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## PIONEERS IN CRIMINOLOGY: EDWARD LIVINGSTON (1764-1836)\*

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Observing that criminological literature has largely neglected and sometimes misinterpreted the work of Edward Livingston, Mr. Mouledous in this article reviews the contributions of Livingston to both nineteenth and twentieth century criminology. The author views Livingston as a product of the Enlightenment, but one who reached a degree of sophistication in his views on criminology and penology surprising for his time. Mr. Mouledous presents both an exposition of Livingston's theories and an evaluation of their present day applicability.—EDITOR.

In the literature of criminology, such names as Cesare Beccaria (1738-1794), Jeremy Bentham (1748-1832), Alexander Maconochie (1787-1860), V. John Haviland (1792-1852), Cesare Lombroso (1835-1909), Gabriel Tarde (1843-1904), Raffaele Garofalo (1852-1934), and Enrico Ferri (1856-1929)<sup>1</sup> are familiar. In contrast, Edward Livingston (1764-1836) has been largely ignored or misrepresented. Called by William Tallack America's greatest penologist,<sup>2</sup> and considered the first legal genius of modern times by Sir Henry Maine,<sup>3</sup> this son of parents who participated in the American Revolution grew up to write a system of criminal jurisprudence for the State of Louisiana and subsequently served as Secretary of State and Minister to France under Andrew Jackson.<sup>4</sup>

The exclusion of Livingston from most contemporary criminological literature gains interest when we understand that he is neither an obscure nor an insignificant figure in the history of American criminal jurisprudence. From the beginning he received widespread recognition. In addition to

Sir Henry Maine and William Tallack, such contemporaries as Thomas Jefferson,<sup>5</sup> DeBeaumont and DeToqueville<sup>6</sup> recognized his abilities and praised his production. Throughout the years scholars have maintained an interest in him. Carleton Hunt<sup>7</sup> and Eugene Smith<sup>8</sup> published articles on him at the turn of the century; Charles and Mary Beard<sup>9</sup> made favorable reference to him in the 1920's. Finally the height of academic and professional interest was shown in 1936 when an Edward Livingston Centennial was held in New Orleans, October 27-30, 1936, featuring lectures by Dean Roscoe Pound, and a series of articles were published in honor of Livingston in the *Tulane Law Review*<sup>10</sup> and other journals.<sup>11</sup> Yet in spite of this widespread interest and extensive literature, a review of contemporary works in the field of criminology and penology shows that only two studies make reference to him. In the earlier study he is correctly judged as an opposer of the death penalty, a supporter of solitary confinement without flogging or other forms of brutality, an

\* This paper is a chapter from the writer's unpublished master's thesis, *Sociological Perspectives on a Prison Social System* (Louisiana State University, 1962).

<sup>1</sup> MANNHEIM (ed.), *PIONEERS IN CRIMINOLOGY* (1960). This volume contains articles on 17 pioneers; Edward Livingston is not included.

<sup>2</sup> TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* 117 (London: 1889).

<sup>3</sup> This phrase is attributed to Sir Henry Maine. See HUNT, *LIFE OF EDWARD LIVINGSTON* 278 n. 31 (1864). Also, Franklin, *Concerning the Historical Importance of Edward Livingston*, 11 *TUL. L. REV.* 212 (1937); TEETERS & SHEARER, *THE PRISON AT PHILADELPHIA: CHERRY HILL 24* (1957).

<sup>4</sup> HATCHER, *EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT* (1940). Also Hall, *Edward Livingston and his Louisiana Penal Code*, 22 *A.B.A.J.* 191 (1936).

<sup>5</sup> TEETERS & SHEARER, *op. cit. supra* note 3, at 25.

<sup>6</sup> DEBEAUMONT & DETOQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* p. xii (1833).

<sup>7</sup> Hunt, *Life and Services of Edward Livingston*, 12 *AM. LAWYER* 154 (1904). Also, Hunt, *Edward Livingston and the Law of Louisiana*, 7 *LAW NOTES* 88 (1903).

<sup>8</sup> Eugene Smith, *Edward Livingston and His Criminal Code*, 39 *J. SOCIAL SCIENCE* 27-28 (1901). Also, Smith, *Edward Livingston and the Louisiana Codes*, 2 *COLUM. L. REV.* 24 (1902).

