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## Livingston Code, The

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# THE LIVINGSTON CODE

ELON H. MOORE<sup>a</sup>

## I

### FOREWORD

"The human mind, awakened from the sleep of feudalism and the Dark Ages, fastened on all the problems that are inherent to human society—problems which even at the present day, are not half solved."<sup>1</sup>

As Adam Smith may be called the father of political economy, so Edward Livingston may be termed the father of sociological jurisprudence. These two hold somewhat similar positions in relation to their respective fields. Both were men of wide knowledge and acquaintance, each was heir to a considerable amount of the thinking and discoveries contributed by preceding scholars; and it was the glory of each to have placed in ordered arrangement the content of his field of investigation. Each approached a mass of general and specific knowledge, each left it a science. The statement often times made of the former may with appropriateness be adapted for the latter in venturing the opinion that not only did Edward Livingston found sociological jurisprudence but that he almost finished it.

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Note. Edward Livingston was born of an illustrious family at Clermont on the banks of the Hudson in 1764. His father was a judge of the colonial supreme court, his brother, Robert, one of the committee of five appointed to draft the Declaration of Independence and later minister to France, while his brother-in-law was the General Montgomery who gave his life at Quebec. These relations are indicative of the unusual advantages and associations which conditioned Edward in his early life. His own rise in the legal profession and in the political field of that day was most rapid. His appearance in Congress at the age of thirty as representative of the district of New York City, his election as mayor of that city at the age of thirty-six, his appointment as district attorney for the federal government are evidences of this rapid rise. In 1803 occurred tragedies which changed the course of his life. These were the death of his wife which followed closely the death of his oldest son. To this sorrow was added heavy financial obligations to the federal government occasioned by the dishonesty of a clerk to whom he had entrusted the collection of public money. Livingston sought to forget his grief and to recuperate his fortune in the newly acquired city of New Orleans. It was here in the year 1820 that he was called upon by the legislature to prepare a unified code of criminal jurisprudence for the State of Louisiana. Later he was called upon to perform many honored services for both his state and his country, but the reform of criminal law, to which he had been commissioned, remained the guiding passion of his life.

<sup>1</sup>Edward Abner, "*Pilgrim Fathers*," Preface. Quoted in Glenn, "*Some Colonial Mansions*," Vol. I, p. 295.

## II

## CONDITION OF JURISPRUDENCE IN LOUISIANA

When Edward Livingston was appointed by the legislature of Louisiana in 1820 to prepare a systematic code of criminal law, the jurisprudence of the state was in a most unsatisfactory condition. Not only had the laws and legal customs been continued beyond their time of need and usefulness; but there existed an incongruous mixture of Spanish, legislative, and common law, with perhaps here and there a touch of the French. Formerly a possession of France, later of Spain, then again in 1803, retransferred to France for the purpose of sale to the United States, after which much of the Spanish law remained unrepealed, the state suffered from a conflict of laws and custom. Neither was the condition improved when Congress and the frontier legislature sought to provide legal guarantees and laws as occasion demanded, and eastern lawyers sought to introduce the English common law in which they had been trained. The judges appointed by the United States were frequently called upon to administer laws written in a language which they did not understand. This medley of laws and customs

"made the interpretation of criminal law perplexing, the mode of procedure uncertain, the rules of evidence largely discretionary, and the consequent miscarriage of justice frequent and inevitable."<sup>2</sup>

The common law itself was described as a heterogeneous indigestible mass, full of obsolete terms, and often referring to usages long since obsolete or now absurd. Its disgusting technicalities, its basis on general and local customs, its jumble of precedents and customs, and its unwritten feature with resulting arbitrary decisions and inavailability for the common man, were some of the objections which Livingston levied against it. In all it was described as "an unseemly piece of patchwork."<sup>3</sup>

Bad as was the common law, the Spanish laws were even worse.

"In these the most ludicrous and the most horrid offenses were conjoined; the legislation of the Fifteenth Century was considered law for the people of the Nineteenth; and offenses that could only be committed in the days of witchcraft and judicial astrology, were ranged side by side with invasions of property or attacks on the person. Infamous punishments could be inflicted at the option of any choleric magistrate; political disabilities were attached to the most innocent acts under the names of crimes;

<sup>2</sup>Col. Law Rev., Vol. II, p. 31 (1902).

<sup>3</sup>United States Magazine and Democratic Review, July, 1841, Vol. IX, O. S., p. 11.

gamblers, buffoons, usurers, recreant knights, forsworn promise breakers, comedians, and procurers, were classed as persons equally dishonorable; a child born out of wedlock could never serve as a witness; a lawyer who should cite the law falsely was indictable; incantations, love-powders, and wax-images, were specially inveighed against; divination was a capital offense, except when done by astronomy, . . . sorcerers, fortune tellers of every description, and enchanterers who raised the spirits of the dead, except it was done to exercise the devil, or to preserve the crops from hail, lightning, and insects, were punished with death."<sup>4</sup>

