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### Edward Livingston and His Louisiana Penal Code

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should be as much concerned to exonerate a lawyer and prevent undeserved injury to his reputation as to eliminate an undesirable lawyer from the ranks of the profession. The procedure of investigation should take full cognizance of the fact that, from the mere fact that a complaint has been made, a lawyer is likely to be injured somewhat if that fact is known. Consequently, initial investigations should be conducted with as much secrecy as possible. Reasonable ground to believe in the truth of the charges having been discovered, the matter should be pursued with promptness, thoroughness and fearlessness by representatives of the Bar. Adequate discovery of the facts, however, requires the power to subpoena witnesses and administer oaths. When misconduct is found which is indicative of lack of character, the situation should be dealt with courageously. In such cases elimination of the lawyer is not only in the interest of the pro-

fession but of the public as well. In any stage of the investigation when the lawyer is found to be blameless, the representatives of his profession owe it to themselves and to him to make an earnest attempt to convince those who suspect him of misconduct that he was blameless. If it becomes generally known that a lawyer has been charged with misdeeds, findings which exonerate him should be given publicity with a view to preventing injury as much as possible. There will of course be some small injury to lawyers complained against, even when exonerated, in spite of all that can be done, but this is the price that the individual lawyer must contribute to a campaign which contemplates both the elimination of undesirables and stopping that undeserved injury to lawyers which results from honest but erroneous conclusions of clients. The campaign is one in which every honest and well meaning lawyer can enthusiastically enlist.

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## EDWARD LIVINGSTON AND HIS LOUISIANA PENAL CODE

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Remarkable Career of Livingston—Resigns New York Mayoralty and District Attorneyship to Enter Practice in New Orleans—The Louisiana of His Day—His Sympathetic Attitude towards the Local Views—Legislature Passes Act for Preparation of Criminal Code to Be Founded on the One Principle of the Prevention of Crime—Livingston Receives Appointment for Task—His Exceptional Qualifications for It—Modernity of Some of His Proposals—Code never Adopted, etc.

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By JEROME HALL

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**T**HE life<sup>1</sup> of Edward Livingston is an American epic. From its beginning on his ancestral estates in New York to its close one hundred years ago next May 23rd, it unfolds with sustained interest, dramatic and deeply inspiring. The boy spends his childhood in distinguished pre-revolutionary society, nurtured by fearless scholars who led the way to independence under banners proclaiming the rights of man, the innate worth of human beings and their freedom from governmental oppression. He hears, learns from, knows the great. On to Princeton; then the study of law both common and civil, and in company with future leaders of the Bar. To New York and eminence in practice. Soon he is elected to the United States Congress. Then he is appointed United States District Attorney for New York, and simultaneously is elected to and fills the office of Mayor of New York City. Yellow fever lays low the population, and he ministers unceasingly to the stricken folk. Weakened by his exertions, he falls, himself, victim to the epidemic. While thus confined, a clerk absconds with \$100,000—money due the United States. With no intimation of blame or liability, Livingston assumes the indebtedness, sells his entire belongings, assigns the proceeds to the United States and acknowledges a deficiency of approximately

\$44,000. With the hope of achieving quick financial success in New Orleans, he resigns the New York mayoralty and district attorneyship, and, aged 39, he goes in 1803 to Louisiana—to rise to eminence at the Bar and in public life and to immortality in the world of legal scholarship.

To understand the man and his work, and the quality of genius that uniquely fitted him for his abundant contribution, it is necessary to know the Louisiana of his day. Long before any settlement on the Atlantic coast, the Spaniards had explored Florida, founded St. Augustine, and penetrated the Southwest far into Mexico. Years later, in the last quarter of the seventeenth century, Marquette and Joliet cut a perilous route down the Father of the Waters until they came to the border of the Spaniards' southern domain, when, deterred by fear of enslavement or assassination, they turned back and brought their wonder-rousing reports to their compatriots in Canada. In 1682 the undaunted chevalier de La Salle led a party to the very mouth of the Mississippi, making no settlement but planting the flag of his king on the vast domain he called Louisiana. In 1699 three of the Le Moynes brothers left their Canadian estates, established successful settlements in Louisiana, and became the first governors.

