PERSPECTIVES ON LEGISLATION

Essays from the 1999
Legal Dimensions Initiative

The papers in this collection were written for the 1999 Legal Dimensions competition co-sponsored by the Law Commission of Canada, the Canadian Association of Law Teachers, the Canadian Law and Society Association and the Council of Canadian Law Deans. The views expressed are those of the authors and do not necessarily reflect the views of the Law Commission of Canada or the other sponsors. The accuracy of the information contained in these papers is the sole responsibility of the authors.

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Foreword

In February 1999, the Law Commission of Canada, together with the Canadian Association of Law Teachers, the Canadian Law and Society Association, and the Council of Canadian Law Deans launched the first of what it is hoped will become an annual socio-legal research competition.

The theme for the 1999 Legal Dimensions initiative was "Perspectives on Legislation". In all, more than two dozen scholars in law, political science, philosophy, policy studies, women's studies and criminology submitted proposals. The six papers presented in this collection are those that received research funding.

Drafts of these papers have already been presented by their authors at the Congress of the Social Sciences and Humanities held at Sherbrooke, Quebec in a joint session of the Canadian Law and Society Association and the Canadian Association of Law Teachers held on June 6, 1999. The co-sponsors are most grateful to the authors for their efforts in preparing and revising their papers.

These Law Commission of Canada has undertaken to make this collection available to members of the Canadian Association of Law Teachers and the Canadian Law and Society Association in both English and French. Others may obtain copies in either or both official languages by writing to:

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Introduction: Legislation as a Normative Enterprise

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I. Introduction

For many Canadians, the explicit enactment of formal rules by an authorized legislative body such as Parliament captures the essence of law today. This common perception is, however, open to question.

To begin, many official legal rules are enacted by non-Parliamentary official bodies like municipal councils, schools boards and administrative agencies. More than this, many legal rules are enacted or promulgated without the intervention of the State at all: by-laws of social clubs, cottage proprietors' associations, trade unions, universities, corporations, and so on. Still other rules, such as technical standards, apartment building regulations, and so on, are incorporated into documents like contracts of sale, collective agreements, and leases. These other examples of legal rules suggest that what characterizes legislation is the manner by which rules are expressed in writing, not their source.

The conscious and deliberate making of explicit rules to govern behaviour is only one way in which the State makes official law manifest in Canada. Many of our most important legal rules have emerged from decisions of courts; others result simply from settled patterns of interaction by which people reciprocally adjust their behaviour to the needs and expectations of others; still others are derived from religion and morality. Legislation is just one legal form through which the State recognizes normativity.

All of this is not to say that legislation as popularly understood is not a significant part of the law in Canada today. After all, most proposals for reforming the law usually presuppose that the reform will take place through the enactment of a statute by Parliament or a provincial legislature. Nonetheless, scholars and policy-makers are now also focusing attention on understanding the various forms of legislation, its functions and its limitations as a way of making law. This collection is a reflection of this trend. It is part of a programme of research adopted by the Law Commission of Canada under its theme "Governance Relationships".

II. The Legal Dimensions Initiative

The 1999 Legal Dimensions initiative sponsored by the Law Commission of Canada, the Canadian Association of Law Teachers, the Canadian Law and Society Association, and the Council of Canadian Law Deans was officially entitled "Perspectives on Legislation". The goal was to generate interest from scholars in law, political science, philosophy, policy studies, women's studies, criminology and other fields about the role of legislation in modern liberal democracies. The published prospectus for the competition was as follows.

> Law may be understood as the enterprise of subjecting human conduct to the governance of rules. As such, it ought to engage lawyers, judges, scholars, Parliamentarians and citizens in a quest for the principles

and processes of social ordering by and through which human beings may peacefully, productively and justly interact in modern society.

Nonetheless, most contemporary thinking about law is directed to examining the substantive policies that should be pursued, with little attention paid to the manner or form in which these policies are expressed. Parliamentarians are wont to respond to what they perceive as public pressure for legal change simply by enacting statutes that directly address (often by a criminal proscription) the concern. Thus, if too many companies are laying off workers, pass a law prohibiting them from doing so; if too many youths are vandalizing property, pass a law sending them to boot camp; if too many divorced fathers are failing to pay child support, pass a law garnishing their wages.

This type of reflexive instrumentalism also drives many scholarly analyses. Whether the critical perspective is "law and economics" or "feminist theories" and whether the discipline is law, linguistics, sociology or criminology, most often the general assumption is that the translation of policy into legal rules through legislative enactments is relatively unproblematic. The focus of these critiques is on ends: given the goal of "wealth-maximization", what should the substantive rules of property, tort and contract be? or given a "gender analysis" of property and tax law, how should the substance of the law be recast? Even when means are addressed by those adopting one or other critical perspective, they are typically thought to be merely a "technical" issue involving matters such as procedures for legislative drafting and rules of statutory interpretation.

Yet the whole idea of using legislation as a vehicle of normative expression in linguisticly and ethnicly diverse societies is problematic. A number of difficult philosophical, linguistic, sociological and managerial issues arise. Take two examples: what insight might critical perspectives bring to bear on the question whether we should even attempt to codify the general part of the criminal law? or, what is the semiotic bearing of the fact that federal statutes must at the same time be written in English and French, and must be capable of being applied in both civil law and common law jurisdictions? The Law Commission of Canada believes that identifying these issues, and bringing a multidisciplinary perspective to bear on them could make a major contribution to our understanding of how the enterprise of law (and law reform) might be carried out more effectively in Canada.

Scholars who contributed to this collection were invited to make proposals that would address any one or more of a range of questions about the role of legislation. These questions included the following:

1. Is legislation still a viable way of making or reforming law, whether this be the law of the state or the law of any other body?

2. If so, how should Parliament, legislatures, corporations, trade unions, universities, social clubs and other legislative bodies actually be legislating?

3. Does our inability to keep legislation up to date mean that we need a new conception of how to draft law, and a new theory of judicial interpretation?

4. Is it possible to codify law in the late 20th century -- whether the *Civil Law* in Quebec, the common law or the criminal law?

5. Do we have an adequate account of whether, when and how deliberative bodies ought to translate policy into legislative texts?

6. What should be the substantive and formal features of legislative texts? Are there better and worse goals to try to pursue by legislation? Are there better and worse ways of expressing legislative rules?

7. Is there a symbolic, non-instrumental role for legislation? What assumptions underlie the way in which legislation is used to regulate behaviour?

8. Do certain statutes or other forms of legislation have a cultural or iconic role? If so, does this have implications for how they are drafted and what they purport to regulate?

9. Do different communities react differently to different forms of legislative expression, and if so, should an attempt be made to reduce dissonance between different socio-cultural reactions?

10. What does legal bilingualism (or in informal organizations, legal plurilingualism) say about the semiotics of legislating (how to make different linguistic versions of statutes truly equivalent).

11. What does legal multijuralism -- common law, civil law, aboriginal law of Nunavut -- (or in informal organizations, the local law of the organization) say about how we should legislate so as to reconcile what seem like conflicting legal concepts.

III. The Purpose and Normative Effect of Enactments

The questions "what are we trying to do with legislation (what is the purpose of the exercise)?" and "what is the normative effect of explicit lawmaking through enactments (what is the actual impact of passing a statute)?" are among the most fundamental of legal inquiries. Three papers speak directly to them.

Take first the question "what we are trying to do with enactments?" Even today, some believe that statutes are not that different from the type of command that an army officer gives to a subordinate, or a manager in a workplace give to an employee, or a parent gives to a child. On this view, a statute is simply an order backed by force. But the character of contemporary legislation is quite otherwise. After all, the Parliament of

Canada and provincial legislatures do not physically confront, face-to-face the people to whom their statutes are directed. More than this, the language of statutes is necessarily more abstract. When a parent tell a child "Don't eat that cookie!" there is usually a direct relationship between the words of the command and a relatively obvious intended action. But no statute, no regulation, no municipal and corporate by-law can ever exhaustively state the conditions of its own application. A legislative text has to be interpreted and applied. In other words, an enactment is not a command; it is a hypothesis of normativity.

Legal rules are not self-generating. A command may well be the episodic or once-off reflection of a power relationship. A legislative enactment, by contrast, is invariably the result on a long process of debate and deliberation. Legislators debate about whether a rule is rule; they discuss the appropriate content of the rule; they argue about the best way to formulate the rule; and they deliberate about issues of under-inclusiveness and over-inclusiveness. Debate about the form and scope of legislation is an important feature of political deliberation, whether at the level of a national state, or at the level of the by-laws of a social club.

There is more. Legal rules are also not self-executing. Legislation works, rather, to provide a structure for analyzing and understanding human interaction. Statutes frame propositions for citizens, advocates and courts to debate and decide. The legislative provision requiring a seller to deliver to the buyer an object that is of "merchantable quality" or that is free from "latent defects" invites people to ask of themselves: am I a seller? am I a buyer? is this the kind of object targeted by the statute? is this object of "merchantable quality". The purpose of the legislative rule in question is to provide a vocabulary and a structure within which people who have a disagreement about a product that has passed between them, can argue about and settle that difference peaceably.

The implications for the legislative process of a recognition that Parliament cannot simply command an outcome are striking. This recognition brings to attention the fact that most enactments are facilitative rather than prohibitive; most seek to structure the way in which certain kinds of activity is carried on. Even statutes that appear prohibitive actually serve to facilitate self-directed human interaction by providing base-lines for the application of human energies. A rule that requires motorists to drive on the right-hand side of a centre line in a road certainly carries with it a prohibition on driving to the left. But to see such a rule only as a restriction on behaviour misses the significant co-ordinating role that such rules provide.

The legislative process is, consequently, very much about understanding when explicit rules may be imagined, drafted and promulgated in a manner that the persons to whom they are directed will recognize the good sense of the announced rules and will voluntarily comply with them. Knowing the conditions under which enacted rules can serve this co-ordinating function, even when their aim is fundamentally prohibitive, and thinking through how rules should be drafted in consequence are fundamental aspects of legislative design.

The **second** line of inquiry, "what is the normative effect of explicit lawmaking through enactments?" comes down to this. The two notions of legislation and governmental regulatory action are both distinct and non-congruent. While enacting

legislation is surely something that Parliament does, official legislatures have no monopoly on the endeavour. While governments certainly accomplish much of their regulatory ambitions by asking Parliament to enact statutes, they also are able to deploy many other instruments -- for example, education, contract, subsidy -- of public governance. In the present context it is the latter point that bears attention. When an area of activity is "left to the common law developed by courts" or "left to the market" it is being regulated just as much as if it were the subject of explicit legislation. De-regulation and non-regulation are as much normative regimes as those set out in statutes enacted by Parliament. Indeed, de-regulation and non-regulation are simply regulatory regimes without the formal democratic controls that normally accompany governance regimes announced in legislation.

Two important consequences for how the legislative endeavour is conceived flow from this conclusion. These are most apparent when one considers that form of legislation known as subordinate or delegated legislation. If one takes the view that normal democratic controls only apply when Parliament enacts legislation or when it explicitly authorizes the making of statutory instruments, one is likely not to capture large parts of the legislative endeavour in Canada today. As a result, it paves the way for officials to make rules that do not meet some of the procedural and substantive standards that we think should apply to legislative enactments.

But more importantly, it is also an invitation for private actors to present to government ready-made, non-democratic, non-public, and self-interested negotiated regimes of regulation (typically designed either to increase barriers to market-entry or to externalize a significant proportion of the cost of doing business to the public). These self-interested regimes are then proposed as standards to be incorporated by reference into the overall legislative regime ostensibly managed in the public interest by Parliament.

These considerations lead to an inquiry into some of the perverse consequences of all enacted rules. The idea can be characterized as the "logic of the tacitly permitted". All attempts explicitly to state either the substance or procedure of law have for necessary consequence the tacit authorization of whatever does not fall directly under the definition of the identified activity. For example, a *Freedom of Information Act* not only sets out the conditions under which a government may be compelled to divulge information; by ricochet it gives an ironclad formal excuse to a government that does not want to divulge any information of a kind that is not caught by the disclosure requirement. In general, any legal definitions and concepts that are not purposive actually risk generating larger zones of unregulated conduct; and even purposive definitions and concepts can be constrained by explicit exclusions.

IV. The Implicit Laws of Lawmaking

The above observations suggest the need for a careful look at the pragmatic features of the legislative endeavour. But other issues are equally important. Given the

aims and effects of enactments, are there not certain considerations that ought to shape or constrain how legislation is actually drafted? The other three papers in this collection speak to this issue. Some years ago, the idea was advanced that if the purpose of legislation was to provide recognizable and serviceable principles by which people could orient their conduct towards each other, statutes would have to respect certain formal requirements.

First all of, a regime of enacted rules presupposes just that; a degree of **generality** such that decisions are not simply taken on an *ad hoc* basis. A Parliament must be concerned to state the norm at a sufficient level of generality as to be genuinely legislative. Rules that apply to only one case, whatever else they are, are not rules.

A second principle of lawmaking integrity is the principle of **promulgation**. The existence of secret, unpublished or inaccessible laws infringes this principle. In a Parliamentary democracy, laws are rarely secret, but they can be passed in a manner than escapes the attention of the public. Examples include: large masses of legislation passed quickly; statutes with purposely misleading titles, or that hide bizarre legislative provisions within lengthy texts; and statutes that are shell enactments where everything is stated in regulations, or in principles incorporated by reference.

A third principle is the principle of **non-retroactivity**. If the purpose of legislation is to allow citizens to orient their conduct by reference to rules, obviously these rules must be largely prospective. The reflex to use retroactive statutes to "fix a problem" betrays a surprisingly naive view of how legislative action generates commitment and fidelity by citizens.

A fourth principle is the principle of **intelligibility**. In the sense used here intelligibility refers to the substantive content of legislation. If statutes are so detailed, complex and confusing that they cannot be understood except by professionals, they can hardly be said to provide baselines for self-directed human interaction. Legislation must be drafted in a manner that makes it intelligible to its primary intended audience: legislation enacting industry standards may, of course, be technical and detailed as long as it speaks the language of the industry to which it is directed.

A fifth principle is the idea that legislation cannot be **contradictory**. Rarely do statutes contain explicit contradictions. But as between two or more statutes, implicit contradiction, or policy objectives working to cross-purposes are common. This type of contradiction arises primarily in fiscal legislation, when Parliaments attempt to use taxation to guide certain types of behaviour. Sometimes the consequence is that different tax acts provide mutually inconsistent incentives and disincentives, and that these conflict with policy goals in enactments relating to employment, housing or consumer protection.

A sixth principle is that legislation should not require the **impossible**. Here impossibility does not mean absolute impossibility, although this obviously places a constraint on Parliament. Rather, impossibility should be understood broadly, so that it also refers to the idea that legislation should not require people to make moral or ethical decisions that are beyond the capacity of the average citizen. Since we are not all saints, laws should not be framed on the assumption that we are.

A seventh principle is the principle of **constancy over time**. Admittedly, one of the main purposes of the statutory form is to ensure Parliament's capacity to modify legislation as the situation requires. Good legislative design in the first place will often mean that enactments do not require constant tinkering to ensure that they achieve their intended purposes.

A final principle speaks as much to judicial method as to legislative design. There must be a **congruence** between what the average citizen thinks a law means and the interpretation given by judges. If judges do not attempt to collaborate with legislatures in giving meaning to statutes, citizens are no better off than if the legislation were initially unintelligible.

The purpose of reviewing these implicit laws of lawmaking is to suggest that they ought to be a central preoccupation of any account of legislation. The point is, of course, not to argue that they should be themselves enacted by Parliament as a means of governing the legislative process. The formal and public character of Parliamentary legislation and the greater transparency of the process are most often sufficient to the purposes of ensuring respect for the Rule of Law and the constitution. But it should be remembered that respect for these principles is part of a culture of a liberal democracy; Parliamentarians and governments need frequent reminders that effective legislation requires the commitment and collaboration of citizens. This is especially true in the realm of regulations and other subordinate legislative instruments that by their nature are made through less formal, less public and less explicitly transparent processes.

V. Rethinking Legislation

The challenges raised by the essays in this collection can be summed up in a series of hypotheses about the role and shape of legislation in Canada today. These hypotheses are being explored by the LAW COMMISSION OF CANADA in other projects under its Governance Relationships theme. They can be framed as a series of questions.

1. In a liberal democracy should the presumption be that citizens are themselves capable of self-legislation?

2. Where any legislative body seeks to enact rules, should the presumption be that citizens are capable of orienting their conduct to the rules enacted?

3. Can the fundamental principles of good legislative design be exhaustively stated in advance or will they always reflect a combination of both explicit and implicit norms?

4. Should the basic orientation of rules be to state a general framework within which citizens may pursue self-directed interaction, or should it be to regulate behaviour in detail?

5. Since different sociological and virtual communities react differently to different forms of legislative expression, should legislation be drafted so that it lines up with the implicit law of these communities?

6. Are "functional" rather than "essential" concepts a preferred way for law to speak symbollicly as well as instrumentally in a way that captures the understandings of appropriate normativity of its addressees?

7. How can legislation be designed so that it provides opportunities for interpretation and application by non-adversarial dispute resolution processes (for example, ADR, settlements, mediation, negotiation), and the development of forward looking remedies and redress processes (for example, restorative justice and transformative justice).

Of course, however important legislation may be in the modern world, it remains only one form of law. And however important legislation by government is, government is only one type of modern law-maker. In the final analysis these are key lessons of the six papers in this collection. The LAW COMMISSION OF CANADA is most grateful to their authors, and trusts that readers will find them to be stimulating reflections on the art of legislation in Canada today.

Prosecutorial Discretion as a Compliment to Legislative Reform: The Post-C.C. Section 43 Scenario

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I. Introduction: Institutionalizing Informality

The exercise of discretion by legal officers maintains an awkward place in our legal tradition: "[a]lways known, grudgingly tolerated."[1] There is, however, a current climate of interest in the progressive potential of legal officials' discretionary powers to choose between alternative courses of action and to make decisions that are not dictated by legal rules. Indeed, in some circles discretion is proffered as a kind of "Great Hope" for our legal system's ability to adapt to the needs and demands of an increasingly pluralistic society. A maximization of the scope of discretion that is available to legal decision makers, and the creation of new sites for discretion, may facilitate the pursuit of concepts of justice and policy goals that are restricted by our system's traditional embrace of more rule-bound decision-making and process-oriented justice.

It is too soon to say whether or not discretion is up to the challenge. Indeed, the very standards of success in this regard would be difficult to articulate. What we are able to do, however, is to consider interesting and challenging questions about the operation of discretion in specific contexts, and as exercised by particular legal actors. This paper will concentrate upon the exercise of discretion in the administration of criminal law. Furthermore, although discretionary decision-making by judges has received the most attention from jurisprudence scholars, this discussion will be primarily concerned with decision-making by Crown prosecutors.

The most general issue that is at large in this discussion is the nature of the relationship between prosecutorial discretion and *Criminal Code*[2] reform agendas. The *Criminal Code* and the judiciary have always provided for, confirmed the legitimacy of, or leastwise tolerated a range of discretionary activities on the part of Crown prosecutors.[3] This discussion will consider the implications of relying upon these traditional sites of prosecutorial discretion to compliment and facilitate new, progressive law reform strategies, or the creation of new sites of prosecutorial discretion in pursuit of similar objectives.

In this discussion, "progressive law reform strategies" refers to two general kinds of initiatives. First, the reference to such strategies includes attempts to modify the nature and application of criminal law so as to diminish the disproportionate burdens that it exerts upon certain groups of people. Among the most striking examples of this kind of systemic discrimination in the Canadian context is the over-representation of Aboriginal people before the criminal courts and in prisons. A second theme of progressive law reform strategies is the attempt to identify and redress ways in which criminal law operates so as to compromise the security interests of people who are most vulnerable to violent activity. Sites of concern in this respect, which may be the focus of progressive law reform strategies, are criminal defences. Some defences operate not only to excuse violent conduct in certain circumstances, but also to sanction or encourage it by characterizing the conduct as "justified".

One such formal justification of violent conduct, the "corrective force defence" contained in *Criminal Code* s. 43, is the focus of this paper's concern with the

relationship between prosecutorial discretion and law reform initiatives. Section 43 provides teachers, parents, and people standing in the place of parents, a defence to a charge of assault - at least[4] - when their victims are their pupils and children respectively. *Criminal Code* s. 43's repeal would serve the important law reform objective of enhancing the physical security of children. As compared to legislative reform agendas that are "positive" in the sense that they involve the creation of new statutory rules, this law reform proposal is "negative" in the sense that it would be satisfied by the repeal of *Criminal Code* section 43.

Standing in opposition to this law reform objective is a climate of opinion that argues that the "reasonable force" standard that is written into the section has allowed judges to decide when important "lines are crossed" between situations where the application of the criminal law of assault is and is not warranted.[5] This opinion was expressed by a majority of the Law Reform Commission of Canada. In *Recodifying Criminal Law*, the Commission indicated that "the majority [of the members] felt that such a provision [as s. 43, but restricted to parents] should be retained to prevent the intrusion of law enforcement into the privacy of the home for every trivial slap or spanking."[6]

Leaving aside the question as to whether slaps and spankings are ever trivial, the offence of assault under s. 265 of the *Criminal Code* may be satisfied by a range of conduct that, at the least violent end, includes gestures.[7] It is in this regard that the current of opinion favouring s. 43's retention deserves most serious attention. Quite apart from the intentional infliction of pain that defines many forms of corporal punishment, an assault may be performed by less offensive kinds of "corrective" conduct that may be incidents of the parental stewardship of children. Such conduct includes, for example, pulling a recalcitrant child by the hand, carrying an equally recalcitrant, screaming child from a theatre or church, or gesturing sternly at a child. As unfortunate as any of these examples may be, it is not clear that criminal prosecution for assault would represent the best response to them.[8]

In keeping with the Law Reform Commission's focus, this paper will be similarly concerned with the issue of parental force, to the exclusion of the use of corrective force by teachers and people standing in the place of parents. While it is beyond the scope of this discussion to develop the point, the use of force against children by teachers and other supervising adults raises issues that are distinguishable from those surrounding parental force.

If there is any substance to argument that the law of assault needs to be applied in a manner that is occasionally sensitive to the unique situation of parents, this paper will suggest that s. 43's presence in our law is nevertheless too symbolically objectionable and demonstrably offensive in practice to be sustained. Therefore, the necessary line-drawing between situations where the law will and will not show this sensitivity must be done in the absence of a statutory corrective force defence. Furthermore, judges should be discouraged from developing a common law replacement for the s. 43 defence, as this would reproduce its objectionable symbolism.

An alternative, proposed by at least one advocate of *Criminal Code* s. 43's repeal, is that prosecutorial discretion may provide a middle ground between a statutory

defence and a legal regime that makes no concessions in the administration of its law of assault for the application of force upon children by their parents. In her case comment on the Supreme Court of Canada's leading decision in *Ogg-Moss* v. *R.*, Sheila Noonan wrote:

> This is not to suggest that every exercise of physical force against a child should result in a criminal charge. … [T]here might be instances … where adults might be guilty of an offence under circumstances in which punishment would seem unjust. Nonetheless, this recognition is insufficient reason for abrogation of the child's right to dignity and bodily security. *One would hope that such occurrences would be properly handled through the exercise of prosecutorial and police discretion*.[9]

This paper explores Noonan's suggestion in relation to prosecutorial discretion in particular. If prosecutorial discretion can modify the application of the law of assault in this area, then a more general understanding of this fact might facilitate acceptance of the proposal to repeal *Criminal Code* s. 43 on the part of those who feel that our law needs to maintain some ability to distinguish parental force from other forms of such conduct. However, this raises the critical issue as to whether the exercise of discretion can or should be relied upon in this way: to do informally and in a limited manner, what it is objectionable for our law to do formally and more generally. Furthermore, if a proposed course of legislative reform like the repeal of s. 43 is premised upon the expectation that certain kinds of decisions will be made, can the activity in question be characterized as truly discretionary in nature? To some considerable extent, the products of discretionary decision-making are uncertain by definition.

Discretion has been recognized as something that helps lawmakers duck or fudge hard choices and relegate them to more private settings.[10] Prosecutorial discretion in the post - s. 43 context asks us to think about a less cynical but related assessment of its potential. Can we candidly accept pockets of informal, discretionary justice as compliments to a formal system of rules that has been expressly purged of provisions that would result in the kinds of outcomes that discretionary decision-making is being relied upon to deliver? Alternatively, should this kind of decision-making be rejected or, if it is likely to be exercised anyway, forced to continue to dwell in "the dark realms of the unmentionable" where other examples of prosecutorial discretion have traditionally been found?[11]

This paper will first review the academic debate over the nature and legitimacy of discretion, and place prosecutorial discretion within that theoretical context. It will be suggested that pragmatic acceptance of the prevalence of discretionary activity, and its ability to facilitate governance in modern industrial society, is in tension with an on-going climate of concern about this activity as exercised by legal actors in general, and prosecutors in particular. Furthermore, this discussion will consider the implications of the fact that empirical research suggests that outside of legal scholarship, the exercise of discretion does not emerge as a substantive, discreet kind of activity that can be distinguished from rule following.

This paper will then begin to establish its particular point of focus by outlining the corrective force defence and discussing the need for law reform in this area. The

potential for prosecutorial discretion to provide some sensitivity to situations involving the use of parental force in the absence of s. 43 will be considered. Ultimately, it will be suggested that Crown counsels' common law powers to withdraw charges and *Criminal Code* authority to stay charges deserve the most consideration in this regard. The last part of this paper will subject this possibility to critical analysis.

A peculiarity of this topic is that it does not lend itself to grand conclusions about what "ought" to be done. The only firm position that is advanced here is that it is time for s. 43 of the *Criminal Code* to be repealed. If, however, we are concerned that some flexibility be maintained for the application of the law in this area, then the identification of sites of discretion that may allow for this could assist this law reform project. However, an attitude of candidness about discretionary decision-making's existence in this area, and the possible outcome of its exercise, may touch too directly upon a tenet of our legal culture that must necessarily remain undeclared. This discussion will emphasize the anomalous and enigmatic character of discretion in our law. This character makes it difficult to harness in pursuit of the policy objectives that inspire legislative law reform agendas. Ironically, discretion may operate most effectively in situations where we agree to act as if it does not exist. It represents, therefore, a kind of *eminence grise* of progressive law reformer initiatives.

II. Discretion

A. The Theoretical Context for Discretion

In mainstream legal theory, the concept of discretion refers to state officials' ability to choose from among alternative policies in making the decisions that are required of them.[12] This is contrasted with situations where rules are understood to dictate decisions. In A. V. Dicey's constitutional theory, discretion plays the arbitrary, totalitarian foil to "ordinary law" of general application upon which rests the concept of the rule of law itself. According to Dicey "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[13] However, it is now commonly concluded that a dilemma resides at the heart of modern governments' attempts to follow Dicey's prescription for restricting discretionary decision-making. In the attempt to regulate the activities of millions of people through broadly applicable rules, the very broadness of these standards limits their effectiveness. The best-drafted general laws cannot escape some degree of incompleteness, ambiguity, and occasional unfairness when applied to a large and diverse population. Discretion may assist in addressing these shortcomings.[14]

As Keith Hawkins suggests: "Discretion has in the past… been considered a desirable means of individualizing the application of the law, and of softening the rigours that from time to time arise from the dispassionate application of legal rules."[15] Carl E. Schneider gives historical supports to this point by remarking upon the fact that courts of

equity were designed to address the rigidity of the common law. When the common-law courts and the courts of equity were combined, the result was "to broaden judicial discretion, since the common law has incorporated many of [equity's] more flexible doctrines, remedies and attitudes."[16] Furthermore, Canada's governance is now permanently dependent upon the delegation of authority to a plethora of agencies and tribunals that exercise considerable discretion.[17] Accordingly, while there may continue to be some principled concerns about the legitimacy of discretion in specific contexts, its existence and operation seems to be fairly generally accepted on the evidence of practical daily fact.

That being said, as it relates to judicial activity at least, the role of discretion has been a central concern of mainstream Anglo-American jurisprudence in the second half of this century. The great example in this regard is the debate between H.L.A. Hart and Ronald Dworkin in relation to the nature, scope, and implications of non-rule-bound decision-making by judges. In the process of defending legal positivism from arguments for the necessary moral content of law, Hart recognized the existence of a "penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."[18] Hart argued that in these situations judges have to exercise a creative or legislative function. Dicey's vision of the rule of law is largely protected from this exercise of discretion, however, by the fact that it is very rare. Hart assures us that "the life of the law consists to a very large extent in the guidance of both officials and private individuals by determinate rules which… do *not* require from them a fresh judgment from case to case."[19]

Dworkin responded by arguing that even when "no settled rule disposes of the case one party may nevertheless have a right to win."[20] Beyond the realm of legal rules there exists "background standards"[21] that are also parts of the law. These standards allow judges to "discover what the rights of the parties are, not [as Hart would have it] to invent new rights retrospectively."[22] According to Dworkin, therefore, judicial decision-making in hard cases remains within the realm of law, because law is inclusive of principles that are the basis for legal arguments and determinations about rights.[23]

Dworkin identifies discretion as a relative concept. Like the hole in a doughnut, it "does not exist except as an area left open by a surrounding belt of restriction"[24] and its precise meaning depends upon the nature of those surrounding restrictions. Nevertheless, Dworkin identifies three "gross distinctions". Weak discretion is engaged in by decision makers when judgment is required in order to apply any standards, as is the case with all rules. Another weak form of discretion indicates that an official has final, non-reviewable authority to make a decision. Finally there exists strong discretion, the *bete noire* of mainstream liberal legal theory. Strong discretion is decision-making that occurs in the absence of standards that are set by a body in authority.[25] Dworkin suggests that it is trite, in a sense, that the application of the law by judges involves the two weak versions of discretion. Strong discretion, however, amounts to law creation by decision-makers, is avoided by Dworkin's theory of adjudication and rarely invoked in Hart's account of that process.[26]

B. Prosecutorial Discretion's Place in this Theoretical Context

Dworkin's contribution to our understanding of the nature of discretion, as developed in his response to Hart's legal positivism, has been identified with a particular strand of scholarship that is concerned with the justice of discretion. This scholarship provides something of a basis for the related current of concern over the power that discretion grants to officials and the scope for its abuse.[27] Prosecutorial discretion is a prime subject of critical concern in this second context, and in this regard a note of alarm was soundly enough struck thirty years ago that it continues to draw attention today.

In *Discretionary Justice: A Preliminary Inquiry*, Kenneth Culp Davis wrote:

> Jurisprudence misses many realities about justice because it is too much concerned with judges and legislators and not enough with administrators, executives, police, *and prosecutors.* Furthermore, jurisprudence acknowledges the law-discretion dichotomy and then spends itself almost entirely on the law half. [28]

Later in the same book Davis introduces his discussion of the issue that is central to this paper with the following observation:

> Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute. The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse.[29]

Hawkins credits Davis with disturbing the "somewhat benevolent view" toward discretion that prevailed at the time and doing so in a manner that was forceful enough to make his work a standard point of reference for the study of discretion over the last thirty years.[30] The benevolent view that Davis challenged was supported by the evident efficiency and convenience resulting from the delegation of authority and discretionary power to administrative agencies, and mainstream legal theory's containment (Hart) or rejection (Dworkin) of the threat that judicial discretion posed to the rule of law. With respect to the latter, Davis argued that jurisprudence scholars' concern with statutory and judge-made law limited their effectiveness to the "refine[ment of] what is already tolerably good." Davis suggested that scholarly energy would be better spent on the attempt "to penetrate the unpleasant areas of discretionary determinations by police and prosecutors and other administrators, where huge concentrations of injustice invite drastic reforms."[31]

Hawkins suggests that Davis' strong concerns about the exercise of discretion by justice officials apart from judges, is an expression of the civil rights and legal rights movement in the United States. Bureaucratic discretion was a serious obstacle in the campaign to clarify and to secure the rights of citizens in relation to the government.[32] Accordingly, to some extent Davis' concerns may be creatures of their time. Furthermore, Davis' framing of the problem of discretion has been criticized as one that

is characteristically - and perhaps naively - legalistic. To the extent that this legalistic perspective still prevails, these currents of criticism are important to consider.

It has been suggested, for example, that Davis' style of analysis is indicative of lawyers' and legislators' tendency to view as essentially unproblematic, the classic distinction between rules and discretion.[33] Although useful for certain general descriptive purposes, increasingly little substance is attributed to the distinction. This is a long-standing theme of critical legal thought[34] and even mainstream jurisprudence is distancing itself from firm categorizations of rule-bound and discretionary activity.[35] Furthermore, sociological research has served to undermine the empirical basis for the distinction.[36]

In relation to the legacy of Davis' work, Hawkins points to the new vocabulary of reform that he established. The concepts of "confining," "structuring," and "checking" discretion are now well established in administrative law and elsewhere. Hawkins also suggests, however, that Davis provided a "limited, though forceful, approach and this may have created too pejorative an impression of discretion."[37]

The following part of this discussion bears out Hawkins' point that the prospect of discretionary decision-making is no longer received with the kind of apprehension that is characteristic of the work of Davis or neo-Diceans (if there are any).[38] Notwithstanding the themes of criticism relating to the coherence of the concept of discretion and the attempts to control, structure, and direct it, an array of progressive legal reform movements advocates some form of wider decision-making either in the context of existing or alternative justice institutions. Furthermore, evidence suggests that decision-makers within the existing system are interested in maximizing the potential fact-sensitivity of their statutory and common law jurisdictions.

C. Recent Interest in Discretionary Decision-Making: "Contextualism"

To some considerable extent our concept of law depends upon the assumption that the social world can be understood as a collection of discrete facts about people and what they do. In seeking to resolve disputes and settle issues of right, legal analysis involves a good deal of sorting through these facts, identifying those that are relevant for the purposes of certain legal categories, and disregarding the rest. Accordingly, a restricted factual embrace may be a necessary condition of our law and legal system.[39] Concomitantly, law and legal systems may not provide an appropriate vehicle for addressing every aspect of the social world that we may think deserving of serious concern and attention. This is particularly the case when those matters of concern do not lend themselves to crude factual atomization.

Rather than rejecting law as a vehicle for social change on account of its endemic factual poverty and the artificiality of breaking human experience up into facts in the first place, some currents of progressive opinion attempt to make the most out of what may be a bad situation. If legal analysis and decision-making necessarily involves

screening out some facts, perhaps it can nonetheless be *more* factually sensitive than has traditionally, or is presently, the case. A commitment to more "contextual" decision-making might go some way towards satisfying important alternative concepts of justice and standards of equality that are compromised by the commitment to formal or process-oriented justice that is most characteristic of our legal system.[40] In this regard, Martha Minow and Elizabeth Spelman suggest:

> [T]he call to context in the late twentieth century reflects a critical argument that prevailing legal and political norms have been used in the form of abstract, general, and universal prescriptions while neglecting the experiences and needs of women of all races and classes, people of colour, and people without wealth.[41]

There is an important, if rather obvious, role for discretion in this attempt to make legal processes more fact sensitive. In jurisprudential terms discretion is essentially defined as decision-making in the absence of rules that purport to dictate those decisions.[42] From a jurisprudential point of view, the primary way that rules are understood to dictate decisions is by identifying the specific facts - or what Ronald Dworkin refers to as "practice conditions" - that make rules applicable and which, as a result of their presence, supply an answer.[43] Other facts, therefore, are irrelevant from the rule-bound decision-makers' point of view. To put it another way, the ability of discretionary decision-makers to "choose between broad alternative courses of action in the wielding of [state power]"[44] is justified by the extent to which those decision makers are charged with allowing that a broad range of facts may be relevant to their considerations. The broader the range of facts, the more likely that situations will seem different and, therefore, require different responses.

The flexibility that discretionary decision-making is presumed to have is a correlate of its broader factual basis. This flexibility has been essential to discretion's attractiveness for legal reformers. For example, Joel Handler identifies in Critical Legal Studies and Feminist scholarship a shared idea that "space has to be created within structural frameworks to allow for the flexible, creative resolution of conflicts. Modern and postmodern philosophers argue for conversation, for dialogue, and for community, rather than governing relationships through rules."[45] Alternative dispute resolution and "popular justice" strategies are premised upon the potential for flexible and very fact-sensitive decision-making.[46]

D. Contextual, Discretionary Decision-Making in the Administration of Criminal Law

Quite apart from the campaign to bring broader fact-sensitivity and more flexibility to the legal system by providing alternatives to the existing process, it is clear that members of the Bench are prepared to explore and to maximize the potential of their existing jurisdiction in this regard. Thus, the co-operation of trial judges, working within their common law discretionary jurisdiction, was essential for the launch of circle sentencing initiatives for aboriginal people that are now well-established in a number of jurisdictions.[47] The spirit of contextualism is also evident at the highest levels of

appellate adjudication. In their reasons for their decision in *R.* v. *S. (R.D.)* L'Heureux-Dube and McLachlin JJ. stated:

> Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality…. Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. …. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.[48]

In relation to prosecutorial discretion, Parliament has recently marshaled it as part of its attempt to turn the criminal justice system in a direction that is less punitive and which addresses Canada's general over use of incarceration, and our disproportionate incarceration of certain groups of people, most notably aboriginal people.[49] Several of Parliament's amendments to the *Criminal Code*'s sentencing provisions in 1996 are specific responses to these deinstitutionalization objectives.[50] Furthermore, the *Purposes and Principles of Sentencing* set out in sections 718-718.2, while reflecting conventional just deserts and utilitarian sentencing philosophy, are also remarkable for the restorative justice themes that they pronounce.[51]

Prosecutorial co-operation in the exercise of discretion will certainly be required in order to maximize the reform potential of a provision like s. 718.2(e). This section directs sentencing courts to consider "all available sanctions other than imprisonment … with particular attention to the circumstances of aboriginal offenders." More directly, the new sentencing provisions include *inter alia* the use of alternative measures programs to divert those charged with offences from regular trial process.[52] As has been the case with a similar provision in the *Young Offenders Act*[53] prosecutors may be expected to operate as the effective gatekeepers for these diversion programs, through the exercise of their discretion.

E. Summary

Looking backward from this point in the discussion, it has been argued that some recent jurisprudential and statutory activity reflects an assumption that is shared by a number of contemporary currents of progressive legal thought. This assumption is that legal officials serve important alternative concepts of justice by engaging in decision-making that is more fact sensitive or contextual than the kind that generally characterizes the strict observance of formal, process-oriented justice. The connection was made between this spirit of contextualism and the concept of legal discretion. It was pointed out, however, that this interest in discretion is in tension with the chronic suspicion in which the concept is held in liberal legal thought.