Through all the laws were to be found the most unequal of punishments. One who stole a pint of molasses from a sugar house was dealt with more harshly than he who aided the escape of a murderer.<sup>5</sup> The slave who broke an iron collar was to suffer not less than a \$200 fine and six months in prison, while he who kidnapped a free person might escape with a fine of ten cents.<sup>6</sup>

#### BACKGROUND AND PREPARATION

It was the above tangle of criminal law and practice which Edward Livingston was to put in ordered arrangement, or to build anew where he deemed necessary. He brought to this task an enviable background and preparation. It will be remembered that in his first congressional experience, he had served as chairman of two committees, whose purpose had been the revision of the criminal laws of the United States. In addition he brought his experience as lawyer and as judge to the task, as well as his activities on two commissions in the State of Louisiana for the codification of civil laws and procedure. Further, he brought a wide knowledge of both contemporary and former jurisprudence. Not only was he skilled in the principles, practice, and technicalities of the common law and legal practice of his day, but he had long been an analytical student of the Roman, French, Russian, Prussian, and Tuscan codes,<sup>7</sup> and was without doubt the outstanding American follower of the method employed by that French group who made studies of comparative governments and law.

To trace his debt to the jurists and thinkers of his own and former times would be an impossible task. However, his library, letters, and writings give evidence of the large contribution which

<sup>4</sup>Ibid., July, 1841, Vol. IX, O. S., p. 11.

<sup>5</sup>Works of Edward Livingston, Vol. I, p. 136. In Introductory Report to the System of Penal Law.

<sup>6</sup>Ibid., Vol. I, p. 133.

<sup>7</sup>Conservative Rev., III, p. 376 (June, 1900); C. H. Peck, "Edward Livingston."

many of them made. Of first rank among these would be the name of Bentham. From him, Livingston first conceived of penal law as a science. Of whom he wrote:

"a man to whom the science of legislation owes the great attention that is now paid to its true principles, and to whom statutes would be raised if the benefactors of mankind were as much honored as the oppressors of nations."<sup>8</sup>

A letter from Livingston to this English scholar in 1830, further substantiates this view, an excerpt of which follows:

"Although strongly impressed with the defects of our actual system of penal law, yet the perusal of your works first gave method to my ideas, and taught me to consider legislation as a science governed by certain principles applicable to all its different branches, instead of an occasional exercise of its powers called forth only on particular occasions, without relation to, or connection with, each other."<sup>9</sup>

However, we should not infer from the above that Livingston drew his code from the writings and thinking of Bentham. He developed a more comprehensive system and in many cases reduced to practice what the latter had only suggested. Also, he drew much from the writings of Montesquieu, while his obligations to Franklin, Bacon, Peel, Cicero, Eden, Blackstone, Voltaire, Diderot, Huatefort, Beccaria, Erasmus, Ponthier, Taillandier, Howard, Filangieri, Kent, and a host of others is substantiated by his notes, letters, references, and library. He kept in constant correspondence with the distinguished students of jurisprudence of both continents, and followed with avidity the developments in thinking and practice both here and abroad. Nor did he evidence any false pride in his own ability. He submitted his work to the criticism of others. Thus he writes to M. Taillandier in 1826.

"I send you three of my divisions to examine and correct; the others shall follow as soon as they shall be printed. You shall see that the part that I am sending to you can be well appreciated only when you shall see the ensemble of the whole system. I warn you that that which I am sending to you has been printed only in order to be an object of examination and of correction."<sup>10</sup>

On another occasion he wrote:

"I have need of all the aid that the European talents are to give."<sup>11</sup>

<sup>8</sup>Works of Edward Livingston, Vol. I, Note on p. 209.

<sup>9</sup>Letter of July 1, 1830; *Bentham's Works*, by Bowring, Vol. XI, p. 51.

<sup>10</sup>Dated January 10, 1826. Quoted in *Exposé D'un Systeme de Legislation Criminelle*, in Preface by Lucas, pp. X and XI.

<sup>11</sup>*Ibid.*, p. XIV; Letter of June, 1827.

His appointment for his work brought the approbation of his own time. The North American Review commented as follows:

"We consider it not the least propitious—that a jurist was selected to prepare the plan, whose personal qualities are an adequate pledge and guarantee of the excellence of whatever comes from beneath his hand, and whose public standing is such that he must move in a sphere far above the influence of any inducements, but an ambition to promote the best good of his country and his species."<sup>12</sup>

#### DESTRUCTION OF CODE

Before the code was finished, Livingston was elected to Congress. With these new duties, it became necessary for him to spend his congressional vacations on the work that it might be completed according to schedule. This time he spent in New York where sources and materials for study were more available. On the night before he was to deliver his manuscript to the printer, he had remained up until a late hour to put certain finishing touches upon his work. Shortly after his retirement, he was awakened by a cry of fire, which had originated from a spark from his study lamp. All of his papers except some sixty pages already at the printers and a "few imperfect notes," had been destroyed. Four years of labor were completed and destroyed on the same night. Though sixty years of age, he resumed his work with an energy which brought it to completion again within two years, fulfilling his prophetic comment to his wife on the night of the disaster that it, like Phoenix, would rise again from its own ashes. A letter written to Du Ponceau two days after the fire gives evidence of his fortitude and spirit. After relating his catastrophe, he continues:

"My habits for some years past, however, have fortunately inured me to labour, and my whole life has to disappointment and distress. I therefore bear it with more fortitude than I otherwise should, and, instead of repining, work all night and correct the proof all day, to repair the loss and get the work ready by the time I had promised it to the legislature. In a preliminary discourse, which I intended as a kind of commentary on the text of the law, I had made several references to Bentham. Having the volume before me, I made no extracts; and the books being also burned, I am much at a loss, as I cannot find them in any library or bookstore in this city. Will you do me the favor to buy, borrow, or beg them for me? The works I allude to are the French editions, published by Dumont: '*Principles of Legislation*,' 3 vols.; '*Theory of Punishments*,' 2 vols.; and '*Treatise of Judicial Proof*.' Your little book escaped the

<sup>12</sup>Vol. 17, p. 243.

flames, and I saved your Bacon,\* though not my own. I make no apology for giving you this trouble, because I know you will not think it one."<sup>13</sup>

#### OBJECTIVES OF THE CODE

Livingston conceived his task, not as that of patching up the defects and omissions of occasional and opportunistic legislation, but rather the construction of a unified system of criminal jurisprudence, each part related to the other and all parts based on constant principles of legislation. He

"regarded his scheme of codification primarily as the vehicle of introducing reforms of the most comprehensive and important character. He sought to bring the administration of criminal justice into accord with the more humane and enlightened sentiment, which had begun to dominate the thought of the world."<sup>14</sup>

He held as his guide to adopt no theory until satisfied of its utility, to admit nothing on the "mere authority of names," to institute no unnecessary changes, but when changed to give the reasons for such change. When we bear in mind the tangle of jurisprudence and the insufficiencies of the laws of the state at that time, the following objects appear as a logical remedy for much of that confusion:

"To remove doubts relative to the authority of any parts of the penal law of the different nations by which this state, before its independence, was governed.

"To embody into one law and to arrange into system much of the various prohibitions enacted by different statutes as are proper to be retained in the penal code.

"To include in the class of offenses, acts injurious to the state and its inhabitants, which are not forbidden by law.

"To abrogate the reference, which now exists, to a foreign law for the definition of offenses and the modes of prosecuting them.

"To organize a connected system for the prevention as well as the prosecution and punishment of offenses.

"To collect into written codes, and to express in plain language, all the rules which it may be necessary to establish, for the protection of the government of the country, and the persons, property, condition, and reputation of individuals; etc.

"And to change the present penal laws in all those points in which they contravene the following principles, which the general assembly con-

\*Bacon's "*Aphorisms*."

<sup>13</sup>Dated New York, Nov. 16, 1824. Contained in George Bancroft collection of Livingston Papers, Manuscript Room, New York City Library.

<sup>14</sup>Conservative Rev., III, 377 (June, 1900); C. H. Peck, "*Edward Livingston*."

sider as fundamental truths, and which they have made the basis of their legislation on this subject."<sup>15</sup>

Here follow the various principles which formed the basis of the various codes. One of the consuming objectives in Livingston's purpose was the provision for written law prepared by the constituted legislative body. He was unwilling to accept the necessity of judicial construction, and would follow Paine somewhat in the view that laws which were not written could only with difficulty be designated as such.

This opposition to judicial construction led him to seek its remedy by providing the book of definitions which defines and illustrates all those terms, used within the work, if the plain import of meaning might otherwise be in doubt. If put in plain terms so that one of ordinary intelligence might easily comprehend, the will of the legislature could not longer be in doubt and the need for constructive legislation on the part of the courts would be eliminated. Here is evidently a failure on the part of the codifier fully to sense that language is a dynamic institution, growing and changing with the growth and change of social life. It is surprising that one so aware of the evolutionary development of other institutions should hold a static view of language. In his effort to overthrow the absurdities and undesirable features of the jurisprudence of that day, he also sought to remove from the jurisdiction of the courts certain functions which, probably, by necessity, are theirs, if the law is to be progressive.

Though we may disagree with Livingston on a single sociological development, we must respect the ability which he evidenced in the definition of the terms. Had he but devoted all his powers in this direction his name might today receive equal respect in the field of lexicography. I repeat a few,<sup>16</sup> chosen at random, that the reader may sense his clearness in definition.

"ADVANTAGE, applied in different parts of the system to that which is to be gained or lost, means whatever, in the estimation of mankind, causes pleasure by its possession or enjoyment, or uneasiness by its loss or cessation.

"ATTEMPT. An attempt to commit an offense, in this system, means an endeavor to accomplish it, which has failed for some other cause than the voluntary relinquishment of the design.

"ORDINARY CARE—ORDINARY ATTENTION. These terms signify that degree of attention and care which a man of common pru-

<sup>15</sup>Works of Edward Livingston, Vol. I, pp. 82, 83.

<sup>16</sup>From "*Book of Definitions*," Title II, pp. 641-657; Works of Edward Livingston, Vol. II.



dence and activity employs in his daily occupations; they exclude that deliberation and solicitude which is shown by men of extraordinary circumspection and diligence in common affairs, or which concerns of more than ordinary interest excite in all."