From then until Spain took possession, constructively in 1762, actually in 1769, French law governed.

1. Charles H. Hunt, *Life of Edward Livingston* (1864).

In 1769 O'Reilly proclaimed Spanish laws and planted Spanish judicial and political institutions in the teeth of strenuous but, for the time being, inadequate resistance. In 1800 the Little Corporal forced Spain to surrender the American dominion; and in 1803 Livingston's older brother, Robert, and Monroe negotiated the Louisiana Purchase for fifteen million dollars.

The vast Louisiana Purchase included at least the present states of Louisiana, Arkansas, Missouri, Iowa, Oklahoma, Nebraska, North and South Dakota, Montana, Colorado, Wyoming, and part of Minnesota. When Livingston arrived in New Orleans in 1804 he found a town of about 8,000 inhabitants, half of whom were white persons, chiefly of French descent. In 1806 the territory had a population of about 53,000 persons of whom 23,500 were slaves, 3,500 free colored, and 26,000 whites, of whom more than half were natives of Louisiana, mostly French.<sup>2</sup>

In Louisiana Livingston found men of learning and ability, devoted to French culture, and resentful of attempts to substitute an alien language and alien laws. His sympathetic grasp of the situation is an object lesson in the resolution of culture conflicts. He endeared himself by his distinguished services in support of the civil law. In the second year of his residence he simplified the civil practice and procedure, and saw his recommendations enacted April 10, 1805. Twenty years later, he collaborated with Lislet and Derbigny in the drafting of both the Code of Practice of 1825 and the Civil Code.

On May 4, 1805 the Territory passed a comprehensive act naming, but not defining, practically all of the important common law crimes, and adopting the English common law system, both substantive and procedural, as regards the designated offenses. Subsequent crimes were to be defined by statute. Between 1805 and 1821 a number of other penal statutes were enacted. The Congressional Act of March 26, 1804 had provided for the continuance of those territorial laws not inconsistent with jury trial, habeas corpus, bail, and the privilege against "cruel and unusual punishments." Livingston was convinced that the congressional and territorial legislation did not completely abolish the prior Spanish penal law. Later decisions indicate rather clearly that the judges in fact looked to the English law for interpretation; and it does not appear that Spanish laws were drawn upon to any extent either for that purpose or to fill in lacunae. But that possibility combined with numerous difficulties of the common law and the confusion resulting from hastily drawn legislation, to induce wide reform.

On February 10, 1820 the General Assembly of Louisiana passed the historic act providing that there be prepared a code of criminal law to be "founded on one principle, viz., the prevention of crime; that all offences should be clearly and explicitly defined, in language generally understood; that punishments should be proportioned to offences; that the rules of evidence should be ascertained as applicable to each offence; that the mode of procedure should be simple, and the duty of magistrates, executive officers and individuals assisting them, should be pointed out by law."<sup>3</sup> In February, 1821 Livingston received the appointment—57 years of age, at the peak of his intellectual vigor, and with vast varied experience, a linguist versed in Latin, French, and Spanish, a scholar familiar with Roman and comparative law, a master of the common

law, as well. Two intensive years of unremitting labor led to completion of the project. Then, at the very end of his task, his manuscript was totally destroyed by fire. Unhappy, but indefatigable, and with unshaken faith in the need for his code, Livingston immediately started afresh and produced the voluminous works that we possess. His code was never adopted. But, if the judgment of gifted contemporaries be valid criterion, the work that roused the unbounded praise and enthusiasm of Bentham, Hugo, Kent, Story and Marshall must have been of the rarest quality, indeed.

His System of Penal Law has five divisions: A Code of Crimes and Punishments, A Code of Procedure, A Code of Evidence, A Code of Reform and Discipline, and A Book of Definitions. At the outset, and frequently later, he declared that "no act of legislation can or ought to be immutable." So, too, if we wish to understand his work we must strive to read it in light of the problems of over a century ago, as well as against the background of the then-prevalent philosophies.