<sup>9</sup> CHARLES & MARY BEARD, *THE RISE OF AMERICAN CIVILIZATION* 561 (1949).

<sup>10</sup> See, e.g., Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 *TUL. L. REV.* 243 (1937); Franklin, *supra* note 3; Harris, *The Edward Livingston Centennial*, 11 *TUL. L. REV.* 1 (1936).

<sup>11</sup> E.g., Hall, *supra* note 4.

advocate of productive work for due pay for prison inmates, and a supporter of separating those imprisoned before trial from those already found guilty.<sup>12</sup> In the later study, he is simply and mistakenly referred to as a follower of the phrenologist Combe.<sup>13</sup>

Livingston deserves greater recognition and understanding on the part of criminologists. His influence on the origin and early development of the penitentiary system in Louisiana suggests it, and the quality of his ideas, considering his place in history, requires it.

Historically Livingston's life span most closely coincided with Cesare Beccaria and Jeremy Bentham. Beccaria was a much admired intellectual progenitor. Bentham was a contemporary and the two engaged in correspondence.

As would be expected, Livingston has been compared with these thinkers. Jerome Hall has correctly noted that in Livingston's writings there is a shift from Beccaria's reliance on abstract principles and a marked tendency to use empirical methods.<sup>14</sup> Eugene Smith<sup>15</sup> and later Paul Brosman<sup>16</sup> have acknowledged that while Livingston was indebted to Jeremy Bentham, he reached a broader and higher plane of thought. The importance of these comparisons is not that they show Livingston's intellectual debts but that they bring us, through Livingston, to the heart of an issue of the Enlightenment which is very much alive today; namely, the respective merits of the "rational" and "positive" orientations.

It is generally agreed that Beccaria is a member of the "Classical" school of penology. Even Mannheim, who questions the validity of classifying thinkers into schools, places Beccaria—but only Beccaria—in the Classical school.<sup>17</sup> Bentham on the other hand has received contradictory treatment. Clarence Ray Jeffery combines Bentham with Beccaria to construct the Classical school,<sup>18</sup>

<sup>12</sup> TEETERS & SHEARER, *op. cit. supra* note 3, at 24-25.

<sup>13</sup> KORN & McCORKLE, *CRIMINOLOGY AND PENOLOGY* 213 (1949).

<sup>14</sup> Hall, *supra* note 4, at 195.

<sup>15</sup> Smith, *Edward Livingston and the Louisiana Codes, supra* note 8, at 35.

<sup>16</sup> Brosman, *supra* note 10, at 256.

<sup>17</sup> MANNHEIM, *op. cit. supra* note 1, at 8, states: "In the over-simplified terminology of the Schools we might say our volume shows the progress from the Classical School of Beccaria to the Positivist School of Lombroso and Ferri and from there to the Sociological School of Tarde and Durkheim."

<sup>18</sup> Jeffery, *Pioneers in Criminology: The Historical Development of Criminology*, 50 J. CRIM. L., C. & P.S. 3-4 (1959).

while Mannheim places Bentham in the Positivist school of Lombroso and Ferri. The disagreement indicates more than a misinterpretation of either Beccaria or Bentham or of the composition of the Classical and Positive schools; it reveals the construction of a false dichotomy between consistent ideas.

It is axiomatic that these writers were in the main tradition of the Enlightenment. Beccaria's indebtedness to the French philosophers, especially Montesquieu and Rousseau, is so great that his book has often been claimed as their spiritual property.<sup>19</sup> Bentham in turn admits a direct debt to Beccaria, for one, in the development of his principle of utility; "Before it was mine," he wrote, "it was M. Beccaria's."<sup>20</sup> As inheritors of the Enlightenment, Beccaria and Bentham expressed, respectively the two main spirits of that age: the "rational" and the "positive" spirits. And while it is correct to state that each placed greater emphasis on one, it is incorrect to imply—by the separation of these spirits into "schools"—that the mind of the Enlightenment ever considered these two "spirits" in conflict. In fact, as Cassirer points out, a major goal of the Enlightenment was to create a synthesis of the two "spirits." "One should not seek order, law, and reason as a rule that may be grasped and expressed prior to the phenomena, as there *a priori*; one should rather discover such regularity in the phenomena themselves, as the form of their immanent connection."<sup>21</sup> Thus universals remain the proper goal of inquiry, but a significant methodological shift has occurred in that *a priori* universals have changed into universals grounded in human experience.<sup>22</sup>