III. The Corrective Force Defence

A. *C.C.* s. 43

Section 43 of the *Criminal Code* reads:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Our society may be inured to parents and teachers being shielded from charges of common assault by the operation of s. 43.[54] The section owes its survival to a compliment of familiar practical, social, and political arguments that make children's and pupils' unique physical vulnerability seem natural and inevitable.[55] There may also be religious undertones to the support that the corrective force defence has traditionally received. It is trite that the defence finds support in the biblical admonition that to spare the rod is to spoil the child.[56] Notwithstanding this, some judges still feel that the connection is worth emphasizing.[57] Less trite, and a more fitting prologue to a review of s. 43, is Northrop Frye's assessment that the Book of Proverb's encouragement of corporal punishment "has probably been responsible for more physical pain than any other sentence ever written."[58]

In her case comment on the *R.* v. *K. (M.),*[59] Anne McGillivray[60] traces the "ancient and checkered history" of s. 43 to a melange of Anglo-Saxon and Roman sources. The former gave chattel rights in children to fathers, which allowed them to sell sons and daughters who were under the age of seven years. The Roman legal influence, on the other hand, was characterized by the restrictions that it had developed upon the legal right of fathers to kill or punish their children unreasonably.[61]

William Blackstone's *Commentaries on the Laws of England* dominated Anglo-Canadian legal education in the century that preceded the coming into force of Canada's *Criminal Code* in 1893.[62] In reviewing the "Rights of Persons" in his *Commentaries* Blackstone identified English law's "moderate" (in comparison to Roman law) power of a parent to "keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education."[63]

The core of the present corrective force defence has been in the *Criminal Code* since it was first drafted.[64] Absent from its current construction is the relationship of master and apprentice that was excluded in 1955. Eric Colvin emphasizes the contrast between the "stark simplicity" of s. 43 in comparison to the baroque construction of the neighbouring *Code* provisions relating to the defence of the person and property.[65] It might also be suggested that s. 43's simplicity belies the complexity of its social implications. As Anne McGillivray suggests, it represents "a lightning-rod for values associated with religion and authority, values which in a pluralistic society are far too diverse, vague and idiosyncratic to control the application of the criminal law."[66] Sheila

Noonan strikes a similar note, characterizing s. 43 as "a haunting licence to embark upon conduct which at one end of the spectrum embraces authoritarianism, and at the other shades murkily into abuse."[67]

B. The Reform Context

In addition to its unfortunate role in sanctioning forms of physical violence that are otherwise criminally culpable, *Criminal Code* s. 43 occupies a very awkward place in Canada's professedly individual rights-respecting legal system. The movement to have the section repealed or, in the alternative, declared of no force and effect by the courts, now involves a challenge under the *Canadian Charter of Rights and Freedoms*.[68] Among other things, s. 43 is clearly in tension with *Charter* s. 7's guarantee of protection for the security of everyone's person.[69] It also represents discrimination on the basis of age that offends *Charter* s.15[70] and the corrective force defence may also infringe *Charter* s. 12's guarantee of the right not to be subjected to any cruel and unusual punishment.[71]

The sanctuary that our criminal law provides for corrective force is also an embarrassment for Canada on the international level. Section 43 has been identified as contravening Canada's obligations under the *United Nations Convention on the Rights of the Child.*[72] In the wake of a recent decision by the European Court of Human Rights that found that the corrective force defence in Great Britain contravenes the *European Convention on Human Rights,* the government in that country has committed itself to critically reexamining its law on point.[73] Therefore, in this climate of international opinion that is critical of the corrective force defence, Canada stands in increasing isolation.

Even outside the *Charter* context, the way that the section compromises the interests of children and pupils has provoked unease on the Bench. This is evident in Chief Justice Dickson's decision in *Ogg-Moss* v. *R*[74] which is leading authority on the nature and scope of the defence. The Chief Justice stated: "One of the key rights in our society is the individual's right to be free from unconsented invasions of his or her physical security or dignity and it is a central purpose of the criminal law to protect members of society from such invasions…. [Therefore] any derogation from this right and this protection ought to be strictly construed."[75]

The kind of rights for which the Chief Justice shows such concern fall comfortably within our contemporary understanding of human rights. In fact, however, the status of children as full human rights-bearing beings in our society – and therefore full human beings in a legal sense at least – continues to be a controversial issue.[76] This argument will not be elaborated upon here because it is submitted that there is no controversy in relation to children's ability to claim the personal security rights that are compromised by the corrective force defence. Furthermore, to some considerable extent the *Charter* has ended this argument with its recognition of age as an enumerated ground of discrimination that offends the Constitution.

These uncontroversial human rights draw much of their authority from liberal individualist social and political philosophy. This body of thought with its themes of the radical formal equality of people is conventionally understood to have arisen to explain and justify revolutionary responses to the demands of Monarchs who headed archaic regimes. These regimes institutionalized status-based social relations of radical inequality. Section 43 of the *Criminal Code* is a throwback to this pre-liberal era.

Rhoda Howard emphasizes that human rights,[77] like the right to security of the person alluded to by Chief Justice Dickson in *Ogg-Moss* and enshrined in s. 7 of the *Charter*, represent "a radical rupture from the many status-based, nonegalitarian, and hierarchical societies of the past and present."[78] Most radical among the implications of the theory of human rights, is the principle that humanness – and therefore human-rights-bearing capacity - is a biological, rather than a social fact. Howard writes: "In the lexicon of human rights, humanity is a mere physical attribute; one is or is not a live human being. In most societies' lexicons of dignity and justice, however, to be a human is a social attribute."[79] Furthermore, Howard argues that human rights are particularly characteristic of liberal and/or social democratic societies, and in such societies "the idea of different laws for different categories of persons is anathema. All are subject to the same rules. But in many past societies, laws varied depending on one's social category, and such variation was considered 'just' by the majority of citizens socialized into that society." [80]

In fact, Howard over-states her position in this regard. Status-based laws are not necessarily offensive to the goal of securing the equal dignity of every individual, and therefore not anathema merely because they give legal significance to certain status relationships. Our law is replete with entirely legitimate rules that impose automatic or potential duties upon the better-advantaged parties in status relationships for the benefit or security of less-advantaged parties. In the area of family law, for example, the courts are regularly involved in enforcing custody and support rights and obligations on the basis of family status.

In the area of criminal law in particular, the enjoyment of superior status in a relationship with another individual most often operates so as to create or aggravate culpability in relation to conduct performed against those occupying the less powerful positions. It is in this regard that s. 43 is most remarkable. It operates in the precisely the opposite manner. Therefore, like Howard's example of the worst kinds of historic status-based offences, the European Lord's *droit de seignerur*,[81] the corrective force defence maintains our law's connection to a past of violent and archetypally patriarchal privilege and institutionalized dehumanization.

Accordingly, s. 43 is a *Criminal Code* provision that *justifies* and therefore essentially encourages corporal punishment[82] and is therefore objectionable both symbolically and in practice.[83] This discussion will, however, entertains the argument that we may occasionally want our law to distinguish forceful conduct by parents, from assaultive conduct by others. It is suggested, however, that this should have less to do with parental status *per se*, than the unique social situation that parents may be in, in relation to children.

Therefore, however objectionable forceful conduct by parents toward their children may be, this discussion will allow that it is not clear that all of it should be subjected to the criminal law process. No attempt will be made here to provide a list of what these situations might be. For the present purposes, it will suffice to say that criminal law is not our only vehicle of social control and condemnation and criminologists consistently remind us that it is not the most effective recourse in many situations. This suggests that something of a middle ground should be recognized, between a situation where a formal defence exists, and one where parental force is never distinguished from other kinds of force for the purposes of criminal law. The next part of this discussion will consider the potential for prosecutorial discretion to provide that middle ground.

IV. Prosecutorial Discretion in the Post *C.C.* s. 43 Context

A. The General Framework of Prosecutorial Discretion

This discussion focuses on a small part of the large topic that is the scope of prosecutorial responsibilities and discretion in relation to criminal investigations, the laying of charges and, of course, the prosecution of cases. That large topic includes the important distinctions and relationships that exist between the roles of federal and provincial Attorneys General, the federal Solicitor General and, in one provincial jurisdiction, a Director of Public Prosecutions.[84]

The *Constitution Act, 1867* gives the federal government jurisdiction over Criminal law in Canada.[85] However, the Act gives provincial governments jurisdiction over the administration of justice in the provinces, including the constitution, maintenance, and organization of Provincial Courts of criminal jurisdiction.[86] A peculiar result of this constitutional arrangement is that provincial attorneys general have prosecutorial authority over the *Criminal Code*, a piece of federal legislation.

While some exceptional incidences of prosecutorial power may require the personal action of the relevant Attorney General, individual Crown prosecutors exercise most of this authority. The Supreme Court of Canada has affirmed the general legitimacy of attorneys general having their statutory duties under the *Criminal Code* carried out by departmental officials to whom that authority is delegated.[87] Furthermore, the Courts have recognized that there is generally no requirement for personal involvement by attorneys general in prosecutors' exercises of this authority.[88]

Michael Code identifies both practical and principled reasons for this state of affairs. Practically speaking, as pointed out by Dickson J. in *R.* v. *Harrison*, "The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally."[89] Policy considerations relate to the fact that attorneys general, who are also the provincial justice ministers, are elected officials and cabinet members. Therefore, the important principle of

prosecutorial independence, including freedom from the perception of political influence, is served by attorneys general maintaining some distance from the exercise of the authority that is officially theirs.[90]

Prosecutorial discretion in Canada is concentrated in the stage of the criminal process that follows a charge being laid, with very little authority extending back into the investigation process, or the decision as to whether to lay a charge. In contrast to the United States, where District Attorneys are actively involved in the investigation and charge-laying process, the traditional approach in Canada is to recognize the laying of a charge as the boundary between the police's and the prosecutors' respective areas of obligation.[91] Apart from rare examples where Crown approval is required for part of an investigation,[92] the Canadian Crown counsels' role in the pre-charge and charge-laying period is as an independent advisor to the police.

Citing the federal Department of Justice policy guidelines for Crown counsel, Code indicates that prosecutors can provide legal advice to the police, when the police request it. This advice might include discussions about the strength of the case and the form and content of charges, but it must stop short of any advice that amounts to "directing" a police investigation.[93] Crown counsels' independent position, which is distinct from that of a solicitor to a client, is essential in order for them to maintain the integrity of their quasi-judicial status as officers of the Court and agents of attorneys general.[94]

Notwithstanding these generally held principles, however, Quebec, New Brunswick, and British Columbia require the police to obtain the approval of Crown Counsel before a charge is laid. Professor Archibald characterizes this state of affairs as "controversial in terms of statutory authority, criminal law policy, and constitutional principle."[95] Michael Code comments: "Suffice it to say that this is neither the law nor the practice in Ontario and in the majority of Canadian provinces. Furthermore, in my opinion, the charge approval practices that exist in these three provinces do not mean that Crown counsel directs the police investigation. It simply mean that Crown counsel must approve any prosecution *at the end of the investigation."* [96]

This, therefore, establishes some of the framework for the role that prosecutors might play in effectively providing a midway point between a formal corrective force defence, and a situation where parental force is never distinguished from other kinds for the purposes of the law of assault. Individual prosecutors are in a position to exercise the statutory and common law jurisdiction that is available to attorneys general. This jurisdiction should not, however, be understood to extend to the pre-charge investigation period. Furthermore, in most provincial jurisdictions, prosecutors have very little role in relation to police officers' decisions about whether or not assault charges should be laid in situations involving parental force. Generally, any affect that prosecutors may have upon police decisions at the charging stage should be an indirect result of legal advice that the police have requested.

B. Discretion to Terminate or Stay Proceedings

But for the exceptions represented by practices in Quebec, New Brunswick and British Columbia, prosecutorial discretion in Canada is essentially premised upon charges having been laid by the police. Contribution to the process before that point should be limited to giving legal advice. Accordingly, any ability of the justice system to respond to instances of the use of parental force in a manner that would avoid having people charged with assault in the first place would not involve prosecutors.

Within the range of decision-making powers that are available to Crown prosecutors acting as agents for attorneys general, the common law power to withdraw charges and the statutorily defined ability to stay criminal proceedings once commenced[97] would seem to be most applicable to the present discussion.[98] Furthermore, these examples of Crown authority are relevant to this paper's concern with the use of prosecutorial discretion as a compliment to law reform strategies. Archibald points out that the prosecution's discretion to stay or terminate proceedings by withdrawing or staying charges "is critical in relation to the choice between punitive and restorative paradigms of criminal justice…"[99]

Prosecutorial authority to suspend or withdraw criminal proceedings flows from the common law powers of the English Attorney General to enter on the record a plea of *nolle prosequi* ("I am unwilling that it should be prosecuted").[100] For the most part a discussion of these two types of authority may be folded together in that the principles relating to their use are similar. Symbolically, however, their differences may be important. As the name suggests, the exercise of the power to withdraw charges prior to an arraignment and plea has the effect of terminating proceedings. The Crown, on the other hand, can recommence proceedings that are stayed within a year without laying a new information.[101] There may also be some practical significance in the distinction between withdrawals and stays. There is some confusion in the authorities in relation to whether leave of the court is required before the Crown can withdraw charges.[102] The wording of s. 579 makes it clear that leave of the Court is not required in order for the Crown to enter a stay of proceedings.

Professor Archibald's canvassing of the federal and provincial Crown counsel guidelines in relation to the discretion to terminate proceedings in Canada reveals the general recognition of two principles: sufficiency of proof and public interest.[103] Heretofore, the former principle has been of particular significance to the issue of parental force. The principle of proof provides a threshold test whereby a Crown prosecutor must be satisfied that there is a reasonable chance of gaining a conviction at trial. Assessment in this regard involves considering whether there is sufficient evidence relating to each element of the offence, and any *defences* that an accused might raise.

Accordingly, in the context of the sufficiency of proof principle, the corrective force defence can operate to invoke the exercise of prosecutorial discretion in such a way as to prevent a charge relating to the use of parental force from going to trial. In the absence of s. 43 or a judge-made replacement, any distinction that might be drawn between parental and other kinds of force would have to be made in the context of

Crown Counsel's application of the principle of public interest. The existence of the public interest principle reflects the common law position that sufficiency of evidence will not, alone, compel the prosecution of a charge.[104] Archibald emphasizes the extent to which this principle is reflected at the federal and provincial levels. The relevant guidelines for prosecutors in Nova Scotia indicate that in addition to sufficiency of evidence "[t]he principle of prosecutorial discretion also requires that a prosecution only proceed where the public interest is best served by a prosecution."[105]

Concerning the specific content of the concept of the public interest, Archibald remarks on a trend in Canadian jurisdictions to enumerate non-exclusive lists of factors for prosecutors to consider. Assuming that the Nova Scotia example provided by Professor Archibald is indicative of these factors, it is significant that several of them could speak to the concerns of those who are anxious that the law remain capable of responding sensitively to the exercise of parental force in certain circumstances. Indeed, to the extent that s. 43 only justifies the use of force for correction, non-corrective uses of parental force would not have fit within the "defences" part of prosecutors' considerations relating to the sufficiency of proof for a prosecution. Accordingly, factors that inform the public interest part of the process would already have been applied to these non-corrective uses of parental force.

For example, the directives indicate that prosecutors who are assessing the public interest component of a prosecution may consider the "technical" nature of an offence. This factor might speak to concerns about the wide scope of conduct that satisfies an assault and which, at the low end, includes gestures. If parental conduct sometimes needs to be considered more sensitively than similar conduct by people in different situations, the reference to a "technical" offence would allow this. Examples of other factors that are of potentially applicable to the parental force situation are: the possible counterproductivity of a prosecution; undue harshness or oppressiveness of a conviction under the circumstances; the opinion of the victim.

C. Judicial Review of Prosecutorial Discretion to Terminate or Stay Proceedings

The institution of judicial review of discretionary decision-making by officials has developed to address concerns about the fairness and legal legitimacy of this activity. In keeping with the process-oriented concept of justice that is conventionally identified with our legal system, judicial review is understood be "concerned only with the legitimacy of the *process* whereby discretionary decisions are made and not with the merits of those decisions."[106] The Attorney General's discretion to stay charges under s. 579, however, falls within a class of discretionary decision making that is least subject to judicial review. In *Campbell* v. *Ontario (A.G.)*[107] the Ontario Court of Appeal held, apart from situations involving flagrant impropriety on the part of Crown counsel, the exercise of discretion under this section is not subject to judicial review. The *Charter* may, however, have broadened the courts' jurisdiction in this regard. Thus, in *Chartrand* v. *Quebec (Min. of Justice)*, the Quebec Court of Appeal held that, regardless of how absolute the Attorney

General's discretion in this regard may have been in the past, the exercise of discretion under s. 579 is reviewable in relation to its consistency with *Charter* rights.[108]

D. Summary

This part of the paper has identified prosecutorial authority to withdraw and stay charges as sites of discretionary activity that could allow the law of assault to be applied in a manner that occasionally distinguishes the use of force by parents from other examples of the use of force. It has been suggested that this potential lies, more specifically, within the public interest aspect of the decision-making process that prosecutors are directed to follow in exercising their discretion. Although there is some potential for judicial review of this site of discretionary decision-making, the basis for such review is relatively restricted.

V. Critical Analysis

The final part of this discussion deals with concerns and issues relating to the exercise of prosecutorial discretion in the particular context of decisions to withdraw or stay assault charges that involve parental force. This part of the discussion will begin by reviewing the academic debate over the nature and substance of discretionary, as compared to rule-bound, decision-making by individual legal actors. An important current of this debate suggests that the assumption that a substantive distinction exists between these kinds of decision-making reflects a naively legalistic attitude.

The discussion will then concentrate upon issues that are, frankly, most relevant to this legalistic context. The issues that rely upon these assumptions are concerns about how the rights of victims and people who are charged with offences may be compromised by the exercise of prosecutorial discretion in this context. The final issue to be discussed is the how *Criminal Code* reforms should be understood to affect prosecutorial discretion and the extent to which such discretion can be candidly recognized as a compliment to such reforms.

A. Problematic Aspects of the Concept of Discretion

Issues that are of critical concern at this point in the discussion are whether the current *optimism* in relation to discretion may suffer from its reliance upon legalistic assumptions. In the example at hand, emphasis is placed upon the ability of prosecutorial discretion to allow the law of assault to operate in a manner that sometimes distinguishes parental force from other forms of force. We are challenged, however, to consider the implications of the social science perspective that suggests that

the concept of discretion may be obsolete. It is possible that the exercise of discretion is as predictable and therefore inflexible, as the rule-bound decision-making that it is invoked to modify. Furthermore, it may operate in the prosecutorial context in a manner that is particularly germane to this discussion.

In her article "The Myth of Discretion" M.P. Baumgartner discusses factors that empirical research have identified as influencing the exercise of discretion in predictable ways.[109] Baumgartner indicates that one of the most significant of these factors is "relational distance" between the parties to a legal dispute. The general finding is that the greater the "prior intimacy, the more indifferent and lenient legal officials will be….prosecutors [for example] are less likely to press charges." [110] Baumgartner also mentions "social status" as a factor leading to decisions that are, predictably, highly deferential to the interests of the party in a dispute with superior status. Clearly, discretionary decision-making by prosecutors in relation to parental conduct could be affected by both of the relational distance and the social status factors.

The predictability and consistency of discretionary decision-making has been used to undermine the kinds of concerns about this activity that were earlier identified with A.V. Dicey and Kenneth Davis.[111] Baumgartner's observations, however, place this phenomenon in a different and more troubling light. Not only does discretion fail to emerge as a force that allows the occasional modification of the law in response to compelling fact, but also it may consistently maintain values that have been removed from our formal laws. This perspective suggests that discretion's progressive promise may be hollow to the extent that it presumes the flexibility and unpredictability of this activity. It also raises specific concerns about its exercise in relation to situations involving parental force.

We are also challenged to consider the implications of the extent to which the model of discretion that dominates legal debate is essentially individualistic. Keith Hawkins argues that this is problematic.[112] Hawkins argues that it is important to be sensitive to the non-individualistic or "serial" nature of discretionary decision-making in most administrative contexts. Any final decisions in relation to a matter are the product of a chain of decision making by different people that lead to that point.[113] Among the implications of this, as Hawkins sees it, is that decision-making is very often concentrated in the hands of those who make informal decisions. The example that Hawkins refers to is administrative officials who act as the "gate keepers at the periphery of their organization where it is generally less visible and less controllable."[114]

Bruce Archibald uses the "gatekeeper" metaphor to describe the role of prosecutors in the common law system.[115] This discussion has emphasized, however, that the role of prosecutors in the investigation and charge-laying part of the process is expected to be limited to giving legal advice to the police. In many respects, therefore, police decision-making may have the greatest significance for parental force situations.[116] Among the questions that this raises is whether parental force situations that reach the stage of charges being laid have already been effectively vetted by the police in relation to the public interest principle.

These criticisms that undermine the naïve legalistic perspective on discretion, similarly challenge proposals that are based on this view which seek to exploit existing sites of discretion, including new ones, or restrict discretionary activity in light of the threat that it poses. In this latter regard, the contemporary theme of legal response to excessive discretion is the imposition of law and law-like standards.[117] In this regard, Nicola Lacey writes:

> In its tendency to produce law-like generalizations about the need for and means of control of discretion, its emphasis on rules, standards, and guidelines, its preoccupation with procedure and formal equality rather than with substance, and its focus on the discretion of 'public' officials, jurisprudence even of a relatively broad-minded type tends unwittingly to reproduce the inherent limitations of more conventional legal scholarship.[118]

Notwithstanding these themes of criticism about the nature of discretion, our understanding of its operation, and our ability to control it, legalistic debate about the potential and legitimacy of this activity continues. This discussion will now turn to issues arising in that context.

B. The Interests of Victims of Parental Force

The exercise of prosecutorial discretion in relation to withdrawing and staying charges gives specific focus to classic general concerns about the threat that this kind of decision-making by officials represents for individual rights and the rule of law in particular. These themes of concern were reviewed in Part II of this paper. They include the ideas that whereas discretion may facilitate decision-making that is more sensitivity to the particular circumstances of each case and may therefore enhance the quality of justice that our legal system dispenses, it conflicts with the perceived need for clear general standards that apply to every case. The obligation of public officials to observe general standards is understood to safeguard individual liberty and rights.

In this respect, the exercise of prosecutorial discretion as it concerns situations involving the use of parental force suggests a compliment of concerns. Foremost among these concerns are that the security interests of victims of parental force will be compromised by exercises of discretion to withdraw or stay assault charges. It is beyond the scope of this discussion to consider the extent to which criminal law's attempt to punish and incapacitate people and deter others by example enhances the security of the victims of violence. For the present purposes, however, it will suffice to say that the interest in having *Criminal Code* s. 43 repealed is a response to the belief that insulating violent conduct towards children from criminal liability does not enhance children's security in any way.

If discretionary decision-making by prosecutors is exercised in a manner that produces some of the same results as s. 43, those decisions will be a concern. Furthermore, given the discretionary, informal nature of the decision-making context, those who are affected by the decision may not be in a position to consider its fairness.

This point is among the most problematic for the assumption that prosecutorial discretion may allow the administration of the criminal law to distinguish parental force from other kinds in a manner that is less objectionable than s. 43. An earlier part of this discussion emphasized the extent to which the existing corrective force defence is in serious tension with *Charter* guarantees. That being the case, in accordance with the *Chartrand* ruling mentioned above, an exercise of prosecutorial discretion that similarly compromises those rights could at least open the decision to judicial review in relation to its consistency with principles of natural justice. In all likelihood, it would be subject to review in relation to its consistency with fundamental or substantive justice as well.[119]

A weak theme of response in this regard relates to the complex and ironic nature of rights thought and analysis. It is something of a truism in modern Critical Legal thought, at least, that the coherence of "rights talk" is compromised by the extent to which any rights claim may be understood to involve compromising another rights claim.[120] This point is not uncommonly illustrated in *Charter* litigation. The suggestion that the Crown should never exercise its discretion to withdraw or stay assault charges stemming from the use of parental force because it compromises the *Charter* protected security interests of the victims of force, is something that could be said about many defences. In fact, defences have been *expanded* by the Supreme Court in response to concerns about the manner in which they infringe *Charter* rights of the accused, notwithstanding concerns that this compromises the security interests of the people who may be subject to that kind of conduct. [121]

Accordingly, it is arguably the case that criminal defences inevitably operate against the interests or rights of people who are not charged with offences, and victims of the conduct in particular. The corrective force defence, however, is extraordinary in the extent to which it not only infringes the security interests of victims of parental force, but it represents direct formal discrimination on the basis of age and family status as well. In this respect, therefore, it stands apart from other defences.

C. Discretionary Activity in Criminal Law Context in Particular

In the context of the broadly liberal principles that explain and justify our legal and political institutions, the legitimacy of discretionary activity is always more or less suspect. Criminal law is certainly among those areas of law where this kind of activity will be received with the greatest suspicion. It is in the context of the administration of criminal law that the state is most blatantly involved in threatening basic standards of human rights: life, liberty and the security of the person. A conventional understanding of the significance of due process rights is that they have evolved precisely so as to protect these individual rights from the criminal prosecution process. Due process rights are the apotheosis of formal justice, the ideal of which is most threatened by discretionary decision-making.

In general terms, this state of affairs represents a serious challenge for proposals to reform criminal law that involve discretionary activity on the part of officials. We are in the early days of watching this develop in the context of the *Criminal Code*'s statement

of the purposes and principles of sentencing. For example, s. 718.2(e)'s mandate that the courts pay "particular attention to the circumstances of aboriginal offenders" seems to affirm circle-sentencing initiatives. Such initiatives, however, are premised on a belief in the importance of less formality and a lack of specific concern for consistency with the outcome of other sentencing processes.[122] It is, perhaps, unsurprising that the case law on point has evinced tension between the willingness of trial courts to innovate in this regard, and appellate courts' attempts to impose generally applicable and restrictive principles upon those innovations.[123]

Therefore, it may be assumed that prosecutors' decisions to withdraw or stay assault charges involving parental force will face some of the challenges that are uniquely arrayed in opposition to discretion in the criminal law area, where a special premium is placed upon procedural justice. That being said, as compared to new sites of informal decision-making, this discussion has reviewed the extent to which prosecutors' exercise of their traditional discretion to withdraw stay charges is well established. A distinction could also be drawn between instances of informal decision-making the results of which could compromise an accused's interests, and those that only work in the accused's favour by providing a potential benefit. In this regard, an extension of the reasoning of the Manitoba Court of Appeal in *R.* v. *Catagas* is helpful. [124] In *Catagas* the accused argued that his prosecution under *The Migratory Birds Convention Act*[125] represented an abuse of process. Catagas had been charged for hunting on unoccupied crown land, notwithstanding an explicit policy that aboriginal people would not be prosecuted for this kind of activity in Manitoba. The Court identified this as "a clear case of the exercise of a purported dispensing power by executive action in favour of a particular group...[and s]uch a power does not exist."[126] Alternative legitimate authority that did exist was the Crown's ability to stay proceedings on any pending charge. The Court held, however, that this discretion could be exercised only in relation to specific cases: "It is the particular facts of a given case that call that discretion into play…. The Crown may not by Executive action dispense with laws."[127]

This emphasis upon the need for discretion to be exercised only in relation to specific cases gives rise to a related point. Following the holding in *Catagas*, no one has an interest that approaches the nature of a "right" to have the Attorney General's discretion to stay charges exercised in his or her favour. Accordingly, if the exercise of discretion in the context of criminal law raises concerns because of its inconsistency with formal procedures that are understood to protect the rights of accused people, this is not an issue in relation to the exercise of discretion to withdraw or stay charges. This is the case because no issue of right arises for the accused in this context.

The argument, rejected in *Catagas,* that prosecutorial policy can give rise to a kind of right to be spared from prosecution may, however, be distinguished from the suggestion that accused persons' right to equal treatment before the law may be offended by prosecutors' failure to exercise their discretion in a certain way. Authority that has some applicability to this point relates to s. 4(1) of the *Young Offenders Act.* In *R.* v. *S.(S.)*,[128] Dickson C.J.C. found it significant that the *Act* gives the Attorney General the "a power, but not a duty, to develop and implement programs of alternative measures."[129] The discretionary aspect of this authority supported the Court's finding that the absence of such programs does not infringe young offenders' equality rights

under *Charter* s.15 (1). This could support an argument that the optional or discretionary nature of the authority to withdraw or stay charges in parental force cases insulates this authority from challenge by those who feel discriminated against by the fact that they have not benefited from its exercise.

D. The Impact on Prosecutorial Discretion of s. 43's Repeal

This discussion has demonstrated that prosecutors may already have within their scope of discretionary authority, the ability to distinguish parental force from other forms of assaultive conduct, for the purposes of deciding whether to withdraw or stay charges. An issue that arises, however, is whether that discretion should be affected by changes in the law that reflect less tolerance for parental force.

By repealing s. 43 Parliament would demonstrate an intention to remove from the law's consideration for the purposes of assault law, the potential significance of parental status.[130] Arguably, therefore, absent some specific directive from Parliament, its intention in this respect should also restrict the extent to which the law informally responds to parental status. As suggested earlier, a repeal of s. 43 would at least prevent prosecutors from considering corrective force as part of "any defences" that an accused person might have when Crown counsel apply the sufficiency of proof principle in deciding whether or not to proceed with a prosecution. In relation to the second principle that applies to the exercise of prosecutorial discretion in this area, the repeal of the corrective force defence could be understood to provide authoritative content to the concept of "public interest."

Conversely, if Parliament is interested in maintaining some informal sensitivity to parental force in the application of the law of assault, it is an interesting question as to whether it can be clear about this, in a manner that avoids the objectionable symbolism of the statutory defence. Practically speaking, an obstacle to Parliament's ability to influence the informal aspects of the *Criminal Code*'s administration is the fact that this falls within the jurisdiction of the provincial attorneys general. Accordingly, this would forestall any direct ability of the federal Attorney General, a Member of Parliament and cabinet member, to promulgate policy for the Crown counsel who exercise the discretion to withdraw and stay *Criminal Code* charges.

Quite apart from these practical considerations, these issues shed light on some of the most enigmatic and anomalous aspects of discretionary activity. It seems possible that an official attitude of "toleration" rather than recognition may be a necessary condition of its effective exercise. That being the case, it suggests limitations on the ability to use the prospect of discretionary decision-making as a means of promoting acceptance of legislative change that might otherwise seem too sweeping in nature.

To some extent this may be illustrated by the *Catagas* case. In that case it will be recalled that the Manitoba Court of Appeal declared invalid a general non-prosecution policy that operated in favour of aboriginal people. The Court did not, however, question

the validity of the same result being affected by the exercise of individual prosecutorial discretion in relation to specific cases. In a sense, therefore, grand patterns of discretionary activity are allowed to operate systemically, in a manner that would be suspect if these patterns were intentional.

VI. Conclusion

It is difficult to articulate conclusions in relation to the general question that this paper poses about the relationship between law reform agendas and the exercise of discretion by legal officials. This is the case not least because certain currents of scholarship have succeeded in casting doubt on the extent to which discretion is a meaningful concept and its exercise by officials is a real phenomenon. Leaving aside these doubts, what can be said in general terms is that legislative bodies and legal professionals themselves are actively engaged in attempting to take advantage of whatever potential this kind of activity may offer.

This discussion's specific focus upon prosecutorial discretion and the repeal of the corrective force defence has only begun to touch upon some of the details of the complex relationship that exists between discretion and legislative reform agendas. Discretion's potential to advance progressive law reform objectives may be uniquely dependent upon the inclinations of individual legal officers like prosecutors and, concomitantly, it may be uniquely impossible to tap this potential by imposition from above. If we really want legal actors to exercise discretion, then "top down" law reform initiatives that allow for this kind of activity can not be premised upon the generation of certain kinds of policy-friendly decisions by those to whom discretionary powers are granted. Legal theory tells us that rules, which are the opposite of pockets of discretion, are the way of ensuring specific kinds of decisions.

Because it is unpredictable by definition, when it is part of a law reform proposal, discretionary activity must somehow be important in and of itself. The discretionary authority of officials may, for example, enhance community involvement in aspects of the justice system. This has been the case with sentencing circle initiatives that took advantage of judicial discretion in relation to sentencing.[131] It would be difficult, however, to try to engage this kind of discretion to obtain particular objectives, like less incarceration and lower recidivism, without interfering with the discretionary activity itself, by establishing guidelines that are at least quasi- rules.

These points are illustrated in the specific example of the role of prosecutorial discretion in facilitating the demise of the *Criminal Code*'s corrective force defence. In this regard, let us return to the view expressed by the majority of the members of the Law Reform Commission twelve years ago. Those members felt that the statutory corrective force defence, applicable only to parents, "should be retained to prevent the intrusion of law enforcement into the privacy of the home for every trivial slap or spanking."

Rather than retaining the section as the Commission suggested, this paper has considered the alternative of relying upon prosecutorial discretion to modify the law of assault as it applies to the exercise of parental force. The potential for this seems to exist in the Attorney General's authority to terminate criminal proceedings after charges have been laid, on the basis of their lack of consistency with the public interest. Ironically, however, the very act of repealing s. 43 might give the kind of substantive content to the notion of public interest that would prevent prosecutorial discretion from being exercised in this way.

Another irony relates to the nature of our legalistic construction of the concept of discretion. As suggested above, in an important sense we are not allowed to expect particular kinds of decisions from the exercise of discretion. Such expectations would suggest consistency or predictability in the outcome of the decision-making process, which would imply that discretion is not "really" being exercised. This, then, suggests limits upon the extent to which prosecutorial discretion can be identified in any candid, official way, as a compliment to law reform strategies.

We are free to assume, and we are perhaps justified in expecting, that in the absence of *C.C.* s. 43, prosecutorial discretion will sometimes be exercised so as to distinguish parental force from other kinds of forceful conduct for the purposes of prosecuting assault charges. This may not be a sufficient enough prospect to convince advocates of s. 43's retention that their concerns have been addressed. Parents do not, however, "deserve" to have their forceful conduct insulated from legal liability in the same way that children deserve to see the end of the way in which the law formally compromises their dignity and security interests. It is fully appropriate, therefore, that any leniency that is shown in the application of the criminal law to the use of parental force should be no more formal than the nature of discretion itself.

Endnotes

[1] Joel Handler, "Discretion: Power, Quiescence, and Trust" in Keith Hawkins, ed., The Uses of Discretion (Oxford: Clarendon, 1992) at 331.

[2] R.S.C. 1985, Chap. C-46.

[3] See Philip Stenning, Appearing for the Crown (Cowansville, Que.: Brown Legal Publications, 1986).

[4] It may be a defence to conduct that would also amount to a sexual assault. This is the subject of my paper "The Corrective Force Defence and Sexual Assault" delivered to the annual meeting of the Canadian Law and Society Association, Sherbrooke Quebec, June 1999.

[5] "[L]awyer Dallas Miller …said the courts are quite capable of deciding when the line between discipline and abuse is crossed. Removing Section 43 would result in a 'police nanny state' that would turn parents into criminals." "Right to spank Children Faces Challenge by Advocacy Group", Vancouver Sun (20 Nov 1998) A10

[6] Law Reform Commission of Canada, *Recodifying Criminal Law,* rev. ed. (Ottawa: Law Reform Commission of Canada, 1987) at 40.

[7] Criminal Code s. 265 reads in part: (1) A person commits an "assault" when (a)without the consent of another person, he applies force intentionally to the other person, directly or indirectly; (b) he attempts or threatens, by an act or gesture to apply force to another person …

[8] See Dianne Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall L.J. 150. Dianne Martin warns against the tendency to equate taking crimes against women "seriously" with the need to treat offenders more punitively (at 153). Similarly, for the purposes of the present discussion, the suggestion that criminal prosecution is not the best way of responding to all examples of the use of parental force should not be interpreted as a failure to take such conduct seriously.

[9] Sheila Noonan, annotation to *Ogg-Moss* v. *R.* (1984), 41 C.R. (3d) 297 at 299.

[10] Keith Hawkins, "Law and Discretion: Exploring Collective Aspects of Administrative Decision-Making" (1998) 8 Education L.J. 139 at 141.

[11] Simon Verdun-Jones and Douglas Cousineau, "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada" (1979) 17 Osgoode Hall L.J. 227 at 240.

[12] Kenneth Culp Davis provides the following definition: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 4.

[13] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution,* 10th ed. (London: Macmillan, 1959) at 188. The first of Dicey's three concepts that constitute the rule of law states that: "[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint." (*Ibid.* at 88)

[14] Carl E. Schneider, "Discretion and Rules: A Lawyer's View" in *Keith Hawkins*, *supra* note 1 at 46.

[15] *Keith Hawkins*, preface, *ibid.* at vi.

[16] *Carl E. Schneider*, *supra* note 14 at 57.

[17] As Professor Hogg points out, governments' delegation of authority to administrative agencies and tribunals has developed over the last 100 years to the point that they now deal with more disputes and deal with more money than ordinary courts. Such delegation promises the development of expertise in specific areas; innovation in relation to policies and remedies; research and education activities; relieving the volume of work that would otherwise be assumed by the regular courts; development of a faster and less expensive procedure than the regular courts. Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 190.

[18] H.L.A. Hart, "Separation of Law and Morals" (1958) 71 Harvard L.R. 593 at 606.

[19] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961) at 132.

[20] Ronald Dworkin, *Taking Rights Seriously* (Cambridge Mass.: Harvard University Press, 1978) at 81.

[21] *Ibid.* at 29

[22] *Ibid.* at 81

[23] *Ibid.* at 81

[24] *Ibid.* at 31

[25] *Ibid.* at 32

[26] In Critical Legal thought, of course, neither the mainstream positivist nor principle-embracing theories of Hart and Dworkin respectively are descriptively or prescriptively convincing. This is the case particularly insofar as these mainstream accounts are designed to maintain the distinction between law and politics that is essential to the liberal concept of the rule of law. In critical legal terms, adjudication is an intrinsically political and ideological activity. See Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge: Harvard University Press, 1997); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2nd ed. (Toronto: Thompson, 1994); Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Politics* (Toronto: University of Toronto Press, 1995

[27] *Keith Hawkins*, *supra* note 1 at 14,16.

[28] *Kenneth Culp Davis*, *supra* note 12 at vi [emphasis added].

[29] *Ibid*. at 188.

[30] *Keith Hawkins*, *supra* note 1 at 17. Testifying to the on-going influence of Davis' analysis in the contemporary Canadian context is the extent to which his work is cited with approval in recent work concerning administrative law and discretionary decision making. See, for example, *Administrative Law: Principles, Practice, Pluralism* (Toronto: Carswell, 1992) and, in particular, Hudson Janisch, "The Choice of Decision making Method: Adjudication, Policies, and Rulemaking" 259 at 285 and J.A. Fraser, "Rule-Making: A Cautionary Comment" 327 at 334.

[31] *Kenneth Davis*, *supra* note 12 at 215.

[32] *Keith Hawkins*, *supra* note 28 at 17.

[33] "[L]awyers tend to think about 'law' as a system of rules. Where an area of law … seems poor in rules and rich in discretion, they begin to wonder whether it is real law." *Carl E. Schneider*, supra note 14 at 48. See also Nicola Lacey, "The Jurisprudence of Discretion: Escaping the Legal Paradigm" in *Keith Hawkins*, supra note 1 at 362.

[34] The distinction between rules and discretion is a reflection of the general liberal legal commitment to the distinction between law and politics that supports the liberal notion of rule of law which has been the subject of sustained attack by Critical Legal scholars. See, for example, *Alan Hutchinson*, supra note 26 at 7-12.

[35] Madam Justice Beverley McLachlin, "Rules and Discretion in the Governance of Canada" (1992) 56 Saskatchewan L.R. at 167.

[36] See Robert Emerson and Blair Paley "Organizatonal Horizons and Complaint-Filing" in *Keith Hawkins*, supra note 1 at 231. The authors' study of the exercise of discretion in a Deputy District Attorney's office bears out the "well established" point that "a sharp rules-discretion

dichotomy presumes and perpetuates overly narrow and mechanistic treatments of discretionary decision-making. This dichotomy obscures the contingent and variable processes of rule interpretation inevitably unspecified by the rules themselves." (*Ibid*. at 231)

[37] *Keith Hawkins*, *supra* note 1 at 17.

[38] David Luban, who is far from a conventional thinker (if that is what a Neo-Dicean would be), presents the following "empirical conjecture" in his essay "The Legacies of Nuremberg" in Legal Modernism (Ann Arbor: University of Michigan Press, 1997) at (373-374): "that industrial societies are becoming increasingly complex; that such complexity can be governed only with unfettered and arbitrary administrative discretion – a pragmatism that is the opposite of the rule of law - or else a proliferating bureaucracy that passes over the threshold to rule by Nobody; and that a state ruled in either of these two ways is likely to take on the criminal characteristics of the Third Reich.…")

[39] I make a related point, with some expansion, in my review of Duncan *Kennedy's A Critique of Adjudication: {fin de siècle}*, supra note 26. Kennedy argues that appellate level judges (in particular) operate in "bad faith" and are "in denial" when they deliver judgments that are written in objective terms which deny the deeply ideological nature of adjudication. Kennedy identifies this ideological element as (at 191) "a kind of secret, like a family secret –the incestuous relationship between grandfather and mother – that affects all the generations as something that is both known and denied." It occurs to me, however, that something more interesting and complex may be going on in this process than is captured by concepts like Kennedy's "bad faith" and "denial." I think everyone, including the public, is in on the secret. A fascinating irony exists, however, in that if we want law (and perhaps we do not) we have to talk as if we do not know the secret.

