

A SYSTEM OF
PENAL LAW
FOR THE STATE
OF LOUISIANA

EDWARD LIVINGSTON



NOTES FROM THE EDITORS

INTRODUCTION

By Thomas G. Barnes*

Two young French magistrates, studying American prisons at first hand in 1831, wrote of Louisiana's only prison, the old New Orleans jail,

We saw there men thrown in pell-mell with swine, in the midst of excrement and filth. In locking up criminals, no thought is given to making them better but simply to taming their wickedness; they are chained like wild beasts; they are not refined but brutalized.¹

This was not quite the worst prison that Alexis de Tocqueville and Gustave de Beaumont saw on their celebrated visit to America. Neither would it be much different in kind from what would obtain as the norm in Louisiana penology from the mid-nineteenth century to the Long Boys' Regime in the mid-twentieth.² Yet within four years of the Tocqueville-Beaumont visit, Louisiana would open at Baton Rouge a "model" penitentiary of the sort which the two *juges auditeurs au tribunal* had seen elsewhere and accorded high praise in their 1833 report, *Du Système Pénitenciaire aux États-Unis et de son Application en France*. At Baton Rouge some three hundred prisoners, two-thirds of them white, one-third of them convicted of homicide and serving life sentences or long terms, were put on useful and rehabilitative work making cotton, leather, and woolen goods.³ This busy hive was the sole, oblique, belated, and ill-acknowledged monument to Early National America's most remarkable social experiment, one which had failed utterly to achieve an institutional frame and had left its creator a prophet without honor in his own country, more, a voice crying in the wilderness. Worse, after only nine years, when Louisiana's solons concluded that the penitentiary was too costly and rehabilitation chimerical, the state prison was leased to a private firm as a source of cheap labor, and so it would continue, almost without interruption

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until this century, latterly at Angola—on the private estate of one ambitious lessee—where it remains. Mercifully, death spared the Honorable Edward Livingston, Esq. (1764-1836) that ignominious spectacle.

Perhaps one seems to damn Livingston's legal classic with faint praise in describing it as a "social experiment." *A System of Penal Law for the State of Louisiana: Consisting of a Code of Crimes and Punishments, a Code of Procedure, a Code of Evidence, a Code of Reform and Prison Discipline, a Book of Definitions, Prepared under the Authority of a Law of the said State. By Edward Livingston. To which are Prefixed a Preliminary Report on the Plan of a Penal Code, and Introductory Reports to the Several Codes Embraced in the System of Penal Law* (Philadelphia, 1833)—to give it its full title, for what it says is what you get—is beyond question a legal classic. For here was a complete and novel code of law (about half of the whole volume) published together with its own "Institutes" comprising plan, jurisprudential rationale, ethical justification, and critical commentary. That it was in the event not enacted into law in any part hardly detracts from its juristic worth and not at all from its distinction as a work of consummate legal creativity and learned accomplishment. But because it attempted so much more than merely to make and to explain law and stemmed from a brilliant and enquiring mind of deep erudition and catholic interests informed by a spirit of liberality and to ends of almost unattainable idealism, the faintest praise would be to call it merely a legal classic.

Livingston's objective was to provide a completely integrated, self-contained, comprehensive, simple, rationalized, socially effective, and humane criminal justice system. It was in every respect original: a model enterprise, one without antecedents, posited as exemplary, and inviting imitation. It owed a great deal to a strong jurisprudential tradition but very little if anything to any existing law.

The clearest statement of Livingston's jurisprudential foundations, and the justification for his legal novelty is in the "Introductory Report to the System of Penal Law," where he answered the fifth objection to a code, that a new system presupposes new definitions the set-

ting of which by judicial decisions creates the uncertainty the code was intended to remedy (*System*, pp. 103-106). He distinguished between civil law and criminal law: the former law arises from the infinite claims between individuals and so responds to change in society, commerce, and the arts, whereas criminal laws, "emanating from the sovereign will, they admit of no alteration but that which it declares." (p. 103) "Positive legislation" alone can change criminal law; an "ambiguous penal law, is no law; and judicial decisions cannot explain it without usurping authority which does not belong to them." (p. 104) If a "penal law have no such plain obvious meaning in its terms, it is deficient in an essential requisite to its very existence, and can have no sanction." (p. 105) Consequently,

The best code that can be provided, is but a frame-work on which a better is to be constructed. It must provide for its own progress towards perfection; but it provides for its corruption and final destruction, if it admits judicial decisions, unsanctioned by law, to eke out its deficient parts, to explain what is doubtful, or to retrench what may be thought bad. The remedy is easy, efficacious, if it succeed; innocent, if, contrary to all reason, it should fail. (p. 106)

This unflinching positivism and evocation of the sovereign authority for law was worthy of John Austin. It probably owed nothing directly to him, for it was written before Austin's magnum opus was first published in 1832 and before he gave voice to his ideas in lectures at London University in 1828-1829.⁴ It owed a great deal to the philosophical magister of both Austin and Livingston, Jeremy Bentham.

