HAPPY BIRTHDAY MIRANDA 
AND HOW OLD ARE YOU, REALLY?

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I. INTRODUCTION

Some folks (not my students) remember that the great comedian Jack Benny celebrated his 39th birthday every year until he died at the age of 80. *Miranda v. Arizona,* not much of a comedian, has pulled off the opposite trick. Though few have noticed, including Chief Justice Earl Warren when he wrote the *Miranda* opinion, a kind of *Miranda* warning first surfaced in the late 1700s in England. *Miranda* warnings appeared in almost modern form in an 1829 New York statute. The New York version was quickly copied by Missouri (1835) and Arkansas (1838). The mystery here is two-fold: (1) why *Miranda* warnings developed so early; and (2) why they disappeared only to re-appear in *Miranda v. Arizona.* In this paper, we will focus on the first mystery.

II. MIRANDA’S EARLY ROOTS

Beginning in 1554, English suspects named in a criminal complaint had to appear before a magistrate and had to answer questions about the crime. Those

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* Rutgers University Board of Governors Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar. I wish to make clear the credit due for the ideas in this paper. As far as I know, Wes Oliver, Duquesne University School of Law, is the modern scholar who “discovered” the 1829 New York “*Miranda*” statute. *See Wesley Oliver, Magistrate’s Examinations, Police Interrogations, and Miranda-Like Rules in the Nineteenth Century, 81 TULANE L. REV. 777 (2007).* Richard Leo and I disagree with Wes’s interpretation of the motivation of the New York legislature in enacting the statute. *See George C. Thomas III & Richard A. Leo, CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND 78-80 (2012).* What makes this paper an original contribution, however, is the proof that Edward Livingston is the probable originator of the notion that suspects examined by magistrates should be given the warning of the right not to answer questions and the right to the assistance of counsel. This idea, and the laborious archival research needed to support it, is exclusively that of my co-author, Amy Jane Agnew. Both authors are extremely grateful to Mike Widener, Rare Book Librarian at The Lilian Goldman Law Library at Yale Law School. Without his assistance and access to the complete volumes of the *Reports of the New York Commissioners* (Footnote 71), it would have been impossible to attribute the Magistrate’s Warning to Edward Livingston.

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4. *See 1 & 2 Phil. & Mar. c. 13 (1554) (examination prior to bail decision); 2 & 3 Phil. & Mar. c. 10 (1555) (examination prior to committal where bail denied).*
answers were taken down by the magistrate or his clerk, who had to certify the answers to the criminal court to be “given in evidence against the offender.” As police would not appear for almost another three hundred years, the magistrate’s function was to gather evidence and get the case ready for trial; most criminal cases were prosecuted by the crime victim, rather than the crown’s prosecutor, which made the magistrate and his role critical to securing convictions of guilty defendants.

At least by the early 1700s, however, English judges became aware that accused suspects might make involuntary statements to magistrates. The earliest reference to this risk is found in Hale’s Pleas of the Crown, published in 1736. Hale cautions justices of the peace to testify that the prisoner confessed to them “freely and without any menace, or undue terror imposed upon him.” Hale’s Pleas of the Crown was not published until fifty years after his death in 1676. The passage about prisoners confessing “freely” might have been added by the editor of the 1736 volume, a well-known lawyer named Sollom Emlyn. But the passage says that Hale saw cases where defendants obtained acquittals by disavowing their confessions, suggesting that he wrote it. Sollom Emlyn claims on the title page that the treatise was “published from his Lordship’s Original Manuscript . . . . To which is added A Table of Principal Matters.” If one takes Emlyn at his word, he added nothing of substance. Although, the earliest case we have found that discussed the voluntariness of a confession was in 1677, a year after Hale died, but that does not mean earlier cases do not exist. Hale was appointed Chief Justice of the King’s Bench in 1671 and could have heard cases in which justices granted acquittals following successful challenges to confessions made to magistrates.

By 1813, William Dickinson, a prominent English treatise writer, identified a “duty of the magistrate to apprise the prisoner that his examination may be produced on his trial, and to give him a reasonable caution, that he is not required to criminate himself.” A more elaborate version of Dickinson’s warning appears in the Sir John Jervis Indictable Offences Act of 1848, which standardized the duties of justices of the peace in serious criminal cases.

Section 18 of Chapter 42 of the Act required magistrates to read the depositions

6. Id. at vol. 2, 284.
8. Id. at vol.1, title page.
taken from other witnesses to the suspect and then to say: “Having heard the Evidence, do you wish to say anything in answer to the Charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial . . . .” While it is tempting to suggest a natural development from the 1554 requirement that magistrates question subjects through Hale and the Old Bailey cases to Dickinson and Parliament’s 1848 Act, the appearance of a magistrate’s warning in an 1829 New York Statute calls that natural sweep into question.\textsuperscript{12}

III. NEW YORK’S “MIRANDA” STATUTE

Why would the New York legislature be twenty years ahead of Parliament in mandating that magistrates warn suspects that their confessions can be used against them at trial? More fundamentally, the 1829 New York Code also contained a requirement that the suspect be advised of his right to consult with counsel prior to the examination and to have counsel present when the magistrate questioned the suspect.\textsuperscript{13} No reference to counsel is made in the English treatises or the act of Parliament of 1848. Even if New York legislators copied the duty to warn from Dickinson, from whence came the notion that the suspect had a robust right to counsel when being questioned by the magistrate? There is a first-rate mystery here.

