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## Canada's Criminal Law Codification Viewed and Reviewed

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La réforme du droit par la codification et son histoire semblent fasciner tout juriste, et notamment le juriste québécois. L'auteur analyse l'histoire et l'historiographie de ce genre particulier de réforme à partir d'un récent historique de la codification du droit pénal canadien de 1892. Toujours conscient des pièges du révisionnisme et du présentisme, il établit un parallèle entre cette codification du droit criminel et l'activité législative qui a donné naissance au *Code civil du Bas Canada* de 1866. Dans un deuxième temps, l'auteur va au-delà des codifications elles-mêmes et examine comment l'histoire de ces codifications a été relatées. Une lecture comparative des historiques des codifications tels que narrés par juristes et historiens met en lumière les contraintes méthodologiques sous-jacentes à l'effort de raconter l'histoire d'une législation. Un survol de certains de ces textes écrits par des juristes québécois amène l'auteur à conclure que l'historique de la législation représente une occasion opportune de s'impliquer dans ce que l'on a déjà décrit comme étant l'« histoire interne du droit ». Dans la dernière partie de cet article, l'auteur se base sur la codification du droit privé québécois et celle du droit pénal canadien pour illustrer qu'une technique législative demeure contingente aux faits historiques qui l'entourent. Il conclut en soulevant la difficulté de s'entendre sur une conception universelle de la codification qui transcenderait les différents domaines du droit, les traditions juridiques et les circonstances historiques.

Using a recent historical account of the codification of Canadian criminal law in 1892 as his point of departure, the author explores the history and historiography of this particular brand of law reform which holds such fascination for lawyers generally, and notably for Quebec lawyers. Mindful of the perils of revisionism and present-mindedness, he draws parallels in the codification of criminal law and the legislative effort which resulted in the *Civil Code of Lower Canada* of 1866. The author then moves beyond the codifications themselves to examine how the history of Quebec private law and Canadian criminal law codifications have been told. A comparative reading of the histories of codifications as recounted by lawyers and historians affords an opportunity to reflect on the methodological constraints on the telling of the history of legislation generally. Citing some leading examples of such accounts written by Quebec lawyers, the author concludes that the history of legislation may represent a useful occasion to engage in what others have described as "internal legal history". In the final section of his paper, the author uses the examples of Quebec private law and Canadian criminal law codification to reflect on codification as a modern legislative technique and on how historically contingent this legislative technique may in fact be. He concludes by observing the difficulty in finding any truly universal meaning for codification that might transcend different disciplines of law, different legal traditions and different historical circumstances.

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#### **Introduction**

One of the lesser tourist attractions in downtown Paris is the Emperor Napoleon's tomb: an oversized, above-ground marble casket that sits in a wing of the Hôtel des Invalides in the seventh *arrondissement*. The tomb is the centrepiece of a round room ringed with reliefs depicting the more successful moments in the French dictator's political career. In one of these murals, a man in Roman garb (Napoleon Bonaparte playing Justinian) sits on a chair (the First Consul's throne) and speaks (*il dit le Droit*) while other men on bended knee (the *jurisconsultes*) take dictation in a book (the *travaux préparatoires* for the *Code civil des français*). The artist has provided the casual viewer with an iconological clue: the words "*Code civil*" were (prematurely) carved onto the covers of one of the *jurisconsulte's* notebooks, signalling that the relief tells the story of the codification of French private law done at Napoleon's behest in 1804.

University of Alberta historian Desmond H. Brown and the Invalides' sepulchral artist are part of the same great if unheralded story-telling tradition: that of the codification of laws. Reading Brown's *The Genesis of the Canadian Criminal Code of 1892*<sup>1</sup> is in part an exercise in discovering the story of criminal law codification and in part an exercise in watching the telling of that story. In this sense a reading of this and other accounts of codification match an iconological study of the Invalides' relief: a study which turns in part on the image itself and in part on the person who depicted it.

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<sup>1</sup>(Toronto: University of Toronto, 1989).

But surely a picture of Napoleon is the wrong icon for making sense of the genesis of a Canadian criminal code. A better choice would no doubt be a portrait of Sir James Fitzjames Stephen, the father of the ill-fated English criminal codification of the 1870s or perhaps one of George Wheelock Burbidge, the civil servant then Exchequer Court judge largely responsible for drafting, cutting and pasting together the Canadian *Criminal Code, 1892*. Not only is the spiritual paternity wrong (Napoleon is of course first associated with the codification of private, not public law) but so too is the legal tradition: Canada definitively threw over French criminal law in favour of the "Certainty and Lenity" of English law in 1774.<sup>2</sup> The lapse is to some extent excusable for a Quebecker who, in reading Brown's book, is inclined to look to private law codification as a point of reference, particularly that which resulted in the promulgation of the *Civil Code of Lower Canada* on August 1, 1866, more than twenty-five years before the coming into force of Canada's first *Criminal Code*. Furthermore, it is not just the local story of codification, but the local telling of that story — ably done by John E.C. Brierley some twenty two years ago in his "Quebec Civil Law Codification Viewed and Reviewed"<sup>3</sup> — that forms the background against which a Quebec lawyer might be inclined to understand *The Genesis of the Canadian Criminal Code of 1892*.

It seems unthinkable that a Quebec jurist, reflecting on the possibility of a codification of criminal law one hundred years ago, would not hold up by way of comparison the 1866 private law experiment which had already dominated legal thought in Quebec for a generation before the genesis of the Canadian criminal code began in earnest. Thomas-Jean-Jacques Loranger<sup>4</sup> was one of many Quebeckers not shy to draw the parallel in his well-known plea for criminal law codification in 1874:

Faites pour tous les hommes et pour les contenir dans les bornes de la morale et de l'honnêteté par des peines criminelles, qui sont la sanction de ses prohibitions,

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<sup>2</sup>*An Act for making more effective provision for the Government of the Province of Quebec in North America*, 14 Geo. III, c. 83 (U.K.), s. XI [indexed as *The Quebec Act, 1774*, R.S.C. 1985, Appendix II, No. 2].

<sup>3</sup>(1968) 14 McGill L. J. 521. I owe the title of the present note to this text.

<sup>4</sup>Advocate, legislator, judge and law-reformer, Loranger (1823-1885) was a key-player in the codification 'movement' in Canada and one whose role is underexplored. In addition to his active interest in private law and criminal law codification, he chaired a commission considering the (re)codification of Quebec civil procedure: see *Travaux de la Commission de codification des statuts sur les régimes judiciaires* (Quebec, 1882) and Loranger, "Défense des statuts sur les réformes judiciaires contre la critique de M. le juge Ramsay" (1882) 4 *La Thémis* 193 and *passim*. Loranger, a French-Canadian nationalist who died in office as the president of the Société St.-Jean Baptiste, opposed certain of Sir George-Etienne Cartier's efforts for codification on the basis that they would anglicize French-Canada through law: see Jean-Charles Bonenfant, "Loranger", *Dictionary of Canadian Biography*, vol. XI (Toronto: U. of T. Press, 1982) at 259.

la loi criminelle comme la loi civile doit être connue de tous, et comme la loi civile elle ne se popularisera jamais sans codification.<sup>5</sup>

Thus the instinct to codify Canadian criminal law had — and has — a natural first cousin for Quebec lawyers. This is, of course, only a small part of the story that Desmond Brown sets out to tell in his book although, to the Alberta historian's considerable credit, he saw fit to draw the parallel on occasion throughout his narrative.<sup>6</sup> I am encouraged in my provincial reading of Brown's work by three additional considerations: my sense that, rightly or wrongly, Quebec lawyers seeking a better understanding of the shape of criminal law continue to look, wittingly or unwittingly, to the *Civil Code of Lower Canada* as a point of reference; second, that non-Quebeckers reflecting on the genesis of the *Criminal Code* could profit from the parallel; and, third, for the natural occasion that Brown's book provides to reflect on codification as a legislative and political technique in law reform at a time when both criminal and private lawyers are touting the word "codification" in perhaps too cavalier a manner to describe their work in the early 1990s.

Quebec lawyers may currently be trained to ignore this parallel between 1892 and 1866 but, once stated, the parallel becomes obvious and striking.<sup>7</sup> Here are two nineteenth century derivative codifications, both closely based on foreign models from a mother country. Both were adopted in response to an urgent sense that the protracted and peculiar development of received law had gone awry. Both were preceded by a consolidation of applicable statutory law

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<sup>5</sup>Later reprinted in (1879) 1 La Thémis 271 at 273. See also, among many others, Loranger, "Le Droit civil du Bas-Canada suivant l'ordre du Code" (1869) 1 Rev. Lég. 1 at 9 and B.-A.T de Montigny, "La codification des lois fédérales" (1882) 4 La Thémis 317, 326, 353. The full implications of the idea that Canadian criminal law had to be codified before it could properly take root in Quebec society are explored in André Morel, "La réception du droit criminel anglais au Québec (1760-1892)" (1978) 13 R.J.T. 449 esp. at 533-540.

<sup>6</sup>In a footnote to his chapter on consolidation and codification before Confederation, Brown, *supra*, note 1 at 88 n. 57, says that the work of the Commission convened in 1857 to codify the private law of Lower Canada was an "important and interesting development ... beyond the scope of this study, but those who wish to learn about its historical development could not do better than to read John Brierley's informative 'Quebec's Civil Law Codification' (1968) 14 *McGill Law Journal* 521-89." He did make several references to the history of the Quebec legal system (see e.g. at 44-46, 55ff.); and to codification as part of the broader civilian tradition (see e.g. at 14 on Roman law, at 17 n. 42 on the Napoleonic Code, and at 125-26 on the codification of French criminal law).

<sup>7</sup>There is a small but vocal number of Quebec scholars who have hinted that public and private law codifications are worth comparing, especially from an historical perspective: see, e.g., various works by André Morel including successive editions of his teaching materials, *Histoire du droit* (Montreal, Université de Montréal mimeograph, 1988) and "La réception du droit criminel anglais au Québec (1760-1892)" *supra*, note 5; works by G. Blaine Baker, including his teaching materials, *Studies in Canadian Legal History*, 2 vols (Montreal: McGill University mimeograph, 1984-87); and Jean-Maurice Brisson, *La formation d'un droit mixte — L'évolution de la procédure civile de 1774 à 1867* (Montreal: Thémis, 1986) *passim*.

that was more normative than administrative in its design and execution. Both were the work of law reform commissions dominated by a handful of strong personalities. Both codifications had, for some, wider symbolic importance in the political communities into which they were introduced. And, most strikingly and most underexplored, the final products bear comparison. If there was a shared political and legislative mission between the group of Canada East civil law codifiers, on the one hand, and the group of Ottawa criminal law codifiers on the other, it might be a reasonable exercise to compare the two codes. The temptation to go beyond drawing parallels, after reading Brown's book, is difficult to resist.

Similarly, the accounts of the two codifications bear comparison. Both Brown, a history professor interested in law, and Brierley, a law professor interested in history, relied on primary materials to avoid lawyerly habits of present-mindedness and revisionism in reading their respective codes. Both examined the political and legal contexts into which rules were introduced, both considered the different actors involved and their influences on the codes. Most importantly, both the work of Desmond Brown and J.E.C. Brierley bear plain messages for the reader — Quebecker or otherwise — who seeks to learn what a code is (or was) by looking at its origins. It is fair to look for parallels between the stories of Canadian criminal law and Quebec civil law codification (IA) and parallels between Brown's and Brierley's accounts of those two stories (IB) in reading *The Genesis of the Canadian Criminal Code of 1892*. Finally, given codification, how is it possible? (II)

*The Genesis of the Canadian Criminal Code of 1892*, a book presented by the Osgoode Society,<sup>8</sup> is a re-worked version of the author's doctoral thesis in history which he defended in 1986.<sup>9</sup> In an epilogue added to the thesis for publication, Brown brings the history down to the present by signalling its relevance for the Law Reform Commission of Canada's blueprints for "recodifying"<sup>10</sup> substantive criminal law and procedure.

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<sup>8</sup>The Osgoode Society was incorporated in May, 1979 by the Law Society of Upper Canada to promote the study of the history of the law, the legal profession and the judiciary: see C.J.N. Kates, "The Osgoode Society: Preservation of Legal Records" in *Proceedings, Canadian Law in History Conference, June 8-10, 1987* (Ottawa: Carleton University mimeograph, 1987) vol. I, 223.

<sup>9</sup>Desmond H. Brown, *The Canadian Criminal Code, 1892: A Comparative Study in Codification* (Phd. thesis, University of Alberta, 1986) ISBN 0315301899 [unpublished]. Most of what appears in the book appears in the thesis, though the latter includes chapters on the origins of law codes in the ancient world, the development of penal codes in France and Germany, and developments in English criminal law to 1900 which are all but left out of the book.

<sup>10</sup>This is the term the Law Reform Commission has chosen to designate its project: *Recodifying Criminal Law* (Report 31) (Ottawa, L.R.C.C., 1987). While one might correctly object to this 'recodification' since it will replace something that was never a code, the violence to the term is repeated since the proposed text is not a code either: see *infra*.

## I. The Geneses of the Codes

### A. *Parallels in the Stories*

I could not hope to catalogue the many parallels in the legislative efforts resulting in the 1866 and 1892 statutes. There are just too many. More challenging still would be to explore shared ground in the social and economic circumstances bearing on the codifications. Here I will raise just two of the many points in common. First, in what measure were the codes political symbols and political devices? Second, what was the scope of influence of foreign models on each codification? I view these two broad themes as benchmark issues for much of the parallel political and legislative influences on the two codifications. The second represents the threshold question for those examining the formal and informal sources of the codified law, an issue which has preoccupied lawyers and historians alike. As for examining the codes as political symbols and political devices, I view this as a point of departure for a reflection on the codes as social institutions, a matter which, judging from the literature, holds an important interest for historians examining these documents and an issue which has been a particular struggle for lawyers engaged in the same enterprise. I will consider this latter point first.