The most remarkable feature of the Code of Crimes and Punishments is the "total abolition of capital punishment."<sup>4</sup> Fully aware of universal opposition (all the states were then retaining the capital penalty) he summoned his greatest powers of analysis and persuasion, and presented an argument that has never been surpassed. Brilliantly he endeavored to establish the ineffectiveness of capital punishment as a deterrent of crimes of strong passion; the greater effects of life imprisonment; its destruction of the public sensibilities; the avoidance of the prescription by jurors and witnesses; and the unfortunate experience of communities that inflicted the penalty in comparison with two or three others, where, for a time, it was abolished, showing, he concluded "not only that it fails in any repressive effect, but that it promotes the crime" (murder).<sup>5</sup> His analysis and the reform he so eloquently urged caught the imagination of scholars and humanitarians the world over; and none can say how great an effect his report has had nor when his masterly appeal may again inspire complete reexamination of the problem.

It is possible merely to touch upon a few of the other salient features of the Code of Crimes: No child under nine could be convicted of any crime. A married woman who committed a crime under command or persuasion of her husband, was to receive one-half the penalty otherwise provided. The punishment for a second offense was to be increased by half; and one who had twice been convicted of a crime, was, upon a third conviction, to be imprisoned at hard labor for life. He would exempt close relations from liability as accessories after the fact. Contempt of court was rigidly curtailed. Strikingly novel were offenses against the liberty of the press, which included even legislation to restrain the right. Adultery was made criminal, a wife being punished more severely than a husband. Assaults on officers carried double punishment as did assaults by men against women, and wards against tutors. Murders were divided into four ascending grades: infanticide, assassination, murder under trust, and parricide. Suicide was made not criminal. And it was made a conspiracy to combine to raise or, and this was not in the English statute nor yet, I believe, in American jurisprudence, to reduce wages—the penalty for employers being imprisonment, that for employees, imprisonment or fine.

Livingston's Code of Criminal Procedure was prob-

2. Claiborne, *Official Letters*, etc.

3. *The Complete Works of Edward Livingston on Criminal Jurisprudence* (1873) vol I, p. 1.

4. *Id.* I, 224.

5. *Id.* I, 201.

ably much more truly prophetic. He deplored the disregard of preventive remedies; and though his plan for reward of informers has not found legal sanction, his provisions for enlistment of public cooperation by honorary rewards, for early education, and for relief of economic insecurity challenge contemporary scholarship to reconstruct the traditional coercive legal apparatus and provide theory and instrumentality for prevention of criminal behavior.

His proposals regarding the preliminary magisterial hearing have but recently been adopted, and in certain important matters he is still leading the way. To avoid tricking the accused, the magistrate's examination was to be limited to specified questions; the answers were to be recorded, corrected, signed by the accused, and transmitted with the record, to the trial court. The accused, being protected from catch-questioning, must have his refusal to answer militate against him.

In matters of simplification of pleading, Livingston was a full century in advance of his time. Here, especially, his linguistic bent, inspired probably by Bentham, found an apt sphere of application. The classic story of his informing a newly arrived and apprehensive practitioner that he could learn all the rules of Louisiana pleading in the course of a dinner's conversation is some indication of their simplicity. After conviction, no judgment was to be arrested for any defect save failure to allege a crime. A rather unique proposal was provision that the defendant was to present the closing argument.

From a political point of view the sections on *habeas corpus* and jury trial are most significant. By requiring the magistrate to issue a warrant for the prisoner, he sought to avoid circumvention of the writ by police officers. All offenses were to be tried by jury; but any number agreed upon, less than twelve, could try a misdemeanor. Unanimous verdict was required.

The originality of the Code of Evidence may be seen from such provisions as the following: where one is convicted because of the unjust operation of the rules regarding admission or exclusion of evidence, the court is directed to report to the legislature and withhold judgment until the end of the session, when, if the code is altered, a new trial must be granted; the refusal to exclude the testimony of husband or wife, for or against the other; and the abolition of the rule denying a party the right to discredit his own witness either by cross-examination to test veracity, or by calling character witnesses.