In Confessions of Guilt: From Torture to Miranda and Beyond, Richard Leo and I speculated that the proximate cause of the New York “Miranda” statute was a remarkably self-aggrandizing lawyer named John Graham.\textsuperscript{14} In 1787, seven months before the United States Constitution was created, New York adopted by statute the English requirement that suspects answer questions posed by a magistrate.\textsuperscript{15} In an 1823 New York Mayoral Court case, Hiram Maxwell was accused of “stealing a horse and a gig, valued at $225.”\textsuperscript{16} Graham represented Maxwell and objected to the admission into evidence of statements

\textsuperscript{12.} Upcoming work by the authors will demonstrate that the source of the New York warnings statute is also the source of the English act.

\textsuperscript{13.} Revised Statutes of the Law of New York State, Part IV, Title II, §§ 14-15 (Albany, Packard and Van Benthuysen 1829)

\textsuperscript{14.} George C. Thomas III & Richard A. Leo, Confessions of Guilt: From Torture to Miranda and Beyond (2012), 80-88.

\textsuperscript{15.} Laws of the State of New York, Act of Jan. 30, 1787, ch. 8, 1787.

Maxwell made when examined by a magistrate. Graham argued that suppression was required because of the failure of the magistrate to warn Maxwell of his right not to answer and his right to counsel. Graham’s colorful argument goes on for 16 pages. It begins: "There is evil in the city. —Evil did I say? Yes! an evil greatly to be deprecated. I allude to the mode and manner practised in taking the examinations of persons charged with crime..."\(^{17}\)

To support his position, Graham made a sophisticated constitutional argument based on the New York Constitution of 1821, which became effective a month prior to Maxwell’s case.\(^{18}\) New York’s 1777 Constitution included a right to counsel “at trials for impeachment or indictment,” but no explicit right against compelled self-incrimination.\(^{19}\) A state bill of rights, ratified in 1787, also failed to specify a right against compelled self-incrimination.\(^{20}\) But the Constitution of 1821 included, in Article VII, section 7, a right to counsel at trial and a right not to “be compelled, in any criminal case, to be a wit-ness against himself.”\(^{21}\) Graham argued that because of the new constitution, “A new era has commenced: the state of New-York, on the first day of January, was regenerated, was born again.”\(^{22}\) The new constitution, Graham argued, required “a new system” of examining prisoners.\(^{23}\) Specifically, by pairing the right to counsel with the right against compelled self-incrimination, in the same sentence, the 1821 constitution created a right not to be questioned by a magistrate without knowing that one had both the right to consult counsel and the right not to answer questions. If one substitutes “police” for “magistrate,” this is precisely the holding in *Miranda*.

Here is the Graham formulation of what he thought the New York Constitution required when a magistrate was examining a prisoner:

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1st. Prisoner, you are entitled to counsel.

2d. Your confession must be free and voluntary, without fear, threats, or promises.

3d. You are not bound to answer any question which may tend to criminate yourself.
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18. Maxwell’s case was heard February 3, 1823. The 1821 New York Constitution became effective December 31, 1822. See N.Y. Const. of 1821, art. IX, § 1.
19. N.Y. Const. of 1777, art. XXXIV, http://www.nhinet.org/ccs/docs/ny-1777.htm (last visited April 13, 2016). Thomas Davies thinks that a right against compelled self-incrimination might be implicit in a prohibition of the creation of courts that proceed other than “according to the course of the common law.” Email from Davies to George Thomas, March 5, 2008.
23. *Id.*
Two accounts exist of the Maxwell case. One is contained in the monograph Graham published himself that also included the letters Graham received in praise of his argument. In that account, Graham claims that the judge stated that he “agrees with Doctor Graham, in most of the points which he has taken on the subject of examinations and confessions taken in the police office; but as the examination now before the court appears to have been voluntarily made by the prisoner . . . the court will permit it to be read to the jury.” However, this rendition does not synch with that of Jacob Wheeler, the nominative reporter who included the case in his Criminal Recorder. Wheeler reported that Graham indeed gave the fiery speech and suggested the Magistrate’s Warning, but that the judge “knew of no law to compel the magistrate to caution the prisoner that his examination ought to be free, or that it would be read in evidence against him, or that it ought to appear on the face of the depositions.” Nowhere in Wheeler’s Reporter do the judges agree with John Graham that a principle of law demands the Magistrate’s Warning. In any event, Maxwell’s statements were read to the jury, which “found the prisoner guilty, without leaving the box,” suggesting why Graham worked so hard to keep the answers from the jury.