A case can be made that both the *Criminal Code, 1892* and the *Civil Code of Lower Canada* were political symbols and political devices connected to the entrenchment and promotion of a particular way of life in their respective political communities. Brown cites the connection made by Sir John A. Macdonald between national unity of a young and not particularly independent Canada and a national criminal law. In his survey chapter on the origins and development of the legal systems in North America, he describes the fractured character of both the jurisdiction over and the sources of criminal law in Canada on the eve of Confederation. Even as between the united Upper and Lower Canada in 1841 there was considerable disparity in the applicable criminal law, some of the "certain and lenient" criminal law of 1763 producing rather cruel results in Canada East while Canada West's population was subject to a more benign and relevant local criminal law. Indeed the first true effort to codify criminal law in Canada — the bills to consolidate criminal law for the Province of Canada introduced by Quebec M.L.A. Sir Henry Black<sup>11</sup> — came out of this politically uncomfortable anomaly whereby two standards of justice purported to apply in one (or what was supposed to be one) political jurisdiction. In other parts of British North America the substantive criminal law varied considerably: the

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<sup>11</sup>Brown, *supra*, note 1 at 56-57 citing Elizabeth (Nish) Gibbs, ed., *Debates of the Legislative Assembly of United Canada* (Montreal: Centre d'Études du Québec, 1978) at 710ff. [27 Aug. 1841].

maritime and western colonies all had "English" criminal law, but each began with a law of a different time depending on the circumstances of reception, and each body of law having been adapted, to a greater or lesser degree, to the needs of the local polity.<sup>12</sup> Radical differences in the manner in which justice was administered also obtained across British North America prior to Confederation. Brown concludes that this disparate jurisdiction over criminal law before Confederation "resembled the decentralized civilian jurisdictions of France and Germany rather than the common law parent of England".<sup>13</sup> And just as in pre-codification France, there was a considerable political sense that the nation would unite through uniform law. This moved John A. Macdonald to seek and secure a broad federal power over the criminal law at Confederation in 1867 on the theory that Canada's nationhood was to be assured, in part, through a national criminal law uniformly applicable to all Canadians.<sup>14</sup> Following conventional wisdom,<sup>15</sup> Brown links the impetus to codify criminal law twenty-five years later to this same political motive. Brown extends Macdonald's pre-Confederation rhetoric to the old leader's post-Confederation mission of cementing the union through a national criminal law. Brown notes that engendering a sense of national unity among the Canadian people "was to be accomplished by giving them [the people] a common criminal law".<sup>16</sup>

John E.C. Brierley cites similar "political factors" in his account of the circumstances leading to the codification of private law in Lower Canada in 1866. Those looking back on Quebec's private law codification have sometimes argued that the *Code* would represent what Brierley described as "an instrument of legal nationalism"<sup>17</sup>. After the fact, many Quebecers have seen in the *Code* a political symbol: Louis Baudouin, a Quebec law professor who taught in the nineteen fifties and sixties called the *Code* an "arme défensive de la race

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<sup>12</sup>In an appendix, *ibid.* at 167-68, Brown offers his readers tables of capital felonies in British North America between 1829 and 1841 and at Confederation which demonstrate variations in the applicable law among the colonies. For an overview of the federal Parliament's effort to consolidate criminal law after Confederation see Alan W. Mewett, "The Criminal Law, 1867-1967" (1967) 45 Can. Bar Rev. 726. For a comparison of two such colonies, see L. Knafla & T. Chapin, "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada, 1760-1812" (1983) 21 Osgoode Hall L.J. 245. Brown has made his own contribution to this literature: "Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886" (1979) 17 Alta L. Rev. 497.

<sup>13</sup>Brown, *supra*, note 1 at 59.

<sup>14</sup>*Ibid.* at 60.

<sup>15</sup>For a slight variation on this view see Graham Parker, "The Origins of the Canadian Criminal Code" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: Osgoode Society, 1981) 249 at 252 who argued that Macdonald simply sought to attain a measure of uniformity in criminal law.

<sup>16</sup>Brown, *supra*, note 1 at 92.

<sup>17</sup>Brierley, *supra*, note 3 at 528.

canadienne-française"<sup>18</sup> and others have taken a similar perspective.<sup>19</sup> Brierley himself was not convinced. On the strength of his reading of materials contemporary with the work of the Commission, he contended that there is no evidence that the idea of codification was born with such considerations in mind, preferring to characterize the genesis of Quebec private law codification as "intelligent law reform" rather than politics.<sup>20</sup> Others have subsequently agreed that this was not part of the instinct to codify in 1857 when the codification project took formal shape. David Howes has reconstructed a good case for the reverse position: that Lower Canadian codification was viewed as a possible model for the rest of British North America.<sup>21</sup> Patrick Glenn has suggested that the idea that a different private law as a means of cultural demarcation and cultural survival is better associated with the twentieth century than with the codification period.<sup>22</sup> Finally, the most credible association between the 1866 codification and a political agenda is made by Jean-Maurice Brisson in his thesis on the development and codification of civil procedure in Quebec to 1867. Building on Brierley's analysis and paying close attention in particular to the speeches of Cartier, Brisson contributes to the debunking of the idea that the *Civil Code* was a symbol for French Canada, but instead suggests that if it symbolized anything, it was the bilingual and bi-cultural Canada East that Cartier was trying to satisfy with his code and his codifiers.<sup>23</sup>

That both Brown and Brierley raise the possibility that the codes they examined had a symbolic or political function is suggestive. It is not, of course, unthinkable that a particular law become the rallying cry for a political community either because its substance is closely allied with the political sense of community or that it has come to symbolize the political community in a less formal manner. A Quebecker might wear a badge saying "Ne touchez pas à la Loi

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<sup>18</sup>*Le droit civil de la Province de Québec* (Montreal: Wilson & Lafleur, 1953) at 61, cited by Brierley, *ibid.* at 528 n. 18.

<sup>19</sup>The most cited examples are best associated with particular thinkers rather than a particular way of thinking: see, e.g., A. Perrault, *Pour la défense de nos lois françaises — "l'Action française" et notre système de lois* (Address to l'Action française, January 15, 1919, Montreal) [pamphlet]; P. Azard, "Le Droit québécois, pièce maîtresse de la civilisation canadienne française" (1963) 5 C. de D. 7 and "Le problème des sources de droit civil dans la Province de Québec" (1966) 44 Can. Bar Rev. 417.

<sup>20</sup>Brierley, *supra*, note 3 at 529.

<sup>21</sup>"From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill L.J. 523 at 528. This idea originated at the very latest with Cartier who made it plain in "Discours sur le Code civil du Bas-Canada prononcé le 31 janvier 1865" reprinted in "Document historique" (1955) 57 R. du N. 586. See H. O'Brien (attrib.), "Sir George Cartier and the Civil Code" (1885) 21 Can. L.J. 127. The Codification Commission Secretary Thomas McCord made a plea for a "Civil Code of Canada" in the preface to the second edition of his *The Civil Code of Lower Canada* (Montreal: Dawson Bros., 1873) at iv.

<sup>22</sup>"Persuasive Authority" (1987) 32 McGill L.J. 261 at 291.

<sup>23</sup>*Supra*, note 7 at 117ff.



101"<sup>24</sup> for two reasons: first, that the content of the *Charter of the French Language* is so closely allied with political well-being in the wearer's mind that the law has become untouchable; or, second, that Bill 101 is reified — it is not so much the law as law that is untouchable but the law as symbol that cannot be tinkered with.

This said, it is difficult to accept claims that either the *Criminal Code, 1892* or the 1866 *Civil Code of Lower Canada* had political significance for 1892 national unity or for 1866 French-Canadian statehood without courting the pitfalls of present-mindedness or revisionism. The view of a pan-Canadian criminal law as a harmonizing political force, linked to national unity and all things Canadian, may be defensible to some today,<sup>25</sup> but the bulk of the source material uncovered by Brown suggests the contrary view: that codification was intended in 1892 to unify criminal law, not unify Canada as a nation twenty-five years before it had achieved nationhood on the battlefields of World War I. Similarly, John E.C. Brierley's conclusions ring true from a substantive perspective: the content of the *Civil Code of Lower Canada*, at least at the time of codification, was not designed to protect or define a political community. If indeed the *Civil Code* is "a law of survival of the French-speaking community of Quebec which is a separate reality within Canada"<sup>26</sup>, as one leading Quebec scholar wrote recently, it is hard to find authority for this in the constituent legislation for the codification commission, their *Reports*, the contemporary debates and legal and non-legal materials Brierley canvassed, or the even in the notebooks or *cahiers* of the commissioners which he discovered relating to the period.<sup>27</sup> It may be

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<sup>24</sup>The pre-enactment designation and now popular tag for the *Charter of the French Language*, R.S.Q., c. C-11.

<sup>25</sup>This old theme continues to find expression in a segment of the doctrinal commentary on criminal law: see, e.g., Alan W. Mewett, "Editorial [:] Criminal Law and Codification" (1975) 17 *Crim. L.Q.* 125; M. Friedland, *A Century of Criminal Justice* (Toronto: Carswell, 1984) at 51. It is also a implicit but recurring motif in Canadian constitutional jurisprudence affirming a broad interpretation of federal jurisdiction over criminal law. Another perspective is, of course, possible. I have argued elsewhere that one might view a systemic tolerance for an uneven application of national law as itself having more of a positive influence on "nation-building": see N. Kasirer, "Annotated Criminal Codes *en version québécoise*: Signs of Territoriality in Canadian Criminal Law" (1990) 13 *Dalhousie L.J.* number 2 (forthcoming).

<sup>26</sup>Maurice Tancelin, "Introduction" in F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (1907) (Toronto: Butterworths, 1980) at 20-21.

<sup>27</sup>This is certainly true if one examines the speeches of George-Etienne Cartier in the Legislative Assembly made when the enabling legislation was passed: see "Discours sur la codification des lois prononcé le 27 avril 1857 à l'Assemblée législative" in Joseph Tassé, *Discours de Sir George Cartier, Baronnet accompagnés de notices* (Montreal: Eusèbe Senécal & fils, 1893) at 129-130. Brierley, *supra*, note 3 at 530 and others have attributed to Cartier an anonymous note, "De la codification des lois du Canada" (1846) 1 *Rev. de lég. et juris.* 337 which described the purpose as rendering comprehensible and accessible to both linguistic groups the "babel légale" of private law sources. In her doctoral thesis in history, *Changement dans le droit privé au Québec et au Bas-Canada entre 1760 et 1840: Attitudes et réactions des contemporains*, 2 vols (unpublished,

true, however, that in some quarters the *Code* today has been reified as a political symbol and that the integrity of Quebec private law is allied with the integrity of a Quebec nation.<sup>28</sup> Indeed, the idea of the *Code* as political symbol merits further study. The separate but connected question as to whether the *Code* was intended to preserve the juridical specificity of Quebec private law allowing it to become a symbol thereof is by no means agreed upon by modern day commentators.<sup>29</sup> But whatever the currency of this idea today, its origins seem best associated with turn of the century Quebec legal thinking and not with the 1866 codification,<sup>30</sup> although it most certainly marked the major project to recodify Quebec private law in the 1960s and 1970s which resulted in a draft civil code.<sup>31</sup>

If both codes have been contemplated by some as political symbols, it remains to be considered fully whether codification might be characterized as a political device in both cases. One senses that there may be a broader socio-political common ground between the two codifications when one considers that the two small bands of lawyers involved in each of the projects were part of comparable elites, separated by one short generation. Reflecting on a legal system in which codification is as much a way of thinking as a legislative tech-

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Université de Montréal, 1980), Evelyn Kolish traces the move to codify back to 1831 legislative debates in Lower Canada where promoting accessibility and certainty were advanced as reasons: Vol. II at 666 ff.

<sup>28</sup>Senator Arthur Tremblay gave vent to such a sentiment in the Senate Debates on the Meech Lake Accord on Oct. 31, 1989, 2nd Sess., 34th Parl., vol. 133, No. 34 at 655:

On s'étonnera peut être qu'un Québécois, lui-même francophone, se permette de dire que ce qui définit le Québec en tant que société distincte et unique au Canada, ce n'est pas d'abord son caractère francophone. Ce qui fait que le Québec est différent et unique en tant que société ... et qui a été reconnu comme tel depuis au delà de deux siècles par l'autorité britannique, c'est son Code civil.

<sup>29</sup>For a strong expression of this view see P.-A. Crépeau, "La renaissance du droit civil canadien" in Jacques Boucher et André Morel, eds, *Le droit dans la vie familiale: Livre du centenaire du Code civil*, vol. I (Montreal: Presses de l'Université de Montréal, 1970) XII who argued at XV that "[i]l est ... permis de croire que la Codification de 1866, garantissant sur le plan juridique la sécurité et la stabilité des institutions françaises, constituait pour nos ancêtres un gage de survivance des coutumes ancestrales." See generally Sylvio Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil" (1987) 32 McGill L.J. 559.

<sup>30</sup>See Howes, *supra*, note 21; Brisson, *supra*, note 7. H.P. Glenn makes the case that the instinct to protect the integrity of civil law is an idea that became popular considerably after codification and largely due to the thinking of law professor and Supreme Court justice Pierre-Basile Mignault: see "Le droit comparé et la Cour suprême du Canada" in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 197. For a particularly telling version of Mignault's philosophy see Mignault, "Le Code civil au Canada" in *Le Code civil 1804-1904 [:] Livre du centenaire* (1904), (Paris: Lib. Ed. Duchemin, 1979) t. 2 at 723. There is, however, some scattered evidence of this being a concern in the pre-codification period: see, e.g., M. Bibaud, *Commentaires sur les lois du Bas Canada* (Montreal: Cérat et Bourguignon, 1859), *passim*.

<sup>31</sup>See P.-A. Crépeau, "Foreword" in Civil Code Revision Office, *Report on the Québec Civil Code*, vol. I (Quebec City: Éditeur Officiel, 1978) at XXIII and *passim*.

nique, a French legal theorist has suggested that there may be a close relationship between the "codificateur" and the "codifié": "une coïncidence partielle de celui qui formule la règle et celui qui en est le sujet".<sup>32</sup> Canadian scholars have also recognized that the social class and political ideology of law reformers have a very immediate impact on the shape of reformed laws and on persons subject to those laws. Jim Phillips, for example, has explained the influence of conservative ideology on criminal law reform in Nova Scotia in the mid-nineteenth century.<sup>33</sup> Similarly, G. Blaine Baker's study of a Montreal law office practising around the time of civil law codification in Quebec suggests a close relationship between the preoccupations of Lower Canada's social and political elite and law reform,<sup>34</sup> and like themes emerge in the work of David Howes,<sup>35</sup> Evelyn Kolish<sup>36</sup> and Tom Johnson,<sup>37</sup> to name but these few. While the generation which separated the adoption of the *Civil Code* from the *Criminal Code*, 1892 meant that the same lawyers did not work on both projects, the socio-legal elites from which codifiers were drawn bear comparison.

