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Ginger Roberts*

"'T'here is no cause to the success of which I would more willingly devote my feeble talents, and the exertions of my life, including, as it does, the cause of religion, humanity, and social order, than the one which forms the subject of this letter . . . ."—Letter from Edward Livingston on the advantages of the Pennsylvania system of prison discipline, 1828

On December 20, 1803 W.C.C. Claiborne became the governor of the newly acquired Louisiana province.¹ Less than two weeks later, he wrote a lengthy account of his first impressions and actions to then Secretary of State James Madison, including some comments on the handling of crime:

In the different prisons of this City I have found upwards of one hundred prisoners, some of whom had been there from ten to thirteen years, on Suspicions of crimes of which it does not appear they were ever convicted; and Some for offences of a very trivial nature.²

Claiborne went on to say that "justice and humanity" demanded an immediate resolution of the problem and that he had spoken with the Spanish authorities about it. The Spaniards seemed to feel, by and large, that the prisoners "passed with the Sovereignty of the Country," hence were an American responsibility.³ The United States thus acquired its first Louisiana convicts, and Claiborne in an act of mercy brought them literally into the land of the free:

Of the prisoners who have fallen within my province [he wrote James Madison] I have already released five, and shall proceed to set I believe the whole at large. Their detention would be attended with a heavy public expense, and would answer no good purpose, as it appears to me very questionable, whether any principle of Law would justify our noticing offences of which we had no cognizance at the time of their commission. It is also to be presumed that many of them

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* 1977 Graduate of Louisiana State University Law School.
1. W. Hatcher, Edward Livingston, Jeffersonian Republican and Jacksonian Democrat 100 (1940) [hereinafter cited as Hatcher].
2. 1 D. Rowland, Official Letter Books of W.C.C. Claiborne 325 (1917) [hereinafter cited as Rowland].
3. Id. at 326.
are innocent, and if others less deserving should be included in the
general Amnesty, it is more pleasing that our error should be on the
Side of Mercy. Less happy events have in other places thrown open
the prison doors, and I confess I should feel a pang, if the present
occasion so glorious to my country, should be disgraced by the
rattling of a Single chain.  

About a month after Governor Claiborne's letter to James Madison
another man arrived in Louisiana, also interested in taking advantage of
the new life offered by the territory.  Edward Livingston left behind an
illustrious career in New York. He was born into a distinguished family,
attended the finest schools and became an attorney, was elected to the
United States Congress and later served as the United States Attorney for
the District of New York and then as mayor of New York. His career was
besmirched when a subordinate in the District Attorney's Office absconded
with a large amount of money. Livingston took responsibility for the
loss, accepting judgment for $100,000. He voluntarily resigned his posi-
tions and set sail for New Orleans, with one goal in mind—to repay the
debt as quickly as possible and then return from his self-imposed exile.

Along with his abilities and his aspirations, Livingston brought his
ideas on how society should handle its criminals. These ideas which
germinated in New York were to be nurtured over the next twenty years
in Louisiana, to be brought to fruition in a criminal code that would bring
Livingston international fame. He would be hailed as a genius throughout
Europe; his code would be translated and parts of it adopted in other
nations. Ironically, it would never be accepted by the state of Louisiana.

Livingston and Louisiana were peculiarly suited for each other.
Louisiana was a territory of diverse nationalities, with a conglomeration of
laws. Livingston was equally diverse and worldly, with scholarly pursuits
that took him into other languages and familiarized him with the European
antecedents of Louisiana's culture.

The citizens of New Orleans in the early 1800's were, for the most
part, Frenchmen and Spaniards, who had not seen France or Spain. The

4. Id.
5. C. HUTT, LIFE OF EDWARD LIVINGSTON 111 (1864) [hereinafter cited as HUTT).
6. For excellent biographical information on Livingston's entire life, see
HATCHER, supra note 1; HUTT, supra note 5.
7. HATCHER, supra note 1, at 37, 82-83.
8. HUTT, supra note 5, at 276-81.
9. See materials cited in note 6, supra, especially HUTT, supra note 5, at 41, 119.
10. HUTT, supra note 5, at 112.
Creoles were graced with "'[r]efinement, sociability, and the capacity for the full enjoyment and appreciation of the finer aspects of life'" and apparently some lived quite elegantly. Livingston spoke French fluently, and his own high level of education probably increased his appreciation of the Creole culture. But he also had the energy and ambition of the other American pioneers.

The diversity of heritage, while intriguing to a scholar of culture, created havoc in the legal system. The laws of this newly acquired province were a mishmash inherited with little logic from the Corpus Juris Civilis, the Pandects, the Code of Justinian, various laws and codes of France and Spain, criminal and commercial laws and the law of evidence from England, the Code Napoleon, and various Federal and state laws of the United States.

The basic foundation of Louisiana's colonial life was Roman law, as interpreted through the Custom of Paris when the French ruled, and by O'Reilly's formularies when Spain took control. After the Louisiana Purchase in 1803, Congress extended such Anglo-American concepts as trial by jury and the writ of habeas corpus into the territory, but otherwise provided that all prior laws, as long as they were not inconsistent with the new American edicts, would remain in force. The territorial legislature subsequently passed several acts listing various specific crimes, providing that they would be interpreted and enforced according to the common law.

12. Id. at 102.
13. See id. at 106-07. Hatcher notes that "'[t]he Americans were generally merchants and traders employed by the commercial interests of New York, Philadelphia, and Baltimore, which had established branch houses in Spanish New Orleans to compete for the increasingly large and valuable western trade. In addition to the resident Americans, there was an almost steady stream of western boatmen, traders, and frontiersmen from the Ohio and upper Mississippi River territory pouring into the city with their wares . . . .'." Id. at 101.

Livingston, like most of these other Americans, was intent on financial success. With his background of refinement, his fluency in French, his training in the common law and his pioneering American spirit, Livingston was uniquely suited to blend with all aspects of the population. Small wonder then that he was able to write home within a few months of his arrival that "'my profession and other circumstances have given me a very extensive acquaintance in the province; and the impressions I have received are very favorable to the character of the inhabitants.'" Hunt, supra note 5, at 113.
15. Hatcher, supra note 1, at 245.
16. Id. at 264.
of England, but leaving other offenses not mentioned to be defined, tried and punished according to the Spanish procedure. Among the Spanish laws were

some remains of those parts of the old system which denounced bloody penalties upon the crimes of Judaism, heresy, and blasphemy, and which regulated torture, some vestiges of the pillory, of public whipping, and of burning to death; and some horrors, in the way of punishments strictly legal, had been, under the Territorial government actually imposed in some parishes of the province, by magistrates of an antiquarian turn . . . .

The territorial legislature added its own brand of confusing priorities in its own statutes. The earliest enactments, for example, punished perjury with five to ten years at hard labor, horse stealing with seven to fourteen years hard labor and public whipping, while manslaughter was punished by a fine up to $500 and possible imprisonment up to twelve months. The conglomeration of different offenses, different sources, different procedural rules and different penalties caused Livingston to complain that references from one statute to another were "as difficult to trace as the most involved table of descents." If the laws were confusing in theory, they sometimes bordered on the nonsensical in practice. A traveler in Louisiana in 1803 reported that there were over sixty unpunished murderers in the prisons. At the same time, he wrote,

[i]f the most peaceful inhabitant, who offends a magistrate or a rich man, does not flee promptly, he is cast for life into a dungeon without being enabled to learn the reasons for it. He can be assured that there exists no guaranty for him. He can not even procure defense. All communication is forbidden him. He can say as he enters the prison, "The light is taken from me forever."