After losing the Maxwell case, it was important to Graham to convince the public that other imminent legal thinkers did agree with him. Affixed to his published version of the Maxwell case, including his argument for a Magistrate’s Warning, Graham presented twenty-three letters he had received from venerable lawyers, statesmen and philosophers. From the text of the letters, it seems that

24. Id. at 13.
25. Id. at 23-24. The Court was presided over by one Judge, called the “Recorder,” and two aldermen.
27. Id. at 166, People v. Maxwell.
28. The letters of support were from: John Adams (former President); Thomas Jefferson (former President); John Jay (former Governor of NY); Morgan Lewis (former Governor of NY and Chief Justice of State); DeWitt Clinton (former Governor of NY); Major General Andrew Jackson; John Marshall (Chief Justice of the Supreme Court); James Kent (Chancellor to State of New York); Cadwallader D. Colden (former Mayor of New-York City, Congressman); Thomas Addis Emmet (former AG of New York); Josiah Ogden Hoffman (former Recorder City of New-York; former AG of New York); Pierre C. Van Wych (former Recorder City of New York; former DA for City and County of NY; partner of John Graham’s brother in practice); David B. Ogden (Lawyer); John Anthon (Lawyer); William Sampson (Lawyer); David Graham (Lawyer and John Graham’s Brother); Maturin Livingston (Judge of Common Pleas in Dutchess County; former Recorder of City of New York); Samuel L. Mitchell (former U.S. Congressman and Senator); David Hosack; Ambrose Spencer (former Chief Justice of NY Supreme Court); Reverend John M. Mason (President Dickinson College); Reverend John Knox; and Reverend Chauncy Lee. Ironically, DeWitt Clinton had opposed the Constitutional convention and James Kent and
Graham sent out copies of his oral argument with requests for feedback on February 22-23, 1823, just two weeks after having lost Maxwell’s case.29

John Adams, who had defended clients against British persecution, was perhaps the strongest in his support of Graham’s argument.30 In Adams’s view, the only justification for a “personal examination” of an accused “before a magistrate” was to provide “an opportunity of being witness for himself in his own favour.” But “no insidious questioning ought to be put to him, by which he may be betrayed into any confession of any fact that may discover his guilt, if he is guilty. His examination ought to be public, and he ought to be allowed counsel, if he can have it.” John Marshall noted that Virginia did not follow New York in requiring the English form of magistrate examination, but Marshall said, “[W]here the contrary practice prevails, it would seem proper that it be regulated by principles you lay down.”31

However, most of the responses to Graham’s self-published monograph on the Magistrate’s Warning were nothing more than perfunctory thanks to Graham for his letter. While Graham had a colorful past as a criminal defense attorney, nothing suggests he was a great legal thinker or legal reformer. We now believe the Thomas-Leo book was incorrect in concluding that it was John Graham who came up with the idea of Magistrate Warnings. His published works suggest a man continually striving for public recognition and, perhaps, reaching for fame beyond his abilities. He started a law practice in Rutland, Vermont in 1785 and practiced there until 1794.32 In 1794, Governor Chittendon sent him to England to try and arrange the consecration of Vermont’s bishop elect in England, but some sources suggest his trip was also to flee lawsuits and debt to an ex-wife.33 The Vermont Episcopal community wanted their new bishop consecrated by the Bishop of Canterbury or the Bishop of York in England, rather than by a collection of three American bishops in the United States.34 While their plea was ostensibly based on convenience because their bishop-elect was in England, it

Ambrose Spencer were delegates to the Convention, but refused to sign the new Constitution of 1821.


30. Id. at 25-6.

31. Id. at 37 (italics removed).


34. Graham argued that An Act of Parliament from 1786 gave power to the Bishops of England to consecrate American Bishops. The Archbishop of Canterbury (who proposed and implemented the Act) corrected Graham’s misconceptions. The Act was meant to allow for the consecration of three American Bishops, who thereafter would consecrate all further American Bishops under the College of Bishops of America. Id. at 19-22.
seems the true objective was to protect church lands owned by the Protestant Episcopal Church in Vermont from the post-Revolution reordering that might make the lands subject to claims of the Vermont Legislature or the College of Bishops of America. Graham utterly failed at arranging the Vermont bishop’s consecration in England, despite spending several months there arguing his cause. He published a paper setting out his failure to achieve the desired outcome in the bishop case. When he returned from England in 1795, he arranged a position as clerk with Senator Stephen Bradley of Vermont in his Washington D.C. office. But, within a year Graham and Bradley had a severe falling out which ended with Graham fleeing once again, this time to Philadelphia, where he suffered a nervous breakdown. His brother, David Graham, a successful lawyer in New York City, collected John and brought him to New York to work in his office. In New York, Graham continued to publish documents memorializing his arguable failures, an odd habit that he would follow in years to come.