I have suggested in the text accompanying this note that a necessary condition of our construction of law and legal analysis is some degree of artificial atomization of the social world into facts, and the selection of some of those facts in relation to artificial legal categories. It is perfectly valid to reject this process, but at a certain point that would involve rejecting the concept of law. I suggest that there is a similar point to be made in relation to the objective judicial stance that Kennedy charges with dishonestly masking the ideological nature of adjudication. To quote myself "According to this more complex possibility…if law is largely distinguished from politics by linguistic conventions which are observed within certain institutional contexts, then law's existence depends upon judges doing "the objectivity thing" in their opinion writing. There may be more transparent alternatives to this, but they might not be law." [(1997), 35 Osgoode Hall L.J. at 403.]

[40] See *Nicola Lacey*, *supra* note 33. Professor Lacey argues that there exists a dominant Anglo-American "legal paradigm." In discussing the implications of this paradigm for the study of discretion she writes: "This kind of jurisprudential approach to judicial discretion [which insists on the 'special suitability of certain kinds of questions, (typically those involving individual rights)'] flows in part from …the association of the rule-of-law ideal with the value of formal justice (treat like cases alike) and with the protection of individual rights. The emphasis laid on formal justice relates to the importance of the notion of rationality in the liberal world-view: faith in the idea that openness, rationality, consistency, generality, and predictability (values centrally located in the rule-of-law ideal) will conduce to fairness…. *This conception of fairness is irreducibly process-oriented – reflecting the traditional insistence of legal ideology on a clear distinction between review of process and appeal on the merits*." (at 369-370.) [emphasis added].

[41] Martha Minow and Elisabeth Spelman, "In Context" (1989-90) 63 Southern California L. R. 1597 at 1632-1633.

[42] *Joel Handler*, *supra* note 1 at 331.

[43] "If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision." *Ronald Dworkin*, *supra* note 20 at 24. [emphasis added].

[44] Howard Abadinsky*, Discretionary Justice: An Introduction to Discretion in Criminal Justice* (Springield: Chalres C. Thomas, 1984), ch. 1. As cited in Bruce P. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Betweeen Punitive and Restorative Paradigms of Justice" (1998) 3 Canadian Criminal L.R. 68 at note 8.

[45] *Joel Handler*, *supra* note 1 at 331.

[46] See Sally Merry and Neal Miller, eds., *The Possibility of Popular Justice: A Case Study of Commuity Mediation in the United States* (Ann Arbor: University of Michigan Press, 1993).

[47] See Ross Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998).

[48] *R.* v. *S. (R.D.)* (1998), 10 C.R. (5th) 1 (S.C.C.) at 23.

[49] In relation to the general incarceration rate, in *R.* v. *Gladue* (1999), 23 C.R. (5th) 197 (S.C.C.) at 216.), Cory and Iacobucci JJ., writing for a unanimous Court, recognized:

> Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada's rate of approximately 130 inmates per 100,000 population places it second or third highest: see First Report on Progress for Federal/Provincial/Territorial Ministers Responsible for Justice, Corrections Population Growth (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, "Prison and Jail Inmates at Midyear 1998" (1999); The Sentencing Project, Americans Behind Bars: U.S. and International Use of Incarceration, 1995 (1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, Infomat: A Weekly Review (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instill a sense of pride."
>
> In relation to the disproportionate representation of aboriginal people in prison populations, the Court held (at 218)
>
> If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent: see M. Jackson, Locking up Natives in Canada (1988-89), 23 U.B.C. L. Rev. 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates:

Solicitor General of Canada, Consolidated Report, Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act--Five Years Later (1998), at pp. 142-55….

[50] Minister of Justice Allan Rock introduced the second reading of Bill C-41 on September 20, 1994 (House of Commons Debates, vol. IV, 1st sess., 35th Parl., at pp. 5871 and 5873) with the following statements (quoted in R.. v. Gladue, ibid. at 214): "A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration…. Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. ... [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done".

[51] Honourable Chief Justice E.D. Bayda (Saskatchewan Court of Appeal), "The Theory and Practice of Sentencing: Are They On the Same Wavelength?" (1996) 60 Saskatchewan L.R. 317.

[52] *Criminal Code*, s. 717.

[53] *Young Offenders Act*, R.S.C. 1985, c. Y-1, 4.

[54] The aggravated forms of the assault offence – those that do not fit the non-legal term "common assault" - are s. 267 (assault with a weapon or causing bodily harm) and 268 (aggravated assault). The s.267 and s. 268 offences are not really an issue here to the extent that their commission involves a degree of force that would almost certainly exceed s. 43's "reasonable under the circumstances" standard. In relation to aggravated assault, for example, although the Crown does not have to prove an intention to wound, maim or disfigure, the objective foresight of such harm is required. *R.* v. *Godin* (1994), 31 C.R. (4th) 33 (S.C.C.).

[55] A theme of practical argument is that it would be ridiculous to consider prosecuting parents and teachers for every application of force that they render to children and students respectively. The social arguments relate to the current of opinion suggesting that corporal punishment benefits children ("spare the rod…"). Politically, it is argued that the practice of physically disciplining one's own children is a quintessentially private activity that is beyond the legitimate purview of the state and its criminal law. As indicated in the introduction to this discussion, the Law Reform Commission of Canada expressed some support for this point of view. *Recodifying Criminal Law*, supra note 6.

[56] *Proverbs*, XIII 24: "He that spareth his rod hateth his son..."

[57] In *R.* v. *Graham* (1994), 151 N.B.R. (2d) 81, affirmed (1995), 39 C.R. (4th) 339 (Q.B.), a case involving a teacher who spanked a nine-year-old student who had been disruptive in class, Justice Harper of the New Brunswick Provincial court indicated that the maxim is as valid today as it was in biblical time. This case engaged the important issue of the significance for criminal liability of contractual agreements under which teachers agree not to impose corporal punishment. In this case, the Court held that s. 70(2) of the Schools Act, S.N.B. 1990 did not affect the accused's ability to claim the corrective force defence under Criminal Code s. 43.

[58] Northrop Frye, *The Great Code: The Bible and Literature* (Toronto: Harcourt Brace Jovanovich, 1986) at 121. Quoted in Anne McGillivray, R. v. K. (M.): Legitimating Brutality (1992), 16 C.R. (4th) 125.

[59] *R.* v. *K. (M.)* (1992), 16 C.R. (4th) 121 (Man.C.A.).

[60] *Supra*, note 56.

[61] *Ibid.* at 127-128.

[62] S.C. 1892, c. 29.

[63] William Blackstone, *Commentaries on the Laws of England, Book 1*, 14th ed. (1803) para. 452-453.

[64] *Supra,* note 60 s. 5.

[65] Eric Colvin, *Principles of Criminal Law Second Edition*, (Toronto: Carswell, 1991) at 227.

[66] *McGillivray, supra* note 58 at 132.

[67] *Sheila Noonan, supra* note 9 at 299.

[68] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. [Hereinafter *Charter]*. "Child-rights Group Takes Ottawa to Court: Hitting Children is Not Discipline Activists Say," *Globe and Mail* (21 Nov 1998). See as well Sharon D. Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to be Protected from Physical Assault, Part I" (1998) 41 C.L.Q. 288; "Part II" (1999), 41 C.L.Q. 462.

[69] *Charter* s. 7 reads: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[70] *Charter* s. 15(1) reads: Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [emphasis added].

[71] "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[72] U.N. General Assembly resolution 44/25, adopted 20 November 1989. Signed by Canada in 1990. "B.C. Failing Obligations On Children's Rights, Report Says" *Vancouver Sun* (18 March 1997).

[73] E.T.S. No. 5; U.K.T.S 70 (1950), Cmd. 8969 "Britain to Put Limits on Beating of Children", *Globe and Mail* (29 September 1998).

[74] *Supra*, note 9.

[75] *Ibid*. at 308.

[76] See David Archard, *Children: Rights and Childhood* (New York: Routledge, 1993); Also, see Marge Reitsma-Street "More Control than Care: A Critique of Historical and Contemporary Laws for Delinquency and Neglect of Children in Ontario" (1989) 3 C.J.W.L. 510. Reitsma-Street identifies and analyzes and assesses the implications of the opposing ideological frameworks of "rights" and "parens patriae" that inform legislation concerning the welfare of children.

[77] While the content of the notion of human rights is a matter of debate, it can at least be said with confidence that they are "rights one has simply because one is a human being,"[Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithica: Cornell University Press, 1989), at 9.] Furthermore, human rights can be characterized as the "minimum conditions of a dignified life. (Ibid. at 18) Things become more complicated at this point, as human dignity is, obviously, a broad concept. Furthermore, there are different ways of recognizing human dignity, only one of

which involves the idea that human beings can make these special claims because they are human.

[78] Rhoda Howard, "Dignity, community and Human Rights" in Abdullahi Ahmed Naim ed. *Human Rights in Cross-Cultural Perspective* (University of Pennsylvania Press: Philadelphia, 1992) at 81.

[79] *Ibid.* at 86.

[80] *Ibid.* at 85.

[81] Providing a Lord the right of sexual access to unmarried women of the serf class.

[82] Section 43 says that corrective force is "justified." Defences in criminal law that are "justified" are distinguished from excuses by the way that the former conduct is understood to have been necessary, and something that anyone in the circumstances would have done, and perhaps should do. Excuses, on the other hand, recognize that the conduct is wrong but, for some reason, allow that an accused person should not be convicted of an offence under the circumstances.

[83] See Sharon D. Greene, supra note 68 for a litany of examples of examples of violent conduct that has been held to be justifiable under s. 43.

[84] The Province of Nova Scotia has a Director of Public Prosecutions with a significant degree of independence from the provincial Attorney General. Public Prosecutions Act, S. N.S., 1990, c. 21.

[85] *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c. 3, s. 91(27).

[86] S. 92(14).

[87] *R.* v. *Harrison* (1976), 66 D.L.R. (3d) 660 (S.C.C.). This case involved C.C. s. 605 (now s. 676). The section grants "the Attorney-General or counsel instructed by him for the purpose" to appeal against acquittals on indictments. In rejecting a defence challenge to the Crown's decision to appeal on the basis that the Attorney-General had not personal involvement in the decision, Mister Justice Dickson (as he then was) held (at 665): "where the exercise of a discretionary power is entrusted to a Minister of the Crown it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his Department…."

[88] In R. v. McKay (1979) 9 C.R. (3d) 378 (Sask.C.A.), the Court affirmed that the Attorney General's personal involvement was not required to support a prosecutor's decision under s. 579 to stay proceedings.

[89] *Supra,* note 87 at 665-66.

[90] Apart from the involvement of attorneys general in passing broad guidelines for Crown counsel, Code indicates that the conduct of individual cases is the responsibility of individual prosecutors. The exception to this general state of affairs is in relation to cases that raise issues of policy or principle that are important enough that an attorney general may be expected to have to answer questions in relation to it. In such circumstances Code indicates that attorneys general are briefed and informed of the Crown's position. Although attorneys general have the ability to change that position in response to serious concerns that they may have, but the departmental officials' position is usually accepted. Michael Code, "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage" (1998), 40 Criminal Law Quarterly 326 at 351-352.

[91] *Ibid.* at 326.

[92] For example, C.C. s. 185 requires the provincial Attorney General to sign an application for authorization to intercept private communications.

[93] *Michael Code, supra* note 90 at 337.

[94] *Ibid.* at 339.

[95] *Bruce Archibald, supra* note 44 at footnote 59.

[96] *Michael Code, supra* note 90 at 342. Don Stuart, however, suggests that Crown prosecutors routinely decide whether or not to lay charges, and what those charges will be. See "Prosecuting Accountability in Canada" in Philip Stenning, eds., *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995) at 330. In considering "the accountability of trial prosecutors in Canada, with particular reference to the practical realities of prosecuting in Toronto," Professor Stuart indicates that "Crown attorneys have virtually unfettered discretion as to when to charge, [and] what to charge…" (at 332).

[97] C.C. s. 579.

[98] For a list of other decisions that may be made by prosecutors, see *Bruce Archibald supra* note 44 at 80.

[99] *Ibid.* at 81.

[100] *Philip Stenning, supra* note 3 at 26.

[101] C.C. s. 579(2).

[102] In *R.* v. *Osborne* (1976), 25 C.C.C. (2d) 405, Mister Justice Limerick of the New Brunswick Court of Appeal stated "the Crown prosecutor is in a better position than the Judge to know how serious any particular case is. Further, the prosecutor is the representative of The Queen and it is inconceivable the Court should refuse the right of Her Majesty to withdraw an information or stay a prosecution." (at 412). However, in Re Forrester and the Queen (1977), 33 C.C.C. (2d) 221, Quigley J. of the Alberta Supreme Court stated "The Attorney-General has an unfettered power to elect how to prosecute, so a priori he must have an unfettered power to elect not to prosecute. Once he elects to prosecute however, and a plea is taken he can apply for a withdrawal, which the Court may grant and which in effect may or may not amount to a dismissal, or he can enter a stay of proceedings pursuant to [now s. 579] of the Code." (at 225).

[103] *Bruce Archibald, supra* note 44 at 81.

[104] Annual Report, 1992-93, Public Prosecution Service, Nova Scotia Government Printer, Halifax at 67. Quoted in *Bruce Archibald*, ibid. at 82.

[105] Annual Report, 1992-93, at 67-69. Quoted ibid. at footnote 71.

[106] *Nicola Lacey, supra* note 33 at 373.

[107] *Campbell* v*. Ontario* (A.G.) (1987), 35 C.C.C. (3d) 480 (Ont.C.A.).

[108] *Chartrand* v. *Quebec* (Min. of Justice) (1987), 59 C.R. (3d) 388 (Que. C.A.).

[109] M. P. Baumgartner, "The Myth of Discretion" in *Keith Hawkins, supra* note 1 at 129.

[110] *Ibid*. at 132-133.

[111] *Madam Justice Beverley McLachlin, supra* note 35 at 167-68.

[112] *Keith Hawkins, supra* note 27 at 17.

[113] *Keith Hawkins, supra* note 10 at 144. The author writes "Decision-making in law is …almost always and in various way, not only a collective but, with increasing frequency, an organizational enterprise: it is hard to sustain the idea of the individual actor exercising discretion according to legal rules or standards alone, unencumbered by the decisions or influences of others."

[114] *Ibid.* at 146

[115] *Bruce Archibald supra* note 44 at 71.

[116] In R. v. Catagas (1977), 38 C.C.C. (2d) 296, the Chief Justice Freedman of the Manitoba Court of Appeal represents as unremarkable, the exercise of this kind of police discretion. The Chief Justice stated (at 301): "Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket."

[117] See *Davis, supra* note 12, Chapters III-V, "Confining Discretion", "Structuring Discretion," "Checking Discretion."

[118] *Nicola Lacey, supra* note 33 at 387.

[119] As mentioned supra note 69, Charter s. 7 guarantees that everyone's right to "life liberty and security of the person" will not be infringed by government activity except in accordance with the "principles of fundamental justice." This concept has been interpreted by the Supreme Court to give the courts the ability to engage in review of government activity that goes beyond an assessment of its procedural fairness. Reference re. Section 94(2) of the Motor Vehicle Act (1985), 48 C.R. (3d) 289 (S.C.C.).

[120] For example, Duncan Kennedy, "Legal Education As Training for Hierarchy" in The Politics of Law, ed. D. Kairys (New York: Pantheon: 1982).

[121] I discuss this phenomenon in "Criminal Law, Women's Equality, and the Charter: An Analysis of the Criminal Code's Self-Induced Intoxication Provisions" in ed. Margaret Jackson and Kathleen Banks (Vancouver: Canada Publishing, 1996).

[122] *Ross Green, supra* note 47.

[123] *R*. v*. Morin* (1996), 104 C.C.C. 346 (Sask. C.A.).

[124] *R*. v. *Catagas , supra* note 116.

[125] *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12

[126] *R.* v. *Catagas, supra* note 116 at 301.

[127] *Ibid.*

[128] *R.* v. *S. (S.)* (1990), 77 C.R. (3d) 273 (S.C.C.).

[129] *Ibid.* at 290.

[130] It would also remove the significance of teachers and people standing in the place of parents, but as indicated in the introduction, this discussion is concerned only with the parental situation.

[131] *Ross Green, supra* note 47, identifies this as one of the most important benefits of circle sentencing initiatives, quite apart from their ability to prevent recidivism and the incarceration of aboriginal people.

As Good as Our Word: Reconciling Kahnawake Mohawk and Canadian Legal Culture in the Negotiation and Articulation of Self-Determination

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I. Introduction

Since the moment of the first arrogation of rights of law and governance were made by the newcomer governments over the Mohawk Nation community at Kahnawake, the Kahnawakehronon[1] have resisted this erosion of their independence and nationhood. While this resistance has coalesced around a range of epicenters over time, a consistent theme of the struggle resides in the fundamental violation of Mohawk sovereignty implicit in the presence and power of Canadian law within Kahnawake, most notably the federal *Indian Act*.[2] As the "pointman" of Canadian legal jurisdiction in the community, the *Indian Act* has attracted a fair measure of ambivalence among Kahnawakehronon. This irresolution resides in the reality that, at the same time as Kahnawake's political elite have been encouraged by a strong local antipathy for Canadian law generally, and the *Indian Act* in particular, to adopt a rhetoric of defiance against such state intrusions into "Kahnawake's business", practical exigencies have dictated that the elected leaders must also embrace the *Act* which lay at the center of their politics of resistance. The resulting dynamic requires that the elected Mohawk Band Council must appear activist and unyielding in its own nationalism, while at the same time ensuring it does not bite too deeply the hand that feeds it. This tension has engendered a modern political discourse in which the Council's delicately qualified rejection of state law in practice has emerged as decidedly unqualified in principle: The Mohawk Council has consistently endorsed its push toward self-determination as leading to a Kahnawake unencumbered by Canadian laws or legal jurisdiction - whether *Indian Act*, *Constitution* or *Charter* - and their concomitant arrogation of Mohawk rights.

The Council's most recent efforts to reach this end reside in their decade-long bilateral negotiations with the Federal government toward the definition of a new relationship between Kahnawake and Canada. If successful, these talks will see their community delivered from the limitations and restrictions of the *Indian Act*. The negotiations are a source of some controversy within Kahnawake, as centuries of contact and colonialism have nurtured a profound cynicism both towards Canadian law and consultations with the

Canadian government that creates and imposes it. Recently, this scepticism has extended to the Mohawk Council which is negotiating the terms of the emancipation. There are those Kahnawakehronon who express concern about what they perceive to be a lack of transparency surrounding the Council's interactions with representatives of outside government; they fear that they do not know what might be signed away by a Council which is sometimes seen as out of touch with its constituency. The fact of the matter is that although most (if not all) Kahnawakehronon openly resent the presence of Canadian law in their lives, they also appreciate that the status quo in Kahnawake is much less problematic than the political and philosophical compromises which permit that status quo. Negotiations must thus promise to ameliorate those political problems of sovereignty and jurisdiction without undermining the important practical benefits obtained by those compromises - a quality which the Mohawks would appear to share with some of the newcomers in their midst.

The sensitive political climate surrounding the work of the Council's Intergovernmental Relations Team (IRT) has undoubtedly been a significant contributor to the Council's cautious stance regarding disclosure of the details of negotiations. Little has been said about the ultimate vehicle for removal of the *Indian Act* from the community, or that at least some of the agreements anticipated by the negotiations will be defined and implemented through the same framework that has historically been deemed responsible for much that is wrong in Kahnawake, namely, Canadian legislation. Hence the Council finds itself in the uncomfortable position of selling its presence at the bargaining table to the community as directed toward removing Canadian law and jurisdiction from Kahnawake, while at the same time working with outside governments to develop Canadian legislation which will define that removal. To the degree that Kahnawake self-determination will require legal validation in the form of a Canada/Kahnawake Intergovernmental Relations Act (CKIRA), it seems likely that the full escape from Canadian legislation anticipated by at least some Mohawks may not be forthcoming.[3] That this proposed legislation is further expected to determine the "application or non-application of the Indian Act"[4] also seems likely to exacerbate current controversies over the new relationship within the Kahnawake community.

There are a range of questions inspired by the discussions around a new relationship between Canada and Kahnawake; we will deal with only two broad categories of those questions here. First, it is crucial that "legislation", as one of the primary means of defining the terms of Mohawk emancipation, be problematized both in terms of the Iroquois culture and traditions of regulation alien to it, as well as the historic legacy which it possesses for most First Nations in Canada. What is the nature of the obstacles to be overcome in convincing a sceptical and profoundly nationalist Kahnawake community that legislation, a thing foreign to Mohawk traditional culture and historically directed to deconstructing that culture, may be a potentially positive force in the community? Second, given the current and historic differences between these cultures and their forms of law and regulation, how might such legislation provide for internal Kahnawake laws which, although not in violation of either the umbrella legislation or Kahnawake's own constitution, radically conflict with other Canadian laws? Here a brief case study of the challenge of defining membership and citizenship within Kahnawake will be undertaken as a means of conveying the remarkable complexity of navigating a return to traditional government more than three centuries after "contact".

II. Through the Barricades: Situating the "Negotiation of a New Relationship between Canada and Kahnawake" in Recent Kahnawake History

In a twist of irony consistent with many in Kahnawake's past, the latest efforts by the Mohawk Council to redefine and improve their relationship with Canada find their origins in a barricade erected to keep Kahnawake and Canada apart. The blockade was the product of a protracted Kahnawake-Canada disagreement over the Mohawks' active interpretation of their *Jay Treaty* rights to import and sell "contraband cigarettes", and the

Canadian government's apparent uncertainty over how to respond to that activity. Those Mohawks most closely associated with the trade appear to have appreciated early on that this disagreement had the potential for full-blown conflict, and they had worked diligently to avoid the realization of that possibility. In January of 1988 the leaders of the largest traditional group (or "Longhouse"[5]) in the community had approached the governments of Quebec and Canada hoping to initiate talks in regard to the Mohawks' cross-border rights. The federal government apparently refused to participate in the talks, probably owing in equal measure to their desire not to appear to undermine the Mohawk Council as the legitimate local government in the community, and a certain ambivalence in their own position on the trade. The province of Quebec agreed to join the negotiations, and their officials were actively working with the Longhouse towards an agreement on "contraband" when the federal government executed "the first meaningful response of Canada" to the cigarette trade: a raid which saw 200 Royal Canadian Mounted Police officers storm Kahnawake's borders and raid four cigarette shops.[6] It was an act which was both violent and designed to intimidate, and in its aftermath, seventeen people had either been arrested or held, a clan matron had been assaulted, and cigarettes, money and business records had been permanently seized under the authority of the Canadian *Customs Act*.

If the federal government had hoped this action would undermine either the trade or the Mohawk activism which reinforced it, they were to be sorely disappointed. Instead of withdrawing from the fight and the trade, the people of Kahnawake responded to the raid by barricading all roads leading into and across the community to "defend our territory and jurisdiction".[7] The barricades remained in place for 29 hours and set a new and portentous standard in Kahnawake-Canada relations which, as noted by a Mohawk commentator, possessed "all the makings of a future tragedy".[8]

In one massive misstep, the federal government had managed to reinforce the lines of conflict both between and within Canada and Kahnawake in relation to Mohawk sovereignty, rights and jurisdiction. Within Kahnawake, the raid had provided a common ground uniting groups traditionally at odds in most political matters, the Mohawk Council and the Longhouse and, in so-doing, had added significantly to the distance between these Kahnawake political elite and the Canadian state. Although that alliance would not prove enduring, it did reveal clearly that, while Mohawks might disagree within themselves about the means by which to reach their common end of a return to self-determination and traditional Mohawk ways, they were in substantial agreement in their resolve that no outside government should dictate either the terms or limitations applicable to that end.

The raid and the events leading up to it were equally effective in underscoring political divisions outside Kahnawake's borders, throwing into relief one of the single greatest challenges to the negotiation of Mohawk autonomy, namely, the inability of Canada and Quebec to attain some degree of working cooperation in their relationships with First Nations. Like most Aboriginal communities in Canada, the Mohawks of Kahnawake are no strangers to being caught in the middle as the federal and provincial governments argue over the precise division of rights and responsibilities in regard to "Indians". For those First Nations residing within the province of Quebec, this dynamic made that much more problematic by the ongoing struggle of Quebec to define its own

independence and self-determination, and what appears to be the general trend by the federal government to resist any action which might provide additional political fuel for that struggle. Insofar as federal support for those nations within Quebec might easily be construed as undermining Quebec's own movement toward enhanced self-determination, First Nations within Quebec face not only the challenge of bringing together outside governments with disparate interests to negotiate Aboriginal rights and entitlement, but must also overcome the special degree of hostility between Ottawa and Quebec. That much of the latter enmity revolves around Quebec's rejection of the Canadian Constitution whose terms are so central to the debates over Aboriginal self-determination, adds an additional complication to the struggle.

Unlike those other Aboriginal Nations however, the Mohawks of Kahnawake have a distinct advantage. After all, this is the Nation which, over much of the colonial history of northeastern America, held the balance of power between French and British colonies simply by playing the two powers' clearly opposed ends against each other and in the direction of a very favourable middle-ground for the Mohawk Nation. Despite the fall of New France as a central political power in Canada in 1760, the French, British, and now Canadian, presence remain central defining elements of Canadian politics and are thus vulnerable to the same sorts of traditional Iroquois political strategies. As events in the wake of the raid would illustrate, it was to this traditional strategy that Kahnawake's leadership would turn to overcome external political competition and conflict to initiate discussions with outside governments separately, but simultaneously, toward the end of Kahnawake autonomy. How this occurred and what made the strategy possible are matters we will return to shortly.

The Mohawk Council was quick to respond to Canada's belligerence, condemning the raid and recasting both it and the dispute over "contraband" which had incited it as matters arising directly from the unwillingness of the Canadian government to respect Kahnawake's nationhood and sovereignty. In so doing, they linked the conflict directly to the issue of self-determination, thereby opening the door to the federal government to turn a very negative political situation into a potentially positive change in the direction of their "Indian policy" in regard to Kahnawake:

> The issue that surrounds this incident is the sovereignty, the jurisdiction and the territorial integrity of the Mohawk Nation People of Kahnawake.... The Federal government must agree to political level discussions to deal with the Federal/Kahnawake Mohawks relationship in the areas of jurisdiction, our sovereignty and our territorial integrity... Our relationship with the Federal government must be clarified.[9]

What had begun as a way to assert Canadian law and jurisdiction in Kahnawake was thus transformed into a forum for negotiating the withdrawal of at least some aspects of that law and jurisdiction, and an opportunity to debate and define the terms of the federal government's long-promised policy of Aboriginal self-government.

III. Guess Who's Coming to Dinner: Kahnawake, Quebec and Canada Define the Terms of the Debate of Kahnawake Self-Determination

Motivated in some measure by the poor optics around the raid as well as its basic failure to stem the flow of contraband or weaken Mohawk activism, the federal government agreed to open talks with Kahnawake around the matter of the future of the Mohawk community and, more specifically, the relationship of Canadian law and jurisdiction to that future. Inevitably, those talks revolved around the matter of the much-maligned *Indian Act*, the means of its withdrawal from Kahnawake and what might fill the policy and administrative gaps in a post-*Indian Act* Kahnawake's political fabric.

The Mohawk view of the process obtained official form in December 1988, in a Mohawk Council document entitled: "A Framework Proposal for Negotiations Between Canada and the Mohawk Council of Kahnawake (on Behalf of the Mohawks of Kahnawake)".[10] In this document the Council proposed the recognition of a significant degree of Kahnawake autonomy in a range of local government matters, all of which would be protected under the umbrella legislation of a "Canada/Kahnawake Intergovernmental Relations Act" (CKIRA). This legislation would define the terms of the withdrawal of the *Indian Act* and guarantee the continuing relationship between Canada and Kahnawake in a range of areas which the framework divided into four categories, including: "Transitional Framework for Mohawk Government in Kahnawake, Justice, Financial Arrangements, and Land Management and Control"[11]. Under the first of these headings were included a number of important powers, some of which were already areas of substantial activity and authority by the Mohawk Council, including:

- legal authority, capacity and structure of the Mohawk government;
- election procedures;
- duties and powers of the Mohawk Government;
- procedures and guidelines for the Mohawk Government, including accountability to the membership;
- functions and responsibilities of Mohawk institutions;
- provisions for amendment;
- nature of the traditional government and procedures for its implementation; and
- membership/citizenship.[12]

Those powers related to "Justice" included a goal that "Canada recognize by legislation the legal capacity of Mohawk government to legislate, adjudicate and enforce laws for the community and territory of the Mohawks of Kahnawake".[13] There was also to be consideration and negotiation of the "ongoing responsibility" of Canada to the Mohawks of Kahnawake within any agreed-upon "Financial Arrangements", as well as over clarification of the historically problematic matter of Kahnawake's increasingly inadequate landbase. Finally, negotiations would need to attend to a range of such "Other Matters" as taxation, social services, and family law.[14] The Mohawk Council was unambiguous about the goal of these negotiations:

> The objective of the Mohawks of Kahnawake is to reinstitute [sic] traditional Mohawk government in the Territory of Kahnawake. The principles of Traditional Government provide for the guarantee of both collective and individual rights *and* a matriarchal system of selection of male political representation. [original emphasis] [15]

The Federal government was open to these terms, and movement toward the formation of an agreement on a formal agenda and process for the negotiation of a "new relationship" between Kahnawake and Canada continued. It was soon apparent, however, that the participation of Quebec would be a crucial part of the negotiations, especially since some of the matters raised by the Council's document could be expected to involve provincial areas of authority (i.e., such as in those areas of "Justice" articulated by the Mohawks). Thus entered the eternal third man of Aboriginal politics in Canada and the emergence of that oldest of challenges in Canadian Indian policy: Securing meaningful participation by all parties - First Nation, Canada, and province - in tripartite negotiations.

Events soon transpired to allocate discussions of the "new relationship" to a distant second-place, as conflict over the development of a golf course on traditional Mohawk lands in Kahnesatake began to heat up, ultimately exploding in the Oka Crisis of 1990. The crisis was protracted and violent, and effectively ended almost all non-crisis related intercourse with the Canadian and Quebec governments. Although the stalemate slowed progress on the Council's efforts to reach an agreement on the parameters of their intended talks with Canada, the federal government was relatively quick to return to the table in the wake of the crisis. Their enthusiasm was in no doubt linked with the rising activism among the Mohawk communities and a concomitant trend toward an increasing willingness to enlist the more explicit violence of barricades and gunplay. The Oka Crisis was a disaster in international public relations for Canada, and certainly garnered the Mulroney government its fair share of bad press locally; after all, Canada had a reputation for fairness and tolerance which was little aided by sending in police and heavy artillery against Aboriginal people protecting a traditional burial and ceremonial ground from development as a recreational site. Exacerbating those political costs of Oka was the fact that, for many Aboriginal people in Canada, the crisis was seen as a rallying cry and source of pride. There was no question that future Okas had to be avoided. One way to do so might be to work with the Mohawks rather than against them in their pursuit of autonomy. After all, Kahnawake is, relatively speaking, a wealthy and well-organized community, and they had already embarked on a process for changing their formal relationship with the federal government; if any community was capable of flying without the net of the *Indian Act*, it would be Kahnawake. Less than a year after the closure of the crisis, the Mohawk Council and the Canadian government had defined, signed and delivered an "Agreement on an Agenda and Process for the Negotiation of a New Relationship Between the Mohawks of Kahnawake and Canada".

Getting Quebec to the table in the wake of 1990 proved a far greater challenge. Following the conclusion of the 1990 crisis in its incarnation at Kahnawake, the community had agreed that, in the interests of public security, the warriors would man a series of border checkpoints on highways leading into Kahnawake. An important facet of the checkpoint policy was to ensure that "outside police" remained outside

Kahnawake's boundaries. The checkpoints (or perhaps more accurately the symbol of the rejection of Quebec's right to police Kahnawake which the checkpoints symbolized), became a central issue in the province's position in regard to talks with the community. From 1990 to 1995, the official position of the Quebec government was that there would be no talks with Kahnawake until some agreement was reached upon policing the community, and the checkpoints came down.

The Mohawk Council was only too happy to resolve the issue of their right to police their own community; selling that right to the province proved more difficult. According to one observer, there were three occasions on which the Parti Québecois agreed to the terms of an agreement, only to step back and reject those settlements. Despite these setbacks, the province and the Mohawk Council were able to reach an agreement in 1995 which was based upon "institutional recognition" by Quebec of the Kahnawake Peacekeepers and the right and ability of that institution to effectively police Kahnawake. Having been approved by Quebec, federal recognition of the Agreement was almost immediate as, according to one Mohawk Councillor and IRA team member, the federal position was simply that they would agree to recognize the Agreement if it was recognized by Quebec.[16] Once in place, the Policing Agreement "opened the door" for discussion with Quebec on a range of issues, and on 15 October 1998, Kahnawake and Quebec signaled the formal initiation of a series of very wide-ranging talks in their signing of a "Statement of Understanding and Mutual Respect. Quebec was coming to the table.

Perhaps more accurately, Quebec was coming to *a* table, one other than that at which the federal government was already sitting and talking with Kahnawake's representatives. Their willingness to do so signaled the initiation of simultaneous bilateral talks - a significant political victory which permitted the many highly motivated parties on all sides to overcome the political impasse implicit in forcing the issue of trilateral talks. If trilateral talks were impossible, the parties would simply embark upon two sets of bilateral talks the respective outcomes of which would cover all relevant areas of jurisdiction and, when combined, would fully articulate the terms of Kahnawake's autonomy. Mohawk Council officials would talk with Canada and Quebec separately, acting as their own "political middleman".

IV. Using the Past to Define the Future: Traditional Political Tactics and the Articulation of Agreements Defining Kahnawake Autonomy

The tactic has since proven to be a highly successful one, as agreements appear to be in place, or nearly so, with both the federal and provincial governments. The latter were the first to be announced, and the reaction they received is indicative of the challenge facing the Mohawk Council in selling compacts with outside governments to the Kahnawake public. As will be seen, the hard sell is owed at least in part to the exceptional nationalism of the Mohawk people and their distrust of outside governments

and their laws, a scepticism which it now appears has spread in some Kahnawakehronon minds from outside governments to their own.

The discussions following from Kahnawake and Quebec's 1998 "Statement of Mutual Respect and Understanding" lead to the signing on March 30, 1999 of a series of agreements with the provincial government on a range of matters, including policing and justice, roads and taxation.[17] Taken together, those agreements constitute a significant expansion of Kahnawake's current jurisdiction and a noteworthy step in the direction of self-determination. For example, in the area of policing and justice, the pre-existing policing agreement has been divided between the federal and provincial governments each of whom have signed separate agreements with the Mohawk Council. In addition, the current *Indian Act* court in Kahnawake, established under s.107 of the *Act* and presided over by a Justice of the Peace with quite limited powers, has been modified through the expansion of the current jurisdiction facilitating the Court's handling of a range of matters previously dealt with outside Kahnawake in the courts of the neighboring community of Longueuil. Although the Court of Kahnawake had long pushed the envelope of its *Indian Act* jurisdiction, such actions were essentially extra-legal and decisions made within them always at risk. Acknowledgment of a superior jurisdiction constitutes not only recognition of the Court's prior work and success, but affords an official support and respect for those activities which was previously lacking.

In a similar enhancement of legal authority, Quebec has now agreed to recognize the Mohawk Council's right to issue birth and death notices, and marriage documents, an important right and one which is intimately linked with Kahnawake's control over citizenship in an autonomous Mohawk community. As well, Kahnawake has been respected in its right to freely offer and support such revenue-generating events as "Extreme Fighting" which have been the source of more than little friction with outside authorities in the past. While these may seem to some like minor concessions, they are in fact quite significant insofar as the fact of prior outside intrusion into such matters speaks of the degree of lack of respect and freedom which characterized Quebec's relationship with Kahnawake in the past; that the agreements recognize the Mohawks' right to be free of such control is an important and long-awaited development.

It is in the realm of taxation that the most controversial aspects of the agreements are found. The agreements on taxation address two issues that have historically been highly contentious for both constituents of the agreements. For the Mohawks, the promise in the agreement of a "swipe card" which will guarantee the observation of their right to be free from provincial sales tax on off-reserve purchases is welcomed by many Kahnawakehronon. While much shopping can be done within Kahnawake and thus without the endless battles with sales clerks, store management and corporations ignorant of Aboriginal rights in regard to taxation, purchases made off-reserve not uncommonly come with fruitless arguments regarding tax benefits which usually lead either to a refusal of the right or directions to follow convoluted process of requests for reimbursement which hardly seem worth the effort. For some Mohawks, simply to be free from such irritants of daily life make the more troubling aspects of the agreements worth the cost; that being said, the provincial agreements will not affect similar battles with regard to federal sales taxes, which must await an agreement with the higher level of government.

One of the more troubling aspects of the agreements resides in the issue of "parity" which is an important part of the taxation aspects of the "Agreement on Tobacco, Petroleum and Alcohol Products". The latter provides that the Mohawk Council will establish a central authority within a regulatory framework for the supply and sale of tobacco, fuel and alcohol, ensuring in essence that non-Mohawks who purchase such products will pay any applicable taxes. Clearly such a development carries a substantial possibility of undermining the competitive edge of those Kahnawake business people who attract a clientele from "outside" seeking lower prices created at least in part owing to lower taxes. It is perhaps not surprising then, that some members of Kahnawake's business community have voiced grave concerns about the agreements, and have urged for greater clarification and consultation before the agreements are passed as Quebec law.

Reservations about the agreements are not limited to Kahnawake businesspeople. Citing an absence of "proper consultation and confirmation by the people" of the 10 point agreements shortly after their signing, Kahnawakehronon activists journeyed to Ottawa to request the assistance of the Minister of Indian and Northern Affairs, as well as the federal opposition parties, to have the agreements declared null and void.[18] In a number of meetings, both formal and informal, Kahnawakehronon voiced concerns over a lack of information both about the agreements and what they might mean once the details are "worked out".[19] In an editorial published in the local newspaper, *The Eastern Door*, the unease which lay at the heart of many Kahnawakehronon's reactions to the agreements with the province was summarized in a single statement which aptly conveys the community's response to outside governments generally: "Why is the province making these deals?"[20] For many in Kahnawake, it is a question which, to date, remains unanswered.

At the same time that Kahnawake expressed concerns and scepticism about some aspects of the agreements, the federal government was also voicing uncertainty. While more detailed responses had not emerged at the time this was written, it is worth noting that almost immediately following the publication of some details of the taxation arrangements, the federal finance department expressed strong reservations about some aspects of the arrangements, noting that some of these may not be legal.[21]

Confident in their mandate and the soundness of the agreements, the Mohawk Council and the Province of Quebec have pressed forward. In one of its last acts before closing its spring session, the National Assembly of Quebec tabled Bill 66: "An act to provide for the implementation of the agreements with the Mohawk Nation". While the Bill might well have passed on that date (June 14), it has been held over until the fall session to permit for the full debate later in the year.[22] The reaction of the community to the agreements and this development are aptly reflected in the editorial which accompanies local reports on Bill 66 in the Kahnawake newspaper, the *Eastern Door*. Reflecting upon Quebec's public and official position of "recognizing" 11 First Nations in Quebec, the editor notes that the agreements made with the province do not recognize "our land rights, sovereignty or other substantial expressions of our self-determination":

> [B]ill 66 does not recognize our right to control activities in our community, it only allows certain activities which have been negotiated and agreed to by Quebec.

> No agreement, no control. The relationship is still not a true Nation-to-Nation relationship... Our view of nationhood differs from that held by Quebec. We believe that we are a sovereign people with all the rights of self-determination that any other people have. No more no less... Bill 66 does not rise to that level of relationship... Let the Mohawk Nation define its own relationship, let's not let it be defined by the province through legislation.[23]

While the Mohawk Council and many outside observers may not share this view of the Mohawk Nation, tending toward a more pragmatic political vision, the position articulated by the editor is very much a part of the political fabric and cultural identity of Kahnawake. It is also a rhetoric which the Council has, in other contexts and in regard to other matters, adopted in the interests of its own policy ends. That such discourse can be turned against the Council is, one assumes, merely the opposite edge of the very sharp, double-edged sword of Mohawk politics and political language. It is also a language and perception which the Council will have to work hard to overcome if it hopes to gain community acceptance of the agreements and, with it, the realization of the Councils' more pragmatic perception of self-determination.