If the function of criminal law then, as now, was in part to protect one segment of society by controlling another, some study of the relationship between "codificateurs" and "codifié" (both as subject and object of codification) is in order. Indeed part of the success of Brown's method comes from the care he devotes to depicting the *dramatis personae* of the genesis of the *Code*. A case in point is the very vivid image of Sir James Robert Gowan<sup>38</sup> who emerges as

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<sup>32</sup>François Terré, "Les problèmes de la codification à la lumière des expériences et des situations actuelles" in *Travaux et recherches de l'Institut de droit comparé, VIème Congrès international de droit comparé, Hambourg 1962* (Paris: Cujas, 1962) 175 at 201. One might extend the "codifié" to include both the subject and the object of codification.

<sup>33</sup>"The Reform of Nova Scotia's Criminal Law, 1830-1841" in *Proceedings, Canadian Law in History Conference 1987, supra*, note 8, vol. III, 480.

<sup>34</sup>"Law Practice and Statecraft in Mid-Nineteenth Century Montreal: The Torrance-Morris Firm, 1848-1868" in Carol Wilton-Siegel, ed., *Essays in the History of Canadian Law: Lawyers and Business*, vol. 4 (Toronto: Butterworths, 1990) [forthcoming].

<sup>35</sup>*Supra*, note 21 and "La domestication de la pensée juridique québécoise" (1989) 13 *Anthr. et Sociétés* 103.

<sup>36</sup>"The Impact of Change in Legal Metropolis on the Development of Lower Canada's Legal System (1791-1838)" (1988) 3 *Can. J.L. & Soc.* 1.

<sup>37</sup>*Perceptions of Property: The Social and Historical Imagination of Quebec's Legal Elite, 1836-1856* (unpub. S.J.D. dissertation, Univ. of Wisconsin, Madison, 1989). One of the important themes of Johnson's thesis is that, during this period, members of the legal elite became the spokespersons for Quebec history. This meant that in respect of the abolition of seigniorial title, "legal terrain [became] the valid arena for ideological conflict in Quebec society" (at 9 and *passim*).

<sup>38</sup>(1815-1909), Irish-born lawyer, judge and senator. At 27, Gowan was the youngest judge ever commissioned in Canada West. Brown describes him as a "dedicated and apolitical servant of the government in power" and John A. Macdonald's personal legal draftsman for over thirty years. See biographical information in Brown, *supra*, note 1 at 62 *passim* and sources cited therein. Brown's research even turned up a chance meeting in Europe between Gowan and Mrs. Livingston Barton, the daughter of Edward Livingston who is closely associated with the codification of the law of

the *eminence grise* behind the legislative history of the *Code*: "As a source of information of what had gone on before, Gowan was unequalled; as a legislative draftsman, he was without peer; but as a parliamentary tactician, he was a booby".<sup>39</sup> Yet the full scope of the relationship between the "codificateurs" and the "codifié" still needs to be explored. Brown skilfully describes political double-dealing and personal peccadillos of those directly and obliquely involved in the 1892 venture, but chooses not to speculate fully on the social or ideological agenda of the elite that controlled the shape of the first *Code*.

In a like manner, Brierley gave his readers a part-picture of the "three fit and proper persons" called upon to serve on the Lower Canadian codification Commission.<sup>40</sup> The parameters of the relationship between the "codificateurs" and the "codifié" were fixed to some extent by the enabling legislation. As Brierley explained in the opening paragraphs of his section on the *modus operandi* of the Commission, the Commissioners were charged with reducing the law in force to one document of the applicable rules "of a general and permanent character", to do so within the same general plan and the inclusion of the same amount of detail as the French *Code civil*, and finally to suggest such amendments to this body of law as they thought desirable, directing the attention of the Legislative Assembly to these proposals.<sup>41</sup> Brierley described this *cadre* within which "creative reform" was left open to the Commissioners and then, through the exploration of their private papers which were the focus of his 1968 article, explored the extent to which this technically limited creativity was exercised. He provided thumbnail sketches of the three Commissioners and the three secretaries who assisted them.<sup>42</sup> Brierley's focus was the specific responsibilities of each of these codifiers and, when the occasion presented itself, he culled from their private notes thoughts and approaches they had in respect of the titles of the *Code* that fell into each of their laps.<sup>43</sup> But Brierley left for future scholars the task of situating each of the codifiers socially and ideologically and measuring how the product of their labours reflected the narrow segment of society and political conviction represented on the Commission. What impact, for example, did Charles Dewey Day's *anti-patriote*, English-Montreal elite ins-

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Louisiana and with whom, Brown surmises, Gowan discussed codification since the daughter mailed Gowan a copy of the French translation of the Louisiana Code at a later date (at 99).

<sup>39</sup>Brown, *supra*, note 1 at 136.

<sup>40</sup>Established by *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure*, S.C. 20 Vict., c. 43, s.1 (1857) [hereinafter *The 1857 Act*].

<sup>41</sup>Sections 4, 6 and 7 of *the 1857 Act*, *ibid.*, as described by Brierley, *supra*, note 3 at 543.

<sup>42</sup>*Ibid.*, Appendix II, 581 in which he introduces Judges René-Edouard Caron (1800-1876), Charles Dewey Day (1806-1884) and Augustin-Norbert Morin (1803-1865) and secretaries Joseph Ubalde Beaudry (1816-1876), T.K. Ramsay (1826-1886) and Thomas McCord (1828-1886).

<sup>43</sup>See e.g. Brierley's description of Caron's notes on divorce (*ibid.* at 560 n. 121) and of Day's "individualist philosophy" as it found expression in delict (at 565) and regarding penalty clauses (at 569).

tinct<sup>44</sup> have on the Book on obligations which he drafted? It seems unthinkable to take the statutory directions to the codifiers at their word and read the *Code* without contemplating the ideological preoccupations of those drafting it. The view that intellectual history of a given legal system or culture can be as relevant to the understanding of that system as the study of the rules which operate therein could be a point of departure for future studies of codification.

Both Brown and Brierley embark on the perilous task of separating political and legal influences on codification with considerable success. They both set out a series of legal or technical problems to which the codifications were designed to attend. Again, parallels emerge. Both codes were designed to sort out competing sources; both sought to synthesize in the absence of a working synthesis; both aimed at consolidating rules and ideas, and at heightening accessibility of the law. Importantly, the notion that law reform would 'reduce' existing law to a 'system' is a recurring motif in both stories and in the accounts of both stories. Rather than explore the full implications of this common experience here, I think it sufficient to signal that the some of the same legal factors played upon the 1866 and 1892 experiments resulting in a more substantial commonality in the final products than is generally acknowledged elsewhere. One such common legal factor was the influence of a foreign model.

Both the codification of criminal law and that of Quebec private law twenty some years earlier are generally held up against the foreign models with which they are most closely associated: the Quebec project is compared to the "monument de sagesse humaine"<sup>45</sup> represented by the *Code Napoléon*, while the Canadian *Criminal Code, 1892* is conventionally seen as a local version of the James Fitzjames Stephen's great 'system' for the law of crime in England, *A Digest of Criminal Law*,<sup>46</sup> which later spawned the Draft Criminal Code presented to the British Parliament at the end of the 1870s. In both cases, the model shaped the modeled law both as to substance and form, constituting a first-order source of law and justifying a careful study as against its local progeny. But the broader implications of the influence of the model, beyond its role as a formal source of law, also merits study. Code-watchers must take care not to allow the models to obscure other formal and informal sources of law or sources of inspiration on the codification. Perhaps the most compelling tribute to the idea that a model for a code relates more to an idea about law than a legal tradition is the

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<sup>44</sup>For a sketch of Day, see Carmen Miller, "Day", *Dictionary of Canadian Biography*, *supra*, note 4 at 237. Baker, *supra*, note 34 at 10, 47 describes Day variously as an outspoken tory, a *Château Clique* lawyer, and part of an English Montreal mercantile elite with long-standing ideological commitments.

<sup>45</sup>Cartier (attrib.), *supra*, note 27. Thirteen years later, in 1859 (about the date when Cartier's Commission began the work in earnest), Maximilien Bibaud called the French model a "véritable Eldorado de la jurisprudence": *supra*, note 30 at 376, cited by Brisson, *supra*, note 7 at 143.

<sup>46</sup>1st ed. (London: Macmillan, 1877).

story of the export of the *Civil Code of Lower Canada* to St. Lucia in 1879 under a British regime by a former Sorel, Quebec lawyer.<sup>47</sup>

Understanding Stephen's draft code requires, to be sure, a full sense of its role not just in the elaboration of Canadian criminal law, but its place in the development of the common law of England. Brown's study of what he describes as the "untidy and unsystematic" evolution of the English law through to the unsuccessful nineteenth century codification attempts is important not only because English law was (and remains) a source of Canadian criminal law, but also for the record he provides of the process of law reform. To be sure, the connection between the law of crime in Canada and English law generally cannot be underestimated. Brown does a creditable job going beyond the acceptance of the influence of substantive English law as an article of faith in charting the relationship between Canadian and English criminal law from the Quebec Act to 1892. The model, of course, had to be adapted to fit local circumstances,<sup>48</sup> and, as this process of adaptation progressed through the Union period,<sup>49</sup> past Confederation, past the consolidations of 1869<sup>50</sup> to 1892, the relationship, from a substantive point of view, became increasingly complex. The considerable care with which Brown treats the work of Fitzjames Stephen as a model is part of the author's healthy sense of the importance of reconstructing the letter and the spirit of the Canadian *Code* beyond its technical sources. Brown examines Stephen's *Digest* carefully, both on its own terms and as a model for the Canadian *Code*, describing it as a "systematic treatment ... not unlike the French or German codes in appearance and text, [though] it was not a code in the sense that they were."<sup>51</sup> Brown tracks the impact that Fitzjames Stephen's work had on each step of the process which ended in the 1892 *Code*: unearthing

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<sup>47</sup>See N.J.O. Liverpool, "The History and Development of the St. Lucia Civil Code" in R.A. Landry & E. Caparros, eds, *Essays on the Civil Codes of Quebec and St. Lucia* (Ottawa: University of Ottawa Press, 1984) 304 for an account of how the *Civil Code* served as a model for private law in a common law jurisdiction.

<sup>48</sup>This adaptation took on particular significance in Quebec where the influence of language and local custom among advocates suggests that local circumstances have contributed to a distinctive criminal law: see Kasirer, *supra*, note 25.

<sup>49</sup>During this period William Badgely introduced, as leader of the Opposition, draft codes of substantive and procedural criminal law before the Legislative Assembly. These codes, straying considerably from the applicable English law of the day, merit further study: W. Badgely, *Criminal Law Bills, Third Session, Third Parliament* (Toronto, 1850), described briefly in Morel, *supra*, note 5 at 538 and in Baker, *supra*, note 34 at 11.

<sup>50</sup>The leading text was a formidable adaptation of the English pre-Stephen *Digest* law to Canada by Henri-Elzéar Taschereau, then one of the judges of the Superior Court of the Province of Quebec: *The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict., for the Dominion of Canada*, vol. I (Montreal: Lovell, 1874); vol. II (Toronto: Hunter, Rose, 1875), described in Kasirer, *supra*, note 25.

<sup>51</sup>Brown, *supra*, note 1 at 24. Interestingly, Stephen himself used the same word to describe a post draft code edition of this work as "a systematic statement of existing law": *A Digest of the Criminal Law*, 3d ed. (London: Macmillan, 1883) at iv.

Burbidge's requisition for six copies of Fitzjames Stephen's draft code and for a personal copy of the Stephen *Digest* for the preparation of the Canadian Deputy Minister of Justice's little known 1884 draft criminal code.<sup>52</sup> Indeed when Burbidge wrote his own *Digest of Canadian Criminal Law* in 1887, he obtained the express permission from Stephen to follow the plan of his English counterpart's own *Digest*.<sup>53</sup> When Burbidge, by that time on the bench, was asked by Sir John Thompson, then Minister of Justice, to draft a criminal code for Canada in late 1889, he and his team of codifiers put together a bill which closely resembled the English model, or at least that is how it was presented in the House of Commons by the Minister. Brown describes this as part of a political near-conspiracy to cloak the Canadian bill in the moral authority of the mother country's draft.<sup>54</sup> The truth of the matter, as Brown's exegesis of the Canadian text reveals, is that the Canadian content of the Bill was important. He attributes 70 per cent of the 715 sections in the original bill to the Canadian codifiers Burbidge, Charles Masters and Robert Sedgewick, even if they were drafting "in the terse and economical style developed by Stephen."<sup>55</sup> The final product was, then, a mix of direct and oblique influence.

The *Code Napoléon*, in a very similar manner, represented both a substantive and stylistic model for the civil law codifiers in 1866. To be sure, much attention has rightly been devoted to connecting the 1866 Lower Canadian *Code* to the one adopted in post-revolutionary France sixty-two years earlier. The very terms of reference for the codifiers work made this most plain.<sup>56</sup> One of the great contributions of Brierley's account of the codification is his description of how Day, Morin and Caron organized the undisciplined mass of applicable law in 1866 into the *cadre* provided by the Napoleonic model. Most revealing is the very structure of the *cahiers* containing the Commissioners drafts which Brierley discovered at the *Séminaire de Québec*. The three judges drafted the proposed codal articles using four columns in these notebooks: one for the existing law, one for the corresponding French provision, one for the proposed amendments and one for remarks, if any.<sup>57</sup> The image conveyed by Brierley of the codifiers copying out by hand each provision of the French code before contemplating it as against the applicable local law is a powerful reminder of the

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<sup>52</sup>Brown, *ibid.* at 109-111.

<sup>53</sup>See *A Digest of the Criminal Law of Canada* (Toronto: Carswell, 1890) discussed by Brown, *ibid.* at 121. In Burbidge's *Digest*, propositions of criminal law were presented as "articles" of a would-be code.

<sup>54</sup>Brown, *ibid.* at 126ff.

<sup>55</sup>*Ibid.* at 124.

<sup>56</sup>Section 7 of the *1857 Act*, *supra*, note 40 directed that the future Civil Code and Code of Civil Procedure "shall be framed upon the same general plan, and shall contain as nearly as may be found convenient, the like amount of detail upon each subject, as the French Codes known as the *Code civil*, the *Code de Commerce*, and the *Code de Procédure Civile*".

<sup>57</sup>Brierley, *supra*, note 3 at 563.

strength of the influence of the *Code civil des français* on the substance and style of the rules drafted by the three Canada East judges.