In 1811, Graham published a collection of narratives of some of his criminal cases. Of the twenty-three cases in that monograph, he lost fifteen. One supposes he thought his arguments worth preserving in any event. In one case, he sought a new trial for a client convicted of stealing a turkey. Graham moved to vacate his client’s conviction by contending that a dead turkey—whose head, wings, and feet had been removed—is not a turkey. He argued that “instead of its being a turkey, it was only the skeleton or dead body of a turkey. This I take to be sound logic; since it could not fly, having no wings; and having no head, it could not see; and having no toes, it could not walk . . . Ergo, it cannot be a turkey, as charged in the indictment, but must be considered a dead carcass . . . .” His motion for a new trial was denied.

Other losses included defending a client charged with assault and battery on the ground that the victim had been working on the Sabbath and thus was “literally and truly in the service of the devil.” He defended a slave against a charge of bigamy on the ground that a slave, who had no right to make “any civil contract,” could not validly marry and thus could not be guilty of marrying twice. Part of his defense was an attack on slavery: Slavery is the evil, Graham

35. A TRUE COPY OF THE PROCEEDINGS OF JOHN A. GRAHAM, ESQ., LL.D, supra, 12.
36. See supra, footnote 33.
39. While in England, Graham may have picked up the English barristers’ habit of publishing narratives of trials and circulating them as a form of advertisement.
40. GRAHAM at 34, People v. James Bluet.
41. Id. at 48, People v. Sebray Bogert.
42. Id. at 57, People v. Williams.
said: “Make the slave free—there is the remedy.” He was, of course, correct on the slavery issue, but the jury convicted on the bigamy charge.

While Graham himself seemed charmed by his own orations, nothing suggests he was particularly brilliant or capable of developing new constitutional protections by examining and extrapolating from the newly-ratified New York Constitution. Indeed, Graham’s suggestion of the Magistrate’s Warning in 1823 seems to spring from the mind of a salesman, not a legal scholar. But another legal mind with unquestionable talent and learning had been slowly and methodically revising the laws of the Territory of Orleans (and later Louisiana) since 1805. Edward Livingston, the eleventh child of Judge Robert R. Livingston of New York, drafted a simplified code of civil laws and procedure for the Territory of Orleans and published it in 1807. After Louisiana gained statehood in 1812, Livingston, Louis Moreau-Lislet, and Pierre Derbigny were paid $3,500 each to translate the Spanish code, Partidas, for use by the state legislature, courts and lawyers. At that point, the state of the law in Louisiana was a serious muddle. The adopted Louisiana Constitution of 1812 only read, “all laws now in force in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature.” This, in effect, meant that the state courts were operating under French and Spanish laws with random injections of American common law.

On March 14, 1822, the Louisiana State Legislature chose three jurisconsults—Livingston, Derbigny and Moreau-Lislet—to revise the Civil Code, prepare a Commercial Code, and formulate a “treatise on the rules of civil actions and a system of practice to be observed by all the courts.” But even before commencing work on the Civil and Commercial Codes, Livingston was busily working on a proposed Penal Code. Just the day before, March 13, Livingston submitted his preliminary report to the General Assembly relative to the progress of his work on the Penal Code. This was almost eleven months before Graham’s argument in the Maxwell case.

43. Id. (emphasis in original).
44. In 1805, an Act was passed charging Livingston with the writing of a simplified code of civil practice and procedure for the Territory of Orleans. Territory of Orleans Acts, 1805 at 144-88, 210-60.
45. WILLIAM B. HATCHER. EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT (Louisiana State University Press, 1940), 248, footnote 9.
46. LOUISIANA ACTS, 44-46 (1819); MOREAU-LISLET, LOUIS AND CARLETON, THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (Henry, trans., New Orleans, 1820).
47. LA. CONST. of 1812, Art. IV, § 11.
48. HATCHER, EDWARD LIVINGSTON, supra, at 248; LOUISIANA ACTS, at 108 (1822).
49. EDWARD LIVINGSTON. REPORT MADE TO THE GENERAL ASSEMBLY OF THE STATE OF LOUISIANA, ON THE PLAN OF A PENAL CODE FOR THE SAID STATE (New Orleans, 1822); LOUISIANA HOUSE JOURNAL, 76-7 (French ed., 1822). The Assembly also ordered that two thousand copies be printed – one thousand in English and one thousand in French. Id. at 108.
In this first Report to the General Assembly on his proposed Penal Code, Livingston published an allusion to his Magistrate Warning. In explaining the details of the fourth proposed book on criminal procedure he wrote, “It regulates the mode in which complaints and accusations are to be made; designates the proper persons to receive them, and directs their duty in conducting the examination; taking evidence on the complaint and ordering the arrest.”50 Later in the text Livingston added, “The Fourth [book] is nearly complete.”51