Within less than two months of the announcement of the provincial agreements, the people of Kahnawake received notice that the Council was rapidly approaching the point of conclusion of their talks with the Federal government. The "Draft Umbrella Agreement" (DUA) completed on 10 May 1999 will form the basis of the proposed CKIRA which, if passed, will confirm a form of Kahnawake governance defined in an as yet non-finalized "Kahnawake Charter". The latter also obtained a draft form on 10 May 1999, but, at the time of writing , was yet to be made public in Kahnawake. According to terms to be defined within the Charter, government in a post-*Indian Act* Kahnawake will be both democratic and accountable, and founded upon "the principles of Mohawk Government in Kahnawake based upon custom, traditions and traditional laws of the Iroquois Confederacy".[24]

Despite its completion nearly four months ago, at the time of this writing the DUA has not been made public in Canada and has been made available and public to only a limited degree in Kahnawake, where some public meetings were to be called to discuss the document and those interested Kahnawakehronon were apparently invited to view it at the Council offices for a limited time. Because the Kahnawake public has been given only limited access to and information about the draft agreement, only limited disclosure of its contents is permissible here.

The purpose of the CKIRA envisaged by the DUA is, as noted above, to "establish a new relationship between Kahnawake and Canada whereby Kahnawake exercises jurisdiction on subject matters as agreed to by the parties and, where the matter is dealt with in the Indian Act, the corresponding provisions of the Act are removed..."[25] On the surface this seems straightforward enough, and the DUA deals with a range of powers which would ultimately fall to Kahnawake. Under the category of governance, provision is to be made in a "Kahnawake Charter" for such matters as "leadership selection" and "a democratic form of governance", "accountability of the Mohawk Government of Kahnawake to its members", "conflict of interest rules", and the respect for and articulation of, "principles of Mohawk Government in Kahnawake based

on custom, traditions and traditional laws of the Iroquois Confederacy", among others.[26] This 'neo-traditional' government is to act within a wide-ranging jurisdiction covering 28 matters ranging from control over the administration and operation of government, policing and the administration of justice, waters and the environment, taxation, membership and social services, education, housing, gaming and sports and recreation".[27] Most of these 28 jurisdictions will be "phased in" over time, consistent with the phasing out of those sections of the *Indian Act* incompatible with various elements of those jurisdictions. The CKIRA further envisages a range of sub-agreements which will not only detail the specifics of individual aspects of Kahnawake's jurisdiction and authority, but will also provide a set of "specific rules for resolving conflicts between laws".[28]

As noted above, while the limited disclosure of the DUA and the parameters of this paper do not permit a detailed analysis of the DUA in its entirety, there are two important themes to the DUA and the CKIRA it anticipates which merit mention. The first of these is the priority of "tradition" and the "transition to traditional government" which Kahnawake set as its Council's top priority nearly two decades ago. The DUA consistently reinforces these priorities, and yet there is little in the document reminiscent of "tradition" or recalling its forms or functions as these might animate a post-*Indian Act* Kahnawake. This theme ties in neatly with the second, namely, the potential for conflict (and the resolution thereof) between "traditional" Kahnawake law and Canadian laws. Here we encounter, as both a central problem for an autonomous Kahnawake and a potential barrier to the realization of the CKIRA, the troubling matter of citizenship and membership in Kahnawake. It is in this example we find revealed the challenges of a return to tradition in the complex modern world and the difficulties of reconciling those "traditions" with the laws and traditions of the societies which surround and interact with modern Mohawks.

VII. Challenging Autonomy and Self-Determination: Citizenship and Conflict of Laws Within and Between the Mohawk Nation and Canada

Historically the most straightforward manner in which to obtain citizenship in the Mohawk Nation was to be born into it and of Mohawks. It was also possible to obtain some manner of formal affiliation through marriage, insofar as this would carry with it clan membership, the sine qua non of status and rights in Iroquois culture. One might also obtain citizenship through adoption, most commonly in the context of warfare. It was commonplace in Iroquoia that captives gained in war would be adopted into extant clan networks to replace clansmen lost in battle and maintain a nation's warrior-strength. Once adopted, an individual lost all traces of their former identity, exchanging these for the name, role, reputation and status of the deceased person they were replacing (the exchange was usually relatively willingly made, given that the alternative was often a grisly death by ritual torture). There is absolutely no indication that such adoptions were in any way considered temporary in principle or practice: Traditional approaches to

adoption viewed adoptees as permanent citizens possessing full rights and entitlements within both clan and community.[29]

When the matter of adoption is raised in modern Kahnawake, it is clear that there has been a radical, if perhaps not always conscious, rethinking of traditional policies in this regard. Over the past two decades, popular wisdom in Kahnawake has revised adoptees' status as lost upon reaching the age of 21; an informal policy which today links in with the community's membership laws, which would view the loss of status at 21 as connected to an adoptee's inability to demonstrate a blood linkage to the community. Consistent with Kahnawake's current "Custom Code" on membership, those who lack an adequate amount of "Mohawk blood" evidenced in a clear biological connection to Mohawk ancestry have no animation or place in Kahnawake, and will be asked to leave.[30] Adoption, once a permanent and integral element of Mohawk and Iroquois society and culture, has as a "modern tradition" enshrined in a "custom code" become quite a bit less than this and a far cry from what appears to have been the original tradition. This "neo-tradition" has very real implications for those adopted Mohawks who find the very same traditions they embrace and which define so much of their lives and culture as the means justifying their exclusion from Kahnawake.

Clearly, Kahnawake's modern take on "who belongs" has evolved somewhat from that witnessed historically among their Mohawk and Iroquois progenitors; it also differs significant from the membership policies of DIAND which have pertained to Kahnawake for most of her recent history. Although concerns over "non-Mohawks" residing in Kahnawake had been in evidence consistently over much of the community's 300 year history "above the rapids", it was not until the 1980's that the community sought to control the presence of outsiders in their midst through control over the definition of insiders.[31] The catalyst for this initiative was the community's awareness that the Department of Indian Affairs was contemplating changes to the *Indian Act* on the matter of Indian status and band membership.

The Department's new position on status and rights in Kahnawake emerged as part of its larger reaction to the international shaming the federal government had obtained at the hands of the United Nations Court of Human Rights in the Lovelace decision. In that case, Canada's image as a proponent of human rights received a substantial blow when the federal government was admonished for the blatant gender discrimination implicit in section 12(1)(b) of the *Indian Act*. This section directed that Aboriginal women who chose to marry non-Aboriginal men would lose their Indian status and all rights and entitlements associated with that status, as would any children of such unions. The opposite did not hold true for Aboriginal men marrying non-Aboriginal women, as the latter assumed status by virtue of their husband's Indian status. The government's response to this humiliation was the proposal of Bill C-31. Passage of this bill would mean (and has meant) that Department would unilaterally reinstate such women and their children into their bands of origin, expecting councils to cope with the return of these people and their demands for recognition of membership rights. That this was to be achieved with federal funds, which were promised but never materialized, added an additional pressure to already stressed reservation lands and band finances.

The proposed changes placed the community of Kahnawake in an interesting and highly complex position. Popular wisdom dictated that the community was simply without the resources to support an influx of returning band members. Modern traditional culture also suggested that such a return could not happen: Consistent with the Two Row Wampum, a person who had jumped from one community or nation to another would have to live with that choice. Thus a Mohawk woman who had lost her status and band membership by "marrying outside" would have to stay outside, as would her children by that union. A return might be permitted if she were divorced or widowed, but no promises could be made either to her or her children. Certainly the *Indian Act* was unfair when it stole the status of Mohawk women who married out, but these women had made a choice and would simply have to live with the consequences, amendments notwithstanding (the contradiction of the apparent ability of men to make this leap also notwithstanding). Kahnawake could not be asked to pay, both monetarily and culturally, for Canada's efforts to improve its international image on gender equality and Aboriginal rights.

At the same time, the *Indian Act* and, among other things, its inherent paternalism, patriarchy and gender discrimination, constituted an affront to Mohawk culture, which was traditionally and historically matrilineal and highly pro-woman in practice and politics. Thus the amendments could be seen, at least on a technical cultural level, as a positive development. That being said, however, those same amendments - and the "membership" provisions of the *Act* generally - constituted a much larger affront to the enduring sovereignty and nationhood of the Mohawk people, insofar as these constituted a further arrogation by the Canadian state of the fundamental right of the Mohawk Nation to define its own citizenry. In their eyes, Kahnawake saw the impending amendments to the *Indian Act* as yet another theft of their nation's rights and powers by the Canada.

The Council responded to this rather unique and conflicting set of circumstances by declaring its control over the articulation of Mohawk identity and its associated rights a full three years before Department handed down its "legislative permission" to do so. Transpiring as it did on the eve of Bill C-31's changes to the *Act*, such a declaration need not have been a controversial one. The changes in the Bill, which became law in 1985, created a context whereby band councils could create their own "membership codes" which would act as a foil on those rights and entitlements associated with "Indian status" and membership in a recognized "Indian band". This was a rather radical departure from prior practice. Pre-1985, the Department had maintained an "Indian Registry", which contains the names of all persons who meet the *Indian Act*'s criteria for Indian status, and individual "band lists". An apparent separation between the lists was, at that time, more theoretical than real: an individual was noted on the Registry as an Indian and as a member of a given band. After the passage of Bill C-31, the Indian Register and band lists became separate entities. Today, inclusion on a band list, which exists separately from the Registry, will be determined either by the Department or an individual band, in those cases where the band in question has assumed formal control over its membership list via s.10 of the current *Indian Act*. Where a Band Council has not assumed such control, s.8 of the *Indian Act* requires the Department to keep a list of all band members who fit with the membership criteria defined in s.6 of the *Act*. When a band assumes control over membership under s.10, the Department is no longer

required to maintain that list as it has delegated statutory control over membership to that band. Thus the list created by the band council becomes the central document for purposes of membership and the allocation of benefits associated with membership, including among others rights of residence, education, land allotment, welfare and the local franchise.

However, that the Mohawk Council's assertion of control over the rights and privileges associated with being a Mohawk of Kahnawake should become controversial was, in retrospect, almost inevitable. Consistent with its position of enduring Mohawk sovereignty and nationhood, the Council refused to consider a delegated control over "membership" in the "Kahnawake band". Rather, it would take full control over defining those criteria which must be met to be accepted by the Council as a Mohawk of Kahnawake and to enjoy any of the rights or privileges normally associated with "membership", but which would now flow from designation as a Mohawk. It was not so much that the Mohawk Council rejected the concept of membership or bands or the *Indian Act* which defined and created these things, it was simply that such things are irrelevant to an independent nation, which by definition deals in matters of citizenship and the rights and responsibilities associated with it. The people of Kahnawake, as part of the larger, sovereign Mohawk Nation, retained as a fundamental right of citizenship the authority to define the contents of that citizenship and its concomitant rights.

Clearly, then, the Mohawk Council eschewed a delegated power over membership, preferring instead to reassert the historic right of the Mohawk Nation to define its own identity and population. Consistent with this choice, the Council also refused to ratify their Membership policy within the terms for assuming control over membership defined within s.10 of the *Indian Act*. As a result, the "Mohawk list" which resulted from this position and is currently maintained by the Mohawk Council has not officially superseded the Department's list as it is not, strictly speaking, recognized by the Department as resulting from a legal process. The consequence is that, outside of the Department's Indian Registry, there currently exist two lists of those persons deemed entitled to any rights and responsibilities associated with qualification as a Mohawk of Kahnawake: The list kept by the Department, wherein those rights and responsibilities arise from membership in the Kahnawake Band, and the list maintained by the Mohawk Council, wherein rights and responsibilities are linked with status as a Mohawk of Kahnawake. Given this, it is possible for an individual recognized as an "Indian" and member of the Kahnawake band by the Department to be denied any of the rights and benefits which historically flowed from such standing, as they are not defined as Mohawks by the Mohawk Council which actually administers those rights and benefits. It is thus possible to be an "Indian", but not a "Mohawk", a "Mohawk" but not an "Indian", and have access to (for want of a better term) membership-based rights while not necessarily a member. The situation is confusing, to say the least, and has proven to be highly problematic and troubling for many people of Kahnawake as well.[32]

At least part of the problems resided in the focus of the Kahnawake membership on exclusion as opposed to inclusion. As a first task in determining who belonged in Kahnawake, the Council worked for the systematic removal of those non-Indian residents who resided in the community with no tangible connection to the people or culture. While this addressed one dimension of an historic problem, it did little to

address the problem of those non-Indians whose presence on the reservation territory was gained through their marriage or adoption into Mohawk families. The Council's response to the compromise of Mohawk culture perceived to reside in such unions and families was to render them illegal according to "Mohawk Law". Thus in a statement issued by the Council in 1981, a moratorium was placed upon all "mixed marriages" and the adoption of non-Indians by Kahnawake Mohawks which stated that:

> As of that date [22 May 1982], any Indian man or woman who marries a non-Indian man or woman is not eligible for any of the following benefits that are derived from Kahnawake[:]...
> - Band number
> - Residency (to live in Kahnawake)
> - Land allotment
> - Housing assistance - loan or repair
> - Welfare - in Kahnawake only
> - Education - in Kahnawake only
> - Voting privileges - in Kahnawake only
> - Burial
> - Medicines - in Kahnawake only
> - Tax privileges - in Kahnawake only[33]

The moratorium was expanded and complemented in 1984 with the passage of the Council's "Mohawk Citizenship Law", which specified who could qualify as a "Mohawk" for purposes of the aforementioned rights and services within the community.[34] Article 3 of the law specified the following definitions as foils on rights and access to services within Kahnawake:

> *Mohawk* - any person, male or female, whose name appears on the present band and reinstatement lists and whose blood quantum is 50% and more shall comprise the Kahnawake Mohawk Registry.
>
> *Non-Indian* - any person, male or female, whose name does not appear on the present band and reinstatement lists and whose blood quantum is less than 50%.[35]

The impact of the Councils' definition of citizenship for the exercise of that most fundamental of citizenship rights, the franchise, became apparent at the next local government elections held in 1986. Having obtained ratification for its Citizenship Law at a public meeting of rather slim attendance (popular wisdom records attendance at about 50 people), the Council obtained approval for its specification of the local franchise as limited to anyone "18 years of age and over"..."who is presently on the Band List and the Mohawk Registry...excluding those persons who are non-Indian by birth and those persons who are affected by the Kahnawake Mohawk Citizenship Law".[36] The result of this policy was the denial of the right to vote of 475 of the 1,266 persons who attended the polls, on grounds that their blood quantum had been judged inadequate, and thus they no longer possessed Mohawk citizenship or its concomitant right of enfranchisement.[37]

The franchise was not the only right restricted by the new citizenship law. Over the decade following the 1986 election controversy, the rules regulating citizenship in the

Kahnawake community were enlisted to deny residence rights to divorced or widowed Mohawk women, once married to non-Indians, wishing to return to live in the community, and to prevent their children from participating in the local educational system. In other cases, Mohawk land-holders found their livelihoods under threat as they were restricted from leasing privately-held lands to non-Indians.[38] In a similar fashion, one life-long resident of Kahnawake who applied to the Council to expand his automotive repair business was denied in that effort because, according to the Council, an investigation of his family history had revealed him to possess "only a blood quantum of 25% Indian Blood".[39] More recently, a Kahnawake man was denied the opportunity to run for the position of Grand Chief of the Mohawk Council because a similar investigation found that only 46.87% of his blood was Mohawk. In a classic example of the Kahnawake sense of humour, the man was quoted in the local newspaper as remarking "How they get to this number is beyond me. It is two percentage points lower than the last time I asked".[40]

Indeed, the apparent capriciousness with which the policy on blood and belonging was applied in Kahnawake did little to enhance its credibility among a populace that was increasingly unsure that blood quantum was the best approach to defining Mohawks. There had always been voices of discontent with the policy; the first had emerged with the moratorium in 1981 - after all, as one Kahnawakehronon woman observed, "we all have members in our family who have married non-Natives, whether it was with their knowledge or without their knowledge".[41] A law that threatened many Mohawks on a personal level offended still others as an affront to Mohawk tradition, which was perceived as embracing of difference and utterly unconcerned with such matters as blood quantum:[42]

> In our history we have accepted people who were non-Aboriginal. It is very clear in our current society. We have families and family lineages that go right back to non-Native great-grandparents or great-great grandparents. These families have been accepted into our community. Generally, people are accepted because they contribute to the community in some way and in some function that is not detrimental to the community. Historically, we adopted babies. We have adopted captives of one kind and another at different times to supplement the loss of our young men in war and disease. It is historically documented.[43]

By 1995, those initial few voices which protested against blood quantum had been joined by many others, and the Mohawk Council struck a "Task Force on Membership" for the purposes of reconsidering then-current membership policies. The Task Force was to be a "non-political" vehicle for community consultation about membership, and was to condense the results of its consultations into a new draft policy on membership. The ability of the group to be non-political in dealing with such a politically-charged issue was uncertain, especially as their report and draft policy were to be submitted to the Mohawk Council, many members of which appeared distinctly pro-blood quantum. That the Council retained the right to change the draft before releasing it to the public further eroded the veneer of independence of both the Task Force and their report.[44]

The results of the Task Force report, as released to the public, revealed how difficult it would be to keep politics out of the process of policy change. According to the editor of the *Eastern Door*, who was briefed by the Task Force on their consultations

with the community, "they told me basically that the majority of people they met with have a big problem with the whole issue of blood quantum".[45] When the draft membership law was released to the community, it proposed the replacement of the blood quantum requirement with the concept of a "clear, recognizable lineage", whereby a prospective Mohawk citizen and member of the Kahnawake band would possess, among other capacities, "at least two grandparents who are Mohawk or Native".[46] It is difficult to see precisely how lineage may be determined without some consideration of blood (a criticism which had been levied against DIAND when it adopted the policy of lineage sometime prior to Kahnawake's discussions around it), suggesting that the apparently pro-blood quantum Council members had engaged in an artful and political end-run on the matter.

This law apparently left unratified, the blood quantum requirement remained a central and hotly disputed aspect of Kahnawake's criteria for Mohawk citizenship and band membership. Hoping to affect some closure on the issue, a Committee of Elders entered the fray, releasing in April of 1998 a "Declaration on Kanienké:ha Membership of Kahnawá:ke". By this document, "Kanienké:ha membership" requires the demonstration of four things: "Knowledge of the Kanienke:ha language, Kanienke:ha lineage back to three generations, respect for Mother Earth and identification with a clan".[47] The Elders added to these requirements a directive that:

> any Kanienké:ha person who marries a non-Native is to leave the Kanienké:ha Territory along with any children resulting from this union and such persons will be deprived of certain privileges such as residency rights, land ownership and political participation... Persons who fall under this customary exclusion may return if widowed and furthermore the children of this union may return and be recognized as full members of the Kahnawá:ke community if they marry recognized members of the Kanienké:ha of Kahnawá:ke.[48]

The Elders' position did little to improve the situation, entrenching as it did the imperative of blood. As noted above, this policy has attracted more than a little controversy and caused more than a little heartache within Kahnawakehronon families. It has also been rejected by the Canadian Human Rights Commission, which in 1998 determined that the policy discriminates on the basis of race when it denies rights and services to "Indians" deemed not to be Mohawks. In the case of *Peter and Trudy Jacobs and the Canadian Human Rights Commission and Mohawk Council of Kahnawake*, a life-long resident of Kahnawake who was adopted by a Mohawk family as a baby and possessed Indian status according to DIAND, was denied rights and services by the Mohawk Council owing to his lack of the requisite blood quantum. Jacobs challenged the Council's rejection of his membership and that of his family - full and "half-blood" Mohawks who lost all rights through their connection to him - to the Canadian Human Rights Commission. After dragging on for years, the case was concluded when a Human Rights Tribunal found that not only was the Council engaging in discrimination, but that DIAND was indirectly condoning that discrimination by refusing to come to the aid of persons it defined as "status Indians" and members of the Kahnawake Band, but who failed to meet the Council's apparently non-legal membership code:

> Clearly the Minister [of Indian Affairs and Northern Development] has turned over considerable responsibility to the MCK [Mohawk Council of Kahnawake] with respect to services covered in its [Funding] Arrangement and does not interfere with the decisions made by the MCK... It was also clear that DIAND is aware of the current membership criteria being applied at Kahnawake and nonetheless has taken a "hands-off" approach. This is so notwithstanding that Peter [Jacobs] is a status Indian within the meaning of the *Indian Act* who resides in a Territory and is therefore entitled to the benefits of programs funded by DIAND under the *Act*. While one can well understand the politics of the Kahnawake situation, in our view DIAND has abrogated its statutory responsibility by refusing to assist Peter and his family...[49]
>
> ...In satisfying its political requirements, the federal government has become a party to the resulting discriminatory practice...[50]

With the achievement through their negotiations with DIAND of the DUA, it seems clear that the federal government is prepared to grant the Mohawk Council an increasing level of authority in regard to membership (and a range of related powers). This despite the fact that the current law remains in violation of Canadian human rights laws and is clearly in contravention of the as-yet unratified DUA, which contains Kahnawake's agreement that all "laws and executive actions of the Mohawk Government of Kahnawake will respect the rights and freedoms guaranteed by the *Charter*".[51] Inasmuch as the Mohawk Council has long held that "the collective rights of the Mohawk People and the construct of traditional government must be taken into account in interpreting the...Charter of Rights and Freedoms" in Kahnawake", conflict between "tradition" and outside law in a *post- Indian Act* Kahnawake would seem inevitable.

VI. Putting our Houses in Order: Resolving Conflict of Law and Moving Forward to a Self-Determinating Mohawk Nation at Kahnawake

While the community and Council of Kahnawake continue to grapple with the issue of membership and how best to define this, the bottom line remains one of blood. Insofar as the Council appears from the DUA to have conceded that it will operate in a manner consistent with the Canadian Charter of Rights and Freedoms, respecting those rights and freedoms in manner consistent with Mohawk culture and a Kahnawake Charter, it would seem likely that a blood requirement will continue to be problematic and may stand as a barrier to federal consent to the CKIRA. On the surface, there appear to be two possible resolutions. One, the Council may choose to radically alter its current position on membership, eliminating the blood/ancestry requirements and thereby overcoming the conflict of laws by eliminating one source of that conflict. This may yet transpire, and some commentators in Kahnawake suggest that precisely such a development is in the works. If, however, such a policy change relies upon general community support, it seems unlikely, as word "on the ground" indicates that there is a strong grassroots support for retaining a blood requirement. Second, the federal

government may choose to provide in the CKIRA some mechanism which provides for blood quantum and does so in a manner which circumnavigates human rights protections which operate “outside” and which may be kept within those boundaries on the basis of the same sort of “cultural arguments” which the Council has enlisted to vitiate the application of the Canadian *Charter* to an autonomous Kahnawake. Even if this were to transpire, the Charter will undoubtedly retain some relevance to Mohawks of Kahnawake insofar as the DUA, and thus the CKIRA, provides that any Mohawk may avail themselves of the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*”. The DUA also notes, in a fashion which seems somewhat cavalier given its impact, that the final agreement must “address” the “relationship” between Kahnawake and the *Canadian Human Rights Act*, a statement which may mean something, such as that Kahnawake must step in line with the decision of the Tribunal in *Jacobs*, or nothing, as the case may be.

The DUA acknowledges that certain individuals in Kahnawake may possess Indian status but not membership, and appears to confirm that those individuals will be provided for throughout their lifetime despite that lack of membership. It thus seems obvious that DIAND in particular has recognized that there exists in Kahnawake two qualities of "members": status Indians, as defined by the Indian Registry retained by DIAND within the relevant terms of the *Indian Act*, and Mohawks, as defined by the Council's current membership provisions. DIAND seems also to have accepted as inevitable that some of the people it defines as Indians will not be accepted as Mohawks upon the dissolution of the Kahnawake Indian Band; a practice which in fact is already occurring in Kahnawake and which has already been acknowledged in Canadian law as illegal and discriminatory. Canada's response to this scenario appears to be twofold: (1) As noted above, DIAND will ensure that status Indians who are not Mohawks will be provided for financially for their lifetime; and (2) where there arises some conflict around such persons and their rights, the CKIRA will define a "process for addressing" those conflicts.[52]

It is, of course, impossible to comment on the adequacy of such processes prior to their creation; past experiences in this area, however, compel some consideration of the first of DIAND's reactions to the membership conundrum in Kahnawake. It is, I think, easily argued that simply accepting that those Kahnawakehronon whose rights in Kahnawake spring only from DIAND's definition of them as status Indians is deeply problematic on a number of levels. First, not all of these Indians are not Mohawks due to an inadequate blood quantum: they may be *full-blood* Mohawks who lost their Mohawk membership because they married someone lacking an adequate blood quantum (as in the case of Trudy Jacobs discussed above). Thus persons who are Mohawk by blood may be excluded from Kahnawake one the basis of a membership policy which has already been deemed in part discriminatory in Canadian law. Second, although Canada is prepared to recognize status but not Mohawk membership (thereby once again implicitly condoning a non-legal and discriminatory membership policy) for the lifetime of affected individuals, what is to become of their children? Returning to the facts in *Jacobs*, this may well mean that Indians who possess a 50% blood quantum will be denied membership and any associated benefits because their full-blood mother "married out" (this term used loosely here, insofar as Mr. Jacobs was adopted by a Kahnawakehronon family when he was only a few weeks old, and grew up within

Kahnawake and Mohawk culture). This state of affairs seems rather reminiscent of the discriminatory provisions of the *Indian Act* which were to be rectified by Bill C-31, the end result of which appears to simply be a further level of discrimination. That this discrimination now resides as much in Mohawk law as Canadian is probably of little comfort to those experiencing the discrimination; its apparent justification by an alleged connection to “tradition” and “traditional government” makes it only more problematic - especially as history appears to document a quite contrary tradition of adoption and inclusion of “non-Mohawks” into Mohawk families and society.

Insofar as Canada has some complicity in that discrimination both by its apparently tacit acceptance of the Mohawk laws creating it as well as in their ownership of the policy of blood quantum (now discarded in favor of the concept of lineage, which is somehow not linked with blood issues despite a focus on one’s blood relatives and ancestors), it is simply not sufficient for them to accept discrimination for the lifetime of status Indians in Kahnawake and then view this as concluded as there are no longer such Indians resident in Kahnawake owing to the primacy of a Custom Code which deals only in Mohawks. Both DIAND and the Council, if the Custom Code preserves the blood quantum bottom line, must also accept the reality that this Code may move Kahnawake a good distance in the direction of the original historic state plans for assimilation: as noted by the editor of the *Eastern Door,* "with a blood quantum requirement of 50 percent, we are all just two generations away from extinction".[53] Kahnawake can legislate a blood quantum requirement through its Custom Code, and Canada can build into the CKIRA a right to opt out of membership after a single generation, but neither source of law can legislate who this and future generations of Mohawks may choose to marry. And neither can avoid the fundamental violation of human rights implicit in either option. Canada may choose to accommodate this discrimination in the CKIRA, as it has to date as evidenced in *Jacobs*, but the violation will remain and may ultimately lead to a revisiting of the same international sources of rights which created at least some of this controversy in the first place.

There is clearly an inauspicious precedent contained within the DUA provisions respecting membership, as it seems clear that DIAND both acknowledges the potential for discrimination in the present membership arrangements in Kahnawake and is prepared to perpetuate that potentiality in a post-*Indian Act* Kahnawake. And while it is certainly possible to rationalize the hands-off approach in terms of respecting Kahnawake's independence and political maturity, this seems a bit short-sighted given the implications of the current membership policies for many Kahnawakehronon and the fact that this latest permutation of membership criteria find their origins in Canada law. It is also possible that Canada is simply recognizing the position of the Mohawk Council on "outside interference" articulated in the *Jacobs* case. When it became apparent that the Mohawk Council was likely to lose its bid to defend its membership policy before a Canadian Human Rights Tribunal in the *Jacobs* case, representatives of the Council made clear that a negative ruling would simply be ignored in practice in Kahnawake:

> First of all, with all due respect to this Tribunal, I don’t know if the community would be prepared to acknowledge that order. It would become a very touchy situation...[54]

> To me, that would probably be the surest way of making sure that the Council and the community don't accommodate the membership of Peter and Trudy Jacobs. It seems that the community of Kahnawake is still so defensive and still so assertive of its autonomous right to determine for itself who is a Mohawk...that any statement, any intrusion into this issue by this Tribunal or any institution of the Canadian government would be seen as an unjust intrusion and would probably firm their resolve not to deal with the situation and to reject it out of hand.[55]

The implicit message in such testimony was that outsiders would uphold their definitions of human rights in Kahnawake at the peril of those for whom those definitions were intended. It thus seems rather foolhardy to suggest that those who encounter discrimination under the terms of a Custom Code protected in the CKIRA might obtain redress through a *Charter* challenge or the dispute resolution provisions of the CKIRA. Canadian law has, both in the recent and distant past, often proven quite neuter in the face of Kahnawake law and nationalism; is it reasonable to assume that the CKIRA might be better able to thwart discrimination than other "outside law"?

The Jacobs' challenge to current membership laws, despite its success, has improved little in Kahnawake for those who sought clarification of their rights, and one wonders what, if anything, might change once membership is fully controlled by Kahnawake under the terms of the CKIRA. As noted above, given that the Mohawk Council intends to enshrine their policy on membership within the terms of a "Custom Code", will similar violations of human rights within Kahnawake go unchallenged owing to their putative basis in the Mohawks' "distinctive philosophies, traditions and cultural practices" (as provided in clause 72)? Insofar as any number of Mohawks within Kahnawake will dispute blood quantum as a legitimate part of Kahnawake Mohawk traditional culture, there appears to be an equal and opposite force which will assert a cultural integrity to blood requirements, if less in loyalty to history and tradition than to the pragmatics of modern economics: fewer "Mohawks" to split the fiscal pot equates with a superior lifestyle for "real Mohawks". Notwithstanding putatively more salutary motivations for blood quantum, experience the world over has revealed that a combination of strong nationalism and blood in struggles to define belonging cannot lead to a positive place, and yet it is in the direction of such a place that the DUA and anticipated CKIRA appear to move Kahnawake.

While the issue of blood quantum may well prove to be the greatest obstacle to be overcome in the Canada-Kahnawake relationship, a further impediment to Kahnawake's acceptance of the DUA may reside in the Council's apparent rethinking of much of its historic rhetoric and rationalization of self-determination. Where it once framed its bid for Mohawk autonomy within traditional constructions of sovereignty, nationhood and nationalism, the Council has clearly and publicly stepped back from such language in its discussions with outside governments, something which is made abundantly clear in the terms of the DUA in particular. For example, according to the DUA, Kahnawake's independence will at all times be circumscribed by the parameters defining the relationship between laws of Kahnawake and Canada. Clause 55 of the DUA specifies that "in the event of a conflict between the provisions of a Kahnawake law and the provisions of a federal law that pursues an objective of overriding national importance, the provisions of the federal law will prevail".[56] For purposes of such

conflict, an "objective of overriding national importance" is defined as "federal laws in relation to the preservation of peace, order and good government in Canada, as well as other federal laws of like importance".[57] There has long been debate within Canada about the potential for abuse of power and rights contained within the "peace, order and good government" provisions of the Constitution; and it seems reasonable to question whether a similar potential for abuse might reside in making this very ambiguous and open-ended criteria the acid test for paramountcy in a Canada-Kahnawake conflict of laws. Consider the differing interpretations of the *Jay Treaty* which persist between Mohawks and Canada. Given the controversy over "contraband" and the apparent importance assigned it by Canada, would the continued active articulation of Kahnawake's interpretation of their cross-border rights be deemed so linked with "peace, order and good government" that another raid becomes inevitable (notwithstanding an ongoing policing agreement shared by Kahnawake, Canada and Quebec)? At the same time, those more radical Mohawk nationalists within Kahnawake are unlikely to accept that their independence might be fettered by such an interpretation of paramountcy. These individuals, many of whom were active in the crisis of the summer of 1990 (most certainly an event defined as a threat to "peace, order and good government"), might be expected to protest vehemently against any clause in the DUA or CKIRA which might leave the definition of such threats to the same outside government that sent more of its troops to barricades at Oka and Kahnawake than it sent to the Gulf War.

These same nationalists may also feel in some measure betrayed by the reality that the DUA and resulting CKIRA do not seem to anticipate a full removal of the *Indian Act* from their community, especially insofar as many of them view this end as the essential goal of more than a century of struggle. Clearly, the "phasing out" of the *Act* will be hard sell to these people even as it may alleviate the anxieties felt by other Kahnawakehronon who do not share such a profoundly activist form of Mohawk nationalism. These latter Mohawks, probably accurately characterized as among the majority in Kahnawake, reflect the ambivalence toward "imposed law" articulated in the opening paragraphs of this paper. Here we see that a century of living within the admittedly restricted terms of the *Indian Act* has engendered a certain acceptance of those terms, for at the same time as they limit the potential of the people, they also have inspired a level of stability, predictability and affluence in Kahnawake. Those Mohawks of a more practical mindset may question whether now is the time to rock a reasonably satisfactory boat for a series of untried political possibilities. And while the DUA and a resulting CKIRA anticipate greater and potentially positive Mohawk Council control over lands, finances and a range of powers currently held by the state through the *Indian Act*, these potential gains are mitigated by the loss of the protections contained in the *Act* and the rise of liability for the Council and Kahnawake.

The primary challenges to the DUA and CKIRA, whether in regard to issues of membership and human rights or any of the range of jurisdictions envisaged as falling to a post- *Indian Act* Kahnawake, probably have less to do with the laws themselves than the spirit and direction of their implementation. Legislation merely sets the structure, the key is what the people involved choose to do with it. If Canada sees relinquishing control over membership to the Mohawk Council as simply a politically correct way out of a political quagmire they no longer wish any part of, then they are choosing to wash their hands of a mess of their own making, and once again the expedience of outside

governments will cost many Mohawks of Kahnawake quite dearly. If, at the same time, Kahnawake views the membership provisions of the DUA and CKIRA as a blank cheque from which they can erase a number of names for a range of not always redeeming reasons, they will merely assist in the eventual assimilation of a number of their people. There are more positive alternatives, and it is hoped that Kahnawake and Canada will choose those better outcomes. Both parties may endeavor to legislate those choices, but history has shown that, in Kahnawake's case, this does not necessarily equate with compliance nor will it lead to the betterment of the community.

Rousseau believed that the strongest of laws were enscribed not in brass, but on the hearts of the people, thus laws which are truly legitimate must come both from within the community and the people who will live by them. Governments both within and outside Kahnawake must be mindful of this important element of the legitimacy of laws, and both must be equally certain that the laws they will make go as far as possible to realize this legitimacy for all Kahnawakehronon, regardless of their blood or politics. It is not a small challenge, and it is one that must always be vigilant to the reality of law and legislation, namely, that the most compelling component of the legitimacy of laws has less to do with the laws themselves than the willingness of people to ensure that justice is an active defining element of how they live their lives and relate to each other. And in the end, in the real world, there is really very little way to legislate that most crucial form of justice beyond empowering them to make the right choices. These agreements open the door for that empowerment; it is up to the Mohawk Council and the Kahnawakehronon to build a better world beyond its threshold.

Endnotes

[1] A Mohawk term most closely translated into English as "people of the place above the rapids".

[2] R.S.C. 1985, c. I-5.

[3] Mohawk Council of Kahnawake/Canada. Agreement on an Agenda and Process for the Negotiation of a New Relationship Between the Mohawks of Kahnawake and Canada, (Ottawa, 13 December 1991), AnnexB at 2.

[4] *Ibid.* at 3.

[5] There are currently at least three separate Longhouses in Kahnawake. The largest is that known by its location on hwy.207, and it is this Longhouse which, while still recovering from the crisis of 1990, remains the dominant traditional group in the community. It sometimes gains the cooperation of the second largest Longhouse, which is based on the teachings of the Seneca prophet, Handsome Lake; rarely is there much interaction (to my knowledge) with the third Longhouse, which is comprised almost entirely of a single, highly activist family. It is the 207 Longhouse which is referred to in the discussion around cigarettes.

[6] "The Sovereignty Position of the Kanienkehaka (Mohawk Nation), Kahnawake Territory of the Haudenosaunee Six Nations Iroquois Confederacy", 15 June 1988 (Ottawa: Department of Indian Affairs and Northern Development, File #E4200-070 (vol.2) 7/88-12/88 Band Management - Mohawks of Kahnawake) at 2.

[7] Ottawa. Department of Indian and Northern Affairs, File #E4200-070 (vol.4) 10/89 - 12/90. Band Management - Mohawks of Kahnawake. Letter from Joe Norton, Grand Chief, Mohawk Council of Kahnawake, to Pierre Cadieux, Minister of Indian and Northern Affairs, 6 February 1989.

[8] William Johnson, "Some native claims based on myth" The [*Montreal*] Gazette (n.d.) in Department of Indian and Northern Affairs file #E4200-070 (vol.2) 7/88-12/88 Band Management, Mohawks of Kahnawake.

[9] Letter from Grand Chief Joseph Norton to Prime Minister Brian Mulroney (6 June 1988).

[10] Annex B, "Discussion Paper, Canada/Kahnawake Relations" (18 May 1990), in Canada /Kahnawake Relations. An Agreement on an Agenda and Process for the Negotiation of a New Relationship Between The Mohawks of Kahnawake and Canada, 13 December 1991.

[11] *Ibid.* at 12.

[12] *Ibid.* at 4.

[13] *Ibid.*

[14] *Ibid.* at 5.

[15] *Ibid.* at 2.

[16] Interview with Arnold Goodleaf, Mohawk Council of Kahnawake, Intergovernmental Relations Team Office, Kahnawake, Quebec (21 May 1999).

[17] "Kahnawake and Quebec sign historic agreement" *The Eastern Door* (vol.7, no.37) 1,7; "Quebec Cabinet signs agreements" *The Eastern Door* (vol.8, no.9) 1,5.

[18] "Opposition protests against agreements" *The Eastern Door* (vol.8, no.14) 1,12.

[19] "The Nosy News Guy" *The Eastern Door* (vol.8, no.11) 9.

[20] "Agreements with Quebec" *The Eastern Door* (vol.8, no.9) 2.

[21] "MCK/Quebec officially sign agreements" *The Eastern Door* (vol.8, no.10) 5.

[22] “Quebec Tables Bill 66" *The Eastern Door* (13 Aug 1999, vol.8, no.28) 1.

[23] “Bill 66: Is Quebec dealing with the Mohawk Nation?” *The Eastern Door, ibid.* at 2.

[24] Clause 6, "Kahnawake Governance", DUA at 5.

[25] Clause 4, “Purposes of the Legislation”, DUA at 5.

[26] Clause 6, “Governance”, DUA at 5-6.

[27] Clause 9, “Jurisdiction”, DUA at 6.

[28] Clause 11, “Sub-Agreements”, DUA at 7.

[29] This statement is bound to inspire some controversy in Iroquois circles, as transcribed versions of the Kaianerakowa, or Iroquois Great Law of Peace/Constitution clearly implies that adoptions could be transitory relationships. While this is clearly significant, I believe that two factors must mitigate a full acceptance of the Kaianerkowa’s statement. First, I have not been able to uncover any historical evidence to corroborate the Kaianerakowa; in fact, there is considerable

evidence to directly discount it (as I have documented elsewhere, see note , below). Second, on the basis of the historical evidence and the reality that modern transcriptions of the Great Law transpired after a significant measure of 'acculturative stress' had been experienced by most Iroquois nations, it is important to view those transcriptions as what they are: efforts to define a modern system of law and governance by twentieth century Iroquois. This goal may well have influenced the shape of some of the traditions the Law preserved, and thus its contents cannot be accepted uncritically.

[30] See: E.J. Dickson-Gilmore, "Iati-Onkwehonwe: Blood Quantum, Membership and the Politics of Exclusion in Kahnawake", Citizenship Studies, vol.3, no.1 (1999): 27-43; E.J. Dickson-Gilmore, "More Mohawk than my Blood": Citizenship, Membership and the Struggle over Identity in Kahnawake", forthcoming, Canadian Issues 1999.