The fact that the *Code Napoléon* and Stephen's *Digest* figured so prominently on the codifiers' desks is a formidable distraction for those inclined to test the notion that other legal sources can be linked to the codes outside of the classical French civil law and English criminal law traditions. An obvious example which is ripe for further study concerns the influence of and the legal sources associated with the American codification movement of the 1820s to 1860s. What was the connection between the instinct to 'systematize' Canadian private and public law (which began to manifest itself in the 1830s and 1840s) and equivalent instincts in the United States? Reading Charles M. Cook's leading study, *The American Codification Movement [:] A Study of Antebellum Legal Reform*,<sup>58</sup> one cannot help but be struck by the number of themes similar to the Canadian codal histories, particularly those factors encouraging what Cook calls "lawyers' reform": simplification, rationalization, heightened accessibility of law.

In what measure were the Quebec codifications of private law and procedure a late hurrah in a wider continental movement which petered out in code-statutes such as the *Criminal Code, 1892*? There are signs, for the moment scattered, that nineteenth-century Canadian private and public lawyers were not as inward looking as one might guess using present-day civil-law and criminal-law isolationism as a guide. One example in Lower Canadian legal culture, among many, is found in the report of the consolidation of the laws of Lower Canada in 1842. This commission, which was to have included Charles Dewey Day before the latter was named to the bench, looked south in its choice of form for this important pre-codal consolidation:

Les commissaires se sont occupés du meilleur format à donner à cette publication: et en adoptant l'octavo royal, ils ont été guidés dans leur choix, tant par la préférence généralement donnée à ce format par le barreau, que par la circonstance que les statuts révisés des diverses législatures des États-Unis qui leur sont tombés sous la main, sont publiés sous ce format. Les commissaires ont pris pour modèle le format des statuts révisés de l'état du Massachussets [*sic*], comme étant le meilleur sous le rapport de la grandeur, de l'impression et de l'arrangement des matières.<sup>59</sup>

Even in terms of formal sources of law, the 1866 codifiers cited (albeit rarely) American doctrinal writers and statutes beyond the Louisiana materials

<sup>58</sup>(Westport, Ct: Greenwood Press, 1981), esp. c. 4.

<sup>59</sup>A. Buchanan, H. Heney & G.W. Wicksteed, "Second rapport" in *Les actes et ordonnances révisés du Bas-Canada* (Montreal: S. Derbishire & G. Desbarats, 1845) at ix. Brown discusses this consolidation at length, concluding that "[t]he ghosts of Justinian's commissioners might have been peering over their shoulders as they deliberated, because what they produced approximated the layout of his Code" (*supra*, note 1 at 76).



to which the enabling legislation had addressed their attention.<sup>60</sup> In respect of criminal law, a considerable degree of continentalism is prevalent in nineteenth century Canadian lawyers' materials,<sup>61</sup> including an awareness and sensitivity to American legislative technique.<sup>62</sup>

G. Blaine Baker has developed this idea of a nineteenth century continentalist legal thought based on a careful study of law library contents and curricula for courses of study in legal education.<sup>63</sup> He reconstituted how Upper Canadian (and other) lawyers thought by examining what they read, how they were trained, what books they bought and who they bought them from. He found striking evidence that Canadian lawyers had cosmopolitan tastes which often went well beyond whatever the bounds that formal sources placed on their particular legal tradition or jurisdiction. Can this openness to other legal traditions and these signs of a nineteenth century continentalism have influenced the local codification projects? Brierley raised the possibility,<sup>64</sup> as did Brown.<sup>65</sup> Baker's work<sup>66</sup> would suggest that legal models other than the *Code Napoléon* and the

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<sup>60</sup>See e.g. *Civil Code of Lower Canada. Sixth and Seventh Reports and Supplementary Report* (Quebec: G. Desbarats, 1865) in which Massachusetts legislation and leading American textbooks of the day are cited. This is a different issue than that relating to the special relationship between the 1866 *Code* and its Louisiana equivalent based on their shared civilian heritage, discussed in J.P. Richert & E.S. Richert, "The Impact of the Civil Code of Louisiana on the Civil Code of Quebec of 1866" (1973) 8 R.J.T. 501.

<sup>61</sup>See e.g. Raoul Dandurand & Charles Lanctôt, *Traité théorique et pratique de droit criminel* (Montréal: A. Périard, 1890), in which the authors cited American jurisprudence liberally. The later volumes of Henri-Elzéar Taschereau's annotated statutes reflect the Supreme Court justice and code-followers sensitivity to American sources in addition to the more conventional Anglo-Canadian materials he used: see esp. *The Criminal Code of Canada, as amended in 1893, with Commentaries, Annotations and Precedents* (Toronto: Carswell, 1893).

<sup>62</sup>See e.g. John Henry Willan, *A Manual of the Criminal Law of Canada* (Quebec, 1861) in which the author encouraged lawyers to cite not just English and local cases, but authorities from the United States and beyond. The book includes separate sections on Upper and Lower Canadian, Nova Scotian, New Brunswick and Imperial statutes as well as, interestingly, the Code of Criminal Procedure of the State of New York.

<sup>63</sup>"The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law & Hist. Rev.* 219, esp. at 238-39, 243 for Lower Canada, *passim* for Upper Canada. Baker demonstrates a widespread migration of books and ideas back and forth across the border.

<sup>64</sup>*Supra*, note 3 at 541 where he alluded to the place of Quebec civil law codification as part of a wider nineteenth century phenomenon.

<sup>65</sup>See e.g. Brown's discussion of the use of the Revised Statutes of Massachusetts and New York by the Nova Scotia consolidation commission in 1851 and concluded that the American models were used for style but not content: "the form [of R.S.N.S. 1851] was foreign, the substance Nova Scotian" (*supra*, note 1 at 81). In addition, Brown makes mention of the American codification movement in his chapter on English codification (at 16 n. 35, 22).

<sup>66</sup>See also G. Blaine Baker *et al.*, *Sources in the Law Library of McGill University For A Reconstruction of the Legal Culture of Quebec, 1760-1890* (Montreal: Faculty of Law and Montreal Business History Project, McGill University, 1987) in which a considerable migration north of U.S. criminal law and early codification materials is documented.

Stephen *Digest* may flesh out the history of codification in Canada.<sup>67</sup> Plainly, a foreign model can be not just a source of law, but a source of inspiration, as scholars examining other codes are quick to point out.<sup>68</sup> Sorting out how a codifier has proceeded by “mimétisme”, as Brisson pointed out in respect of the 1867 codification of Quebec civil procedure,<sup>69</sup> requires lateral thinking beyond the usual confines of legal sources and law generally.

### B. *Parallels in the Story-telling*

Part of the story is in the telling. The historiography of codification is, in a sense, as worthy of study as the history of codification itself. Thomas McCord's well-known synopsis of Quebec private law codification published as a preface to the first privately published English-language edition of the Civil Code of Lower Canada is a case in point.<sup>70</sup> McCord, an English-speaking secretary to the codification commission convened by George-Étienne Cartier in 1857,<sup>71</sup> described in rather uncolourful terms the “long and arduous labor, the study, research and learning bestowed upon the work, by eminent legists entrusted with its elaboration”.<sup>72</sup> But in so doing, McCord showed his own colours in respect of codification and law reform, which he saw as a process designed to promote stability rather than change — to conserve the apples rather

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<sup>67</sup>Brown, *supra*, note 1 at 117, discovered an 1887 letter from Minister of Justice Sir John Thompson to New York codifier David Dudley Field, which indicates that Ottawa was in touch with American codification efforts at some level. In his essay on the 1892 codification, Graham Parker's review of the legal literature of the day reveals some discussion of the U.S. movement, but he concludes that the “influence of American law and legal institutions on Canadian law is rather hard to assess”: *supra*, note 15 at 254.

<sup>68</sup>See e.g. Clarence Morrow, “Louisiana Blueprint: Civilian Codification and Legal Method” (1943) 17 Tu. L. Rev. 351 for an effort to systematize “the need of all peoples for a systematized legal conceptualism”; Sanford Kadish, “Codifiers of the Criminal Law: Wechler's Predecessors” (1978) 78 Colum. L. Rev. 1098 suggesting that models for codification are not tradition bound; M. Friedland, “R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law” (1981) 1 Oxford. J. Leg. Stud. 307.

<sup>69</sup>Brisson, “La procédure civile au Québec avant la codification: Un droit mixte, faute de mieux” in *La formation du droit national dans les pays de droit mixte* (Aix-Marseille: Presses Universitaires Aix-Marseille, 1987) 93 at 98.

<sup>70</sup>“Synopsis of the Change in the Law effected by the Civil Code of Lower Canada” in T. McCord, ed., *The Civil Code of Lower Canada*, (Montreal: Dawson Bros., 1867) 1. Part of McCord's account is to be found in the prefaces to this and the second edition of his *Code*, *supra*, note 21.

<sup>71</sup>Advocate, counsel to the Legislative Assembly, and later judge, McCord (1828-1886) replaced T.K. Ramsay as English-language secretary to the commission in 1862 when the latter was dismissed for “political causes” that merit further exploration: see Brierley, *supra*, note 3 at 586 n. 28a. On McCord, see generally P.-G. Roy, *Les juges de la Province de Québec* (Quebec City: King's Printer, 1933) at 359.

<sup>72</sup>*Supra*, note 70 at 1.

than to upset the apple-cart.<sup>73</sup> Needless to say, understanding the short history offered by McCord requires sensitivity to the context in which it was written. Participants write participants' histories, and their accounts of their own work<sup>74</sup> and the work of others<sup>75</sup> are not so much suspect as special. It almost goes without saying that a reading of any history of codification requires some measure of sensitivity for the writer's point of departure.<sup>76</sup>

What of the accounts of John Brierley and Desmond Brown? As I mentioned earlier, Brown is an historian and Brierley is a lawyer and both have talent and instinct for what radio announcers and university administrators call "cross-over". Part of the challenge in reading both Brown and Brierley today is situating their work in what some have characterized as the new and at times undisciplined discipline of Canadian legal history, or at least a brand thereof.<sup>77</sup> Even a casual observer of legal literature and law school curriculum would acknowledge the growing place of legal history in the academic discipline of law, fuelled in large part by the so-called 'law and society' approach to law teaching.<sup>78</sup> One of the most important tenets of this new historical sensitivity for

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<sup>73</sup>One suspects that McCord may have been at the origin of the injunction against amending the *Code* which appeared in volume 7 of the codifiers' *Report*, *supra*, note 60 at 264 which he himself cited later in a similar warning against changes which would "produce confusion, and destroy the unity and usefulness of the work": "Preface to the Second Edition", *supra*, note 21 at iv.

<sup>74</sup>See e.g. J.C. Martin's account of the significant revision of the *Criminal Code* in which he participated, an account animated by the same sense of history and deference to the Fitzjames Stephen model as was the 1955 revision: see "Introduction", *The Criminal Code of Canada* (Toronto: Cartwright & Sons, 1955) 1. While Martin's work is generally held in the highest esteem, Arthur E. Maloney noted a bias in J.C. Martin's 1955 annotated *Code* given what he perceived to be Martin's close connection with the legislative revision team: (1956) 34 Can. Bar Rev. 491 at 492.

<sup>75</sup>See the nutshell history of criminal law codification by the President of the Law Reform Commission of Canada in which the lesson of history is seen to confirm of the Commission's policy in respect of its own work: Allen Linden, "Toward a New Criminal Code for Canada" in P. Fitzgerald, ed., *Crime, Justice & Codification: Essays in Commemoration of Jacques Fortin* (Toronto: Carswell, 1986) 163.

<sup>76</sup>See e.g. Louis Baudouin, "La genèse du Code", *supra*, note 18 at 61-110 in which the author writes a history coloured by his views on the specificity of Quebec legal thinking, his provincialist approach to constitutional law, and his fire-proof house approach to comparative law in the continentalist tradition. For an example of a personalized history of criminal law codification, see Louis Wharton, *A Manual of Canadian Criminal Law* (London, U.K.: Fortune Press, 1951), c. 1 ("Of Codes and Codifying") and 2 ("An Historical Survey") in which the author's anglo-centric and code-wary view of the Canadian enterprise finds expression.

<sup>77</sup>See D.H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty, ed., *supra*, note 15, 3 at 4 where Canadian legal history was described as being in a "fledgling stage of development". See generally, D.G. Bell, "The Birth of Canadian Legal History" (1984) 33 U.N.B. L.J. 312 at 313 in which a law professor makes a compelling plea for the view that "legal rules are historically contingent rather than doctrinally inevitable". See references cited in V. Masciotra, "Quebec Legal Historiography, 1760-1900" (1987) 32 McGill L.J. 712 at 712 n. 2 and 713 n. 3.

<sup>78</sup>Flaherty, *ibid.* at 4 describes this trend as "an approach that goes beyond the narrow aspects of legal developments to focus ultimately on the general relationships between law and society".

a social view of legal relations<sup>79</sup> is a sense of the importance of what one of the standard-bearers of the movement, Robert Gordon, has characterized as "historicism". Historicism is, for Gordon, the perspective that the meanings of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticism suggested by that perspective.<sup>80</sup> Part of the success of both Brown and Brierley's accounts is the effectiveness with which they meet the challenge of historicism.

Legal historians, particularly those trained as lawyers and not historians, are often criticized for drawing important conclusions from historical materials without appropriate methodological care. In short, they sometimes do not show appropriate sensitivity to historicism. In the review of a biography of English jurist A.V. Dicey, David Sugarman listed some of these vices: "narrowly drawn and shadowy treatment of the context in which Dicey worked", "present-mindedness", "failure to question lawyers' categories and values" and "reductionism"<sup>81</sup>. This chilling indictment was extended by legal historian Douglas Hay about a year later in the same journal. He listed a series of errors of historical logic which plague lawyers' work when the latter stray from what he described, from his historian's perspective, as a range of legal mountains which loom over the social landscape: moralism, presentism, rationalist view of legal decision-making, false dichotomous questions, revisionism and more.<sup>82</sup>

Does this mean that legal history is beyond the reach of lawyers? Lawyers may lack more than the methodological training to enable them to "think like historians", to turn one of their own favourite exclusionary phrases against them. If practising historicism requires the scholar to 'contextualize' and limit his or her conclusions to those which are intellectually defensible on the basis of materials beyond the normal reach of lawyers and judges, the problem may be more fundamental. The problem is that lawyers are trained against doing both these things. Law is often perceived to be anti-contextual: an idea defined by a parliament or judge fifty years ago will be applied, assuming it is the right rule, with no allowances made for anything but the most egregious anachronisms in its original expression. Furthermore, the drive to explain is a powerful one for a lawyer trained to expect that every problem has a solution, often to be found in an another old problem that had a similar solution: this is a lawyers'

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He and others trace this sort of preoccupation to the work of Wisconsin historian J. Willard Hurst. In a recent report of a consultative group on research and education in law, the need for this type of legal history was voiced: Social Sciences and Humanities Research Council of Canada, *Law and Learning* (Ottawa: Supp. and Serv., 1983) at 63 and *passim*. On this point, see Bell, *ibid.* at 312.