17. Id.
18. HUNT, supra note 5, at 261.
20. Id. at 418.
21. Id. at 432.
22. 1 NATIONAL PRISON ASSOCIATION, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 183 (1873) [hereinafter cited as COMPLETE WORKS].
Little documentation exists as to exactly what Louisiana's earliest prisons were like. An ordinance, passed in 1731, itemized the duties of the jailer, stating, among other things, that

[t]he jailer should . . . visit the prisoners, at least once a day, he will see that they do not scrape in the cells . . . . He will furnish or will have furnished to the prisoners bread, water and straw in good condition . . . . He will report when prisoners are sick in order that they may be cared for.\textsuperscript{24}

How thoroughly these rules were carried out is unknown.

One of the earliest prison structures in New Orleans was the Calabozo, a remnant from the Spanish regime.\textsuperscript{25} The small cells had little access for light or air and prison included several underground cells.\textsuperscript{26}

Under the Spanish government it [the Calabozo] was a wretched receptacle of vice and misery; like the grave it received many tenants, who were soon forgotten by the world: Some of them perished with age and disease, and others by the hands of assassins.\textsuperscript{27}

Governor Claiborne wanted to free all the prisoners so that the entrance of Louisiana into the United States would not be marred "by the rattling of a Single chain."\textsuperscript{28} Freeing the prisoners, however, was only a temporary solution as people continued to commit crimes by whatever statute they were defined.

An act in 1805 allowed the court to remand convicts to be employed in the public service.\textsuperscript{29} This solution was apparently not utilized, for two years later, in his address to the legislature, Governor Claiborne complained that "no satisfactory provision is made for employment of such offenders as may be sentenced to hard labor."\textsuperscript{30}

The Governor went on to suggest a more humane approach to the problem:

[I]t would indeed, be best that convicts should pass in obscurity, the

\textsuperscript{24} The Cabildo Archives, 3 LA. Hist. Q. 80, 82 (1920).
\textsuperscript{25} Kendall, Notes on the Criminal History of New Orleans, (pt.3), 34 LA. Hist. Q. 147 (1951).
\textsuperscript{27} A. Stoddard, Sketches, Historical and Descriptive, of Louisiana 154 (1812).
\textsuperscript{28} 1 Rowland, supra note 2, at 326.
\textsuperscript{29} Acts of the Territory of Orleans, 2nd Sess. 40-42 (1805).
\textsuperscript{30} 3 Rowland, supra note 2, at 275.
time which they are to pass in disgrace: Solitary confinement invites to reflection, and tends to correct vicious habits—while an exposure to the public view, checks the return of moral principle, and palsies every struggle of pride to regain a rank Once lost in Society.\(^{31}\)

Claiborne went on to recommend that a Penitentiary House be built for the convicts, but conceded that the territory probably could not afford one.\(^{32}\)

In 1809, Governor Claiborne made an even stronger plea for improvements in the system of punishments. In addressing both houses of the legislature, he declared:

Punishments are not apportioned to crimes, & in some cases, offenders are imprisoned for life, whose reformation might probably be effected, by a less rigorous suffering. The Jail of New Orleans is the common receptacle for convicts sentenced to hard labour; But no means being pointed out for their employment, these unfortunate victims of the Law, herd together in idleness, until their vice becomes contagious: Their support moreover, is a serious charge upon the Treasury; so much so, that a view to political economy, has had an influence in pardoning offenders, whose claims for mercy, were very doubtful.\(^{33}\)

The Governor again recommended the building of a Penitentiary House.\(^{34}\) Eventually, some minor improvements were made. In 1814, a statute was passed itemizing the daily rations prisoners were to be fed.\(^{35}\) Various laws were passed providing for a physician to tend to sick prisoners.\(^{36}\) Solitary confinement appeared as a punishment for certain offenses in 1818.\(^{37}\) In 1820, the lawmakers noted that several Federal prisoners housed in state prison were “destitute of clothing and necessary covering” and appropriated money to purchase “pantaloons, coats and covering.”\(^{38}\)

Some provision was made for prisoner labor, although not along the

31. Id.
32. Id. at 275-76.
33. Id. at 295.
lines Claiborne recommended. In 1814, the legislature allowed the Governor to hire out the convicts but before they were to be so delivered, the sheriff "shall cause said persons to be ironed in the usual manner . . . and also the heads . . . to be shaven so that they may be designated and recognized as convicts in case of an escape." 39 While Claiborne lamented the ill effect such public display had on the convict's self-esteem, 40 these chain gangs of prisoners were "a daily spectacle of human misery." 41

In 1820, Edward Livingston was elected to the legislature from Plaquemines Parish and became chairman of several committees, including one to examine the idea of a penitentiary house. 42 The appointments were not inappropriate. As early as 1795, when he was a member of Congress, Livingston had offered a motion to ease the harshness of certain penalties. 43 While mayor of New York he had called for employment of the poor to keep them from turning to crime and the employment of ex-convicts to keep them from returning to crime. 44 In 1802, the Common (City) Council, while he was mayor and presiding, passed a resolution to look into building some cells suited for solitary confinement. 45 About a year later, a council committee recommended that a school house be built for the children of the poor. 46 The wording of the resolution could well have been Livingston's, it so foreshadowed some of his later thinking. The education of children was vital, the committee said, because

[i]t implants in their young, and tender minds principles of religion and morality [,] it fits them for useful callings and the benefits they derive from this source are extended to the community. The want of education among the poor children of this City has no doubt been the source of many crimes and tends to debase the mind, and cherishes every evil propensity. 47

Livingston's long interest in criminal matters made him a logical appointment to such committees in the Louisiana legislature. In his inaugural address of 1820, incoming Governor Thomas B. Robertson urged

40. 3 ROWLAND, supra note 2, at 275.
42. HATCHER, supra note 1, at 230-40.
43. Id. at 36-37.
44. Id. at 82-83.
45. 3 NEW YORK (CITY) COMMON COUNCIL MINUTES, 1784-1831 at 110 (1917).
46. Id. at 337.
47. Id.
the establishment of a penitentiary house and the proposal was referred to Livingston's committee which heard several penitentiary plans over the next several years. Meanwhile, the problems of the whole area of the criminal law and procedure continued to plague Louisiana. Livingston, while interested in establishing a penitentiary, was even more desirous of seeing an overhaul of the entire criminal law.

In 1820, the legislature took a significant step toward that goal by declaring that

a person learned in the law, shall be appointed by the Senate and House of Representatives . . . whose duty it shall be to prepare and present . . . a code of criminal law in both the French and English languages, designating all criminal offences punishable by law, defining the same, in clear and explicit terms, designating the punishment to be inflicted on each, laying down the rules of evidence on trials, directing the whole mode of procedure, and pointing out the duties of the Judicial and Executive officers in the performance of their functions under it.

Appropriately, Livingston was selected by the legislature to draft such a code.

Livingston spent several years working on the code. When it was finally completed, the elaborate document was divided into five parts: A Code of Crimes and Punishments, A Code of Procedure, A Code of Evidence, A Code of Reform and Prison Discipline, and a Book of Definitions.