[31] The discussion of the recent history of Kahnawake's struggles with membership are taken from my paper "More Mohawk than My Blood", op.cit., at 1-6.

[32] See Dickson-Gilmore, op.cit., and Peter and Trudy Jacobs and the Canadian Human Rights Commission and Mohawk Council of Kahnawake (1997); Decision of Tribunal in the matter of Peter and Trudy Jacobs and the Canadian Human Rights Commission and Mohawk Council of Kahnawake (1998).

[33] Ottawa. Department of Indian Affairs and Northern Development, File #E4200-070 (vol.1) 1975 - 30/6/88 Band Management - Mohawks of Kahnawake. Summary prepared for the Minister of Indian Affairs, re Actions of the Mohawk Council of Kahnawake, Annex C: Mohawk Council of Kahnawake Moratorium.

[34] Ottawa. Department of Indian Affairs and Northern Development, File #E4218-070 (vol.1) 1/86-3/88. Council Elections - Kahnawake Band. Mohawk Citizenship Law, undated.

[35] *Ibid.* at 2.

[36] Ottawa. Department of Indian and Northern Affairs, File #E4218070 (vol.1) 1/86 - 3/88. Council Elections - Kahnawake Band. Letter from Davis Rice, Chief, Mohawk Council of Kahnawake, to Mr. Gaetan Pilon, Lands, Revenues and Estates, Department of Indian and Northern Affairs, 18 March 1987.

[37] Ottawa. Department of Indian Affairs and Northern Development, File #E4218-2-070 (vol.3) 4/87 - 6/88. Council Elections - Appeals - Caughnawaga Band. Letter and materials from R.B. Kohls, Director General, Lands, Revenues and Trusts (Operations), to R.A. Hodgkinson, Director, Statutory Requirements, re Kahnawake Band Election Appeal. "Norton re-elected Grand Chief, 475 denied right to vote" Chateauguay Sun (undated); "Caughnawaga council vote illegal says Indian refused right to vote" *The [Montreal] Gazette* (undated).

[38] Ottawa. Department of Indian Affairs and Northern Development, File #E4200-070 (vol.1) 1975 - 30/6/88. Band Management - Mohawks of Kahnawake. Summary prepared for the Minister of Indian Affairs, re Actions of the Mohawk Council of Kahnawake, Annex C: Mohawk Council of Kahnawake Moratorium, at 2.

[39] Ottawa. Department of Indian Affairs and Northern Development, File #E4200-070 (vol.1) 1975 - 30/6/88. Band Management - Mohawks of Kahnawake.

[40] K. Deer, "Carl Curotte challenges election regulations" *The Eastern Door* (vol.5, no.17, 1996) 4.

[41] Elena Mayo Diabo, Testimony before the Canadian Human Rights Commission Tribunal, in the matter of Peter and Trudy Jacobs and the Canadian Human Rights Commission and the Mohawk Council of Kahnawake, 11 December, 1995, Montreal, Quebec.

[42] Mark McComber, Testimony before the Canadian Human Rights Commission Tribunal, in the matter of Peter and Trudy Jacobs and the Canadian Human Rights Commission and the Mohawk Council of Kahnawake, 16 September, 1997, Montreal, Quebec.

[43] Kenneth Atsenhaienton Deer, Testimony before the Canadian Human Rights Commission Tribunal, in the matter of Peter and Trudy Jacobs and the Canadian Human Rights Commission and the Mohawk Council of Kahnawake, 15 September, 1997, Montreal, Quebec.

[44] *Ibid.*

[45] *Ibid*.

[46] Kenneth Deer, "New Draft Membership Law Ready" *The Eastern Door* (vol.5, no.25) 1,10.

[47] "Elders come to consensus on membership" *The Eastern Door* (April 1998, vol.7, no.13, 24) 7.

[48] *Ibid.*

[49] Decision of Tribunal in the matter of Peter and Trudy Jacobs (complainants) and the Canadian Human Rights Commission, and the Mohawk Council of Kahnawake (respondents), 11 March, 1998. at 36.

[50] *Ibid.* at 37.

[51] Clause 71, DUA at 15.

[52] Clauses 62, 62, DUA at 13-14.

[53] K. Deer, "On the Issue of Blood Quantum", *The Eastern Door*, vol.5, no.42, 1996, at 2.

[54] Joe Norton, Testimony before the Canadian Human Rights Commission Tribunal, in the matter of Peter and Trudy Jacobs and the Canadian Human Rights Commission and the Mohawk Council of Kahnawake, 12 December, 1995, Montreal, Quebec.

[55] Gerald Alfred, Expert Witness to Mohawk Council of Kahnawake, Testimony before the Canadian Human Rights Commission Tribunal, in the matter of Peter and Trudy Jacobs and the Canadian Human Rights Commission and the Mohawk Council of Kahnawake, 11 & 12 September, 1997, Montreal, Quebec.

[56] Clause 55, DUA at 13.

[57] "Definitions", DUA at 3.

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Better Living Through Legislation?
Parens Patriae Reconsidered

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> The obscurity which hangs over the subject cannot be altogether dispelled until our existing ignorance as to the nature of the will and the mind, the nature of the organs by which they operate, the manner and degree in which these operations are interfered with by disease, and the nature of the diseases which interfere with them, is greatly diminished. The framing of the definition has caused us much labor and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of. Much latitude must in any case be left to the tribunal which has to apply the law to the facts in each particular case.
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> Report of the Royal Commission
> appointed to consider the law
> Relating to Indictable
> Offences, 1879, C 2345[1]

Prefatory Comment

History is about the future. If we don't know it, we are doomed to repeat it. Science fiction is about the present, as any s-f writer can tell you. Law reform is, inevitably, about the past. This Essay examines intimations of parens patriae in Roman law, legal disability as defined in Roman law and in Canada's first Criminal Code, the uneasy relationship between statutory and common law, and the rise of parens patriae and social welfare statutes. The lead example of child protection, and its offshoots into Indian childhood and adult protection, are then considered. The Essay was inspired by the Law Commission of Canada competition on Legislation and the 1999 Report of the Manitoba Law Reform Commission on Elder Abuse and Adult Protection. Rarely does a Law Reform Commission fail to recommend new law, particularly where other jurisdictions have led the way. Yet the Commission did so, choosing a victim-centered emergency orders regime and enhancement of extralegal remedies, over comprehensive statutory regimes, in place in other Canadian jurisdictions.

I. The Promise of *Parens Patriae*

Dupont's promise to the 1950s of 'Better living through chemistry' is echoed in the social alchemy of parens patriae legislation. As with the discoveries of chemistry — Dupont's reliable gunpowder[2] and Dow Chemicals' napalm — the blessings of such legislation are mixed. Parens patriae intervention is aimed at ameliorating the conditions of those unable to act for themselves, through legislation or the equitable jurisdiction of the superior courts. In naming the state or monarch as parens patriae, 'parent of the country,' the jurisdiction grants an almost uninhibited intervention into individual lives. It does so by defining 'legal disability' in slippery and tautological terms. As the English Draft Code Commissioners observe of their 1879 codification of the insanity defence, quoted above, the obscurity hanging over the nature of the will cannot be dispelled until more is known about the human subject. After a century of Canadian jurisprudence and countless studies of the human psyche, of normality, deviance and the techniques of normalisation,[3] we know less than ever, even for the limited purpose of relieving liability in a handful of criminal cases. Constructing statutory definitions for wide-scale intervention under various heads of legal disability is as problematic as the Commissioners' drafting of the insanity defence.

Parens patriae is variously described, rarely defined and generally unconstrained. Lord Somers LC explained in 1696 that

> In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, ideots, lunatics, &c., afterwards such of them as were of profit and advantage to the King, were removed to the *Court of Wards* by the statute [32 Hen VIII, c. 46 (1540)]; but upon the dissolution of that court [by the *Tenures Abolition Act*, 12 Car, c 24 (1660)], came back again to the Chancery.[4]

A widely-cited dictum is that of Lord Eldon LC in *Wellesley v. Beaufort* (1827).[5]

> It belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them.

Esher MR described it in 1893 as[6]

> a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.

The allusion to the state as 'the guardian of all infants' reflects the expanded role of late 19th century English courts in child protection, far beyond its earlier concern only with propertied children and their estates. The court's jurisdiction over children is no mere substitute for parental jurisdiction. Wootten J writes in 1983 that the court [7]

> has a jurisdiction that has existed for many centuries, going back into the Court of Chancery in England, to act to secure the welfare of children. It has the power to override, when necessary, the views of those in charge of children, whether a parent, a minister of the Crown, government official or otherwise.

For Donaldson MR in 1991,[8]

> the practical jurisdiction of the court is wider than that of parents ... [It is] not derivative from the parents' rights and responsibilities, but derives from, or is, the delegated performance of the duties of the Crown to protect its subjects and particularly children ...

In its widest sense, then, parens patriae is wielded both by the courts and by the Crown. It concerns the welfare of the entirety of the population, and of groups and individuals adversely affected by circumstance or the acts of others. All children and, by extension, all persons falling into the class of the legally disabled, are under parens patriae jurisdiction regardless of whether a statutory regime exists or an application for judicial determination has been made.

The original province of parens patriae was not the good of the people but the good of those under legal disability. This jurisdiction was further limited by the fact that, for much of history, it was not the person but the estate of such a person that concerned the law.

II. Origins of Parens Patriae

A. Wardship and *Potestas* in Roman Law

Sir Henry Theobald asserts that the origin of parens patriae 'is lost in the mists of antiquity,'[9] and Fortas J concludes that 'its meaning is murky and its historic credentials are of dubious relevance.'[10] Does the jurisdiction originate 'in the mists of antiquity' or are these myths of origin for equitable powers assumed by Chancery and, later, the paternalistic jurisdiction assumed by the modern state? There is considerable debate over whether parens patriae derived from Roman law, feudal law or both, or whether it was simply invented by the Chancery courts. John Seymour takes the last position, arguing that the jurisdiction was 'plucked out of the air' at the close of the 17th century and that 'subsequent attempts were made to provide assurances about its respectable antiquity.'[11] While doctrinal development of parens patriae has been uneven compared with that of other areas of the common law, as Seymour observes, 18th and 19th century judgements are marked by a progressing 'benevolent opportunism.' His position finds support in the spate of judicial and legislative forays into the benevolence of parens patriae over the last three centuries, in the 'progressivism' of the courts of superior jurisdiction in moving from concern with estates to concern for the person, and in the

virtual impossibility of proving connections between Roman, feudal and common law in such a diffuse area as parens patriae.[12]

The first position, that parens patriae derives from Roman law, is summed up in the assertion that Constantine the Great declared the principle of parens patriae in the 4th century.[13] The reality is more complex and less conclusive. First, the common law is not based on Roman law, although the latter has strongly influenced doctrinal development.[14] Second, Constantine did not 'invent' parens patriae. Perhaps the earliest such provision appears in the Twelve Tables (451 BCE): 'If a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone.' By 287 CE, a series of senatorial decrees had penalized parental failure to acknowledge a child and provided for applications on behalf of children as young as three for an order of support against the father.[15] Constantine did outdo his predecessors in areas we now see as the core of parens patriae, namely child protection and child welfare (see Appendix, 'Intimations of Parens Patriae in Roman Law'). Third, although the term originates in the title of the Roman emperor, *pater patriae* or father of the people,[16] principles suggestive of the modern jurisdiction in the Roman Codes are not always what they seem.

From the early provision of the Twelve Tables regarding 'fools,' Roman jurists developed the doctrine of *alienis juris*. Sui juris, the power to enter into binding contracts, was gained upon emancipation from paternal or ward (Appendix).[17] Women remained alienis juris, requiring consent of their *tutor* or legal guardian to enter into contracts. Roman law was structured around the twin concepts of wardship, its forms, limits, powers, duties and relief[18]; and potestas, a quasi-magisterial status accruing to the *pater familias* (below). The structure emerged in the Twelve Tables, was extended and redefined by judges and the Senate, and codified under Justinian in the 6th century. Excluded as guardians and included as wards were the deaf and the dumb, idiots and lunatics. Lunatics were distinguished from idiots under the doctrine of *cura furiosa* which recognized the possibility of cure, or at least of lucid moments, and wardship was curtailed accordingly. Roman law went further than English law in deeming spendthrifts *non compos mentis,* of unsound mind, and thus furiosa.[19] Roman law after the third century BCE depended far less on legislation than on the Edicts of the elected *praetors* or high-echelon judges. Edicts, or judgments, often included a clause setting out circumstances in which a related action would be considered, together with a model. In this way, new types of contract of sale or hire were established. The Edict 'was the great factor in legal change' and, Cicero (106-43 BCE) writes, was by his day 'basic to legal knowledge and development.'[20] With the exception of this brief period, praetorial reform was molecular and the legislative process remained cumbersome and politically-driven.[21]

Praetorial jurisdiction arose in the context of the *familia*, suggesting a last argument for Roman origins of parens patriae. While the medieval household resembled the familia in its inclusion of relatives, slaves and servants,[22] the familia was a sociolegal structure peculiar to Roman society. The familia was ruled by the *pater familias* whose potestas or magisterial power over all its members — wife, children, slaves, adult relatives — included corporal punishment, the infliction of death and the exposure of newborns; and who represented the familia in the public space. The familia

was the seat of the Roman worship of ancestors as embodied in the household gods the *lares* and *penates.* A primary duty of the praetor was to enable a legatee, upon death of the pater familias, to perform the necessary rites regarding the *penates*, ruler of the family storeroom.[23] Paternal powers were gradually diminished (see Appendix, 'Child Protection' and 'Child Welfare')[24] and legal remedies of household members were enhanced. It is tempting to see in these familial origins of judicial power under Roman law an analogy to the equitable jurisdiction of parens patriae but this, too, is problematic.[25]

> [T]he common notion that the praetors exercised an equity jurisdiction must be treated with great caution [as] there was basically only one system of courts ... and the innovations [of the edict] were no more specifically equitable than is most legislation. ... Equitable remedies of the praetors are to be seen not so much in the Edict as in their granting of ad hoc remedies, *actiones in factum*, and *actiones in utiles* for situations not covered by the forms of action set out in the Edict [and] largely governed by the jurists.

Constantine claimed in 316 that 'It is part of Our duty, and it is lawful for Us alone to interpret questions involving equity and law.'[26] Given the history of his times, it may be the thought that counts.

While Roman law has strongly influenced the development of common law doctrines, the civil law of Quebec is its lineal descendent. The Quebec Civil Code and Code of Civil Procedure, derive from the Napoleonic Code, in turn derived from the Justinian Code. Unlike the Criminal Code, which is essentially a pannomial digest of statutory and common law, the Quebec Codes are 'true' or 'complete' codes.[27] In *V.W.* v. *D.S.* (1996),[28] the Supreme Court observes *passim* that there is no parens patria jurisdiction in the Quebec Superior Court, as the Judicature Act does not extend to that province.[29] Quoting Michel Morin,[30] civil law judgments

> have been able to take the child's interests into account without having to borrow from a foreign system of law ... in private international law the use of the parens patriae jurisdiction in Quebec seems inadvisable. It adds superfluous criteria to the general provisions of the Civil Code and the Code of Civil Procedure. All things considered, we believe that judgments based on this uncertain concept duplicate what already exists in the civil law.

If parens patriae originates in practorial powers, then it would logically extend to judges under the Civil Code regardless of common law developments. If it does not, then this suggests that claims of Roman ancestry are metaphorical.

It cannot conclusively be shown that parens patriae is an innovation of Roman law and a true antecedent to its common law jurisdiction. However, the revival of Roman law throughout the history of the common law has left an indelible stamp on notions of paternal powers and family privacy, the development of parens patriaeand the definition of legal disability.

B. *Doli Incapax*

Legal disability as defined in the 1892 Canadian Criminal Code reflects Roman law. *Doli capax*, the capacity to know right from wrong, underlies the concept of legal liability. One who is *doli incapax* due to minority, mental disorder or mental disability is relieved of criminal responsibility. The concept of minority in Roman law is particularly interesting. Childhood is an estate that is outgrown but it is not outgrown all at once. Nor could all children achieve potestas. Roman law excluded from potestas slaves and children under the sign of the lash, signifying physical punishment[31] and women under *manus* or sign manual. Adult sons and other male relatives of the pater familias could achieve potestas only by enfranchisement through death of the pater, by his edict or by judicial edict (see Appendix, under 'Emancipation'). Children could be held criminally responsible. Not until the establishment of the doctrine of *infantia* in 407 CE were children under seven *doli incapax* and immune from prosecution.

Until the 14th century at common law, children, youth and adults were equally subject to the full weight of criminal prosecution and penalty.[32] The focus was on avenging the harm done, not on the capacity or intent of the offender. After this date, pardons were regularly granted in cases of accident and self-defence. Because guilt must be established before pardon can issue, this policy preserved forfeiture of the defendent's chattels to the crown. By the 15th century, children lacking chattels were simply acquitted, on grounds of immaturity. From the 14th to the 17th centuries, the onset of puberty was the indicia of full criminal capacity, doli capax. Puberty was established by physical examination. Criminal capacity in prepubertal children now had to be established on the facts of the case. Judicial consensus emerged in the 1600s that children under seven should never be prosecuted, a reflection of the Roman doctrine of *infantia* and, perhaps, the rarity of serious wrongdoing by children below that age. With the availability of baptismal records, the age of the young offender could be established without physical examination but there was no judicial consensus on which age should signify puberty. The influential 17th century judge Sir Edward Coke declared it to be fourteen. Although he claimed consensus of the medieval courts, there is no support for this.

Coke may have found his precedent in Roman law. Justinian declared in 529 that

> Abolishing the indecent examination established for the purpose of ascertaining the puberty of males, we order that just as females are considered to have arrived at puberty after having completed their twelfth year, so, likewise, males shall be held to have arrived at that age after having passed their fourteenth year, and the disgraceful examination of the bodies of such persons is hereby terminated [see Appendix].

Children under seven are doli incapax; from seven to fourteen, capacity must be established; after age fourteen, capacity is presumed. This common law regime is set out in ss. 17 and 18 of the 1892 Canadian *Criminal Code*. The test for establishing capacity in children of seven to fourteen resonates with that for insanity: the child must be 'competent to know the nature and consequences of his conduct, and to appreciate

that it was wrong'. Crankshaw's annotations to early editions of the Code explain that 'A child within the age of seven is considered to be without any capacity to discern good from evil or right from wrong. Such a child is *so conclusively,* so *absolutely* presumed to be incapable of committing crime that the presumption of its incapacity cannot be rebutted' (emphasis in original).[33] Yet a child of seven in Canada could be found criminally responsible and hanged.[34] Attempts to mitigate *doli capax* through the legislation of youth courts from 1850 onward were not particularly successful.[35] 'Bright-line' age-based limits on criminal responsibility remain contested.[36]

Doli incapax also excuses from criminal liability those suffering 'a defect of reason, from disease of the mind' or 'natural imbecility'. Halsbury's Encyclopedic Digest of 1911, the last of the Digests to include a section on 'The Crown as Parens Patriae',[37] cites Blackwell's *Commentaries*: 'At common law idiots are persons born without any glimmering of reason, including persons born deaf, dumb, and blind; whilst lunatics are persons who have become temporarily or permanently deprived of their reason, or *non compos mentis*, by disease, grief, or accident after birth.' The 1892 provision is based on the Draft Code, itself based on *M'Naghten's Case* (1843).[38]

James Crankshaw began publication of his annotated Criminal Code in 1894. Intended as a student text [39] as well as a practitioner's aid, the work quotes widely from the Commissioners' Report. After discussing at length the uncertainty of the Commissioner's formulation of insanity,[40] Crankshaw sets out definitions of 'natural imbecility' and 'lunacy' based in part on English common law and in part on late 19th century science.[41] Section 19 of the 1892 Code applies to 'persons who are insane or *non compos mentis*, [including] idiots, lunatics, persons laboring under delirium tremens, imbeciles, persons suffering from delusions and hallucinations, monomaniacs, and homicidal maniacs.' The annotations reflect the science of his day and, more strikingly, Roman law.

> IDIOTS. — An idiot is one who has been without understanding from his birth and who never has any lucid intervals. He is described as a person who, for instance, cannot number twenty nor tell the days of the week and does not know his father or mother, etc.
>
> LUNATICS. — A lunatic is a person who has possessed reason, but who, through disease, grief or other cause has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of law recover his reason. ...
>
> IMBECILES. — Imbecility may be physical or mental. An imbecile is one who is weak, feeble, impotent, decrepit in body or in mind. Mental imbecility is a weakness of the mind due to defective development or to loss of the faculties; and may exist in different degrees between the limits of absolute idiocy on the one hand and perfect capacity on the other.

Tremeear's rival Code omits all such discussion, instead simply restating the test of insanity as set out in the flagship case *R. v. Riel* (No. 2) (1895).[42]

> Without evidence to go to the jury, the prisoner cannot be acquitted upon the plea of insanity. If there is in such a case to be any appeal after a conviction, it must be on the ground that the evidence is so overwhelming in favor of the insanity of the prisoner that the Court will feel that there has been a miscarriage of justice - that a poor, deluded, irresponsible being has been adjudged guilty of that of which he could not be guilty if he were deprived of the power to reason upon the act...

It is small wonder that the visionary Métis leader rejected the defence and his designation a, 'poor, deluded, irresponsible being' and instead hanged for treason.

The distinction between disease of the mind and natural imbecility was dropped in 1991 from what is now s.16 of the Code.[43] Presumably, the new head of 'mental disorder' that replaced 'insanity' continues to embrace mental disability, although the question has not been resolved by the courts.[44] Recent cases involving mental disability rely on the presence of some form of mental disorder for the establishment of the defence. This reflects the 1960s 'clearing out' of the old facilities for the criminally insane in which thousands of residents permanently committed suffered from only mild mental disabilities and could have been readily integrated into society. Current medical classification (DSM-IV) defines 'mental retardation' as 'mild (50-55 to approx. 70); moderate (35-40 to 50-55); severe (20-25 to 35-40); and profound (below 20 or 25).' This maintains the old distinctions of idiot and imbecile, and its subcategory of moron, but replaces the terms with a mathematised schema.

C. Emerging from the Mists of Antiquity

Early Roman law gave little support to statute law. Of legislation in the last days of the empire, Ulpian[45] writes,

> A decision given by the emperor has the force of a statute: This is because by the royal statute that is passed concerning his authority the people commit to and into him its own authority and power. Whatever the emperor has determined by a letter and his signature, or has decreed on judicial determination or ... prescribed by an edict is undoubtedly a law. These are what we commonly call *constitutiones*.

At common law, confirmed by the statute *Praerogativa Regis*[46] (*ca.*1255 -1290),[47] the king held lands belonging to idiots, with the requirement that they be restored to heirs upon the death of the ward; and trusteeship of lands belonging to lunatics, with the requirement that the lunatic and his family be maintained and lands returned with the return of the lunatic's reason, reflecting the Roman doctrine of cura furiosa.

The concern of Roman law with persons of property was also true of medieval England when, in the description of a West Virginia court,[48]

> much of the sovereign's revenue came from feudal incidents resulting from the king's control of persons under disabilities, the most well known of which were

> the wardships and marriages of the minor heirs… [and] there was a thriving open market in much the same sense that there is a futures market today... [T]he early development of *parens patriae* was in no way evidence of the sovereign's solicitude for the welfare of unfortunate subjects, but rather was the result of the king's need for revenue combined with medieval restraints upon the alienation of land which left valuable life estates in the hands of born incompetents under a system of feudal as opposed to modern allodial tenure [absolute ownership] for in those days it can be said with ironic force that the law was no respecter of persons.

As wasting one's estate in the modern context is seen, with few exceptions, as the prerogative of its owner,[49] the Roman equation of spendthrifts with lunatics 'supports the conclusion that Roman law concerned itself primarily with persons of property and not with the general population.'

> The early doctrine of *parens patriae* was conceived in avarice and executed without charity. The romanticized accolades which Victorian and Edwardian writers such as Pollock, Maitland, and Macaullay accorded medieval law for its protection of the laboring classes are unjustified ... [U]ntil the first quarter of the Twentieth century, the common man was but a cipher to the law, in spite of the hard work of social reformers [and] the early development of *parens patriae* was more a state fiscal policy than a humanitarian doctrine.

The complexity of combined Roman, common law and equitable laws of wardship is reflected in Halsbury.[50] Infant wardship, for example, could arise in socage (feudal estates and, later, tenure), by nature (for an heir-apparent), by custom, for nurture, naturally as a parental right, by parental choice or by judicial appointment. Wardship is governed by the law of trusts. Superior courts inheriting the equitable jurisdiction of Chancery determine such questions as removal of a guardian, education and marriage of a ward and estate management. With the 1660 statutory abolition of feudal tenures and the Court of Wards and Liveries,[51] infants, idiots and lunatics and their estates no longer came under the feudal care of the king but of the King's Court of Chancery. At common law,[52]

> the disabilities of an infant and his legal incapacity to manage his own affairs render it necessary that for the protection of his interests and the management of his property he should have a guardian ... to whom he stands in the relation of ward.

Wardship gradually 'lost its connection with property and became purely prospective in nature.'[53] The Chancellor's powers were administrative only, with appeal to the King in Council but not the House of Lords. Appeal was routed to the English Court of Appeal with the fusion of equity and common law effected by the *Judicature Act* (1873).[54] With the enactment of the *Idiots Act* (1886)[55] and the *Lunacy Act* (1890),[56] parens patriae jurisdiction became primarily the creature of legislation rather than the common law.

Although parens patriae is 'a parental jurisdiction' and the Chancery Court acts on behalf of the Crown as 'guardian of all infants,'[57] legislation would become the primary vehicle of the protective custody of children.

D. *Parens Patriae* in the Modern Courts

While adults deemed incompetent could be made wards of the court, only children were subject to its custodial jurisdiction. This changed with the 1852 *Act for the Relief of the Suitors of the High Court of Chancery*[58]. 'Custody of the Persons and Estates of Persons found idiot, lunatic or of unsound Mind' could now be exercised under the sign manual by virtue of the Act. The similarity of the jurisdiction over children and adults is stressed in *Re Eve* (1986),[59] a case involving the 'non-therapeutic' sterilization of a mentally disabled woman of 24. LaForest SCJ observes,

> Wardship… is merely a device by means of which Chancery exercises its *parens patriae* jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the *parens patriae* jurisdiction [and such cases] constitute a solid guide to the exercise of *parens patriae* power even in the case of adults. There is no need, then, to resort to statutes like the *Mental Health Act* to permit a court to exercise the jurisdiction in respect of adults. But proof of incompetence must, of course, be made.

As parens patriae is an inherent jurisdiction of the superior courts, statutory incursions into the field need not be considered, according to the Supreme Court.

After surveying the judicial history of parens patriae in England, Canada and the US, LaForest concludes that the jurisdiction must be exercised in the 'best interests' of the protected person, for his benefit or welfare. 'The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense.' It is 'of a very broad nature' and 'can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations; the list 'is not exhaustive' and the court can act where injury is apprehended.[60] While the jurisdiction is unlimited in scope, the court's discretion may be exercised only 'to do what is necessary for the protection of the person for whose benefit it is exercised' and must be used with great caution, 'redoubled as the seriousness of the matter increases'.[61] LaForest carefully confines his observations to adults. Is there a corner of parens patriae left to the equitable discretion of the courts in the case of that most governed of groups, children?[62]

Re Eve was put to the test in *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.* [1997 3 S.C.R. 925]. G, a young woman addicted to solvents, had given birth to three infants, two of whom were congenitally disabled and in permanent care. A child protection agency sought custody of G, then five months pregnant with her fourth child, to prevent further damage to the fetus. Schulman QBJ granted the order under the Mental Health Act, despite expert opinion that she suffered no psychiatric disorder and, as a separate ground, under parens patriae jurisdiction — not over G but over her fetus. His ruling was overturned by the Manitoba Court of Appeal and by the Supreme Court. The court rejected the extension of parens patriae to a fetus and upheld the 'born alive' rule of tort law.[63] Lamer J explains that extension of the common law into the arena of fetal protection is beyond the reach of the courts. Judicial lawmaking is

> confined to incremental change 'based largely on the mechanism of extending an existing principle to new circumstances'; courts will not extend the common law 'where the revision is major and its ramifications complex' ...The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases ...in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform ...Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.

Parens patriae is thus not infinitely extensible. While its borders and origins may be vague, there are limits on judicial lawmaking even here.

While Lamer would defer to legislative powers to resolve complex social questions, LaForest does not allude to the supremacy or even the ubiquity of parens patriae statutes, other than noting that the court is bound by existing legislation. In *Re Eve*, parens patriae requires neither statutory authority nor strict precedent and prior judgments serve only as a guide. With the proviso that it be exercised for the welfare and benefit of the person for whom relief is claimed, parens patriae is whatever the court deems it to be. *Re D.F.G.* limits the jurisdiction to cases that do not involve complex social and economic ramifications and do not compromise the liberty interests of a judicial subject. Would the case have been decided differently, if parens patriae protection had been sought for G herself, rather than her fetus? Is there no corner left for weird cases in parens patriae?

Re Eve begs the question of who speaks for adults deemed incompetent to act in their own interests. Eve cannot speak, her caregiving mother cannot speak and the state refuses to speak, at least where the question involves the historically suspect area of sterilization and the legal problematics of reproductive control. The disabling of consent is the hard question raised in such cases. A hidden subtext to these judgments is the uneasy history of relations between court and legislature, common law and statute. I now turn to that history.

III. The Iconic Statute and the Elastic Common Law

A. The Contest

> The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement ... [I]ts symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties.
>
> Blackstone[64]

Common law and legislation are the formal sources of Canadian law. The low-lustre incremental development of common law, unless spectacularly illuminated by horrifying facts and perceived sentencing inadequacies,[65] disengages public scrutiny in the vast majority of cases. Common law evolution is portrayed as interstitial and self-correcting.[66] Legislation has a comparatively high degree of visibility. Parens patriae legislation achieves an even higher public visibility due to the emotive issues and social lobbying involved in its inception. Social legislation has the iconographic power to define the state as, for example, a law-and-order state or a social welfare state or a 'neutral' liberal state that merely responds to citizen desires.

Although it is now understood that the common law is a necessary complement to statute law, historically the two sources of law have not been comfortable bedfellows. Blackstone in the 18th century, quoted above, notably employs an architectural metaphor reflecting the 18th century rebuilding of stately houses by new wealth, making faddish improvement that changed or destroyed their architectural integrity. Thus statutes are 'mere refinements, useless ornamentation to the common law [and] specious embellishments and fantastic novelties [added] with all the rage of modern improvement.' Drawing out the metaphor, Blackstone argues that legislation fails when it departs from the structure of the common law.[67] Sir Francis Buller, quoting Wilmot CJ, employed a horticultural metaphor, arguing in 1787 that statute law 'like a powerful tyrant that knows no bounds ... mows down all before it' but the common law 'with a lenient hand ... roots out that which is bad and leaves that which is good.'[68] Blackstone, seizing yet another metaphor, proposed a 'science of legislation.' This would feature, in David Lieberman's words, 'an elegantly displayed common law' and a 'genuinely rational and coherently organized system.' This would improve the quality of legislation and its fit within the structure and wisdom of the common law. The longstanding rivalry between parliament and the courts over the development and reform of law is apparent in these debates.

Jeremy Bentham premised his *Pannomium* not on the superiority of neither source of law, but on his belief that statutory and common law together constitute a complete body of law and, further, that all law, whatever its source, should be digested — named together, pannomialised — so that offences against the law could be known.[69] His 'province of legislation' widened in his later writings to encompass all social practices and the social system itself as operating by the will of the legislator. The common law was a necessary means of carrying out the encompassing legislative will. The only limit on law is 'the calculation of felicity', that great moral principle of utilitarianism ensuring the greatest good to the greatest number.[70] Although the *Pannomium* never came to be, its enduring legacy was the movement toward codified criminal law and its reflection of another of Bentham's jurisprudential achievements, legal positivism. Legal positivism was a paradigmatic shift from law as flowing from divine nature to law as the contingent product of mortal men. It changed the face of lawmaking and law reform. But one era's meat is another's poison, as benthamite reforms to the Poor Laws (below) suggest. Legal positivism by the end of the 19th century became just another limit on judicial social justice.[71]

Eighteenth-century debates were provoked by the steep numerical rise in statutes enacted after the 1688 revolution asserting the supremacy of parliament.

Regular yearly parliamentary sessions increased the exercise of the constitutional lawmaking power of the King-in-Parliament.[72] The parliaments of William III (1689-1702) passed a yearly average of 58 public acts; of Anne (1702-14), 78; of George I (1714-1727), 58; of George II (1727-60), 81; and of George III (1760-1820), 254 — over four times the rate of output of William III's parliaments. The total number of public acts in this period is 12,485, of which 9980 appeared in the reign of George III. The numbers support the assertion of the English Draft Code Commissioners in 1878 that[73]

> In by-gone ages, when legislation was scanty and rare, the powers [of judges to create criminal offences at common law] may have been useful and even necessary; but that is not the case at the present day. Parliament is regular in its sittings and active in its labors; and if the protection of society requires the enactment of additional penal laws Parliament will soon supply them.

Blackstone's concern for the low quality of legislation finds support in the escalation of legislation in the 18th and 19th centuries. The statute was iconic as the state's declaration of offences against the king's peace. This intended iconography of state power is reflected in the 18th century orgy of hanging offences.

B. Criminal Statutes and Social (Dis)Order

> [Law was now] a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them too, of course, the law was The Law. The fact that they reified it, that they shut their eyes to its daily enactment in Parliament by men of their own class, heightened the illusion…. In short, its very inefficiency, its absurd formalism, was part of its strength as ideology.[74]

Lieberman observes that "Nowhere was the growth of legislation more striking that in the area of penal policy" in the 18th century.[75] In his 1819 speech to the House of Commons, Thomas Fowell Buxton numbered 'capital statutes' at 223, of which 150 existing criminal offences were made capital in the 18th century. The increase in hanging acts was such that one William Eden wondered in 1771 whether 'the chief object of legislation in England' might be seen as 'the extirpation of mankind' but Lord Hardwicke, responsible for the 1747 Highlands Act, put the cause to 'the degeneracy of the present times, fruitful in the inventions of wickedness.' The hanging acts were required 'to suppress mischiefs, which were growing frequent among us.'

Hanging acts constitute only a part of the huge output of legislation in this period. The eighteenth edition of Richard Burn's handbook for justices, published 1797, was three times the length of the first edition of 1775. According to Alexander Hamilton in 1788, in the context of the new United States, 'a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of free government.'[76] The hanging acts must be seen in this context of governmentality. In enactment and in application, the hanging acts were icons of state power, as much a tool of the mercantile state as the 'voluminous' spate of civil legislation.

The power of the guilds and merchant classes to influence parliament in making a capital offence of, for example, the theft of Brussels lace by street urchins at the docks, confirmed mercantile supremacy in the new state. The pomp and majesty of the 'bloody assizes' with gorgeously-gowned judges and local gentlewomen sitting by them on the bench, and the dangling hope of mercy by royal prerogative in pardon or commutation of sentence — these served as much the spectacle of execution, spiked heads, chained corpses and instructive Chronicles of the lives of felons, to control society in the absence of public policing.[77] The courts interpreted penal statutes strictly and narrowly, failing well-founded prosecutions on such minor defects in the form of the indictment as stating the accused's occupation as 'farmer' rather than 'yeoman'. This insistence on procedural perfection strengthened the ideological place of law in popular culture. Not only was law beyond the power of the people, but the judges themselves were also helpless before it. Calls for social order spur criminal legislation. In turn, those subject to its purview — children, women, the impoverished, the social outcast — then become the subject of social reform movements and protective legislation aimed at reducing crime. Criminal legislation is linked with parens patriae.

In the enactment of criminal law, the courts vied with parliament. The Court of King's Bench held in *Sedley's Case* (1663)[78] that the court, as *custos morum* of the King's subjects and inheritor of the powers of the Star Chamber, can create criminal offences out of conduct threatening the King's peace. The debate came to a head in James Fitzjames Stephen's 1878 Draft Code for the English Foreign Office and in the 1879 Commissioners' Draft Code, substantially Stephen's work as one of the Commissioners.[79] Stephen argued compellingly for the abolition of common law crimes.[80]

> After the experience of centuries, and with a Parliament sitting every year, and keenly alive to all matters likely to endanger the public interests, we are surely in a position to say the power of declaring new offences shall henceforth be vested in Parliament only. The power which has at times been claimed for the judges of declaring new offences cannot be useful now, whatever may have been its value in earlier times. ... Cases sometimes occur in which public opinion is at once violently excited and greatly divided, so that conduct is regarded as criminal or praiseworthy according to the sympathies of excited partisans. ... The continued existence of the undefined common law offences is not only dangerous to individuals, but may be dangerous to the administration of justice itself. By allowing them to remain, we run the risk of tempting the judges to express their disapproval of conduct which, upon political, moral, or social grounds, they consider deserving of punishment, by declaring upon slender authority that it constitutes an offence at common law; nothing, I think, could place the bench in a more invidious position, or go further to shake its authority.[81]

S. 5 of the Commissioners' 1880 Draft Code 'provides that, for the future, all offences shall be prosecuted either under the Code or under some other statute, *and not at common law*.'[82]

The English judges reviewing the Commissioners' Report on the Draft Code objected to this innovation. Baron Parke founded his objection 'on the danger of

confining provisions against crimes to enactments and repealing in this respect the rules of the common law which are clear and well understood'. The common law has[83]

> the incalculable advantage of being capable of application to new combinations of circumstances, perpetually occurring, which are decided, when they arise, by inference and analogy to them and upon the principles on which they rest. Whatever care be used in defining offences and in the language of the proposed enactments, it will be impractable to make the definitions embrace every possible case that can arise, and consequently many acts which are criminal, and closely fall within the principle of the rules of the common law, will be dispunishable, *whereas if the common law is suffered to continue*, it may justly and legally be applied to them.

This position was adopted in the 1892 Criminal Code. Introducing the Draft Bill to the Canadian House of Commons, Sir John Thompson assured the legislature that 'The common law will still stand and be referred to, and in that respect the code ... will have that elasticity which has been so much desired by those who are opposed to codification on general principles.'[84] However, this found no place in the new Canadian Code. Crankshaw explains that the Code preserves the common law 'not only so far as it affords a DEFENCE ... in cases not expressly provided for, but also so far as it may afford a GROUND OF PROSECUTION in cases not expressly provided for'[85].

The question was settled somewhat ambiguously by the Supreme Court of Canada in *Frey v. Fedoruk* (1950) 51.[86] Cartwright J writes,

> I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the *Criminal Code, or can be established by the authority of some reported case as an offence known to the law*. I think that if any course of conduct is now to be declared criminal ... such declaration should be made by Parliament and not by the Courts [emphasis added].

Subsequent amendments to the Criminal Code in 1955 overrode even this preservation of existing common law crimes. In a sweeping abolition, s. 9 of the Criminal Code now states that 'no person shall be convicted or discharged ... of an offence at common law.'

C. Social Legislation and Law Reform

> Promiscuous alms giving is fatal ... it is the patent process for the manufacture of paupers out of the worthless and improvident. A poor law is a legislative machine for the manufacture of pauperism. It is true mercy to say that it would be better that a few individuals should die of starvation than a pauper class should be raised up.[87]
>
> *The Globe*, 1874

Practically speaking, the courts retain their law-creation powers, in private law creating torts and principles of contractual liability, and in fashioning judicial standards for the application of broad statutory tests found in parens patriae legislation. Such

legislation is typically championed as preventative — of crime, of disease, of social disorder and the foment of discontent — and, like criminal law, achieves iconic visibility. Social legislation brings together

> areas of law which, beyond their traditional definition in private and public law, correspond to new forms of state intervention. Common to [such] statutes is their presentation as measures of protection involving the establishment of institutions, structures and mechanisms to prevent injustice, correct situations and guarantee their beneficiaries a state of economic, social and cultural well-being.[88]

Of the almost 10,000 public acts passed in the reign of George III, none introduce new social legislation. Indeed, before Victoria's reign (1837-1907), only two such acts appeared — *The Poor Relief Act* (1601) and the *Act of Settlement* (1662).[89] The early 19th century English benthamites and reforming Whigs believed that their efforts led only to trivial and ineffective statutory reform, a conclusion confirmed in the 1830s by commissions on Aborigines and the Poor Law (below) and solidified in later 19th century Whig-Fabian views of the 18th century.