The writers who compose the movement referred to as "The American Enlightenment"<sup>23</sup> also inherited this synthesis of the "rational" and "positive" spirits and expressed them in their writings. Jefferson—as a single example—believed that every man was born with a moral sense or instinct. This instinct did not provide men with immediate or intuitive knowledge of good or evil, rather it allowed men to judge acts correctly in relation to

<sup>19</sup> MANNHEIM, *op. cit. supra* note 1, at 5. See also Monachesi, *Cesare Beccaria*, in MANNHEIM, at 39.

<sup>20</sup> BAUMGARDT, *BENTHAM AND THE ETHICS OF TODAY* 37 (1952).

<sup>21</sup> CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 8-9 (1951).

<sup>22</sup> *Id.* ch. 5.

<sup>23</sup> Including, for example, Benjamin Franklin, Thomas Jefferson, Thomas Paine, and Benjamin Rush. See BLAU, *MAN AND MOVEMENTS IN AMERICAN PHILOSOPHY* (1952).

the specific conditions of the environment. "Men," he wrote, "living in different countries under different circumstances, different habits and regimens may have different utilities; the same act, therefore, may be useful, and consequently virtuous in one country which is injurious and vicious in another differently circumstanced."<sup>24</sup> Obviously the underlying assumption is that man is inherently reasonable and basically good. Defects in human beings, evils and perversions, are capable of being corrected through education and the use of reason. Yet in its specific expressions virtue can vary, can be determined by the conditions of its environment.<sup>25</sup>

Edward Livingston is a direct descendant of the great movements of European and American Enlightenment. Within the confines of his immediate family, he came into contact with those ideas of social contract and the rights of man that played such an important part in developing the American Revolution. His grandfather was an extreme advocate of an American Revolution and predicted that it would occur within the grandchildren's lifetime.<sup>26</sup> Edward's brother, Robert Livingston, served with Jefferson, Franklin, Sherman, and Adams as the committee selected by Congress to prepare the Declaration of Independence.<sup>27</sup> Later, in 1782, Robert Livingston along with George Washington and Robert Morris arranged for Thomas Paine to "receive a salary of eight hundred dollars a year, no trivial sum in those days, to write in the cause of liberty."<sup>28</sup>

From the European movement of the Enlightenment, Edward Livingston acknowledged, in addition to Beccaria<sup>29</sup> and Bentham,<sup>30</sup> intellectual debts to Francis Bacon,<sup>31</sup> the encyclopaedists Voltaire,<sup>32</sup> Condorcet,<sup>33</sup> and Diderot.<sup>34</sup> He undoubtedly was familiar with Edmund Burke, Thomas Hobbes, Grotius, Rousseau, and others, but the quality and extent of their influence is difficult to determine, mainly because Livingston's ideas are expressed in a single work, which was

commissioned.<sup>35</sup> Furthermore, at its completion the original draft of this work, along with most of his notes, was destroyed in a fire, and Livingston was required to rewrite his entire work, mainly from memory and a few remaining notes.<sup>36</sup>

Within the limitations of this single work Livingston articulates a theory of man and society which, in spite of obvious identities with prevailing Enlightenment theories, shows a degree of sophistication and awareness not expressed in criminological literature until Durkheim and Tarde, in the 1880's, published attacks on the Lombrosian theory.<sup>37</sup> Livingston, first, rejects all prevailing theories of "social contract." He does not accept the Hobbesian state of nature composed of selfish men continually warring with one another.<sup>38</sup> Similarly he rejects the peaceful state of nature theory as expressed by Grotius (1583-1645), Locke (1632-1704), and subsequently drawn in idyllic terms by Rousseau (1712-1778). Livingston considers the argument meaningless. Man, he argues, has always lived in a state of society. Societies are found wherever men are found and must have come into existence as soon as the number of the species was sufficiently multiplied to produce them.<sup>39</sup> Thus society is a natural and inevitable product of human existence. And, logically, the main function of society is the preservation of the life of its members.<sup>40</sup> This is in no way an original statement. The similar doctrine of inalienable rights was a major theme of the French philosophers of the En-