His definition of property is significant since in it may be found the distinction between use value of a thing and the thing itself.

"PROPERTY. This term conveys a compound idea, composed of that which is its subject, and of the right to be exercised over it. In relation to its object, property is CORPOREAL or INCORPOREAL; the other part of the definition, the right connected with the object, is that of possessing and using, with respect to corporeal property, or of enforcing or transferring, with respect to that which is incorporeal."

#### CRIMES AND PUNISHMENTS

In his treatment of crimes and punishments he was often Neo-Classical in his thinking. While he scaled punishments according to the offense he also provided that they should be proportioned to the offender. The punishment was determined by those incentives which actuate the offender as a class for each particular crime. While vengeance was unknown, the punishment inflicted should be speedy and certain. Moderate punishments are preferred to severe and in no case were unremissible ones to be inflicted. That of death is socially unnecessary and fraught with potential dangers to liberty and progress. Imprisonment is preferred while banishment, chains, deportation, confiscation of property, labor on public works, exposure to derision, marks of disgrace, stripes, or the infliction of other bodily pain finds no place in his system. In designing punishments, the propensities of human nature must be considered. The pardoning power must be used with caution.

The determination of crimes, Livingston held, was solely the duty of the legislative branch, but that in this function considerations of the support of public opinion and sentiments must be kept clearly in mind. His insistence that the laws should be clear and accessible to the people is but an expression of his democratic conceptions of government. He sought social correction in prevention and not solely by the punishment of offenses. He opened up the whole field of the causation of crime, emphasizing the individual, social, and economic aspects. This approach led him to his comprehensive proposals for the prevention of crime embracing as it did public education, with training in both the vocational and the obligations of good citizenship, the encouragement of religious and moral control, elimination

of the causes of poverty, social provision for those who become dependent, a house of industry for the idle and vagrants, a house of refuge for the unemployed, social readjustment for the discharged convict, and always a careful regard lest institutions designed for punishment become schools of crime. This suggests but is by no means a complete statement of his proposal.

"Remedial, as against vindictive laws, have had no abler and no more ardent advocate."<sup>17</sup>

#### PROCEDURE

In procedure, he became a veritable bull in the china shop of obscure jargon and cluttered technicalities. He sought only the discovery of truth, the protection of innocence, and the punishment of guilt. Technicalities lending themselves to the delay or miscarriage of justice were junked, the terminology made clear, dispatch in criminal trial made possible, and expensive costs made unnecessary. He retained the grand jury only for its educational value, he humanely provided the trial jury with food and drink during the course of its decision. The civil and penal processes were separated, the militia made subordinate to the civil, rewards of honor provided for meritorious service on the part of citizens, and the legal forms made intelligible. The religious sanction of the oath is retained but seriously questioned. As a spur toward the needed change, dilatory legislatures are charged with criminal negligence.

#### EVIDENCE

In the field of evidence, the admission of the testimony of interested parties, the right of the jury to question and examine the witnesses, and the abolishment of leading questions are contributions which Livingston made. Aside from these his work was largely that of an orderly arrangement and classification of the forms and rules of evidence.

#### REFORM AND PRISON DISCIPLINE

Livingston would confine offenders to prison life in order that society might be protected and would-be criminals restrained. Since protection is a primary object, murderers and habitual offenders would be permanently confined. For those whose confinement was limited, reformation also became an added object. This reformation, however, contained none of the moralistic sentiment which is

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<sup>17</sup>Hunt, C. H., *"Life of Edward Livingston,"* p. 264, New York, 1864.

sometimes associated with the term but partook of the nature of a readjustment of the individual's life to his social and economic surroundings. He provided a penitentiary scheme, neither Auburn nor Pennsylvanian in its nature but occupying a middle position in this early controversy, although leaning more toward the latter than toward the Auburn plan. In it, the convict entered into a solitary confinement but he might earn the right to social labor, instruction, books, letters, and other privileges. The murderer, however, was denied most of these opportunities. He suffered permanent solitary confinement, and was constantly reminded of his crime by poetic punishments. No physical punishments were ever inflicted. They partook more of a mental and social nature. All labor, all advancement took place because of the desire and free will of the prisoner. Work was to become a pleasure in one's escape from a painful solitude. It was a skillful attempt to change the attitude toward labor and to establish new habits of industry. Because of this objective, sentences were to be relatively long; the average length being about six years.

The jail is characterized as a school of crime. In place of the existing machinery of punishment, Livingston provided four institutions; a house of detention, for those awaiting trial, detained witnesses, and those in simple imprisonment for misdemeanors; a prison for convicted criminals; a School of Reform for juvenile offenders, and finally the House of Refuge and Industry already mentioned above. Divisions were made in all the above on the basis of sex and offense. The control of these institutions was to be centralized in an administrative board of paid members, aided in their work by an advisory board of unpaid inspectors. Wardens were to be carefully picked and matrons employed. The contract system of labor was provided. But his primary object was social protection and readjustment, not profits, and he warned against that false economy which sacrifices human values.