Recent evaluation of social legislation enacted in the later Hanoverian period (1790-1840) suggests otherwise.[90] This period saw links forged between local and central government and the success of charitable agencies in casting private agenda into public statute. It was the origin of a 'radically different system of policy formation' emergent in the 19th century, a 'complex nexus of political strategies and cultural influences which made individual reformers and voluntary pressure groups such powerful influences on social legislation.'[91] Before 1820, reformers relied on volunteers to raise public awareness and influence back-benchers but after 1830, a *quasi*-bureaucratic reform elite relied on official reports and draft legislation introduced by the front bench (cabinet). Poor Law, education, factory, prison, police and public health reform fit this new model of social reform. It was a shift from the mobilization of public opinion to the direct mobilization of government through the new medium of the royal commission. The power of the law reform commission was such that Sir Robert Peel warned his Home Secretary Sir James Graham that

> if you issue a Commission, you will excite to the utmost the hopes and fears of rival factions; the truth will be exposed in a light probably somewhat exaggerated, and the Government, which exposes to view so great a national deformity, ought to be prepared with an adequate remedy. A Commission is most useful to pave the way for a measure, which is preconcerted; take for example the Poor Law Inquiry.[92]

The promise of a commission is a promise of a statutory remedy. The rise of the commission signalled the demise of the back-bencher and the decline of the Commons in the development of social legislation. 'The languages of philanthropy, of improvement, of virtue' split into exclusive benthamite and political economy discourses,[93] into benthamite calculations of felicity and Malthusian calculations of shortage, leaving popular sentiment behind on the path of reform.

Social legislation took off in the latter part of the 19th century, the century whose *ethos* of social reform and reliance on royal commissions, inquiries, parliamentary and legislative committees, and on statutory regimes for the amelioration of the human

condition, most resembles our own. In his speech to the Freemason's Tavern in London, February 1850, Charles Dickens praises those 'champions' who 'found infancy was made stunted, ugly, and full of pain; maturity made old, and old age imbecile; and pauperism made hopeless every day' and who 'claimed for the metropolis of a Christian country that this should be remedied, and that the capital should set an example of humanity and justice to the whole empire.'[94] The ugly residua of Benthamite Poor Law reforms in the 1830s, earlier exposed in *Oliver Twist*, are a reminder that in social reform, as in other invocations of larger powers, we should be careful what we wish for. Canada was later to see itself as England's proper heir and future equal in the empire and would, as Dickens thought, follow London's lead in its approach to social problems.

The larger project of 19th century social reform — freedom from basic want, infants and children cared for, illness, disability and old age provided for — although steeped in a punitive religiosity, became the scientised project of the Progressive Era.[95] The history of social welfare legislation in Canada is a checkered one. The 1867 British North America Act gave little attention to social welfare. At Confederation, the originating provinces followed three models of welfare delivery — the church in Lower Canada; the English Poor Law (administered by townships rather than parishes) in Nova Scotia and New Brunswick after 1759; and a hodge-podge of services in Upper Canada, where the Poor Law was excluded by legislation from its English common law heritage on grounds that economic opportunities were such that anyone wanting work could find it.[96] As this was of no help to the disabled, legislation was enacted in 1849 empowering municipalities to collect money for asylums for the poor and disabled and the 1874 Charity Aid Act supported institutions for the deaf, blind and mentally handicapped.[97]

The 'reluctant welfarism' of the period 1891 to 1940[98] spurred the establishment of associations aimed at political, social, moral and economic reform in the context of the Social Gospel movement and radical labour. Associations include the Women's Christian Temperance Union, the National Council of Women, the Social Service Council of Canada, farmers' unions, consumer and agricultural co-operatives and radical societies of working people. Worker's compensation, public health programs and Depression relief projects paved the way for the boom years of the welfare state 1941-1974. Rent, wage, price and materials controls and family allowances were instituted during WW 2. The militant labour movement and unemployment pushed further reform in the 1950s. The 1950s spawned the Communist menace, envisioned in Orwell's *1984* as a paranoiac life in a surveilled society in which the state is not the benign parent of the country but every citizen's bullying and sadistic Big Brother. The decade saw the culmination of social legislation in the Canadian welfare state,[99] coloured socialist pink on J. Edgar Hoover's mapping of the free world.[100] Medicare forged in Saskatchewan under NDP Premier Tommy Douglas in 1961 gave the province its outstanding red. Medicare was the last great achievement of the Victorian vision and its contemporary Karl Marx.[101]

IV. Parens Patriae's Statutory Child

A. Saving Children

> There is little or no difference in character or needs between the neglected and the delinquent child. It is often a mere accident whether he is brought before the court because he is wandering or beyond control or because he has committed some offence. Neglect [of moral training] leads to delinquency and delinquency is often the direct outcome of [moral] neglect.
>
> Anonymous English reformer, 1927

The first significant social legislation in England was a series of acts between 1536 and 1601 forming the Tudor Poor Law. These acts required the parish, on order of a justice, to receive or remove the children of vagrant, destitute or deceased parents, and to apprentice them to a trade, with the aim of boarding them out with a 'good' middle-class family.[102] The imperative of moral socialization of children was driven by the need of a rising bourgeois state for skilled child labour in an industrialising society, and by the threat of unsocialised children to civil stability and the public order. The Poor Laws were the sole legislative expression of state responsibility for unpropertied children for over two centuries. Moral reform and philanthropy in the 19th century was similarly driven by the threat of unsocialised children, in an atmosphere of moral panic in which fear and sentimentality are comingled.[103] The names of two London-based societies — the Philanthropic Society for the Prevention of Crimes, and the Reform of the Criminal Poor, by the encouragement of Industry and the Culture of Good Morals, among those Children who are now being trained up to Vicious Courses, Public Plunder, Infamy and Ruin (1788); and the Society for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis (1815) — make the point.[104] These societies based their remedies on the new asylum model that was to replace the Poor Law boarding-out model. The asylum model, exemplified in the industrial school, concentrated children in institutions where they could be taught codes of behaviour, factory skills and Christianity.

The direction for the management of childhood in the empire was set out in two reports, the 1834 *Report from His Majesty's Commission for Inquiring into the Administration and Practical Operation of the Poor Laws* and the 1837 House of Commons *Report of the Select Committee on Aborigines*. The Select Committee on Aborigines was concerned with 'Native Inhabitants of Countries where British Settlements are made ... to promote the spread of civilization among them.' The Poor Laws commission was concerned with problems of the outcast closer to home. Both reports recommend special overseers or protectors, propose training programs aimed at low-level employment and emphasise assimilation of their respective targets into the larger society. Both reports stress childhood and the need to educate, civilize, and bring into Christianity the young pauper or Aborigine. As the Select Committee on Aborigines writes, 'True civilization and Christianity are inseparable: the former has never been found, but as a fruit of the latter.' The identification of Christianity with citizenship characterized the child saving movement and the agenda of the asylum or orphanage,

the industrial school, Canadian public schooling and Indian residential school, all falling under some form of statutory governance in the 19th century.

A plethora of child saving societies sprang up in England in this period, leading to the first major legislative innovation since the Poor Laws, the *Act* to make better provision for the Care and Education of Vagrant Destitute and Disorderly Children and for the Extension of Industrial Schools (1854, enlarged1861; consolidated 1866). Children under fourteen found wandering, begging or consorting with thieves; children under twelve charged with criminal offences; children whose parents declared them uncontrollable; and, later, truant children escaping day schools and Sunday schools, were placed in industrial schools. The 1908 *Children Act* brought reformatories and industrial schools under a single administration. As the 1927 reformer quoted above shows, no distinction needed to be made between the perishing child and the dangerous child. It was irrelevant to child protection whether the child had been wronged or had done wrong, as both were signs of incipient criminality.

Post-1850 urbanization of Upper Canada spawned fears of a criminal subclass, driven by the increasing visibility of street urchins and waifs and by English panics and statutory solutions.[105] In Canada, as in England, social legislation regulating children's homes, factories, schools, charitable and public institutions, and child protection was enacted prior to 1911. The child protection movement's *leitmotif* in the US and Canada was for a century the 1874 Mary Ellen Case. A Mrs. Wheeler of New York became concerned about a child beaten and neglected by relatives but there was insufficient evidence for police action and the Department of Charities could not interfere with legal custody.[106] The Society for Prevention of Cruelty to Animals successfully intervened by placing child protection on par with animal protection. While it is likely that the case was a media set-up, it led to the formation of the Humane Association which, with its Canadian and English counterparts, represented animals and children until the turn of the century. Although the state could apprehend children under the Poor Laws, only moral injury — the corruption of children's innate purity — mattered. Even the Victorian anti-cruelty movement focused on the criminalization of parental misconduct rather than on child protection. Parents who severely injured or killed their children were already subject to criminal prosecution in fact as well as law, as Pollock's study of newspaper accounts from 1785 to 1860 shows.[107] Prosecution may have been sparse and difficult[108] and 19th century child protection laws in England and Canada, perhaps compensating, set out criminal penalties for parents of children found in such conditions.

The *Rules* of the Liverpool Society for Prevention of Cruelty to Children state that the Society 'was not formed with a view to permanently housing, clothing, feeding or otherwise providing for children, but rather for the purpose of increasing and, if need be, enforcing such duties upon parents, guardians, or others entrusted with the care of children'. The 1889 *Prevention of Cruelty to Children Act* (UK) inferentially defined the parameters of parental duty by making it a misdemeanor to wilfully ill-treat, neglect, abandon or expose children if likely to cause 'unnecessary suffering'. 'The evil was as much the spiritual harm which befell the abusers as the physical or moral damage sustained by their victims.'[109] The themes were expressed in the 1969 *Children and Young Persons Act* and its successor, the 1980 *Child Care Act*.

Child welfare legislation in late 19th century Canada followed upon a half-century of parallel child saving in the US and England. Confederation confirmed provincial responsibility for schooling and child welfare. Manitoba, carved out of the North-West Territories in 1870, three years after confederation, enacted the 1877 *Apprentices and Minors Act* based on the Tudor Poor Laws.[110] Subsequent reforms followed Ontario. The Ontario child protection movement, championed by JJ Kelso, followed US and UK developments. Its *Humane Societies Act* giving animal protection societies the power to remove children from the custody of parents and guardians under new heads of mistreatment was followed in 1888 by the *Children's Protection Act* empowering the courts to commit children to recognized institutions and the Lieutenant Governor to appoint a commission for juvenile offenders if requested by a municipal council. In 1890, Kelso saw the need for legislative and charitable separation of child and animal protection interests. 'The difficulty is cropping up of keeping the animals and children from clashing, the two having their separate and distinct friends.'[111] Kelso instituted a campaign for a system of quasi-charitable Children's Aid Societies, to be controlled by provincial statute, under the motto, 'It is wiser and less expensive to save children than to punish criminals.'[112]

Ontario legislation was amended in 1893 to make neglect and exploitation of a child punishable by a fine of up to $100 or up to three months imprisonment. Children could be placed in the charge of one of 29 Children's Aid Societies in place by 1895. The Societies could apprehend children, act as legal guardians and select and monitor foster homes. Manitoba followed suit, instituting a system of Children's Aid Societies in 1891 and enacting its *Child Protection Act* in 1898. The Children's Aid Society model is extant in Manitoba and provinces east, but not in provinces further west. The spate of reform continued in Manitoba, as elsewhere, into the next century.[113] In place of a single statute based on the Tudor Poor Laws — the 1877 Manitoba *Apprentices and Minors Act* — there were by 1913 a multitude of statutory provisions. Agencies could apprehend children for parental delict — neglect, abuse, immoral conduct; and for delicts of the child — vagrancy, truancy, expulsion from school, petty crime, exposure to immorality. Judicial determination of custody as between the Society, representing the state, and parents, augmented these rather vague legislative provisions. Presumptive rules developed by the judiciary to define 'the welfare of the child' and its later statutory variation, 'the best interests of the child' invite the judicial discretion characteristic of parens patriae.

Needy children — immigrant, orphaned, deserted, impoverished, Aboriginal – were to be placed in a normalizing environment, at first industrial schools under the 'new' asylum model adopted in Upper Canada, phased out by fostering from the turn of the century to the 1920s in an unconscious return to the boarding-out model of the Poor Laws. Aboriginal children remained caught in the industrial school model of normalisation, yet the labour of other children was also exploited by 'normal' replacement families. Some 100,000 children were sent to Canada from England between 1870 and 1925 as farm and household labourers under the evangelical entrepreneurship of such Victorian childsavers as 'Dr.' Thomas Barnardo and the infamous Maria Rye, under banners of Empire and child-saving, health and opportunity, pushed by the expense of maintaining such children, pulled by Canada's need for cheap labour and English 'stock.' By the 1920s, child welfare philosophy had shifted from child

apprehension to a therapeutic regime supporting family unity.[114] Professional social workers and university experts replaced the charitable amateur of the preceding century and statutes were renamed 'child and family services'. New aims resembled the old — 'to avoid present and future expenditures on public welfare and to guarantee social peace and stability by transforming dependent children into industrious, law-abiding workers.'[115] The new expertise legitimated the bias of 19th century reformers.[116] It was assumed,

> first, that the natural, inevitable, and highest form of the family is a particular type of household arrangement — a nuclear unit comprising two adults in a monogamous, heterosexual, legal marriage, and their dependent children; second, that the family is premised on the biological or sexual division of labour that gives each member a different, but complementary, role with attendant obligations; third, the family is a private haven that operates on the basis of consensus as opposed to the public sphere of the market-place where competition and conflict prevail.

There were central implications for Aboriginal children in the omission of kinship structures equally seen as 'family'.[117] The nuclear family foregrounded in legislation invited intervention into familial structures that did not fit the Progressive pattern.[118]

The evangelical social purity movement flowed through the great transitional stage in Canadian society and nationhood from the 1880s to WWI.[119] Canadian Progressivism wove moral, physical and social hygiene, religion and science, state and moral philanthropy, into a seamless web symbolically linking a new childhood with a new nation. Metaphors of social purity drew upon Canada's pure water, untouched wilderness and glacial north. The opening speaker at the 1896 meeting of the National Council of Women orated, 'This vast Dominion, stretching as it does from ocean to ocean, endowed by nature so lavishly [gives] every sign and token, whether of natural resource or racial heritage, [that] the future of Canada will be, must be, the golden future of a great and mighty nation'.[120] The 'racial heritage' was white and European. Child welfare work, although increasingly regulated by legislation,[121] was private, reflecting the liberal state's reliance on moral initiative.[122] The social purity movement did not share the divisiveness over disciplinary expertise characteristic of UK and US Progressivism, as Canadian charity work early internalized a scientific perspective. While the movement imported ideas from abroad, sometimes without reflection on Canadian conditions — counting Winnipeg bedrooms in the London slum "lodger evil" construct of child sexual abuse — 'social purity' had a uniquely Canadian flavour. In its stress on children's moral regulation and the elimination of vice and degeneracy, it resembled English child welfare, but the goal was a new nation. 'If Canada is to rear an imperial race, it will not be by children raised in slums', an Anglican clergyman stated in 1912[123].

Child protection statutes have been refined over the years. The 1960s, the decade of massive influx of Aboriginal children into the child protection system, was inaugurated by the medical discovery of 'the battered child' as defined by pediatric radiology. It received its medical name in order to avoid criminal consequences. The brief but intense debate of the 1960s was settled in favour of criminalization.[124] In the massive rewriting of legislation, definitions were expanded and new forms of abuse — emotional abuse, sexual abuse — were named. Child sexual abuse emerged in the

1970s as a feminist issue pushing out the Freudian construct of sexual abuse as imaginary, an oedipal hysteria in which the child imagines her father as her lover. The new feminist construct, like the old, focused on female children injured by dominant male household members, but sexual abuse was now real. That boys are victims of sexual abuse and that girls are also victims of extra-familiar abusers would await later studies. The parental penalties favoured by the Victorians have been dropped from child protection statutes, in the shift from protecting the child's moral welfare to protecting her body.

B. Smashing Icons — Residential Schools and Aboriginal Child Welfare

> The Indian is sometimes spoken of as a child, but he is very far from being a child. The race is in its childhood. As far as the childhood analogy is applicable, what it suggests is a policy that shall look patiently for fruit, not after five or ten years, but after a generation or two. The analogy is misleading ... There is, it is true, in the adult, the helplessness of mind of the child, as well as the practical helplessness; there is, too, the child's want of perspective; but there is little of the child's receptivity; nor is the child's tractableness always found. One of the prime conditions of childhood is absent — the abeyance of the passions ... if anything is to be done with the Indian, we must catch him very young.[125]
>
> Nicholas Davin, 1879

Responsibility for 'Indians and lands reserved for Indians' was transferred to the new federal government under the *British North America Act* (1867). The opening of the West to settlement in 1869-70 on the departure of the Hudson's Bay Company required speedy solutions to 'the Indian problem'.[126] Under a succession of Indian Acts, Indians were made wards of the federal government, to be kept apart from settlers as they trod the slow road to civilization mapped by the Acts. Their children were to be subjected to a speedier civilization through residential schooling. Based on the US model of 'aggressive civilization', the schools were to be joint ventures of church and state, with children supplying much of the food and labour, Nicholas Davin's report was accepted by the new Dominion government and implemented in 1883.[127]

Much has been written about the schools. A rough summary would go something like this. In the early years of the schools, "Christian civilization" was indeed aggressive, with brutal punishments for speaking an Indian language or displaying culture, although this abated somewhat in the early decades of the 20th century. Education was rarely above a low primary school level. Children were exposed for the first time to corporal punishment. Countless former students report extreme physical, sexual and emotional abuse.[128] Dormitories were cold and airless and tuberculosis killed a third to a half of students in the early schools. Most destructive in the long term, however, was the separation of children, some as young as three, from families and cultures for the majority of each year, compounded by the schools' rigid isolation of siblings and genders. The schools failed in their mission of assimilation but did provide some level of education, were for some students a positive experience, contributed to

the pan-Indian movement by exposing children to different First Nations cultures and "graduated" most Canadian Aboriginal leaders.

The system left an indelible mark on families, in erosion of parenting and cultural knowledge and skills and in heightened self and substance abuse and the abuse of partners and children.[129] The opening of the north in the 1950s disclosed the damage to children and their families but provinces refused services to the federal enclaves of the reserves on constitutional grounds. The *Indian Act* was amended to permit the operation of provincial law to the extent consistent with the Act, an explicit invitation to provincial child welfare services. Cost-sharing finally spurred the extension of provincial child protection services to reserves. Geographical and cultural distance invoked the easy remedy of child apprehension. Aboriginal children were apprehended in record numbers through the 1960s and 70s for placement with non-Aboriginal foster and adoptive parents. Children were placed out of province, in the US and in Europe, particularly by Manitoba agencies. This made agency follow-up impossible, virtually denied legal status and entitlements, and barred resumption of cultural and kinship connections. Like the residential school, child welfare severed the child from family and culture.

Provinces now require First Nations involvement in child protection decision-making.[130] This is taken to its furthest extent in the Manitoba system of child protection agencies funded by Indian Affairs and managed on an intertribal basis under the *Child and Family Services Act*. This has not resolved the question of constitutional authority or self-determination. Contracting bands explicitly deny provincial authority in the tripartite agreements founding the agencies. Preference for native placement has left many children in fostering limbo. Local healing and protection projects hold out promise for approaches better tuned to culture.[131] The impact of child protection legislation on Aboriginality — on children, families and their Nations, on self-imaging and imaging by others — discloses what a mere reading of statutes cannot. This is the cultural bias inherent in structure, approach and remedies of legislative regimes. First Nations children were caught in a constitutional timewarp in the development of child protection and bore the brunt of its late intervention. This is not to say that children are better off without such remedies — abused bodies absorb not culture but the culture of abuse — but rather to inject a note of caution into the legislative exercise. Legislation is indeed a ready solution to social problems, but can such problems be legislatively defined?

'Childhood is the most intensively governed sector of human existence', Nikolas Rose claims, and the health and rearing of children is linked to national destiny.[132] The linkage is manifest in child protection, schooling, juvenile justice, parental education and state educational projects.[133] Socialization into adulthood is not an 'anthropological universal' but 'the historically specific outcome of technologies for the government of the subjectivity of citizens,'[134] extending post-1700 statist concerns with population measure, control and citizenship into intimate governance.[135] For First Nations peoples trapped in the legislative net of the reserve, the residential school and the child protection system, it would seem that paternalistic statutory regimes have for the most part failed the hopes of both colonialist humanitarianism and the peoples it was to have helped.

C. When Adults are Children – The New Problem of Elder Abuse

> Some paradox in our nature leads us, once we have made our fellow men or women the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, and ultimately of our coercion.[136]
>
> Lionel Trilling, 1950

> No single legislative response to 'elder abuse' will be sufficient. ... A wide variety of problems is encompassed within the term, and solutions appropriate to different causes and considerations that arise within each must be used. [137]
>
> Harbison *et al.,* 1995

Beginning in the early 1960s, a series of discoveries of the dimensions of family violence challenged post-war family reconstruction, beginning with the discovery of 'battered child syndrome.' This etiology informed subsequent developments in the family violence field. 'Wife battering' came to the forefront as a result of grass-roots feminism of the 1960s and 1970s, pushing *Criminal Code* reforms to rape law and 'no-drop' prosecution policies in physical assault in the 1980s.[138] Elder abuse as 'granny battering' is first mentioned in the academic literature in 1975.[139] The phrase was coined by British media to describe random acts of violence against the elderly in the 1970s. This was first seen as a form of youth rebellion and only later as an aspect of the submerged problem of elder abuse.[140] Wardship and 'quality of life' intervention into the lives of the elderly had been part of US state legislation based on the model *Older Americans Act* (1965), a regime into which elder abuse could be easily incorporated. Canadian elder abuse legislation first emerged in Newfoundland and was adopted in various forms in the Atlantic provinces in the late 1970s and early 80s.[141] Although elder abuse as a social cause reflected the liaison established in the 19th century between lay and professional reformers, the initial impetus came not from grassroots groups but from gerontologists and professional caregivers.

Intervention thresholds vary widely, from legal disability; age (60 or 65); or 'vulnerability' induced by age or circumstances of abuse, neglect or exploitation invited by older age. The tautology is apparent. Definition, typology and causal explanations of elder abuse draw from the study of other forms of familial violence. Like other forms of family-related violence, elder abuse definitions include physical, emotional and sexual abuse and various forms of neglect and exploitation.[142] The statutes are similar in other ways to child protection statutes, in that many incorporate a 'best interests' test and mandate reporting of an adult in need of protection.

Comprehensive adult protection statutes incorporate guardianship, committeeship and adult protection. Of these, the most recent is the British Columbia *Adult Guardianship Act.*[143] The Act offers the most detailed balancing of procedural rights[144] but it also sets out what appears to be the most intrusive protection regime of those surveyed. The Act uniquely requires reporting of all criminal activity observed. This is not restricted to crimes directed at the subject of intervention.[145] It authorizes forcible entry without a warrant in emergent circumstances and based on any report of abuse. The subject can be medically examined on-site without consent if duress or

incompetence is suspected, and can be forcibly removed from the premises to a place of safety. Although duress is relieved by removing the perpetrator rather than the subject, the Act provides only for removal of the suspected victim.[146] Where the subject is deemed competent, the Act provides for another stage of intervention, 'cooperative case planning'. While the subject can reject this, the substantial interference that has already occurred as a result of involuntary intervention makes real choice remote. Autonomy and procedural rights come into play only after significant loss of liberty as a result of agency involvement. Although reporting is not mandatory under the Act, the agency 'must' respond to all reports. Taking as an example the adults visible on the streets of any large urban centre who meet the Act's criteria of vulnerability, the mandate if taken literally would deplete provincial resources.

The novelty of adult protection legislation and its professional underpinning make socio-historic analysis of the sort possible with child protection difficult, as does the extreme variation in such statutes. The rapidity of reform has enabled introduction of newer concepts such as limited guardianship, the presumption of autonomy and procedural rights. Even so, draconian powers of intervention and ageist stereotyping are typical of such statutes. Ageism is already reflected in mandatory retirement and other legal and social barriers to financial independence and a devaluation of age.[147] The aged are not seen as fonts of wisdom and experience but as senile, weak, taking up space and so unattractive that one writer wonders, sarcastically, whether there may be a duty upon older people to die. Does such legislation only simplify the sidelining of older adults? Does its recent extension to vulnerable adults generally merely mask this? What is the experience of adults subject to such legislation? These questions have not been tested.

The promise of improved conditions is inherent in the concept of adult protection legislation. Does it promise more than we can give? Yet such legislation may be over-used, where lesser measures would suffice.[148] A review of Nova Scotia legislation made such a finding. The report recommends abolishing the best interests test, as this puts adults on par with children and presumes incompetence. The focus on competence is 'a significant source of frustration for those working with the Act'.[149] Absent a finding of legal disability, the adult's wishes must be the deciding factor, the authors argue, and mandatory reporting should be replaced by self-reporting. Self-neglect and abuse should be removed from the Act and abuse addressed in the context of family violence policy, as a criminal problem.

Unitary regimes covering all stages from rescue to case planning and service provision, police and agency involvement, uniting child protection and adult protection in aims and remedies, seem to be a desirable response to intimate violence and exploitation. But, no statutory regime can encompass an area as diffuse as adult protection, where incapacity is presumed against the legal and social stream of presumption of capacity, and self-determination is compromised in attempts to solve problems deeply imbricated in the social fabric. The foot in the door granted to agencies in some of the legislation is encased in a heavy statutory boot.[150] Legal checks and balances may do little more than mark out a small and difficult space for the exercise of choice. The Manitoba Law Reform Commission rejected such legislation in favour of a limited emergency orders regime and extralegal approaches.

V. The Dilemma of Intervention

> **dilemma**, n. Argument forcing opponent to choose one of two alternatives (*horns of the* -) both unfavourable to him; position that leaves only a choice between equal evils...
>
> The Concise Oxford Dictionary, 5th ed.

Evidence of Roman origins of parens patriae is suggestive but inconclusive. Roman law is founded on potestas and its opposite, legal disability and wardship, concepts emblematic of parens patriae. Yet wardship in Roman, feudal and early common law, was hardly the kind of ameliorative jurisdiction supposed in modern law reform. Innovations in Roman statute law are less proactive than restrictive of earlier powers of, for example, abandonment of newborns and killing of sons (see Appendix, under 'Child Protection'). Wardship in common law moved from feudal tenures to the King's prerogative with its brisk trade in wardships prior to 1680, to the transfer of parens patriae from the King to Chancery and from Chancery via the Judicature Acts to the superior courts of common law. The 18th century debates that pit judge-made law against statute are resolved in the benthamite vision of the common law as a shared jurisdiction. Judicial lawmaking reached a high point in *Sedley's Case* and the 1892 Criminal Code provisions, was restricted to past common law crimes in *Frey* v. *Fedoruk* and was abolished altogether in the 1955 Code reforms. Claims of judicial parens patriae jurisdiction over all children in the 19th century are met in the 20th century by broad provincial statutory regimes. Even in the corners of parens patriae discretion not mapped out by legislation, there has been a narrowing, as seen in the shift from *Re Eve* to *R.D.G.*

As Moscovitch and Albert observe of the Canadian welfare state and Valverde of the social purity movement that spawned it,[151] Canada is different. We cannot assume that the environment of reform in such areas as cruelty to children, "the Indian problem", battered women and elder abuse were the same in the US, the UK, Canada or Quebec. In surveying the statutory outcomes of such movements, it becomes clear that interventions into childhood, for example, were driven by agenda extraneous, and sometimes opposed, to the well-being of children. Elder abuse and adult protection statutes raise similar questions. Are we helping those needing help, or giving a legal stamp to stereotyping and to further abuse at the hands of the state?

"Law reform" promises renewal, pioneering a new social problem, unification of disciplines, and a public arena in which reform can be debated, criticized and refined, and the cause of the day can be publicized. Announcement of the reform process, briefs and hearings, consultation with stakeholder groups, media coverage and the distribution of discussion papers arouse public awareness of social problems. Enactment of reforms cements in the mind of the public the commitment of a government to a social issue. "Doing good" is one horn of the reform dilemma.

The other horn is the danger of doing wrong while doing good. Would new legislation work better than existing legal remedies or, indeed, the help of a good friend, a helpful agency, help lines, a public advocate, a free legal clinic, a good lawyer and a

legal aid plan and a community alert to the concern? Charter-proofing protection regimes for adults has only upped the ante, not stopped the game. Matthew Hale stated in 1787 that law reform would be easy if it were only a question of applying a 'plaister' to a 'sore' but the 'great business' of the reformer is to ensure that the remedy does not cause 'some other considerable inconvenience' or displace 'some other considerable convenience'.[152] Covering up a syphilitic chancre without healing the disease, Hale's metaphor, is now our own metaphoric "bandaid solution." Hale's admonition that short-term solutions fail to resolve underlying social problems and may do more harm than good stands as a warning in parens patriae law reform.

What may represent a long and laudable consultative process, seen most recently in statutory innovations governing elder abuse and adult protection, must be weighed in the balance of history and personality. We cannot know the human subject. The more closely we define it, the more we leave out. The more we intervene, the more we may harm the object of our intervention. The 19th century welfare adage, 'The poor are always with us'[153] too readily becomes 'The poor, we are always with them.' It may be possible to legislatively span the great divide between the faceless state and the individual, protect fragile truces and generate new alliances. Statutes, by their nature require sweeping remedies and broad definitions of vulnerability that ignore or erase the subject. The history of parens patriae legislation suggests that protecting the subject and not merely the body of law's subject may be a doomed enterprise. Yet we hope for better living through legislation and continue to believe, to take a later cliché, that the truth of the subject is still out there.

Endnotes

[1] James Crankshaw, *The Criminal Code of Canada ... with commentaries, annotations, forms, etc., etc....,* 3rd ed. (Toronto: Carswell, 1910) annotation to Sec. 19 at 29-30.

[2] Dupont was founded in Delaware in 1802 by French émigré Eleuthére Iréné du Pont de Nemours, a student of the chemist Lavoisier. The manufacture of 'reliable black powder' or gunpowder was its 19th century mission. Its 20th century inventions include nylon and neoprene in the 1930s, followed by a host of synthetic substitutes for natural materials.

[3] See e.g. Daniel Pick, *Faces of Degeneration: A European Disorder*, c. 1848-c. 1918 (Cambridge UP, 1989); *Michel Foucault, Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1977); and Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (London: Routledge, 1989).

[4] *Falkland* v. *Bertie* [1696] 23 ER 814 at 818; 2 Vern. 333 at 342. [Statute citations added].

[5] *Wellesley* v. *Duke of Beaufort* [1827] 38 ER 236.

[6] *R*. v. *Gyngall* [1893] 2 QB 232 at 239.

[7] *Rolands* v. *Rolands* (1983) 9 Fam. L.R. 320 at 321.

[8] *Re R* (a minor) [1991] 4 All ER 177 at 186.

[9] H.S. Theobald, *The Law Relating to Lunacy* (London, Stevens, 1924).

[10] Qtd., Anthony Graham, "Parens Patriae: Past, Present, and Future" (1994) 32 Fam. and Conciliation Cts. Rev. 184-207 at 190.

[11] John Seymour, "Parens Patriae and Wardship Powers" (1994) 14 Oxford J. Leg. Stud. 159-188 at 187-88.

[12] The common law was influenced by Roman law through various processes of infusion. The earliest intersection was between Roman and Anglo-Saxon law through conquest; the ecclesiastical courts used Roman law principles and discourse in their deliberations; and continental Roman lawyers travelling in Britain, and students attending European universities brought its ideas into the common law. Sir William Holdsworth, *A History of English Law* (London: Methuen, 1903) v. 1.

[13] Eg. Patricia Schene and Sue F. Ward, "The Vexing Problem of Elder Abuse — The Relevance of the Child Protection Experience" (Spring 1988) 1 *Public Welfare* 14, citing Robert W. ten Bensel, "The Development of the Concept of the Needs of Children" (1987) 8 Latham Letter 1-4. Schene and Ward write, 'In the fourth century A.D., Constantine the Great introduced the concept of *parens patriae* (the state as parent), the precedent for the legal principle behind the state's intervention in family life when care falls below an established minimum.'

[14] Continental scholars travelling in England, English scholars attending continental universities, early writers like Bracton who set out Roman precepts and claimed them as English, various judicial borrowings during the centuries are among the ways in which the common law was infused with Roman principles. Roman law was a core subject of legal education in its various forms and was taught in Canadian law schools until the middle of the 20th century; John Diefenbaker's rather dismal mark is on display at the Diefenbaker Center in Saskatoon.

[15] *Justinian Code* s. 8, 47, 9, Emperors Diocletian and Maximian, ca. 287 (quoted in full in Appendix).

[16] I am grateful to Michel Morin for his reminder.

[17] A. Frank Johns, "Guardianship Folly: The Misgovernment of parens patriae and the forecast of its crimbling linkage to unprotected older Americans in the twenty-first century — a march of folly? or just a mask of virtual reality?" (1997) 27 Stetson L.R. 1-90, quoting WW Buckland, *A Textbook of Roman Law from Augustus to Justinian* 1-2, 2nd. ed., Cambridge UP, 1932). The low-born did not have *potestas* even though they might be *sui juris*.

[18] See Appendix for examples.

[19] *The Code of Justinian*, S.P. Scott, ed., *The Civil Law* (Cincinnati: The Central Trust Company, 1932).

[20] Alan Watson, *The Spirit of Roman Law* (Athens, GA.; London: University of Georgia Press, 1995) at 77.

[21] *Ibid.*, quoting David Daube, 'Legislation was less suitable for the continuous day-to-day adjustments called for in private law. For one thing, it involved a cumbersome machinery, as a rule set in motion only for political purposes. In private law, it was something of a last resort...' (at 75). Nor did legislation enjoy the supremacy accorded to it in common law. Gaius states that "An imperial constitution is what the emperor ordains by edict or letter. It has never been doubted that this has the sovereign force of statute since the emperor himself receives his

sovereign power by statute." Emperors for the most part achieved their status through military prowess, not precedent legislation (at 148).

[22] Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (Harmondsworth, Middlesex: Penguin, 1979).

[23] *Supra* note 20 at 148.

[24] On the development of the corporal punishment justification from Roman to common law to the Canadian Criminal Code, see Anne McGillivray, "He'll learn it on his body: Disciplining Childhood in Canadian Law" (1997) 5 Int. J. Children's Rights 193-242.

[25] *Supra* note 20 at 79-80.

[26] See Appendix.

[27] The question does point to the larger issue of the nature of 'true' codes versus legislation and legislated collections of common law principles as, for example, the *Sale of Goods Act* and the *Criminal Code*. See "Toward a re-codification of the Criminal Law", papers and agenda, Kingston Ont., November 1998.

[28] [1996] 2 S.C.R. 108.

[29] *V.W.* v. *D.S.* [1996] 2 S.C.R. 108.

[30] Michel Morin, "La compénce parens patriae et le droit privé québécois: un emprunt inutile, un affront àl'histoire" (1990), 50 R. du. B. 827

[31] *Anne McGillivray, supra* note 24 at 193-242.

[32] Sanjeev S. Anand, "Catalyst for Change: The History of Canadian Juvenile Justice Reform" (1999) 24 Queen's L.J. 515 at 517 et seq.

[33] *Supra* note 1, section 18 at 24.

[34] D. Owen Carrigan, *Crime and Punishment in Canada, a History* (Toronto: McClelland & Stewart, 1991).

[35] The 1908 *Juvenile Delinquents Act* paralleled the child welfare legislation of the day. A single offence, delinquency, covered federal, provincial and municipal offences, with 'child' varying defined by the provinces, as 16 or 18. The test was the child's welfare, irrespective of the criminal charge. Children could be placed in foster or institutional care., by this date in foster families or the Canadian equivalent of borstals, industrial schools for juvenile delinquents. The age of criminal responsibility was raised to 12 under *The Young Offenders Act* (1984). England continues to rely on a version of *doli incapax* in young offender cases; see Michael Freeman, *The Moral Status of Children* (Martinus Nijhoff, 1997) at 238-9. Children between 10 and 12 are criminally responsible if *doli capax*. Glanville Williams sets out the test as first, proof of the necessary *mens rea* and second, proof that the child knew the act was wrong (*Criminal Law: the General Part,* 2nd ed. (London: Stevens, 1961) at 814. The test resonates with the M'Naughten rules.

[36] *Supra* note 32 at 515-559.

[37] Halsbury's, 475 et seq.

[38] 10 Cl.&F. 200 E.R. 718. 'No person shall be convicted of an offence by reason of an act done or omitted by him when laboring under natural imbecility, or disease of the mind, to such an

extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.'

[39] *Who's Who and Why in Canada* (1912) states that James Crankshaw "In 1894 published work on criminal code, used as text-book throughout Canada, now in 3rd edition". This by process of elimination is in fact his annotated Criminal Code. Such works were used by apprenticing lawyers and the designation of the work as a student text is supportable on the basis of Crankshaw's insistent inclusion of English Draft Code debates, the amalgam of legal education as both practical and theoretical at the close of the century and old 'Crankshaw's' in the Manitoba Law School library archives inscribed with student names. Histories of the genesis of the Canadian Criminal Code do not mention Crankshaw; see H Brown, ed., *The Birth of the Criminal Code: The Evolution of Canada's Justice System* (University of Toronto Press, 1995) and H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Society, 1989).

[40] *Supra* note 1

[41] *Ibid.* at 25-26.

[42] 1 Terr. L.R. 23 at 63. WJ Tremeear, *The Criminal Code and the Law of Criminal Evidence in Canada, Being an Annotation...*, 2nd ed. (Toronto: Canada Law Book; Philadelphia: Cromarty Law Book, 1908).

[43] The case signalling Criminal Code reform, including the change in designation from insanity to mental disorder is *R.* v. *Swain* (1991), 63 C.C.C. (3d) 481 (SCC), the omission of delusions. On the history of the defence, see generally Don Stuart, *Canadian Criminal Law*, 3rd ed. (Carswell, 1995) and *Williams, supra* note 35.

[44] See *Stuart, ibid.* See also the dissent in *R.* v. *Cooper* (1978) 40 CCC (2nd) 146 (Ont. CA); reversed, (1980) 51 CCC (2nd) 129 (SCC). Dubin JA (Ont.) called for a retrial on the basis of the trial judge's failure to relate the medical evidence to the insanity plea and cites Glanville Williams in arguing that '"a state of natural imbecility" should be given a separate meaning from "disease of the mind", as an 'imperfect condition of mental power from congenital defect or natural decay as distinguished from a mind once normal which has become diseased.' (at 153) The Supreme Court of Canada avoided the question of 'natural imbecility' and the dissent found 'no evidence to show a state of natural imbecility' without saying what it was. (at 135)

[45] *Supra* note 20 at 148.

[46] 17 Edw. II.

[47] *Incert. temp.* cc. 11, 12; 17 Edw. 2, stat. 2., cc. 9, 10, Ruff.

[48] *State ex. R. Hawks* v. *Lazaro*, 202 S.E. (2nd) Rep.109 at 118-19.

[49] Wastage intended to foil the legitimate claims of another in a judicial action is censurable in Canadian law.

[50] Halsbury,Part VII, Guardianship of Person and Estate, 121.

[51] 3 Car. II, c. 24.

[52] *Supra* note 50 at 121.

[53] *Re Eve*, SCC 1986 31 DLR (4th) 1-37 at 14.

[54] 36 & 37 Vict., c. 66.

[55] 49 & 50 Vict., c. 25.

[56] 53 Vict. c. 5.

[57] *Supra* note 6 at 239.

[58] UK, c. 87, s. 15.

[59] 31 DLR (4th) 1-37 at 15

[60] *Supra* note 52 at 28-30.

[61] The judgement has been criticized on the ground that the parens patriae 'best interests test,' in presuming that sterilization is non-therapeutic except on extremely limited grounds, is wrong. There are a number of therapeutic outcomes for a woman in Eve's position. See Margaret A. Shone, Case Comment, *Re Eve* (1987) 66 Can. Bar Rev. 635-646.