The Code of Reform and Prison Discipline is in some respects the most remarkable of all. Throughout, the objective was prevention of crime through "restraint, example and reformation." Where prisoners were indiscriminately mingled, including even, in those days, persons awaiting trial, the grossest contamination resulted. Livingston advocated careful classification and segregation of typical groups. He worked out a detailed program to include not only treatment of the criminal but also support and training of the economically submerged. To appreciate the sweep of his constructive imagination, it may be recalled that even at Auburn which was one of the most progressive of American penal institutions, treatment was characterized by solitary confinement, absolute silence, and unrestrained, frequent use of the lash by the turnkeys.

Livingston advocated a system of education that would give instruction in the duties of the citizen to-

wards the state, towards each other, and in those principles of religion that were common to all sects.

He proclaimed as an axiom that "political society . . . owes necessary subsistence to all those who cannot procure it for themselves."<sup>6</sup> To this end he would establish a House of Industry where, in one department, those who desired would be given employment, and, in another department, vagrants and able-bodied beggars would be forced to work. These latter, arrested at an early age and taught to be industrious, would, he believed, remove a prolific source of criminality. In the jail, offenders were to be subjected, according to the moral turpitude of their offenses, to various degrees of imprisonment, labor, and solitude. To the improvement of housing conditions, sanitation, the education and comfort of prisoners, Livingston made many notable suggestions. And he sought to provide for the reestablishment in society of discharged convicts by throwing open to those unable to find employment, the facilities of the House of Refuge and Industry. As to juvenile offenders, the place of confinement was to be "a school of instruction rather than a prison for degrading punishment." Finally he emphasized the importance of personnel in penal institutions, and provided for a board of inspectors to be liberally remunerated. All of these projects were not novel, but, as he stated, "they had never before been consolidated and presented as component parts of a whole system."<sup>8</sup>

The basic philosophic tenets upon which Livingston constructed the above codes were utilitarian, individualistic, and humanitarian.

To understand the Utilitarianism which the Livingston codes represent, one must look back a full century before he wrote. The intellectual origins were diverse. There was the hedonistic ideology which Gay in 1730 reestablished as a basic philosophic viewpoint. Next, and at least equally distinctive, was the prestige of Newtonian mechanics, which, like relativity at present, influenced all departments of thought. Professor Hutcheson of Glasgow, a forerunner of Hume and the teacher of Adam Smith, was among the first to suggest application of exact scientific method to "moral science." In 1738 Hume proposed the introduction of the experimental method into moral subjects, and he applied the idea of Newtonian attraction to psychologic association, arguing that mental phenomena were mutually attractive and in causal interrelationship. This conception was pushed further in 1749 by Hartley who superadded the principle of contingency and drew close analogies between mental phenomena, thus viewed, and physical attractive forces. In France, Helvetius, to whom Bentham fervently expressed his profound debt for the suggestion of a science of legislation, also "wished to treat morals like any other science and to make an experimental morality like an experimental physics"; and he argued that "there exists a pedagogic art of inspiring and ruling the passions whose principles are 'as certain as the principles of geometry.'"<sup>9</sup> Helvetius' writing was taken up by Beccaria, who emphasized, naturally, the mathematical claims of the new moral science, formulated the principle of "the greatest good to the greatest number," and applied the utilitarian ideology to crime and penal law.

Bentham who became the recognized fount of util-

6. *Id.* I, 528-9.

7. *Id.* I, 573.

8. *Id.* I, 586. For very interesting comment, see *Two Letters of Chancellor Kent* 12 *Am. L. Rev.* 479.

9. See Halévy, *Philosophical Radicalism in the 19th Century*.

itarianism, must be read against these intellectual and cultural movements. And it is little exaggeration to state that Livingston was Bentham's ardent disciple. He referred to Bentham as "the man who has thrown more light on the science of legislation than any other in ancient or modern times,"<sup>10</sup> "a man to whom statues would be raised if the benefactors of mankind were as much honored as the oppressors of nations,"<sup>11</sup> and as "a most profound writer on this subject" (evidence).<sup>12</sup>

Livingston's insistence upon the statement of reasons in support of the provisions of any code, his distinction between immediate and remote means of preventing offenses, his eloquent appeal to address the people "in the language of reason," and to invite them "to obey the laws by showing that they are framed on the great principle of utility!"<sup>13</sup> his deliberate avowal that he has "taken . . . utility for the sole object of [his] provisions,"<sup>14</sup> that "in affixing punishments, we should compare the evil of the offense with that necessarily caused by the punishment, and decide as the balance shall incline"<sup>15</sup>—here and throughout we see clear indications of a major intellectual influence upon the leading American exponent of 19th century utilitarianism in law.

