THE ORIGIN AND DEVELOPMENT OF THE AMERICAN CRIMINAL LAW PRINCIPLE OF LEGALITY

Robb Murray Jones
Charlottesville, Virginia

A.B. Grove City College, 1975
J.D. University of Virginia, 1978

A Thesis Presented to the Graduate Faculty of
the University of Virginia
in Candidacy for the Degree of Master of Arts

Corcoran Department of History
University of Virginia

May, 1978

Approved:
G. E. White
C. W. McCurdy

I.

INTRODUCTION

Common law crimes, or crimes undeclared by statute, were a part of America's English heritage. After American independence, the extent of this inherited criminal law became a subject of concern. The Revolution had been fought for principles of liberty, and the common law had been regarded as part of a heritage of liberty. Yet, as the system which guided the relationship between individual and state in England, the common law of crimes had also a heritage of oppression, as exemplified by the Star Chamber and the Tower of London. Americans looked to the English criminal law as the basis of their own, yet, in common with their practice in other areas of law, freely modified it to meet their requirements. The nature of this reception and the underlying uncertainty of the common law itself provoked controversy and raised important questions as to the scope and operation of American criminal law.

At the time of the Revolution, the major English felonies were statutory, although many other offenses were not. Some were tried by ecclesiastical courts, which had jurisdiction over a wide range of morasl offenses ranging from incest to tippling on the sabbath.[1] Others were tried

under the common law, within which a residual power to punish certain misdemeanors existed.[2] The English ecclesiastical court system never crossed the Atlantic, thus presenting Americans with some problems as to the choice of which morals offenses to punish. It was easy enough to punish adultery or drunkenness, but heresy and profaning the church were not as obvious. The problem of reception clouded the existence of common law felonies and misdemeanors as well. Some English offenses, an obvious example were the game and forest laws, were inapplicable to conditions in the new world.[3] Colonial legislation solved a number of uncertainties by declaring some crimes and by changing some of the English punishments, but again the crimes given legislative promulgation were usually the more important felonies.[4] Because of the uncertainties of reception and the incompleteness of colonial penal legislation, the criminal law at the time of the American Revolution was both uncertain and wide-open in scope. It was also based on the substantive English criminal law, which at the time of independence was "both a crude and bloody system. fraught with technicality and using for its major sanctions only death and transportation."[5] Upon independence, the applicability of the English criminal law was almost immediately called into question. Linking this often arbitrary and brutal penal system with the despotic, monarchical government so recently cast off, post-Revolution reformers called for a new scheme of crimes and

punishments. Adding impetus to their agitation was an Enlightenment-derived ideology which sought to inject rationality and humanitarianism into the criminal law. The vehicle chosen by the reformers was legislative limitation of the English common law of crimes. The hope of the more advanced reformers, such as Edward Livingston, was to codify systematically and completely the criminal law. Codes such as Livingston's were often proposed, and more often discussed, but were never enacted. Other reformers succeeded in ending the criminal common law jurisdiction of the federal government and of Ohio, beginning an abolition trend which gained momentum throughout the nineteenth century and culminated in the near abandonment of common law crimes by the mid-twentieth century.

More specific reforms were agitated for, and in a few cases achieved, in the areas of labor conspiracy and courts' constructive contempt powers. On the whole, however, the successes of the reformers were limited. Common law powers over crimes persisted in most states well into the twentieth century. More importantly, the English common law continued to provide definitions and defenses, as well as principles and doctrines measuring the scope of criminal liability, thus providing a fertile field for arbitrary or inconsistent judicial interpretation. This failure can be explained by the defense of common law crimes carried out by prominent members of the American legal community. Defended as a

necessary, evolutionary tool for crime con trol, and as a system which could not easily be discarded, the common law of crimes remained in force, although some objections of the reformers were tempered by increasing statutory declaration of crimes and specific judicial limitations on crimes-creating powers.

Although they enjoyed only limited success, the agitations of the post-Revolution reformers marked the beginnings of the principle of legality in the United States. The early birth and continued persistence of the principle indicated the solid historical roots of such recent reforms as systematic criminal codification. Indeed the twentieth century success of the Model Penal Code must be looked at as the vindication of such theoretical-minded reformers as Edward Livingston. Post-Revolution reformers' efforts to meliorate certain specific abuses of power can be viewed as the historic ancestor to current Supreme Court responses, under the doctrine of void for vagueness, to the deprivations of individual rights by the state. Despite their failure to forsee the use of judicial review in this area, the early reformers' desire to erect legal barriers preventing the deprivation of individual liberties is mirrored in the contemporary efforts of the Supreme Court.

While focusing on Post-Revolution objections to common law crimes, this paper will attempt to trace the origin and development of what is now called the principle of

legality. Part II below will set out the theoretical elements of the principle and will state its modern constitutional meaning. Part III will trace the origins of the principle in response to common law crimes. Part IV will chart the failure of the movement for codification and abolition of common law crimes. A conclusion on the significance of the movement to the principle of legality will follow.

II
THE PRINCIPLE OF LEGALITY

Ideally, a principle of legality governs the operation of criminal law in the United States. In a broad sense, it is part of the "rule of law" enshrined in both the popular and legal consciousness. Specifically applied to the criminal law, the principle of legality is explained by two latin maxims—Nulla Poena Sine Lege and Nullum Crimen Sine Lege—"Without a law there is no punishment," and "Without a law there is no crime." Nulla Poena Sine Lege concerns the imposition of punishment—no one is to be punished except in pursuance of a statute which prescribes a penalty. Nulla Crimen Sine Lege holds that no conduct is to be held criminal unless described with certainty by a penal law.[6] Combined as the principle of legality, these maxims have interrelated procedural and substantive connotations. The notion of "rule of law" and "due process of law" state the procedural content of the principle. They stand for the proposition that impositions of criminal sanctions must take place only within the framework of certain forms and safeguards.[7] Substantively, the "central meaning" of the principle stands as a "definite limitation on the power of the state."[8] The principle in this sense holds that the creation of criminality, as well as the imposition of punishment, must occur within the context of certain rules and limitations.

Three applications of the criminal law raise substantive legality questions. One is extending penal statutes; the second is interpreting penal statutes; and the third is the creation of criminality by judges in the absence of a penal statute. The problems posed by these three practices are analytically similar. Extending a statutory provision by analogy to include acts not within the scope of its precise language, but within the act's principle, involves a creation of criminality not unlike that of the judge who, despite the lack of an applicable penal statute, declares an act criminal because it violates customary moral prohibitions.[9] Similar also, to a certain extent, is the interpretation of an imprecisely worded statute to include acts not clearly within the scope of its language. The principle of legality condemns all three practices, and raises three objections to their use. First, no fair warning is given as to what the state considers to be criminal. The individual must guess at his peril whether a contemplated act is prohibited or not. This objection becomes more important as the state's demands become more complex and further divorced from communally held moral obligations. The second objection is related to the first and proceeds from an assumption that if an individual knew of the criminality of certain conduct, he would avoid it. All three practices allow for retroactive operation of the penal laws. Retroactivity is particularly objectionable because the individual's present innocent act is subject to the possibility that it might

later be declared criminal. Finally, all three practices exhibit a potential for arbitrary and inconsistent administration of the criminal laws. Like cases may not be treated alike, and a potential for oppression exists.

Despite these theoretical objections, practices raising the same notice, retroactivity, and arbitrariness problems have continually occurred in American criminal law.[10] The principle of legality, as a complete statement of these objections, has neither been constitutionalized nor institutionalized to strike down objectionable practices. This is not to say that other doctrines of statutory construction and constitutional law have not been used to meet legality objections. The Ex Post Facto clauses, applicable to both the states and the federal government, have protected against retroactive penal legislation. By their terms they only apply to legislative actions, however; they do not address the problem of retroactive judicial application of the penal law.[11] Rules mandating strict construction of penal statutes, which require ambiguous language to be construed favorably to the defendant, have been in existence since the early nineteenth century.[12] The strict construction rule was qualified shortly after its acceptance in the United States, however, and the rigor of the rule was considerably lessened in numerous cases.[13] Finally, the concept of Due Process has been used to mitigate some legality deprivations. For example, there is a constitutional due process requirement

that the state give fair notice of what constitutes proscribed conduct before declaring it criminal.[14] Statutes failing to meet this test are said to be void for vagueness. Such a requirement is replete with qualifications,[15] however, and as a result the void-for-vagueness adjudications of the United States Supreme Court are hardly consistent, nor can it be said that fair notice is a general principle which controls throught.[16] A constitutional prohibition against retroactive judicial lawmaking has also been read into the Due Process Clause.[17] Over and above the specific notice and retroactivity concerns of the Supreme Court seems to run a pragmatic concern with the possible abuse of power. The concern can also be seen as a factor of whatever has motivated the Court's exercise of substantive due process protection.[18] Currently the First Amendment area is where legality concerns are most evident.[19] Furthermore, the course of the Court's adjudications has suggested a desire to control police and prosecutorial discretion in this sensitive area.[20]

These considerations suggest that the constitutional expression of the principle of legality, primarily under the void for vagueness doctrine, may be regarded less as a theoretical principle regulating the permissible relationship between law and the individual, than as a pragmatic instrument mediating between the freedom of the individual and the criminal justice needs of the state.[21] Over time the legality balance has been adjusted, sometimes in favor of the individual, but often in favor of society's crime control

interests.[22] Perhaps as a consequence of this balancing, here has never been a successful Supreme Court challenge on the merits of common law crimes, despite notice, retroactivity, and arbitrariness objections which strongly suggest that common law crimes are unconstitutional.[23]

Judicial balancing of legality interests against crime control interests has taken place over years of history. At the inception of the American Revolution, the full subtlety and complexity of the principle of legality had not been developed. Instead, as it originated in European Enlightenment reaction to the abuses of the ancien regime, the principle of legality stood close to its simple, central meaning as a limitation on the power of the state. Influenced by Enlightenment penal thought and believing that a free state was a limited one, post-Revolution reformers mounted an assault on broad, discretionary common law crimes powers of judges, which were seen as posing a threat to individual freedom.

III

THE ORIGIN AND DEVELOPMENT OF THE PRINCIPLE OF LEGALITY

A.

The Influence of Enlightenment Penal Ideology and American Political Thought

The eighteenth century saw the development of the "first modern penal ideology."[24] Enlightenment thinkers in continental Europe, repelled by arbitrary administration of penal laws, uncertainty over what constituted a criminal offense, and the existence of brutal and capricious punishments, attempted to inject rationality and humanitarianism into the criminal law.[25] Leading Enlightenment theoreticians such as Voltaire and Montesquieu set down principles for ideal penal codes, highlighted by provisions which sought to establish procedural safeguards, eliminate secret trials, and ban the use of torture.[26] To this point the proposed reforms would have merely brought continental criminal law up to the same standards as that of England.[27] But the logic of reason carried the reforms further. In contradistinction to English criminal law, and particularly to common law crimes, Voltaire and Montesquieu also believed that an ideal criminal code should be characterized by certainty in the definition of criminal conduct. Here the English model was deviated from; a conclusion was reached that laws would have to be clear and exact, and that any powers of judges would have to be fixed by principles of law.[28]

The Italian Cesare Beccaria carried this insight to its logical conclusion. In his Essay on Crimes and Punishments, he maintained that "the laws only can determine the punishment of crimes." And, because only written law could be certain enough to control discretion, "the authority of making penal laws can only reside with the legislator..." Beccaria's system envisioned a niggardly role for judges, who in criminal cases would have no right to interpret the penal laws.[29] Also important in terms of its later effect on American thinking was Beccaria's notion of a relative penal law. Criminal law was not to enforce moral virtue as such, but was simply to serve the needs of a particular society.[30] Clear, legislatively declared penal laws were linked with republican government. Beccaria wrote:

> Hence it follows, that without written laws, no society will ever acquire a fixed form of government, in which the power is vested in the whole, and not in any part of the society; and in which the laws are not to be altered but by the will of the whole, nor corrupted by the force of private interest. Experience and reason show us, that the probability of human traditions diminishes in proportion as they are distant from their sources. How then can laws resist the inevitable force of time, if there be not a lasting monument of the social compact?[31]

Beccaria's ideas were incorporated with other Enlightenment ideas to form what one commentator called the "liberal doctrine of criminal law." The legality aspects of the doctrine were a belief in the need for clarity and certainty in the criminal law, to be expressed in a written code, and a subordination of preventative

regulation to the punishment of actual crime, as declared by law.[32] In addition, a further tenet of the liberal doctrine was to eliminate the callous and indiscriminate use of the death penalty.[33]

The liberal doctrine received practical recognition shortly after it was promulgated. One result was the first widespread institutionalization of nullum crimen sine lege and nulla poena sine lege. In 1787 the Code of Austrian monarch Joseph II included a provision stating, "Only such illegal acts are to be considered and treated as crimes which have been enumerated in the present law."[34] Two years later the French Declaration of the Rights of Man declared, "The law may establish only such punishments as are strictly necessary. No one may be punished except according to a law enacted and promulgated before the commission of an offense and lawfully applied."[35]

The influence of the Enlightenment on American criminal law reformers was pervasive. William Bradford said as much in a 1793 essay on the nature of crimes and punishments in Pennsylvania. Asserting that the general principles upon which penal laws would be founded was already settled, Bradford noted that "Montesquieu and Beccaria led the way in the discussion." Furthermore, due to their influence, "a remarkable coincidence of opinion, among enlightened writers in this subject, seems to announce the justice of their conclusions."[36] Bradford was correct on

one point. There was general agreement on the relevancy of Beccaria and Montesquieu to the reform of American criminal law. The influence of Enlightenment penal thought operated on two distinct, although related, levels, however. The consensus of opinion which Bradford celebrated reached only a general agreement to lessen the severity of punishments. It was here that Beccaria's principles "found a soil prepared to receive them," and Montesquieu's maxim, "That as freedom advances, the severity of the penal law decreases," was borne out.[37] No more will be said here of the post-Revolution movement to limit or abolish capital punishment.[38] It should be noted that the punishment issue cannot be totally separated from the issue of legality, however. Often those who urged abolition of common law crimes urged an end to capital punishment as well.[39] Of greater import was the linking of bloody common law punishments with the system of common law crimes, a kind of condemnation by association. As will be shown later, this was an important element in the critique of common law crimes. Nonetheless, not as many reformers took the step from the critique of capital punishment to the critique of the administrative superstructure which imposed it. Those that did received equal impetus from the legality elements of Enlightenment penal thought.[40]

The American objection the common law crimes was a distinctly post-Revolution phenonmenon.[41] Because Montesquieu's and Beccaria's views on criminal law reform circulated

widely before the Revolution, Enlightenment penal theories alone cannot explain the objection to common law crimes.[42] Changing political perceptions and a new conception of the criminal law propelled legality concerns to the forefront. Revolutionary thought posited a new relationship between the individual and the state, and ideas changed as legal institutions were modified to meet the imperatives of this new insight.

The successful assertion of American independence vindicated the principles of liberty, asserted in countless broadsides and pamphlets, which in the years leading up to the Revolution had decried the corrupt and arbitrary imposition of English rule on the colonies.[43] As was to be expected in the case of a revolution fought for liberty's sake, a heightened concern for the preservation of liberty continued after the Revolution.[44] Within the criminal law, further changes in the nature of the state's relationship to the individual gave cause for this concern to reach a new importance. If William Nelson's study of Massachusetts is generally applicable, then the revolutionary years and thereafter saw a marked increase in the number of cases in which the state had a direct interest in criminal prosecutions.[45] Political prosecutions, such as those arising out of opposition to revolutionary governments, or later debtor uprisings against post-Revolution governments, were examples of this trend; a rise in counterfeiting prosecutions was another.[46] More

important was the substitution of the government as a real party in interest for property-related prosecutions.[47] Antagonism of the state to the individual may not have been important alone, but in the context of a wide-open and uncertain substantive criminal law, the potential for arbitrariness and oppression became evident, Coupled with this recognition of the oppressive potentialities of government was a political consciousness which separated the people from the government.[48] Added to political theories based on consent and a will theory of sovereignty, the thrust of these ideas pointed toward a distrust of all power except that which was rigidly circumscribed by law.[49]

An additional index of this distrust was the profound unpopularity of law, lawyers, and legal institutions after the Revolution.[50] This was symptomatic of a general fear that privilege, power, and wealth would combine to negate the liberties won by independence. Attention was at times concentrated on the possibility of a lawyers' conspiracy.[51] The judiciary was the primary focus of concern, however. In the decades after the Revolution, the precise role of the judiciary in the new scheme of government became crucial.[52] Entrenchment of Federalists on the nation's judicial benches magnified this concern.[53]

Combining these elements of the "American Science of Politics" with Enlightenment penal theories, some criminal law reformers built an analysis which denied the compatibility

of common law crimes with the new scheme of government. Their contribution to the American understanding of the principle of legality is best understood in the context of specific instances where the actions of the state and the medium of common law crimes were combined to suggest new potentialities for oppression.