[62] Anne McGillivray, *Governing Childhood* (Alderhot, Hants.: Dartmouth,1997), inspired by Nikolas Rose's assertion that 'childhood is the most intimately governed sector of society.'

[63] *Winnipeg Child and Family Services (Northwest Area)* v. *G.(D.F.)* [1997] 3 S.C.R. 925.

[64] 1 *Commentaries* 10.

[65] An example is the Manitoba 'mature babysitter' case in which the rape of a 12 year old girl was remade at trial and appeal as consensual, albeit illicit, sex. See Anne McGillivray, "*R.* v. *Bauder*: Seductive Children, Safe Rapists and Other Justice Tales" (1998) 25 Man. L.J. 359-383.

[66] 'Law's entity is sustained despite the process of change by presenting transition as a step from one ordered state containing the entity to another — from the primitive to the modern, and so on. The transition is always one from the simple to the complex, from the unified to the diverse ... accompanied by a continued social integration, an encompassing order which law itself sustains. The entity in evolving responds to and overcomes the inadequacies of its prior form.' Peter Fitzpatrick, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Duke U.P., 1991), describing the evolutionary theory of common law in H.L.A. Hart, *The Concept of Law* (1961). Also see *Harrison* v. *Carswell* [1976] 2 S.C.R. 200 and the differing views of the judicial function of Dickson J for the majority and Laskin J for the dissent. Dickson J quotes the 1917 dictum of Holmes J in *Southern Pacific Co.* v. *Jensen*, 'I recognize without hesitation that judges do and must legislate, but they can do it only interstitially; they are confined from molar to molecular actions' (at 218). Laskin J objected to the 'mechanical deference' paid to stare decisis and invoked the court's 'balancing role ... where an ancient doctrine, in this case trespass, in invoked in a new setting to suppress a lawful activity[picketing]' (at 202).

[67] David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge UP, 1989) at 63. This, then, was the project of Blackstone's *Commentaries* which, although a student text in the 19th century, was not so intended.

[68] *Roe* v. *Galliers* (1787), 2 Term Rpts. 139, in *Lieberman, supra* note 67 at 63.

[69] Bentham's Pannomium is reflected in Digests of the law that are so 'compendious' as to defy the simplicity inherent in the concept. *Lieberman, ibid.* at 282.

[70] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 1789 ed. J.H. Burns and H.L.A. Hart (London) at 33.

[71] This in turn led to such movements as legal realism, law and society, critical approaches to law and, in Canada, the Charter as substitute for the overarching perspective once promised by natural law and its ecclesiastical claims.

[72] *Supra* note 67 at 13.

[73] *Supra* note 1 at xc.

[74] Douglas Hay, "Property, Authority and the Criminal Law" in Hay et al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975), 17-63 at 33.

[75] *Supra* note 67 at 14.

[76] *Ibid.* at 15.

[77] *Supra* note 74 at 17-63. Charles Dickens describes the reaction of the crowds to the hanging of the Mannings, executed for conspiring to murder her lover, in two letters to The Times 14 and 18 November 1849, reprinted as handbills. Disgusted by their 'wickedness and levity', 'cries and howls', 'screeching and laughing' and 'brutal mirth or callousness,' he recommended that hanging be conducted secretly within the prison walls. Peter Ackroyd, *Charles Dickens* (London: Minerva, 1991) at 604-5.

[78] [1663] 17 St. Tri. 155.

[79] *Report of the Royal Commission appointed to consider the law Relating to Indictable Offences*, 1879, C 2345 (Lord Blackburn, Chair, Lush, Barry and Stephen, JJ). See ML Friedland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) Oxford J. Leg. Studies 307-346; Law Society of Upper Canada; Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments*) 4th ed. (London: Macmillan, 1887) at 147. 'By far the greater part of the Code and of the Report was my own composition.' (J.F. Stephen, *A History of the Criminal Law of England*, London, 1883,Vol. III, 349). The *Draft Code* was prepared for the English Colonial Office and based criminal codes in Canada (1892), New Zealand (1893), Queensland (1899) and the remaining Australian states (at 340). The Canadian version was substantially modified by colonial legal developments. England rejected codification of its criminal law.

[80] JF Stephen, *The Nineteenth Century*, qtd. in Glanville Williams, "Necessity" (1978) Crim. L. Rev. 128 at 129-30.

[81] The Draft Code and the Canadian Criminal Code preserve common law defences. JF Stephen, writes, 'The only result which can follow from preserving the common law as to justification and excuse is, that a man morally innocent, not otherwise protected, may avoid punishment. In the one case you remove rusty spring-guns and man-traps from unfrequented plantations, in the other you decline to issue an order for the destruction of every old-fashioned drag or life-buoy which may be found on the banks of a dangerous river ...' (*ibid*. at 130)

[82] *Supra* note 1, Introduction at *lxxxviii*; [emphasis in original].

[83] *Ibid.* at xci-ii

[84] John Willis, Case Comment, *Frey* v. *Fedoruk* [1950] S.C.R. 517, 10 C.R. 26.

[85] *Supra* note 1 at xcii.

[86] [1950] SCR 517 at 530. The Court struck down the common law offence of 'peeping Tom-ism' created by the court below, declaring that, as a matter of certainty and prospectivity, new offences must be created by Parliament and not by the courts.

[87] Leonard Rutman, "J.J. Kelso and the Development of Child Welfare" in Allan Moscovitch and Jim Albert, eds., *The Benevolent State: The Growth of Welfare in Canada* (Toronto: Garamond, 1987) 68-76 at 68.

[88] Robert D. Bureau, Katherine Lippel and Lucie Lamarche, "Development and Trends in Canadian Social Law, 1940 to 1984" in Ivan Bernier and Andree Lajoie, eds., *Family Law and Social Welfare Legislation in Canada* (University of Toronto Press, 1989) 71-131 at 76.

[89] N.J. Smith, *A Brief Guide to Social Legislation* (London: Methuen, 1972) at xiii et seq. Nor was such legislation passed during the intervening reigns of George IV (1820-30) and William IV (1830-37).

[90] David Eastwood, "Men, Morals and the Machinery of Social Legislation, 1790-1840" (1994) 13 (2) Parliamentary History 190-205 at 191. The Hanoverian history of social legislation had been chronicled in Sidney and Beatrice Webb, *The English Local Government from the Revolution to the Municipal Corporations Act* (9 vols., 1906-29) and others. Eastwood founds his critique on Joanna Innes' works "Parliament and the Shaping of Eighteenth-Century English Social Policy" (1990) *Transactions of the Royal Historical Society*, 5th ser. XL, 63-92 and "Politics and Morals: The Reformation of Manners Movement in the Later Eighteenth Century" in E. Hellmuth, ed., *The Transformation of Political Culture*. England and Germany in the Later Eighteenth Century (Oxford, 1990) 57-118.

[91] *Ibid.* at 192.

[92] *Ibid.* at 200.

[93] *Ibid.* at 205.

[94] *Ackroyd, supra* note 77 at 616. That same day, Dickens spoke at the inauguration of the Metropolitan Sanitary Association, instituted in response to the cholera epidemic of the previous winter, and to the horrors of London sanitation (suppurating sewers and graveyards coughing up the dead), an Association uniting public health, housing, and the close of London churchyards for country sepulture.

[95] Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart, 1991).

[96] This same argument drives the 1999 Manitoba Filmon government's call for 'workfare' which would divide the poor into deserving and undeserving classes, with make-work projects for the able-bodied and mandatory rehabilitation for the addicted. The division of the poor is similar to that of English Poor Law reform in 1837, discussed below.

[97] Allan Moscovitch and Glen Drover, "Social Expenditures and the Welfare State" in Moscovitch and Jim Albert, eds., The Benevolent State: The Growth of Welfare in Canada (Toronto: Garamond, 1987) 13-43 at 15 et seq.

[98] *Ibid.* at 20.

[99] *Ibid.*

[100] Director of the US Federal Bureau of Investigation from 1924 to 1972 and an engineer of the Cold War and Communist panic, Hoover displayed a world map over his desk on which communist states were coloured red, socialist pink. Canada's pink was disrupted by Saskatchewan's 'commie' red.

[101] Karl Marx and Friedrich Engels published the *Communist Manifesto* in 1848. 'The workers have nothing to lose but their chains. They have a world to win. Workers of all lands, unite!' The first volume of *Das Kapital* was published in 1867. Fiscal crisis and debt financing, neo-conservatism and privatization, and NAFTA have deeply eroded the Canadian vision of social justice.

[102] R. Dingwall, JM Eekelaar and T. Murray, "Childhood as a Social Problem: A Survey of the History of Legal Regulation" (1984) 11 J. Law & Society 207-232 at 210-11.

[103] On moral panic, see Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (London: MacGibbon and Kee, 1972). Also see the works of Charles Dickens, in which these emotions — horror, fear, sentimentality — are evoked around the treatment of children.

[104] *Supra* note 102 at 214 et seq.

[105] This subject, and similar developments in England, are discussed below.

[106] *Supra* note 13 at 14-21.

[107] Linda Pollock, *Forgotten Children: Parent-Child Relations from 1500-1800* (Cambridge University Press, 1983). Also see *A Lasting Relationship: Parents and Children Over Three Centuries* (Fourth Estate, 1987).

[108] McGillivray*, supra* note 24.

[109] *Supra* note 102 at 218.

[110] J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Women's Press, 1992).

[111] Diary entry, 10 January 1890. Kelso was a key figure in the development of the Canadian foster care system, Children's Aid Societies, statutory powers of apprehension and the juvenile court. See John Bullen, 'J.J. Kelso and the "New" Child-savers: The Genesis of the Children's Aid Movement in Ontario' (1990) 82 Ontario History 107; and *Rutman, supra* note 87 at 68-76.

[112] Kelso stressed the linkage between child maltreatment and crime, in his submission to the Ontario Prison Reform Commission; its 1891 Report supported Kelso's initiatives. *Rutman, ibid.*

[113] The discussion is based upon Anne McGillivray, Governing Childhood (Introduction) *supra* note 62 and "Therapies of Freedom: The Colonization of Aboriginal Childhood" included in that work.

[114] Dorothy E. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario 1890-1940* (University of Toronto Press, 1992); Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960* (Penguin, 1988); Carol Anne Hooper, "Child Sexual Abuse and the Regulation of Women: Variations on a Theme" in Christine Smart, ed., *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* (Routledge, 1992).

[115] *Bullen, supra* note 111 at 157-58. Children were placed on farms, given little education, subjected to 'many obvious injustices' and 'condemned to a working-class world that offered few opportunities for personal development and social mobility'.

[116] *Chunn, supra* note 114 at 36.

[117] See J. Korbin, *Child Abuse and Neglect: Cross-Cultural Perspectives* (University of California Press, 1981).

[118] Margrit Eichler, *Families in Canada Today: Recent Changes and their Policy Consequences* (Gage, 1983). Eichler calls this the 'monolithic bias'. Closely linked is the 'conservative bias' which includes 'a tendency to either ignore children altogether, or to see them merely as objects to be acted upon, rather than as active participants in family life'.

[119] *Supra* note 95.

[120] *Ibid.* at 45.

[121] See Ursel, *supra* note 110, and *Chunn, supra* note 114.

[122] By constructing and then apparently ignoring a private moral realm, the liberal state can then claim to govern what transpires within only where invited to do so by that realm's constituents or their experts. As almost everything could be constructed as a moral problem, the public-private line was moveable at moral will.

[123] *Supra* note 95 at 128.

[124] Anne McGillivray, *The Criminalization of Child Abuse* (LL.M. Thesis, University of Toronto, 1988), "Reconstructing Child Abuse: Western Definitions and Non-Western Experience" in MDA Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Netherlands: Kluwer, 1992).

[125] Nicholas Davin, *Report on the working of Industrial Schools for the education of Indians and mixed-bloods in the United States, and on the advisability of establishing similar institutions in the North-West Territories of the Dominion* (Ottawa: Queen's Printer, 1879).

[126] *Supra* note 113; Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (University of Toronto Press, 1999).

[127] Speech of Sir Hector Langevin, 22 May 1883, House of Commons in Committee. "The Industrial Schools Debate"; $4400 was initially allocated to the program.

[128] Canada apologized in 1997. By 1998, 1200 former pupils had filed lawsuits. One First Nation, seizing a central issue, is suing Canada and three Christian denominations for cultural destruction through residential schooling. See Anne McGillivray, "Capturing Childhood: The Indian Child in the European Imagination" in Andrew Lewis and Michael Freeman, *Law and Literature: A Colloquium* (University College London, 1999).

[129] *McGillivray and Comaskey, supra* note 126.

[130] Anne McGillivray and Sid Frankel, "Post-1950 Aboriginal Child Welfare" in Hesketh et al., Canadian History CD-ROM Project (University of Calgary, forthcoming).

[131] *McGillivray and Comaskey, supra* note 126.

[132] Nikolas Rose, Governing the Soul: The Shaping of the Private Self (Routledge, 1989) at 103.

[133] *Ibid.* at 2.

[134] *Ibid.* at 130.

[135] *Ibid.* at 5.

[136] Lionel Trilling, *The Liberal Imagination: Essays on Literature and Society* (New York: Viking, 1950).

[137] J. Harbison et al., *Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect, Summary Document* (Health Law Institute, Dalhousie University, Halifax, 1995) vii, ix.

[138] Manitoba, with other Canadian provinces, adopted "no-drop" prosecution policies in the early 1980s. Criminal Code provisions for child sexual assault were amended in 1987.

[139] R. Wolf, "Elder Abuse: Ten Years Later" (1988) 36 *Journal of the American Gerontological Society* 758-762.

[140] Connections between child abuse and elder abuse are barely mentioned in elder abuse literature. Random violence against older people may be propelled by severe childhood abuse. The 'old man down the road' was a reality for many. One 10 year old boy picking lilacs for his mother, analy raped and disbelieved by his family, spent much of his adolescence pushing 'grannies' into traffic; *supra* note 124.

[141] For a more detailed discussion of Canadian legislation, see Manitoba Law Reform Commission, Discussion Paper on Elder Abuse and Adult Protection (Winnipeg; The Commission, 1998).

[142] See R.M. Gordon and S.N. Verdun-Jones, *Adult Guardianship Law in Canada* (1992) (release 2, 1995) 2-2.

[143] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 (Supp.) s. 44. The Act is part of a parcel of statutes aimed at adult protection, including *The Community Care Facility Act*, R.S.B.C. 1996, c. 60, *The Public Guardianship and Trustee Act*, R.S.B.C. 1996, c. 383, *and The Representation Agreement Act*, R.S.B.C. 1996, c. 405. *The Adult Guardianship Act* has not been proclaimed in force, at the time of writing. One explanation is the cost and complexity of restructuring.

[144] Protection orders confining the adult to a treatment or protective regime can be appealed and terminate automatically. Orders must be as unintrusive as possible. A competent adult must be involved in case planning and can refuse services. Definitions of abuse, neglect and self-neglect are wide and risk-based intervention is limited to urgent circumstances. 'Guiding Principles' set out in s. 2, stress autonomy.

[145] There is no general duty on the public to report a criminal offence. The requirement of reporting all criminal activities not only goes beyond the Act's protection mandate but also may have a chilling effect on self-reporting and reporting by a household member. A son's marijuana plant on the windowsill has nothing to do with his father's abuse of his mother, for example.

[146] An alleged perpetrator can be removed 'on the spot' upon the issue of a judicial warrant, if appropriate procedural protection is provided.

[147] Peter M. Horstman, "Protective Services for the Elderly: The Limits of Parens Patriae" (1975) 40 Montana L.R.

[148] J. Harbison et al., *Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect*, vols. 1 and 2 (Health Law Institute, Dalhousie University, Halifax, 1995).

[149] *Supra* note 137 at vi. If the recommendations were adopted, the Act would apply only to psychological abuse and caregiver neglect.

[150] Works critical of comprehensive adult protection regimes include Marshall B. Kapp, "Forcing Services on At-Risk Older Adults: When Doing Good Is Not So Good" (1988) 13 Social Work in Health Care 1-13 (autonomy and distributive justice — willing adults should receive services over unwilling adults); Donald J. Bersoff, "Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science" (1992) 37 Villanova L.R. 1569-73 (paternalism versus autonomy); and the useful exchange "The Vexing Problem of Elder Abuse" (1988) Public Welfare 7-44. On legal paternalism generally, see, Joel Feinberg, "Legal Paternalism" (1971) 1 Can. J. Philosophy 106-24, rep. Rolf Sartorius, ed., *Paternalism* (University of Minnesota Press, 1983) 3-18 (weak versus strong paternalism); and Gerald Dworkin, "Paternalism", *ibid*. at 19-34 (least restrictive alternative).

[151] *Supra* note 95.

[152] Matthew Hale, *Considerations touching the Amendment or Alteration of Laws* in Francis Hargrave, ed., *A Collection of Tracts, Relative to the Law of England* (London, 1787) 249-89.

[153] "For ye have the poor always with you" (Bible, Matt. 26:11).

Appendix
Intimations of *Parens Patriae* in Roman Law

CJ = Justinian Code
C = Theodosian Code

Date, Citation	Emperor	Edict

I. The Emperor as *Pater Patriae*: Public Welfare

316, CJ 1, 14,1	Constantine	It is part of Our duty, and is lawful for Us alone to interpret questions involving equity and law.
384, CJ 9, 29, 3	Gratian, Valentinian and Theodosius	The conduct of the Emperor should not be discussed, for it is the same as sacrilege to doubt whether he whom the sovereign selects for an office is worthy or not.
392, CJ 9, 7, 1	Theodosius, Arcadius and Honorius	Where anyone, ignorant of modesty and without any sense of shame, thinks Our name should be attacked with dishonourable and petulant abuse, or if rendered turbulent by drunkenness, he should manifest discontent with the proceedings of Our reign, We are unwilling for him to be subjected to any penalty, nor do We desire that he be treated with severity or harshness; since if this was the result of levity, he is only worthy of contempt; if it was caused by insanity, he is an object of pity; and if it was done for the purpose of insult, he should be pardoned...
396, CJ 7, 65, 8	Arcadius and Honorius	The interest of the public as well as that of Our Private Treasury requires that claims due to Our Household should not be deferred by the cunning arts of debtors...

397, CJ 11, 22, 2	Arcadius and Honorius	Where immunity from the delivery of wheat or barley to the City is granted, it will be void, as rescripts specially issued contrary to the public welfare are of no force or effect.
ca. 479 CJ 4, 59, 1	Zeno	We order that no one shall be so bold as to monopolize the sale of clothing of any kind, or of fish, combs, copper utensils, or anything else having reference to the nourishment or the common use of mankind, no matter of what material it may be composed... Moreover, if anyone should venture to practice monopoly, he shall be deprived of all his property, and sentenced to perpetual exile.
503, CJ 10, 27, 1	Anastasius	We decree that when, through urgent necessity, purchases of wheat, barley, or other grain take place in any province whatsoever, no owner of said property shall, under the pretext of any privilege whatsoever, have the right to refuse to sell it, and that in accordance with the terms of this, Our most salutary law, permission shall never be given to the possessor of such articles in any way or at any time, to avail himself of any rescript, pragmatic sanction, or judicial decree, by which he may claim immunity. Therefore, We desire that these burdens shall be imposed upon all persons in proportion to the allotment of each, and We do not allow even Our own household, or that of Our Most Serene Consort, to be exempt from this obligation.

II. Protection of Wards

216, CJ 5, 50, 1	Antoninus	When a ward is not furnished support by his guardian, he should apply to the governor of the province who will perform his duty in seeing that no delay takes place in providing him with food.

231, CJ 5, 37, 10	Alexander	If you have suffered any injury through the negligence or fraud of the freedman who is your curator, the Governor of the province will take measures that the damage shall be made good by him who is responsible for it, and you should entertain no doubt that more severe measures will be taken, if fraud has been so openly committed that the freedman, after having been convicted of the crime, should be punished for having perpetrated it.
261, CJ 5, 36, 4	Valerian and Gallienus	Although a guardian cannot be appointed for a person who already has one, still, another who is suitable can, under certain circumstances, be substituted by the decree of a competent court, instead of one who, having been suspected, has been convicted and removed...
284, CJ 5, 52, 2	Carinus and Numerianus	...In a case of this kind, the guardians or curators are only responsible for the share of the administration with which they have been entrusted, unless they have failed to remove one of their number on account of his being suspected of being guilty of fraud or negligence; or they stated their suspicions of this, when it was too late...
295, CJ 5, 62, 23	Diocletian and Maximian	The principles of humanity and affection do not permit you to be compelled to bring suit against your sister or her children, on account of matters connected withed the guardianship, as the welfare of the ward himself, of whom you have been appointed guardian, appears to require another course, that is to say, that he should have a guardian who will not be prevented from conducting his defence through affection for his adversary.

III. Child Protection

451 *BCE*	Twelve Tables 7, 15	Anyone who kills an ascendant [male ancestor, pater familias], shall have his head wrapped in a cloth, and after having been sewed up in a sack, shall be thrown into the water.
451 *BCE*	Twelve Tables 4, 1	A father shall have the right of life and death over his son born in lawful marriage, and shall also have the power to render hm independent ...
228, CJ 8, 47, 3	Alexander	While your son is under your control, he cannot alienate any property which he has acquired for you. If he should not show you the respect due to a father, you will not be prevented from punishing him by the right of paternal authority, and you can use even a harsher remedy if he should persevere in his obstinacy, for having brought him before the Governor of the province, the latter will impose the sentence which you desire.
ca. 261 CJ 8, 47, 4	Valerian and Gallienus	It seems to be more proper for the disputes which have arisen between you and your children to be settled at home. If, however, the matter is of such a nature that you deem it necessary to have recourse to the law in order to punish them for the wrong which they have inflicted upon you, the Governor of the province, if applied to, will order what is usually prescribed by law with reference to pecuniary disputes, and will compel your children to show you the respect which is due to their mother, and if he should ascertain that their disgraceful conduct has proceeded to the extent of serious injury, he will severely punish their want of filial affection.

ca. 287 CJ 8, 47, 9	Diocletian and Maximian	The Decrees of the Senate enacted with reference to the acknowledgment of offspring clearly set forth that no one can deny his child, as is shown by the penalty prescribed, as well as the prejudicial action authorized by the Perpetual Edict, and the fact that support can be demanded before the Governor by a child over three years of age, if applied for in its own name.
315, CJ 9, 20, 16	Constantine	Those who inflict wretchedness upon parents by kidnapping their living children are liable to be sentenced to the mines, in addition to the other penalties already prescribed by the laws. Where, however, anyone is accused and convicted of a crime of this kind, if he is a slave or a freedman, he shall be throw to wild beasts; if he is freeborn, he shall perish by the sword.
318, CJ 9, 17, 1	Constantine	If anyone should hasten the end of either of his parents, his son, his daughter, or any of those relatives whose murder is designated by the term parricide ... he shall suffer the penalty of parricide, and shall neither be put to death by the sword, nor by fire, nor by any other ordinary method, but shall be sewed up in a sack with a dog, a cock, a viper, and a monkey, and, enclosed with these wild animals and associated with serpents, he shall be either thrown into the sea, or into a river, according to the nature of the locality...
322, TC 11, 27, 2	Constantine	We have learned that provincials suffering from lack of sustenance and the necessities of life are selling or pledging their own children. Therefore, if any such person should be found who is sustained by no substance of family fortune and who is supporting his children with suffering and difficulty, he shall be assisted through Our fisc [purse] before he becomes a prey to calamity. The proconsuls and governors and the fiscal representatives throughout all Africa shall thus have the power, they shall bestow freely the necessary support on all persons whom they observe to be placed in dire need, and from the State storehouses they shall immediately assign adequate sustenance. For it is at variance with Our character that We should allow any person to be destroyed by hunger or to break forth to the commission of a shameful deed.

323, CJ 8, 47, 10	Constantine	Such importance was attached to liberty by our ancestors that fathers, who in former times had the right of life and death over their children, were not permitted to deprive them of their freedom.
329, TC 11, 27, 1	Constantine	A law shall be written...whereby the hands of parents may be restrained from parricide and their hopes turned to the better. Your office shall be constrained to administer this regulation, namely, that if any parent should report that he has offspring which on account of poverty he is not able to rear, there shall be no delay in issuing food and clothing, since the rearing of a newborn infant will not allow any delay. For the performance of this task We command that Our fisc and Our privy purse shall furnish their services without distinction.
365, CJ 9, 15, 1	Valentinian and Valens	We grant the power of punishing minors to their elder relatives, according to the nature of the offence which they have committed, in order that the remedy of such discipline may exert its influence over those whom a praiseworthy example at home has not induced to lead an honourable life. We, however, are not willing that the right to inflict extremely severe castigation for the faults of minors should be conferred, but that the exercise of paternal authority may correct the errors of youth, and repress them by private chastisement. If, however, the enormity of the deed should exceed the limits of domestic correction, We decree that those guilty of atrocious crime shall be brought before the courts of justice.
374, CJ 9, 16, 8	Valentinian, Valens and Gratian	If any person of either sex should kill an infant, he or she is hereby notified that they will be punished with death.
374, CJ 8, 52, 2	Valentinian, Valens and Gratian	Every person should support his own offspring, and anyone who thinks that he can abandon his child shall be subjected to the penalty prescribed by law. We do not give any right to masters or to patrons to recover children who have been abandoned, when children exposed by them, as it were, to death, have been rescued through motives of pity, for no one can say that a child whom he has left to perish belongs to him.

529, CJ 8, 52, 3	Justinian	We decree that no one shall be permitted to claim as his, under the title of ownership, vassalage, or tenancy, any child born either to freeborn parents, or to freedmen, or to slaves, who has been abandoned. And We do not permit those tho have taken such children for the purpose of rearing them to do so with any distinction, so as to bring them up and educate them, whether they are males or females, in such a way as to hold them as slaves, freedmen, serfs, or vassals; but children brought up by men of this kind shall, without distinction, be considered free and freeborn, and can acquire property for themselves, and transmit everything which they possess, in any way they may desire, to their posterity, or to foreign heirs, without being branded with the stigma of servitude, vassalage, or the restrictions attaching to the conditions of tenancy or serfdom. Nor do we concede that those who have received them have any right to their property, and this law shall be enforced throughout the entire extent of the Roman Empire. Nor shall those who, in the first place, have abandoned their children and perhaps entertained the hope of their death, and rendered their destiny uncertain have any right to recover them from the persons by whom they were rescued, and reduced them to slavery. Nor shall those who, through motives of compassion, have supported these children, be allowed to change their minds, and make them slaves, even though, in the beginning, they took charge of them with this intention, lest it may appear that what was dictated by benevolence has become merely a mercenary transaction.

IV. Child Welfare

A. Emancipation

451 *BCE*	Twelve Tables 4, 1	A father shall have the right of life and death over his son born in lawful marriage, and shall also have the power to render him independent, after he has been sold three times.

ca.164 CJ 4, 43, 1	Diocletian and Maximian	It is a plain rule of law that children cannot be alienated by their parents, either through sale, donation, pledge, or in any other way, even under the pretext of the ignorance of the person who receives them.
286, CJ 8, 48, 2	Diocletian and Maximian	If the blood-relatives of the child under the age of puberty, whom you desire to arrogate as your natural son, consent to this before the Governor of the province, you can have him as your son, but a fourth part of your estate must be left to him by your last will or given to him by you at the time of his emancipation, and security with reference to his patrimony shall be provided with proper sureties in the presence of a public official, in order that you may not, under the pretext of adoption, seize his property, which should be diligently preserved by you for his benefit...
291, CJ 8, 49, 3	Diocletian and Maximian	[A child can be emancipated by deemed (fictitious) sale; actual sale by the pater familias is not required.]
367, CJ 8, 50, 1	Valentinian, Valens and Gratian	The laws punish, by the revocation of emancipation and the deprivation of undeserved freedom, sons, daughters, and other descendants who have been guilty of disobedience, or who have inflicted any verbal insult or atrocious injury upon the parent who emancipated them.
503, CJ 8, 49, 5	Anastasius	[The fictitious sale of a child is not required if the father obtains an imperial rescript authorizing his emancipation.]
531, CJ 8, 49, 6	Justinian	[An Imperial rescript of emancipation is not required. The father must make a declaration before a magistrate of his intent to emancipate his child.]

B. Child Welfare Generally

Ca. 164 CJ 5, 6, 7	Diocletian and Maximian	If a guardian or a curator should, without having obtained an Imperial rescript for that purpose, marry his ward or a minor in his charge either to himself or to his son, he shall be branded with infamy as having confessed that he had been guilty of mismanagement of the guardianship, because, by an union of this kind, he had attempted to conceal fraud committed during his administration...
198, CJ 5, 25, 4	Severus and Antoninus	If you have properly discharged the duties which you owe to your father, he will not refuse you his paternal affection. If he should not do this voluntarily, a competent judge, having been applied to, shall order him to support you in proportion to his means.
224, CJ 5, 49, 1	Alexander	The bringing up of your wards should be entrusted to their mother in preference to all other persons, if she has not given them a step-father. Where, however, a dispute with reference to this point arises between her and the cognates and guardians, the Governor of the province, after having taken into consideration the rank and relationship of the parties, should decide where the child is to be brought up; and when he renders such a decision, he whom he charges with this duty will be obliged to perform it.
286, CJ 2, 25, 3	Diocletian and Maximian	It has already been decided that the benefit of complete restitution can be accorded to minors in matters which their guardians or curators can be proved to have improperly administered, although they can recover what they are entitled to from their guardians or curators by means of a personal action.
329, CJ 4, 43, 2	Constantine	If any heartless person, induced by extreme poverty and want, should sell either his son or daughter for the purpose of obtaining means wherewith to live, in a case of this kind the sale shall only be valid where the purchaser had a right to the service of the person sold, and he who made the sale, or the one to whom the child was alienated, shall have the right to restore it to its freeborn condition, provided he tenders its value to the owner, or furnishes him another slave in its stead.

428, CJ 6, 61, 2	Theodosius and Valentinian	For the purpose of rendering a clearer interpretation of a point in Our New Constitution, We decree that whatever has been given by a husband or a wife, no matter under what title, or transmitted by a last will through sons, grandsons and great-grandsons, as well as daughters, granddaughters, and great-granddaughters, cannot be acquired for their father, even though they are under paternal control; but let no one think that this rule applies to what has been bestowed by the parent himself, either by way of dowry, or as an ante-nuptial donation, which was given in behalf of the persons above mentioned, so that it may not, under any circumstances, return to him if opportunity should occur; for care must be taken to prevent the generosity of parents towards their children from being influenced by apprehension of this...
530, CJ 5, 29, 4	Justinian	With a view to providing for the welfare of natural children, We grant permission to their fathers to appoint guardians for them, to insure the administration of such property as they may have given or bequeathed them in any manner whatsoever...
530, CJ 5, 35, 3	Justinian	...For if they [women] can be appointed guardians of legitimate children who have a right to testamentary or legal guardians, and are themselves permitted to be the guardians of their children where others are lacking, there is much more reason, and it is much more humane in cases of this kind, where no legal guardianship can exist, for their mothers to be appointed.

C. Young Offenders

407, CJ		[Children under 7 are *infantia*, incapable of malice, and cannot be prosecuted.]

420, CJ 2, 22, 8	Honorius and Theodosius	It has been established by innumerable authorities that the interests of minors must be consulted, whether they have been guilty of negligence, or have failed to act through ignorance.
529, CJ 5, 60, 3	Justinian	Abolishing the indecent examination established for the purpose of ascertaining the puberty of males, we order that just as females are considered to have arrived at puberty after having completed their twelfth year, so, likewise, males shall be held to have arrived at that age after having passed their fourteenth year, and the disgraceful examination of the bodies of such persons is hereby terminated.
531, CJ 5, 59, 4	Justinian	...We order that guardians or curators must, by all means, be present when minors under the age of twenty-five years either institute criminal proceedings, or are defendants under circumstances where the laws permit minors and wards to be accused, as it is more prudent and better that minors should make their defences or prosecute their cases with the full advice of their guardians, in order that they may not either say or suppress anything through their want of experience or juvenile impetuosity, which, if it had been stated on the one hand, or not mentioned on the other, might have been of advantage to them, or have prevented them from being injured.

V. Others under Legal Disability

451 *BCE*	Twelve Tables	If a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone.
205, CJ 5, 68, 1	Severus and Antoninus	If your father is over seventy years of age, and is appointed either a guardian or a curator, he can legally be excused.

215, CJ 5, 70, 1	Antoninus	It is customary for curators to be appointed for spendthrifts and *insane* persons, though they may have attained their majority.
247, CJ 5, 67, 1	Philip and Caesar Philip	Anyone who is blind, deaf, dumb, insane, or is suffering from an incurable chronic disease, has a valid excuse for declining a guardianship or curatorship.
287, CJ 8, 47, 5	Diocletian and Maximian	If your daughter does not show you proper respect, but also refuses to furnish you with the necessaries of life, she can be compelled to do so by the Governor of the province.
312, CJ 9, 14, 1	Constantine	If a master should punish his slave by striking him with rods or straps, or, in order to keep him in custody, should place him in chains, no objection can be raised with reference to the time he was confined, and the master need have no fear of criminal prosecution, in case the slave should die. For, indeed, he does not use his rights without moderation in a case of this kind, but he will become guilty of homicide if he should intentionally inflict a fatal wound upon the slave by means of rods, stones, or weapons; or order him to be hung; or direct him to be hurled from a precipice etc...
530, CJ 5, 70, 6	Justinian	...Hence We, desiring to decide this doubtful point, do hereby decree that, as when insane persons of this kind recover their senses it is uncertain and impossible to determine whether this will endure for a long or for a short period, and as the parties in question frequently remain on the border line of insanity and health, and after they continue for a considerable time in this condition, the lunacy seems in some cases to be removed, We decree that the appointment of the curator shall not be considered as ended, but to exist as long as the insane person lives, for generally a disease of this kind is incurable; and We also decree that, during their perfectly lucid intervals, the curator shall not exercise his authority, and that the demented person, while he is temporarily in possession of his senses, can enter upon an estate and do everything else which sane men are competent to do...

Portalis v. Bentham?
The Objectives Pursued by the Codification of the Civil and Criminal Law in France, England and Canada

New English version, revised by the author

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I. Introduction

The perception of codification and jurisprudence in Canada, seemed to us to be an interesting topic for a collection of essays entitled “Perspectives on Legislation”, the theme of the “Legal Dimensions Initiative 1999”; “jurisprudence” is given hereafter its civil law meaning, namely “case law” in the common law world. This idea was prompted both by the unsuccessful attempt to recodify the criminal law spearheaded by the Law Reform Commission of Canada in 1986 and 1991, and by a recent lecture given by Professor André Jodouin.[1] It is tempting to assume that certain negative perceptions of codification explain, at least in part, the lack of interest of the powers that be in this project. Such hostility probably dates back to the 19th-century debates surrounding proposals to codify the English criminal law. These criticisms show that the relationship between a code and jurisprudence is often misunderstood. This misunderstanding, in turn, seems to derive from certain remarks ascribed to Jeremy Bentham. The relevant portion of his writings completely distorts the objectives pursued by legislation in a system of codified law. These goals have been superbly described by Jean-Étienne-Marie Portalis; hence the title of this study.

France was the first country to adopt brief codes, consisting of general principles encompassing the whole of the civil or criminal law. At the time, the codifiers firmly believed that courts should be given considerable latitude to take new or unforeseen circumstances into account. They knew full well that an enactment could not provide for all eventualities. The approach they favoured nevertheless allowed for the evolution of jurisprudence and even the development of new rules (I). In England, however, some jurists believed that codification was impossible in a common law system, since judges would lose the power to shape the law. This perception, as one might well imagine, is not consistent with the French experience and no longer seems to be widespread in the United Kingdom (II). In Canada, both the civil law and the criminal law have been codified. The European debates had their counterpart here, although the latter were less intense. For linguistic and cultural reasons, few Quebec francophones were interested in the criminal law, while anglophones in Quebec and Ontario recognized, with time, the benefits of codification. There was therefore a broad consensus on the adoption of the *Criminal Code, 1892*, which seems difficult to recreate at present (III).

II. The French Notion of Jurisprudence in a System of Codified Law

Codification is the outcome of a period of profound transformation of the French legal system, extending from 1789 to 1800 (A). It is based on a particular notion of the role of jurisprudence that differs slightly, however, in the case of the civil law (B) and of the criminal law. Subsequently, the evolution of French criminal law is reminiscent of the situation that prevails in Canada (C).

A. Changes in the Legal System During the French Revolution

In 1790, with the restucturing of the French judicial system (1), courts were deprived of the power to interpret legislation. This reform very quickly proved a failure that would have major consequences for French civil law (2).

1. The Restructuring of the Courts

In 1789, the French Revolution allowed elected representatives to exercise the Legislative Power according to rules that have varied with various constitutional régimes. Previously, no bill could be adopted without the king's consent. The Revolutionaries therefore truly worshipped legislation, which was viewed as the expression of the common will. They were also hostile towards courts, because of the political role judges had assumed under the *Ancien Régime* in opposing the monarchy. Finally, they fully endorsed the principles of the Age of Enlightenment; its representatives often decried the irrationality of the legal system. In particular, they attacked the cruelty of the criminal law, the disproportion between crimes and punishments, and the excessive use of the death penalty. For the Italian jurist Beccaria, it was even inconceivable that judges should interpret criminal laws.[2]

Beginning in 1789, the institutions of France would be completely overhauled. In November, the *parlements*, the appeal courts of the *Ancien Régime*, were dissolved. In August 1790, a new judicial system was put in place. The jury made its appearance in criminal matters. In civil matters, the parties could appoint an arbitrator; furthemore, they had to go through conciliation proceedings. In 1793-94, arbitration even became mandatory in cases involving succession and communal lands. As of 1790, in family matters, disputes were submitted to a family court. Each party appointed two relatives or friends; if no agreement was reached, they appointed an arbitrator to settle the deadlock. One should not be misled by the term "friend"; quite often, this individual had practiced law as a barrister (*avocat*) or solicitor (*procureur*) before the Revolution.[3] These courts had jurisdiction notably in matters of divorce, filiation and succession; they were abolished in 1796.

The law of 1790 created district courts (*tribunaux de district*). Judges were elected for a six-year term; jurists with a university degree and five years' experience were eligible. In September 1792, the Assembly held new elections; any citizen age 25 or older could be a candidate. From 1793 to 1795, members of the *Convention* gave themselves the right to overturn decisions and punish judges deemed to have rendered bad judgments. During this period, the *Tribunal Révolutionnaire* was authorized to hand down a death sentence without hearing the witnesses or the defence; no appeal as allowed from its judgments. In 1794, the *Convention* entrusted the taks of filling vacant judicial positions to its Legislation Committee; a law of 1795 authorized the *Directoire* to do likewise if no judge had been elected by an electoral assembly. Article 264 of the Constitution of Year III (August 22, 1795) expressly forbade the *Corps Législatif* to overturn the decisions of the *Tribunal de*

Cassation. In 1800, Napoleon Bonaparte did away with the election of judges, who would henceforth be appointed by the government.

In the system established in 1790, a judgment rendered by a district court could be appealed before the neighbouring one. After heated debate, the *Tribunal de Cassation* came into being in November 1790. Its role was to oversee the application of the law by quashing judgments and referring cases to a competent court which could nonetheless decline to follow its opinion. After two unsuccessful referrals, the matter was submitted to the legislative power, which rendered a "decree declaratory of the law." In 1800, Bonaparte did away with the appeal to the neighbouring district tribunal; in its place, he created independent appeal courts whose decisions were appealable before the *Tribunal de cassation*. In 1804, the term "*cour*" (*d'appel* or *de cassation*) replaced the term "*tribunal*."

The Revolutionaries were hostile towards legal professionals. In 1790, the French bar was abolished: the right to present arguments in court was open to everyone; one spoke of unofficial defenders or friends, who were to carry out their functions for free, as a public service. In 1791, solicitors made their appearance: their role was to represent the parties by writing the pleadings; only former judges, prosecutors or lawyers could perform this function, which was abolished in 1793. Then, representatives legally appointed (*fondé de pouvoir*) were, in principle, to act for free. In 1804, lawyers had to register with the courts. To be eligible, a candidate had to hold a licence in law and must have completed three years' training. The writing of pleadings was again reserved for solicitors.