48. Hatcher, supra note 1, at 236-37.
50. Hatcher, supra note 1, at 237.
52. Hatcher, supra note 1, at 238. The selection was apt, for as one writer noted, Livingston was "fifty-seven 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." Edward Livingston and His Louisiana Penal Code, 22 A.B.A.J. 191, 192 (1936). Exactly how appropriate a selection it was was noted by another Livingston biographer who concluded that "[t]he initial act, passed in 1820, was undoubtedly framed, word for word, by him." Hunt, supra note 5, at 256.
53. This included time spent after the original manuscript was burned in a fire on the eve of its presentation. Hatcher, supra note 1, at 262-63.
Perhaps the most well known of Livingston’s proposals was his call for the abolition of capital punishment.\(^{54}\) One recent writer has said that he “was the most influential and renowned opponent of the gallows in American history.”\(^{55}\) In the early 1800’s all the states had capital crimes. Livingston’s argument was that capital punishment obviously did not reform the offender, nor did he feel it deterred others.\(^{56}\) Livingston not only recommended the abolition of capital punishment, but his code of punishments excluded corporal penalties as well.\(^{57}\)

While his stand on capital punishment was his singularly most famous recommendation, his Code of Reform and Prison Discipline was the most essential part of his overall plan. Livingston himself recognized it as such:

In offering to the legislature a system of penal law, the principal sanction of which is imprisonment, it is scarcely necessary to remark, that its whole efficacy must depend on the manner in which confinement is to be inflicted as a punishment, or used as a means of detention; in other words, on the wisdom of the Code of Prison Discipline.\(^{58}\)

Livingston’s Code was a cradle-to-grave blueprint on how society can eradicate crime. His plan called for the religious training of all school children, alleviation of poverty and unemployment through state industrial houses, separation of the accused from convicted persons, placement of convicted persons in different facilities according to their offenses, post-release assistance to offenders and a reformatory school for problem juveniles. Defending the comprehensiveness of his code as its “chief value,”\(^{59}\) Livingston had little use for the scatter-shot approach to criminal justice.

No where has a system been established consisting of a connected series of institutions founded on the same principle of uniformity, directed to the same end; no where is criminal jurisprudence treated as a science; what goes by that name, consists of a collection of dissimilar, unconnected, sometimes conflicting expedients to punish


\(^{55}\) *Id.* at 145.

\(^{56}\) 1 COMPLETE WORKS, *supra* note 22, at 190-224.

\(^{57}\) *Id.* at 187-328.


\(^{59}\) *Id.* at 586.
different offenses as they happen to prevail; of experiments directed by no principle, to try the effect of different penalties; of permanent laws to repress temporary evils; of discretionary power, sometimes with the blindest confidence vested in the judge, and at others with the most criminal negligence given to an officer of executive justice.\textsuperscript{60}

Livingston's plan began with public education,

not confined to the elements of literature, but extended particularly to the duties of a citizen towards the state, and of men towards each other in every relation in life, and to those principles of religion which are equally acknowledged by all sects.\textsuperscript{61}

As to the second part of his overall plan, Livingston proposed a House of Industry to alleviate

pauperism, mendacity, idleness, and vagrancy, the great sources of those offenses which send the greatest number to our prisons.\textsuperscript{62}

Basic to his concept was Livingston's feeling that society owes a double-pronged duty to its citizens—protection and subsistence.\textsuperscript{63} He criticized those who fail to see the connection between poverty and crime or who feel that "[t]he duty to provide for the poor is rather a moral than a civil obligation."\textsuperscript{64} He believed that the duty to provide protection and subsistence were actually the same:

That society owes protection to all its members, is not denied. But what is that protection? Certainly its chief object is life; but whether life be assailed by the sword or by famine, it is equally important for the individual, and for the community too, that it should be preserved.\textsuperscript{65}

This obligation, he felt, arose innately from the relationship between a citizen and his society—and this relationship put the preservation of life

\textsuperscript{60.} \textit{Id.} at 588.
\textsuperscript{61.} \textit{Id.} at 525. Livingston argued that criminals can gamble on being caught by manmade laws but that divine retribution was inescapable. If this fear were instilled at an early age, he reasoned, crime would diminish. \textit{Id.} at 526-27. To bolster his argument, he cited statistics from New York and Boston where the public schools included religious instruction and juvenile offenses were virtually non-existent. \textit{Id.} at 527-28.
\textsuperscript{62.} \textit{Id.} at 528.
\textsuperscript{63.} \textit{Id.} at 528-29.
\textsuperscript{64.} \textit{Id.} at 532.
\textsuperscript{65.} \textit{Id.} at 533.
foremost, with property protection only secondary. Thus, in order for life to be sustained, encroachments could be made on the property of others. Livingston could not conceive of a society that would presuppose that one citizen "should die of hunger, in order that the others might enjoy, without deduction, the whole of their property."6

His House of Industry was divided into two sections. One was for voluntary admissions—those who were unable to work who would be cared for and those who were willing and able to work but unable to find work on the outside. The other section would be for persons "convicted of illegal idleness and vice" who would be "forced to labour for their support."7 The purpose of both divisions was to divert people before they turned to crime.8 Wary of the expense of maintaining such a facility, Livingston stressed that various trades could be carried on and pointed out that as a crime preventative, it would save money in the long run.9

Livingston then dealt with pre-trial detention. At that time, such detainees were jailed with convicted felons, where "he who can commit the oldest crime the newest sort of way is hailed as a genius" and he noted statistics from New York which showed that the vast majority of those detained were actually discharged before trial, having been kept "just long enough to receive instructions in all the mysteries of crime."10 Apart from the swapping of criminal techniques, Livingston condemned the shock to the sensibilities that co-mingling produced.

The innocent stranger, unable to fund security, is joint tenant . . . with three times convicted convicts; vagrants sunk in vice, and brutified by intoxication . . . 11

As a solution, Livingston offered a House of Detention, also divided into compartments. Persons accused of crimes, persons accused of misdemeanors and persons needed as witnesses would be housed separately.12 Additionally, those convicted of misdemeanors would go to the House

as no great moral guilt is implied in the offences of which they have

66. Id. at 533-34.
67. Id. at 533.
68. Id. at 530.
69. Id. at 531.
70. Id. at 530.
71. Id.
72. Id. at 536.
73. Id. at 538.
74. Id. at 540.
75. Id. at 542.
been guilty, and the detention is limited to short periods, so the imprisonment is intended more for punishment than reformation.\footnote{76}{Id. at 545.}

In his allocation of offenders to different types of institutions, Livingston stressed a point he returned to persistently—that the legislature must clearly enunciate the penalties for each offense, leaving some discretion to the judge, but no discretion to the jailer.\footnote{77}{Id. at 546.} In his Code of Crimes and Punishment, Livingston carefully itemized the consequences of each criminal act. In order to maintain this legislative control, he meticulously described how each institution should be maintained. But Livingston’s strong feelings came from more than a desire to preserve the sanctity of the statutory requirements. He believed that the penalty should be proportional to the offense—that the goal of imprisonment was to restrain, deter and reform and that the Code should “rigidly . . . direct every privation necessary to attain” that goal, but should “inflict no greater evil” than that “required to produce these consequences.”\footnote{78}{Id. at 507.} Any penalty imposed which was “beyond that which is necessarily included in the sentence, is illegal, is cruel, is tyrannical.”\footnote{79}{Id. at 546.}

From the House of Detention, Livingston moved on to the “beaten ground of penitentiary discipline,”\footnote{80}{Id. at 547.} dealing with offenders who are assumed to have a “depravity and corruption of mind which requires the application of reformatory discipline as well as punishment.”\footnote{81}{Id.} Livingston considered the contemporary argument of punishment v. reformation as misguided as he felt both were necessary for a successful system. The punishment-only approach had been popular for years and he, noting that it had “failed in preventing offences” returned to one of his basic themes, that “the severest [punishments] have always without exception been found the least efficacious.”\footnote{82}{Id. at 549.} Livingston did not, however, argue the opposite—that the more mild the punishment, the more effective the reform. He agreed that some unpleasantness was needed to deter and he felt that regardless of the conditions of confinement, constraint alone was punishment.\footnote{83}{Id. at 550.}