Throughout Livingston's work runs an emphasis of unity, coherence, and clearness. The code seeks definite objectives, the style is illustrative, the method comparative. Its author hoped not for a panacea but sought to apply to criminal jurisprudence the scientific knowledge of his day.

#### FAILURE OF ADOPTION

Though honored time and again by his adopted state, Livingston suffered the disappointment of its failure to ever adopt the code

it had authorized him to prepare. The duties at Washington had since 1824 consumed his attention and time, except for that spent in the completion of the code, with the result that after being elected to Congress he never returned to Louisiana. With his advance to the senate, he entered upon the preparation of a similar work which he had conceived for the District of Columbia and for the United States. Not only was the stimulation for the adoption of the code somewhat lessened by his absence from the state; but the consideration of the code was twice delayed, first due to the destruction of the code by fire, and second by an epidemic of Yellow Fever which prevented the legislature of Louisiana from meeting. This lapse of time doubtless lessened the ardor of the legislature. While circumstances of time and work kept him from returning to push the adoption of the code, such was not the case with the opposition who remained in Louisiana. This opposition came, to a large extent, from certain of the legal profession of New Orleans, who, having the vested interests resulting from an obscure and technical jurisprudence, opposed any simplification of that from which they secured their undue advantage. It also arose partly from a personal antagonism among many of the lawyers toward Livingston, because of his leadership. Their opposition under the leadership of Seth Lewis was sufficient to accomplish their object. They brought into play all the time worn arguments of reaction and conservatism, discouraging its adoption because of its innovation, the inconvenience of changing from a somewhat satisfactory present, and that it might be good in theory but would not be practical.<sup>18</sup>

Though disappointment was the result of six years of labor, he never ceased his efforts to further this reform. Less than a year before his death, when in 1835 he took leave of certain of his French friends, he told them:

"that he renounced the political life, and that the days that it would please Providence to still give to him would be entirely devoted to the perfecting of his system of criminal laws."<sup>19</sup>

In the same year he wrote the Howard Society of New Jersey urging the adoption of penal reforms. This letter indicates not only his continued interest into that period of life when many have resigned their activities for peace and retirement, but it also shows that fresh interest which he was able to impart to subjects apparently exhausted

<sup>18</sup>Works of Edward Livingston, Vol. I, p. 153.

<sup>19</sup>Edward Livingston, "*Système de Legislation Criminelle*," Preface by Charles Lucas, p. XXVI.

many years before. Speaking of the individual effort necessary for the accomplishment of their object, he continues:

"Let him use one-half the exertion that he would for chartering a bank or building a bridge, and the work will be done, and it will be worth more than all the banks that were ever chartered, and all the canals that were ever dug.

"I cannot conclude without expressing an earnest hope that your society may see the necessity of employing its collective influence—to endow your state with that which no state has yet had the happiness to possess, a complete system of penal law, resting on the great preventive basis of general education, religious, moral, and literary, and of which all parts shall be adapted to each other.

"No country, I repeat, has ever had such a system; and none will have it as long as the patchwork plan, of applying remedies only when evils become intolerable, shall be pursued.

"New Jersey has an opportunity of rising to a proud pre-eminence, in jurisprudential legislation, above her two powerful neighbors, by constructing the whole of the new machine, and putting it at once in motion, while they are trying separately the effects of some of its detached springs and wheels. These partial experiments become less efficient, and sometimes totally fail, because the institutions on which they are made are unsupported, and thus bring discredit on the whole system. Thus the penitentiary plan loses one-half its efficiency and many of its advocates, because it is counteracted by indiscriminate confinement before trial, and is not supported by proper laws to regulate pauperism and vagrancy. If one state could be prevailed upon to give the plan a fair trial, by a connected series of well-adapted institutions, my life for it, the efforts would exceed the most sanguine expectations; and, if it failed, how easy to return to the present system, if system it may be called, which consists only of detached parts."<sup>20</sup>

#### RECEPTION OF THE CODE

If Livingston suffered disappointment because of the inaction of the legislature of Louisiana, he must have been more than repaid by the reception which the work received elsewhere. In this country favorable recognition was given the work by Chief Justice Marshall, Story, Madison, and even by his former friend and enemy, Jefferson, while Kent wrote that Livingston had done more in giving "precision, specification, accuracy, and moderation to the system of crimes and punishments" than any other legislator of his age.<sup>21</sup> His opinion was sought on many occasions and from many places; his remarks on the punishment of death were reprinted in Philadelphia in 1831

<sup>20</sup>Quoted by Hunt, C. H., *"Life of Edward Livingston,"* pp. 407-408.