Livingston never failed to credit the Seer of Westminster for inspiration, and puffed slightly in noting to the Louisiana Legislature that he had secured from Bentham by the agency of the American minister to St. James, Richard Rush, "documents of great utility," reports and papers to the Commons on penal law revision. (*System*, p. 6). Incidentally, Rush, a lawyer and former Attorney General and Secretary of State, was a warm supporter of Livingston's effort, both by conviction and

as the eldest son of the luminous Dr. Benjamin Rush of Philadelphia whose 1792 essay, *Considerations on the Injustice and the Impolicy of Punishing Murder by Death*, was an early and influential attack on capital punishment raised on solid Benthamite foundations. Bentham's influence on Livingston is explicit even where tacit. In Livingston's high compliment to the Louisiana Legislature—and implicitly himself—for An Act Relative to the Criminal Laws of that State, 10 February 1820 (in extenso, pp. 1-2) and his own "Report on the Plan of a Penal Code" of 1822 (pp. 5-46) which contained the principles for penal law reform and which "have excited an interest abroad," he ascribed their provocativeness to "the novelty of hearing governors, for the first time, addressing the people in the language of reason, and inviting them to obey the laws, by showing that they are framed on the great principles of utility!" (pp. 106-107) The people would be drawn to obey the law because it "has its source, not in our will, but in reason, truth, justice and utility: of all which our will is only the organ and record." (p. 107) And from the great principles of Bentham's Utilitarianism grew that rhetorical and logical simplicity which had become the cardinal test of positivism:

It is the unprecedented nature of this frank, simple language that distinguishes your projected code, and that makes it an object of curiosity and interest; a theme for arguments; and possibly, a model for imitation in its leading characteristics. (p. 107)

Indeed, the ultimate Benthamite and Austinian prescriptions are advanced in yoke in the 1822 "Report," wherein Livingston recommended the legislature exclude from the penal law those generally proscribed crimes

under the vague description of offences against the laws of morality, of nature, and of religion. The will of the legislature is established as the only rule; and the crude and varying opinions of judges, as to the extent of this uncertain code of good morals, are no longer to usurp the authority of law. Connected with this, is the provision which prohibits the punishment of any act not expressly forbidden by the letter of the law, under the pretence that it comes within its spirit. (p. 8)

Everything in the Utilitarian credo is here: the secularist dismissal of antique extra-legal restraints, the reduction of "deontology" (moral philosophy) to passivity and negligent relevance, the rigorous literalness of the code, the restriction of judges to fact-finding and code-applying, and the imperative of the positivist sovereign.

Behind Bentham stood two geniuses of the eighteenth century Continental Enlightenment, the French judge and *philosophe*, Charles de Secondat, Baron de La Brède et de Montesquieu, and the Italian judge and *filosofo*, Cesare Bonesana, Marchese di Beccaria. So much the fount of so many ideas of government and society, Montesquieu's *The Spirit of Laws* (1748) devotes an entire Book (XII) of thirty Chapters to the matter "Of the Laws that form political Liberty as relative to the Subject," raised on the resounding proposition that

Political *liberty* consists in security, or at least in the opinion we have of security. This security is never more dangerously attacked than in public or private accusations. It is therefore on the goodness of criminal laws that the liberty of the subject principally depends.⁵

Behind the sustained argument for criminal law reform, for the independence of the judiciary in doing justice, for rational laws reflecting the nature and circumstances of society, for known laws, for moderate punishments to corrective ends of Book XII lay the dreadful experience of Judge Montesquieu in the criminal court of Bordeaux, where he had presided at interrogation by torture and had adjudged the miserables of town and village to the gallows, the wheel, the galleys. Likewise, from Beccaria's experience came *An Essay on Crimes and Punishments* (1764) condemning confiscation, capital punishment, all forms of physical cruelty towards prisoners, and torture, and arguing for education and rehabilitation of criminals.⁶ Both Montesquieu and Beccaria directly and effectually, by advocacy and precept, example and argument, profoundly influenced Edward Livingston.

Not all the genius or all the spirit that moved Livingston came from the Old World. He was very much a product of the New World, that "New Man" of Crèvecoeur's description, and therefore a Political Man.

That is to say, Livingston, born in 1764 into one of the major dynasties of New York and consequently bound by its "connexions" in both city and country, came of age in the War of Independence. This formative experience was difficult and unsettling. The Livingston family, Patriots to the man and to the woman, was closely allied with the Schuyler family, whose chieftain, Philip John Schuyler, was a notable (if not always effectual) Patriot warrior, and whose son-in-law was Edward Livingston's slightly senior near-contemporary, Alexander Hamilton. The Livingstons' patriotism was onerous, for the British occupation of New York city throughout the war reduced access to their commercial interests and restricted them to their country estate, "Clermont," up the Hudson. Young Edward was educated at Albany and in Kingston at a dame's school, and sent to Princeton—within the Patriot lines—rather than to King's (Columbia) in New York. Instead of finishing his languages with the grand tour in Europe, the year after Princeton was spent studying French and German with tutors at "Clermont." Law study had to be done in the Albany office of John Lansing. This was not quite deprivation, since Lansing was eminent and among young Edward's fellow pupils were two just-demobilized young Continental Army officers, Alexander Hamilton and Aaron Burr—whose fates were joined and Livingston's intertwined with both—and James Kent, a Yale graduate a year older than Edward.

War was also liberating, for it realigned the ideologies and the allegiances of American politics. Increasingly over the half-century before the Declaration of Independence, colonial politics had become defined and parties distinguished by the difference between "court" (comprising the governor and council) and "country" (the legislative assembly and popular estimation) as means to political power within the colony and to all the numerous advantages, official, commercial, professional, and social that political power afforded. The War destroyed the distinction, suppressed the differing ideologies, and by exacting fidelity to either the King OR the Continental Congress drove the "court" party quite literally out of

the country, to become Empire Loyalists in Canada, Nova Scotia, the Caribbean, or Britain itself. The result was a kind of ideological vacuum created by the absence of the old distinctions and the failure of new ones to emerge in the midst of the great, relatively united, Patriotic War. The vacuum quickly disappeared between 1787 and 1789 when the new nation struggled to construct a novel and effective frame. Federalist and Anti-Federalist became Federalist and Republican with ratification of the Bill of Rights, the advent of a thoroughly partisan Republican leader in Thomas Jefferson, and the sudden release of all the joyful, bumptious, and strenuous rivalries that local interests, patronage, and two political theatres (national and state) accorded by the new Constitution produced. And nowhere were the New Politics and the New Politicians more partisan (and strenuous) than in New York.