B.

Constructive Contempt and the Common Law

The issue of constructive contempt raised early post-Revolution legality concerns. Involved here was the power of a judge to order summary punishment for written affronts to the dignity and power of a court taking place outside of the courtroom. The primary incident had an inauspicious beginning. Thomas Passmore, the owner of a sailing brig, had it insured in 1801. On a routine voyage, the brig sprung a leak and was abandoned. The underwriters, among them the firm of Bayard and Petit, refused to pay on the loss, claiming that the vessel was originally unseaworthy. A suit was begun and was referred to arbitrators, who decided in favor of Passmore. Bayard and Petit, as was their right, moved to reconsider the award. Passmore, claiming that he knew nothing of the motion, apparently grew weary of waiting for his money. He took action and posted a somewhat libelous notice on the exchange board of a local tavern. The notice impugned the integrity and character of Bayard and Petit.

The fact of Passmore's action was brought before the Supreme Court of Pennsylvania, and after a hearing, it was ordered that Passmore apologize for his actions. Passmore apologized to the court, but obstinately refused to retract his characterization of Bayard, who apparently had owed him money previously. Recognizing that it could not take cognizance of the libel, but believing that a contemptible act had taken place, the court fined Passmore fifty dollars and ordered him jailed for thirty days.[54] Passmore's case might have passed into obscurity had it not taken place during a period when radical Pennsylvania Republicans were mounting an attack against the state's largely Federalist judiciary.[55] Passmore served his time and then took his case to the Republican-dominated legislature, where he received a sympathetic hearing. There was an outcry against the three justices of the supreme court, who were all Federalists. Justices Shippen, Yeates, and Smith were impeached by the House, and avoided conviction in the Senate by only two votes.[56]

The Passmore incident brought to the fore American legality objections against the common law of crimes. Contempt by publication was in fact a paradigm case in the judicial creation of criminal law. Then Chief Justice Thomas KcKean, in Respublica v. Oswald,[57] a case which in 1788 established the doctrine in Pennsylvania, applied an English precedent which was, at best, dictum, in developing a necessity justification for punishing contempt by publication.[58] While he

did not understand McKean's misuse of precedent, William Duane, editor of the Republican newspaper Aurora, and himself a victim of the practice,[59] objected to the creation of contempt by publication. He characterized the supreme court's contempt practices as "frequent abuses of power" and wondered why judges "should be more independent of the control of a free people than those who have the formation and execution of the laws entrusted to them." Reporting on a legislative committee which recommended the enactment of a bill limiting judges' contempt powers, Duane noted that the committee felt it was their duty to "curb the arbitrary power assumed by the courts over the citizens...as unauthorized by any law but the indefinite and incomprehensible doctrines of English Common Law."[60]

Duane was disappointed by the Senate acquittal of the justices, but turned his attention to the upcoming Pennsylvania gubernatorial election of 1805. Judicial reform was a large issue in that election and Duane raised the banner of revolutionary principles against judges'broad common law powers to declare crimes. "The central issue," he wrote, was:

> ...whether the constitution established upon the principles of the revolution should remain, or the dark, arbitrary, unwritten, incoherent, cruel, inconsistent, and contradictory maxims of the Common Law of England should supercede them?[61]

Thomas Paine, in a pamphlet addressed to the people of Pennsylvania on the eve of the election, echoed Duane in his criticism of the Pennsylvania courts' contempt powers.

"It is a species of despotism," he said, "for contempt of court is now anything a court imperiously pleases to call it so."[62]

The rhetoric of Duane and Paine had little effect on the outcome of the election. Governor McKean, the author of the Oswald decision, was reelected and prevented any legislative limitation on the power of contempt. However, in 1809, after McKean's retirement, the Pennsylvania legislature passed a bill eliminating the power of courts to declare summary punishment in cases such as Passmore's. The summary power was limited to official misconduct of court officers, disobedience of process, and misbehavior in the presence of the court which obstructed the administration of justice. Contempt by publication remained punishable, but the individual had to be indicted and tried by a jury before punishment was imposed.[63]

A later New York contempt case raised similar issues of judicial discretion and the imposition of summary punishment. J.V.N. Yates, a master in chancery, although disqualified by statute from practicing law, did so nonetheless. Chancellor John Lansing adjudged him guilty of contempt. Here the historic bona fides of a contempt presoecution were clear,[64] yet the New York Court of Errors, reversing then Chief Justice James Kent, held the summary contempt proceedings unlawful.[65] The old New York Court of Errors did not publish reasons for its decisions; instead, as a kind of super appellate court consisting of the chancellor, the

justices of the supreme court, and the members of the State Senate, it voted for or against a result. Therfore its reasoning for reversing the contempt conviction was not clear. Nonetheless, evident in Senator DeWitt Clinton's arguments against the contempt charge were the same legality objections raised in Passmore's case. The doctrine of constructive contempt, said Clinton, "can never be considered legitimate:"

> for then the jurisdictional functions of common law courts might, under the pretence of constructive contempt, or some other plausible assumption, be exercised to an unlimited extent,...[66]

A New York statute confirming the results of the Yates case was passed in 1829.[67]

Edward Livingston, whose works represented the apex of early nineteenth century concerns on the principle of legality, likewise condemned constructive contempt and contempt by publication. Describing the offenses, Livingston wrote,"Of all the words in the language, this is, perhaps, the most indefinite." Almost anything could be considered disrespectful to a court, according to the belief of the presiding judge. Livingston thought the danger here was obvious. "What is the conduct that will secure a man against its exercise in the hands of a vain or vindictive judge?" Such an "ill-defined offense, so liable to be imputed, embracing such a variety of dissimilar acts" was undesirous even if prosecuted with full procedural safeguards. Summary power in the judge made the wide-open offense even more dangerous,

for "the judge carries the standard in his own breast." Livingston recognized the necessity for courts to protect both their power and the dignity of their proceedings, but he thought the summary power of judges should extend only to the removal of the obstruction to order. Criminal proceedings, with an impartial tribunal and jury, could answer the state's need to punish activities which persisted in their obstruction of justice.[66] To this end Livingston's contempt provisions in his proposed code of crimes and punishments rigidly circumscribed judges' summary contempt powers, even more so than the Pennsylvania or New York statutes. Livingston's proposal only allowed a judge to remove the offender and temporarily detain him during the day the court was in session. Any further punishment would have to follow a criminal charge by indictment or information.

Shortly after Livingston's proposals were circulated, events occurred which presaged a national recognition of the legality principles in favor of limiting summary judicial power to punish constructive contempts. The events were those surrounding the Peck-Lawless case of 1826-31. Involved was a series of personal intrigues and political machinations, all taking place against a backdrop of land speculation and internecine political battles.[70] The outcome was the impeachment of James Peck, federal judge for the District of Missouri. The precipitating event was Peck's citation of Luke Lawless, a Missouri attorney, for contempt. The contempt citation occurred when Lawless, after losing an important land title

case, published an article criticizing Peck's decision.

As Passmore did, Lawless appealed his conviction to the legislature. The House of Representatives voted impeachment articles by a large majority.[71] The arguments in the Senate trial were by this time familiar, as Peck's defenders asserted a necessity to preserve judicial dignity and cited common law precedents for contempt by publication.[72] In opposition, House Managers prosecuting Peck gave freedom of the press prominent emphasis, but legality fears of unlimited judicial discretion were paramount. James Buchanon relied on the Passmore case to prove the uncongeniality of Peck's action to principles of liberty, and quoted the whole of Edward Livingston's discussion on contempt.[73] Ambrose Spencer claimed the implied power urged by Peck's defenders to be "without limits...(and) utterly incompatible with the rights and liberties of the people." Moreover, because the power depended on the personal discretion of the judge, it was "a despotic power, and intolerable in a society governed by known laws."[74] Henry Storrs expressed his fear that judges would abuse such an unlimited power for purposes unrelated to the legitimate aims of the criminal law. In this sense he foreshadowed a modern formulation of the principle of legality. "The most dangerous and alarming extension of the law of contempt," he said, "would be that which brought within the jurisdction of the judges or their discretion anything which partook the nature of a general political offense—above all things, one which admitted of no fixed and accurate definition." Storrs saw an anomaly where the judge "makes the law,

and expounds and executes it in the same breath." He concluded that such an act would be the antithesis of law.[75]

Summing up for the prosecution, James Buchanon linked constructive contempt with the English common law's despotic and arbitrary practices, which he said the United States government, based on principles of liberty, had left behind. Unlimited contempt power was "Star Chamber power" and historical objections to it were "a struggle between judicial prerogative and the rights of the people." Questioning the applicability of Peck's common law precedents, Buchanon asked, "Are we to look to the laws of England, or to the constitution and laws of the United States,for the powers of our judges?" The fact of independence answered that rhetorical question. "At the Revolution we separated ourselves from the mother country, and we have established a republican form of government..." His conclusion logically followed:

> ...the federal judiciary...was not on its establishment vested by construction with all the power of punishing them(contempts) in a summary manner, which belongs to a monarchy governed by an omnipotent parliament.[76]

Despite these arguments, the Senate backed off from conviction. Peck won acquittal in a close vote.[77] The vote cannot be looked at as an approval of indefinite contempt power, however. The same day that Peck won acquittal, the House Judiciary Committee set into action a process which within a few weeks resulted in an act declaring strict limits on the contempt power.[78] The codification of contempt was based on the earlier Pennsylvania and New York statutes, as

well as the writings of Edward Livingston. Contempt by publication was made unreachable, and along with the power of judges to enforce process and punish officials of the courts, the contempt power was limited to acts occurring in the presence of a court, or near enough to obstruct the administration of justice. A second section defined as criminal offenses requiring indictment and trial those acts commonly subsumed as obstructions of justice. The law seems to have passed with nearly unanimous approval.[79] The depth of feeling noticeable in Congress was echoed across the country. By 1860, twenty-three of thirty-three states had statutes limiting the summary powers of courts to punish for contempt.[80]

The early history of constructive contempt was important for a number of reasons. Broad discretionary contempt powers—the ability of judges to create crimes for illegitimate ends, were linked with contempt's English common law origins, and in turn were characterized as being irreconcilable with a republican government based on liberty. The Enlightenment insight that the criminal law, the most powerful institution governing the relationship between individual and state, must be restricted within defined boundaries was first brought home to the American consciousness. Equally important, the common law, long thought to be the repository of liberty, became cognizable as as potential usurper of liberty. The later history of constructive contempt showed a successful movement to reach a solution to the legality problems recognized by the early reformers.

Circumstances related to contempt by publication insured that a solution would be found to the reformers' legality objections. The doctrine was especially vulnerable for two reasons, and these distinguished contempt by publication from other areas of the criminal law. It involved liberty of the press, an ideal which in the wake of the alien and sedition laws had particular value to Jeffersonian Republicans and their heirs. The fact that punishment could be initiated and applied by one person—the judge, heightened arbitrariness concerns. The procedural safeguards of formal charge and trial were absent here.

Subsequent applications of the common law of crimes indicated that procedural safeguards were not in themselves enough to insure the legitimacy of common law criminal prosecutions, however. An important example was the use of common law conspiracy to harass and outlaw labor combinations. Brought into sharper focus by this practice was the ability of judges and prosecutors, given an amorphous mass of common law precedent, to create crimes in order to enforce their own preferred version of economic and social arrangements.

C.

Criminal Conspiracy and Labor Combination

In England, the doctrine of criminal conspiracy showed a historical development by analogical extension to encompass various forms of group criminality not reached by more precise declaration.[81] Criminal conspiracy had no common law

law basis, but originated in thirteenth century statutes designed to remedy certain specific justice-obstructing abuses of legal process.[82] Within five hundred years it had grown into the statement by Hawkins that "all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."[83] In America, the first reported conspiracy cases began shortly before the beginning of the nineteenth century.[84] Beginning with the first labor conspiracy case in 1806, the English common law of criminal conspiracy provided the basis for all prosecutions.[85] At least eighteen labor conspiracy cases were brought between 1806 and 1844, when Lemuel Shaw's Commonwealth v. Hunt opinion signalled a temporary end of the practice.[86] Many of the prosecutions involved combinations of workers to raise wages, or concerted actions to enforce a closed shop. Numerous others concerned attempts to enforce internal union discipline.[87]

The Philadelphia cordwainers were the first American labor organization subjected to a conspiracy charge. The arguments in that 1806 case set a general tone and content which was repeated in later cases, although arguments and concepts were refined due to the reliance of both prosecutors and defense attorneys on the earlier American precedents. Joseph Hopkinson, one of the Philadelphia prosecutors, began by stating a variation of Hawkins' conspiracy doctrine. "The law does not permit any body of men to do any act injurious to the general welfare," he claimed. Hopkinson's understanding

of the general welfare coincided with Hamiltonian economic principles. He told the jury that disasterous economic consequences would follow a labor combination and success in its goal to raise wages. American articles would not be able tocompete in the export trade, workingmen would lose employment, and the economy would be depressed. The oppressive operation of labor combinations on workingmen who did not wish to join the organizations was also stressed.[88] The cordwainers' defense counsel, Ceasar Rodney and Walter Franklin, met Hopkinson's and co-prosecutor Jared Ingersoll's theories with countervailing arguments on the economic merits. Then, arguing in the alternative, they first attempted to prove that English precedents would not support a prosecution for conspiracy to raise wages. The second prong of their argument was an objection to the cordwainers prosecution on nearly the same grounds upon which reformers had objected to constructive contempt.

By a twentieth century analysis, the major legality objection to the cordwainers prosecution was that it purported to punish combined activities which, as prosecutor, judge, and defense counsel agreed, an individual could lawfully pursue.[89] Building on Hawkins' seventeenth century statement, nineteenth century conspiracy theory was developing towards this particular result.[90] The essence of the result's rationale was that somehow the confederation in itself produced harm. Although logically indefensible, the rationale had a certain emotive appeal, especially when, as

in the case of labor combinations, the group action seemed to threaten an ideal of the general welfare held by those who controlled the prosecutorial apparatus of the state.[91]

Rodney and Franklin sensed this objection to the cordwainers prosecution, but never fully articulated the connection between the offense's lack of definition and its illegitimacy. Instead they focused on the origin of conspiracy and its inapplicability to American conditions. "By what law are the defendants punishable?" asked Franklin. He could find no statute in force, so he concluded that the common law provided its origin. The English common law of crimes was hardly compatible with American conditions, however. "Very different are the genius and feelings of the countries on the subject of criminal law, particularly that branch of which relates to the present conspiracy."[92] Ceasar Rodney reflected this insight in a vague and groping manner, criticizing the common law of crimes for its sanguinary nature, and noting how the English criminal law had been changed in Pennsylvania.[93]

In later conspiracy cases, counsel refined these insights. This led to a sweeping reexamination of the common law and its applicability to American conditions. Defense counsel stressed that there was no American legislative approval of labor conspiracy. Walter Forward, counsel for the Pittsburgh cordwainers in 1815, exclaimed, "Let the law be produced by which this despotic authority is conferred... your legislature disclaims it." And the common law, which

was claimed as the source of the prosecution's power, was no more than "a bastard common law...fraught with mischief and oppression" because not suitable to American conditions.[94] William Sampson, counsel for the New York journeyman cordwainers in 1809, made the most elaborate attack on the common law and its applicability to American notions of freedom and equality. "By too great familiarity with foreign law books , and too little attention to our own constitution and laws, we are often led into error, not considering how unsuitable these foreign laws may be to our condition," he asserted.[95] According to Sampson, the English common law had its origin in superstition and barbarity, while its development took place through centuries of despotism and arbitrary rule. Upon establishing governments in the new world, the colonies had accepted only those elements of the common law suitable to the necessities of their condition. Lately, "a nation was rescued from colonial dependence; her citizens from prerogative, monopoly, and privilege; her religion purged from intolerance; and a constitution was founded on the sacred rights of man." Surely, implied Sampson, the same purification of the laws was demanded.[96] Implicit also in Sampson's argument was a belief that judicial definition of what constituted a criminal conspiracy was illegitimate. Sampson stressed throughout his argument that no statute proscribed such a combination as that of the cordwainers; that the English Statute of Labourers was never in force in New York; that a combination to achieve an object not declared criminal, when no criminal

means were used, could not be in itself a crime; and therefore the cordwainers' activites could not be punished.

