); *Holloway v. State*, 182 So. 2d 906 (Ala. Ct. App. 1965) (carnal knowledge of girl); *Shorty v. State*, 152 So. 267 (Ala. Ct. App. 1934) (robbery); *Franklin v. State*, 92 So. 526 (Ala. Ct. App. 1922) (carnal knowledge of girl).



Judges set terms of imprisonment for other offenses.<sup>257</sup> What jury sentencing there was in Alabama was abandoned with the new criminal code of 1975, effective in 1980.<sup>258</sup>

**Connecticut:** Imprisonment in Connecticut was not centralized until the state's prison was rebuilt in 1790.<sup>259</sup> Judges, not juries, selected incarceration terms under the state's criminal code of 1790.<sup>260</sup>

**Georgia:** The Georgia penitentiary opened in 1816 with the adoption of a new penal code imposing discretionary terms of imprisonment. The code provided that judges set jail sentences, but for most offenses penitentiary terms were set "as the jury may recommend."<sup>261</sup> With the adoption of indeterminate sentencing in 1937, jury sentencing was suspended.<sup>262</sup> Judge sentencing lasted only a year, for the legislature provided in March 1939 that juries were to prescribe minimum and maximum terms of imprisonment in their verdict and that the judge shall commit the defendant "in accordance with the verdict of the jury."<sup>263</sup> Georgia abandoned jury sentencing in 1974.<sup>264</sup>

**Maryland:** Maryland, like Pennsylvania, experimented with substituting public labor for capital punishment for some felonies in 1789. When Maryland eventually did build a penitentiary, opened in 1811, the new Penitentiary Act of 1809 eliminated capital punishment for many offenses and gave judges wide discretion to sentence felons to either hanging or prison.<sup>265</sup>

257. *Freeman v. State*, 44 So. 46 (Ala. 1907) (assault and battery); *Ellis v. State*, 42 Ala. 525 (1868) (adultery between a white and a negro); *Isbell v. State*, 304 So. 2d 904 (Ala. Crim. App. 1974) (drug offenses); *Caldwell v. State*, 23 So. 2d 876 (Ala. Ct. App. 1945) (resisting arrest).

258. See ALA. R. CRIM. P. 26.6 comm. cmts.

259. ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY* 56 (1992).

260. See Act . . . for the punishment of certain atrocious Crimes and Felonies, Conn. 1790, at 393 (providing terms to be set "at the Discretion of the Court"); see also *State v. Smith*, 5 Day 175 (Conn. 1811) (judge imposed sentence for counterfeiting); *State v. Farrand*, 1 Root 446 (Conn. Super. Ct. 1792) (judge imposed sentence for robbery).

261. Act of Dec. 19, 1816, 1 Nov./Dec. 1816 Ga. Acts 27; see also Act of Dec. 14, 1811, 1 Nov./Dec. 1811 Ga. Acts 26 (granting judges the discretion to set terms of imprisonment for many offenses, and retaining capital punishment and benefit of clergy for others). For a searchable digital library of Georgia legislation from 1799, see <http://dlg.Galileo.usg.edu>.

262. Act of Feb. 16, 1938, 2 1937-38 Ga. Acts 326.

263. Act of March 24, 1939, § 3, 1 1939 Ga. Acts 285, 287.

264. Act of March 20, 1974, 1 1974 Ga. Acts 352.

265. *Laws of Maryland, 1809*, ch. 138, §§ 3-6; James D. Rice, *Crime and Punishment in Frederick County and Maryland, 1748-1837: A Study in Culture, Society, and Law* 388-409

**New Jersey:** New Jersey's new criminal code of 1796 authorized its first prison, constructed in 1798.<sup>266</sup> The new state code abolished clergy and imposed terms of imprisonment for most felonies, but retained the death penalty for treason, petit treason, a second offense of manslaughter, sodomy, rape, arson, burglary, robbery, forgery, permitting a capital prisoner to escape, and aiding in the rescue of a capital prisoner.<sup>267</sup> Judges were given sentencing authority to select terms of imprisonment.<sup>268</sup>

**New York:** New York substituted solitary confinement and hard labor for capital punishment for most felonies in March 1796 and completed Newgate prison on the east bank of the Hudson River in 1797.<sup>269</sup>

**North Carolina:** North Carolina, like South Carolina and Florida, did not build its first penitentiary until *after* the Civil War.<sup>270</sup> The state's 1868 constitution limited the death penalty to murder, arson, burglary, and rape, and directed that a penitentiary be erected.<sup>271</sup> In 1870 a site was purchased in Raleigh, and by 1873 state law provided for terms of imprisonment for rape, sodomy, and other crimes formerly punished by death.<sup>272</sup> These sentences were at the discretion of the judge.<sup>273</sup>

(1994) (Unpublished Ph.D. dissertation History, University of Maryland); *see also* Sawyer, *supra* note 46, at 66-67 (summarizing Maryland's reform provisions).