<sup>21</sup>Hunt, Carleton, *"Life and Services of Edward Livingston,"* Address before the Louisiana Bar Association, p. 31.

when the legislature of Pennsylvania had under consideration the abolishment of the death penalty. Harvard conferred upon him the degree of Doctor of Laws as did also Columbia and Transylvania.<sup>22</sup> In its review of the Plan of the Penal Code, the North American Review described it as embracing:

"The high minded views of public policy, the stain of manly and animated eloquence, the powerful reasoning, the comprehensiveness and accuracy of details, by which it is everywhere pervaded and marked."<sup>23</sup>

Some years later, after time had given its perspective, the historian, George Bancroft, wrote the following:

"The code—is in its simplicity, completeness, and humanity, at once an impersonation of the man and an exposition of the American Constitution. If it has never yet been adopted as a whole, it has proved an unfailing fountain of reforms, suggested by its principles. In this work, more than any other may be seen the character and the lifelong faith of the author."<sup>24</sup>

The favorable reaction which the code produced upon the continent was even more pronounced. He received personal appreciation from Czar Nicholas of Russia, and King Charles of Sweden; the King of the Netherlands sent him a gold medal with an appropriate inscription; while Louis Kossuth, exiled Governor of Hungary, declared at a public dinner given by the bar of the City of New York, that the code had made Livingston one of the four Americans, best known in Europe.<sup>25</sup> Villemain said of the work that it was "without example from the hands of any one man"<sup>26</sup>; Dr. H. S. Maine pronounced Livingston, "the first legal genius of modern times"<sup>27</sup>; Victor Hugo, in a personal letter described it as:

"un beau livre—un livre utile—un livre modele—vous etes du nombre des hommes qui ont le plus et le mieux merite de l'humanite dans se siecle."<sup>28</sup>

The Institute of France elected him a foreign associate; while in Geneva, Count de Sellon erected a monument to the inviolability of the life of man, having on its twelve faces inscription to twelve men who had spent their lives for this purpose. Keeping company with inscriptions to Bacon and Wilberforce, was the following to Livingston:<sup>29</sup>

<sup>22</sup>Quinquennial Catalogue of Harvard University, 1636-1925, p. 961.

<sup>23</sup>Vol. 17, 243 (1823).

<sup>24</sup>Hunt, C. H., "*Life of Edward Livingston*," Preface XVIII and XVII.

<sup>25</sup>Hunt, C. H., "*Life of Edward Livingston*," pp. 278, 279, 280.

<sup>26</sup>Ibid., p. 278.

<sup>27</sup>"*Cambridge Essays*," 1856, p. 17. Quoted in Hunt, p. 278.

<sup>28</sup>Ibid., p. 405.

<sup>29</sup>Ibid., p. 410.

"A .  
LIVINGSTON  
IL DEMANDA  
L'ABOLITION DE LA  
PEINE DE MORT A  
L'AMERIQUE"

In England his work was reprinted by a Dr. Southward Smith, a stranger to Livingston while Jeremy Bentham proposed to Parliament that it print the code for the benefit of the English nation.<sup>30</sup> A French edition appeared with copious notes by M. Taillandier, the counsellor whose criticism Livingston had so often sought.<sup>31</sup> Numerous reviews were made of his work in France, Germany, and England. Among these, one selected from the Edinburgh Review serves to show the respect in which the man and the book were held. It follows:

"There is nothing local, limited, provincial, conventional, nor even national, in or about the system or the man; he never gave up to party what was meant for mankind; he and his work were essentially cosmopolitan; if asked for his country, he might have pointed, like the Grecian sage, to heaven; and it is as a citizen of the world, not as a citizen of an American Republic, that he will be consulted, cited, interpreted, practically applied and hailed as an honored guide, by the generations of converts yet unborn that are promised him."<sup>32</sup>

INFLUENCE OF THE CODE

There are some works and deeds which echo and reverberate from generation to generation and from age to age. Such is the work of Edward Livingston. Though a hundred years have passed, we are in each decade instituting some of the features of criminal jurisprudence proposed by the "Father of penal reform." Proposals for a wage for prisoners, parole, prison library, prison school, separate provision for the insane, a system of rewards and punishments, a marking system, guidance after release, frequent inspection, juvenile reformatory, and matron are a few of the later reforms to be found within his system. It would be rash to suggest that where these reforms have been accomplished that they may be always directly traceable to the Livingston Code. The influence of reformers, in

<sup>30</sup>*Works of Jeremy Bentham*, by Borwing, Vol. XI, p. 37.

<sup>31</sup>*Ibid.*, p. 276.

<sup>32</sup>July, 1864. Quoted in Hayward, *Biographical and Critical Essays*, Vol. II, p. 97.

advance of their day in social thinking, does not lend itself to ready measurement. While in the above matters, later practice has to a greater or lesser extent followed the proposals of the code, but few prisons of this country employ the provision of separate labor which Livingston proposed. However, if we turn to France, where his writings apparently had more weight, we may possibly infer that it was through his effort as much as through the work of De Beaumont and De Toqueville, that that system was adopted there. Hunt records that the code was laid before the Council of Superintendents of Prison Discipline in the City of Paris. With all its modern shortcomings the code still constitutes a thesaurus from which the world continues to draw ideas and principles.