More slowly than in the case of constructive contempt, the most objectionable feature of labor conspiracy—its expansiveness and potential for arbitrary application, became explicitly recognized. "Where would this doctrine of conspiracy end?" asked the defense attorney for the New York hatters in 1823. The English doctrine of conspiracy, used in England as an "engine of state," could not be tolerated in the United States.[97] The characterization of common law conspiracy as a tool of oppression was made more explicit by Frederick Robinson in an address before the trades union of Boston in 1834. Robinson viewed judges as the "headquarters of the aristocracy," and he believed that whenever the producing classes asserted their right to fix wages by agreement, the aristocracy, "whenever they have held all political power," enacted laws inflicting fines, imprisonment, and transportation on those that attempted by unions among themselves to fix the price of their labor. In the United States, Robinson said, the aristocracy had not achieved political power, but had attempted by "every sophistry" to defeat the rights of the producing classes. The chief tool of sophistry was the common law. According to Robinson, "Common law, although written in ten thousand books, is said to be unwritten law, deposited only in the head of the judge, so that whatever he says is common law, must be common law, and it is impossible to know before the judge decides, what the law is." Robinson's

remedy was both radical and simple in conception:

> Instead of living under British laws after we had thrown off the government which produced those laws, we should have adopted republican laws, enacted in codes, written with the greatest simplicity and conciseness, alphabetically arranged in a single book, so that everyone could read and understand for himself.[98]

Uncertainty and judicial discretion were Robinson's major objections to the common law. Robert Rantoul, Jr., lifelong reformer and defense counsel for the Boston journeyman bootmakers in 1840, applied these twin tenets to criminal conspiracy and in the most famous labor case in American history, won one of labor's first legal victories. Rantoul's efforts led to a victory for legality principles as well.

In the beginning stages of his argument, Rantoul repeated the discussions of earlier defense counsel. He stressed that no law existed against conspiracies in restraint of trade except by common law. Furthermore, he stated the inapplicability of the English common law to the United States. "Laws against acts done in restraint of trade belong to that portion of the law of England which we have not adopted. They are part of the English tyranny from which we fled. They are repugnant to the Constitution and to the first principles of freedom."[99] Rantoul then objected to the prosecution on legality grounds.[100] Common law crimes were judge-made and thus vague, uncertain, and expansive. "The law should be a positive and unbending text, otherwise the judge has an arbitrary power, or discretion; and the discretion of a good man is often nothing better than caprice...

while the discretion of a bad man is an odious and irresponsible tyranny." Rantoul also raised a retroactivity objection to common law conspiracy. "Judge-made law is ex post facto, and therefore unjust. An act is not forbidden by the statute law, but it becomes by judicial decision a crime." Rantoul also noted the violation of the Massachusetts constitutional provision mandating the separation of powers. "...(I)t is subversive of the fundamental principle of free government, because it deposits in the same hands the power of first making the general laws, and then applying them to individual cases; powers distinct in their nature, and which ought to be jealously separated."[101]

Rantoul supported his legality arguments with a learned exposition of the common law origins of conspiracy, most likely based on Franklin's and Sampson's earlier arguments. His most important assertion here, later included in a proposed charge to the jury denied by presiding judge Peter Thacher, was:

> That the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreements therein set forth did not constitute a conspiracy by any law of this Commonwealth.[102]

Rantoul failed to convince the jury, which at that time decided both law and fact. A guilty verdict was returned. This was perhaps explainable because of Judge Peter Thacher's charge, which in rejecting Rantoul's exposition of the law all but directed the jury to bring in a guilty verdict.[103]

Thacher also played on the jury's emotions by predicting economic ruin and labor tyranny should workingmen's combinations go unchecked.[104]

The case was appealed to the Supreme Judicial Court and there Rantoul repeated his earlier legal arguments.[105] The resulting decision by Chief Justice Lemuel Shaw reversed the conspiracy convictions and established the legitimacy of labor combination. Of special interest for legality purposes, Shaw's opinion, by adopting with some modifications Rantoul's conspiracy argument, removed some of the worst vagueness and arbitrariness objections from common law criminal conspiracy.

Shaw had no doubt that the general common law rules making conspiracy an indictable offense were in force in Massachusetts. General usage before the passage of the Massachusetts constitution, which endorsed laws previously "adopted, used, and approved," established that proposition.[106] Rantoul's contention that changed conditions in the United States rendered English common law inapplicable was not lost on Shaw, however. He wrote, "Still, it is proper in this connexion to remark, that although the common law in regard to conspiracy in this Commonwealth is inforce, yet it will not necessarily follow that every indictment at common law for this offense is a precedent for a similar indictment in this state." The reason was that urged by Rantoul and other defense counsel in the labor conspiracy trials. "...(I)t must depend upon the local laws of each country, to determine

whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries." Shaw went on to note that English statutes regulating the wages and conditions of workingmen were "not adapted to our colonial condition" and hence never had force in America. This served to distinguish English precedents punishing conspiracy to raise wages and in effect held that they had no persuasive force.[107]

Having established that American conditions required a modification of the common law, Shaw next recognized the legality problem inherent in criminal conspiracy. "But the greatest difficulty is, framing any definition or description to be drawn from the decided cases, which shall specifically identify this offense—a description broad enough to include all cases punishable under this condition without including acts which are not punishable." To provide more specificity, Shaw extracted a rule which, though admittedly "not a precise and accurate definition," represented a considerable improvement over either the Hawkins or Hopkinson statement of criminal conspiracy. Shaw wrote:

> a criminal conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means.[108]

As applied, Shaw's principle would require an indictment to state, "with as much certainty as the nature of the case will admit," the facts constituting the crime charged. Under Shaw's definition of conspiracy:

> When the criminality of a conspiracy consists in an unlawful agreement of two or morepersons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offence... consists in the agreement to compass or promote some purpose, not of itself criminal, by the use of fraud, force, falsehood or other unlawful means, it must be set out in the indictment.[109]

Tested by these standards, the indictments against the Boston journeyman bootmakers failed to pass scrutiny. The essence of the charge, "that defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member o f such society, after notice given to him to discharge such workers," could not be deemed to be unlawful, nor were any unlawful means to accomplsih this object averred and proved.[110]

The result of Shaw's opinion was to judicially narrow the defintion of crimnal conspiracy so as to exclude mere labor combinations from criminality. It denied the charge of Robinson and others that the common law was necessarily an aristocratic tool of oppression. "It said too that harshness, unfairness, and ambiguity in the common law as received in America would not be endured."[111] Although some commentators have advanced the theory that Shaw's opinion was a defensive action against the forces of codification (as exemplified by Rantoul and Robinson), it seems more likely that Commonwealth v. Hunt represented the efforts of a great common law systematizer to remedy ambiguity and confusion in an important area of the law which was subject

to charges that it was being used for illegitimate ends.[112] That Shaw so viewed his effort in this way is suggested by his apparent approval of the legitimacy of labor combination. If labor combination for the purposes of competition was a legitimate liberty interest of individuals, as Shaw's analogies to business competition suggested, then it probably followed that Shaw viewed a use of ambiguous criminal law principles to punish protected activity as impermissible.[113]

Shaw's opinion can thus be viewed as a different response to notice and arbitrariness objections to the criminal law. Unlike the outcry against constructive contempt, legislative codification did not result from objections to labor conspiracy prosecutions, even though it was at times proposed.[114] Instead judicial circumscription of the power to create criminality was chosen. Although all of the legality problems of criminal conspiracy were hardly eliminated,[115] Shaw's opinion limited the scope of the offense and effectively ended labor conspiracy prosecutions for a number of decades.[116]

Judicial limitation of scope was not always an acceptable solution to perceived problems of uncertainty and the oppressive potentialities of common law crimes, however. When circumstances coalesced to suggest the full oppressive nature of common law crimes, the result was a movement to abolish them. Such was the case with the common law crimes jurisdiction of the United States.

D.

The Principle of Legality and Federal Common Law Crimes

The events leading up to the Hudson and Coolidge cases,[117] where the Supreme Court affirmed the non-existence of a general federal common law of crimes jurisdiction, often have been viewed as a battle bewteen Federalist and Jeffersonian views on the proper division of power between nation and states.[118] While the Jeffersonian-Antifederalist fear of consolidation was instrumental in the objection to federal common law crimes, the evidence is suggestive that legality objections to the uncertainty of common law crimes themselves, along with their concomitant tendency for arbitrary and illegitimate application, motivated the outcry against them. The fears of consolidation, added to politically motivated sedition prosecutions and blatant political activity by Federalist judges, suggested that common law crimes could easily be turned into a tool of the national government and judiciary.[119]

The use of the common law of crimes by federal judges and prosecutors can be looked at as an outgrowth of the original judiciary acts' silence on the procedures and substantive law to be applied in the new United States circuit courts. The original "Act for the Punishment of Certain Crimes Against the United States" was a limited recital of punishable crimes. The statute also said little about which procedures should be followed in the circuit courts.[120] Likewise left vague or unsaid were grand juries' powers of

inquest and presentment, evidentiary rules, and standards for the instruction of petit juries.[121] Presented with this record of silence, judges, prosecutors, and attorneys naturally looked to the common law.

Only when prosecutions based on the common law became entwined with political issues did this use cause controversy. This first happened in cases arising out of George Washington's Neutrality Proclamation of 1793. The background of the proclamation was public division over aid to revolutionary France. Desirous not to offend any of the warring European powers, the Washington administration proclaimed neutrality and ordered prosecution of American citizens violating the terms of the Neutrality Proclamation. The first American to be prosecuted under Washington's order was Gideon Henfield, who was prizemaster on an English ship captured by a French privateer. Henfield was prosecuted under the law of nations and treaties of the United States.[122] Circuit Justice James Wilson, in his jury charge, implied that the law of nations had been adopted by the common law and thus provided a jurisdiction for the federal prosecution. Although factually guilty of the offense, Henfield was acquitted by the jury. The Henfield case began a politicization of common law crimes.[123] Beginning with neutrality prosecutions[124] and continuing through Chief Justice Oliver Ellsworth's declaration that the common law doctrine of inalienable allegiance prohibited expatriation of citizenship, the use of the common law of

crime became open to the charge, so effectively voiced in the later cases of constructive contempt and labor conspiracy, that it no longer fit American conditions.[125]

The passage of the Alien and Sedition Acts of 1798 brought home to Republicans who opposed a federal common law jurisdiction the full dangers of its successful assertion. In Republican responses to the Alien and Sedition Acts can be seen the fear that a federal common law of crimes, whether assumed or enacted, possessed grave dangers to Republican ideals of liberty and limited government. In this sense Antifederalist fears and legality-based realizations that the common law's propensity for crimes creation was infinitely expansive combined to insure a marked revulsion to the assertions of Story, Ellsworth, Jay, and others that the federal courts possessed a general common law of crimes jurisdiction.

Thomas Jefferson's Kentucky Resolutions manifested this dual rejection of national power and an expansive common law of crimes. After stating a strict constructionist view of the national union and the right of the states to make independent determinations of constitutionality, the Resolutions made a conditional prediction of disaster. Should the Alien and Sedition laws go unchallenged, stated the Resolutions, "these conclusions would flow from them—that the general government may place any act they think proper on the list of crimes, and punish it themselves,

whether enumerated or not enumerated by the Constitution as cognizable by them."[126] The explicit link between common law crimes and an expansive federal jurisdiction was not made in the Kentucky Resolutions. Instead Jefferson's language could apply as well to any attempt by Congress to exceed what he saw as its limited jurisdiction over the criminal law. Implicit in Jefferson's formulation was undoubtedly a conviction, bolstered by a knowledge of the judiciary's claim to a common law jurisdiction over crimes, that the common law of crimes provided a ready-made tool for an expansive federal assertion of jurisdiction. This unsaid link was made explicit by Madison in his 1799 Report on the Virginia Resolutions, where he joined together objections to the Alien and Sedition Acts with objections to a federal common law of crimes jurisdiction. "...the difficulties and confusion inseparable from a constructive introduction of the common law would afford powerful reasons against it," he wrote. Recognizing that the common law as received in the separate states was hardly uniform or capable of precise statement, Madison stressed that the consequences of assuming a general common law jurisdiction would be detrimental and unwarranted. Imposed on the legislature, whether as constitutionally required or constitutionally permitted, a common law jurisdiction would either unalterably impose the English common law of crimes, "with all its incongruities, barbarisms, and bloody maxims," or would allow Congress every

object of legislation "in all cases whatsoever."[127] Applied to the executive, Madison feared that "his authority would be coextensive with every branch of the common law," and might allow that branch the various prerogatives given to the executive by the common law.[128] It was the effect of a common law jurisdiction on the judiciary which provoked Madison's longest and most pointed list of fears. Such a jurisdiction "would confer on the judicial department a discretion little short of legislative power:

> On the supposition of its having a constitutional obligation, this power in the judges would be permanent and irremediable by the legislature. On the other supposition, the power would not expire until the legislature have introduced a full system of statutory provisions, Let it be observed, too, that besides all the uncertainties above enumerated, and which present an immense field for judicial discretion, it would remain with the same department to decide which parts of the common law would and which would not, be properly applicable to the circumstances of the United States.
>
> A discretion of this sort has always been lamented as incongruous and dangerous, even in the colonial and state courts...Under the United States, where so few laws exist on those subjects, and where so great a lapse of time must happen before the vast chasm could be supplied, it is manifest that the power of judges over the law would, in fact, erect them into legislators, and that for a long time, it would be impossible for the citizens to conjecture either what was, or would be, law.[129]

Madison's argument was approved by the Virginia General Assembly, which drafted instructions to Virginia's senators in the national Congress. The instructions were a protest against the common law of crimes and instructed Virginia's senators to vote against any attempt to

legislatively enact a federal jurisdiction in this area. The Instructions, like Madison's Report, opposed the "monstrous pretensions resulting from the adoption of this principle." Five reasons were given against acceptance of the jurisdiction. Two of these related to states' rights. The other three were legality statements. One relating to the harshness of English crimes and punishments was, "It opens up a new code of sanguinary criminal law, both obsolete and unknown." The second raised notice objections. "It subjects the citizen to punishment, according to the judiciary will, when he is left in ignorance of what this law enjoins as a duty, or prohibits as a crime..." Finally, the ambiguity of common law crimes was scored. "It assumes a range of jurisdiction for the federal courts which defies limitation or definition."[130]

Judicial recognition of these principles came about gradually. Justice Samuel Chase, sitting on circuit in 1798, refused to take cognizance of federal common law crimes. Chase's decision was based primarily upon the separation of powers, although he was aware of the same uncertainty difficulties which Madison noted.[131] Chief Justice John Marshall, in the Aaron Burr treason trial, next refused to accept the common law doctrine of accessories to treason in holding that Burr's activities could not be comprehended by the existing constitutional statement of treason. Marshall at this time also expressed some doubt

as to whether the common law could be accepted as a rule of decision in United States criminal trials.[132] Marshall's Burr opinion was somewhat oblique, however; his refusal to extend the constitutional definition of treason did not depend upon any determination of general common law applicability. Despite its lack of legal effect, Marshall's doubt as to a federal common law jurisdiction had great importance. In the words of a contemporary commentator, "...the doubts of great men have often more influence than the settled opinions of men of inferior minds,...From the opinion of Judge Chase and the doubt of Mr. Chief Justice Marshall, an unsettled notion was formed and spread abroad among the profession that 'the courts of the United States had not jurisdiction of the common law.'"[133]

Despite the increasing acceptance of this notion, some district judges and circuit justices continued to invoke the common law of crimes.[134] Nonetheless, the changed political situation undoubtedly lessened the number of common law-based criminal prosecutions. After 1800 Jeffersonians were in power and given their previous antagonism to a federal common law of crimes jurisdiction, could be expected to eschew any prosecutions under this power. Surprisingly, common law of crimes prosecutions continued for, of all things, common law seditious libel.[135] The prosecutions were of prominent Connecticut Federalists and were initiated in the district court of Judge Pierpoint Edwards. There is some question as to the motivation behind these prosecutions,[136]

but undoubtedly the clash between reality and republican ideals caused some embarrassment to Thomas Jefferson, who apparently ordered them withdrawn.[137] All but one case was dismissed and that one became the subject of a Supreme Court appeal on jurisdictional grounds before any trial was commenced.