Livingstons and Schuylers had lent great weight to New York's ratification of the Constitution, at the Poughkeepsie Convention, in the Albany Legislature, and on the sidewalks of New York. Yet the New York Federalists were negligent of the Livingstons' services, President Washington overlooked them in mending political fences with federal(ist) posts, and the family bolted en masse to support the Clinton clan, the Schuylers' arch-rival, who were Anti-Federalists and early supporters of Thomas Jefferson. Edward Livingston entered Congress from New York city in 1795, not in his natural alliance with the great New York Federalists—Hamilton, Burr, Kent, John Jay (who detected Livingston's potential when still at Princeton)—but as a Jeffersonian Republican if not quite an unalloyed admirer of Thomas Jefferson himself. As a Congressman in 1801, when the disputed presidential election between Jefferson for the Republicans and Aaron Burr for the Federalists went to the House of Representatives, despite long friendship and social and intellectual affinity with Burr, Livingston loyally supported Jefferson.

Livingston had not run for Congress again in the 1800 election, and so was gratified by his reward for his loyalty to Jefferson: appointment as U.S. Attorney for the District

of New York, which he supplemented with the highly lucrative office of Mayor of the City. His enjoyment of both offices was shortlived, through no real fault of his. While Livingston was deathly ill in the summer of 1803, an unsupervised clerk in his office who had been investing for personal profit federal taxes collected, was caught short on audit. The debt fell on Livingston as principal: he immediately assigned his personal holdings of some \$100,000 to cover the default and other debts and resigned the office under a cloud. Determined to start anew in a new land, in early 1804 Edward Livingston arrived in New Orleans, acquired less than a year before by Jefferson's purchase. He began a successful practice at the bar, fee'd with considerable landed property, and had high hopes of recouping his fortune. In fact, his debts in New York were greater than he had realized, and one of his creditors was Aaron Burr. When an assignee of Burr's debt presented it for collection in New Orleans in the aftermath of Burr's conspiracy to seize control of the Louisiana Territory, Livingston was openly accused of complicity in the plot. Jefferson's distrust of Livingston dated from 1801 rumors that he really favored Burr and had been confirmed by the evidence of Livingston's incompetency if not moral tergiversation in the matter of his clerk's embezzlement; now with his characteristically abrupt, judgmental, and moral self-righteousness, Jefferson chose Livingston for an inveterate enemy.

Worse fell out between them. Among the lands Livingston acquired as fees for litigation was a large chunk of the Mississippi River's alluvially-deposited bank fronting New Orleans, the "Batture" (bank, bar, or reef in Acadian French). To that valuable waterfront property, Livingston's advocacy had established private ownership subject to servitudes in favor of the public by Spanish law as against the state's right if French law governed. Livingston, armed with the judgment of the Territorial Superior Court in 1807 in his client's favor set out to exploit his own interest by construction of wharves and warehouses on the Batture. Public outrage in New Orleans expressed to President Thomas Jefferson precipitated that worthy to a patently unlawful act, with-

out any type of legal hearing, in ordering the U.S. Marshall to put out Livingston on the grounds that the Batture was Federal land. Livingston sued Jefferson for recovery and, later, for damages, attacked the President in pamphlets, and tried to deal directly with him and members of his cabinet, but to no avail. Jefferson's anger with Livingston was so pronounced it turned into a personal vendetta. Jefferson's animus moved him to an obdurate and persistent misreading of pre-Territorial law obtaining in Louisiana, a misreading which because of Jefferson's illustrious reputation for learning has continued to bedevil the whole, large, question of how French was Louisiana law.⁷

If this has seemed a long way to get to Livingston's credentials as a Jeffersonian Republican, it has served two purposes. First, to explain how a high-born, well-educated, thoroughly-connected Anglo-Saxon New York lawyer and politician ended up on a frontier which was also culturally a very foreign society. More, to explain why he stayed there, in what he always called his "exile," with only temporary absences until the last decade of his life despite its remoteness, inconveniences, and incivility. Second, to testify to Livingston's remarkable capacity to distinguish between person and belief, to accept the validity of the sacrament despite the sin of the celebrant. Livingston was a genuine Jeffersonian Republican with that type's gut fear that notwithstanding the Bill of Rights the Constitution was deficient in protecting adequately the individual rights near and dear to the hearts of all Tom's little farmers:

Our constitution, containing a very imperfect declaration of rights, leaves the legislative power entirely uncontrolled in some points, where restraint has, in most free governments, been deemed essential; a majority may establish their religion as that of the state; non-conformity may be punished as heresy; and even toleration of other creeds may be refused; without violating any express constitutional law. Corruption of blood may be established, and it is even somewhat doubtful, whether, strictly speaking, it does not, under the general terms in which the rules of the common law are adopted, now exist. (*System*, p. 9)

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . .”—as for the Louisiana State Legislature, refer to the Louisiana Constitution of 1812. Livingston himself makes the point categorically (p. 68).