In his Introductory Report to the Code of Procedure, which was presented to the Louisiana General Assembly, Livingston shared his thought process on the necessity of the Magistrate’s Warning:

After weighing these and other arguments on both sides of this important question, I came to this conclusion, that it would be unwise to abandon the advantage to be derived from an examination of the accused; but at the same time, that justice required us to reduce to their lowest term the two inseparable evils attached to this mode of proceeding, and I thought that this might be effected by restricting the magistrate to a prescribed form of interrogatory, so drawn that no innocent person could be entrapped by answering them; while, at the same time, evasions or untrue answers might frequently lead to the detection of guilt; and to avoid inaccuracies in recording the answers, the interrogatories are pointed only to such simple circumstances as can be detailed with the greatest simplicity of language, and they are not considered as complete until they have been signed by the party and corrected by him, so as to express exactly the idea he meant to convey; if we add to this that he has the assistance of counsel, and has heard what the witnesses against him have deposed, it will be found that the accused is in no danger of being circumvented or intimidated to his prejudice in the preparatory examination. He is first apprized that although he may refuse to answer the interrogatories that are about to be put to him, or answer them in any way he may think fit, yet a false answer, or his refusal to give any, must operate against him on the trial. This consequence is inevitable, and under our present practice, where he is expressly told that he is at perfect liberty to answer or not, as he pleases, which implies that no injury to him can result from his silence, the same result is produced; and the prisoner is invited to silence by being assured that it will do him no injury, when in the nature of things the jury cannot but infer guilt from false representations, or from silence, without any motive but that of concealing the truth; either of which circumstances, when they occur, are given in evidence according to our present practice. It was, therefore, thought, that justice to the prisoner as well as to the public, required that full notice should be
given of the deductions that would be drawn from his silence or
evasions.\textsuperscript{52}

We believe that this report was written before 1823.\textsuperscript{53} If so, the italicized part in the quotation above is the earliest reference we have seen to the idea that a suspect should have counsel present as protection against the pressure of the magistrate’s examination. On May 1, 1821, Livingston published a “Circular in the Relation to the Code,” which he sent to the Governors of each state for their dispersal and feedback.\textsuperscript{54} Although the first Circular dealt with penitentiaries and whether or not certain levels of punishment served as deterrents for crime, later circulars asked explicit questions about the definitions of crimes and included drafts of his reports to the Louisiana legislature. It is likely that the germ of the idea of magistrate’s warnings also appeared in these circulars.

On December 7, 1821, Daniel Rogers, publisher of the \textit{New York City Hall Recorder} wrote Livingston.\textsuperscript{55} In the letter Rogers says that he saw Livingston’s Circular asking for commentary on the criminal law and he identified himself as the publisher of “The New York City Hall Recorder – a work of Reports.” Rogers enclosed a volume for Livingston’s use and offered to send further volumes. This letter is the best evidence that John Graham saw Livingston’s circular before he argued the Maxwell case. Rogers was the nominative reporter for all the cases argued in the Mayor’s Court and he and Graham would have occupied the same courtroom on a regular basis. Rogers might have shared Livingston’s Circular with Graham or Graham could have gotten one directly from Livingston if it was sent to local lawyers.

Livingston had a long association with the New York Mayor’s Court and it makes perfect sense that he would have sent circulars to practitioners within the

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52. \textsc{Edward Livingston}, “Introductory Report to The Code of Procedure” in \textsc{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 the Said State} (James Kay, Jun. \& Co., Philadelphia, 1833), 208-214 (italics added). Livingston’s handwritten draft version also includes reference to a concern that suspects might lie to the magistrate: “implies that no injury to him can result from his silence or the falsehood of his answer, the same result is produced; and the prisoner is invited to silence or misrepresentation by being assured that it will do him no injury.” \textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 75, Folder 5 “Introductory Report to the Code of Procedure,” p. 24.} [Note: The words in italics and bold were omitted from Livingston’s published version, but are present in his hand-written draft.]

53. It is difficult to pinpoint the date of the drafting and/or publication of the \textit{Introductory Report for the Code of Procedure}. The handwritten draft in the Princeton collection bears no date and while the publication date in New Orleans was 1827, Livingston made his preliminary report on a penal code to the Louisiana legislature in 1822, stating that the fourth book was “nearly complete.” That suggests that the introductory report was in existence in 1822.