That case was United States v. Hudson and Goodwin.[138] The two defendants were co-editors of a Federalist newspaper. On appeal, Justice William Johnson, for the majority, denied that the United States courts could exercise a common law jurisdiction in criminal cases. Johnson's opinion was only sparsely reasoned. He began his discussion by stating, "We consider the question as having been long settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition."[139] Johnson also expressed a Jeffersonian view on the powers delegated to the central government, which led to the conclusion that the "courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the the(sic) general government will authorize them to confer."[140] Refusing to rule whether Congress could grant a common law jurisdiction to the courts, Johnson wrote that it was decisive of the present issue that Congress had not granted such a power. However, in a legality

argument clearly borrowed from Chase's opinion in United States v. Worrall, Johnson maintained that even had the general government been granted common law powers, it did not follow that the courts had concurrent jurisdiction. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence."[141]

United States v. Hudson and Goodwin was not considered to have conclusievely settled the issue of common law crimes. The case was decided without argument and although the official reports bear no notation of a dissent, it is certain that at least Joseph Story disagreed with Johnson's opinion.[142] Story's disagreement was manifested by a circuit court opinion he wrote one year after the Hudson case. His use of the common law of crimes must be understood against the background of the War of 1812. Given the unpopularity of Madison's embrago and the disloyalty of New England, many cases of trading with the enemy were brought before the federal courts, especially Story's First Circuit.[143] The existing federal statutes were inadequate to punish these crimes. In consequence, the cases were prosecuted under the common law. United States v. Coolidge was precipitated when Coolidge and his compatriots forcibly rescued a prize captured by an American privateer. In a well-reasoned opinion, Story distinguished the Hudson case on the grounds that the Constitution specifically granted the United States courts

jurisdiction over admiralty, and thus the use of the common law as a rule of decision, rather than as a source of jurisdiction, was entirely permissible, even necessary.[144] Thus Story held that the act of Coolidge constituted a crime. With a view to putting the question before the Supreme Court, District Judge Davis did not concur, and the issue of federal common law crimes was once again before the nation's highest court.

Its determination of the issue was frustratingly obscure. Once again, no counsel appeared for the defendant and Attorney General Richard Rush, considering the point settled, declined to argue the case. Three justices, Story, Livingston, and Washington, considered that at least the precise issue in Coolidge remained open. Justice Johnson asserted that Hudson and Goodwin controlled, while the record was silent as to the views of Justices Marshall, Todd, and Duval.[145] Whatever the dynamics of the situation, Johnson wrote an opinion reaffirming Hudson and Goodwin, and certified that opinion to the circuit court.[146] Johnson's reaffirmance of United States v. Hudson and Goodwin conclusively settled the existence of a general federal common law of crimes jurisdiction, despite the continuing questions of some justices. Story's efforts to obtain a legislative grant of general jurisdiction over common law crimes failed to win Congressional approval.[147] Deflected from that aim, and aware that the problem of unpunished criminality

continued, Story drafted a crimes bill which was enacted in 1825.[148]

Once Antifederalist fears are distilled out of the opposition to a federal common law of crimes, the movement's importance to the developement of the principle of legality can be seen. As indicated by the court cases denying federal jurisdiction, the primacy of legislative declaration of crimes was affirmed. In a sense the European principle of nullum crimen sine lege was Americanized on the national level through application of separation of powers rationales in order to maintain the tripartite arrangement of federal government. Equally important was the new conception of the common law which notivated reformers' opposition to its enshrinement on a national level. This was a realization of the fundamental ambiguity of common law reception in the United States. Before the Revolution, indications are that the common law was looked on as a unitary body of precepts—indeed as the locus of fundamental rights and liberties.[149] The breakdown of this unitary conception of law presaged an understanding that the uncertainties of the common law admitted a wide range of judicial discretion.[150] In his Report on the Virginia Resolutions, Madison asked a series of questions, impossible of precise answer, which sub silentio declared the formidable difficulties any limited use of the common law would entail. Madison asked:

> Is it to be the common law with or without the British Statutes?;...If with these Amendments, what period is to be fixed for limiting the

> British authority over our laws?; Is it to be the date of the eldest or the youngest of the colonies?; ...Or is our Independence to be taken for the date?; Is, again, regard to be had to the various changes in the common law made by the local codes of America?; Is regard to be had to the various changes subsequent as well as prior to the Constitution?; Is regard to be had to future as well as past changes?; Is the law to be different in every state, as differently modified by its code?; or are the modifications of any particular state to be applied to all?; and on the latter supposition, which among the state codes forms the standard?...[151]

The conclusion was clear. In the criminal law, at least, the American heritage of liberty and the ideal that power should be limited by rules would not permit the judicial discretion necessary to declare law from within the framework of this uncertainty.

E.

From Abolition of Common Law Crimes to Codification

Although the impelling fear of national consolidation was not present, the same conception of the common law argued against the maintenance of common law crimes on the state level. Strong arguments to this effect were made in the contempt and conspiracy cases, but reformers there focused on specific abuses and on the whole seemed satisfied when they were meliorated. In 1819, however, John Milton Goodenow's Historical Sketches of the Principles and Maxims of American Jurisprudence was published. Its conclusion was unmistakeable—in a democratic republic there was no place for common law crimes, irrespective of state or national jurisdiction.

Goodenow was a practicing lawyer in Eastern Ohio. It was uncertain how he became motivated to attack the existence of common law crimes in that state. There were some indications that a personality clash between Goodenow and Judge Benjamin Tappan, who as Presiding Judge of the Ohio Fifth Judicial Circuit upheld the existence of common law crimes in that state, caused Goodenow to question any conclusion of Tappan's.[152] Nonetheless, during a period of two months when court was not in session, Goodenow wrote and published his 426 page treatise. In a masterful synthesis, Goodenow combined arguments against judicial discretion, common law uncertainty, and the inapplicability of English institutions into a theoretical argument for legislative specification of crimes.

The starting point of Goodenow's analysis was a criticism of the English criminal law. His remarks were intended to counter what he saw as a false reverence for the common law. His method, like many other critics of the Englishcommon law, was to extract a real though one-sided history of arbitrary arrest, unfair trial, and bloody punishment to characterize the English common law as antithetical to its supposed heritage of liberty.[153] Goodenow wrote that the common law of crimes:

> had its origin and received its impression and perfection even down to the time our ancestors left England, in dark, uncultivated, and bloody ages, suited to an ignorant and bloodthirsty people; under the tutilage of turbulent, haughty sacrilegious tyrants and dictators: That as a code separate from statute law, it is without

> beauty, symmetry, or even shape; undefinable and immeasurable; bloody in its maxims; inhuman in its policy; and entirely diverse and repugnant to the philosophy and Christian refinement of this country.[154]

In its place Goodenow proposed legislative specification of crimes. It is instructive to note the reasoning Goodenow used to reach this conclusion. First he made a distinction between natural laws and human laws, "which were confined to the society alone for which they were made." This reflected the Beccarian insight on the relativity of penal law—a country's criminal law should coincide with its level of liberty and form of government. From here Goodenow asserted that the new republican governments in America deserved new criminal laws. Because the "natural equality of man" was taken to be the true basis of government, and because the right to exercise power over others could rest only on their consent, "The making, expounding, and executing of laws belonged to the people themselves." American consent theories then translated the people's will into a governing practice. "The function of government which gives expression and form to the public will is the legislative." To Goodenow, only legislative declaration of the laws could be legitimate. The American understanding of strict separation of powers argued that any other result would have grave consequences. Were the legislative power to be assumed by the judiciary, the resulting "severe degree of despotism" would be "destructive of liberty." Consequently, because the criminal law of the republican state is the positive law, or "will of the people,"

only the legislature could give expression to the public will, only the judicial branch could apply the will, and only the executive branch could put the sentence of the will, when pronounced, into execution. Goodenow buttressed this argument with another that stressed that because the best scheme of government rested on a written constitution, the best means of controlling conduct within society likewise should run "in direct parallel with the principles and designs of government." Evident was Goodenow's perception that if the political powers of government were constrained by law, surely the equally important power of the government over the individual should be as well.[155] Goodenow concluded:

> ...law, as a rule of civil conduct, authorising the infliction of human punishment, must be prescribed by the supreme power, in an unequivocal style, defining the offense, directing the tribunal which shall try, and the minister who shall execute; and that no act shall be adjudged a violation of such law until the same be published in a manner rendering it practicable for the people to become acquainted therewith.[156]

Applying this analysis to Ohio, Goodenow exploited the uncertainty of common law reception in that state to argue that the reasons he raised in favor of common law abolition were not blocked by any legal or constitutional barriers. The Ordinance of 1787 creating the Northwest Territory had allowed the governor and judges of the territory to adopt such laws of the original states as were necessary. Pursuant to that authority, a law was passed in 1795 providing that the common law of England and English statutes passed after a certain date were to be rules of decision until repealed

by the legislative authority or disapproved by Congress.[157] That act was repealed by the Ohio legislature in 1816, however.[158] No reception statute replaced it and no specific rules of decision were given to the Ohio courts. The normal course of Ohio legal practice was apparently not changed by this vacuum. Consequently, when Judge Benjamin Tappan declared common law crimes to be the law of Ohio, he was reiterating what he thought to be a natural and customary situation.[159] Goodenow used the fact of legislative nonrecognition and certain broad assumptions of Tappan to raise the spectre of plenary judicial discretion and its potential for abuse.[160] Concluding his analysis, Goodenow denied the legitimacy of all judicial crimes-creating power derived from the common law and reiterated his argument that only legislatures could declare crimes.[161]

Goodenow's treatise was satisfyingly successful. In 1821, the Ohio Supreme Court, in a somewhat offhand manner, declared that there were no common law crimes in Ohio.[162] That decision was continually reaffirmed, and the abolition of common law crimes in Ohio was never challenged.[163] Later court opinions attributed to Goodenow's treatise a major role in securing abolition.[164]

Ohio's abolition of common law crimes went only part of the way towards meeting legality objections of notice, retroactivity, and arbitrariness, however. Although the residual crimes-creating power of judges was eliminated, little

was done to meet more subtle problems of judges' discretionary powers. As the history of labor conspiracy in New York indicated,[165] even after statutory declaration of crimes, the powers of judges to determine the contours of criminality were barely limited. In Ohio, as elsewhere, most crimes were specified, but the definitions of elements and defenses, as well as principles and doctrines measuring the scope of liability for crime, were accomplished through interpretation of common law precedents.[166] To the layperson, the statutory criminal law, with its vague specification of crimes, was in many cases hardly open or knowable. Arcane language and words of art characterized the definitions of crime, while common law precedent filled their lacunae.

More advanced criminal law reformers as Edward Livingston moved toward true codification of crimes as a solution to statutory vagueness and the need for judicial lawmaking in the guise of interpretation. Codification, as opposed to mere statutory specification of crimes, was the creation of a complete and systematic code for the definition and punishment of criminal offenses. In Livingston's view, an ideal code would be self-contained, requiring no reference to rules or precepts outside of its body.

Livingston reached this conclusion by a logical progression from the penal theories of earlier reformers. He began his reform efforts from the primary tenet of the Enlightenment theory of penology. Elected a Congressman from New

York in 1794, one of his first legislative acts was to propose a committee to study revision of the federal criminal laws. Livingston thought the current scheme of punishments "too sanguinary" and desired to make them milder.[167] No proposal for codification was mentioned at this time. Gradually, Livingston began to share Goodenow's and other reformers' condemnation of the English common law of crimes.[168] He also came to favor legislative supremacy and strict separation of powers. Livingston's long studies of the criminal law and the influence of Jeremy Bentham's theories on legislation led him to regard the current statutory scheme as unsatisfactory.[169] Piecemeal statutory specification of crimes was ad hoc, incomplete, unsystematic, and inconsistent.[170] Only after the institution of a code could the criminal law be made certain, knowable, and amenable to principles of liberty:

> The incongruities which have pervaded our system will disappear; every new enactment will be impressed with the character of the original body of laws, and our penal legislation will no longer be a piece of fretwork exhibting the passions of its several authors, their fears, their caprices, or the carelessness and inattention which legislatures of all ages and in every country have, at times, endangered the lives, liberties, and fortunes of the people by inconsistent provisions, cruel or disproportioned punishments, and a legislation weak and wavering, because guided by no principle, only one that was continually changing and therefore could seldom be right.[171]

The Louisiana legislature gave Livingston an opportunity to put his ideas into practical form when in 1821 it appointed him to draft a criminal code for that state. The legislature

desired to correct the prevailing confusion of its mixed French, Spanish, and English laws. Livingston's first step was to consolidate all of the criminal law into one body of materials. This seemed a simple step, but in many states, no comparable consolidation had been accomplished. More importantly, Livingston integrated the criminal law materials into a systematic whole. A preamble and principles of construction began the code. Rules regulating principals, accomplices, and accessories were set out, to control all prosecutions under the code. Of the specific crimes, elements, defenses, and rules regulating the scope of criminal liability were particularly stated. In addition, a volume of definitions was appended. The code was on the whole a systematization of the common law of crimes and to that extent was hardly radical. In numerous areas, Livingston went further and made substantial changes in the common law to fit his view of American conditions. Some changes were technical, such as his modification in the scope of accessorial liability.[172] Others were more political, such as Livingston's crime of interfering with the liberty of the press.[173] Livingston's scheme of punishments was also a break from the common law. His code abolished the death penalty and instituted the penitentiary system.[174]

The penal code was thorough and complete. Being a realist, however, Livingston realized the imprecision of statutory language and the impracticability of controlling

all human conduct within the confines of a code. It was his means for providing the code with a capacity for growth and change which resulted in the code's greatest departure from the common law. Livingston held an extremely narrow view of the judicial function. He was afraid that judicial interpretation would destroy a code. Consequently, while a code "must provide for its own progress towards perfection;... it provides for its own corruption and final destruction if it admits judicial decision, unsanctioned by law, to eke out its deficient parts, to explain what is doubtful, or to retrench what may be thought bad."[175] Judicial expansion of crime was particularly to be feared. Livingston believed that "the first constructive extension of a penal statute beyond its letter, is an ex post facto law, as regards to the offense to which it is applied."[176] Accordingly, Livingston followed a policy of strictly limiting judges' powers of crimes creation and construction. His code flatly forbade the judiciary any power to create crimes:

> The legislature alone has the right to declare what shall constitute an offence; therefore it is forbidden to punish any acts or omissions, not expressly prohibited, under pretence that they offend against morality, or any other rule, except written law.[177]

By changing then prevailing rules of statutory construction, Livingston further subordinated the judiciary to the legislature. Judges were directed that, "All penal laws whatever are to be construed according to the plain import of their words, taken in their usual sense, in connexion with the

context, and with reference to the matter of which they treat."[178] This rule of construction contrasted with the contemporary rule that penal statutes were to be strictly construed. Nineteenth century strict construction rules were a particularly two-edged tool in advancing judicial discretion.[179] The "plain-import" rule of Livingston's was designed to end judicial ability to make their own interpretations of penal statutes contrary to legislative intent, no matter how favorable to criminal defendants.[180] The legality role of strict construction was performed in Livingston's code by a provision prohibiting creation of crimes by analogy. That provision stated, "Courts are expressly prohibited from punishing any acts or omissions which are not forbidden by the plain import of the words of the law under the pretense that they are within its spirit."[181] Because constructive offenses were prohibited, the judges were to report periodically to the legislature on the existence of any acts which should be punished. In this manner the code could be modified to meet unforseen criminal acts. In no case were interpretations to be applied retroactively. Any doubt in the application of a law was to result in the acquittal of the accused. Society's interest in crime control was to be met by prospective legislative declaration of crime. The legislature, guided by the reports of the judges, could decide whether to apply a statute to acts of future offenders, or could specifically remedy the code's lacunae.[182]

Livingston's draft of his code was published in 1823. It was immediately praised for its learning and systematization.[183] The most flattering tribute to his efforts was not paid, however. The code was never adopted in Louisiana.[184] His similar code drafted for the United States likewise failed of adoption.[185]

IV.