Jeffersonianism also worked preceptively and exemplarily on Livingston. Thomas Jefferson, a few weeks after signing that Declaration which stands as the indestructible monument to his eloquence, undertook to reform the penal laws of Virginia along republican and rational lines. Raised on Beccarian principles, the draft proposed criminal sanctions which were enlightened, benign, and reductive. Capital punishment was limited to murder and treason, and overall the rigorosity of punishment reduced. However, Jefferson’s overzealous theoreticalness moved him to give effect to one of Beccaria’s least benevolent notions, analogic punishment: a poison-murderer would be executed by poison, a rapist castrated, and one convicted for mayhem would be maimed. While Jefferson’s bill was rejected by the Virginia legislature after debate, it raised the vision of what republican reasonableness could work in the New Republic on the New Man. It sounded the trumpet of reform of the criminal law for a free and sovereign people endowed equally with inalienable rights as citizens to life, liberty, and the pursuit of happiness.

Livingston early answered the call, passionately, and with a consistent fidelity throughout his life and career. The freshman Congressman from New York took his seat on 7 December 1795—eight days later, he moved the House to revise United States penal laws because they were uneven, disproportionate, and far too sanguinary. He was delivered the first of many disappointments. Yet even though his great effort failed in Louisiana in the 1820s, he went back to the fight in his original arena. Elected as a U.S. Congressman from Louisiana in 1822, 1824, and 1826, he admitted that his main objective in that forum was to adapt his Louisiana penal code to national needs. He prepared a uniform system of United States penal laws which was only slightly differenced from the Louisiana code; printed by order of the House of

Representatives in 1828, the draft was not legislatively pursued. Failing of reelection to the House in 1828 (he was negligent of constituency needs and made too good use of his duties in Washington to end his “exile” in Louisiana), Livingston went to the Senate on the election of the Louisiana legislature. Immediately, he introduced his *System of Penal Laws for the United States of America* (1828) in the Senate, with no better results than he had enjoyed anywhere else.

Livingston, as most other Jeffersonian Republicans of his generation who remained open to the imperative of change, made that long pilgrim’s progress which by the end of the 1820s had created the American Newer Man, the Jacksonian Democrat. In his case, the process was accelerated by three circumstances. The first was an early and mutually respectful acquaintance with Andrew Jackson himself, which grew into a genuine friendship and an enduring political alliance. They had been Congressmen together in 1796-1797. In 1814, when Major General Andrew Jackson brought a small force to defend Louisiana against imminent British invasion, Livingston as chairman of the local committee of defense provided Jackson with intelligence, organized Louisianians to resist the British, and brought over to the cause Jean and Pierre Lafitte, smugglers and privateers operating from a base near the mouth of the Mississippi, who if they had sided with the British might have afforded them control of the delta. In January 1815, Livingston as an aide-de-camp to Jackson, served as his secretary, interpreter, and political adviser before, during, and after Old Hickory’s famous victory at New Orleans. It was Livingston who negotiated prisoner exchange with the British. As Congressman in 1824, Livingston had voted for Jackson in the disputed election which went to John Quincy Adams, thanks to Henry Clay of Kentucky throwing his support to the Massachusetts man as the lesser of two evils. In 1828, Livingston went to the Senate as Old Hickory went to the White House. Jackson appointed him Secretary of State in 1831—and as such Livingston drafted Jackson’s uncompromising proclamation rejecting South Carolina’s “nullification.”

From 1833 to 1835 Livingston was in Paris as minister to France to forward negotiations for French reparations for injuries to Americans during the Napoleonic Wars. Livingston's last public service before his death in New York in May 1836 was four months before when he counselled moderation to a typically bellicose President Jackson on the final negotiations on that issue with France. Jackson wrote to his widow that he would stand a "witness to the purity and devotion of his character."⁸

The second circumstance was their common experience on the frontier. As Livingston had migrated from New York to Louisiana, Jackson had trekked over the Appalachians from North Carolina to the Tennessee Territory. Whatever personal qualities either man was born with and had developed in early life, each had faced those challenges peculiar to the frontier, many of them economic where survival was a struggle and financial difficulties a constant. The challenges varied in kind and degree, of course—it was a long time before Jackson's Nashville attained even some of the civic amenities and urbanity of Livingston's New Orleans. But if the challenges were to be met and overcome, then a liberal spirit, considerable pragmatism, personal openness, curbed aggressiveness, courage, vitality, impatience with the established and accepted ways of doing things, and plain persistence were essential. These were attributes (even qualities) almost universal on the frontier, and they were impressed into Jacksonian Democracy because its crucible was the frontier.

The third circumstance was the fact that both Livingston and Jackson were lawyers and constitutionalists. Jackson as a draftsman of the Tennessee Constitution of 1796 and for six years a justice of the state supreme court is easily forgotten in the course of his more colorful career as "General Hickory" and "King Andy." They were therefore examples of the one profession which in force and earlier than any other penetrated to the edge of the wilderness in Early National America. Ministers, teachers, doctors, even soldiers arrived on the frontier to find a growing coterie of lawyers stimulating and stemming the disputes and disagreements of farmers, mer-

chants, and mechanics. This was a phenomenon that lasted as long as the frontier, and if we are disciples of Frederick Jackson Turner then we confess it disappeared only in 1890, when the census revealed that more Americans lived in towns than in the countryside. One consequence was that frontier democracy—in its first manifestation Jacksonian Democracy, later Lincolnian Republicanism, and finally western Progressivism—exalted the legislator-lawyer and looked to legislation as the reforming force for democratic improvement. While Jeffersonian Republicanism had been suspicious of law and lawyers, Jacksonian Democracy embraced both, perhaps defensively, but none the less firmly.