The bent for mathematical precision and application of exact scientific thought in social disciplines characterized the Classical School in penology. We see this predilection—a still prevalent one—in Livingston's assignment of specific penalties (fines and years of confinement) to a carefully dissected mass of criminal offenses. Thus, the penalty for second convictions was an addition of half to the punishment otherwise prescribed.<sup>16</sup> A fine must never exceed one-fourth of the value of the property of the offender.<sup>17</sup> Fines of public officers bore a certain proportion to income; fines for bribes were fixed in proportion to the value of the bribe. Typical was the provision that:

"Where negligent homicide in the second grade has been committed, in the doing or the attempt to do an act which is an injury, but not an offence, one-fifth shall be added to the punishment. If the act done or attempted, be a misdemeanor, but not an offence against the person, one-fourth shall be added. If it be one of those designated as an offence against the person, but not one of those offences designated as murder, one-half shall be added. If it be a crime punishable with imprisonment at hard labour for any term less than life, the punishment shall be doubled, and the imprisonment shall be at hard labour. And if the act be done or attempted to be done, be a crime punishable with imprisonment for life, the homicide shall be punished by imprisonment at hard labour for life."<sup>18</sup>

Livingston's Classicism should not be evaluated in the light of subsequent knowledge. Nor can it be understood except when viewed as a revolt from the indiscriminate cruelty of the preexisting English law.<sup>19</sup> This insistence upon exact penalties must be considered in conjunction with the humanitarian sentiments that supplied the intellectual fuel to motivate application of the prevalent scientific ideology to crime and law.

The humanitarian movement received great im-

petus from the publication in 1764 (the year of Livingston's birth) of Beccaria's epoch-making booklet. In England the work immediately stimulated in penology the spirit that moved in many fields. John Howard, Elizabeth Fry, Samuel Romilly and Fowell Buxton carried the torch of humanity into the prisons and the parliaments. Livingston's attempt to abolish capital punishment completely and his program for peno-correctional reform are outstanding instances of the deep humanity that guided him throughout.

Humanitarianism fused also with idealist individualism—the latter being represented by laissez-faire, by political guarantees against executive abuse, and by the reformulation and intense avowal of natural rights. Livingston's most sensitive years were molded by this thought. Members of his family helped initiate the Revolution and his sister's husband died on the field; they joined in the Declaration of Independence; they were among the first to fill important places in the judicial and legislative branches of the new government. He could not be other than an ardent exponent of individual rights and interests.

His insistence upon protection of the individual from possible governmental oppression is strikingly apparent in the codes. He sought to check official discretion rigorously, not because offenders escaped but because the innocent might be caught in the web of "constructive crime," and "ex post facto laws."<sup>20</sup> His advocacy of trial by jury is one of the most eloquent ever made, and instructive, too, if one have an eye to the relationship of procedure to philosophy, and to the historical relativity of political institutions. His proposals to make *habeas corpus* more effective, his rather visionary plans to insure liberty of the press by making interference with it criminal—even when such interference was by the legislature itself—these and many other provisions were logical deductions from individualistic premises immortalized by the Revolution, and adopted by Livingston as axioms of practical behavior in every realm.

We need to study Livingston because he provides us with the only detailed analysis in English of many of the problems involved in penal code making, coupled with application of the analysis made. His thought illuminates our own, even though we have made considerable progress in the social disciplines during the past century, and are therefore better equipped for penal legislation.

We cannot here make an analysis of the problems involved in the construction of a modern penal code.<sup>21</sup> But we may briefly examine certain problems which Livingston analyzed, and which, restated in a somewhat newer terminology, will necessarily engage our close attention if we take up the legal needs of our times in

ery that would disgust a savage . . . No proportion was preserved between crimes and punishments. The cutting of a twig, and the assassination of a parent; breaking a fishpond, and poisoning a whole family or murdering them in their sleep, all incurred the same penalties; and two hundred different actions, many not deserving the name of offences, were punishable by death." Livingston, *Works I*, 12.