THE FAILURE OF CODIFICATION AND COMMON LAW ABOLITION

The failure of Livingston's codes marked the crest of the post-Revolution criminal law reform movement. After 1830 there were few successful efforts to eliminate arbitrariness and uncertainty problems of American criminal law. For over thirty years, Ohio was the only state to have abolished common law crimes. Although limited to misdemeanors, the residuary crimes-creating power of the common law was used frequently during this period. Large-scale judicial discretion continued, and the English common law precedents remained available to the industrious prosecutor and willing judge. By the middle of the nineteenth century, in the words of one contemporary commentator, "a judicial criminal code" had been created.[186]

Why abolition of common law crimes and codification did not become widespread is a perplexing problem. Compelling arguments based on accepted American political ideology

argued against the continuing existence of potentially arbitrary judicial power over individual liberty. The movements against constructive contempt, labor conspiracy, and federal common law crimes indicated that these arguments could be translated into political action. Yet the final step towards establishing a complete legislative system of criminal law was not taken. Part of the reason might be explained by the difficulty of legislative reform. Except when the criminal law affected persons whose legitimate interests were perceived to be threatened by criminalization—the cases of labor unions and Jeffersonian Republicans were examples, reformers found it difficult to mobilize the necessary legislative consensus behind their reforms. This was particularly true over an abstract issue such as the operation of legality principles within the criminal law. Those who violated the law had little power; those who did not had little concern for criminals' objections to the inequities of the system. On the whole legislators of the nineteenth century, after the first flush of government-making, were too preoccupied with other concerns to consider abstract and subtle issues of the criminal law.[187]

While suggestive, this analysis ignores the opposition to reform and the widespread professional approval of the common law. Existing contemporaneously with reform efforts, and especially noticeable after 1820, was the extolling of the common law's virtues by members of the American legal profession.[188] Along with this came an assertion of the

common law as the best possible legal system for the United States. Common law defenders' perceptions of reformers' attacks on the common law also explained the nature and succes of this defense. Criminal codification and the abolition of common law crimes seemed to be linked with a wholesale rejection of the common law system, even as applied to private law. It was here that limitation of judicial discretion was viewed as a radical and unwarranted change. During the first half of the nineteenth century, judges used creative applications of common law rules to self-consciously advance economic development.[189] Along with the acceptance of this judicial policy-making came an increase in the exercise of constitutionally-based judicial review of legislation.[190] The same judges who made economic policy determinations and judged the validity of legislation were also the arbiters of criminal law in their respective jurisdictions. Added to their understandable reluctance to allow limitation of their discretion was a justifiable realization that the processes of judging were not mechanical, and that legislative rules, however detailed, necessarily required judicial interpretation. James Kent, commenting on Livingston's Louisiana penal code, wrote, "Why not leave a thousand of these little forms to the discretion of the judge, to be used or not used as the occasion requires. I humbly think this legislation here descends too far into petty detail."[191] Making more precise the grounds of his objection, Kent stated, "Say what you will against a favorable or unfavorable

construction of penal laws, judges will construe laws according to the intent and the equity of the case."[192]

Kent's comment made clear an American ambiguity about written law which went a long way towards vitiating the legislative supremacy arguments of the criminal law reformers. Legislative enactment seemed incapable of providing remedies for all of the problems of an increasingly complex society. Legislation was seen as static; the common law was evolutionary. At the same time legislative law-making came more under question. Conservatives had always looked for a check on legislative majorities, but by the third decade of the nineteenth century, the desire to check legislatures had become widespread.[193] Yet the modern conception of statute law, resting on the consent of the governed, was too deeply ingrained to allow a bald assertion of the judicial discretion necessary to declare the law. The conundrum was solved by an assertion that the common law had been Americanized to fit conditions in the new world, and as modified, the common law expressed unwritten customs and regulations which had the "sanction of universal consent and adoption in practice." These customs and regulations thus had the force of law and were obligatory.[194]

The defenders of the common law established its Americanization by pointing to the provisions of various states' reception articles which accepted the common law of England except for those laws repugnant to their constitutions or governing principles.[195] Reacting to counsel's argument

that the common law had no force in Massachusetts, Chief Justice Francis Dana stated that the common law was cherishable "as our birthright and best inheritance." "So sensible were the citizens of the United States of the truth of this observation," he continued, "that, when forming their constitutions, the carefully...secured its operation, so far as local conditions admitted."[196] Judge Benjamin Tappan, the Ohio foe of John Goodenow, expressed similar sentiments in his opinion declaring the existence of common law crimes in Ohio:

> But although the common law, in all countries, has its foundation in reason and laws of nature, and therefore is similar in general principles, in its application it has been modified and adapted to various forms of government....It is also a law of liberty; and hence we find, that when North America was colonized by emigrants who fled from the pressure of monarchy and priestcraft in the old world, to enjoy freedom in the new, they brought with them the common law of England...claiming it as their birthright and inheritance....When the revolution commenced and independent state governments were formed; in the midst of hostile collisions with mother country, when the passions of men were inflamed, and a deep and general abhorrence of the British government was felt; the sages and patriots who commenced the revolution and founded those state governments, recognized in the common law a guardian of liberty and social order. The common law of England has thus always been the common law of the colonies and states of North America; not indeed in its full extent, supporting a monarchy, hierarchy, and aristocracy, but so far as it was applicable to our more free and happy habits of government.[197]

For the defenders of the common law, the uncertainty of reception thus proved manipulable enough to urge an undefined body of precepts which had become Americanized.

Common law defenders also pointed out how the common law provided Americans with some of their most treasured liberties. Trial by jury, habeas corpus, and protection against self-incrimination, as well as illegal searches and seizures, were all emphasized as being of common law origin.[198] A Massachusetts moderate, defending the common law against attack, wrote, "The body of the English common law ... (is) ...the only body for right and liberty that ever had an intelligent soul to inform it...and we hope for liberty's sake (it is) immeasurably established in the states."[199] James Kent believed that according to this heritage:

> the common law may be cultivated as part of the jurisdiction of the United States. In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of expanded commerce, of enlightened justice, of republican principles, and of sound philosophy, the common law has become a code of matured ethics, and enlarged social wisdom, admirably suited to promote and secure the freedom and happiness of social life. It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty.[200]

As against those who would abolish the common law without putting anything in its place, conservators of that system pointed out its necessity for filling the content of crimes and criminal procedure. Lemuel Shaw, in upholding a conviction for malicious libel, stressed that the unwritten law was the basis of criminal jurisprudence. "Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system," he wrote.[201] He noted how the

statutes declared that murder and manslaughter shall be punishable, "but what acts shall constitute murder, what manslaughter, or what excuseable homicide are left to be decided by rules and principles of the common law." This was of course what Livingston and the codifiers intended to rememdy, but to Shaw, there was no doubt that judges, "the depositories of the law, the living oracles," were to fill out statutory outlines.[202] Joseph Story expanded Shaw's analysis to maintain that the United States Constitution was incomprehensible without reference to the common law. He argued, "The constitution and laws of the United States are predicated upon the existence of the common law." The mode of conducting trial by jury depended on the common law, as did other precious constitutional rights. "What is the writ of Habeas Corpus? What is the privilege which it grants? The common law, and that alone, furnishes the true answer."[203]

Legislation was viewed as only supplementing the common law, although it was sometimes necessary to Americanize the common law, which remained the bedrock of the American legal system. The moderate Republicans of Pennsylvania, led by Alexander James Dallas and Thomas McKean, stressed this circumstance in an address to the people of Pennsylvania. The address was intended to combat the anti-common law diatribes of William Duane and Jesse Higgins. It began by stating that the common law of Pennsylvania was the common law of England, "as stripped of its feudal trappings,"

modified by the General Assembly, and "purified by the principles of the constitution." The address made clear that it was the common law, not the Acts of Assembly:

> that assures title and possession of your farms and your horses, and protects your persons, your liberty, your reputation from violence; that defines and punishes offences; that regulates trial by jury; and (in a word comprehending all its attributes) that gives efficacy to the fundamental principles of the constitution.[204]

Most important in the opposition to criminal law reform was the perceived inability of codes to include definitions and punishments for all crimes. Judges, prosecutors, and common law defenders urged the need for an expansive, instrumental use of the criminal law to insure society's protection from crime. Nothing could have been more of an attack on the major presuppositions of the criminal law reformers. The instrumental view held judicial discretion, based on broad principles of morality or religion, necessary and advisable. Its focus was on the needs of the state rather than on protection of the individual. James Kent raised this view in a letter to Livingston. "I believe I have hitherto declared war against the annihilation of all constructive offenses," he wrote. Kent believed that it was "impossible to define expressly and literally every offense that ought to be punished." Consequently, the problem was when government punished no crimes except those declared by written law, "a great deal of fraud and villainy, and abuse and offence will escape unpunished." To guard against this possibility, Kent would have given judges the power to

declare discretionary offenses. "The laws of nature, of religion, of morality, which are written in the heart of every son and daughter of Adam," provided the standard of criminality.[205]

Kent was hardly alone in holding these principles. Judge Benjamin Tappan declared, "...the maxim, the safety of the people is the supreme law, needs not the sanction of a constitution or statute to give it validity and force; but it cannot have validity and force, as law, unless the judicial has powers to punish all such actions as directly tend to jeopardize that safety." Tappan lauded the ability of an expansive common law to protect these interests. He wrote, "It is the salutary power of the common law, which spreads its shield over society, to protect it from the incessant activity and novel invention of the profligate and unprincipled, inventions which the most perfect legislation could not always see and guard against."[206] Judge Robert McKinney of the Tennessee Supreme Court noted how historically, the "liberal, enlightened, and expansive principles of the common law" had been adopted and applied to new cases for which there were no precedents. "And this must continue to be so," he continued, "unless a stop be put to all further progress of society; and unless a stop be also put to the further workings of depraved human nature in seeking out new inventions to evade the law."[207] Numerous other courts, urged by prosecuting attorneys that they were the custos morum, followed similar reasoning in punishing acts which offended their notions of morality.[208]

This expansive view of the criminal law was in direct opposition to criminal law reformers' desires that the prosecutorial arm of the state be limited by precise rules. It also confronted headfirst the philosophical basis which undergirded the reformers' view of the criminal law. The rough sense of justice evinced in the writings of the common law's defenders presupposed a retributive view of punishment, as opposed to the deterrent view held by reformers.[209] Knowable and certain penal laws would not be necessary if one viewed punishment not as a deterrent, but as a retribution for some moral wrongdoing. In that sense it would follow that judges should be given some residual power to carry out a role of custos morum.[210] Carried to an extreme degree, the retributive view would allow community action to punish crime whenever it was felt that laws did not satisfactorily protect society, or when they too satisfactorily protected the criminal. Vigilanteism and lynch-rope justice surfaced occasionally during the first half of the nineteenth century.[211] While those activites would have horrified Chancellor Kent, they were only removed from his theory of the criminal law by a matter of degree.

Although the view of punishment held by the reformers may have lost some currency as the nineteenth century progressed, their views on the proper allocation of power were not wholly muted, despite the defeat of the common law abolition movement. Residual common law powers of judges to declare crimes in fact became less important as the century

progressed. By a process of legislative accretion, most crimes, even those previously punished as common law misdemeanors, received legislative recognition.[212] This did not render the fact of judicial discretion any less important. Crimes-declaring powers were often given to judges by broad provisions of catch-all criminal statutes.[213] Also, as noted above, the failure of codification left to judges a large discretion to declare the contours of the criminal law.

Criminal law reform ideals also persisted, although their effect was slight. Following the recommendation of a committee report written by Joseph Story, a proposed Massachusetts criminal code was drafted in 1842. As was the case with other codification efforts, the work took longer than expected and a reconstituted Massachusetts Assembly lost interest.[214] More successful was the Field Penal Code in New York. Completed in 1865, the code was finally enacted in 1881. It bore little resemblance to Livingston's code, however, as it was only a restatement and reenactment of existing law.[215] Moreover, although the draft version of 1865 would have abolished common law crimes in New York, the code as enacted had no such provision. Field's code had much influence in the western states, and there reformers gained partial victories against the common law of crimes. Both California and Montana adopted versions of the Field Penal Code in 1873 and 1895, respectively. Those codes contained most of the defects of the original; crimes

undeclared by statute were abolished, however. Other states had preceeded California and Montana in abolishing non-statutory crimes, either by court decision or legislative declaration. Indiana's legislature abolished non-statutory crimes in 1852. The Texas, Oregon, and Nebraska legislatures followed within two decades.[216] Louisiana and Iowa abolished non-statutory crimes through court decisions.[217] The Iowa decision recognized the necessaity to refer to common law precepts in all criminal adjudications, but refused to accept a common law jurisdiction because not given one by "the supreme law-making power of this state." That recognition was tempered later in the opinion, however. The court advanced a rationale which showed the progression of the statutory declaration of crimes by mid-century. The court reasoned that it was not necessary to assume a common law jurisdiction because "...the statute offenses so nearly cover all the common law offenses, that it is reasonable to infer that those which were omitted were intended to be excluded."[218]

Reformers' legality concerns were not wholly submerged either. Legality principles were advanced by the judiciary through canons of statutory construction. While in some sense the canons advanced principles of non-retroactivity and fair notice, they were particularly susceptible to discretionary use. Also, it was possible for a judge, using strict construction principles, to override a legislative policy judgment and negate the operation of a criminal statute.

Thus the nineteenth century saw the anomaly of legislatures enacting liberal construction statutes to apply to certain laws.[219]

Originally developed in England as a response to that country's imposition of capital punishment for hundreds of offenses, the strict construction rule there became "a veritable conspiracy for administrative nullification of the death penalty."[220] Because of the limitation of capital punishment in the United States, the original justification for the doctrine no longer applied. Strict construction remained as a judicial check on the criminal law, however. In one sense the American doctrine served legality purposes by requiring a clear legislative declaration of criminality. Chief Justice John Marshall's opinion in United States v. Wiltberger best exemplified this use.[221] The case involved an attempt by federal prosecutors to apply the United States Crimes Act to a homicide occurring on board an anchored ship. The act's terms applied only to manslaughter which took place on the "high seas." In refusing to extend that statutory language, Marshall said that the rule of strict construction was as old as construction itself. "...founded on the tenderness of the law for the rights of individuals," the principle rested also on separation of powers grounds. "It is the legislature, not the Court, which is to define a crime and ordain punishments," wrote Marshall. "It would be dangerous indeed to carry the principle, that a case within

the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because of equal atrocity or of kindred character, with those which are enumerated."[222] In another sense, strict construction was applied formalistically in narrowly technical interpretations of statutory language. In one case, the defendant cut off small paper strips from seven circulating bank bills and pasted them together to form an eighth. Convicted before he attempted to pass the altered bill, he was freed on appeal when the court ruled that the statute only applied to altering bills in an attempt to increase their value.[223] In a similar exercise of artifical technicality, an Indiana court refused to enforce one section of a liquor regulation because the legislature inadvertently omitted a penalty for the section's violation.[224] Legislatures reacted to this percevied judicial usurpation. Although it was not certain whether they had crime control or legislative superiority ends in mind, some legislatures passed acts abrogating the strict construction rule. In its place they ordered liberal construction.[225] Despite their existence, judges often ignored these statutes and used their own discretion when construing statutes, developing new rules to meet particular circumstances.[226] By mid-century, the strict construction rule, where it remained in effect, was encumbered by numerous qualifications and corallaries.[227] Commentators continued to assert its vitality as a control of judicial discretion,[228]

but in fact it operated to increase judicial freedom of action.[229] This kind of roving commission for the supervision of the criminal law, unrestricted by any principle or rule, was far from being the strict limitation on governmental action which earlier nineteenth century reformers had demanded.

Few further improvements were made in the substantive criminal law during the remainder of the nineteenth century. The common law remained the paramount determinant of the criminal law. Legislative attempts to redefine old crimes were often negated by judicial interpretation of their language as being merely declaratory of common law offenses.[230] Reforms such as parole and probation were instituted, but they had no effect on the definition of crime and were superimposed on the body of the common law. The United States thus entered the twentieth century without a coherent or rational articulation of the criminal law.[231] In 1923, with the establishment of the American Law Institute, reform of the criminal law once again had a constituency. Unlike the Institute's efforts in private law areas, it was early realized that restatement of the existing criminal law would be as difficult as it was vacuous. Instead an equally difficult, although more valuable undertaking, was proposed. American criminal law was to be distilled into a model code, much in the manner that Edward Livingston had proposed one hundred years previously. The necessary funds were not

secured until 1950, and the code was not completed until 1962. A new legislative interest in reform, operating coextensively with the rise of due process controls in criminal procedure, ensured practical success for the code. As of this writing, some thirty states have enacted laws based on the Model Penal Code. A number of jurisdictions have revisions pending.