Territorial Louisiana was stereotypical of the phenomenon. Where under French and Spanish rule a handful of lawyers, notaries rather than advocates, sufficed to do law, with Mr. Jefferson's purchase American lawyers like Livingston arrived on every packet. Among established Louisianians (including earlier anglophone arrivals) there was mounting resentment at their presence and political prominence. Much of the storm that greeted Livingston over the Batture grew from that resentment. The vehement demand for a civil code based on the "old law of Louisiana" (whatever it was) was produced by detestation for the briefcase-carpetbaggers of the common law. The fear was real enough. When the first Territorial Legislature in 1806 passed an act providing that Roman and Spanish laws in effect at the time of the purchase should govern, Governor William C.C. Claiborne vetoed it. The Legislature adjourned in protest. A month later it confided the drafting of the first "civil code" for the Territory to James Brown and Louis Moreau-Lislet, Governor Claiborne reversed himself, and in 1808 the two jurisperitii produced *A Digest of the Civil Laws Now in Force in the Territory of Orleans*. This code governed civil law until the comprehensive *Civil Code of 1825*, the work of Moreau-Lislet, Pierre Derbigny, and Edward Livingston done between 1822 and 1824, and the glory of the early codificatory movement in North America.

A closer look at these developments reveals that the

ultimate triumph of codification in Louisiana along the principles of and founded upon the Civil Law owed a great deal to anglo accommodation, the capacity of the carpetbagger common lawyers to join city hall rather than fight it, their willingness to use any law (and quickly learning enough of it to use it well) as long as it brought fees, and their ready acceptance that new men in new societies on the edge of nowhere can make Justitia's temple out of any material at hand. Take Claiborne, an eastern Virginian who migrated to Tennessee to practice law, served in the Tennessee Constitutional Convention, succeeded Andrew Jackson as Congressman in 1797 when Jackson went to the Senate, and was a Tennessee supreme court justice—he was virtually a junior copy of Jackson. As Governor of Mississippi Territory he was involved in the Louisiana purchase, and became first Governor. He was astute enough to marry a distinguished Creole lady, reversed himself on the Civil Law, and by 1808 confessed handsomely and honestly that Americans had to be mindful

of the respect due the sentiments and wishes of the ancient Louisianians who compose so great a proportion of the population. Educated in a belief in the excellencies of the civil law, the Louisianians have hitherto been unwilling to part with them, and while we feel ourselves the force of habit and prejudice, we should not be surprised at the attachment which the old inhabitants manifest for many of their former customs and local institutions.⁹

While Louis Moreau-Lislet was a Haitian-born long-time *avocat* or *abogado*, James Brown came from Piedmont Virginia, had migrated to Kentucky and practiced law, arriving in Louisiana shortly after the purchase. Pierre Derbigny was an *émigré* from the French Revolution, via Haiti, Pennsylvania, Missouri, and Florida to New Orleans in 1800, who aided Claiborne in the transition from Spanish rule to American and went a long way toward converting Claiborne to the Civil Law. He was a justice of Louisiana's first supreme court after its admission as a state in 1812.

As Brown and Livingston readily, and even Claiborne

ultimately, adapted themselves to the Civil Law regime, so Moreau-Lislet and Derbigny moved steadily towards American constitutionalism and worked to reconcile the “ancient Louisianians” with the brasher newcomers. By the time Brown, Livingston, Moreau-Lislet, and Derbigny died—all within a few years of each other around 1830—the old tensions were largely gone, eroded in great part by the common legal endeavor of the codifiers to give effect to democratic self-government under law in a republic by whatever system appeared best suited to the polity's needs and most desired by its citizens. This experience was less than unique. The same process of accommodation and acceptance rather than rude “common law reception” would manifest itself again in the Spanish West, from Texas to California after 1848, as anglo lawyers sought at least for a season to give effect to the old law to the ends of certainty, stability, and the solution of probative and evidentiary problems which the over-rigorous proceduralism of the common law made nearly insoluble.¹⁰ And when the Anglo-Saxon world first had to do law for a conquered European people in the New World, in Nova Scotia (formerly Acadie) after 1713 and Canada (formerly Nouvelle France) after 1763, it had been similarly flexible and accommodating. The protocol proved permanent for Canada East, or Quebec, for which anglo governance maintained its French law in civil matters, latterly codified largely on Napoleonic models, to this day. Even in deepest, darkest, Nova Scotia, from 1713 to 1749, the negligible British government at Annapolis Royal did justice to some 6000 Acadian French “new subjects” by applying their customary law based on the *Coutume de Paris*, relying on the garrison-surgeon, trained in the Roman Law tradition of Scotland, to provide some idea of what that law was.¹¹

The Louisiana Civil Code, both the first version, the 1808 *Digest*, and the more comprehensive 1825 *Code* of Moreau-Lislet, Livingston, and Derbigny, raised considerable problems, primarily of adopting pre-purchase law but, secondarily, of adapting whatever that law was to certain fundamental American constitutional dictates. The primary problem was inherent in Civil Law