Assuming that punishment and reformation were the twin goals, Livingston reiterated the necessity of spelling out clearly the exact penal-
ties for each offense.84 Recognizing that traditionally a jailer’s only job had been to prevent escape by his “promiscuous assemblage of vagrants” it wasn’t unexpected that he would become “an extortioner and a petty tyrant.”85 With the stress on reformation, Livingston called for the appointment of persons with “high talents, and honour and integrity” to fill the positions.86 He noted the irony of requiring a judge to abide by meticulously drawn statutes in sentencing, only to have the jailer change the character of the punishment at his whim.87 Livingston particularly abhorred whipping, either as a sentence or as a disciplinary tool of the jailer, calling it “too severe, and degrading, and demoralizing and unequal.”88

Livingston’s strategy of reformation was basically a relearning process based on rewards. His goal was to convince the offender to prefer a life of honest industry, not from the fear of punishment, but from a conviction of its utility.89

The key assumption was that convicts were motivated by the same desires as other people, and that crime is caused primarily by “intemperance, idleness, ignorance, vicious associations, irreligion and poverty” rather than “any defective natural organization.”90 He took a hard swipe at the legislature for ignoring the causes of crime, then covering up their own inattention by claiming convicts were simply inferior beings, “incapable of receiving the impressions of good.”91 The idea that convicts were inherently deficient must have been prevalent in Livingston’s day, as he became quite eloquent in his defense of his own theory.

Convicts are men. The most depraved and degraded are men: their minds are moved by the same springs that give activity to those of others; they avoid pain with the same care, and pursue pleasure with the same avidity, that actuate their fellow mortals. It is the false direction only of these great motives that produces the criminal actions which they prompt. To turn them into a course that will promote the true happiness of the individual, by making them cease

84. Id. at 554.
85. Id.
86. Id.
87. Id.
88. Id. at 555.
89. Id. at 516.
90. Id. at 563.
91. Id.
to injure that of society, should be the great object of penal juris-
prudence. 92

When a prisoner would arrive, he would be placed in a solitary cell
with basically nothing to divert him. All his physical needs would be taken
care of, but no indulgences allowed. By depriving the convict of any
rewards for his crime, but at the same time not causing him to suffer
physically, the prisoner was left to think about the consequences of his
crime.

[W]ith no companions to applaud his perseverance in wrong; no
means of drowning reflection by intemperance; no acute or dispro-
portioned pain to brace him up against real or fancied oppression; the
heart must necessarily be softened, and the spirit subdued, and the
mind prepared to receive . . . great truths. 93

With this atmosphere, Livingston laid the groundwork for the voluntary
self-reformation of the prisoner; he strongly urged that coercion, no matter
how often or harshly repeated, would not produce permanent change. 94

Initially, the privation of employment would be part of the penalty.
After a certain period of time, employment would be offered to the
prisoner as a break from his boredom, although he would work alone.
Other inducements would be offered—a better diet, permission to attend
small classes or to acquire books. 95 If the inmate abused a privilege, "the
indulgence is withdrawn and he returns to his solitude and other priva-
tions." 96 Through this process of voluntary participation by the convict,
Livingston hoped to change him permanently.

A period thus passed, without any possibility of corrupting associa-
tions, with the daily experience of the actual enjoyments gained by
diligence, hearing no precepts but those of religion, morality and
science, and those inculcated not in the harsh language of reproach,
but in the mild yet firm accents of advice, pronounced by men who
take an interest in the welfare of the convict, and with the cheering
prospect of regaining, by honest industry, that good opinion of

92. Id. at 562-63. Echoing Bentham, Livingston theorized that convicts had not
learned to "prefer a distant and moral good, to a present and physical enjoyment" (id. at 559) and that crime came about from impatience with the labor needed to
acquire things legitimately. Livingston's answer was to convince the convict that
the honest life would bring more rewards in the long run.
93. Id. at 559-60.
94. Id. at 559.
95. Id. at 560-61.
96. Id. at 562.
society, which no one ever lost without regret: a period thus passed, it is confidently believed, must efface bad impressions, must create lasting habits of industry and virtuous pursuit, must discharge the subject of this discipline from the prison a better, a wiser, and a happier man than he entered.97

Livingston could have easily ended his code at this point, having arranged a prison system that would discharge reformed offenders. He was aware, however, that it would be vain to teach the inmate a skill, or encourage him in honest pursuits, if the public would continue to consider him a criminal. "[H]is relapse is certain, unavoidable, and his depravity will be the greater" if such distrust occurred.98 To circumvent this, Livingston suggested that the ex-offender be permitted to work in the House of Industry in order to confirm his reformation. There he would find employment and sustenance while he passed "the dangerous and trying period between the acquisition of liberty and restoration to the confidence of society."99

For those offenders sentenced to life imprisonment for particularly serious offenses, Livingston offered little solace even as he eliminated the death penalty. Such offenders were to be considered

as much dead to the world as if no commutation of their former punishment had been made; their property is divided among their heirs; they are buried in their solitary cells, and their epitaph is contained in the inscription which records their crime, and the daily renewal of its punishment.100

Lastly, Livingston proposed a School of Reform for juvenile offenders. To Livingston, the natural state of a child was one of free and spontaneous impulses, for children had not yet learned the self-control and discretion that come with maturity.101 Livingston seemed to feel that the main problem juvenile offenders had was that their parents or guardians had failed in this task of education, so the state needed to fill the gap.102 The purpose of the School was to instruct rather than to punish.103 Livingston cited a number of successful case histories from a similar

97. Id. at 564-65.
98. Id. at 565.
99. Id.
100. Id. at 568.
101. Id. at 571-72.
102. Id. at 572-73.
103. Id. at 573.
program in New York where young offenders learned skills and were apprenticed out to private employers.\(^{104}\)

Livingston concluded his study with a renewed plea for a comprehensive attack on the crime problem and for clear legislative direction.\(^{105}\) The lawmaker should

form correct principles; enounce them for his own guidance and that of his successors; and, with them constantly before his eyes, arrange his system of criminal jurisprudence into its natural divisions, by providing for the poor, employing the idle, educating the ignorant, defining offences and designating their correspondent punishment, regulating the mode of procedure, for preventing crimes and prosecuting offenders, and giving precise rules for the government and discipline of prisons.\(^{106}\)

In 1825, the code was finished and presented to the legislature. One scholar commented that if Louisiana had adopted it, it would have placed her at least a hundred years ahead of the rest of the world.\(^{107}\) The code was translated into several languages; the emperor of Russia and the King of Sweden commended Livingston; the King of the Netherlands presented him with a gold medal and Guatemala adopted the Code of Reform and Prison Discipline as part of her law.\(^{108}\) Jeremy Bentham wanted it republished and generally distributed throughout England; the Institut de France elected Livingston to honorary membership.\(^{109}\) Apart from the scholarly acclaim abroad, he was praised also in the United States; even ex-President Thomas Jefferson, who had feuded with Livingston over some New Orleans land, wrote to congratulate him and to profess that the code "will certainly arrange your name with the sages of antiquity."\(^{110}\)

Ironically, the Louisiana legislature chose not to enact the code, although it eventually followed the lead of the Netherlands and presented Livingston with a gold medal.\(^{111}\) Part of the problem was that Livingston himself was elected to the United States Congress, hence could not push

\(^{104}\) Id. at 574-79.

\(^{105}\) Id. at 586-89.

\(^{106}\) Id. at 588.