V.

CONCLUSION

Of the links between legality concerns motivating early objections to the common law and later aims of the criminal codification movement, one shared assumption stands out. The post-Revolution reformers concerned themselves with the unfettered resevoir of power granted to the adminstrators of the criminal law by the common law of crimes. This was a constant which ran through the objections to common law crimes, labor conspiracy, and constructive contempt. Likewise modern codifiers aimed to replace an arrogation by criminal law administrators of discretion that was unconferred and undefined by law.[232] In all cases, it was believed that principles, or rules of law were needed to limit or guide the use of discretion. Codification efforts in the twentieth century were colored by a realization that discretion was inevitable in any workable body of criminal law, however. Contrary to the assumptions of Edward Livingston, the Model Penal Code's authors realized that a large discretion had

to be conferred in judges and other administrators of the criminal law.[233] Nonetheless, except for the role of the judiciary, the theoretical aims of Edward Livingston were largely carried out by the twentieth century criminal law codifications. In those states which enacted versions of the Model Penal Code, the criminal law was systematized and rationalized. General principles of culpability were designed to be applied to all offenses, and the elements, defenses, and scope of liability for criminal acts were set out in the codes. The new criminal codes also codified Nullum Crimen Sine Lege, eliminating any residual common law offenses.[234]

The twentieth century also saw a change in the judiciary's role with respect to enforcement of legality principles. Post-Revolution reformers saw the judiciary solely as a threat to liberty and sought to circumscribe completely any judicial discretion. Twentieth century jurisprudence acknowledged and accpeted judicial discretion in determining the application of the law.[235] The modern judiciary has also carved itself a role as the guardian of individual liberties. Nonetheless, modern judicial applications of the principle of legality have not operated to rigidly demark a line between permissible certainty and impermissible ambiguity in the criminal law's application to individual conduct. Instead, accepting the role foreshadowed by Lemuel Shaw in Commonwealth v. Hunt, they have operated to balance the liberty interest of the individual and the crime control

needs of society.[236] Now, as in the past, this aspect of the principle of legality has received its most important application when individual liberty interests have been illegitimately threatened by the application of the criminal law. In this sense, American legality principles are as old and as important as the American notion of individual liberty itself.

NOTES

[1] 1 William Holdsworth, History of English Law 619-20 (7th ed. 1956); 2 Fitzjames Stephen, History of English Criminal Law 396f (1883).

[2] 1 William Russell, Treatise on Crimes and Indictable Misdemeanors 43-44(Metcalf 2d ed. 1831).

[3] See 3 Stephen, supra note 1, at 275-82.

[4] See, e.g., "An Act for the Advancement of Justice and More Certain Administration Thereof," (Pa. 1718) in 3 Statutes at Large of Pennsylvania 199 (1896).

[5] Herbert Wechsler, "The Model Penal Code and the Codification of American Criminal Law," in Crime, Criminology and Public Policy: Essays in Honor of Sir Leon Radzinowicz 419 (Hood ed. 1974).

[6] Jerome Hall, General Principles of the Criminal Law 27-8 (2d. ed. 1960).

[7] The Ex Post Facto Clauses, Art. I, §9 and Art. I, §10 of the United States Constitution, as well as the Bill of Rights, Amendments 1-8, can be seen as an example of this principle in constitutional form.

[8] J. Hall, supra note 6, at 27.

[9] Analogical creation of new crimes has not been a problem in American criminal law, primarily because criminal law in this country has not, until recently, been codified. See "Note, The Use of Analogy in Criminal Law," 47 Col. L. Rev. 613 (1947). Of course, an expansive interpretation of a criminal statute is similar to reasoning by analogy. The most famous example of a code provision which allowed the imposition of criminal sanctions by analogy was the Nazi Germany Penal Code of 1933. Art. 2 of that Code stated:

> Punishment will be inflicted on the person who commits an act considered by the law as punishable, or an act which deserves a penalty, according to the fundamental idea of penal law, and to the sound sense of the nation. If no determinate penal law can be applied directly to such an act, its author will be punished according to that law, the fundamental idea of which most clearly corresponds to the said act.

Quoted in Stefan Glaser, "Nullum Crimen Sine Lege," 24 J. Comp. Leg. and Int. Law 32-33 (3rd ser. 1942). The Hague Court of International Justice declared the above German provision inapplicable to the Free City of Danzig because the provision violated fundamental ideas of penal law. See Hague: Permanent Court of International Justice, Advisory Opinion on Consistency of Certain Danzig Legislative Degrees with the Constitution of the Free City. Series A./B. #65 (12/4/35).

[10]A classic example is conspiracy, which has been described as being so vague that it almost defines definition. See "Extended Note on Background and Criticism of Present Conspiracy Law," in 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 387 (1970). See also Francis Sayre, "Criminal Conspiracy," 35 Harv. L. Rev. 393 (1922). Illustrative is Tit. 18 U.S.C. §371(1970), the major conspiracy section of the federal criminal law. The law imposes punishment for the following activities:

> If two or more persons conspire to commit any offense against the United States, or to defraud the government of the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy...

The major legality problem here is with the prohibition of any conspiracy to "defraud the United States...in any manner or for any purpose...." This offense, "every bit as shadowy as common law conspiracy" is imprecise enough that an authority on its operation, with only slight hyperbole, calls it a "Kafkaesque crime." See Abraham Goldstein, "Conspiracy to Defraud the United States," 68 Yale L. J. 405, 463 (1959). The history of decisions under this provision of the statute demonstrates the introduction of an "evolutionary conception of the law of crimes clearly at odds with the old saw that there are no judge-made 'common law offenses against the United States.'" See Id. at 424. For this and other reasons conspiracy is called the prosecutor's darling. See Klein, "Conspiracy, The Prosecutor's Darling," 24 Brooklyn L. Rev. 1 (1967). Furthermore, the case of conspiracy indicates that satisfaction of the principle of legality is not automatically reached when criminal law becomes statutory. Aside from almost designedly overinclusive crimes such as conspiracy, legality considerations also operate in other areas of the sibstantive law of statutory crimes. Designing the contours of criminality is a complex undertaking, and addressed to the legislature, the principle of legality offers standards by which to achieve precision and overcome vagueness objections, It counsels that despite the inherent imprecision of language, criminal statutes must be drawn to be specific and certain in application.

[11]Ross v, Oregon, 227 U.S. 150 (1913). Retroactive judicial interpretation may run afoul of the Due Process Clause in the Fourteenth Amendment. See Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). But see United States v. Hamlin, 418 U.S. 115-6(1973); Ginzberg v. United States, 383 U.S. 403 (1966).

[12]See Marshall, J., in United States v. Wiltberger, 18 U.S.(5 Wheat.) 76, 95 (1820).

[13]See, e.g., United States v. Corbett, 215 U.S. 233 (1909)(Comptroller of the United States, although he did not directly examine records of individual banks, was deemed to be an "agent" for purposes of a statute prohibiting the making of false reports to "an agent appointed to examine the affairs of (a) ...bank."). See also how strict constructionprinciples were not sufficient to defeat the broadening of criminal liability in the case of a statute prohibiting a conspiracy to defraud the United States. See Goldstein, supra note 10, at 419-28. Compare also McBoyle v. United States, 283 U.S. 25 (1930) (per Holmes, J., airplane not "any other vehicle not designed for running on rails" for purposes of National Motor Vehicle Theft Act), certainly one of the most quoted of struct construction cases, with Cleveland v. United States, where the Mann Act received a construction latitudinarian enough to include transportation of a woman as part of the practice of polygamy within its prohibition.

[14]See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) which struck down a vagrancy ordinance because, inter alia, "It fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." The requirement was similarly stated in United States v. Hariss, 347 U.S. 612, 617 (1954). "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contenplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." See also Conally v. General Construction Co., 264 U.S. 385, 391 (1925); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[15]The most important qualification of the doctrine reflects the inherent imprecision of language and the difficulty of fashioning a criminal statute precise enough to give notice of criminality while at the same time being inclusive enough to prohibit conduct which society has deemed harmful. The Supreme Court recognized this problem in Nash v. United States, 229 U.S. 373 (1913). There Justice Holmes, for the majority, refused to strike down a Sherman Act prosecution for conspiracy in restraint of trade. Said Justice Holmes, "...the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree... the criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." 229 U.S. at 377. See also Winters v. United States, 333 U.S. 507 (1948)(Frankfurter, J., dissenting). Corallaries to the Nash doctrine are those recognizing that a well-settled common law definition

will cure vagueness problems in a statute. Connally v. General Construction Co., 269 U.S. 385, 391 (1925), as will statutes employing words or phrases having a technical or special meaning well enough known to enable those within their reach to understand them. See, e.g., Omechevarria v. Idaho, 246 U.S. 343, 348 (1917)(Idaho law prohibiting grazing of sheep on "range previously occupied by cattle;" held that "men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it.") See also Screws v. United States, 325 U.S. 91, 101-2 (1945), where it was stated that "...the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." Accord, Boyce Motor Lines v. United States, 342 U.S. 337 (1952).

[16]See Anthony Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67, 73-4 (1960). For the purpose of developing a consistent fair notice principle, Amsterdam characterizes the void for vagueness cases of the Supreme Court as having "an almost habitual lack of informing reasoning" and "singularly unilluminating." Id., at 70-1. It may be that the fair notice aspect of the principle of legality is, of itself, logically unintelligible. Cf. Herbert Packer, The Limits of the Criminal Sanction 79-85 (1968); Note: "Vagueness Doctrine in the Federal Courts," 26 Stan. L. Rev. 855 (1974). This is especially true in such cases as McBoyle v. United States, note 13, supra, where notice or lack thereof depends on making technical distinctions of language. Paul Weidenbaum, "Liberal Thought and Undefined Crimes," 19 J. Comp. Leg. and Int. Law 90, 95 (3rd. ser. 1949), is certainly correct when he states, "Here the wrongdoer knows that his act has, if detected, evil consequences. Unless he is a learned member of the profession he has no idea how far and why his acts are to be distinguished from any other theft, fraud, or cheating."

[17]See Bouie v. City of Columbia, 378 U.S. 347, 352-4 (1964), where it was said "...an unforseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law....If a state legislature is barred by the Ex Post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." But cf. note 11, supra.

[18]"...(I)t seems a coincidence of some moment that the device of invalidating a statute for vagueness should develop on a federal level concurrently with the growth of substantive due process." Note, "Void for Vagueness: An Escape from Statutory Interpretation," 23 Ind. L. Rev. 272 (1948).

The early cases decided under the void for vagueness doctrine were almost invariably cases of economic regulation; later cases primarily involved First Amendment freedoms. See Id. at 277-8; Amsterdam, supra note 16, at 67, 78-9.

[19]See, e.g., Coates v. City of Cincinnatti, 402 U.S. 611, 614 (1971)(assembly); Thornhill v. Alabama, 310 U.S. 88, 97-8(1940)(peaceful picketing); Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1969)(parading).

[20]Papachristou v. City of Jacksonville, 405 U.S. 156, 168-9 (1972); Grayned v. City of Rockford, 408 U.S. 108-9 (1972). Justice Felix Frankfurter, dissenting in Winters v. New York, 333 U.S. 507, 540 (1945), characterized the vices inherent in broadly drawn vagrancy statutes:

> These statutes are in a class by themselves, in view of the familiar abuses to which they are put. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense. In short these "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statutes or by the subject matter so as to give notice of the conduct to be avoided.

See also Packer, supra note 16, at 88f.

[21]Amsterdam, supra note 16, at 81.

[22]In a sense, these contrary pulls on the principle of legality reflect a broader tension in the American criminal justice system. Cf. Herbert Packer, "Two Models of the Criminal Process," 113 U. Pa. L. Rev. 1 (1964).

[23]Musser v. Utah, 333 U.S. 95 (1948), where the Supreme Court remanded a conviction without reaching the merits, may be regarded as a disapproval of wide-open common law of crimes powers, but at the same time an expression of an unwillingness on the Court to face the issue directly. At issue was a conspiracy statute which proscribed, inter alia, a conspiracy to "commit any act injurious to the public health, to public morals, or to trade and commerce, or for the perversion of justice or the due administration of the laws. Justice Robert Jackson, while refusing to interpret the statute, stated, "Standing by itself it would seem to be a warrant for conviction for agreement to do almost any act which a judge or jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice, or order." 333 U.S. at 97. On remand, the Utah Supreme Court reversed the conviction on vagueness grounds. State v, Musser, 118 Ut. 537, 223 P.2d 193 (1950). For an example of a legality decision by a state supreme court applying federal constitutional

principles of notice, retroactivity, and arbitrariness, see Keeler v. Superior Court, 2 Cal.3d 619, 470 P.2d 617 (1970) (feticide not punishable under California homicide statutes). The constitutionality of common law crimes is largely irrelevant now. The current trend, represented by the American Law Institute's Model Penal Code, is toward legislative abolition of common law crimes. See text to notes 233-34, infra.

[24]Leon Radzinowicz, Ideology and Crime (1966), esp. ch. 1.

[25]A general description of criminal law under the old regime is given in Carl Ludwig Von Bar, A History of Continental Criminal Law 315 (1916). "Punishments are unequal; they vary according to the status or rank of the offenders rather than the nature of the crime. Punishments are also cruel and barbarous in their method— the base of the system is the death penalty, and a prodigal use of bodily mutiliations. Furthermore, punishments are variable in discretion; crimes are loosely defined, and the individual has no security against excess of severity in the State's repression of crime. Finally, ignorance, prejudice, and emotional violance bred imaginary crimes; and the scope of penal law extends beyond the regulation of social relations and trespasses even upon the domain of conscience." See also Radzinowicz, supra note 24, at 13-14.

[26]See Radzinowicz, Id.

[27]Indeed England was seen as setting an example for the Continent to follow. Marcello Maestro, Cesare Beccaria and the Origins of Penal Reform 136-7 (1973);Radzinowicz, supra note 24, at 18.

[28]Montesquieu, Spirit of the Laws 75 (Nugent ed. 1949); For Voltaire see Marcello Maestro, Voltaire and Beccaria as Reformers of the Criminal Law 49 (1942).

[29]Cesare Beccaria, Essay on Crimes and Punishments 19 , 21 (1872 ed.).

[30]Radzinowicz, supra note 24, at 9.

[31]Beccaria, supra note 29, at 26.

[32]Radzinowicz,supra note 24, esp. ch. 1.

[33]Id.,at 14. Beccaria would have eliminated the death Penalty entirely. See Beccaria, supra note 29, at 97f.

[34]Quoted in Stefan Glaser, "Nullum Crimen Sine Lege," 24 J. Comp. Leg. and Int. Law 29 (3rd. ser. 1942).

[35]Quoted in Id., at 30.

[36]William Bradford, "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania," 3 (1793), in Reform of the Criminal Law on Pennsylvania: Selected Inquiries, 1787-1819 (1972). For other evidence of the influence of Beccaria and Montesquieu on post-Revolution American criminal law see 2 James Wilson, Works(Anderson ed. 1896); Nathaniel Chipman, A Treatise on Free Institutions 214 (1833, repr. 1970); (Benjamin Rush), "An Enquiry into the Effects of Public Punishment Upon Criminals and Upon Society," 13 (1787), in Reform of the Criminal Law in Pennsylvania:Selected Inquiries, 1787-1819 (1972).

[37]Bradford, supra note 34, at 20; Montesquieu, The Spirit of the Laws, Book V, ch. 9, quoted in Id.

[38]For early Pennsylvania efforts to limit capital punishment, and for a general treatment of the movement in the United States, see Edwin R. Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," 97 U. Pa. L. Rev. 759 (1949); David B. Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," 63 Am. Hist. Rev. 23 (1957).

[39]Edward Livingston was a prominent example. See his "Introductory Report to the Code of Crimes and Punishments," in 1 Complete Works of Edward Livingston on Criminal Jurisprudence 197f (1873).

[40]See, e.g., John Milton Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence in Contrast with the Doctrines of the English Common Law on the Subject of Crimes and Punishments 398-401 (1819-repr. 1972).

[41]See Morton Horwitz, The Transformation of American Law 9, 14 (1977).

[42]See Bernard Bailyn, The Ideological Origins of the American Revolution 27 (1967).