<sup>35</sup> Acts of the General Assembly of Louisiana, February 10, 1820, and March 21, 1822, authorized a code of criminal law for Louisiana. See 1 LIVINGSTON, *op. cit. supra* note 29, at 1-4. There was strong opposition to Livingston's proposals, and his codes were never enacted. Subsequently, Livingston's work was published in two volumes, the first composed of introductory remarks to the codes, and the second containing Livingston's proposed codes. It is to these volumes that this article has reference.

<sup>36</sup> HATCHER, *op. cit. supra* note 4, at 263.

<sup>37</sup> Vine, *Gabriel Tarde*, in MANNHEIM, *op. cit. supra* note 1, at 228; Lunden, *Emile Durkheim*, in MANNHEIM, at 301.

<sup>38</sup> On this point, Livingston takes an important step away from Beccaria. Beccaria's entire system is predicated on the Hobbesian theory of social contract. To Beccaria crime is a result of man's inherent nature, which is self-seeking and which therefore leads him into conflict with society. Punishment functions to control this self-seeking nature and thereby to preserve society. See Monachesi, *supra* note 19, at 36-50.

<sup>39</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 192-93. While Livingston, because of other interests, failed to make the next logical step from this premise, he has still brought us to the threshold; namely, that societies will vary according to the size of their populations.

<sup>40</sup> *Id.* at 533.

<sup>24</sup> *Id.* at 48.

<sup>25</sup> *Id.* at 48-49.

<sup>26</sup> HUNT, *op. cit. supra* note 3, at 20-21.

<sup>27</sup> *Id.* at 20.

<sup>28</sup> BLAU, *op. cit. supra* note 23, at 55.

<sup>29</sup> 1 LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 31 (1873).

<sup>30</sup> *Id.* at 155.

<sup>31</sup> *Id.* at 116.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.* at 207.

<sup>34</sup> *Id.* at 116.

lightenment.<sup>41</sup> And as Cassirer points out, John Locke's theory of social contract held that:

"All such contractual ties are rather preceded by original ties which can neither be created by a contract nor entirely annulled by it. There are natural rights of man which existed before all foundations of social and political organization; and in view of these the real function and purpose of the state consists in admitting such rights into its order and in preserving and guaranteeing them thereby. Locke counts the right of personal freedom and the right of property among these fundamental rights."<sup>42</sup>

But in Livingston we find a more extreme position, for Livingston, completely unhindered by the contract theory, is free virtually to drop the theme of preservation and right of property and focus on the preservation and rights of man. This position is unquestionably consistent with the more "radical" American Enlightenment. As Thomas Jefferson wrote, "The freedom and happiness of man are the sole objects of all legitimate governments. And God forbid that we should ever be twenty years without a revolution."<sup>43</sup> In Livingston the theme of human rights and the preservation of life becomes a thread that unites such uncommon items as his opposition to the death penalty and his insistence that society is responsible for its beggars, paupers, vagrants, and criminals.

If Livingston sees man as potentially reasonable and inherently good and virtuous, how then does he explain the not infrequent acts of evil? That some men differ from the majority so significantly as to comprise a different class of being—the view of Lombroso, to whom criminals were of atavistic or degenerative origin—is completely excluded by Livingston's acceptance of Hobbes' theory of human equality.<sup>44</sup> To Livingston, criminals—no matter how depraved and degraded—are still men, men capable (in our modern terms) of rehabilitation to the point of successful function in society. Livingston writes that the "error . . . lies in considering them as being of a nature so inferior

as to be incapable of elevation, and so bad as to make any amelioration impossible."<sup>45</sup>

Rejecting the theory that defective humans are the source of criminality, Livingston turns his attention to the existing legal system. Again in the spirit of Voltaire and Diderot, he blames much criminal conduct upon inhuman laws, and upon the jurist who would make use of such laws for his own ends.<sup>46</sup> To Livingston laws generally have been oppressive and have supported "class" interests. He writes: "Everywhere, with but few exceptions, the interest of the many has, from the earliest ages, been sacrificed to the power of the few. Everywhere penal laws have been formed to support this power."<sup>47</sup> Livingston is especially bitter about the role law has played under the English common-law system. The English had "seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies."<sup>48</sup>