Cf. the writer's *Theft, Law and Society* (1935) pp. 97ff. 20. "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 framed to support this power; and those institutions, favorable to freedom, which have come down to us from our ancestors, form no part of any original plan, but are isolated privileges which have been wrested from the grasp of tyranny." Livingston, *op. cit. supra*, I, 54.

21. See the writer's forthcoming article, *Criminology and a Modern Penal Code* (1936).

10. *Op. cit. supra* footnote 3, I, 155.

11. *Id.*, I, 209.

12. *Id.*, I, 426. And see vol. 11. *Works of Bentham* (Ed. by Bowring) at 23, 35, 37, 51 for correspondence with Livingston.

13. *Id.*, I, 175.

14. *Id.*, I, 87.

15. *Id.*, I, 236.

16. *Id.*, II, Art 52, at 24.

17. *Id.*, II, Art. 90, at 33.

18. *Id.*, II, Art. 532, at 144.

19. "Executions for some crimes were attended with butch-

anything like the spirit which guided this scholar of the last century in his unaided studies.

Like other cultural manifestations, the laws of any time and place more or less reflect current prevalent philosophic views—even to the point of their inherent inconsistencies. I have stressed the philosophical bases of Livingston's work because it seems to me that such influences are unescapable conditioning factors. If that be true, it is delusive to imagine that we can prepare a code which will suffice for all time. Livingston's understanding of these limitations upon his own codes, led him to espouse Bentham's plan of flexible legislation. He would have the courts constantly report their experiences to the legislature together with recommendations. In part, his program resulted from antipathy towards judicial legislation, legal fictions, and constructive offenses. But there is also some dawning recognition of the limitations necessarily placed upon courts, as constituted, to conduct empirical researches regarding social problems involved in adjudication. Hence he nourished Bentham's recommendation of a Ministry of Justice, which has found rather wide support in recent years among American scholars. The term, "Ministry of Justice" is, however, rather unfortunate because it suggests the continental method of political supervision and control of judiciary. As a permanent research organization, the plan offers abundant prospect of coordination of the judicial and legislative organs of government, and of sounder operation of both. Thus, recognition of the relativity of current philosophic views—at least as they appear in their specific forms and terminologies—carries the implication that research is an endless quest, as is the perennial readaptation of laws to meet new social problems.

Equally fundamental are the methods of research. The epistemological problems here involved, deserve detailed analysis.<sup>22</sup> But we may with profit examine Livingston's methods. If we read Beccaria and then turn to Livingston, we see at once in the latter, a great diminution in reliance upon given abstract principles and a marked tendency towards empirical research. It is true that we find language that smacks of the earlier rationalism, e.g., the statement that with certain "rules constantly before us . . . we can proceed with confidence and ease, to the task of penal legislation; and we may see at a glance, or determine by a single thought, whether any proposed provision is consonant to those maxims which we have adopted as the dictates of truth;"<sup>23</sup> and that "provided [a code] contains the true principles of legislation . . . every future law will be measured by their standard. Then no more discordant provisions; no more vacillating legislation; . . . none of those evils, in short, which are contrary to these principles."<sup>24</sup> But such generalization is rare; and there are numerous acute observations that indicate complete awareness of formal and terminological difficulties. Indeed he regularly proceeds to reconcile and apply his principles in the light of his experience, and he reaches highly persuasive conclusions. Much more significant is Livingston's deliberate and frequent use of empirical data. He sought to avail himself "of the advantage which those experiments [other states' penitentiary systems] afforded," and "to know, with precision, their results." "This information," he continues, "could only be obtained by collecting the returns and official reports of the different establishments, and inducing men of eminence and abilities to communicate