[43]"Liberty" in the sense I use it, "...was the capacity to exercise 'natural rights' within limits set not by the mere will or desire of men in power but by non-arbitrary law..." See Bailyn, Id., at 77.

[44]William E. Nelson, The Americanization of the Common Law 89 (1975).

[45]William E. Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era," 42 N.Y.U.L. Rev. 450, 472 (1967).

[46] Id. See also Pennsylvania v. Gillespie, Add. Rpts. 267 (Pa. 1795) (prosecution for "forcibly and contemptuously tearing down" an advertisement for the sale of lands for arrears of county taxes.); Pennsylvania v. Morrison et. al., Add. Rpts. 274 (Pa. 1795)(prosecution for "raising a liberty pole...in opposition to the government.").

[47] Nelson, "Emerging Notions of Modern Criminal Law," supra note 43, at 473. See also Id. at 458-61. As an outcome of the events noted in the text, Nelson found a libertarian response manifested by a new concern for procedural rights of criminal defendants. See Id., at 478-9.

[48] See Gordon Wood, The Creation of the American Republic 383-389 (1969).

[49] Id., at 181-88; Nelson, Americanization of the Common Law, supra note 42, at 90; Horwitz, supra note 39, at 17.

[50] Maxwell Bloomfield, American Lawyers in a Changing Society: 1776-1876 (1976), esp. ch. 2; Charles Warren, A History of the American Bar (1911), esp. ch. x; 2 Anton-Hermann Chroust, The Rise of the Legal Profession in America (1965), esp. ch. 1.

[51] Bloomfield, Id., at 43.

[52] Richard Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 4 (1971).

[53] Id., chapters 1-14; William Duane, Aurora(Philadelphia) February 12, 1802.

[54] See Bayard et. al. v. Passmore, 3 Yeates 438 (Pa. 1802); Respublica v. Passmore, Id., at 440 (Pa. 1802).

[55] See Ellis, supra note 49, esp. ch. 11.

[56] Id., at 170.

[57] 1 Dall. 319 (Pa. 1788).

[58] See Walter Nelles and Carol King, "Contempt by Publication in the United States," 28 Col. L. Rev. 401, 408-12 (1928).

[59] Hollingsworth v. Duane, Wall C.C. Rptr. 77 (E.D. Pa. 1801).

[60] Aurora, March 31, 1803.

[61] Id., January 30, 1805.

[62]Thomas Paine, 2 Writings 1005-6 (Foner ed. 1945).

[63]1808-09 Pennsylvania Acts, c.78, p. 146.

[64]See Nelles and King, supra note 58, at 416.

[65]Yates v. The People, 6 Johns 337 (N.Y. 1810).

[66]Id. at 503-4.

[67]N.Y. Rev Stat. of 1829, Part iii, ch. iii, tit. 12, art. 1, §10. The New York provisions were based on the theories of Edward Livingston, although they allowed more latitude to the judge in summarily punishing offenders. See Nelles and King, supra note 58, at 421-2.

[68]Edward Livingston, "Introductory Report to the Code of Crimes and Punishments," in 1 Complete Works of Edward Livingston on Criminal Jurisprudence 258f (1873)(hereinafter Livingston).

[69]Edward Livingston, "Code of Crimes and Punishments," Bk. II, Tit. v, ch. xi, Arts. 205-8 in 2 Livingston 59-60.

[70]See Nelles and King, supra note 58, at 423-30.

[71]The vote was 123-49. See Arthur J. Stansbury, Report of the Trial of James H. Peck 46-7 (1833)(hereinafter Stansbury).

[72]See arguments of Jonathan Meredith and William Wirth in Stansbury 327f and Appendix, 457f.

[73]Stansbury, 432, 440-3.

[74]Ambrose Spencer in Stansbury 295. Spencer, when an Associate Justice of the New York Supreme Court, had voted contrary to Chief Justice James Kent to discharge J.V.N. Yates from contempt. See Nelles and King, supra note 58, ay 527.

[75]Henry Storrs in Stansbury 400.

[76]James Buchanon in Stansbury 430, 434, 438.

[77]The vote was 22-21 in favor of acquittal. Edward Livingston, who was at this time Senator from Louisiana, voted in favor of guilt. See Stansbury 456.

[78]Nelles and King, supra note 58, at 430.

[79]Id. at 528.

[80]Id., at 533. Unfortunately, the spirit of legality which guided the original enactment of these statutes, as well as their language itself, was ignored as constructive contempt and contempt by publication saw a judicial expansion after 1865. See Id., at 538f.

[81]Francis Sayre, "Criminal Conspiracy," 35 Harv. L. Rev. 393, 395-406 (1922).

[82]Id., at 395-6.

[83]Hawkins, Pleas of the Crown, 6th ed., Bk. 1, c. 72, §2, p. 438, quoted in Sayre, Id. at 402.

[84]Hampton L. Carson, The Law of Criminal Conspiracies as Found in the American Cases 100 (1887).

[85]A number of New York prosecutions, beginning with People v. Fisher, 14 Wend. 2 (N.Y. 1835), were prosecuted under an 1829 conspiracy statute which punished, inter alia, "conspiracy to injure trade or commerce." The courts treated the statute as declaratory of the common law.

[86]See appendix to Walter Nelles, "Commonwealth v. Hunt," 32 Col. L. Rev. 1128, 1166 (1932).

[87]Commonwealth v. Hunt was of this later variety. See Nelles, Id.,at 1132-36.

[88]See Joseph Hopkinson in 3 John Commons et. al., eds. Documentary History of American Industrial Society 69, 136, 214 (1910-11).(hereinafter Commons). See also the words of Samuel Roberts, president of the tribunal, and the notes of the reporter in the Pittsburgh Cordwainers case, Commonwealth v. Morrow (1815), in 4 Commons 16, 82;Griffin in the New York Journeyman Cordwainers Trial, People v. Melvin, 1 Wheeler's Criminal Cases 262-82 (1809), more complete report in William Sampson, Trial of the Journeyman Cordwainers 160-1 (1810).

[89]See 3 Commons 68, 144-5, 234. The Philadelphia case could have been prosecuted on a number of theories, for in fact there were three indictments charging three different offenses. One charged a conspiracy to raise wages; the second charged a conspiracy to prevent other workmen from pursuing their trade(by enforcement of the closed shop); and the third charged illegal means—threats, etc., were used in carrying out these goals. The prosecution lumped all of these charges together, and condemned one as much as the other. The twentieth century legality analysis does not deny that modern criminal law accepts the legitimacy of punishing groups for acts which an individual could lawfully do. The antitrust laws are an example. The distinguishing feature is that society has by representative

political action determined that the effect of group action in this instance is inimical to consensual social values. Broad conspiracy provisions allow punishment for group conduct when no specific judgment is indicated. See "Commentary on Criminal Conspiracy," American Law Institute, Model Penal Code Tentative Draft Ten 97-8 (1960).

[90]See Sayre, supra note 81, at 401-5. Contemporary nineteenth century American legal scholars had accepted this trend. See 2 James Wilson, Works 430 (Anderson ed. 1896). Wislon's acknowledgement of the doctrine's expansion indicated its somewhat bizarre history. His discussion of conspiracy, which is a recognition of the justice-obstructing original meaning of conspiracy, was followed by a paraphrase of Hawkin's almost limitless definition tacked incongruously on the end. See Id., at 429-30.

[91]In the Pittsburgh Cordwainers prosecution, Henry Baldwin, later Associate Justice of the United States Supreme Court, invited the jury to apply their own sense of the general welfare in their judgment of the case. After stating a variant of Hawkins' conspiracy definition, Baldwin told the jury to: "Throw aside then the statute and common law of England, throw aside the decisions of New York and Philadelphia, and consult the feelings of your own fellow citizens, and the convictions of your consciences; and then with the facts before you, say, if you can,...that the defendants are innocent." Commonwealth v. Morrow (1815), 4 Commons 73. Compare Justice Robert Jackson in Musser v. Utah , 333 U.S. 95, 97 (1948).

[92]Walter Franklin in Commonwealth v. Pullis, 3 Commons 155, 159-60.

[93]Caesar Rodney in Commonwealth v. Pullis, 3 Commons 185-6.

[94]Walter Forward in Commonwealth v. Morrow, 4 Commons 15, 56, 62.

[95]William Sampson, Trial of the Journeyman Cordwainers 11 (1810).

[96]Id., at 27-31.

[97]Argument of Price, counsel for defendants in People v. Trequier, 1 Wheeler's Crim. Cases 143 (City Ct. of N.Y. 1823).

[98]Frederick Robinson, "On Reform of the Law and the Judiciary," an oration delivered before the Trades' Union of Boston and vicinity, July 4, 1834, in Joseph Blau, ed., Social Theories of Jacksonian Democracy 320, 327-8, 331 (1947).

[99]Robert Rantoul, Notes from Commonwealth v. Hunt, quoted in Walter Nelles, supra note 86, at 1145.

[100]Id., at 1144.

[101]Rantoul, "Oration at Scituate, Massachusetts, July 4, 1836, in Memoirs, Speeches, and Writings of Robert Rantoul, Jr. (Hamilton ed. 1854), quoted in Mark DeWolfe Howe, ed., Readings in American Legal History 477f (1949). Rantoul's notes indicated that he read portions of this speech to the Commonwelath v. Hunt jury. See Nelles, supra note 86, at 1145.

[102]Nelles, Id., at 1150.

[103]See charge of Judge Peter Thacher in Commonwealth v. Hunt, Thacher's Criminal Case 609, 640, 653 (1840).

[104]Id., at 653-4.

[105]See outline of Rantoul's argument in Commonwealth v. Hunt, 4 Metc. 111, 115-9 (Mass. 1842). Rantoul apparently did not argue the substance of his Scituate speech before the Supreme Judicial Court. See Leonard Levy, Law of the Commonwealth and Chief Justice Shaw 198 (1965).

[106]Commonwealth v. Hunt, 4 Metc. 111, 121-22 (Mass. 1842). The constitutional provision was Ch. 6, Art. 6 of the Massachusetts Constitution of 1789.

[107]4 Metc. 122.

[108]Id., at 123.

[109]Id., at 125.

[110]Id.

[111]Levy, supra note 105, at 199.

[112]See Elizabeth Henderson, "The Attack on the Judiciary in Pennsylvania, 1800-1810," 61 Pa. Mag. of Hist. and Biog. 113, 124 (1937).

[113]And contemporary legal commentators recognized it as such. "This decision must remain of great and permanent value as chiefly defining and settling the law upon an important subject to which the law was before a great deal complicated, confused, and uncertain." 7 Law Reporter 13 (1844), quoted in Levy, supra note 105, at 201.

[114]Shaw's view on the legitimacy of labor combination for purposes of competition is asserted in Levy, supra note 105, at 203-6.

[115]Shaw's formulation of labor conspiracy became as capable of extension as that of Hawkins. The major problem was with constituted an unlawful purpose or unlawful means. Through unlawfulness, conspiracy could be interpreted to include using merely tortious means to achieve lawful ends, and so on, almost indefinitely. Shaw himself suggested one line of expansion in his Commonwealth v, Hunt opinion, where he stated that a conspiracy to refuse work for an employer where the workers were bound by contract "would present a very different question than the one decided in this opinion." See 4 Metc., at 130-1. Also, closing off the use of the criminal law in this area hardly resulted in an easy time for labor. Later in the century, the anti-trust laws and equitable remedies were used to hinder effectively the ability of labor to organize. See Felix Frankfurter and Nathan Green, The Labor Injunction (1930).

[116]See Levy, supra note 105, at 206; Luke Witte, "Early American Labor Cases," 35 Yale L. J. 825, 829 (1926).

[117]United States v. Hudson and Goodwin, 11 U.S.(7 Cranch) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

[118]See, e.g., Alfred Kelly and Winfred Harbison, The American Constitution 194 (4th ed. 1970).

[119]See, generally, Richard Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic (1971). The sedition prosecutions were of course based on a Sedition Act passed by Congress, but seditious libel had a common law origin, which suggested to reformers the danger of accepting criminal laws developed for English conditions and recognized by them as inapplicable to republican government. The danger would be compounded in the case of non-satutory crimes, for there the judiciary would be applying potentially dangerous common law doctrines. Note the case of constructive contempt.

[120]See 1 United States Statutes 112; Julius Goebel, The History of the United States Supreme Court: Antecedents and Beginnings, 1789-1800 609 (1974).

[121]Goebel, Id., at 620-1, 653.

[122]1 Charles Warren, The Supreme Court in United States History 112-15 (1923); Goebel, supra note 120, at 624-7. Whether the Henfield prosecution was under the common law or not is largely irrelevant, because the law appealed to in justifying the prosecution was similar to a residuary common law of crimes jurisdiction because it was ambiguous and existed anterior to any legislatively declared crime.

[123]eliminate

[124]Which were made statutory in 1794. See 1 U.S. Stats. 381.

[125]The expatriation case was United States v. Issac Williams, unrptd. decision, noted in 2 H. Flanders, Lives and Times of the Chief Justices of the Supreme Court 614, n. 23 (1855-59). See also Goebel, supra note 120, at 631. The Williams decision punished the practice of American citizens who evaded the neutrality laws and aided France by swearing allegiance to that country and then taking French privateering commissions. See 1 Warren, supra note 122, at 160. For an assertion that the common law principle of perpetual allegiance was not applicable to American conditions, see The Genius of Liberty (fredericksburg, Va.), quoted in 1 Warren, supra note 122, at 161.

[126]Thomas Jefferson, Kentucky Resolutions, in 4 Jonathan Elliot, ed. The Debates of the Several State Conventions on the Adoption of the Federal Constitution 543 (1937)(hereinafter Elliot's Debates).

[127]James Madison,"Report on the Virginia Resolution," in 4 Elliot's Debates 565-66. Madison was presumably speaking of the common law of crimes in his first example, and of a general common law jurisdiction in his second. For the same report, see also James Madison, Writings of James Madison IV, 341-406 (Hunt ed. 1901).

[128]4 Elliot's Debates 566.

[129]Id.

[130]Instructions from the General Assembly of Virginia to the Senators from that State in Congress, January 11, 1800, in 1 Blackstone's Commentaries 438 (Tucker ed. 1803),

[131]United States v. Worrall, 2 Dall. 384, 394-5 (C.C.D. Pa. 1798). Chase apparently changed his mind on the existence of a federal common law of crimes one year later. See United States v. Sylvester, unrptd. decision, noted in Leonard Levy, Legacy of Suppression xvi (torchbook ed. 1965). The Sylvester case was a counterfeiting prosecution and a federal common law crimes jurisdiction could be more easily justified there than in the facts presented in Worral. Nonetheless, the reasons for Chase's apparent change of mind are perplexing.

[132]United States v. Burr, 25 Fed. Cas. 55, 176 (C.C.D. Va. 1807).

[133]Peter DuPonceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 5-6 (1824).

[134]See the letters of Judge Peters of the Pennsylvania District, quoted in 1 Warren, supra note 122, at 441.

[135]The Sedition Act of 1798 had expired by its own terms on March 3, 1801. See 1 U.S. Stats. 596-7, §4.

[136]Compare 1 Warren, supra note 122, at 436-7, with Leonard Levy, Jefferson and Civil Liberties 61-66 (1963) and 2 William Crosskey, Politics and the Constitution in the History of the United States 767-84 (1953).

[137]Jefferson was excoriated on the floor of Congress by more radical members of his own party. See the speech of John Randolph quoted in 1 Warren, supra note 122, at 436. For Jefferson's dismissal of the cases, see Id. But see Crosskey, supra note 136, at 767-84.

[138]United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812).

[139]Id.

[140]Id.

[141]Id., at 33. Johnson seems to be making the statement nullum crimen sine lege here. Chase perhaps went further in United States v. Worrall, supra note 131, where he stated that he believed a specified penalty must be attached to any legislatively declared crime. See 2 Dall., at 394. More indications that Johnson imbibed the uncertainty objections to a federal common law of crimes were evident in an unreported circuit court opinion he wrote one year later. The framers of the Constitution, he wrote, as a "favorite object," decided "to leave no one to search for the road of safety or the Dii Limini between crime and innocence, anywhere but in the Statute Book of the Legislative body they were about creating." If this principle were not followed, there would exist an almost plenary judicial power in choosing among common law principles. "By what rule or principle are they to be governed in their selection?" he wrote. There in fact was none. "...(E)ither they find the whole system in force, or what is worse, erect themselves into legislators in the selection." See The Trial of William Butler for Piracy, in Morton Horwitz, ed. Cases and Materials on Legal History (unpubl. materials 1973).