jurisprudence, French law especially. Custom and Romano-Civil Law as implemented in French courts were always in uneasy juxtaposition, and in a particular cause custom might determine the substantive issue while procedure went according to Civil Law. More intractable was trying to determine what was the substantive law applied: the *arrêt* (order upon judgment) of a French court was long on the evidential side but singularly uninformative as to substantive ratio.¹² The concrete case embodiment of French adjudication was not the common law's gossipy Year Books of the high Middle Ages or the more precise and argumentative Reports of the sixteenth century and afterwards; therefore what exactly the law was that obtained in a French jurisdiction was and is difficult to establish. Furthermore, there was not a lot of law-doing in French colonies, in part because there were few lawyers and litigation was expensive, cumbersome, and even politically perilous. There was clearly none until 1712, and probably none until Bienville founded New Orleans in 1718. Finally, Spain's Civil Law had obtained from 1769 when Spain took effective possession of the Louisiana tract from France pursuant to the 1762 secret cession to Spain. The 1769 occupation followed a nasty, brief, and sanguinary revolt by French inhabitants, led by some redoubtable Acadians who had migrated there after expulsion from Nova Scotia in 1755. A fairly methodical imposition of Spanish law was intended to strengthen the hand of Spanish authority and bend the French to Spanish government. Little wonder that subsequent scholarly investigation of the origins of Louisiana's civil law indicate that very nearly as much if not more was owed to Spanish law than French.¹³ While the drafters of both the 1808 *Digest* and 1825 *Civil Code* preferred the French version of Civil Law rules, drawn from Ancien Regime Civil Law jurists like Jean Domat (1625-1696) and Robert Joseph Pothier (1699-1772), the *Projet* of 1800 that led to the 1804 French *Code Civil*, and the *Code Civil* (Napoleon) itself, so many of the specific rules in effect before the purchase were common to both French and Spanish Civil Law that precise attribution becomes Trivial Pursuit. Clearly the

Louisiana Civil Code was (and is) not an English translation of the "Code Napoleon," contrary to a very widely held misconception.

As one of the three juristconsults responsible for the *Civil Code of 1825*, Livingston was required to look at closely, fully consider, and carefully weigh pre-purchase civil law in drafting the *Code*. He felt no such compunction in drafting his *System of Penal Law*. He could fall back on three justifications for very largely ignoring anything either French or Spanish penal law might contribute to the new criminal law and penological system of the State of Louisiana. First was the dictate of American constitutionalism, not all the provisions of the Constitution of 1789 (or for that matter the Louisiana Constitution of 1812) but the greater injunctions given prominence in the Federal instrument and explicitly mandated by the 1804 Act of Congress for the territory: right to trial by jury, the writ of habeas corpus, and the privilege against cruel and unusual punishments. The first two institutions were unknown to the Civil Law, and because of the prominent and essential role of torture as a method of proof in its jurisdictions from the sixteenth century there was total disregard of the last. Livingston's greatest eloquence is raised as panegyrics to trial by jury (he would not allow a defendant to waive it) and habeas corpus (the only guarantor of liberty), and as root and branch condemnation of capital punishment, for which his code has no place (*System*, pp. 10-13, 23-36, 37-41).

Secondly, Livingston could make the rational, and by Benthamite canons irrefutable, argument of utilitarianism, that laws which were perfectly fitted to one society at one time founded on one culture might well be pernicious to another at some other time with different foundations. He might have his naughty little joke surreptitiously by quoting medieval Spanish about Cato the Censor getting among his slave women (p. 64a), he could confess to being hard put not to snicker about the exaggerated Iberian sense of honor when it came to scandal by flirting with married women that fell far short of the eighteenth century English common law's "crim con" (p. 66), but he found nothing funny about Spanish

law concerning religion and the excessive moral punctiliousness imposed by it (pp. 67-68). Here were clear instances in which however admirable the old dispensation might have been, it was not longer suitable for Louisiana of the 1820s.

Finally, Livingston argued with a force and persuasiveness that no Civilian could counter if he was to remain true to his faith in the virtues of a code, that the function of a code constituted not revision of the law but creation of it. A code presumes an entirety fashioned of carefully formed units, fitted together like a tapestry, balanced and harmonious in line and tone, the product of a governing genius, not the haphazardly evolved hodgepodge of accreted disparate initiatives. A good code must neglect its parentage, a great code deny it. A code begins at the creation. It demands courage to choose and choose wisely, for a code is not the result of a process of trial and error, it cannot be fixed by the courts, and any legislatively-ordained revision threatens the integrity of the whole. Form is almost as important as substance in a code, because it is the form that maintains integrity and compels fealty. Napoleon's *Code* has survived thanks largely to its formal power, evident in its rhetorical ability to move the French psyche and spirit, measured by the extent to which its provisions have become and remain clichés in the language. Perhaps Bonaparte and his jurists merely proved that a people whose cuisine tastes magnificent and achieves its apotheosis in the axiom *la présentation est tout* has a natural gift for the formal aesthetics of codification!

Such furtive reflection can only bear in the fact that Edward Livingston with a matchlessly exquisite grasp of the formal aesthetic set out to reinvent the law of crime, of criminal procedure, of proof of crime, and of punishment and give it substance and form without reliance upon anything that had been done anywhere else before. The formal aesthetic is plain to read. The whole is indeed harmonious, the balance just and apparent: substantive and procedural provisions are of equal extent, the Code of Crimes and Punishments and the Code of Procedure comprising about a hundred pages each (ex-

cluding the forms in Book III of the latter), the Code of Evidence and the Code of Reform and Prison Discipline each requiring about half-a-hundred pages. More striking is how free of legal jargon and law-blab each provision is, how precise, clear, concise, and epigrammatic every article is. Livingston's code is readable—it is a pleasure to read. In this it is very nearly unique, certainly in American codificatory jurisprudence, and is challenged only by the French *Code Civil* (though not, significantly, by Napoleon's *Code Penal*).