<sup>79</sup>Peter Linebaugh, "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein" (1985) 60 N.Y.U. L. Rev. 212.

<sup>80</sup>"Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017.

<sup>81</sup>"The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 Mod. L.R. 102 at 104.

<sup>82</sup>"The Criminal Prosecution in England and its Historians" (1984) 47 Mod. L.R. 1.

skill called 'recognizing precedent'. Indeed, lawyers are commended for coming up with answers that learned authority only hints at: this is a lawyers' skill called 'interpretation'. Finally, and most ahistorical, is the reason why many lawyers engage in historical research in their ordinary travels. Too often lawyers limit their excursions into 'old' material as a technique for coming up with a right answer for a current problem. When one looks back for authority that will persuade today, it is easy to understand falling into traps of presentism and revisionism. In a sense, the whole idea of binding authority (if such a thing exists) is ahistorical. To make matters worse, it has been suggested that lawyers tend to use history conservatively, appealing to continuity and tradition which is at the core of their discipline.<sup>83</sup> So lawyers are not intellectually dishonest: they just think like lawyers.<sup>84</sup> One might expect the plague on the legal house to extend beyond lawyers and catch those writing the history of legislation. This is a particular risk when the legislation under study is one which, by its very nature, is one that is supposed to last — to transcend its immediate context — like a code or a constitution.

Brown's work, in my view, survives this kind of critical read. *The Genesis of the Criminal Code of 1892* keeps to the announced purpose in its introduction:<sup>85</sup> the history of the Code is told as a history, with attention to its political evolution, the peculiarities of those who drafted it, and what their own purpose was in the venture. Brown's method is wrapped up in the complicated task of reconstituting late nineteenth-century legal culture. Needless to say, writing about an old law that is still, in large measure, in force today, is risky business if one neglects to bring an historicist approach to the task.

Indeed, one senses that it was a first-order preoccupation for Brown not to de-contextualize nineteenth-century materials and nineteenth-century thinking. He takes care to reconstruct the culture in which the rules in the *Code* took shape. Two very plain recurring motifs in the book give expression to this historicist sensitivity. Brown takes care to account for the legal culture in which the great event took place, in part, through repeated references to how the members of legal communities of a given day were trained as lawyers and what books they read along the way. In describing the legal systems in British North

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<sup>83</sup>See R. Gordon, "Critical Legal Histories" (1984) 36 *Stan. L. Rev.* 57.

<sup>84</sup>Hay, *supra*, note 82 at 18 explains that "[b]y 'thinking like a lawyer' I mean the intellectual habits which are purposefully honed in the course of most legal education and practice, but which vitiate historical explanation." To contrast, one need only look at some of Hay's own work to see how he sees 'thinking like a historian' about law. In "The Meanings of the Criminal Law in Quebec, 1764-1774" in L. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfred Laurier University Press, 1981) 77, Hay engages in an exploration of what he calls "the social meanings of criminal law": "By meanings", he explains, "I mean the interpretations put upon legal institutions by the populations who used and experienced them".

<sup>85</sup>Brown sets out his purpose in a series of rhetorical questions in the opening pages of the book: *supra*, note 1 at 4-5.

America in the nineteenth century he does not simply content himself with a description of the various laws in force but, say for New Brunswick, he describes the four-year clerkship required to join the Bar and examines a catalogue of the 348 volumes in the Law Society's library to help the reader measure what it meant to be a lawyer in the maritimes one hundred and fifty years ago.<sup>86</sup> Sensitivity to the history of law teaching and the contents of law libraries as useful techniques for reconstituting other "idea systems"<sup>87</sup> and avoiding the perils on un-historicized conclusion-drawing are part of a healthy tradition which has already affirmed itself among Canadian legal scholars.

Brown's penchant for non-legal primary sources greatly enriches the book. His hard work in sifting through unexplored or underexplored materials is particularly evident in respect of the correspondence he unearthed. As an example, the fragments of the correspondence between Sir James Gowan and Sir Henri-Elzéar Taschereau in 1880 are most telling in that they help make sense of the Supreme Court justice's well-known attack on the *Code* soon after it was adopted<sup>88</sup> and they add to the picture we have of this complicated and, for some, misunderstood, Quebec jurist.<sup>89</sup> The considerable effort involved in piecing together the puzzle on the basis of primary materials was no mean feat for Brown. As he explains in his bibliographical note at the end of the book, soon after Confederation the Department of Justice became a depository for certain papers relating to the 1892 codification. Not only are these holdings not open to the public, but they are in a high state of disorder. Brown's research is especially valuable for having cleared a trail and signalled an alarm for those concerned about this part of our national heritage going astray.<sup>90</sup>

Yet Brown's account does him credit as a history scholar but also, paradoxically, as a lawyer even though he is not one. One of the strengths of this book is the special care devoted to the history of the *Code* as legislation. Brown's method reveals the author's inclination to read laws and legal docu-

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<sup>86</sup>This instinct is part of a growing sensitivity to matching historical trends in legal thinking and historical trends in how lawyers are trained: see generally G. Blaine Baker, "Legal Education in Upper Canada 1785-1889: The Law Society as Educator" in Flaherty, ed., *supra*, note 15, vol. II, 49; and a series of articles published over the last fifteen years in the Dalhousie Law Journal, notably R. A. Macdonald, "The National Law Programme at McGill: Origins, Establishment and Prospects" (1990) 13 Dalhousie L.J. 211.

<sup>87</sup>Gordon, *supra*, note 80 at 1048.

<sup>88</sup>(1893) 16 The Legal News 36.

<sup>89</sup>See differing pictures of Taschereau emerging from Howes, *supra*, note 21, and, referring to this correspondence, Parker, *supra*, note 15 at 273-76 and R.C. Macleod, "The Shaping of Canadian Criminal Law 1892 to 1902" (1978) Can. Hist. Ass. Papers 64.

<sup>90</sup>Some scholars had enjoyed access to these documents before Brown (see Parker, *supra*, note 16 at 278 n. 40), but Brown's notes contain advice on how to cope with Department of Justice archives and how to obtain access to this important patrimony which he describes as disorganized and mismanaged: *supra*, note 1 at 178-79.

ments as closely as would the highest-priced solicitor.<sup>91</sup> He brings this close reading to many of the other statutes that litter the path he traces to the *Criminal Code, 1892*, noting that the same verbosity that plagued Sir Robert Peel's English legislation also dogged colonial statutes.<sup>92</sup> This analysis has the added advantage of being refreshingly non-legal, allowing Brown to observe formal rather than substantive niceties in circumstances in which a lawyer might have done otherwise.<sup>93</sup> This unlikely care with which Brown works through turgid material, apart from leaving the reader with the impression that the author is a talented advocate *dans l'âme*, lends considerable credibility to the author's conclusions in respect of the legislative impact of each of the various stages in the genesis of the *Code*.

If Brown is an advocate *dans l'âme*, a reading of "Quebec's Civil Law Codification Viewed and Reviewed" and other works by John Brierley point to something of an historian *dans l'âme* in this career law professor.<sup>94</sup> The success of Brierley's codification piece, written for the centenary of the *Civil Code*, lies principally in its method and its intellectually responsible conclusions. His work was not intended to record exhaustively the political and legal circumstances leading to codification, much less the full complexity of the social environment in which this event took place. Instead, Brierley's focus was the *modus operandi* of the Commission charged with the task of compounding, re-organizing and suggesting changes to the laws of Lower Canada in civil matters, based on an analysis of theretofore unexplored primary materials associated with the six-year enterprise. Brierley had discovered a trove of papers in the Quebec Provincial Archives and the archives of the *Séminaire de Québec*: a folio volume containing the private notes the Chairman of the three-person codifying Commission; the working papers or *cahiers* of the Commissioners, including draft provisions of what would become the *Civil Code*; and the minute book of

<sup>91</sup>A typical example is his reading of English legislation drafted during the tenure of Sir Robert Peel as Home Secretary in the Tory government of Lord Liverpool. The 1820s statutes concerning larceny, procedure and the like were supposed to "break [the] sleep of the century" but, as Brown explains, they more likely induced such sleep. Brown read these laws carefully, quoting a sample for the reader, noting the "almost mechanical technique used to draft them, and the fact that each section, regardless of length, was one interminable sentence, complete with enacting words, [and thus] produced the most stultifying prose": *ibid.* at 15, 17.

<sup>92</sup>Brown reproduces the 1809 Upper Canadian *Act to Prevent Frivolous and Vexatious Suits* to prove his point that 500-word sentences in statutes were not rare: *ibid.* at 72.

<sup>93</sup>See his comparison between the shape of early nineteenth century colonial legislation and the English model focusing on volume size, pagination and editing style, *etc.*: *ibid.* at 70.

<sup>94</sup>See, among others, his doctoral thesis, *Arbitrage conventionnel au Canada et spécialement dans le droit privé de la Province de Québec* (Doctoral dissertation in law, Université de Paris, 1964) [unpublished] *passim*; "The Co-existence of Legal Systems in Quebec: «Free and Common Socage» in Canada's «pays de droit civil»" (1979) 20 C. de D. 277; "Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities" (1986) 10 Dalhousie L.J. 5; "La notion de droit commun dans un système de droit mixte: le cas de la province de Québec" in *La formation du droit nationale dans les pays de droit mixte*, *supra*, note 69, 103.

the Commission recording its regular meetings.<sup>95</sup> The scope of his study was purposefully limited: this newfound material would provide fresh insight into the “attitudes and methods” of the Commissioners, but would not necessarily provide the basis for conclusions to be drawn on the nature of Quebec society into which the *Civil Code* was introduced. Mindful of the methodological limits that he had put on his inquiry, Brierley provided the following *caveat* to his own text:

In reviewing the reasons why any codification took place, it is certainly important not to neglect the political (or economic or social) context of the country in which it occurred. At the same time, it is manifestly dangerous to attempt to elucidate the circumstances leading to or contemporaneous with such event by means of attitudes that have only been produced by later historical developments. This is part of the problem in the case of the Quebec codification: there was clearly a series of compelling legal, technical and even linguistic reasons for advocating the codification of the law, and these alone still provide sufficient justification on which to view it historically.<sup>96</sup>

Not only did this distance, in advance, Brierley from those critics suspicious of legal history practised by lawyers, it marked the author’s sober approach to what remain intoxicating materials on which his study is based. And while Brierley’s account of codification does not fall squarely within the Hurstian ‘law and society’ brand of legal history, it forms part of a successful *genre* that seems to be particularly well-established among Quebec lawyers. Brierley examined these technical documents on their own terms, bringing his understanding of doctrinal issues in Quebec law and then contemporary tensions in the system of methodology of law. It would have been impossible to explain the *cahiers* fully without a refined sense of what one nineteenth-century jurist called the “salmigondis”<sup>97</sup> of sources of Quebec private law.

Perhaps the most successful recent manifestation of this brand of lawyers’ legal history is Jean-Maurice Brisson’s thesis on the evolution of civil procedure in Quebec from the ‘Quebec Act’ to the botched codification of 1867.<sup>98</sup> Brisson explained that his study of codification was designed to “reconstituer la physiologie du droit en vigueur”.<sup>99</sup> Like Brierley, Brisson was ruthlessly responsible in the conclusions he drew from the material under study, much of which was unexplored or underexplored. Like Brierley, Brisson had recourse mostly to legal materials, that is writing associated with lawyers, judges and legislators,

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<sup>95</sup>Brierley provided a detailed description of these papers in a bibliographical note: *supra*, note 3 at 575. He arranged for a copy of these materials to be placed in the collection of the Law Library of McGill University.

<sup>96</sup>*Ibid.* at 526 [emphasis added].

<sup>97</sup>Term used to describe the incoherent mass of sources in Amury Girod, *Notes divers sur le Bas-Canada* (1835) cited by Morel, *supra*, note 7 at 133.

<sup>98</sup>*Supra*, note 7.

<sup>99</sup>*Ibid.* at 27. He explained his purpose in more general terms in the preface at 7.



but, mindful of that, limited how far he was prepared to extrapolate beyond those sources.

In a recent historiography of Quebec law, Vince Masciotra cited Brisson and Brierley's work as the most noteworthy of what he called "traditional legal scholars [who] have instrumentalized the most venerable historical methods, chronology and source criticism, in a positive quest for the sources of law."<sup>100</sup> Masciotra argued that there was a danger in this approach in that it promoted a view that the meaning of law lies exclusively in legal texts. This criticism is by no means new. Championed again by Robert Gordon,<sup>101</sup> it has recently been applied to Canadian legal historiography by David Flaherty who borrows the term "internal legal history" to describe the work of the historian who "stays as much as possible within the box of distinctive-appearing legal things".<sup>102</sup> This is contrasted with the 'better' brand of "external legal history" which associates legal "things" with the wider society of which they are a part, avoids the temptation to exaggerate the contribution of the bench and bar to the community in preference to a social history of law.

These categories have their critics;<sup>103</sup> my view is that the distinction is based on an overly eager association between lawyers' legal history and the worst evils of legal positivism. True, there are methodological limits on the conclusions one can draw from strictly legal materials. But all legal history does not aspire to social history. Laws have their own history — an "historicité interne au droit"<sup>104</sup> —, and one that has always had a well-deserved place in Quebec legal scholarship where an understanding of the historical sources of law is an important lawyers' skill.<sup>105</sup> Moreover, complete and responsible histories of legal institutions such as the codes examined by Brierley and Brown form part of the political history of a given community,<sup>106</sup> as the even the standard-bearers

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<sup>100</sup>*Supra*, note 77 at 730.

<sup>101</sup>J. Willard Hurst and the Common Law Tradition on American Legal Historiography" (1975) 10 *Law & Soc. Rev.* 44.

<sup>102</sup>*Supra*, note 15 at 12 citing Robert Gordon.

<sup>103</sup>Flaherty, *ibid.* at 12ff. recognized that these categories were not black and white. See also David Kettler, "The Question of 'Legal Conservatism' in Canada" (1983) 18 *J. Can. Stud.* 136 at 142 who contends that the distinction makes light of the necessary attention of which "forms and reasonings of law" are deserving. David Bell, *supra*, note 77 at 318 warns of the dangers of an American model embracing such ideas without reflection of the specificity of Canadian historicism.