54. \textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 72, Folder 1, “Circulars 1821 – 1824.”}

55. \textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 73, Folder 51.}
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court. He was appointed United States attorney for the District of New York on March 27, 1801 and was appointed Mayor of New York shortly thereafter.56 As Mayor of New York, Livingston presided over the Court of Common Pleas, having both civil and criminal jurisdiction.57 This was known colloquially as the Mayor’s Court. The cases brought before the Mayor’s Court included those nominally reported by Rogers—such as Hiram Maxwell’s theft case.58 Indeed, Livingston wrote and published the first nominative reporter out of the Mayor’s Court covering the cases he presided over in 1802.59

We also know that Livingston’s circle of correspondents for the testing of his ideas on reforms to the penal code was broad. In 1822, John Adams wrote Livingston that he could no longer read or write, but had the manuscript read to him and “wholeheartedly agrees” with pages 13-20 of the manuscript. On October 15, 1822, William Turner, a lawyer from Georgia wrote, “I have seen a copy of your report to the legislature of Louisiana of the Criminal Code of that State . . . .” and he requested copies of further reports.60 On July 10, 1822 James Madison wrote that he also received a copy of the report, but Madison worried that simplifying the law would “distort” its power.61 James Workman wrote because he did not agree with Livingston’s definition of fraud and wanted to propose another.62 In 1822, Livingston’s first report to the Assembly on the progress on writing the Penal Code was published in New Orleans.63 This exchange of ideas and comments on Livingston’s draft code by and between other legal professionals before 1823 suggests that the idea of the Magistrate’s Warning was probably already being circulated by Livingston and that Graham probably got his counsel idea from Livingston. The reach of Livingston’s ideas only increased. In 1824, Jeremy Bentham arranged for Livingston’s first report

56. HATCHER, EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN, JACKSONIAN DEMOCRAT, supra, 76.

57. Id. at 78; By the time of the Hiram Maxwell case, the Mayor no longer presided over the Mayor’s Court. Instead, the Recorder of the City of New York took over the role. See, JAMES WILTON BROOKS, HISTORY OF THE COURT OF COMMON PLEASE OF THE CITY AND COUNTY OF NEW YORK (New York, 1896).

58. Wheeler seems to have taken over as editor of the nominative reporters for the Mayor’s Court cases after Rogers. See footnote 26.

59. EDWARD LIVINGSTON, JUDICIAL OPINIONS, DELIVERED IN THE MAYOR’S COURT OF THE CITY OF NEW YORK, IN THE YEAR 1802 (D. Longsworth at the Shakespeare Gallery, 1803.).

60. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 74, Folder 22.

61. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 73, Folder 13.

62. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 74, Folder 45.

63. EDWARD LIVINGSTON, RAPPORT FAIT A L’ASSEMBLÉE GÉNÉRALE DE L’ÉTAT DE LA LOUISIANE, SUR LE PROJET D’UN CODE PÉNAL, PUR LEDIT ÉTAT (Nouvelle Orleans, 1822).
on the Penal Code to the Louisiana Assembly to be published in England for the reference of lawyers and scholars.\textsuperscript{64} In 1825, it was published in Paris.\textsuperscript{65}

We thus believe that by 1822, Livingston was circulating the idea of the Magistrate’s Warning to the New York legal community through his circulars, correspondence and early reports to the Louisiana General Assembly. That explains why a rather pedestrian lawyer like John Graham could conceive a sophisticated interpretation of the 1821 New York Constitution. The next task is to track how the Livingston warning made its way into the New York statutes.

It’s important to understand that, like Livingston, the men charged with revising the New York Statutes communicated far and wide to gather new thoughts, as well as to validate and test their ideas for legal reform. In May of 1825, John Duer, by then the \textit{de facto} leader of the revisers of the New York Statutes, wrote Anthony Hammond, Esq., of the Inner Temple in London to gain his comments on the revisers’ intentions. Hammond led an effort in the British Parliament to consolidate and amend the laws of England and to create a new “code.” The revisers in New York were having a difficult time getting their hands on Hammond’s writings and suggestions, having access only to “public prints and fugitive works.”\textsuperscript{66} On January 6, 1826 Hammond transmitted copies of the plans for a British revised penal code to the New York revisers.\textsuperscript{67} The shared objective of both sets of legal reformers—those in New York and those in England—was the distillation of common law to code.\textsuperscript{68} In the minds of both groups of men the greatest problem with the common law was the lack of lay knowledge of the law and predictability. In Hammond’s words, “Upon the occurrence of every new case the question arises, what will be the opinion of the court? . . . New causes are not decided by reference to the abstract rule of right, but from analogy to previous decisions.”\textsuperscript{69}

The revisers submitted their annotated reports and suggestions to the Judiciary Committee of the New York Senate between January 5, 1827 and December 15, 1828 in rolling order. They took many liberties from previous statutory revisions by reducing both customary practice in the courts and common law to statute. The revisers followed each proposed provision with a note on its provenance. After the proposed duty of a magistrate to examine a

\textsuperscript{64} Edward Livingston. \textit{Project of a New Penal Code for the State of Louisiana} (London, 1824); Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 72, Folder 13, Letter from Jeremy Bentham to Edward Livingston, dated London, 23 February 1830 in which Bentham details the circumstances of publication.


\textsuperscript{67} Id. at Image 7.

\textsuperscript{68} Id. at Image 26, page 25, § V.