\(^{107}\) Bonham, A Forgotten American Statesman, 2 American Mercury 498 (1924). One Livingston biographer devotes an entire chapter simply to "The Reputation of the Code" which listed the numerous people and governments which praised Livingston's work. See Hunt, supra note 5.

\(^{108}\) Id.

\(^{109}\) Bonham, supra note 107, at 500.

\(^{110}\) The Writings of Thomas Jefferson 113 (A. Bergh Ed. 1907)

\(^{111}\) Hatcher, supra note 1, at 286.
for the code's enactment in the Louisiana legislature. Perhaps too the
governing authorities simply did not share his beliefs.112

Although Livingston's views did not apparently reflect those of his
Louisiana contemporaries, they were not entirely new to the rest of the
world. Livingston was well-read in several languages and was no doubt
aware of the sociological movements throughout Europe. In the 1500's the
natural sciences had begun to develop, with their emphasis on man's
ability to reason his way to truth rather than simply to trust in divine
explanations. This enthusiasm for man's innate worth and intelligence
spilled over into the social sciences, instigating movements for social
reform. A logical consequence of having the confidence to explore one's
own world is the desire to improve it.113

Throughout the centuries, various efforts to wipe out crime had
failed. Torture, branding, maiming and banishment were popular penalties
for centuries, followed by the use of convict labor.114 In the 1700's some
reformers, with rational and humanitarian orientations, placed more
emphasis on crime prevention than on punishment after the fact. The
Marchese de Beccaria published an Essay on Crime and Punishment in
1764 which launched a new movement within penology. He stressed that
the purpose of punishment was to deter persons from committing crimes
rather than to satisfy society's desire for revenge. He also called for penal-
ties tailored to the offense, i.e., fines for property violations. He recom-

112. Id. at 283-84. In his message to the legislature in 1822, Governor Robertson
had outlined his own theory of punishment: "Imprisonment for crime . . . ought to
be considered as an almost intolerable punishment. Severe measures, privations of
every kind compatible with the health of the prisoners, rigid restraint, hard labor,
and occasionally solitary confinement, ought to be resorted to . . . ." OFFICIAL
JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF THE STATE OF LOUISIANA, 2d
Sess. 20 (1822).

The severity of the Governor's philosophy contrasts with Livingston's empha-
sis on the voluntary reformation of the prisoner, minimal coercion, labor as reward,
and penalties tailored exactly to the offense.

113. H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 371-72 (1951)
[hereinafter cited as BARNES & TEETERS].
114. Id. at 337-47, 361-70.
115. Id. at 372-74.
throughout England and the rest of Europe. He helped draft a bill to establish penitentiary houses in order by sobriety, cleanliness and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work. . . . to inure them (the offenders) to habits of industry, to guard them from pernicious company.

Utilitarianism was on the rise, spearheaded by Jeremy Bentham who also took a particular interest in prison reform. The Utilitarians believed that man operated on a simple principle of seeking pleasure and avoiding pain. Applied to criminal conduct, Bentham concluded that an offender would be deterred if the result of crime commission would cause him more pain than enjoyment. Since only enough pain to tip the balance was necessary, Bentham was also a proponent of penalties tailored to particular crimes.

Bentham published a series of articles called the Panopticon Papers presenting his suggestions on prison structure; some of his concepts were in Livingston's plan. Initially, Bentham was a believer in solitary confinement and like Livingston was in favor of labor as an alleviation rather than part of the punishment.

After John Howard's bill for a penitentiary house was passed, Bentham urged his own architectural structure on the authorities. He designed a circle Panopticon with the stacked inmate tiers surrounding the outer walls and the guard station in the center, so that all the inmates would be in view at all times. Bentham's plan offered another advantage, which was also a concern of Livingston's: it would allow the wardens and high officials to keep an eye on the lower echelon guards. The Panopticon was never built in England, although a modified version appeared in the Virginia state prison under the influence of Thomas Jefferson. Interestingly, Bentham later retreated from the idea of solitary cells, saying that their only purpose was "the breaking" of the spirit and

116. Id. at 385-87.
117. Id. at 387.
118. Id. at 374-75, 387-90.
119. Id.
120. "If a man won't work, nothing has he to do, from morning to night, but to eat his bad bread and drink his water, without a soul to speak to. If he will work, his time is occupied, and he has his meat and his beer, or whatever else his earnings may afford him." 1 J. Bentham, Panopticon, Or, the Inspection-House 76-77 (1791) [hereinafter cited as Bentham].
121. Barnes & Teeters, supra note 113, at 388.
122. 1 Bentham, supra note 120, at 5-12, 29.
"subduing the contumacy, of the intractable" which could be done in few days.\footnote{124}

Perhaps more important to Livingston than Bentham's actual prison ideas was Bentham's and the Utilitarians' emphasis on treating social problems in a scientific manner. Livingston discovered Bentham as early as 1802, while he was still in New York, through a French translation and he became friends with Bentham over the years.\footnote{125}

Livingston's emphasis on clear phraseology, on a comprehensive legislative attack on crime, on a system of punishments geared to deterrence, all reflect the influence of the Utilitarian movement which was attempting to humanize the penal laws throughout the world.

Livingston, however, went beyond the movement in his concept that all men were capable of becoming law-abiding citizens without ever having to approach forbidden fruits and subsequently be punished. Bentham's pleasure-pain principle seemed to stop at the point of simple deterrence: to halt crime, simply to punish the criminal so that he incurs more pain than pleasure from his act. Livingston, on the other hand, elaborated on a notion of education, beginning with childhood, of intellectual development and conscious choice of good behavior on the part of the person, and not just a mechanical reflex of avoiding discomfort. Livingston's emphasis on social conditions as the cause of crime is probably what triggered a later Livingston writer to say that he approached "the threshold of socialism" with his views.\footnote{126} Still unexplained is Livingston's attitude that society, and the legislature, had the duty of solving these problems, both in protecting the citizenry from crime and in providing sustenance for those in need.

Livingston shared the enthusiasm born of the American Revolution.\footnote{127} While still in New York, his family had been much involved with the making of the revolution and his brother had helped to draft the Declaration of Independence.\footnote{128} Livingston served as a member of Con-

\footnote{124. 2 Bentham, supra note 120, at 23.}
\footnote{125. Hunt, supra note 5, at 96. "Although strongly impressed with the defects of our actual system of penal law, yet the perusal of your works first gave method to my ideas, and taught me to consider legislation as a science governed by certain principles applicable to all its different branches, instead of an occasional exercise of its powers, called forth only on particular occasions, without relation to or connection with each other." Id.}
\footnote{126. Franklin, Concerning the Historical Importance of Edward Livingston, 11 Tul. L. Rev. 163, 172 (1937).}
\footnote{128. Hatcher, supra note 1, at 5.}
gress in an early session and was active politically during Thomas Jefferson's term as President. Jefferson was perhaps the greatest exponent of the early American philosophy when he said that "'[t]he freedom and happiness of man are the sole objects of all legitimate governments.'"129 This stress on individual rights over property privileges and government's role in maintaining those rights appear in Livingston's conviction that material possessions must give way if individual life is being threatened, hence a House of Industry at society's expense to aid the unemployed, the unemployable and the potentially criminal. Livingston's view might also be a peculiar twist on the Utilitarian notion that the purpose of government was to provide the greatest good for the greatest number of people. While undoubtedly the criminal, the poor and the outcast were a relative minority, their care at the expense of the majority would produce a greater good for the majority in the long run by reducing crime, vagrancy and unemployment.