their observations on the subject."<sup>25</sup> He therefore sent out "circular letters" (questionnaires).<sup>26</sup> In his study of capital punishment, he sought to eliminate bias, to achieve what we are wont to call "objectivity." "I strove," he writes, "to clear my understanding from all prejudices which education or early impressions might have created, and produce a frame of mind fitted for the investigation of truth . . . [and] endeavored to procure a knowledge of the practical effect of this punishment on different crimes in the several countries where it is inflicted."<sup>27</sup> He argued that "the result is capable of being demonstrated by figures,"<sup>28</sup> and he attached statistical tables. But he was hampered by the "want of authentic documents" which prevented him from presenting "facts which would elucidate the subject by examples from the records of criminal courts in the different states. The prevalence of particular offences, as affected by the changes in their criminal laws; the number of commitments, compared with that of convictions; and the effect which the punishment of death has on the frequency of the crimes for which it is inflicted; accurate information on these heads would have much facilitated the investigation in which we are engaged."<sup>29</sup> He searched for "sufficient data"; he examined English and other statistics.<sup>30</sup> 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 the Atlantic states."<sup>31</sup> He desired that reports be made "of all causes that are tried, and all points of law that are determined in the court, and to publish them at stated times, and to make regular returns of all commitments, accusations, indictments, informations and trials, in such form as to give every desirable information of the state of crime and criminal jurisprudence in his district. These returns are to be made to the governor, to be by him laid before the legislature. A mass of information will thus be collected which will be of the utmost value in future legislation."<sup>32</sup> He constructed partial mortality tables showing the number of persons committed for trial, tried, convicted, discharged or acquitted.

In recent years we have, to be sure, become more critical of propositions proposed as premises, more insistent upon the application of narrow generalizations, to be tentatively accepted as hypotheses, and held valid only in so far as supported by empirical data. We have by analysis and experiment become thoroughly conscious of methods, more specific in the recording of data, more cautious in generalizing from them. And we have almost undreamed-of facilities for carrying on large-scale research. In our further advance in these directions, we must not forget the persistent rational use to which Livingston subjected all available data, without which fact-finding is a blind and pointless effort, nor the modernity of his approach. Unfortunately lack of data and facilities made it impossible to construct his codes upon the results of scientific research. One man was research organization, draftsman, lawyer and publicist. His great accomplishment, scientific progress in the ensuing century, and our vastly increased research facilities should encourage present endeavor.

Sound legislation depends not only upon analysis

- 25. *Id.* I, 7.
- 26. *Id.* I, 8.
- 27. *Id.* I, 35.
- 28. *Id.* I, 199.
- 29. *Id.* I, 48.
- 30. *Id.* I, 49.
- 31. *Id.* I, 73.
- 32. *Id.* I, 402.

22. *Cf. ibid.*

23. Livingston, *op. cit. supra* footnote 3, I, 10.

24. *Id.* I, 229.

of prevailing philosophies and upon scientific research but also upon the formulation of adequate word symbols to denote the empirical generalizations discovered. This problem is a linguistic one, and, in law, a largely technical one as well. Modernization of legal language means the construction of symbols which adequately refer to existing fact situations and to present knowledge regarding them. It will call also for the elimination of useless technicality, and of ambiguity and redundancy.

To these latter ends Livingston made valuable contributions. He sought assiduously to avoid every unnecessary technical term, and to provide explanations for such terms in his *Book of Definitions*. He argued that ambiguity and vagueness perverted the judicial function from ascertainment of the facts and application of the rules, to declaration and interpretation of the law.<sup>33</sup> Hence clarification and precision "more than any other," called for his "closest and intensest attention."<sup>34</sup> We have in recent years discovered that the language problem is much more complicated than has hitherto been thought. But no draftsman will fail to benefit from Livingston's refreshing, persistent attempts to eradicate ambiguity, vagueness, and outmoded technicality from the law.

There remain to be considered, certain special problems in regard to codification. Here Livingston preceded Field, and his analysis ran deeper and in broader channels. Livingston was a keen critic of the common law, and his lack of bias is apparent from his unstinted praise of the political guarantees and safeguards provided by English law.<sup>35</sup> He deplored the uncertainty of the common law; the fact that it cannot be known until a case arises for its application, when it is established not by the legislature but by the courts,<sup>36</sup> the difficulty of distinguishing old statutes from common law; inaccurate reporting and consequent confusion; the injustice and absurdity that adherence to precedent frequently produces; the voluminous literature which imposes an absolute physical limitation upon its comprehension.