<sup>104</sup>See this idea as developed by François Ewald, "Droit et histoire" in *Droit, nature, histoire: IVième Colloque de l'Association Française de Philosophie du Droit*, 1984 (Aix-Marseille: Presses Aix-Marseille, 1985) 129.

<sup>105</sup>For a strong expression of this idea at a time when legal sources in Quebec were at their most confused see M. "Sur la nécessité que les étudiants, les avocats et les juges connaissent l'histoire du droit" (1846) 1 *Rev. de lég. et jurispr.* 102.

<sup>106</sup>See, on this point, André Morel's preface to Brisson's thesis, *supra*, note 7 at 5-8. Indeed Morel's own work is perhaps the most eloquent expression of this sensitivity in the Quebec legal

of the American movement have pointed out.<sup>107</sup> Furthermore, this brand of scholarship permits social history to be pursued, if only by others, with assurance. Brierley, Brisson and indeed the historian Desmond Brown, in accounting for the history of a legislative process, demonstrate the usefulness of rigorous internal legal history, for what the term is worth.

To my mind, the greatest failing of internal legal history is as much circumstantial as methodological. Even if one can respect the limits that method places on this brand of research, the focus on lawyers' concerns can distort the social relevance of these concerns among lawyers themselves. Robert Gordon has made this point plain in a review of the historical literature on codification which, he suggests, may have created the nineteenth century codification "movement" it purported to comment upon.<sup>108</sup> He argued forcefully that the attention received by the codification now is inflated considering that codification was designed largely as formal changes to lawyers' internal rules and practices. The internal legal historians' near-obsession with codification can only be that of a lawyer: a social historian might bury in a footnote material to which Brierley, Brisson and the present writer might devote pages. A cynic might say that only someone with a stake in reinforcing the established order would invest such energy in law reform that was more technical than social in its purpose. Yet at the very least (or most), these accounts can give historical insight into codification which may prompt a better sense of what codification was, and is, which I consider in the final section of this paper.

## II. Given Codification, How is it Possible?

Beyond rising to the challenge of disproving the theory that two uncharted parallel lines may indeed intersect, a comparative reading of the accounts of these codifications provides the occasion to reflect on codification as a modern legislative technique and on how historically contingent this legislative technique may in fact be.<sup>109</sup> Indeed it seems safe to assume that both Brown and

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literature: see "La codification devant l'opinion publique de l'époque" in Boucher & Morel, *supra*, note 29, vol. I, 27 and "L'apparition de la succession testamentaire [:] Réflexions sur le rôle de la jurisprudence au regard des codificateurs" (1966) 26 R. du B. 499 as examples of this brand of Morel's work treating the subject matter of the present paper.

<sup>107</sup>In "Alexander Hamilton, Law Maker" (1978) 78 Colum. L. Rev. 483 at 483, J. Willard Hurst noted that

Much of public policy belongs only to its own time. But some aspects of the past enters into the present, and in light of such continuity we can more realistically identify and judge the premises on which we use law.

<sup>108</sup>"Book Review" (1983) 36 Vand. L. Rev. 431, esp. at 437.

<sup>109</sup>A detailed account of the idea that *what* codification means depends on *when* you ask it is found in J. Vanderlinden, *Le concept de code en Europe occidentale du XIIe au XIXe siècle [:] Essai de définition* (Brussels: Université Libre de Bruxelles, 1967). See also, J. Gilissen, *Introduction historique au droit* (Brussels: Bruyant, 1979) at 408-25.

Brierley were encouraged to write their histories given the modern-day relevance of codification. It can hardly be ignored that, first, both the *Criminal Code*<sup>110</sup> and the *Civil Code of Lower Canada*<sup>111</sup> were in force at the date of the publication of these histories and that, second, both codes were the object of resuscitation efforts by law reformers when *Genesis*<sup>112</sup> and "Civil Law Codification"<sup>113</sup> appeared. It seems appropriate to consider 'what is' codification in part by asking 'what was' codification, as long as one is mindful of — or at least apologetic for — present-mindedness. Yet starting from the proposition that the mere existence of these two codifications proves that codification is in fact possible as a legislative technique plainly begs more questions than it answers. At the very least, one must define terms and describe the historical and other contingencies upon which these definitions are premised.

A first and perhaps obvious point: 'code' means different things to different lawyers. Both the Canadian criminal law<sup>114</sup> and Quebec private law<sup>115</sup> had been called codes well before any legislature had given them that name. Over the years all manner of statutes have been dubbed codes in Canada, both formally and informally, and it seems fair to suspect that, at the very least,

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<sup>110</sup>For an overview of the legislative reform brought to the *Criminal Code* since its adoption in response to what the author calls "[P]leas for a systematic and principled approach to reform of the criminal law in Canada [which] are ... almost as old as the *Code* itself" see P. Healy, "The Process of Reform in Canadian Criminal Law" (1984) 42 U. T. Fac. L. Rev. 1.

<sup>111</sup>The *Civil Code* had been modified significantly since 1866 but retained the same essential structure. For the full legislative history of the *Code* see Paul-A. Crépeau & J.E.C. Brierley, eds, *Code civil/Civil Code 1866-1980, Édition historique et critique/Historical and Critical Edition* (Montreal: SOQUIJ, 1981) and its *Supplément/Supplement 1980-1983* (1983).

<sup>112</sup>The publication of Brown's book in 1990 occurs at a time when the Law Reform Commission of Canada has undertaken a complete recodification project for substantive and procedural criminal law: see L.R.C.C., *Recodifying Criminal Law, supra*, note 11 and *Our Criminal Procedure: Report 32* (Ottawa: L.R.C.C., 1988). Brown alludes to this effort in his "Epilogue", *supra*, note 1 at 149-164.

<sup>113</sup>The publication of Brierley's article in 1968, *supra*, note 3 coincided with the work of the Civil Code Revision Office, in which Brierley participated, which was charged by the Quebec government with the preparation of a Draft Civil Code: see Civil Code Revision Office, *Report on the Draft Civil Code*, 3 vols. (Quebec City: Éditeur officiel, 1978). The article was written in connection with the legal community's observing of the centenary of the *Civil Code*: see J. Boucher, J.E.C. Brierley & A. Morel, *Centenaire du Code civil — Centenary of Civil Code 1866-1966 Exposition — Exhibition Catalogue* (Montreal: Litho. Pierre Des Marais, 1966) [pamphlet].

<sup>114</sup>In the preface to his book which post-dated the 1869 consolidation of criminal law but preceded codification by some twenty years, S.R. Clarke wrote "there is one uniform Code of Criminal Jurisprudence prevailing from the Atlantic to the Pacific": *A Treatise on Criminal Law as Applicable to the Dominion of Canada* (Toronto: R. Carswell, 1872) at v.

<sup>115</sup>In *Fundamental Principles of the Laws of Canada*, vol. II, (Montreal, 1843) at 1, N.B. Doucet used the expression "Civil Code" to describe a pre-codification amalgam of private law sources: cited by Brierley, *supra*, note 3 at 535 n. 35. Indeed the Privy Council, which has on occasion been criticized for its infelicitous use of the term, described the *Coutume de Paris* as a "code" in *Hutchison v. Gillespie*, [1844] 1 A.C. 217.

Quebeckers<sup>116</sup> and non-Quebeckers<sup>117</sup> use the term differently. If some Quebeckers seem to use the term with considerable reverence,<sup>118</sup> while others do so with considerable licence,<sup>119</sup> when all is said and done a code is, for the civilian, “le modèle du droit”<sup>120</sup> and, for the Quebec jurist, an “instrument, érigé en symbole, de perception de droit”, to use Brisson’s elegant description of the *Civil Code of Lower Canada*.<sup>121</sup> But this multiplicity of codes makes for little common ground.

It is nevertheless understandable that both Brown and Brierley be preoccupied by the very essence of codification in their respective histories. Brown begins his book with a theoretical effort to define codification. While no mention is made in this opening chapter of the heady local precedent of 1866, in six bold pages Brown reviews Benthamite thinking, considers the ‘codes’ of the ancients, digs into English, French and German dictionaries and legal lexicons, and looks to the French *Code Napoléon* and the *Code pénal*, the Institutes, the German *Bürgerliches Gesetzbuch* and even the *United States Code* for guidance. Brown concludes sensibly that any definition “that purports to be inclusive of all past experience must be very general and unspecific, comprising only the element that is common to the experience, namely, the *systematization* of an existing body of law”.<sup>122</sup> The *Criminal Code, 1892* is presented as a variation on this theme: Brown quotes from Attorney General Sir John Thompson’s address to the House of Commons in April of 1892 on second reading of the Bill that it was “a reduction of law to an orderly written *system*, freed from needless technicalities, obscurities and other defects ... .”<sup>123</sup> I have added emphasis to

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<sup>116</sup>Civil law scholar Robert Kouri has objected to the characterization of the *Criminal Code* as an ordinary statute, choosing himself to describe it as a “véritable codification du droit répressif” even if incomplete: “Réflexions sur les interventions chirurgicales et la défense de l’article 45 du Code criminel” (1982) 12 R.D.U.S. 499 at 504-05.

<sup>117</sup>Few Quebeckers would use the word as did criminal law reformer J.C. Martin in the following sentence: “Although the British Parliament passed other Codes, e.g. the *Partnership Act* and the *Sale of Goods Act*, it failed to pass a Criminal Code”: *supra*, note 74 at vi.

<sup>118</sup>For a recent example in respect of recodification, see P. Legrand, jr, “Consolidation et rupture: les ambiguïtés de la réforme des contrats nonnés” (1989) 30 C. de D. 867, esp. at 870-72, in which the author objected to the form of the *Loi portant réforme au Code civil du Québec du droit des obligations*, 1st Sess., 33rd Leg. Que., 1987, as “le triomphe du technocrate et de sa prose”.

<sup>119</sup>An example of an expansive use of the term by a Quebec jurist is Fernand Veilleux, *Code forestier* (Duschenay, 1945), a pocket-sized volume written to “rendre service à l’homme qui vit en forêt ou que la forêt fait vivre” (at v) and which, in addition to excerpts from legislation relating to life in the woods, includes chapters entitled “Notions de Droit civil .. Droit commercial ... Droit criminel ... Droit municipal” as well as notes on first-aid and good citizenship.

<sup>120</sup>François Ewald, “Introduction” in Ewald, ed., *La naissance du Code civil* (Paris: Gallimard, 1989) at 9, speaking of the Napoleonic Code. He continues, “le Code civil survit à ses propres modifications; il a une existence propre, indépendante des lois qu’il contient” (at 10).

<sup>121</sup>*Supra*, note 7 at 17.

<sup>122</sup>*Supra*, note 1 at 11.

<sup>123</sup>*Ibid.* at 10-11.

these quotations to signal that whatever codification means, the word 'system' is plainly central to Brown's conception thereof.<sup>124</sup> And Brown is in good company. From the earliest scholarly evaluations of the *Canadian Criminal Code*<sup>125</sup> to more recent comments on codification and law reform,<sup>126</sup> some notion of 'systematization' appears at the heart of the matter.

For Brierley, the dual preoccupation of 'what is' and 'what was' a code was just as central to his account of the 1866 codification. This is not at all surprising given that part of his purpose, in exposing the *cahiers* of the codifiers 100 years after the fact, was to "shed new light" on provisions of the 1866 *Code* which remained in force.<sup>127</sup> He devoted considerable energy to discovering the legal and technical considerations in the civil law codification, noting that — at least in 1857 — the primary goal was "the organization and coordination of the whole *corpus* of Lower Canada's private law ... in the simplified and readily accessible form of a code".<sup>128</sup> Codification has been viewed by Brierley<sup>129</sup> and others<sup>130</sup> (as well as by the Commission which had undertaken — and in some measure defined — the task<sup>131</sup>) as a legislative technique for achieving "systematization" of the law. Indeed this idea of 'system' is a recurring motif in Brierley's text as it was in Brown's. What is the 'system' that is at the root of codification?

<sup>124</sup>The quest for what Brown calls the "systematization" of law is a dominant theme in the book if one judges from the number of times he uses this term and its cousins in respect of law reform: see, *inter alia*, *ibid.* at 5, 7, 11, 22, 24, 28, 32, 70, 84, 91, 102, 113, 120, 132, 145, 146, 148 (twice) and 149.

<sup>125</sup>See John J. Power, *The Criminal Law of Canada* (Doctoral dissertation in law, Université Laval, 1924). The Halifax lawyer who wrote this early thesis at a Quebec university described the *Code* as an effort to "arrange the law of crime systematically" (at 1), placing it in the same tradition as the Code of Hammurabi, the *Code Napoléon*, the *Civil Code of Lower Canada*, the Fitzjames Stephen draft and David Dudley Field's New York codes, among others.

<sup>126</sup>Healy, *supra*, note 110 at 9 describes a "deductive" model for criminal law reform, in which codification may partake, as "characteristically systematic and comprehensive".

<sup>127</sup>Brierley, *supra*, note 3 at 524. Brierley the advocate was careful to signal to the reader that the *cahiers* could not, however, constitute aids in any process of "strictly legal interpretation" (at 525).

<sup>128</sup>*Ibid.* at 541.

<sup>129</sup>"The nineteenth century was the period when the *technique* of codification — merely one legislative formula for achieving a systematization of the law — was finally perfected": *Ibid.*

<sup>130</sup>The term springs up with striking regularity in other accounts of codification. See e.g. Brisson, *supra*, note 7 at 17, who in his first sentence of his book on the codification of Quebec civil procedure, describes the process as the "réorganisation complète et systématique d'un ensemble de règles juridiques", and later, at 119, describes Cartier's vision for sorting out the mass of sources of Quebec law as a code, "un ouvrage unique, complet et systématiquement conçu ... ."

<sup>131</sup>In the Report tendered with the draft *Code* to the Legislative Assembly of the Province of Canada the Commissioners, the codifiers, noted that "[t]he compilation and digest in the form of a code, of the entire body of our civil law, ... constitutes a *system* ... .": *Civil Code of Lower Canada. Sixth and Seventh Reports and Supplementary Report* (Quebec: G. Desbarats, 1865) at 262 [emphasis added].