\textsuperscript{69} Id. at Image 27, page 26.
suspect the note read, “Conformable to practice and to 2 R.L. 507.” Some citations read, “Declaratory,” while others, such as the Magistrate’s Warning, read, “New.” The two “new” provisions relevant to our inquiry read:

§ 14. The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; but such counsel shall not be permitted to interrupt the examination, nor to object to any question put by the magistrate, nor to put any question to the prisoner during his examination.

§ 15. At the commencement of the examination, the prisoner shall be informed by the magistrate, that he is at liberty to refuse to answer any question that may be put to him, or to answer such question in any manner he may think proper; but he shall also be cautioned, that a refusal to answer, without sufficient reason or a departure from the truth, will operate as a circumstance against him, as well on the question of his commitment, as upon his trial.

Section 15 is almost a word for word copy of Edward Livingston’s draft of his Penal Code for Louisiana:

Art. 173. The magistrate shall then proceed to the examination of the person accused in the following manner:

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70. NEW YORK (State), COMMISSIONERS APPOINTED TO REVISE THE STATUTE LAWS OF THE STATE OF NEW YORK. REPORTS OF THE COMMISSIONERS APPOINTED ACT OF APRIL 21, 1825 TO REVISE THE STATUTE LAWS OF THE STATE, MADE JANUARY 6, 1827-OCTOBER 15, 1828; WITH DRAFTS OF CHAPTERS OF THE PROPOSED REVISION, AMENDMENTS, ETC. (Albany, Croswell & Van Benthuysen, 1827-1828), Pt. IV, Ch. II, § 2. (“2 R.L. 507” refers to the Revised Laws of 1813, page 507) [Note: the only full four volume copy of the Commissioners’ Reports is at Lillian Goldman Law Library at Yale Law School.]


72. Id. at § 15.

73. Members of the NY Judiciary Committee edited the language before it passed into law. § 14 as ratified ends “his counsel may be present during examination of the complainant and the witnesses on the part of the prosecution, and during examination of the prisoner.” § 15 as ratified reads, “At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him.” NEW YORK (State), THE REVISED STATUTES OF THE STATE OF NEW-YORK: PASSED DURING 1827 AND 1828 (Albany, 1829), Part IV, Title II, § 14, § 15.
1st. He must be informed that, although he is at liberty to answer in what manner he may think proper to the questions that shall be put to him, or not to answer them at all, yet a departure from the truth, or a refusal to answer without assigning a sufficient reason, must operate as a circumstance against him, as well on the question of commitment as of his guilt or innocence on the trial.\textsuperscript{74}

We think it fair to conclude that the New York revisers had Livingston’s draft penal code before them when they drafted § 15. The remaining mystery is § 14.\textsuperscript{75} The early part of § 14 tracks the then-existing New York law about magistrate examinations—i.e., that the examination not be under oath and that the prisoner be advised of the charge against him. But the part about the right to consult with counsel and the right to have counsel present appears in Livingston’s draft penal code a few provisions later but is oddly limited to a second, later examination by the magistrate: “If the accused or the public prosecutor request that a further examination take place” . . . “[t]he prisoner may have the assistance of such counsel as he may employ, but the Magistrate has no authority to assign counsel.”\textsuperscript{76} A reference to the right to counsel at the initial examination does, of course, appear in Livingston’s \textit{Introductory Report to the Code of Procedure}: “if we add to this that he has the assistance of counsel, and has heard what the witnesses against him have deposed, it will be found that the accused is in no danger of being circumvented or intimidated to his prejudice in the preparatory examination.” While this phrasing does not provide the details contained in § 14—e.g., that counsel be present during the examination not only of the accused but also of the prosecution witnesses—the notion that counsel could protect the accused from being circumvented or intimidated implies that counsel would be present during the examination.

Why this phrasing appears in the \textit{Introductory Report} and not in the \textit{Code of Procedure}, a part of the final Penal Code, where Livingston felt the right to counsel only matured at a second examination, is yet another mystery. We offer two explanations. In 1824, after publication of his \textit{Introductory Report}, Livingston was in New York City putting final notes on the engrossed copy of

\textsuperscript{74} \textsc{Edward Livingston}, \textit{The Complete Works of Edward Livingston on Criminal Jurisprudence, Consisting of Systems of Penal Law for the State of Louisiana and for the United States of America: With the Introductory Reports to the Same: To Which is Prefixed an Introduction}, Vol. II, Chapter IV, 237 (Published by the National Prison Association of the United States of America, New York, 1873); This was originally published as \textsc{Edward Livingston, System of Penal Laws, Prepared by the State of Louisiana, Comprising Codes of Offenses and Punishments, of Procedure, of Prison Discipline, and of Evidence Applicable to Civil and Criminal Cases}. And a Book of Definitions of technical words was used. (New Orleans; Printed by B. Levy, 1824).

\textsuperscript{75} The language used by the revisers in § 14 is not that finally adopted in the New York Statutes of 1829. The difference in language is attributable to changes made by members of the New York Judiciary committee before the Code was ratified.