266. *See* LEWIS, *supra* note 83, at 189.

267. *See* Edward Devine et al., *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 269-70 (1984) (providing an historical analysis of the evolution of death penalty statutes in New Jersey).

268. *See* Act of March 18, 1796, § 72, 1796 N.J. Laws 92; *see also* State v. Zellers, 7 N.J.L. 220 (N.J. 1824) (manslaughter); State v. Van Houten, 3 N.J.L. 700 (1810) (counterfeiting).

269. Lewis, *supra* note 83, at 43; *see generally* W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848 (1965).

270. W. ALFRED COOKE, CALEDONIA: FROM ANTEBELLUM PLANTATION 1713-1892 TO STATE PRISON AND FARM 1892-1988, at 31-33 (1988) (quoting First Annual Report of the North Carolina Board of Public Charities, 1870); BLAKE MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS 6-47 (1977); Zimmerman, *supra* note 255, at 54-59.

271. *See* Darnell F. Hawkins, *State Versus County: Prison Policy and Conflicts of Interest in North Carolina*, in V CRIMINAL JUSTICE HISTORY 91, 124 n.12 & 15 (1984) (citing N.C. CONST. art. XI, § 3 (1868)).

272. Public Statutes of N.C. 1873 (Battle's Revisal) ch. 32.

273. *See, e.g., id.* § 17 (horse stealing, "shall suffer imprisonment at hard labor for not less than five, nor more than twenty years, at the discretion of the Judge"); *id.* §§ 21-22 (felonies for which no punishment is prescribed that were not allowed benefit of clergy shall be imprisoned at the discretion of the court, not exceeding two years); *id.* ch. 33, § 123 ("In case a trial by jury

**South Carolina:** South Carolina did not build its penitentiary until after the Civil War.<sup>274</sup> Branding and pillory were abolished by 1833. Whipping and jailing continued through the Civil War for misdemeanants, while whipping and capital punishment remained the penalty for felonies.<sup>275</sup> The state substituted imprisonment for corporal punishment in 1866, delegating sentencing authority to the judge.<sup>276</sup>

**Tennessee:** Replacing its criminal code of 1807, which prescribed death or clergy, whipping, pillory, jail terms, restitution, forfeiture, and fines, Tennessee in 1829 adopted discretionary terms of imprisonment set by juries, and opened its penitentiary in 1831.<sup>277</sup> As in Georgia, jury sentencing in Tennessee had a hiatus shortly after the adoption of indeterminate sentencing, between 1913 and 1923.<sup>278</sup> Jury sentencing was then permanently replaced by judge sentencing in 1982 with the passage of the Tennessee Criminal Sentencing Reform Act of 1982, also known as the “judge sentencing law.”<sup>279</sup>

shall be had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offence charged. . . .”).

274. Opponents of reform had argued that the penitentiary was too expensive, and associated penal reform with abolitionism and Unionism. MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878*, at 216–19 (1980).

275. Williams, *supra* note 81, at 232, 246–54, 264.

276. Act of Dec. 21, 1866, 13 Stats. of S.C. 405; JACK KENNY. WILLIAMS, *VOGUES IN VILLAINY: CRIME AND RETRIBUTION IN ANTEBELLUM SOUTH CAROLINA* (1959); John Charles Thomas, *The Development of “An Institution”: The Establishment and First Years of the South Carolina Penitentiary, 1795-1881* (1983) (unpublished masters thesis, University of South Carolina) (on file with author).

277. Tenn. Public Acts of 1829, ch. 23, §§ 27, 76; Zimmerman, *supra* note 255, at 20.

278. DAVID L. RAYBIN, 11 *TENNESSEE PRACTICE, CRIMINAL PRACTICE AND PROCEDURE* § 32.2, at 177 (1985).

279. See TENN. R. CRIM. P. 32, cmt. to 1984 amend.; T.C.A. § 40-35-101; 11 THOMAS EDWARD NELSON, *JUDGE SENTENCING IN TENNESSEE*, at x (1986); RAYBIN, *supra* note 278, at 175–78; Gary Shockley, *A History of the Incarceration of Juveniles in Tennessee, 1796-1970*, 43 TENN. HIST. Q. 229, 231 (1984).



## II. THE JURY AND RACE