There are, however, certain influences of the code which may be more definitely traced. The Central American state of Guatemala translated his Code of Reform and Prison Discipline and adopted it for its own.<sup>33</sup> I have been unable either through the legation at Washington, the Pan American Union, or other sources to determine with what success this transplanted code resulted. It is interesting to note that the government of Guatemala named one of its cities after him and upon his death declared three days of mourning in his honor.<sup>34</sup> Likewise, the code received consideration in Brazil when the deputies were revising the criminal code of that country in 1830. A letter<sup>35</sup> from Mr. Wright, the consul at Rio de Janeiro states:

"The chambers are now engaged in revising the criminal laws of this country, and I believe have selected Livingston's Criminal Code as a basis; the Minister of Foreign Affairs, who is a member of one Chamber of Deputies, and one other member have requested me, to procure them copies of that work in French, which I have sent for."

However, an inquiry of my own to the offices of the Pan American Union brought the reply that the Brazilian Code of 1830 drew largely from the French Penal Code. A third definite influence appears to have been exerted on the Russian code completed in 1830. It will be remembered that mention has already been made of the letter which Czar Nicholas directed to Livingston in 1826, after seeing the code. It is at least significant that the codification of the laws of the Russian Empire by Alexis Mikhaelovitch was started in that same year by the order of the Czar.<sup>36</sup> Thus, was Livingston able

<sup>33</sup>"*Codigo de Reforma y Disciplina de las Prisiones*," Guatemala, 1834.

<sup>34</sup>Hunt, C. H., "*Life of Edward Livingston*," p. 434.

<sup>35</sup>Consular Letters, Rio de Janeiro, Nov., 1827-Dec., 1830; Dept. of State Archives, Washington, D. C.

<sup>36</sup>Edwin Emerson, "*A History of the Nineteenth Century*," Vol. II, p. 736.



to fulfill his own prophetic sense of social values, which he had expressed in the Plan of the Code:

"This is the greatest glory a wise nation can desire; to see its principles recognized; its institutions adopted; its laws copied; not only by men speaking the same language, and bred in a similarity of manners, but translated into different languages, adapting themselves to different habits; incorporated in different codes, and in all, acknowledged as the first of blessings. And the trial of a cause by an independent jury, on the banks of the La Plata or the Oroonook; or the writ of habeas corpus adopted by a representative assembly in Mexico and Peru, ought to afford more satisfaction to an Englishman, who loves the honor of his country, than the most splendid triumph of her arms."<sup>37</sup>

The passing of a century has not lessened the respect of those who become familiar with Livingston and his code. Aside from this group his name and work has almost been lost from the public memory, due to reasons already suggested in the preface. At the first International Prison Congress in London in 1873, marked honor was done to his memory when there was presented to the delegates of that Congress, two editions of his works, one in French, the compliments of the Institute of France, and the other in English, the compliments of the American Prison Association. Archbishop Manning of Westminster, in a letter to Dr. Wines, accepting the American edition, wrote:

"We have also to thank you for Mr. Livingston's valuable work on reform and prison discipline—Mr. Livingston was before his time—a forerunner in the recent amelioration of our prison discipline, which is, day by day, becoming vital to the welfare and even to the safety of the civil society of the world."<sup>38</sup>

In commenting upon this occasion, Charles Lucas, wrote:

"It is touching to see born at the same time in France and the United States the same thought of honoring in the same manner and at the same hour the memory of Mr. Livingston."<sup>39</sup>

From time to time articles upon the code or the man still appear in law journals and occasionally some mention may be found within the general periodicals. His spirit and that of his code remains with us in a much more indirect way. We must not be unmindful, suggests Charles H. Peck,<sup>40</sup> of the humanitarian inspiration that produced the powerful works of Hugo, Reade, Bulwer, and

<sup>37</sup>Works of Edward Livingston, Vol. I, p. 65.

<sup>38</sup>International Penitentiary Congress, London, July 3-13, 1872, p. 733.

<sup>39</sup>Preface to "*Système de Législation Criminelle*," p. XXXIX.

<sup>40</sup>Conservative Rev., Vol. III, p. 378.

Dickens, "all of whom were stimulated directly or indirectly, by the insight and wisdom of Edward Livingston." But the fact that not one in five can intelligently place the name of Edward Livingston, nor are familiar with his accomplishment, is no criteria of the worth of that work. Like so many former men of vision, his significant contribution has been lost among the warp and woof of our present thinking and practice. Philander S. Knox declared this work to be the "foundation stone upon which criminal reformatory legislation" has been built.<sup>41</sup> Perhaps no better closing may be given to this chapter than the following quotation from Peck.

"The greatest benefactors of the race are too often the least remembered by posterity. Modern civilization is like the coral reef—the fabric of countless and forgotten lives. Enlightened liberty and social progress are primarily due to the men who conceive in the closet the principles that statesmen embody in legislation. Every advance in social conditions soon appears to be such a natural right that we are prone to ignore the beniginity, intellect, and labors of those who encountered all but insurmountable impediments to the introduction of new and larger ideas for the betterment of their fellow-men. To Edward Livingston the world owes much; yet he has almost receded from memory. The resultant of his benevolent purposes and original thought has merged into the elemental truths now universally recognized as entering into the foundations of civilized government."<sup>42</sup>

### III

#### EVALUATION

"Society was slow in emancipating itself from the capricious despotism of its criminal laws. Nothing is changed with more difficulty than practices which have received the sanction of antiquity and habit."<sup>43</sup>

Livingston may be termed a successful failure. The immediate object of the code was never attained but his individual proposals have become a part of the jurisprudence of millions of people.