\textsuperscript{76} \textsc{Edward Livingston}, \textit{Code of Procedure: For Giving Effect To the Penal Code of the State of Louisiana} (New Orleans, 1825), 51-52.
the entire Penal Code for the printer. According to several accounts, a fire broke out during the night in Livingston’s library and burned all copies.\textsuperscript{77} Livingston spent the next two years piecing back together his great work, often with the assistance of notes, circulars and copies he had disseminated to friends who were kind enough to send them back to Livingston when they learned of the tragedy.\textsuperscript{78} Despite the great effort, the final version was a “phoenix of what had been destroyed.”\textsuperscript{79} In 1826, Livingston finished the whole project anew, but the fire and Livingston’s hurried effort to reconstruct the great work may account for the missing guarantee of counsel during the initial examination in the final \textit{Code of Procedure}.\textsuperscript{80}

A second explanation is political. Livingston might very well have thought his penal code would never pass the Louisiana General Assembly if counsel was routinely available in magistrate examinations, and indeed it did not pass even with a reduced role for counsel.\textsuperscript{81} New York in this period had a strong anti-government sentiment. Indeed, the Anti-Federalists were so powerful in New York at the end of the eighteenth century that the New York constitutional convention barely ratified the United States Constitution and did so in a message proposing twenty-five items in a Bill of Rights and thirty-one additional amendments.\textsuperscript{82} That anti-government sentiment might have made the New York legislature prefer the more robust right to counsel in Livingston’s \textit{Introductory Report} over the one in his draft penal code.

In 1828, Livingston published “A System of Penal Law for The United States of America” for the consideration of the U.S. House of Representatives. Among many of his suggestions from the Penal Code of Louisiana, he also incorporated his Magistrate’s Warning for use on the federal level.\textsuperscript{83} But despite wide

\textsuperscript{77}. \textsc{Charles Haven Hunt, Life of Edward Livingston} (New York, 1864), 257-58.

\textsuperscript{78}. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Boxes 72-74 contain many correspondences from friends and colleagues sending back drafts and information Livingston had sent them relating to his draft of the Penal Code.

\textsuperscript{79}. \textsc{Hunt, Life of Edward Livingston, supra}, 257.

\textsuperscript{80}. The Code and its component parts were published rather piecemeal in Louisiana, so it seems reasonable that Livingston would have redrafted the Code of Procedure and sent it for publication before the entire Code was completed in 1826.

\textsuperscript{81}. \textsc{Hatcher, Edward Livingston, supra}, 283-85 (explaining that Livingston was a “‘liberal who attempted to translate into practice his theory of the protection of civil liberties by practical measures.’”)

\textsuperscript{82}. Gordon Lloyd, “Introduction to the New York Ratifying Convention,” The American Founding, Ratification of the Constitution, available at http://teachingamericanhistory.org/ratification/newyork/ (last visited April 13, 2016). The vote was 30-27. The delegates to the New York convention debated for three weeks after Virginia became the tenth state to ratify the new constitution, thus dissolving the Confederation. The only issue before the New York convention at that stage was whether to join the new country or go it alone. And it still took three weeks to (barely) vanquish the Anti-Federalists!!

\textsuperscript{83}. \textsc{Edward Livingston, A System of Penal Law for The United States of America: Consisting of A Code of Crimes and Punishments; A Code of Procedure in Criminal Cases;
approbation for Livingston’s *Penal Code*, the world was not ready: not the legislators of Louisiana and certainly not Congress. Livingston was “a liberal who attempted to translate into practice his theory of the protection of civil liberties by practical measures.” The *Penal Code* was never passed in Louisiana and never even proposed in Congress.

Unless we find more direct evidence for the details in § 14, we are left with the following relatively informed speculation: The idea for warning of the right not to answer came from Livingston as did, probably, the notion of the right to the assistance of counsel (from his introductory report). Graham probably got his four-part warnings from a Livingston circular. And despite Graham’s attempt to influence the legal world, he was probably about as successful at that as he was in claiming that a dead turkey is not a turkey.

Discovering who first thought of warnings as a remedy to the power imbalance between interrogators and suspects is important to historians. To everyone else in the legal community, the larger point is that as early as 1736 it was recognized that the suspect was at a disadvantage when being questioned by the State; as early as 1813 Dickinson recognized that warning of the right not to answer questions was an appropriate safeguard; and as early as 1821 Livingston realized that the right not to answer and the right to the assistance of counsel were necessary to prevent the accused from “being circumvented or intimidated to his prejudice.”

This history suggests that *Miranda* taps into some deeply-held fairness principle; it also explains why *Miranda* remains iconic even in the face of relentless attacks by philosophers, lawyers, and various Supreme Courts. Three chief justices—Warren Burger, William Rehnquist, and John Roberts—have been quite hostile to *Miranda*. Yet, here it stands. Happy Birthday, Miranda, at age 50, or, if we trace back to Livingston, at age 195!

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