With such patent merit, why was Livingston's *System* not enacted into law by the Louisiana Legislature? It was certainly not for want of strenuous advocacy by Livingston. There is no evidence of any politically crooked personal animus towards its author in Louisiana, who by the time he presented his code to the General Assembly in 1826 was the state's most illustrious lawyer, his bona fides as a genuine and committed practitioner of the Civil Law and one of its most learned expositors in either French or English established beyond challenge, and his sincerity in seeking human improvement universally accepted as unalloyed and idealistic. While it has been noted that the *System* was "in retrospect, an odd growth in the regressive, slave-holding society that was antebellum Louisiana,"¹⁴ there is enough evidence of the self-delusory capacity of white southerners to maintain a rigid institutional distinction between free and slave that slavery per se probably had little effect upon the code's fortunes. Moreover, the code had going for it the progressive democratic liberalism of Jacksonian Democracy which was a far more powerful political force in Louisiana in the 1820s than any generalized "regressive" qualities of the society based upon the later dominance of magnolia-and-mint-julep plantationism. Lastly, there is nothing to indicate that the *System* was haunted by any residual fear or rivalry between Civil Law sentiments and common law predilections of the sort evident during the Territorial period; indeed, the code managed a skilful blending of the somewhat limited best in both systems and avoidance of the abundant worst in each.

The *System* appears to have been a victim of its own merits and those of its creator. It was in a sense too perfect, too logical, too complete, too whole; it was also too idiosyncratic, too much the product of a singular genius far removed from the fear, anger, and frustration that moves other more ordinary people. To have abolished capital punishment entirely rather than restrict it only to murder, rape, and arson was asking for public acceptance of the still hotly argued proposition that it has no deterrent effect. To permit abortion if the life of the mother is in danger was to take a step in the 1820s which enjoys less than universal approbation in the 1990s. Refusal to make crimes of homosexuality and sodomy for the delicate (and over-wrought even questionable) reasons advanced (*System*, p. 17) ran so counter to the moral contract on which Judeo-Christian society was raised that decriminalization has had to await the twentieth century's secularization of morality. The much reduced scope of moral offences and the reduction of crimes against religion to protection of the civil right of freedom of belief and worship was too advanced for that day. Some provisions which might appear unacceptable to us probably did not work against the code then. The absence of any appeal beyond motion for a new trial, the absence of a court of appeal, did not shock contemporaries, for Louisiana did not allow criminal appeals between statehood in 1812 and 1843. Criminal defamation (albeit with moderate sanctions) was less foreign to the French and Spanish traditions than it was to the common law. The crypto-analogic gradations of imprisonment, especially the minutely detailed rules for the infamous housing of murderers and rapists sentenced to long or life terms, would have struck contemporaries as eccentric but not inappropriate. In any case, however contemporaries weighed the pros and cons of the various provisions comprised in the four codes of the *System*, in it there was something to dissatisfy everyone even if there was much to satisfy all.

Louisiana legislators were well aware of this fact, and because they were familiar with and well-disposed towards code-law and its requirements they recognized

that to implement Livingston's *System* would demand more legislative effort in its revision with reduced and perhaps pernicious results than the criminal law was worth. Here arose European Civilization's millenium-old neglect of and distaste for that body of law, criminal law, which had always been seen as little more than a device to repress the inherent depravity of the lower orders and which latterly had appeared also to be a threat to decent citizens at the hands of absolutist tyranny. Comparison of the *System* with the *Civil Code of 1825*, their auspices and their fates, is instructive. The *Civil Code* was "important" law, important immediately, day-to-day, and directly to the landowners, merchants, and professionals who sat in the Legislature, and because it was accepted with good though not entirely convincing reason as the "old law" of French and Spanish Louisiana it excited relatively little debate. The *System* could lay no claim to Franco-Hispanic parentage: had it been able to do so it might have been saved from oblivion.

One mourns the fate of Livingston's *System*, because it was a magnificent experiment that deserved a chance both to prove its worth and to attract emulation. As it was, the Code of Reform and Prison Discipline was adopted in Guatemala, and the *System* had a beneficent influence in other newly-independent Spanish American nations. Thomas Babington Macaulay enjoyed a similar freedom to innovate when called to give India a penal code; rejecting the *System* after carefully considering it, he yet imitated its literary qualities, reflected its form, and borrowed some of its substance.¹⁵ Livingston achieved worldwide renown primarily by virtue of the *System*, which was widely published and translated into a number of languages, won commendation from crowned heads as disparate as the King of the Netherlands, the King of Sweden, and the Czar of All the Russias, and excited praise and laud from Chancellor Kent, Chief Justice Marshall, Justice Joseph Story, Victor Hugo, François Mignet, Sir Henry Sumner Maine, and perhaps most notable of all, Jeremy Bentham. Alone, the work and its reception sparked and sustained the whole movement for codification in the English-speaking world.

David Dudley Field would build upon it. And the stalwart Model Penal Code produced since 1950 by the American Law Institute under a guiding genius who might be Edward Livingston's true heir and assign, Herbert Wechsler, has fulfilled a large part of the hope and dream of the Prophet Without and Voice Crying in the Louisiana Wilderness by having had marked impact on the penal codification of four-fifths of the United States.

Yet the most touching tribute must be one Livingston received in 1825 after he had sent a final draft to his correspondent:

I am pleased with the style and diction of your laws. . . . One single object, if your provision attains it, will entitle you to the endless gratitude of society, that of restraining judges from usurping legislation.¹⁸

The acerbity was characteristic, the observation correct and agreeable, the commendation of style the highest compliment from an acknowledged master. Livingston, though, must have been most moved by the fact that the letter came from Monticello. All passions spent.