Attempts at defining codification are as many and varied as attempts at codification and at least as complex. It may well be impossible to trace one idea of 'system' to the various enactments commonly called codes.<sup>132</sup> But the fact that both the *Criminal Code* and the *Civil Code* have been perceived to constitute 'systems' and that this continues to be a stated goal for their reform should prompt an effort to sort out the constituent elements of the system in order to clarify the meaning of codification. Two themes which are common to many understandings of codification were expressed by J.C. Martin (a latter-day Canadian criminal law codifier of sorts) who said that, in part, a code is a "complete and co-ordinated body of law".<sup>133</sup> I propose to canvass briefly these themes of comprehensiveness and of co-ordinated style and organization over the following pages.

While common sense and a sense of history would suggest that law defies this brand of comprehensive legislative expression, it is remarkable to observe the number of codifiers and describers of codes who allude to this as a purpose in codification. Indeed there is some evidence that comprehensiveness — at some level — was an objective in 1866<sup>134</sup> and, to a lesser extent, in 1892.<sup>135</sup> Conventional wisdom — certainly conventional among lawyers<sup>136</sup> — is that the 1892 codification did not result in a code at all.<sup>137</sup> The usual focus is on the ability of judges to create criminal law outside of the ambit of the *Code* which is

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<sup>132</sup>The authors of the (Quebec) *Private Law Dictionary* (Montreal: Quebec Research Centre of Private and Comparative Law, 1988) at 34 define "Code" in part as follows: "Body of fundamental legislative provisions designed to present the different subject matter of an important branch of the law in a *systematic* and coherent manner" [emphasis added]. The definition expressly extends to "civil code" and "*Civil Code of Lower Canada*" but it is unclear whether it would apply to a document such as the *Criminal Code*.

<sup>133</sup>*Supra*, note 74 at 3.

<sup>134</sup>In the last paragraph of their *Reports* submitted in 1864, Commissioners Caron, Day and Morin advised the legislator to proceed carefully and soberly with amendments to the *Code*, so that it might "gradually and surely become more and more complete": *supra*, note 60 at 264.

<sup>135</sup>Brown, *supra*, note 1, describes, at 121ff. the considerable confusion in respect of this objective, and the manner in which the *Code* was almost given a true "general part" by Burbidge. In the end, notes Brown at 126, the *Code* "did not purport to be exhaustive of the penal law, nor did it contain a provision to abrogate the common law, as the English models had."

<sup>136</sup>Brown, while not disagreeing with this lawyers' nuance, took a broader view of this quest for a written system of Canadian criminal law. In the abstract to his unpublished thesis on which the book is based, Brown alluded to the criticism that the *Criminal Code* was not a "real code" and noted that the "thesis of this dissertation is that Canada did indeed adopt a 'real' code which, since it will soon be one hundred years old, has withstood the test of time": *supra*, note 9 at vi. Part of the challenge in reading Brown's book is inferring, both from an historical and a contemporary perspective, just what a 'real' code actually is.

<sup>137</sup>This view does not seem to be time-bound: see, e.g., Taschereau's attack in the months after the *Code's* adoption, *supra*, note 87 at 37; J.D. Cameron, "Codes and Codification" (1917) 37 Can. L. Times 195; G. Crouse, "A Critique of Canadian Criminal Legislation" (1934) 12 Can. Bar Rev. 545, 601 at 566; and G. Parker, *supra*, note 15 at 247 who gives a thumbnail sketch of the issue which he describes as "a matter of debate".

therefore not comprehensive and it is thus not a true code. This argument is invoked today as proof positive that the *Criminal Code* currently in force is no more a code than its 1892 predecessor.<sup>138</sup> In fact, one of the Law Reform Commission of Canada's four objectives for its new criminal code is "comprehensiveness", presumably to make good the current state of affairs.<sup>139</sup> The proposed code purports to include all substantive defences, "in the interest of comprehensiveness", which flies in the face of the Anglo-Canadian idea that courts should always be free to create defences as circumstances may require. The conventional and rather sensible position of criminal law in the English tradition is that courts should always retain a measure of control over the rule-making process in respect of defences to assure that the statutory criminal law does not result in the imprisonment of someone where that would be unjust. The principles of fundamental justice which animate the criminal law, and which are now entrenched in the Canadian constitutional law, thereby preclude a complete legislative statement of the criminal law.<sup>140</sup>

Comprehensiveness as a goal sets up losing debates as to the 'trueness' of codes, as much for private law as for criminal law. Perhaps the most telling warning to be modest in this regard comes from the *rédacteurs* of the French *Code* of 1804. Portalis in his famous *Discours préliminaire* given before the Conseil D'État argued for his colleagues that it was naive to think that any code could be complete:

*Tout prévoir, est un but qu'il est impossible d'atteindre. ... Un Code, quelque complet qu'il puisse paraître, n'est pas plutôt achevé que milles questions inattendues viennent s'offrir au magistrat.*<sup>141</sup>

In an article published in 1989 which in large measure develops thinking begun in "Civil Law Codification", Brierley described different ways in which the *Civil Code of Lower Canada* was and is inherently incomplete.<sup>142</sup> He went back to the archival material that he had catalogued twenty years earlier to show

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<sup>138</sup>When the *Code* was revised in 1954, a rule was added (now s. 9, R.S.C. 1985, c. C-46) which precluded the possibility of a person being convicted for an offence at common law, except for contempt. This made the *Code* more comprehensive for offences, but judges remained and remain free to invoke defences which are not provided for expressly in the *Code*. Thus it is argued that the *Code* is not complete and is therefore not technically a code: see, e.g., Martin, *supra*, note 74 at 3; Law Reform Commission of Canada, *supra*, note 10 at 28.

<sup>139</sup>*Ibid.* at 9.

<sup>140</sup>This is the necessary consequence of the interpretation given to s. 7 of the *Canadian Charter of Rights and Freedoms* by Lamer J. (as he then was) in *Reference Re: Motor Vehicle Act of B.C.*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 36 M.V.R. 240. The Law Reform Commission, *ibid.* at 28 acknowledges that constitutionally entrenched "principles of fundamental justice" will always allow judges to develop other defences.

<sup>141</sup>The *Discours préliminaire* is reproduced in Ewald, *supra*, note 120, 35 at 39, 41.

<sup>142</sup>"Quebec's 'Common Laws' (Droits Communs): How Many are There?" in E. Caparros, ed., *supra*, note 30, 111 at 114-20.

that the Canada East codifiers themselves understood that the *Code* they were drafting was to be necessarily incomplete as it was superimposed upon a *droit commun* residing in implicit norms. He cited Charles Dewey Day's injunction that the laws of God, of Nature, of common sense, as well as custom and the tenets of a universal legal education underlie and sustain all positive legislation:

Every Code of Laws however full & complete it may be necessarily pre-supposes not only the existence but also the knowledge ... of certain primary and fundamental principles.<sup>143</sup>

Brierley extended his argument against the narrow view that true codification is predicated on completeness by demonstrating that, in 1866, the *Code* was intended only as a partial statement of Quebec law. Beyond the implicit norms, the *Code* also left intact a *droit commun* residing in historical fact. Again extending an argument that he traced twenty years earlier, he pointed to the mass of historical sources that the codifiers expressly chose to leave in place,<sup>144</sup> specifically enumerated in Edouard Caron's *cahiers*.<sup>145</sup> Unlike France, where the 1804 *Code* is often described as a *rupture* with the past, Quebec codifiers and code-watchers<sup>146</sup> cheerfully admit that the *Civil Code of Lower Canada* was not and is not<sup>147</sup> a complete catalogue of private law. If the *Code* was and is a 'system', the essence of the system must reside elsewhere. Indeed one is inclined to encourage both modern-day criminal law and Quebec private law codifiers<sup>148</sup> to take note of the Portalis' warning and curb in their avowed ambitions to codify completely a body of law. The better view (and this might be what some mean when they allude to completeness or comprehensiveness) is

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<sup>143</sup>Day, "Cahier S.764" cited in Brierley, *ibid.* at 115 n. 7. Brierley cited this same passage in 1968 as evidence that the *Code* was "not conceived in a spirit of legal positivism": *supra*, note 3 at 565.

<sup>144</sup>Art. 2712 C.C. [numbered 2613 in 1866] which states that the law in force in 1866 remains so unless otherwise provided by the *Code*.

<sup>145</sup>The codifier's notes were reproduced and annotated in Brierley, *supra*, note 3 at 547ff. The sources Caron listed extended beyond the *Coutume de Paris* to include other elements of French *droit commun*, English and French statutes, cases and doctrine, Roman law *etc.*

<sup>146</sup>See Mignault, *supra*, note 30 at 727, for whom the *Code* was "l'expression complète du vieux droit":

Je puis donc dire que notre Code civil énonce en substance la doctrine du vieux droit coutumier, et je ne crois pas qu'il existe au monde de monument législatif, pas même le Code Napoléon, qui en contienne un exposé aussi fidèle.

<sup>147</sup>For a recent affirmation of this idea see the notes of Chouinard J., in *Lapierre v. A.G. Quebec*, [1985] 1 S.C.R. 241, 16 D.L.R. (4th) 554, 32 C.C.L.T. 233.

<sup>148</sup>See *An Act to add the reformed law of persons, successions, and property to the Civil Code of Québec*, S.Q. 1987, c. 18 [not in force] which hints at an objective of comprehensiveness in a Preliminary Provision to the Civil Code of Québec: "The Civil Code comprises a body of rules which in all matters within the letter, spirit or object of its provisions, lays down the *droit commun*, expressly or by implication." This statement and the idea of a *droit commun* residing in legislative enactment is canvassed in Brierley, *supra*, note 142 at 120ff., esp. at 121 n. 25, 26.



that completeness is an unattainable objective, and that 'systematizing' must — or should — mean something else.

So if the *Civil Code of Lower Canada* and the *Criminal Code, 1892* were not complete systems, were they nevertheless systems — and thereby codes — in another sense? To return to the hallmarks of a code cited by J.C. Martin earlier, does the simple (or not so simple) 'coordination' of a given body of law amount to codification? Others, such as French private lawyer Bruno Oppetit, who link codification to systematization, have explained the latter concept in part by identifying process-oriented objectives of codification to explain the system. Oppetit noted that recent codifiers of French civil law, penal law and procedure have cited themes of simplification, clarification, organization as well as the "souci de remédier à l'excessif morcellement des sources du droit" to explain their efforts.<sup>149</sup> This sense of the "valeur générale du procédé de la codification"<sup>150</sup> may be instructive in coming to an understanding of the 'systematization' which Brown and Brierley described in respect of their codes.

According to this view, systematization, as the hallmark of the legislative technique, relates to the coherence of the legislative expression rather than its completeness. A code is a system with an inner logic. And each code — each system — will have its own inner logic rooted in its organization and its style. A successful code is, for Crépeau, "un tout, organique et cohérent".<sup>151</sup> Codification is, according to this view, a process which seeks to achieve these ends. Within a given subject-matter, within a given social and ideological framework, the codifier creates this system within a single document.

The quest for stylistic and organizational unity may appear a modest one, but as codifiers of different stripes have quickly learned, creating a 'unified' document is no mean feat. A uniform use of language is part of this mission,<sup>152</sup> and a measure of the success of a codification has often been its literary quality.<sup>153</sup> This matter is made more complex for Quebec and Canadian codifiers by

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<sup>149</sup>"L'expérience française de codification en matière commerciale" (1990) Rec. Dalloz 1 at 4.

<sup>150</sup>*Ibid.*

<sup>151</sup>Crépeau, *supra*, note 31 at XIV described the *Civil Code* of 1866 as having had this quality upon its adoption, and as having lost it at its centenary, thereby needing reform. Brierley described the way in which the *Civil Code* is perceived by civilians as "a certain perfection in the organization and style of legislative expression": "The Civil Law System in Canada", (Paper presented at the annual meeting of the Canadian Association of law librarians, Sherbrooke, Que., 1973) [unpublished] at 39.

<sup>152</sup>See generally D. Klinck, "The Language of Codification" (1989) 14 Queen's L.J. 33. For a particularly critical view of the unwanted side-effects of poor codal and legislative drafting for Quebec, see Adjutor Rivard, "De la technique législative: 3ième Rédaction" (1923) 1 Rev. du D. 442.

<sup>153</sup>François Gény analyzed the *Code Napoléon* as an "oeuvre littéraire *sui generis*" in "La technique législative dans la codification civile moderne" in *Le Code civil 1804-1904 [:] Livre du centenaire*, *supra*, note 33, 991, esp. at 1003:

the challenge of legal bilingualism. An important part of the purpose of the 1866 codification was, according to Cartier, rendering the private law of Lower Canada fully accessible to both English and French-speaking jurists,<sup>154</sup> and the quality of the 1866 translation is one of its greatest and most enduring successes.<sup>155</sup> The translation of the 1892 *Criminal Code* into French is largely an untold story. Brown makes little mention of this remarkably important, difficult and poorly executed part of the codification enterprise. It was important, as André Morel has argued, because it was the French text that would promote what Morel has called the “enracinement” of the English criminal law in Quebec.<sup>156</sup> It was difficult in that Anglo-Canadian criminal law has a very close relationship with the English language: so close, in fact, that it is arguable that the French-language expression of Canadian criminal law is normatively distinct from the English language *version originale*.<sup>157</sup> Finally, the poor execution of the 1892 translation is evident in the very titles of the two *Codes*.<sup>158</sup>

In a similar way, a measure of the success of a code is often the coherence of its organization. Both the *Civil Code of Lower Canada* and the *Criminal Code, 1892* were enactments drafted to include tables of contents, which was unusual for legislative drafting at the time each of these laws were adopted. Many claim, particularly in respect of the *Civil Code*, that part of the inner logic of the ‘system’ is in the *plan*.<sup>159</sup> It is often this aspect of the system that critics fix upon when insisting that a code needs to be revised. Bruno Oppetit has described two legislative phenomena which contribute to codal systems falling apart: he notes the *décodification* and *instrumentalisme juridique* which have afflicted the French *Code de commerce* and which threaten to destroy the very

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... on peut découvrir, sous les formules aisées, nettes et sans pretention, de notre codification civile, une sorte de technique inconsciente, préparée de longue main par les coutumes rédigées, les travaux de nos anciens auteurs, surtout les ordonnances royales, et plus directement par les lois révolutionnaires, vraiment nouvelle néanmoins en la frappe définitive dont a su la marquer le clair de la génie de la France moderne [...].

<sup>154</sup>Brierley, *supra*, note 3 at 535ff.