Some of his criticism was occasioned by the fact that, at that time, three-fourths of the Louisianians did not read English, and were, for other reasons, also opposed to the introduction of the common law. Besides, his concern for the safeguarding of the individual from governmental oppression, combined with his inheritance of the Jefferies' tradition of judicial persecution,<sup>37</sup> led him to fear and to oppose judicial legislation. The English had "seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies."<sup>38</sup> Hence Livingston sought to restrict the judge to the law, and

to statement of the evidence only when requested by the jury.<sup>39</sup> "Judges," he said, "acquire a habit . . . of taking a side in every question they hear debated. . . . neutrality cannot . . . be expected, . . . In the theory of our law, judges are the counsel for the accused, in practice they are, with a few honourable exceptions, the most virulent prosecutors"<sup>40</sup> He sought, too, to limit rigorously the sentencing power of the judge, although he did provide a sphere of individualization. And indeed his code was not as restrictive of judicial discretion as some of his remarks might lead one to expect.<sup>41</sup> But his general opposition to official discretion led him to oppose it also in peno-correctional treatment, thinking it "unsafe to adopt a system that must depend entirely for its success on the personal qualities of the man who is to carry it into effect."<sup>42</sup>

Livingston believed that legislation might be as incongruous, complex, and unwieldy as the common law.<sup>43</sup> He held that a code, amended frequently, would remove the deficiencies of the common law. A code would provide fixed principles and systematization of rules, not otherwise attainable. The judges would rely upon "grammatical construction; the context of the law, the signification usually given to the words employed, or their technical meaning in reference to the subject matter."<sup>44</sup> But they must follow the "plain import of the words," and must not say "that the law means more, sometimes less, than the legislature intended."<sup>45</sup> His insistence upon constant amendment must be considered as supplementary, and as a preventive of inflexibility. The problem promises to become increasingly important. Indeed, we find such a common law scholar as Mr. Wilshire, in his preface to the fifteenth edition of Harris' *Criminal Law*, stating: "The mass of new legislation has made it necessary to increase to some extent the size of the volume, and, unless some steps are taken in the direction of codification, it will soon be impossible to produce a work of this character which will be of any value."

Unfortunately, early legal training, tradition, and, perhaps even, vested interest, give rise to predilection and bias, not to impartial study of the problems involved. Certainly a minimum desideratum is painstaking investigation of the operations of code systems of penal law.

Even though a penal code be rejected or deferred, there will remain the insistent need to improve penal legislation. Perhaps it will be possible to effect a sound synthesis of various legal materials and methods; or to employ particular techniques with reference to the needs of the specific problems dealt with in the various fields of law. In any event it is clear that cultivation of a science of legislation is a paramount need of our times. If that be true, Livingston's notable contributions must be the starting point of present endeavor in the criminal law, at least. If his breadth of scholarship can be joined to the vastly greater research facilities which we enjoy, the most pressing legal needs of contemporary society will be abundantly supplied.

33. *Id.* I, 178, 179.

34. *Id.* I, 228-30. His solution of the difficulties presented by the rules on forgery are especially suggestive for several other problems resulting from the accumulation of numerous highly refined concepts and a judicial technique which requires identification with one of them (*Cf. id.* I, 279). He proposed to state simply "an instrument in writing, of which a copy is attached," instead of designating it a note, or bond, or bill, etc. (*Id.* I, 376).

35. He relied very considerably upon the common law for his code-e.g., "The numerous cases in the English law on this subject (murder) were studied, and all those principles drawn from them which could give precision to the rules that are laid down." (*Id.* I, 306).

36. *Id.* I, 88ff.

37. "It will not be denied that England has suffered the most cruel evils by this exercise of judicial power . . . we may, hereafter, have a judge who may exercise his constructive ingenuity upon murders or burglary, or other offences, as Jefferies did upon treason." *Id.* I, 232.

38. *Id.* I, 13.

39. *Id.* I, 69.

40. *Id.* I, 70.

41. *Id.* I, 60, 362-3, 397.

42. *Id.* I, 521.

43. *Id.* I, 11, 135.

44. *Id.* I, 180.

45. *Id.* I, 231.

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