FOOTNOTES

1. Quoted in G.W. Pierson, *Tocqueville and Beaumont in America*. New York, 1938, p. 622; see *Notes from the Editors*, pp. 8-9, accompanying The Legal Classics Library edition of Alexis de Tocqueville, *Democracy in America* (1988).
2. See Mark T. Carleton's excellent monograph, *Politics and Punishment: The History of the Louisiana State Penal System*. Baton Rouge, 1971.
3. *Ibid.*, p. 8.
4. *The Province of Jurisprudence Determined*; see *Notes from the Editors* accompanying The Legal Classics Library edition (1984) pp. 4-6.
5. Montesquieu, *The Spirit of Laws*, The Legal Classics Library edition (1984) p. 225, and *Notes from the Editors* accompanying it, pp. 8-12.
6. The Legal Classics Library edition (1991) of Beccaria, with Voltaire's commentary, of the fourth English edition 1775.
7. The best account of the Batture row is Chapter 4 in George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions*. Cambridge, Mass., 1975, the best analysis of its conflict of laws issue is A.N. Yiannopoulos, "The Early Sources of Louisiana Law: Critical Appraisal of a Controversy," *Louisiana's Legal Heritage*, Edward F. Haas, ed. Baton Rouge, 1983, pp. 87-106.
8. Quoted in William B. Hatcher, *Edward Livingston, Jeffersonian Republican and Jacksonian Democrat*. University, LA, 1940, p. 466.
9. Quoted in *The Louisiana Civil Code: A Humanistic Appraisal*, Shael Herman et al., eds. Tulane Law School: New Orleans, 1981, p. 24.
10. Richard R. Powell, *Compromises of Conflicting Claims: A Century of California Law, 1760-1860*. Dobbs Ferry, 1977, T.G. Barnes, *Hastings College of the Law: The First Century*, San Francisco, 1978, pp. 31-42.

11. T.G. Barnes, "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749," *Essays in the History of Canadian Law, III, Nova Scotia*, Philip Girard & Jim Phillips, eds. Osgoode Society: Toronto, 1990, pp. 10-41.
12. The Editor has spent months in the Archives Nationales in Paris and the Archives Départementales in Rouen confronting the substantive enigma presented by *arrêts* of the King's Conseil Privé and the Parlement de Rouen, 1589-1610, with at best mixed results.
13. The hot debate over the Civil Law origins of the 1808 *Digest* between Rodolfo Batiza (French origins) and Robert Pascal (Spanish origins), law professors at Tulane and Louisiana State Universities respectively, that dominated 46 *Tulane Law Review* (1971-1972) is carefully and judiciously weighed by Dargo in *Jefferson's Louisiana*, Chapter 7, and Yiannopoulos in *Louisiana's Legal Heritage*, pp. 87-106, and the issue as well-settled as it is likely to be until a brave scholar appears to devote a lifetime's research to it.
14. Charles McClain, "Criminal Law Reform: Historical Development in the United States," *Encyclopedia of Crime and Justice*, II, S. Kadish, ed., New York, 1983, p. 506.
15. Compare The Legal Classics Library edition (1987) of Macaulay's *Indian Penal Code* (1838), and see Sanford Kadish's *Notes from the Editors* accompanying it.
16. Jefferson to Livingston, 25 March 1825, quoted in Hatcher, p. 285.

FURTHER READING

Edward Livingston found nineteenth century biographers in Charles H. Hunt, *Life of Edward Livingston* (New York, 1864) and Carleton Hunt, "Life and Services of Edward Livingston," *Proceedings of the Louisiana Bar Association* (New Orleans, 1903). Anecdotal and suitably eulogistic, they do contain important information. The best study of Livingston as a whole is William B. Hatcher, *Edward Livingston: Jeffersonian Republican and Jacksonian Democrat* (University, Louisiana, 1940), in LSU's Southern Biography Series. This has a very extensive bibliography with complete entries for Livingston's works.

Recent scholarship on early Louisiana and its law is increasingly abundant. In a class by itself is George Dargo's monograph, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Cambridge, Mass., 1975). Its up-to-date bibliography is the place to start for deeper reading—it contains full references to all the earlier legal-historical scholarship on Louisiana, including the important and pioneering research by Henry P. Dart on pre-purchase law. Richard H. Kilbourne Jr., *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* (Baton Rouge, 1987) adds to our knowledge but also serves to fuel the fire of the Batiza-Pascal dispute; Kilbourne is a Spanish-origins proponent. A course-book prepared by A.N. Yiannopoulos, *Louisiana Civil Law System Course Outlines Part I* (Baton Rouge, 1971) is a very useful text collection with extracts from Continental jurists and an extensive and learned introduction to the Civil Law system with attention to Louisiana concerns. *The Louisiana Civil Code: A Humanistic Approach*, Shael Herman et al., eds. (New Orleans, 1981) is an attractive and concise introduction to the questions raised by Louisiana's regime. *Louisiana's Legal Heritage*, Edward F. Haas ed. (Baton Rouge, 1983) contains a number of important essays, those most relevant to Livingston being Hans W. Baade's "The Law of Slavery in Spanish Louisiana, 1769-1803," A.N. Yiannopoulos's "The Early Sources of Louisiana Law: Crit-

ical Appraisal of a Controversy," and Richard H. Kilbourne Jr.'s "An Overview of the Work of the Territorial Court, 1804-1808, A Missing Chapter in the Development of the Louisiana Civil Code." Mark T. Carleton, *Politics and Punishment: The History of the Louisiana State Penal System* (Baton Rouge, 1971) is an excellent study of after-Livingston. An excellent overview of Livingston and his place in American penal reform from colonial times to the present is Charles McClain's "Criminal Law Reform: Historical Development in the United States," in *Encyclopedia of Crime and Justice*, II, Sanford Kadish ed. (New York, 1983) pp.501-512.

The best guide to search of early Louisiana legal records is Kate Wallach, *Research in Louisiana Law* (Baton Rouge, 1958).