Characteristic of the worldwide movement toward a rational approach to the crime problem was Livingston's stress on empirical data. He was in touch with prison reformers throughout the country and he quoted statistics and case histories in his codes. He began his study by sending out questionnaires throughout the United States.130 While his data are, at times, more in the form of conclusions and opinions than actual facts, his efforts to obtain outside information bolstered the soundness of his conclusions.

While Livingston was no doubt aware of the reform movements in Europe, he was necessarily more in touch with the progress in his own country. Actually, much of Europe had its attention on the United States as well, particularly Pennsylvania where a new prison concept was being tried.131 Livingston followed this experiment with interest as it most closely resembled his own ideas. At the same time, another system of penal reform developed in Auburn, New York which was antagonistic to Livingston's philosophy. The feud between the Pennsylvania and the Auburn system was to fester for nearly a century while the rest of the country and the world watched and took sides.132 Livingston's philosophy was developed against the backdrop of this controversy; his writings reflect the conflict; his search for empirical data returned him repeatedly to look at both systems. They need to be explored in depth to understand Livingston's views as well as to chart the course of prison reform in general in the 1800's.

129. Mouledous, supra note 127, at 291.
130. 1 COMPLETE WORKS, supra note 22, at 7-8.
131. BARNES & TEETERS, supra note 113, at 412-16.
132. Id.
The original criminal law governing the territory that later became the state of Pennsylvania was promulgated in 1676 by the British government. The code emphasized corporal punishment and had numerous capital offenses. These laws were superseded in 1682 by William Penn and the Quaker settlers with laws that narrowed capital crimes and prescribed imprisonment instead of corporal penalties. Reportedly, this was the first instance in history of imprisonment being selected as the punishment for the majority of criminal offenses. The Quaker philosophy stressed mercy and the possibility of reforming the offender. After Penn's death, the old Anglican system gradually returned and by 1718 there were thirteen capital offenses and corporal penalties such as whipping and maiming were restored.

Pennsylvania had not forgotten its Quaker heritage, however. In 1776, the Philadelphia Society for Assisting Distressed Prisoners was formed, held to be the first prison reform society in America or Europe. The revolution halted its activities, but in 1787 it was regrouped and renamed the Philadelphia Society for Alleviating the Miseries of Public Prisons. The active core of the group was the Quakers, including Dr. Benjamin Rush, but they also had the support of influential non-members like Benjamin Franklin; their impact was quickly felt in the Pennsylvania legislature. In 1794, capital punishment was abolished for all but one offense and imprisonment replaced corporal punishment. Livingston, among others, lavishly applauded the efforts.

Applying for Pennsylvania, and perhaps for the world, she had enlightened men to frame her penal laws; and happier still, she had a class of citizens admirably calculated to execute them with the zeal of enthusiasm . . . the modern quakers devote all that time which others waste in dissipation . . . to the direction of charitable institutions . . . and . . . to the cause of humanity.

While reforming the criminal codes, the Society was also involved in the development of American prisons and prison customs, 1776-1845. The active core of the group was the Quakers, including Dr. Benjamin Rush, but they also had the support of influential non-members like Benjamin Franklin; their impact was quickly felt in the Pennsylvania legislature. In 1794, capital punishment was abolished for all but one offense and imprisonment replaced corporal punishment. Livingston, among others, lavishly applauded the efforts.

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<td>O. Lewis, The Development of American Prisons and Prison Customs, 1776-1845 at 10 (1922) [hereinafter cited as Lewis].</td>
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with the bulging jails, particularly the Walnut jail in Philadelphia.\textsuperscript{144} No distinctions were made among prisoners for sex, age or offense. Compulsory public labor was introduced in 1786 to alleviate the crowding and to help meet upkeep costs.\textsuperscript{145} While praising the changes in the criminal laws, Livingston was critical of the use of public labor, claiming it led to "debasement, corruption and an immediate repetition of crime."\textsuperscript{146} Concern over escapes led to unsightly security precautions.\textsuperscript{147}

The Philadelphia Society continued to lobby the legislature for change. In 1788 they suggested that public labor be replaced by "more private and even solitary labor" which "would more successfully tend to reclaim the unhappy objects . . . ."\textsuperscript{148} In 1790, the legislature finally separated the sexes at the Walnut jail and built a new wing of solitary cells for the more troublesome offenders. This block of cells was known as the Penitentiary, the first in the country.\textsuperscript{149} In reality, however, the overcrowding all but negated any attempt at solitary confinement.\textsuperscript{150}

Livingston himself was aware of the frustrations in Pennsylvania.\textsuperscript{151} In several pages of gathered statistics he noted the lower recidivist rate during the periods when genuine solitary confinement was possible. He then charted the increasing rate of re-conviction as the system became too saturated with convicts for seclusion to be realized, and "even classification became impossible."\textsuperscript{152}

Eventually the Pennsylvanians lobbied successfully for new facilities. One institution, known as Cherry Hill, provided for inmate labor but was also made up of solitary cells. The prisoners worked in their cells, but were allowed outdoors in their solitary gardens for exercise. Some prisoners grew vegetables, others had pets.\textsuperscript{153} The goal was to reform the convict through his own repentance. According to a prison inspector's report, the inmates were to think of their cells as "the beautiful gate of the Temple leading to a happy life and by a peaceful end, to Heaven."\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{144} BARNES & TEETERS, supra note 113, at 391-94.
\item \textsuperscript{145} LEWIS, supra note 136, at 17.
\item \textsuperscript{146} E. LIVINGSTON, supra note 58, at 508.
\item \textsuperscript{147} "The keepers [on the streets] were armed with swords, blunder-busses and other weapons of destruction. The prisoners were secured by iron collars, and chains, fixed to bombshells . . . ." LEWIS, supra note 136, at 18.
\item \textsuperscript{148} BARNES, supra note 141, at 126-27.
\item \textsuperscript{149} BARNES & TEETERS, supra note 113, at 393.
\item \textsuperscript{150} BARNES, supra note 141, at 102.
\item \textsuperscript{151} E. LIVINGSTON, supra note 58, at 508-12.
\item \textsuperscript{152} Id. at 512.
\item \textsuperscript{153} BARNES & TEETERS, supra note 113, at 402-06.
\item \textsuperscript{154} Id. at 402.
\end{itemize}
Economics and inmate ingenuity in finding ways to communicate made the system difficult to maintain over a long period of time.\textsuperscript{155} Individual labor was not as economically sound as collective work and one inmate per cell meant vast and costly construction.

The Pennsylvania system was nevertheless influential throughout the other states, including New York.\textsuperscript{156} Ironically, the Auburn system, which came to rival the Pennsylvania system, was an outgrowth from the Quaker concept. In the late 1700's New York, like the other states, including Pennsylvania, had a number of capital crimes. Robbery of a church, counterfeiting and forgery, as well as the traditional murder, rape and treason were punishable by death.\textsuperscript{157} For noncapital offenses, corporal punishment was the common remedy, with imprisonment rarely used except for debtors.\textsuperscript{158}

The programs and publicity aroused by the Philadelphia Society for Alleviating the Miseries of Public Prisoners created curiosity and support in New York.\textsuperscript{159} In 1796, two years after Pennsylvania took similar action, New York reduced the number of capital offenses to two (murder and treason) and replaced corporal punishment with imprisonment. In 1816, the legislature ordered a new institution to be built at Auburn,\textsuperscript{160} adopting the Quaker philosophy to the extent that part of the prison was built for solitary confinement.\textsuperscript{161} The resemblance ended there. Instead of large, airy, well-lit cells, with exercise yards as the Pennsylvanians prescribed, the solitary tiers at Auburn were built along an inside corridor, with the cells tiny, poorly lighted and not well ventilated.\textsuperscript{162} The fact that the New Yorkers had not comprehended the philosophy behind the Pennsylvania system is illustrated in a report made by the board of inspectors at Auburn in 1821, the same year that eighty prisoners were transferred into the solitary tiers.