[142]Story's disagreement was evidenced by his later Coolidge opinion, United States v. Coolidge, 1 Gall. 488, 25 Fed. Cas. 619 (C.C.D. Mass. 1813), where he stated, at 495, that the Hudson case was decided "by a majority only of the court." William Crosskey, in 2 Politics and the Constitution, supra note 136, at 782, from this evidence asserted that the Hudson case was decided by a "bare majority", with Jeffersonian justices Johnson, Livingston,

Todd, and Duval voting affirmatively and the Federalists Marshall and Washington, along with Story, dissenting. Crosskey buttressed his assertion by citing a rather cryptic letter by Story, where that justice, stated, in reference to his Coolidge opinion, that "every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804(as I have been very authoritatively informed) held a like opinion. See 1 Life and Letters of Joseph Story 299 (William Story ed. 1851). Later in the same letter Story mentioned that he submitted his proposal for giving a general jurisdiction to the United States courts to punish crimes committed against the federal government to the justices, all save Justice Johnson approved. This represented a different issue than that presented in the Hudson case, however. Thus, although Justice Washington's vote in United States v. Hudson and Goodwin must remain unknown, it is likely that Chief Justice Marshall assented to the holding in United States v. Hudson and Goodwin. I cite his Burr opinion and DuPonceau's judgment as to its effect, as well as Marshall's later opinion in United States v. Wiltberger, 18 U.S.(5 Wheat.) 76, 95 (1820), where Marshall seemed to accept the reasoning of Johnson's Hudson opinion. See text to notes 221-222, infra.

[143]See 1 Warren, supra note 122, at 439-41.

[144]United States v. Coolidge, 1 Gall. 488, 25 Fed. Cas. 619 (C.C.D. Mass. 1813). A similar argument was made by Peter DuPonceau in his treatise, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States (1824).

[145]See United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816).

[146]14 U.S., at 416-17.

[147]See 1 Story, supra note 142, at 292-300; 1 Warren, supra note 122, at 441.

[148]4 U.S. Stats. 115-123(March 3, 1825). See, generally, James McClellan, Joseph Story and the American Constitution 177-78 (1971).

[149]See Morton Horwitz, The Transformation of American Law 4-9 (1977); Gordon Wood, The Creation of the American Republic 7-10 (1969); Bernard Bailyn, The Ideological Origins of the American Revolution 30-31, 76-79 (1967).

[150]Horwitz, supra note 149, at 9-16.

[151]Madison, "Report on the Virginia Resolutions," in 4 Elliot's Debates 546, 565. See also Justice Chase in United States v. Worrall, 2 Dall. 384, 395 (C.C.D. Pa. 1798).

[152]See Alexander Hadden, Why Are There No Common Law Crimes in Ohio 13-14 (1919).

[153]John Milton Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence in Contrast with the Doctrines of the English Common Law on the Subject of Crimes and Punishments (1819--repr. 1972), esp. ch. III. (hereinafter Goodenow). For a similar criticism see William Sampson, An Anniversary Discourse Showing the Origin, Progress, Antiquities, and Nature of the Common Law (1824).

[154]Goodenow vi.

[155]Id., at 21-44.

[156]Id., at 45.

[157]See Hadden, supra note 152, at 11.

[158]4 Ohio Laws 38.

[159]See Ohio v. Lafferty, Tappan's Rpts. 113 (1817).

[160]Goodenow 393-400.

[161]Id., at 423. Despite his analysis of the criminal law, Goodenow was not a supporter of complete codification. His analysis applied only to the common law of crimes. He based his distinction upon a dichotomy between private rights and public rights. Goodenow wrote, "The principles and objects of civil jurisprudence are dissimilar and distinct from those of the criminal law. Civil actions are founded in the private rights and private wrongs of individuals; in which the legislative power of the civil state has nothing to do, but to guard the first and therein it affords means of redress to the latter. Natural justice and right reason are the foundation of all our private rights." Id., at 36. Accordingly, legislators should not displace the great bulk of the common law. " ...whatever private rights have been created, exercised, and established by the common law, are not abrogated, but perpetuated, by our present systems of government;—in these cases, not only the portion of that law out of which such rights function and duties spring; but the whole code, by way of interpretation may be taken as our law. And, in all cases, it would be equally unwise and preposterous to exile from our courts our old closet companions, Coke, Hale, Bacon, Blackstone, Reeve, and other English elementary reporters and writers...." Id., at 423-4. Unfortunately, as codification became a political issue during the nineteenth century, criminal law codification was lumped together with general codification. Except among a few professionals, the distinction between civil and criminal codification seems not to have been recognized.

For the excpetions, see (Emory Washburn), "We Need a Criminal Code," 7 Am. L. Rev. 264, 268 (1873); Joseph Story, "Report of the Commisioners on Codification," in Story, Miscellaneous Writings 731-2 (William Story ed., 1852).

[162]Key v. Vattier, 1 Ohio 132 (1821). The issue of common law crimes was raised as a defense to a contract which was champertrous at common law. In rejecting the defense, the court declared that there were no common law crimes in Ohio, hence the contract was not void for illegality.

[163]Van Valkenburgh v. Ohio, 11 Ohio 404 (1842); Mitchell v. State, 42 O.S. 383 (1884).

[164]See opinion of Okey, J., in Mitchell v. State, 11 O.S. 383, at 385-6. See also Hadden, supra npte 152, at 20-21. Tappans original decision in Ohio v. Lafferty apparently provoked controversy, and it was likely that Goodenow's treatise was added to what was already popular opposition to common law crimes. See William Utter, "Ohio and the English Common Law," 16 Miss. Valley Hist. Rev. 321, 329)1929).

[165]See People v. Fisher, supra note 85.

[166]For a situation where legislative liberalization of a murder statute was ignored by judges relying on common law precedents, see Edwin R. Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," 97 U. Pa. L. Rev. 759, 771-7 (1949).

[167]See Annals of Congress, 2 Gales and Seaton 144 (Dec. 17, 1795).

[168]See Edward Livingston, "Report on the System of Crimes and Punishments," in 1 Livingston 12-13.

[169]See Elon H. Moore, "The Livingston Code," 19 J. Crim. Law and Criminology 344, 346-7 (1928-9).

[170]For Livingston's critique of the existing statutory criminal law, see "Report on the System of Crimes and Punishments," 1 Livingston 149-53.

[171]Id., at 10-11.

[172]Livingston, "Report on the Penal Code," in 1 Livingston 234-6; "Code of Crimes and Punishments," Bk. I, ch. v. in 2 Livingston 25-6.

[173]See Livingston, "Introductory Report on the System of Crimes and Punishments," in 1 Livingston 29-30. See also Code of Crimes and Punishments," bk. II, Tit. VIII, Arts. 239-244 in 2 Livingston 69-70.

[174]See Livingston, "Code of Reform and Prison Discipline," in 2 Livingston 537f.

[175]"Introductory Report on the System of Crimes and Punishments," in 1 Livingston 173.

[176]Id., at 13.

[177]"Code of Crimes and Punishments, Bk. 1, ch. 1, Art. 7 in 2 Livingston 15.

[178]Id., Bk. 1, ch. 1, Art 8.

[179]See Livingston Hall, "Strict or Liberal Construction of Penal Statutes," 48 Harv. L. Rev. 748 (1935).

[180] no cite.

[181]"Code of Crimes and Punishments," Bk. 1, ch. 1, Art. 9, in 2 Livingston 15.

[182]See "Introductory Report on the System of Crimes and Punishments," in 1 Livingston 231-2.

[183]See Parke Godwin, "Edward Livingston's Code," 17 North American Review 243 (1824); James Kent to Edward Livingston, March 13, 1826, in 16 American Jurist 351, 371 (1837); See also More, supra note 169, at 355-57.

[184]Opposition by local lawyers, the absence of Livingston from Louisiana, and legislative inertia were described as reasons for the code's failure in Louisiana. See More, Id., at 354-55.

[185]See Edward Livingston, "A System of Penal Law for the United States (1828).

[186] Francis Wharton, A Treatise on the Criminal Law 75 (3rd ed. 1850).

[187]See Lawrence Friedman, "Law Reform in Historical Perspective," 13 St. Louis L. Rev. 351 (1969); for a similar judgment see (Emory Washburn), "We Need a Criminal Code," 7 Am. L. Rev. 264, 273 (1872-3). Cf. James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (1954), esp. ch. 1.

[188] 2 Anton-Hermann Chroust, The Rise of the Legal Profession in America 31 (1965).

[189]See, generally, Morton Horwitz, The Transformation of American Law (1977).

[190]See William E. Nelson, "Changing Concepts of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860," 120 U. Pa. L. Rev. 1166 (1972).

[191]James Kent to Edward Livingston, Feb. 17, 1826, in "Two Letters of Chancellor Kent," 12 Am. L. Rev. 484 (1877).

[192]James Kent to Edward Livingston, March 13, 1826, in 16 American Jurist 351, 367 (1837).

[193]See Lawrence Friedman, A History of American Law 295-318 (1973); Rush Welter, The Mind of America: 1820-1860 225-28 (1974).

[194]Horwitz, supra note 189, at 16-22. See also opinion of Shaw, C.J., in Commonwealth v. Chapman, 54 Mass.(13 Metc.) 68 (1847).

[195]For a typical reception provision, see Massachusetts Constitution of 1787, Ch. VI, Art. VI.

[196]Chief Justice Francis Dana, opinion prior to passing sentence on a charge of "false, scandalous, and mischievous libel" reported in The Gazette (Portland, Me.), April 8, 1799, quoted in "Common Law Crimes in the United States," 15 Am. Leg. Reg. 321, 325-6 (1867).

[197]Ohio v. Lafferty, Tappan's Rpts. 111, 115. See also Hugh Henry Brackenridge, Law Miscellanies 34-5 (1814).

[198]1 Kent's Commentaries 321-22 (1826).

[199]"The Republican," No. XIV in The Repertory(Boston), September 7, 1804, quoted in Richard Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 206 (1971).

[200]1 Kent's Commentaries 321-22 (1826).

[201]Commonwealth v. Chapman, 54 Mass. (13 Metc.) 68, 69 (1847).

[202]Id. Shaw here was quoting Blackstone.

[203]Opinion of Joseph Story in United States v. Coolidge, 1 Gall. 488, 489-90, 25 Fed. Cas. 619 (C.C.D.Mass. 1813).

[204]Alexander James Dallas, in Life and Writings of Alexander James Dallas 211-17 (George M. Dallas ed. 1871).

[205]James Kent to Edward Livingston, March 13, 1826, in 16 American Jurist 351, 362-3 (1837).

[206]Ohio v. Lafferty, Tappan's Rpts 111, 114-5 (1817).

[207]Bell v. State, 1 Swan 41 (Tenn. 1842)(defendant charged with uttering obscene words.)

[208]Commonwealth v. Samuel Silsbee, 9 Mass 417 (1812) (casting more than one ballot in town election); Respublica v. Teischer, 1 Dall. 335 (Pa. 1788)(killing a horse); Commonwealth v. Sharpless, 2 Serg. and Rawles 91 (Pa. 1815)(showing an obscene painting); State v. Williams, 2 Overton 108 (Tenn. 1808)(eavesdropping); Brooks v. State, 2 Yerger 482 (Tenn. 1831)(openly and notoriously frequenting a bawdy house). See also Presiding Judge Samuel Roberts in the Pittsburgh Cordwainers case (1815) in IV Commons 15, 79-80.

[209]See. e.g., Edward Livingston, "Intorductory Report on the System of Crimes and Punishments," in 1 Livingston 31; Ch. MDCCLXVI Pa. Stats at Large (1794) in 3 Smith 185 (1810).

[210]See Glanville Williams, Criminal Law: The General Part 600-601 (2d. ed. 1961).

[211]See, e.g., Jack Williams, "Crime and Punishment in Alabama, 1819-1840," 6 Ala. L. Rev. 1427; Lawrence Friedman, A History of American Law 252-3 (1973).

[212]See, e.g., the Pennsylvania experience. The 1860 Pennsylvania Penal Code, §46 punished cruelty to animals, which recognized the result in Respublica v. Teischer, 1 Dall. 335 (Pa. 1788), a common law of crimes prosecution. Section 30 of the same code recognized the result in Commonwealth v. Updegraff, 11 S. & R. 394 (Pa. 1824), a common law prosecution for blasphemy.

[213]See New York Penal Code §675 (1881, as amnd. 1882 and 1891).

[214]See Joseph Story, "Report of the Commissioners on Codification," in Story, Miscellaneous Writings 731-2 (Wm. Story ed. 1852). For the failure of Massachuetts criminal law codification see Charles Cook, The American Codification Movement: A Study in Antebellum Legal Reform 383 (Phd. Diss. U. of Md. 1974).

[215]According to one judgment of Field's penal code, "It was, however, less of an achievment than one might have hoped, for Field was poorly versed in penal law and little given to confront its basic probelms, In this area he purported only to compile and rearrange existing statutes, with minor additions that he thought restated the common law. Even the systematic treatment that he developed was abandoned in New York in later years in favor of an alphabetical arrangement...The code became a dictionary of the statutes, totally

obscuring any sense of function, order, or proportion in the norms that they declared." Herbert Wechsler, "The Model Penal Code and the Codification of American Criminal Law," in Crime, Criminology, and Public Policy: Essays in Honor of Sir Leon Radzinowicz (Hood ed. 1974).

[216]See 1 Ind. Rev. Stats. 353 (1852), ch. 61, §2; Tex. Pen. Code Tit. 1, Art. 3 (1856); Nebr. Crim. Code §251 (1873); Ore. Code of Crim. Proc. §1(1864).

[217]State v. Williams, 7 Rob. 252 (La. 1844); Estes v. Carter, 10 Iowa 400 (1860).

[218]Estes v. Carter, 10 Iowa 400, 401 (1860).

[219]See Livingston Hall, "Strict or Liberal Construction of Penal Statutes," 48 Harv. L. Rev. 748, 751 (1935).

[220]Id.

[221]United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); Cf. also, Anderson v. Commowealth, 26 Va. (5 Rand) 627 (Gen'l Ct. of Va. 1826).

[222]United States v. Wiltberger, 18 U.S., at 96.

[223]Commonwealth v. Haywood, 10 Mass 34 (1813).

[224]Rosenbaum v. State, 4 Ind. 599 (1853). Of course, many courts rejected strained interpretations of the rule. See, e.g., Rawson v. State, 19 Conn. 212 (1848); United States v. Wilson and Porter, 1 Baldwin 78, 101 (C.C.D. Pa. 1830).

[225]See Livingston Hall, supra note 219, at 752-4. Examples were strict construction rules abrogated when interpreting gambling statutes. See, e.g., Va. Acts of 1802, c. 35, §9; Tenn. Acts of 1824, c.5, §5.

[226]Livingston Hall, supra note 219, at 754-5.

[227]See 1 Bishop Criminal Law 114-124 (1852).

[228]Id., at 133-4.

[229]See Lawrence Friedman, A History of American Law 255-6 (1973); Livingston Hall, supra note 219.

[230]Roscoe Pound, Criminal Justice in America 143 (1945).

[231]Herbert Wechsler, supra note 215, at 420.

[232]Herbert Wechsler, "A Thoughtful Code of Substantive Law," 45 J. Crim. Law, Criminology, and Police Science 524 (1955).

[233] Id.

[234] See, e.g., American Law Institute, Model Penal Code §1.05(1)(P.O.D. 1962); Pa. Crimes Code §107 (Purdon 1973). Perhaps significantly, at least two states have decided to retain a common law of crimes jurisdiction, even after codification. See Fla. Stats. §775.01 (1973); Wash. Rev. Stat. Ann. §9A.04.060 (1977 spec. pamp.).

[235] See, e.g., Benjamin Cardozo, The Nature of the Judicial Process 10 (1921); Harlan F. Stone,"The Common Law in the United States," 50 Harv. L. Rev. 4, 10 (1936); Herbert Wechsler, supra note 232, at 524.

[236] In Fisher v. McGirr, 67 Mass. 1 (1854), another opinion by Lemuel Shaw foreshadowed the constitutional application of legality principles. While Fisher v. McGirr involved a statute which encouraged violations of specific articles in the Massachusetts Declaration of Rights, what I have above called the procedural content of the principle of legality, there were notable references in Shaw's opinion to the vagueness of the statute which allowed arbitrary, unguided applications of the criminal law by its administrators.