As indicated in Chapter II, the code drew the warm applause of governors, jurists, kings, and social philosophers both in Europe and America. Doubtless its influence was greater abroad than on this side of the Atlantic. Livingston had drunk deeply from the springs of continental thinking which may partially account for the attention it aroused and the discussion it provoked there. It is im-

<sup>41</sup>"*Louisiana Historical Society*," Published Vol. VI, p. 35; Speech at the Louisiana Centennial.

<sup>42</sup>Conservative Rev., III, p. 361, Article on "Edward Livingston."

<sup>43</sup>The United States Magazine and Democratic Review, Vol. IX, p. 9, July, 1841.

possible to trace the influence of this great work. Of the many proposals which have been adopted some may be traced directly to the influence of Livingston. Others have no connection with the man or work but arose out of the needs of the time or from the growing school of thought of which Livingston was a part. In these cases his glory was that he foresaw the approaching needs and their solution somewhat sooner and somewhat more as a whole than those who later in their difficulty provided opportunistic remedies. Whether we shall ever attain the scientific approach to law-making which Livingston attempted is a question. There is little effort in that direction. Dean Pound the present leader in Sociological Jurisprudence suggests that

"There is no one thing in all the departments of government or of business that is carried on with less scientific or orderly method than the making of laws."<sup>44</sup>

It may be well to list some of the reforms which followed closely upon the heels of his work. Many of these may have developed wholly independently of the suggestions of Livingston, several may have contributed to his thinking. Perhaps his time was already pregnant with the development of the next few decades. At least the reforms which followed the appearance of his works are significant ones. In the year, 1824, was organized the first house of reform for juvenile offenders in New York City. Two years later a similar institution appeared in Boston and in 1828 another in Philadelphia. In 1829, the first chaplain was appointed at Charleston and provisions for a Sunday school and some education in the same prison. The next five years saw the development of the first professional warden in Amos Pillsbury, a system of rewards in Georgia, the encouragement of special talents in Massachusetts, discussion of the aftercare of the prisoner in the same state, while later developments included matrons, the prison library, provision for research, extension of education, and many other features, all of which had been provided in the code. It should be borne in mind, however, that many of these represent only random experiments. Many of these reforms were not rapidly copied and a few are by no means universal in 1928.

Other developments which the code seems to have anticipated was the progressive stage established by Crofton; the intermediate

<sup>44</sup>R. Pound, *"Inherent and Acquired Difficulties in the Administration of Punitive Justice,"* Proceedings of American Political Science Association, Vol. 4, p. 72, 1907.

stage of later development had its prototype in House of Refuge; the Habitual Criminal Act of 1869 in England might easily have been suggested by the code's provision for second and third offenders, while the code anticipated the abolishment of the tread mill by three quarters of a century. The giving of inducements to labor and the central control of the penal institutions by a paid board assisted by an unpaid board of advisors, while by no means original with Livingston, have found wide adoption.

On the other hand, we note the absence of certain features with which we are today familiar, such as the common dining room, communication, chapel, labor outside prison walls, freedom of the yard, the honor system, absence of uniform, good time, and probation. Many of these, of course, were impossible under a system of practically solitary confinement supported as it was by a fear of contamination.

Present advanced thinking still follows Livingston in his objects of punishment, his characterization of the jail as a school of crime, and that whole program of humane provisions for the physical well being of the prisoner. Practice, on the other hand, lags a century behind. His criticisms on procedure still stand. Livingston's treatment of the causation of crime is for the most part acceptable except for the contributions which psychiatry have made. His basis for punishments would be somewhat altered by the present criminologist since we now realize that the same cause does not operate for crimes of similar nature but that the cause must be individually determined in each case. His program of prevention took no consideration of the lessening of defective stock through marriage laws or by other provisions. Perhaps, he lived too near the heyday of Jacksonian democracy to make this suggestion. In other respects his program of prevention has an air of modernity. His fears regarding the dangers and abuses of the pardoning power would find many present day disciples. The efficacy of mild over severe punishments, while questioned in some quarters, probably finds greater acceptance than rejection. At least in the century which has elapsed, the punishment of death has been gradually removed for most crimes in all states, totally abolished in eight states, and seldom inflicted where provided. Similar developments have followed in other countries where doubtless the influence of the code has been greater than here.

The code as such has received no adoption. The Code of Reform and Prison Discipline was incorporated into the law of Guate-

mala but it has not made a school. Lucas<sup>45</sup> suggests that it was not sufficiently written under the inspiration of observation and practical experience. Be this criticism justified or not, it and the other codes have constituted a source book for later developments in criminal jurisprudence. Quoting again from Lucas,

"If they have not attained the immediate success of actuality, they aspired to a place more durable, responding to the progressive needs of science and civilization."<sup>46</sup>

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<sup>45</sup>Livingston, "*Systeme de Legislation Criminelle*," Paris, 1872; Preface by Charles Lucas, p. XXII.

<sup>46</sup>Ibid., p. 1 (Translated from the French).

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