The end and design of the law is the prevention of crime, through fear of punishment, the reformation of offenders being of minor consideration.\textsuperscript{163}

Gustave Auguste de Beaumont and Alexis de Tocqueville, sent by

\begin{thebibliography}{9}
\bibitem{155} \textit{Id.} at 406.
\bibitem{156} \textit{Id.} at 398.
\bibitem{157} \textsc{Barnes}, supra note 141, at 88.
\bibitem{158} \textit{Id.} at 89.
\bibitem{159} \textit{Id.} at 105-06.
\bibitem{160} \textit{Id.} at 107.
\bibitem{161} \textit{Id.} at 108.
\bibitem{162} \textsc{Barnes} & \textsc{Teeters}, supra note 113, at 406-09.
\bibitem{163} \textsc{Lewis}, supra note 136, at 81.
\end{thebibliography}
France to study the American prison systems, recorded the results of the early Auburn experiment:

The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.164

Auburn Warden Gershom Powers remarked that another inmate "beat and mangled his head against the walls of his cell until he destroyed one of his eyes."165

The dismal failure of the Auburn version of the Philadelphia plan resulted in eventual pardons for those remaining in solitary or their transfer back into the general population.166

Casting about for a new idea of prison operation, the New Yorkers adopted the philosophy of the London Society for the Improvement of Prison Discipline which recommended that severe punishment must form the basis of an effective system of prison discipline. The personal sufferings of the offender must be the first consideration... The Society [of London] recommends a system of hard labor and regular employment, a system in which spare diet and occasional solitary confinement and habits of order and silence are steadily enforced.167

New York thus adopted the "silent" system at Auburn, and later at Sing-Sing.168 By maintaining silence the system was simply to void one of the primary complaints about the congregate plan—communication between inmates. With this modified congregate, but silent, strategy, the prisoners could be worked conveniently and together which was economically more popular than separate confinement. Some hoped that prisons might even be able to support themselves financially.169

164. DE BEAUMONT & DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 41 (1964) [hereinafter cited as DE BEAUMONT & DE TOCQUEVILLE].
165. LEWIS, supra note 136, at 82.
166. DE BEAUMONT & DE TOCQUEVILLE, supra note 164, at 42; LEWIS, supra note 136, at 82.
167. LEWIS, supra note 136, at 84.
168. BARNES & TEETERS, supra note 113, at 409-12.
169. Id. at 412.
The Prison Discipline Society of Boston was a major publicity arm for the new system and in 1826 issued its first report.

The unremitting industry, the entire subordination, and subdued feeling among the convicts, has probably no parallel among any equal number of convicts. In their solitary cells, they spend the night with no other book than the Bible, and at sunrise they proceed in military order, under the eye of the turnkey, in solid columns, with the lock march to the workships, thence in the same order at the hour of breakfast, to the common hall, where they partake of their wholesome and frugal meal in silence. Not even a whisper might be heard through the whole apartment.170

The means of enforcing the silence was the frequent and immediate use of the whip for any violation.171 This was the most controversial feature of the system. In an interview with de Beaumont and de Tocqueville, the primary exponent of the Auburn system, Warden Elam Lynds, "constantly returned to this point—that it was necessary to begin with curbing the spirit of the prisoner, convincing him of his weakness."172 Earlier in the interview, Lynds flatly stated that it was "impossible to govern a large prison without a whip."173 Reportedly, once during Lynd's term at Auburn, (he was also warden at Sing-Sing) a disturbance broke out on one of the tiers. Lynds ordered about twenty convicts to be taken out and beaten, reasoning that by punishing all, he was sure to punish the unknown guilty party.174

Livingston, although technically charged only with revising Louisiana's unique confusion of laws, was actually very involved in the controversy between the Auburn and the Pennsylvania systems. Part of the reason was personal—he grew up in New York and was active in politics there during the time when the Quakers were instigating the first changes in Pennsylvania. As Mayor of New York,

he sought to work the reformation of lawbreakers rather than their mere punishment. He was no legal pedant, but a large-hearted and scholarly jurist, with a strong humanitarian zeal for the improvement of the law.175

Livingston was also on the east coast for much of the time while working on the code, having been elected to the United States Congress

170. Lewis, supra note 136, at 87.
171. Id. at 93-95.
172. de Beaumont & de Tocqueville, supra note 164, at 165.
173. Id. at 163.
174. Lewis, supra note 136, at 95.
175. Bonham, supra note 107, at 497.
from Louisiana in 1822. He finished the code while residing in New York City.\textsuperscript{176}

Additionally, Livingston wished his study to be based on empirical evidence, a desire which logically led him to research both systems of penology. Much of his code was founded on the Quaker principles which he readily acknowledged,\textsuperscript{177} and in fact Robert Vaux, one of the most active of the Quaker penologists, is listed as the publisher of at least one printing of Livingston's Code of Reform and Prison Discipline.\textsuperscript{178}

In contrast to his praise of the Pennsylvania system, Livingston was respectfully critical of the Auburn system in his code. His main objection was to the use of whipping as enforcement. He noted that the criminal codes had dropped the lash as a penalty because it was "too ignominious, unequal and cruel to be inflicted by the court" and yet Auburn turnkeys could inflict it "at their discretion; and that, too, for disrespect, or the vague charge of disobedience . . . ."\textsuperscript{179}

Livingston's primary objection to the system, however, was simply that it would not work. First, he did not believe that the silence could be steadily enforced, even with the threat of the whip.

It will make them cautious, but it must change their nature, not only as malefactors, but as men, if it does not increase their desire of communicating with each other while there is a possibility of doing so unobserved; and that such a possibility exists it would be vain to deny—not only during the time of labour, when a word addressed to one standing within a few feet could not be heard further than was intended, by reason of the clanking of hammers, and the noise of machinery, but along the line of the lock march, in going to and returning from labour, when the lips of each man are placed within a few inches of the ear of the one who precedes him, a situation infinitely well calculated for passing the word of revolt or establish-

\footnotesize{\textsuperscript{176} Hatcher, supra note 1, at 263.}\textsuperscript{176}
\footnotesize{\textsuperscript{177} E. Livingston, supra note 58, at 508-12.}\textsuperscript{177}
\footnotesize{\textsuperscript{178} E. Livingston, Introductory Report to the Code of Prison Discipline (Philadelphia 1827).}\textsuperscript{178}
\footnotesize{\textsuperscript{179} E. Livingston supra note 58, at 518. Livingston used the example of this power as a vehicle to launch an attack on the common law system as a whole. The question of whether prison under-officers should have this power had progressed through the New York courts and been sanctioned as necessary to assure obedience. Livingston noted that statutorily in New York, such punishment was to be limited to thirty-nine stripes with two prisons inspectors present. The result of the court decision was that the turnkey could go ahead and whip a convict, regardless of the stipulations of the statute, a priority of legal authority which Livingston felt was a common law fault. Id. at 518-19.}
ing conventional signs of intelligence from the rear to the front of the line almost with electrical rapidity.  

Nor did Livingston think the system, even if enforceable, would work as a deterrent. "Fear is the great principle of this institution, and chastisement of the most degrading kind is the instrument to excite it." He conceded that if preserving order is the only goal of prisons, it would be effective, but he condemned the notion that severity of punishment was a factor in deterrence. If anything, he felt it aroused more rebellion.