From this criticism of legal systems Livingston moves to an analysis of criminal behavior as behavior learned by the individual during maturation from a defective family environment and through association. Here Livingston steps right out of nineteenth century criminological thinking directly into a main tenet of twentieth century criminological theory; namely, that crime is normal learned behavior.<sup>49</sup> Beccaria, tied to his Hobbesian social contract theory, couldn't approach it. Bentham, it is said, flirted continuously with the idea, but never really came to grips with it.<sup>50</sup> However, Lombroso, it is argued,<sup>51</sup> expressed the germ of the normal learned behavior theory in defining his third category of "occasional criminals," which he called "habitual criminals"; these criminals, he maintained, were the product of defective education and training, which evoked primitive tend-

<sup>45</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 563.

<sup>46</sup> *Id.* at 115-18.

<sup>47</sup> *Id.* at 528-35. This statement and others lead Mitchell Franklin to view Livingston as anticipating Marx. He states: "Edward Livingston's ideological conceptions are definitely historical conceptions reflecting the bourgeois social bases that then existed. Livingston, however, represented the material conditions of several advanced liberal countries, in such a way that he was enabled to create an ideology different from any that actually prevailed; and perhaps he almost reached the threshold of socialism." Franklin, *supra* note 3, at 172.

<sup>48</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 13.

<sup>49</sup> VOLD, *THEORETICAL CRIMINOLOGY* (1958).

<sup>50</sup> Geis, *Jeremy Bentham*, in MANNHEIM, *op. cit. supra* note 1, at 57.

<sup>51</sup> Wolfgang, *Cesare Lombroso*, in MANNHEIM, *op. cit. supra* note 1, at 189.

<sup>41</sup> CASSIRER, *op. cit. supra* note 21, at 250.

<sup>42</sup> *Id.* at 249-50.

<sup>43</sup> BLAU, *op. cit. supra* note 23, at 49.

<sup>44</sup> Hobbes wrote: "Nature hath made men so equal in the faculties of the body and mind; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind than another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend." HOBBS, *LEVIATHAN* 80 (Oakeshott ed., Oxford 1946).

encies. They were, he observed, drawn into crime mainly through associations.

Livingston quite clearly states the main ideas of the "crime as normal learned behavior" theory, arguing that deviant behavior among children is produced by defective rearing in which the child is improperly taught. He writes:

"The moral sense is, in childhood, produced by instruction only, and the force of example, and that with the children who are generally the objects of criminal procedure, instruction has either been totally wanting, or both that and example have been of a nature to pervert, not form, a sense of right. . . . Either they have parents who entirely neglect the task, or abuse the power given to them by nature, and confirmed by the laws of society."<sup>52</sup>

These children, devoid of true family relations "are thrown friendless and unprotected into the most contaminating associations, where morality, religion and temperance are spoken of only to be derided, and the restraints of law are studied only to be evaded."<sup>53</sup> Thus a defective environment during the formative period combined with subsequent associations whose standards of behavior differ grossly from those of society are the natural conditions that breed criminal behavior.

In considering the conditions underlying adult criminal behavior, Livingston develops the important social dimension of the "dispossessed"; these are the unemployed, the paupers, the mendicants, the idle in general. Mitchell Franklin claims that "from the relatively advanced methods of production in England and America he [Livingston] found the free working class and other dispossessed groups, and thus discovered unemployment."<sup>54</sup>

The motives for criminal behavior for this class need not have originated in the defective environ-

ment of the formation period, but arise out of the wants and needs created by a defective adult social environment. Livingston unequivocally states that such conditions as idleness, unemployment, pauperism, etc., create needs which send the greatest numbers to our prisons.<sup>55</sup>

Of even greater interest than his analysis of causation is Livingston's refusal to leave his analysis at that level. He recognized that explanations of motives of criminal behavior do not tell how the methods of criminal behavior are acquired, and he knew that such methods are normally learned through association with the criminally sophisticated. Hatcher states that in Livingston's view, "the criminal ranks drew their recruits from those who were unable to secure employment or who were able to work but refused to do so."<sup>56</sup> The following is an example of Livingston's observations in this regard:

"The Bridewell of a large city is the place in which those representatives of human nature, in its most degraded shape, are assembled; brought into close contact, so that no art of fraud, no means of depreciation, no shifts to avoid detection, known to one, may be hid from the other; where those who have escaped received the applause due to their dexterity, and he who has suffered, glories in the consistence with which he has endured his punishment, and resisted the attempts to reform him. Here, he who can commit the oldest crime the newest sort of way, is hailed as a genius of superior order, and having no interest to secure the exclusive use of the discovery he freely imparts it to his less instructed companions."<sup>57</sup>

An immediate impression gained from Livingston's observation on the Bridewell is of its empirical quality. This "positivist spirit" runs as a recognizable theme throughout his study. Jerome Hall notes that in collecting notes and preparing his study Livingston sent out circular letters or questionnaires, developed statistical tables, and constructed "partial mortality tables showing the number of persons committed for trial, tried, convicted, discharged or acquitted."<sup>58</sup> Also, "he proposed to engage in field work by devoting a few months of the summer to a personal examination of the different institutions of the kind (penal) in

<sup>52</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 572.

<sup>53</sup> *Id.* at 573. Here Livingston's emphasis on association clearly antedates the focus that led to Sutherland's formulation of the "differential association" theory. Livingston's views that human character is formed in early childhood mainly by the conditions of the environment were antedated by the writings of Robert Owen. Owen's experiences as an owner-manager of a Scottish textile mill allowed him to become intimately acquainted with the effects of a brutalizing factory environment on children. In 1813 he published *A New View of Society*, in which he argued that the antisocial child behaves as he does due to physical hardships and emotional disturbances. Owen's position was that these delinquents had to be helped, not punished; society owes that obligation to itself as well as the individual. See BRONOWSKI & MAZLISH, *THE WESTERN INTELLECTUAL TRADITION* 450-71 (1960).

<sup>54</sup> Franklin, *supra* note 3, at 173.

<sup>55</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 528.

<sup>56</sup> HATCHER, *op. cit. supra* note 4, at 277. See also 1 LIVINGSTON, *op. cit. supra* note 29, at 528-40.

<sup>57</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 538.

<sup>58</sup> Hall, *supra* note 4, at 195.

the Atlantic states."<sup>59</sup> Furthermore, he made use of case history materials, of which the following are examples:

"D.B.L. Aged fifteen years, born in New York, committed from the police on suspicion of having stolen a shawl. He was brought up in the vicinity of Bancker Street, and for some months played the tambourine in those receptacles of vice and misery, the dancing-houses of Corlears Hook.

"L.S. Age about sixteen, born in Ireland; his parents emigrated to this country about eight years ago. His father has since died. His education was entirely neglected by his parents, and the choice of his companions left exclusively to himself. He has worked at several mechanical branches of business, to none of which his restless disposition could attach itself. He was committed to the Refuge in March, 1825, from the police office for stealing a copper kettle."<sup>60</sup>

Livingston's analysis of crime and criminal behavior was unsystematic and incompletely expressed; but it was subservient to his more ambitious goal of providing a "plan of jurisprudence, combining the prevention of crime with the reformation of the criminal . . . on such a scale as would embrace all the different stages and departments of criminal procedure."<sup>61</sup> In achieving these ends Livingston proposed a wide range of reforms.

To correct injustices originating from vague, outmoded, and inhumane laws administered by self-seeking judges, Livingston turns to and asserts great confidence in the general public, when this public is properly informed and educated. To Livingston, "publicity is an object of such importance in free government, that it not only ought to be permitted, but must be secured by a species of compulsion. The people must be forced to know what their servants are doing or they will, like other masters, submit to imposition rather than take the trouble of inquiring into the state of their affairs."<sup>62</sup> Equally, for education, Livingston held that "religious, moral, and scientific instruction must not only be provided but enforced, in order to stamp on the minds of the people that character, that public feeling, and those manners, without which laws are but vain restraints."<sup>63</sup>