<sup>155</sup>While it would be naive to consider the two texts as normative equivalents, the better view is that the codification process itself made neither version more authoritative than the other. As Brierley demonstrated on the basis of the codifiers *cahiers*, *ibid.* at 537, first drafts of the *Code* may have been in French or in English, but final versions reflected as best as possible the codifiers' preoccupation with generating equivalent texts.

<sup>156</sup>Morel, *supra*, note 7.

<sup>157</sup>This argument is developed in Kasirer, *supra*, note 25.

<sup>158</sup>The complete title of the *Criminal Code, 1892*, 55-56 Vict., c. 29 was “An Act respecting the Criminal Law” in English and “Acte concernant la loi criminelle” in French. The current title in French has substituted “droit” for “loi”.

<sup>159</sup>See Marcel Planiol, “Inutilité d’une révision générale du Code civil” in *Le Code civil 1804-1904* [:] *Livre du centenaire*, *supra*, note 30, 957 for a strongly-worded plea against amending the *plan* of the *Code Napoléon*.

coherence of the *plan* which made it a code in the first place.<sup>160</sup> Indeed it is a matter of considerable debate among Quebec jurists as to what topics deserve a place in the *Code*<sup>161</sup> and in what detail they may be so deserving.<sup>162</sup>

Is organizational and stylistic 'systematization' any more attainable than comprehensiveness as an objective for codification? The *Civil Code*, given its ambitious scope, cannot hope to conform to a single organizational or stylistic *genre* throughout. The chapter of the Book of Obligations treating offences and quasi-offences, which in 1866 had only four articles, is cast very differently from the rules on the extinction of obligations found in the same Book. What allows the two chapters to be part of one unified system is something far more subtle than equivalent organization and style. The same might be said of the *Criminal Code*, where strikingly different drafting styles and organization were necessary to accommodate rules on murder and rules on courts' jurisdiction within the same 'system'. Today, each code contains 'codes-within-codes', impinging on the system further still.<sup>163</sup>

But while those promoting codes as 'systems' often argue that organizational unity is at the core of what makes a code a code, they often fail to explain what the *fil conducteur* of that unity is. Rather than finding codal integrity in its uniform style or formal organization, one might focus on the mission of those charged with codification as the clearest defining feature of the system. A civil code has an inner logic rooted in its objective of setting a framework for the regulation of women and men as private persons in civil society. As Brierley has said, the Quebec *Civil Code* has the status of "common law" in that "[i]t defines and sets out – it *constitutes* – the most fundamental categories and concepts that provide the *cadre* of Quebec legal thought in one of its main branches, the private law".<sup>164</sup> This mission shapes the document and, most probably, renders comparison with the *Criminal Code*, with its different mission, difficult.

Given the frustrations of discovering the key to the systematization of the codes, it is tempting indeed to conclude that codification is an *ad hoc*, task-

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<sup>160</sup>*Supra*, note 149 at 3, which phenomena he explains as "l'utilisation des règles de droit comme simple moyen d'action au service de telle ou telle finalité circonstancielle, au détriment de la stabilité, de la continuité et de la cohérence des concepts juridiques".

<sup>161</sup>See the controversial position argued for by Pierre-Gabriel Jobin to the effect that consumer protection rules belong in a renewed Quebec civil code: "Prospective générale" (1989) 30 C. de D. 557 at 562.

<sup>162</sup>The proposed draft bill on the law of obligations directs that its provisions may be completed by regulations in some instances, which is, for Jobin, "assez loin de l'idéal napoléonien, ... qui fut jadis le nôtre, d'un petit code dans lequel chacun pourrait trouver les préceptes utiles pour régler tous les différends entre individus": "Chronique de droit civil québécois" (1990) R.T.D.C. 841 at 846.

<sup>163</sup>The rules on the interception of communications at ss. 184ff. of the *Criminal Code* and the rules on condominiums at arts 441bff. of the *Civil Code* are two possible examples.

<sup>164</sup>*Supra*, note 142 at 122-23.

oriented technique which defies description, let alone the charting of a road map for its *modus operandi*. That there are no universal truths in codification would also satisfy the legal purist inclined to point up the significant differences inherent to the disciplines of civil and criminal law which limit the commonality between the two codal 'systems'. It is of course true that the whole of criminal law is tempered by concepts such as the principle of legality, the presumption of innocence and the presumption in favour of liberty that affect not just the interpretation of the criminal law, but also its very formulation. The need for techniques to curb the immense clout of the law-enacting, law-enforcing state power in criminal matters where physical liberty is at issue is a real difference between the two 'systems'.<sup>165</sup> On the other hand, "le droit civil est avant tout un style",<sup>166</sup> as Pierre-Gabriel Jobin recalled recently in a review of the Quebec government's re-codification project, and it may be that this style, and the mission associated with it, is so peculiar that it precludes full comparison with norms originating in other 'systems' where drafting styles and legislative missions are different.

What then remains at the core of these 'systematizations'? Very little, it would seem: as François Terré said some thirty years ago, "la notion de code a perdu sa netteté".<sup>167</sup> Comprehensiveness is universally absent to differing degrees. Drafting styles are wildly disparate. Codes can aspire to coherence but they seem always to fall shy. And finally, codes are made special by their political, legislative and ideological missions. There seems little hope, at least in respect of any of these benchmarks, for finding any unity in codification. About the only sure thing that codes seem to have in common — in particular the two compared here — is that they are more durable than ordinary statutes.

It may be that the *Civil Code of Lower Canada* and the *Criminal Code* have managed to survive, as amended, on the statute books for reasons other than whatever strength they may draw from their shape. On the occasion of the centenary of the Quebec *Code*, Maximilien Caron described what he called the physiognomy of the document that had so dominated Quebec legal thinking in the following terms: "Trois tendances se dégagent nettement, que l'on retrouve en filigrane, dans le Code de 1866: individualiste, autocratique et religieuse."<sup>168</sup> It may be that these three themes of the *Code* meant that it was, at its inception and for many years thereafter, a politically flexible document, able to accommo-

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<sup>165</sup>Portalis raised this in his *Discours*, *supra*, note 119 at 44. For a modern expression by a civilian see Jean-Louis Baudouin, "Quelques réflexions sur le droit civil et le droit criminel: où sont les différences réelles?" in P. Fitzgerald, ed., *supra*, note 75, 23 at 25.

<sup>166</sup>*Supra*, note 162 at 846. Jobin finds the *style*, to which the late René David referred, largely absent from the Quebec draft bill on the law of obligations.

<sup>167</sup>*Supra*, note 32 at 175.

<sup>168</sup>"De la physiognomie, de l'évolution et de l'avenir du Code civil" in Morel & Boucher, *supra*, note 29, vol. I, 3 at 10.

date these same three influences on private law relations within Quebec society.<sup>169</sup> The individualist *Code* has allowed the document to keep step with the Quebec free-market economy. The autocratic *Code* has simultaneously reflected the patriarchal Quebec family reality. The religious *Code* has, again at the same time, allowed for a special place for the church in the rules respecting marriage. The *Code* has remained relevant (and in force) because it is several codes, or one code with a plurality of systems working within it. The *Civil Code* is a private law constitution with something for everyone, it is a living tree, a pluralist document of compromise. This is as much its inner secret as its inner logic.

It is difficult to know if a similar analysis can be brought to bear on the *Criminal Code* to explain its (until recently) safe place in the Revised Statutes of Canada. Ironically, in spite of its reputed incoherence, it is more philosophically homogeneous than the *Civil Code*. An individualist approach to culpability based on subjective moral blameworthiness was and is the cardinal philosophical feature of Parliament's hundred year-old *Code*, and for some, this is its system-defining quality.<sup>170</sup> Looking to the themes embedded in the *Criminal Code* in 1892 as a means of explaining its longevity is an important avenue for further research.

In light of the failure to describe an universal experience in codification, it is perhaps surprising to see from the language used by modern-day codifiers to describe their work that codification in criminal law and civil law is proceeding along comparable ground, or at least grounds deserving of comparison. In England, where criminal law codification still raises considerable scepticism, the Law Commission report on the current effort separates the substance of the law to be reformed from the technique:

Codification, as the Criminal Code team points out, is a process which differs from law reform. It is essentially a task of restating the law in a single coherent, consistent, unified and comprehensive piece of legislation.<sup>171</sup>

There is at least a common expression in respect of the objectives of this effort to "systematise"<sup>172</sup> when compared to codifications of private law, past and

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<sup>169</sup>R.A. Macdonald hints at this in his description of the underlying philosophies of the *Code* in "Civil Code", *The Canadian Encyclopedia*, 2d ed., vol. 1 (Edmonton: Hurtig, 1988) 429.

<sup>170</sup>See the notes of Laskin C.J. in *The Queen v. Prue*, [1979] 2 S.C.R. 547 at 553, 8 C.R. (3d) 68, 46 C.C.C. (2d) 257, in which it is said that the mere inclusion of an offence in the *Code* imports *mens rea* because "The *Criminal Code* is a code of outright prohibitions distinguishable from regulatory offences created by other kinds of federal legislation".

<sup>171</sup>The Law Commission (Law Com. No. 143), *Codification of the Criminal Law* (London: H.M.S.O., 1985) at 6-7. These objectives were restated in the plea for codification in the Law Commission's subsequent report (Law Com. No. 177), *A Criminal Code for England and Wales*, vol. 1 (London: H.M.S.O., 1989) at 5-11.

<sup>172</sup>This is the term used to describe the process by one of England's best known criminal lawyers, who remains sceptical of the technique: Brian Hogan, "Some Reservations on Law Reform" in Fitzgerald, ed., *supra*, note 75, 65.

present. And for those who remain sanguine about the benefits of a systematic treatment of the law in a codified form, a comparison between the Quebec experience and the national criminal law project may be useful. This was the view expressed by one of the most prolific civil law scholars of the current generation, Jean-Louis Baudouin, in a *liber amicorum* for criminal law reformer Jacques Fortin. Baudouin argued forcefully in favour of a "véritable" criminal code for Canada which would reorganize the law in a more rational manner along the lines of the codification he knew best:

Il faut avouer que pour quelqu'un habitué à se servir d'un Code civil, le Code criminel canadien est un peu rebutant. ... Notre Code criminel actuel, malgré ses vertus, reste plus une jungle ou au moins un jardin à demi-défriché qu'un ordonnement logique.<sup>173</sup>

It seems that, within important limits, codifiers might learn from each others' mistakes and successes.

### Conclusion

There are many good and sensible reasons to shy away from drawing parallels between the 1866 codification of Quebec private law and the *Criminal Code*, 1892. There are the important differences in the disciplines: the very tenor of legislative drafting in criminal law is affected by the fact that a person's physical liberty is at stake whereas nothing of the sort can be said of private law codes. There is the difference in legal traditions: the dominant *style* of the civil law which finds expression in the *Civil Code of Lower Canada* extends beyond grammar and syntax to go to the very roots of the ideas which take shape as rules therein. Finally, any effort to infer the 'universal' truths of codification, when based on readings of codes adopted at different times in different political communities, is necessarily ahistorical. Indeed perhaps the most important criticism one can levy against the arguments found in this paper is that I have imposed a 1990 parallel on two disconnected moments in nineteenth century law reform.

Yet even if one allows for (or perhaps ignores) these problems, the temptation to trace the boundaries of the common ground is too tempting. The differences in the disciplines have not stopped others, including notable figures in the American codification movement such as David Dudley Fields, from contemplating private law and public law codifications at the same time.<sup>174</sup> The

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<sup>173</sup>Baudouin, *supra*, note 157 at 25. Baudouin, who is now an appellate court judge wrestling with both codes at once, was quick to note the differences between the two 'systems' in this paper.

<sup>174</sup>The connection did not always serve to promote codification. An English scholar recently turned up evidence that one of the most vociferous opponents to the Fitzjames Stephen's draft criminal law code was moved to oppose the bill because he thought it would jeopardize the chances of codifying private law: see S. White, "Lord Chief Justice Cockburn's Letters on the Criminal Code Bill of 1879" [1990] *Crim. L. R.* 315.

similarity in the way in which the civil law and the criminal law codifiers framed and frame their objectives encourages the view that there may be some (as yet uncharted) universality in the two enterprises. Finally, the twenty-six years which separated the two legislative reforms might not be a bar to an 'historicized' comparison when one considers that the same brand of elite lawyer was involved in both projects. A striking connection between 1866 and 1892 is the crossing of paths of two of the prime movers in the two stories in the period *entre deux codes*. Coincidence would have it that John A. Macdonald named both Charles Dewey Day and James Robert Gowan to the Royal Commission charged with the investigation of the 1873 Pacific Railway scandal. Day had devoted the best part of his energies between 1859 and 1865 thinking about private law codification. Gowan, by that time already established as Ottawa's premier criminal law draftsman, would work on and off for the succeeding twenty years towards codifying Canadian criminal law. Did Gowan discuss the 'systematization' of law with his codifier-colleague during the less agitated moments of the Commission's work?

And just as the two codifications appearing at a twenty-odd year interval bear comparison, so do the accounts by J.E.C. Brierley and Desmond Brown, separated, coincidentally, by about the same period of time. In somewhat different shapes, both these accounts contain a plea for a careful history of legislation and for the merits what some have too quickly denounced as "internal legal history". And, coincidentally, both end with thoughts on the lessons of their histories for on-going law reform through codification. The last line of Brown's Epilogue sounds a pessimistic note for the Law Reform Commission's current recodification project, citing "historical legislative experience, from [Francis] Bacon's to [Sir John] Thompson's ...".<sup>175</sup> Brierley also ends his history with advice for modern-day codifiers, then (and today) hard at work at reforming the *Civil Code of Lower Canada*. In the last line of his essay, he turns a quotation from Portalis' *Discours* to a modern-day use: "The reform of Quebec's Code must amount to more than an effort to find new ways to instill a love for old laws".<sup>176</sup> The accounts of codification by Brown and Brierley suggest that there are parallels in the history and the historiography of codification that, when fully recognized, might further an understanding of what it meant to codify law in nineteenth century Canada and to codify law today. In a sense, the work of Brown and Brierley show us that there may in fact be old ways to instill love for new laws, to stretch (ahistorically) Portalis' idea from 24 thermidor an 8 to the present.

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<sup>175</sup>*Supra*, note 1 at 164.

<sup>176</sup>Brierley, *supra*, note 3 at 574. The allusion is to Portalis' explanation of the limited vocation of the 1804 French codification: "...au lieu de changer des lois, il est presque toujours plus utile de présenter aux citoyens de nouveaux motifs de les aimer", *supra*, note 120 at 39. This was, of course, the guiding principle for Quebec's civil law codification of 1866.