The same feeling that elevated, refined, and applied to the noblest purpose, animates the patriot to resist civil tyranny, and the martyr to defy the flames, when it is perverted, and made the incentive to vice and crime, goads on the convict to arraign the justice of his sentence, to rebel against those who execute it, and to counter-act its effects with an obstinacy in exact proportion to the severity of the punishment.

Such a system would be anathema to reforming the convict, and Livingston noted that the "founder of the system [Lynds] did not expect reformation," in fact "considered it as hopeless." To Livingston, the result of the system was the opposite of reformation. "[T]he spirit of hatred, revenge, and a desire to retaliate on society are stimulated and strengthened."

Warden Lynds, in speaking with de Beaumont and de Tocqueville, had his own criticisms to make of Livingston's views. Categorizing Livingston as a "theorist," Lynds said that such persons "deceive themselves, because they have little knowledge of those of whom they speak." He continued that if Livingston should be ordered to apply his theories of penitentiaries to people born like himself, in a class of society in which much intelligence and moral sensibility existed, I believe that he would arrive at excellent results; but prisons, on the contrary, are filled with coarse beings, who have had no education, and who perceive with difficulty ideas, and often even sensations. It is this point which he always forgets.

181. E. LIVINGSTON, supra note 58, at 521.
182. Id.
183. Letter from Edward Livingston, supra note 180, at 7.
184. E. LIVINGSTON, supra note 58, at 522.
185. DE BEAUMONT & DE TOUCHEVILLE, supra note 164, at 164.
186. Id.
Livingston also wrote Gershom Powers, who served as Auburn warden at one point, recommending solitary confinement, saying that it hadn't permanently damaged martyrs and patriots subjected to it. Powers replied that such persons had a high moral cause to sustain them, while criminals had no such inner strength to help them endure the confinement.187

The Pennsylvania system, which Livingston supported, had a head start on the Auburn system and was consequently first tried in other states as well. A number of states adopted it only to abandon it within a few years.188 As in New York, much of the problem with the system came about when the other states

took over "solitude" from the Pennsylvania reformers without the other features that made the system what it really was, viz. prison visiting, recognition of the individual as a human being rather than a wage slave, and firm kindliness as exemplified by the Quaker philosophy of life.189

Livingston himself lamented in a letter to Robert Vaux that "[f]alse economy, and a fatal inattention to the principles which produced this success, destroyed its effects almost as soon as they were felt . . . ."190

While the Pennsylvania system had an erratic career in this country, it did arouse the curiosity of penologists abroad and triggered the visit by Gustave de Beaumont and Alexis de Tocqueville on behalf of the government of France.191 They too found the Quaker system frustrating in reality, saying it was

never crowned with the hoped-for success. In general it was ruinous to the public treasury; it never effected the reformation of the prisoners.192

The disenchantment with the Pennsylvania system and the apparent initial success of the Auburn system caused Livingston great anxiety. He feared that the "partial success" of the New York concept would "arrest the penitentiary system in its progress to that point of perfection at which all its advocates expect it to arrive."193 His worry was particularly acute when a legislative committee in Pennsylvania recommended that the solitary system be modified. In a letter to Robert Vaux, Livingston urged

187. Lewis, supra note 136, at 83.
188. Barnes & Teeters, supra note 113, at 413.
189. Id.
190. Letter from Edward Livingston, supra note 180, at 6.
192. Id. at 39-40.
him not to be "dazzled by the praise that has been bestowed on the Auburn plan, or debarred by the erroneous view that has been taken of your own."\textsuperscript{194}

In praising Pennsylvania for her pioneering lead in penology, Livingston wrote Vaux,

I cannot but lament the efforts that are making to induce your noble legislature to abandon the experiment which your noble building is so well calculated for making with effect. Your state has gone to great expense to solve, by experiment, (the best of all means) the great questions, whether convicts can not, by a judicious treatment, be reformed as well as punished by the same process . . . .\textsuperscript{195}

Livingston added, speaking to the economic problem, that

you do more good, and save more expense to the state and secure the safety of its citizens in a greater degree, by reforming one of them, than by punishing and releasing ten others.\textsuperscript{196} Discharging an unreformed thief is tantamount to authorizing a tax of an unlimited amount to be raised on individuals.\textsuperscript{197}

The argument over the relative merits of the two systems was to continue for many years. It probably created the most active era of penological thought this country has known. Various European nations sent emissaries to study both philosophies and the debate spilled over into international circles.\textsuperscript{198} Perhaps the most perceptive summary of the two systems was made by two such emissaries, de Beaumont and de Tocqueville of France.

The Philadelphia system being also that which produces the deepest impressions on the soul of the convict, must effect more reformation than that of Auburn. The latter, however, is perhaps more conformable to the habits of men in society, and on this account effects a greater number of reformations, which might be called "legal," inasmuch as they produce the external fulfillment of social obligations.

If it be so, the Philadelphia system produces more honest citizens, and that of New York, more obedient citizens.\textsuperscript{199}

\textsuperscript{194} Id. at 12.
\textsuperscript{195} Id. at 11.
\textsuperscript{196} Id. at 12.
\textsuperscript{197} Id. at 13. As proof of the high regard in which Livingston was held, his lengthy letter to Vaux was published in the National Gazette of Philadelphia as a quasi-editorial for the Pennsylvania population to read. Id., prefatory page.
\textsuperscript{198} BARNES & TEETERS, supra note 113, at 412-16.
\textsuperscript{199} DE BEAUMONT & DE TOCQUEVILLE, supra note 164, at 91.
The two Frenchmen were also admiring of Livingston, although they bypassed the south as unlikely to offer anything by way of prison reform. They noted Livingston as a supporter of the solitary system, even as it came under attack, and they added that Livingston, whose writings are so imbued with so elevated a philosophy, had prepared a criminal code, and a code of Prison Discipline for Louisiana, his native state. His profound theories, little understood by those for whom they were destined, had more success in Pennsylvania, for which they had not been intended.

Although Livingston's penological theories seemed to fall on deaf ears in Louisiana, his career thrived otherwise. After serving in the United States House of Representatives, he spent two years in the United States Senate, then served as Secretary of State under Andrew Jackson. Still later he was appointed by Jackson as minister to France. He died in 1836, at the height of the controversy between his and the Auburn system of penology, and at the end of a multitude of careers. The debate over corrections continued with even newer systems displacing those of the Quakers and of New York.

Perhaps Livingston's greatest legacy to the field of penology is simply his concern. A man of much ability, of vast education and culture, whose career took him to the near heights of political power, he still chose to devote his most intense study to the most outcast and misfit of his society: the poor, the unemployable and particularly the criminal. Warden Lynds accused Livingston of not being aware of the character of criminals, yet Livingston's opinions on the causes of criminality have become the accepted truths in the twentieth century.

I believe convicts to be men [Livingston wrote Vaux in 1828], bad men, it is true, but bad from example, from poverty, from vice, from idleness, from intemperance, from the indulgence of evil passions.

Other contemporaries of Livingston's recognized his genius, as proved by the international acclaim which resulted from his code for Louisiana. At his death, one French historian said, "America has lost her most powerful intellect, the Academy one of its most illustrious members, and humanity one of her most zealous benefactors."
Fortunately Livingston left a legacy of written work that embodies both the specific tenets of his ideas and the philosophy behind them. To those who take seriously the role of citizenship, Livingston continues to be an inspiration. For those now active in the fields of penology and corrections, Livingston was a prophet; and through the wisdom of his writings, is still a leader of reform.