He, therefore, made such specific suggestions as that laws be written in a language comprehensible

to the public, and in his own case, he submitted his code to men not familiar with legal terminology, and had them to mark each word not completely understood. "The words so marked were, in the body of the work, always printed in a peculiar character, to show that they were the subject of explanation in a separate place, the Book of Definitions; and each word thus marked received all necessary attention in that book."<sup>64</sup>

He was a strong advocate of the jury system, suggested legislation that would make trial by jury mandatory, and recommended that judges be restricted to the law, and the statement of evidence only when requested by the jury.<sup>65</sup> Livingston supported his stand with the statement that "by our constitution the right of trial by jury is secured to the accused, but it is not exclusively established. This, however, may be done by law, and there are many strong reasons in its favour, that it has been thought proper to insert in the code, a precise declaration, that in all criminal prosecutions, the trial by jury is a privilege which cannot be renounced."<sup>66</sup>

For those individuals who either violated laws, or for whom a high probability for criminal behavior existed (paupers, mendicants, etc.), Livingston proposed a complex machinery that contained a house of detention, a penitentiary, a house of refuge and industry, and a school of reform all under the centralized supervision of five inspectors.<sup>67</sup> The school of reform was a juvenile training school for all youths under the age of eighteen and over the age of six who were sentenced to any term less than life imprisonment. All youthful vagrants, beggars, etc., within these age limits would also be placed in the school of reform for instruction and training.

Livingston conceived that the major function of the school of reform was to teach youths essential skills so that they could successfully seek and meet the conditions of employment following their release. To achieve these ends he proposed that fully qualified teachers be placed in charge of the apprenticeship program. He also introduced a type of indeterminate sentence, in that youths would be discharged after they had successfully completed their apprenticeship even though they had not yet served out their full sentence.<sup>68</sup> But he

<sup>59</sup> *Id.* at 195.

<sup>60</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 579.

<sup>61</sup> *Id.* at 525.

<sup>62</sup> *Id.* at 15.

<sup>63</sup> *Id.* at 587.

<sup>64</sup> HUNT, *op. cit. supra* note 3, at 264.

<sup>65</sup> Hall, *supra* note 4, at 196.

<sup>66</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 15-16.

<sup>67</sup> HATCHER, *op. cit. supra* note 4, at 278.

<sup>68</sup> Alexander Maconochie (1787-1860), who was

felt that a minimum of two years was required for a successful apprenticeship and, therefore, specified that no apprentice could be discharged before that time. Judgment of whether a youth had achieved a successful apprenticeship was made by the warden and required final approval by the five man board of inspectors.<sup>69</sup>

For those with a high probability of turning to criminal acts (ex-convicts newly released, vagrants, beggars, unemployed), Livingston devised the house of refuge and industry, for he believed that society owed to the discharged convict and the dispossessed in general the opportunity to utilize skills necessary for their support.<sup>70</sup> In the house of refuge and industry, Livingston writes, "the discharged convict may find employment and substance, and receive such wages as will enable him to remove from the scenes of his past crimes, place him above temptation, confirm him in his newly-acquired habits of industry, and cause him safely to pass the dangerous and trying point between the acquisition of his liberty and restoration to the confidence of society."<sup>71</sup> Likewise, the unemployed, vagrants, beggars and other dispossessed, would be placed in houses of industry and refuge where they would be given employment. Obviously, Livingston strongly felt that society had a basic obligation to its members, and providing them with the basic necessities of life was one of the foremost.

Livingston conceived the house of detention as holding all those with short sentences who did not require penal incarceration, those arrested and awaiting trial, and even those needed as witnesses who might not freely present themselves. In order to avoid "vicious associations" Livingston proposed that these houses be divided into separate departments for those held for investigation, those charged with crimes, and those serving sentences. He considered a further subdivision between those awaiting trial for misdemeanor crimes and those awaiting felony trial.<sup>72</sup>

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superintendent of the British penal colony, Norfolk Island, from 1840 to 1844, is considered the originator of the movement that led to the indeterminate sentence. Maconochie, who published his articles on penal reform after his recall from Norfolk Island in 1844, expressed many ideas that are almost identical with Livingston's. See Barry, *Alexander Maconochie*, in MANNHEIM, *op. cit. supra* note 1, at 68-90.

<sup>69</sup> 2 LIVINGSTON, *op. cit. supra* note 29, at 576-84.

<sup>70</sup> 1 *id.* at 564-66. See also HATCHER, *op. cit. supra* note 4, at 281.

<sup>71</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 565.

<sup>72</sup> *Id.* at 541-43.

The penitentiary itself was the subject of Livingston's most intense interest and study. As previously stated, he approached his task in a highly empirical manner, making studies and securing statistics and information from other states and from Europe. He was particularly interested in the penitentiary systems of Massachusetts, New York, and Pennsylvania.<sup>73</sup> He concluded from his study of the Pennsylvania "experiment" that "while the numbers were not too great to admit seclusion, offenses diminished; and when it was no longer practicable, they increased."<sup>74</sup> This and other considerations led him to hold that seclusion with labor would successfully diminish offenses. But Livingston adds qualifications to his system which prevent his being classified as a simple proponent of solitary confinement.

In viewing the penitentiary as a system of reformation as well as punishment, Livingston proposed that education and employment training be made available to inmates so that they could develop skills which would allow them, through the aid of the houses of refuge and industry, to make a successful readjustment to society. But he did not propose to make education and training available to all inmates; those with life sentences would be denied these privileges, and those who showed no interest in "reforming" would not only be denied these privileges but would also be required to exist under the extreme deprivations of solitary confinement.<sup>75</sup>

For those who manifested a desire to reform, Livingston planned such bonuses as a better diet, partial relief from solitude, and the right to visitors at stated intervals. When the prisoner manifested his interest in reforming by good conduct and participation in limited programs, for a period of time usually covering six months or longer, he could then commence employment training. Then, after a relatively long period of probation, he might be permitted to work outside the penitentiary. On discharge he would receive a portion of the proceeds of his labours and a certificate of good conduct, industry, and skill in the trade learned or practiced

<sup>73</sup> Hall, *supra* note 4 at 195; HATCHER, *op. cit. supra* note 4, at 279-80.

<sup>74</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 512-13.

<sup>75</sup> It is of interest to note that in recent articles Erving Goffman analyzes "total institutions" as privilege-deprivational systems. See the two articles by Goffman in *THE PRISON; STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE* 15-67, 68-106 (Cressey ed. 1961).

while in prison. All privileges would be suspended for misbehavior.<sup>76</sup>

Livingston opposed the death penalty, but for those convicted of the normally capital offenses he did not offer privileges; nor did he conceive that they should ever return to society. Instead, he felt their punishment should provide an example to the public. Hunt wrote that "Livingston recommended imprisonment for life in a solitary cell, to be painted black without and within, and bearing a conspicuous outer inscription, in distinct white letters, setting forth the culprit's name and his offense, with its circumstances."<sup>77</sup> This inscription would be:

"His food is bread of the coarsest kind; his drink is water mingled with his tears; he is dead to the world; this cell is his grave; his existence is prolonged that he may remember his crime, and repent it, and that the continuance of his punishment may deter others from the indulgence of hatred, avarice, sensuality, and the passions which lead to the crime he has committed. When the Almighty, in His due time, shall exercise

<sup>76</sup> 1 LIVINGSTON, *op. cit. supra* note 29, at 526-28.

<sup>77</sup> HUNT, *op. cit. supra* note 3, at 266.

towards him that dispensation which he arrogantly and wickedly usurped towards another, his body is to be dissected, and his soul will abide that judgement which Divine Justice shall decree."<sup>78</sup>

Recognizing this function of punishment, Livingston antedates Durkheim's position that a wrongdoer is punished so that the act will be judged as abhorrent in the minds of all men, thus maintaining the moral ideals of the society.<sup>79</sup>

Livingston's comprehensive code was never made law, and he subsequently left Louisiana to reenter national politics. Still his influence on the Louisiana penitentiary system can be seen. Louisiana did build an urban-industrial penitentiary which incorporated the ideas prevalent in existing Northern systems, and to supervise the system it appointed a five man Board of Control, whose statements on penal philosophy frequently echoed the ideas of Livingston. The subsequent development of Louisiana's penal system grossly violated Livingston's philosophy, but this constitutes the subject of further study.

<sup>78</sup> 2 LIVINGSTON, *op. cit. supra* note 29, at 573, art. 168.

<sup>79</sup> Lunden, *supra* note 37, at 306-07.