The attempt to do away with legal professionals therefore ended in failure. It attests to a profound aspiration—to entrust the application of the law to the ordinary citizen. However, the existence during this period of an appeal raising legal issues shows that the traditional conception of the role of the courts did not disappear entirely.

2. Control Over the Application of Legislation

Under the *Ancien Régime*, in addition to their judicial functions, the *parlements* enjoyed within their district a fairly broad regulatory power provided, however, they did not contradict the texts approved by the king, such as ordinances and edicts. In some instances, after judgment, an *arrêt de règlement* generalized the solution that was chosen for a specific case.[4] In 1790, this regulatory power was expressly abolished. Instead, judges were to seek the advice of the legislative body "whenever they deem it necessary, either to interpret an enactment, or to make a new one" [translation]: this was the *référé législatif* (Law of August 16-24, 1790). The *Ordonnance sur la Procédure Civile* of 1667 contained a similar provision: judges were to refrain from interpreting texts decreed by the king and ask him to put the issue at rest. The *parlements*, however, paid little attention to this rule.[5]

The *référé législatif* very soon proved unsatisfactory, since legislators either did not respond to the requests they received or neglected to do so. In 1795, the *Directoire* screened requests from the courts. The Court of Cassation put an end to this system, because Article 202 of the Constitution of Year III (1795) prohibited the exercise of a judicial function by the two councils that held the legislative power. The court inferred from this that

the *référé* was to be applied only to "future and not to current cases, otherwise this legislation could only be applied to them in a retroactive manner" [translation]. Moreover, the court frequently censured the use of this mechanism on the ground that the legislation before the lower court was clear. It seems, then, that the courts had to render a decision before resorting to this procedure, although the court of cassation sometimes deviated from this rule. In fact, it referred eighteen requests to the *Corps Législatif*, but received only one reply.[6]

In 1800, the legislature abolished the obligation imposed upon the Court of Cassation to refer to it problems of interpretation. The Court continued to carry out the functions that were initiallly assigned to it. Consequently, the jurisdiction to which a case was referred could refuse to follow its ruling. In such a case, after 1800, the second appeal was heard by the "Joined Chambers", that is, by all the judges, who normally sat in separate chambers. After 1807, if a third court of appeal refused to follow the advice of the Joined Chambers, the matter was referred to the *Conseil d'État*, whose opinion was approved by the Emperor, which put an end to the debate.

In 1828, the Houses of Parliament were required to arbitrate such conflicts by passing an interpretative act; this statute did not affect the judgment in the third appeal court, which became final for the parties. Once again, this experience proved a failure, as it was often difficult to draft a statute of general scope that put an end to the dispute.[7] Consequently, a law of 1837 made mandatory the ruling of the Joined Chambers hearing the second appeal. This procedure has survived to the present day. But since 1967, the second appeal is heard by a plenary assembly composed of, for each of the six chambers, the First President, the President, the most senior and two ordinary councillors. In 1991, the *Cour de Cassation* consisted of 84 *conseillers* and 37 *conseillers référendaires*; at present, it hands down over 30,000 decisions each year.

While the first Revolutionary laws attempted to reserve for legislators the interpretation of legislation, this task very soon had to be turned over exclusively to judges. After 1837, legislators also refused to settle disputes between the *Cour de Cassation* and courts of appeal handing down similar rulings in a given case. After this development, it became evident that judges needed considerable latitude to fully carry out their role. To some extent, this observation made the codification of French civil law possible.

B. The Civil Code and its Repercussions

In 1804, France adopted a civil code (1). Already the authors of this text could foresee the essential role that jurisprudence would be called on to play until the present day (2).

1. The Adoption of the *Code Civil*

Under the *Ancien Régime*, the private law was derived from numerous sources. In the north and central part of the kingdom, some sixty customs applied in as many regions. Initially oral, they were reduced into writing as of the 16th century. In the south, Roman law was the common law, which did not preclude the existence of specific usages. Royal ordinances governed civil and criminal procedure, commercial law and, since the 18th century, gifts and wills. As for obligations and contracts, French jurisprudence initially drew on Roman and canon law; later on scholarly works, notably those of Jean Domat (1625-1696) and especially Robert-Joseph Pothier (1699-1772), synthesized this evolution, using general and concise propositions that earned them an international reputation. In family law, the canon law still applied, notably in matters concerning the validity of marriages and filiation.

In August 1790, the *Assemblée Nationale* announced its intention to undertake the preparation of "a general code of simple and clear laws adapted to the Constitution" [translation]. A decree of September 2, 1791, added: "[t]here will be made a Code of civil laws common to the whole kingdom, to define clearly the laws of liberty, property and free contracts" [translation]. The *Assemblée* doubtless hoped to strengthen its legitimacy and powers. However, it was the criminal law that first held its attention. A complete and well-structured code was first enacted in 1791. It did away with several offences of a religious nature, such as sorcery and homosexual relations between consenting adults. In response to the extremely broad discretion enjoyed by judges under the *Ancien Régime*, sentences were fixed, ruling out any individualization. In 1795, the *Code des Délits et des Peines* (code of crimes and punishments) was enacted; despite its name, it concerned itself with criminal procedure only. That same year, a hypothecary code also came into being; it was revised in 1799.

In civil law, three draft codes were written by Cambacérès: the code of 1793 had 719 articles, that of 1794 had 368, and that of 1797, 1,104. Fairly brief, they were not adopted because of wars and political crises. The first draft, a sign of the times, was deemed too complex by some; the second was described as a "collection of precepts," while the third stirred less opposition at the outset. In all three cases, Cambacérès attempted to co-ordinate the Revolutionary legislation and the rules of the former law still in force.[8] In 1800, Jacqueminot presented a new draft on the law of persons, family and successions, but was no more successful.

Under the *Consulat*, Napoleon Bonaparte had the work resume in 1800. Four prominent jurists were given the task of writing the draft. Two of them were from a region where Roman law was applied (Portalis and Maleville); the other two (Tronchet and Bigot de Préameneu) came from customary law areas. Portalis certainly represented a conservative element; an ardent defender of the traditional family, he fled in 1798, as he was in favour of restoring the monarchy. He returned to France after Bonaparte's *coup d'etat*.[9] On January 21, 1801, the four commissioners submitted the results of their work to the parliamentary assemblies as well as to the various courts of appeal, which were obliged to publish their observations. The study of the draft began soon after. Following an unfavourable vote in the *Tribunat* and the *Corps Législatif* on Title I, a *senatus consultum*

reduced by more than half the number of members of the *Tribunat*, making it possible to exclude the opponents. Napoleon continued to intervene in the debates so that the work would go ahead. These discussions, and the observations of the courts, were published between 1827 and 1832.[10]

An act of Ventôse 30, Year 12 (March 21, 1804), brought together "into a single body of laws, under the title of *Code civil des Français*" [translation] the various acts which had officially sanctionned each of the titles of the code since February 1803. An act of September 3, 1807, prescribed the use of the title *Code Napoléon*, still used today. Other codes were subsequently promulgated: the *Code de procédure civile* (Code of Civil Procedure, 1806), the *Code de commerce* (Code of Commerce, 1807), the *Code d'instruction criminelle* (Code of Criminal Procedure, 1808), and the *Code Pénal* (Criminal Code, 1810). The previous laws were officially repealed by Article 7 of the act of 1804 "in the subject matters covered by the said acts making up the present Code" [translation]. It follows that these laws could still be used to supplement the code.[11] Furthermore, a number of codal provisions repeated the doctrine of the *Ancien Régime*, particularly with regard to obligations and contracts. Thus, these works continued to be cited in the early 19th century, but their use dwindled thereafter.

In many respects, the *Code Napoléon* is a conservative document that revives certain rules of the *Ancien Régime* without entirely renouncing the Revolutionary laws. For instance, Napoleon imposed his vision of marital control; parental control was also reinforced. A sign of the times, Article 1781 stated that the master was to be taken at his word concerning the amount owed to the labourer by way of wages or payment; this provision survived until 1868. The right to divorce was quite limited: fault was the preferred criterion. Moreover, it was abolished in 1816. The right of ownership was fully protected in order to prevent the revival of feudalism or the existence of competing controls over a given plot of land. In matters of succession, the rights of natural children were limited; parents were given back the possibility of increasing the share of a legitimate child.

The *Code Civil* therefore marked a return to the traditional values of France. It established a uniform national law and turned the page on the stirrings of revolution, notably in family law. It also favoured a drafting technique that conferred broad discretionary power on judges. Here too, the Revolutionary ideals were set aside and the importance of jurisprudence was acknowledged.

2. The Interpretation of the *Code Civil*

(a) Portalis' Conception

In 1790, in the early days of the Revolution, some Revolutionaries disputed the utility of jurisprudence. Thus, Robespierre stated:

> [Translation] [T]his word jurisprudence must be erased from our language. In a State which has a constitution, a legislation, the jurisprudence of the courts is nothing more than legislation: then there is always identity of jurisprudence.

His objective was clear: "legislation only and no jurisprudence" [translation]. For some Revolutionaries, the new legislation would be so simple that juries would have no difficulty applying it[12] Yet as early as 1790, in the course of parliamentary debates, several speakers maintained that the *Tribunal de Cassation* should ensure the uniformity of jurisprudence so that it faithfully reflected the will of the legislature.[13] After 1795, this notion spread, owing notably to the ineffectiveness of the *référé législatif*, which judges were using less and less before rendering a decision.[14] Nevertheless, in 1801, some courts criticized the preliminary title of the draft civil code; in their view, it allowed too much discretion to judges in the application of legislation.[15] Napoleon himself, on learning in 1805 that Maleville had published an *Analyse raisonnée de la discussion du Code civil* (A Reasoned Analysis of the Discussion of the Civil Code), is said to have cried out "My Code is lost!"[16] [translation]; fortunately, it did not occur to him to ban doctrinal works.

In his famous preliminary discourse of January 21, 1801, Portalis introduced the draft code he had just completed with his colleagues.[17] He seized the occasion to explain, in dazzling language, his view of legislation and jurisprudence: It is incumbent on the legislator to "establish, by broad views, the general maxims of the law, to set down fruitful principles, and not to descend into the details of questions that may arise on every subject…. There are a multitude of details that escape him, or are too contentious or too mutable to be dealt with by an enactment" [translation]. Portalis had no illusions in this regard: a "code, however complete it may seem, is not so soon finished, that thousands of unexpected questions present themselves to the magistrate…. A multitude of things are therefore necessarily abandoned to the empire of common practice, the discussion of educated men, the arbitration of judges…. In this immensity of diverse subjects which make up civil matters, and the judgment of which, in the vast majority of cases, is less the application of a specific provision than the combination of several provisions that lead to the decision rather than encompass it, one can no more do without jurisprudence than without legislation" [translation]. He concluded: "It is to jurisprudence that we leave those rare and extraordinary cases which do not fall within the framework of a reasonable legislation"[18] [translation].

Thus, the legislator must attempt to encompass in general maxims the various situations likely to arise, making the necessary distinctions, but giving up the idea of foreseeing every difficulty: In Portalis' words, "*Tout prévoir*, est un but qu'il est impossible d'atteindre" (to foresee everything is a goal impossible to achieve). The judge, for his part, must apply the principles contained in legislation, using reasoning that enables him to consider all aspects of the problem and, if need be, to make up for a deficiency. If jurisprudence must as a rule be followed, it can change if "the progress of wisdom warrants it" [translation]. The code is therefore the starting point for an analysis, but judges may add to its provisions.

Article 4 of the *Code Napoléon* confirmed the judge's role: "The judge who refuses to judge, on pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice." The magistrate could no longer refer questions of interpretation to legislators, as was the case since 1790. But this procedure survived until 1837 in the specific case of a disagreement between the *Cour de Cassation* and the appeal courts to which a case had been referred.[19] Article 4 of the *Code Napoléon* was echoed in section 11 of the *Civil Code of Lower Canada* and nowadays in section 42.1 of the

Interpretation Act.[20] The judge could certainly conclude that no rule authorized him to allow the claim; but he was obliged to render a judgment. Moreover, according to Article 5 of the *Code Napoléon*, judges were forbidden "to pronounce decisions by way of general and regulative disposition on causes which are submitted to them." The aim here was to prevent the reappearance of the *arrêts de règlement* issued by courts of appeal before the Revolution. The judge's mission was therefore to find the best solution to the dispute before him. If he could not create a general rule, he must, according to Portalis, "study the spirit of an enactment when its letter is silent" [translation] and "not lay himself open to the risk of being by turns slave and rebel and of disobeying out of a sense of constraint"[21] [translation].

(b) The Role of Jurisprudence after Codification

Despite Portalis' noble conception, certain factors helped to weaken jurisprudence after the adoption of the *Code Civil*. In France, judgments have always been extremely terse. In fact, the mission of judges was to apply the guiding principles of the codes; they did not need to explain them. The decision was an individual case and had no value as a precedent; therefore, magistrates did not need to concern themselves with them. In this context, doctrinal works were thought by some to be more important than jurisprudence. In the 20th century, there has been a return to a more pragmatic notion. When a given problem occurs a number of times and the courts have continually adopted the same solution, the jurisprudence is described as "constant." In theory, judges are not *obliged* to follow this jurisprudence. In practice, if they go against the trend, they are overturned by a court of appeal or by the *Cour de Cassation*. The *Cour de Cassation*, however, is entirely at liberty to reverse this jurisprudence.

In France, published judgments are often accompanied by doctrinal notes that enable the reader to understand the scope of the decision and the circumstances of a case. These notes point out the existence of a controversy or the germ of a jurisprudential reversal. Similarly, many doctrinal works provide a summary of the relevant jurisprudence and of the rules it applies, when they do not contain a detailed review of its evolution. They isolate the principles that are often implicit in judgments. In these circumstances, there is no need to ascribe to decisions the value of precedents: the authors provide guidance to the courts. It is therefore important to consider the role they may have played over time.

In the 19th century, there seemed to be one dominant work method among legal scholars, which subsequently became known as the *École de l'exégèse* (school of exegesis). These authors shared the notion that a solution could be deduced from the code; to this end, they favoured studying the preliminary works, the wording of the enactment and its underlying principles; they attributed less importance to history or even to jurisprudence. In general, they espoused the values conveyed by the code, such as the importance of the legitimate family, property and freedom of contract. This in no way ruled out doctrinal debates, which were numerous, or even participation by some in political struggles.

At the turn of the century, a new trend appeared with Saleilles, Josserand, and especially François Gény. Gény criticized his predecessors for making the evolution of jurisprudence next to impossible and for not taking into consideration the social problems of the time (the rise of trade unionism or occupational injuries, for example). He called for the

use of a broader range of sources. He refused to acknowledge that for every question, the legislator had a solution in mind. He advocated "free scientific research," which would provide ample room for jurisprudence and the social context surrounding a problem. Rather than consider only the terms of the code and the speeches of 1803-1804, it was preferable to look for a fair solution when this could be done without distorting the texts.[22]

Gény's approach eventually took hold. There is scarcely a French legal scholar who thinks it possible to reason solely on the basis of the code. Instead they will consider first of all, jurisprudence and doctrine, as they support diverse views, and then the social context. In the 20th century, judges have proven increasingly bold, notably with regard to *responsabilité du fait des choses* (liability for damage caused by things), abuse of rights and unjust enrichment. They therefore gave effect to principles that appeared nowhere in the code but underlay its provisions. Legislation continued to play a pre-eminent role in this system, but it gave way to other sources.

C. Jurisprudence in French and Canadian Criminal Law

As early as 1801, the importance of jurisprudence in the civil law was scarcely in question. In the criminal law, considerations of another order were at stake. *A priori*, it was eminently desirable not to leave the accused open to the vicissitudes of jurisprudential debates. Yet from 1810 on, the need to interpret legislation was scarcely in doubt in the minds of legislators (1). With regard to defences, French judges also had considerable latitude, which is somewhat reminiscent of the situation in Canada (2).

1. The French Criminal Code and Jurisprudence

(a) The Debates Leading up to the Adoption of the Code

As already mentionned, the first French criminal code dates back to 1791. It repealed offences of a religious nature and the torments imposed under the former law and imposed fixed sentences, thus denying the judge any discretion. In 1808, a code of criminal procedure replaced the code of 1795; it governed procedural matters. The criminal code of 1810 (*Code pénal*) increased the punishments, notably by reinstituting branding and amputation at the wrist for parricide. Some of these provisions served the needs of a totalitarian régime. Others reflected the values of a society on the verge of an industrial revolution, such as offences that served to protect property or ban strikes and the formation of trade unions.[23]

The code of 1810 gave back to judges considerable discretionary power by stipulating in several cases minimum and maximum, rather than fixed, punishments, as well as extenuating circumstances allowing for a lighter penalty. Beginning in 1832, the jury enjoyed unlimited discretion in this regard. While it has often been written that the crimnial code was inspired by utilitarianism, it was also infused with a spirit of retribution.[24] In the speeches introducing the code, the name of Bentham appears only once. Berlier explains that the classification of this author has not been adhered to. He adds that if there was

something to be gleaned from the "profound meditations of the jurisconsults and public law experts, it is by connecting them to the law by imperceptible dots"[25] [translation].

In this context, what role was devolved to jurisprudence? The preliminary discourse of Portalis, delivered in January 1801 during the presentation of the draft civil code, made a very clear distinction between the criminal law and the civil law. In his view, "there may be foresight in criminal matters to which civil matters are not susceptible" [translation]. Moreover, the release of a citizen must be the necessary outcome of a deficiency of legislation. In fact:

> [Translation] The enactment which forms the basis of the charge must precede the act which is impugned by it. The legislator must not strike without warning: if it were otherwise, the law, contrary to its essential purpose, would not propose to make men better, but only to make them more unhappy, which would be contrary to the very essence of things.
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> Thus, in criminal matters, where only a formal and pre-existing enactment may support the judge's action, there must be specific legislation and no jurisprudence. It is otherwise in civil matters; . . .[26]

In this passage, Portalis refused to acknowledge the very existence of jurisprudence in criminal law, even though it must play a primordial role in civil law. Seventeen days later, his attitude would be dramatically different. A bill stated that certain offences were to be judged by special courts. In the debates leading up to the adoption of this enactment, some speakers argued that the terms in which these offences were described were too vague. Portalis' response returned jurisprudence to the fore:

> [Translation] An enactment is not a vocabulary. Good minds are sparing of definition. All the current legislation has spoken of the same things and used the same words, without making new definitions, having reference to the meaning that had always been attached to these words. It is seldom necessary to change the language established by jurisprudence. In legislation, as in sacred things, rarely is novelty not profane.[27]

Portalis therefore seemed to recognize that jurisprudence played an important role in criminal law. Quite simply, if the legislative provision invoked by the public ministry did not clearly encompass the conduct with which the accused was charged, the judge or jury had to acquit. In 1801, Target delivered a preliminary discourse on the occasion of submitting the first draft of the criminal code; he said not a word about the role of jurisprudence.[28]

In 1810, a set of reasons and a report were presented before the adoption of the seven acts that would eventually form the new code.[29] These texts said little about the role of judges and seemed to espouse Portalis' views on this question. Thus, Berlier recalled that there could be no conviction in the absence of a "formal and unambiguous provision"[30] [translation]. These orators lauded the clarity and preciseness of the draft code, and the latitude given judges when imposing a sentence. Noailles recalled that the conciseness of the 1791 code had often resulted in the acquittal of forgers; he hoped that "the wise foresight of the current Code will reach them all"[31] [translation]. Louvet recalled that "clarity,

preciseness, aptness, proper extension to all cases, are indispensable for the application of judgments"[32] [translation]; in his opinion, the proposed provisions "do not have an indefinite extension"[33] [translation]. For Nougarède, the purpose of the code was "to obtain, with the revision of the criminal laws, a systematic and consistent assembling of their general principles"[34] [translation].

For these jurists, it seemed obvious that the application of certain legislative provisions might result in the creation of jurisprudence.[35] It was therefore unnecessary to state "this principle predating all Codes, that where there is no intent there can be no crime"[36] [translation]. Of course, it is necessary "to preserve these general rules of equity that have been introduced into criminal jurisprudence with the consent of all civilized peoples; those, for example, that make it necessary always to interpret in favour of the accused the silence and even the obscure expressions of legislation" [translation]. But "these immutable principles need not be proclaimed by the legislator, they are already imprinted in the hearts of all magistrates"[37] [translation]. Judges were therefore invited to rely on certain pre-existing principles not contained in the code.

While Article 4 of the criminal code of 1810 confined itself to prohibiting the imposing of a punishment that was not prescribed by an enactment at the time the offence was committed, Article 8 of the *Déclaration des Droits de l'Homme* (Declaration of the Rights of Man) of 1789 was more specific. It stipulated that "no one may be punished except by virtue of an enactment established and promulgated before the delict, and legally applied." Both the code of 1791 and that of 1810 attempted to abide by the spirit of the *Déclaration* by precisely defining offences. Several articles were rewritten to describe more fully the essential elements of the infraction; certain vague expressions, such as "principles of natural morals," disappeared. Moreover, the Emperor favoured a "dogmatic" style wherever it was possible "to express in a single phrase with greater clarity and energy the legislator's intent" [translation]. Berlier stated that "[o]missions and gaps are never to be so feared as when one wants to go into the particulars" [translation]. By way of illustration, theft was not defined, the term "frauduleusement" (fraudulently) replaced an entire paragraph, and the expression "animal domestique" (domestic animal) was substituted to a list of ten species. As for unintentional injuries, Cambacérès refused to "fetter the conscience of judges"[38] [translation]. In short, "definitions do not at all suit facts whose character is commonly settled"[39] [translation]. Some essential elements of an infraction were therefore broadly worded in order to give the judge and jury considerable discretionary power.

In the end, the phraseology of the civil code and that of the criminal code were therefore fairly similar. The Revolutionary legacy survived, however, through the "Principle of legality" (*Principe de légalité*), which calls to mind certain theories of Canadian constitutional law.

(b) The French Principle of Legality and Unconstitutional Vagueness in Canadian Law

Since 1958, the *Déclaration des Droits de l'Homme* of 1789 has been part of the "block of constitutionality" that must be respected by French legislation on pain of being censored by the *Conseil constitutionnel*. Jurisprudence nevertheless continues to play an

essential role in French criminal law; the situation has not been altered by the adoption of either a new code of criminal procedure, in 1959, or a new criminal code, in 1992. In this regard, the scope of the “Principle of legality” has been studied closely by jurisprudence and French doctrine. The authors Merle and Vitu summarize the state of the law as follows:

> [Translation] Legality in the strict sense therefore rules out that, in drafting infractions, legislation would allow the creation of what are known as "open" offences, that is, definitions so vaguely worded that in practice they can be made to fit any acts; this would be the case, for example, if a criminal provision made "any act apt to be injurious to the French people" an offence, as did a French act of September 7, 1941, establishing a State tribunal. Similarly, it is appropriate to avoid using vague words, open to several interpretations.
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> The requirement of a specific technique for drafting texts obviously should not be pushed to the point of absurdity: the legislator can legislate only by means of general definitions and cannot be asked, at any time, to enumerate all the specific instances that one’s imagination may suggest; otherwise his task would become impossible. Moreover, the drafters of the current penal code [of 1992] endeavoured to define, better than the 1810 Code did, precisely the infractions they retained, though here and there some wording is quite broad. It is true that some concepts are fairly well known in everyday language or have been sufficiently explained by jurisprudence to obviate the need to define them more precisely: for example, the concepts of homicide, violence, threat or narcotics.[40]

As for the role of jurisprudence, the French position is as follows:

> [Translation] To repressive magistrates, the principle of legality makes it necessary, moreover, to interpret an enactment in a non-extensive way. It would be futile for the legislator to establish specific crimes if, through an arbitrary or analogous interpretation, judges could give criminal provisions as broad a scope as they thought desirable: the uncertainty would be the same for those subject to trial as would arise from a complete absence of legislation. It will be noted, however, that the interpretation of legislation is not forbidden: for courts must apply its general and abstract formulas to concrete cases; a declaratory or teleological interpretation, which is in no way contrary to the principle of legality, should be preferred over an excessively literal interpretation. [41]

In many respects, this view of the role of legislation and jurisprudence calls to mind the doctrine of vagueness recognized by the Supreme Court of Canada. This defect renders a statute unconstitutional because it amounts to a violation of the principles of fundamental justice which the State must respect before infringing the right to life, liberty and security of the person.[42] It is not, however, confined to the criminal field and may be relied upon in the context of other Charter provisions.[43] It appears if a law "so lacks in precision as not to give sufficient guidance for legal debate."[44] In fact, "[l]egal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority."[45] A statute can do no more than "enunciate some boundaries, which create an area of risk."[46] In criminal law, "the terms of the legal debate should be outlined with special care by the State."[47] Compared to the principle of legality, this last exhortation may seem rather timid.[48] But it is based on an undeniable reality: it is neither possible nor desirable to forbid the legislator from using general terms to which the courts must give effect.

In short, "[t]he judiciary always has a mediating role in the actualization of law, although the extent of this role may vary."[49] The Court adds that provisions that are "framed in general terms may be better suited to the achievement of their objectives. . . ."[50] These principles were applied to section 515(10)(*b*) of the *Criminal Code.*[51] Under the terms of this provision, the court ruling on the pre-trial release of an accused held in custody must ask itself whether his detention "is necessary in the public interest or for the protection or safety of the public." In this wording, the notion of "public interest" "provides no guidance for legal debate"; this constitutes a violation of the right "not to be denied reasonable bail without just cause" guaranteed by section 11(*e*) of the *Canadian Charter of Rights and Freedoms.*[52] In this case, Mr. Justice Gonthier disagreed with the Chief Justice, which shows the considerable latitude the State must have in his view; he insists nevertheless on the necessity that "norms which govern conduct, and the contravention of which may result in incarceration, be both promulgated and formulated so as to allow for a high degree of certainty."[53]

These comments show that Canadian and French constitutional law share some similarities concerning the role of legislation; the same may be said of the role of jurisprudence in the field of criminal law.

2. Jurisprudence and Defences

The French criminal code of 1810 contained few defences or grounds for exoneration. It stated that there "is no crime or misdemeanor if the accused was in a state of insanity at the time of his actions or if he was compelled to act by a force which he couldn't resist" (Art. 64). The lack of discernment in minors under age 16 was a ground for acquittal (Art. 66). Article 328 exonerated the author of a homicide, wounding or striking when such acts were "compelled by the immediate and actual necessity to defend oneself or another." However, an excuse or a mitigation of punishment had to be expressly provided for by a specific provision (Art. 65). There were no definitions of these expressions and it was left to jurisprudence and doctrine to stipulate their conditions of application.

In the absence of guidance from the legislator, the courts were called on to specify what intellectual or moral element was required by a given offence. They thus developed an elaborate classification in the absence of any provision on this subject. The moral element could consist of a state of mind known as "dol" (deceit or fraud). It could be general or specific. Furthermore, a criminal fault could be the result of simple negligence. Finally, a regulatory offence (*contravention*) was committed as soon as the conduct complained of occurred, regardless of the author's state of mind.[54] Article 121 of the new criminal code codifies these principles.[55] At first glance, the Canadian jurist is tempted to draw a parallel with crimes of general or specific intent, the *mens rea* for crimes of intent or negligence, and absolute liability offences. The analogy need not be perfect to see that jurisprudence plays a fundamental role in both systems.

This comparison can be extended with two examples. First, since the late 19th century, the defence of necessity had been recognized in France in the absence of a specific provision on this matter.[56] In Canada, this defence had also been recognized by the

Supreme Court, again in the absence of a provision on this subject.[57] The French criminal code of 1992 codified this principle in Article 122-7. The second example concerns the notion of consent. It did not appear in either the French code of 1810 or that of 1992. In principle, it was therefore not a defence, for example in a duel. Similarly, in 1921, in the case of a surgeon who caused injuries while performing cosmetic surgery, the *Cour de Cassation* ruled that consent was not relevant when the aim pursued was contrary to public policy; obviously, jurisprudence has evolved since then. In another vein, the courts had no difficulty concluding that the term "rape" presumes the absence of the victim's consent.[58] In the absence of any indication to the contrary, it seems therefore that a husband could commit rape against his wife. Since 1984, the *Cour de Cassation* has set aside the doctrine that used to reject this position, holding instead that the husband had no special immunity.[59]

In Canada, the *Criminal Code* states that consent constitutes a defence to a charge of assault.[60] However, the Supreme Court has found that at common law, a victim cannot validly consent to a fight in which the participants may injure each other.[61] More recently, it rejected a common law rule and stated that consent to unprotected sexual intercourse is vitiated by fraud if the accused does not disclose that he is HIV-positive.[62] These cases clearly show that the courts have considerable latitude where general concepts are used and that they do not hesitate to use to extend the reach of certain articles of the code.

Thus, it appears that in France, certain grounds of defence have been recognized and limited in the absence of a specific provision. In Canada, the scope of a defence mentioned in the code has sometimes been restricted by jurisprudence. More generally, the limited number of grounds of defence recognized by the French penal code of 1810 calls to mind the structure of the Canadian *Criminal Code*. In both cases, the application of a code is dependent on jurisprudence. In France, this situation is the result of a particular notion of codification and the abandonment of the idealistic visions of the Revolutionary period. That is why in 1810, notions as fundamental as insanity, self-defence and discernment were left undefined. The courts thus had a great deal of latitude. These observations may shed light on the failure of the English attempts to codify criminal law.

III. The English Perception of the Role of Jurisprudence in a System of Codified Law

The difficulties encountered in England during attempts at codification were attributable, at least in part, to the style of statutes that were in favour in that country, of which Jeremy Bentham was highly critical (A). In the 19th century, his followers nearly persuaded Parliament to adopt a code of offences. Several jurists, however, were afraid to take away from the courts the flexibility afforded by the common law. In the 20th century, while the nature of a code is better understood, codification is still a long time coming (B).

A. The Role of Legislation in England

English legislation presents distinct characteristics whose origins must be recalled (1) in order to gain a better understanding of the revolutionary nature of Bentham's criticism (2).

1. The Importance of Style

In England, for a long time access to legislation was problematic. In the Middle Ages, collections of statutes differed from each other. From 1481 on, printing made possible the dissemination of a single text. The first official version of the complete statutes, *Statutes of the Realm,* was published between 1810 and 1822; it ended with the statutes adopted in 1713 and remained incomplete, besides containing texts of doubtful authenticity. It was not until the 19th century that the statutes accumulated since the Middle Ages were repealed, consolidated or reformed. But it should be noted that this was done only by sectors. No general consolidation was completed, although in 1853, a committee, then a commission, were created for this purpose.[63] Between 1870 and 1878, after the repeal of numerous statutes by Parliament, the Queen's Printer was able to publish a collection of eighteen volumes containing the acts of general and lasting interest that were still in force. This "revision" was strictly a chronological ordering. It did not provide a continuous text containing all provisions governing a given question, which would constitute a consolidation. Such an operation was in fact problematic from a stylistic standpoint in a country where some enactments dated back to the 13th century.[64]

The traditions of draftmen also explain certain characteristics of British legislation. At one time, they were often *conveyancers*, experts in the drafting of legal instruments that were paid by the word. Out of professional habit, they used extremely long sentences, which quite often went on for a paragraph or even a page, and in which synonyms were used to excess. In fact, the phrase in which Parliament decreed what was to follow had to be recalled at the start of every new sentence. Also, statutes were not divided into numbered sections. To repeal or amend them, it was necessary to reproduce or paraphrase the relevant passage. It was not until 1850 that a law, known as Lord Brougham's law, abolished these rules and provided for the division of statutes into relatively short sections, though in practice this approach had already been adopted for a while.[65]

In the late 18th century, Jeremy Bentham described the problem posed by the style of English statutes in these words:[66]

> It is by the collection of all these defects that the English statutes have acquired their unbearable prolixity, and that the English law is smothered amidst a redundancy of words.
>
> It is not enough that the whole of a paragraph is concise in regard to the number of ideas that it presents: the sentences in which they are presented should have this

> same quality. This circumstance is equally of importance whether it concerns the understanding or the retaining the sense of a paragraph: the shorter the distance between the beginning and the ending of each sentence, the more numerous the points of repose for the mind. In the English statutes, sentences may be found which would make a small volume. Pitching blocks are erected in certain places in the streets of London, for porters with their loads: when will English legislators take equal care for the reliefs of the minds of those who study their labours.

In 1879, Chief Justice Cockburn himself expressed a similar view. He deplored "the cumbrous, prolix, inartificial, and bewildering phraseology of our statutes."[67]

Moreover, in the common law system, legal principles have been fashioned by judges. Until the 19th century, statutes merely modified these rules. They borrowed the concepts of the common law and its bewildering terminology without restating general principles that were considered well-known for jurists. Thus the reader was implicitly referred to the decisions of the courts. Judges therefore assumed that the common law survived the statute, except insofar as it was indisputably modified by its provisions. Moreover, a narrow interpretation was especially common in criminal matters, as the life of the accused was usually at stake. Thus, it was deemed that the word "turkey hen" did not include a dead turkey hen and that the prohibition against stealing "horses" excluded the theft of a single animal.[68] In the 19th century, this stratagem made it possible to limit the impact of certain important reforms approved by the British Parliament. In these circumstances, prolixity was definitely a virtue. In 1891, Baron Bramwell summarized this situation in a succinct phrase: "[a] prudent draftsman does not accurately examine whether a word will be superfluous, he makes sure by using it."[69]

2. Jeremy Bentham's Conception

In England, the idea of codification is relatively old. In the early 17th century, Chancellor Bacon wished that a Digest would summarize both the statute and the common law. In 1653, under the Commonwealth, members of Parliament abolished the Court of Chancery and hoped to reduce the common law to a pocket "code" that could easily be carried about. But it was Jeremy Bentham (1748-1832) who championed this cause. His very eclectic works left their stamp on the 19th, and even the 20th century, notably his conception of the penitentiary and of utilitarianism. Bentham led a true crusade against the technical knowledge of the legal professions and the common law. In his view, the common law contained no pre-established rules, but was set forth as judges saw fit. The common law, he wrote, is "dog-law":

> When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make the law for you and me.[70]

The following quote puts it more exotically:

> Multitudes are thus doomed to inevitable ruin, for the crime of not knowing a judge's opinion, some ten or twenty years before the question had ever entered into his

> head. This confusion and injustice is of the very essence of what in England is called *common law*—that many-headed monster, which, not capable of thinking of anything till after it has happened, nor then rationally, pretends to have predetermined everything. Nebuchadnezzar put men to death for not finding a meaning for his dreams: but the dreams were at least dreamt first, and duly notified. English judges put men to death very coolly for not having been able to interpret their dreams, and that before they were so much as dreamt.[71]

Consequently, Bentham advocated the adoption of codes based on the principle of utility, which consisted in procuring the greatest possible happiness to the greatest number. His plan began to take shape in 1780. Beginning in 1811, he tried, without success, to convince first Americans officials, then various rulers in other countries to undertake to examine a draft code he offered to write at no cost. Though he prepared several outlines, he never successfully completed a code. In his own country, his theories had little influence on the academics of the 19th century.[72]

Bentham's opinion of codification seems not to be well known. Quite often, only one of these works, a *General View of a Complete Code of Laws*, is analysed.[73] This is the translation of a chapter contained in *Traités de législation civile et pénale*, a book that was edited and published in French by Étienne Dumont in 1802. Dumont collected disparate manuscripts into a single volume. In a "preface," he stated at the outset that there had been "more to remove than to add, more to abridge than to extend," that he had sometimes "tried to elaborate more on the ideas" and that he had "taken the liberty of adding a few discreet embellishments here and there."[74] One must therefore study this work with caution.[75]

Judging from this text, the general code envisaged by Bentham was to be comprehensive: "whatever is not in the code of laws, ought not to be law."[76] He believed it was possible to foresee every type of problem that was likely to arise. In a code, clearness and brevity were essential, even if the whole of the laws would always be too considerable to become fully fixed in the memory of a citizen. Hence the need to separate it into distinct parts for the use of different classes of people, so that they could have in mind the rules that pertained to them before acting. The father of a family or the farmer would thus be able to become acquainted with his rights and obligations. As far as possible, "terms… such as are familiar to the people" should be used, or technical terms defined. Concerning this future code, the text attributed to Bentham concludes as follows:[77]

> A code formed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody: each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals.

This simplistic view is not in keeping with Bentham's other writings. Thus, in the English edition, one finds an additional chapter not included in Dumont's text, entitled "Of the Interpretation, Conservation and Improvement of a Code," in which Bentham stated that after the adoption of a code, it was necessary to forbid the introduction of judicial precedents or doctrinal commentaries. If an unforeseen case arose, the judge could

suggest a remedy that had to be incorporated into the code to have force of law. Generally, the courts were to point out to the legislators any defects they observed. If the terms used did not faithfully express what the legislature had in view, the judge could, in exceptional cases, make up for this shortcoming in the way of interpretation; however, he was to refrain from filling in the blanks of the text. Finally, the code was to be revised after a hundred years, as its terminology would become obsolete with the passage of time.[78]

Other writings of Bentham's stressed the need to attach to the code's provisions a detailed explanation of their import. In a note published in 1789 after the *Introduction to the Principles of Morals and Legislation*, Bentham stated that a precept of a few words (for example, "Thou shalt not steal") would be supplemented by an entire volume explaining the application of the text and its meaning. The classification of offences entailed, as a result, the definition of private rights and the preparation of a complete body of laws, the "Pannomion."[79]

The problems of interpretation would not disappear, however. In 1790, Bentham borrowed from Puffendorf the following example, which he would subsequently use often. In an Italian city, a law decrees that "whosoever draws blood in the streets shall be put to death." But what if a physician, to aid a man struck by apoplexy, bled him? Or what if a murderer strangled his adversary in the street?[80] A manuscript written in 1782, but not published until the 20th century, already provided an answer to this question. If he believed that the legislature had failed to consider a specific problem, the judge was to submit a proposed rule to the legislative authority, which could modify it or reject it. In the event of inaction, it would be presumed to have been adopted.[81] This solution was taken up again in 1790 in a plan for a judicial system for France, as well as in the constitutional code Bentham prepared in about 1822.[82]

After 1811, Bentham remained faithful to this conception, especially with regard to the need to prepare a "perpetual commentary" that must contain a "mass of reasons" to accompany numerous and compact codes (numebering a few sheets), as well as a general code.[83] Bentham was critical of the Napoleonic codes for having no such instruments.[84] In his view, the preliminary speeches attached to these codes contained "a tissue of vague generalities, floating in the air, in the character of *general principles*. In that form it was delivered, and not in the form of reasons,—reasons applied, in the discourse, to the several particular arrangements, to which, in each man's mind, they were respectively meant to apply?" [sic][85] The motives or reasons of the code must arouse the support of the people and serve as beacons to judges charged with applying its provisions, without necessarily providing them with a ready-made solution.[86]

In open letters to the American authorities, Bentham acknowledged that non-jurists had neither the talent nor the skill to be their own lawyer. The adoption of codes would, however, allow educated people to improve their own knowledge, though it would still be necessary to have judges settle disputes.[87] The problems attributable to social changes would, however, remain the exclusive responsibility of the legislature.[88] In the 1820s, Bentham became interested in the rules of evidence and procedure; in this context, he favoured the use of general principles that required considerable judicial discretion, so that the principle of utility might triumph. According to Gerald Postema, this theory does not readily accommodate a mechanistic conception of the application of the law.[89] Moreover,

Bentham was anything but a Utopian. If he could not accept that a judgment would establish a rule applicable to future cases, he knew very well that the resolution of a dispute would sometimes open up debate.[90]

Bentham agreed with Portalis on one point: the general principles of a code were not enough in themselves; they had to be implemented. According to him, the legislature was to provide reasons explaining the purpose of the code's provisions, defining the terms used and the hypotheses covered, and setting out the links between the various areas of law. The role of judges was thus minimized; problems and unforeseen situations were to be brought to the attention of legislators. According to Portalis, it was the courts and doctrine that were to apply the general principles of the code to particular circumstances. These different viewpoints may have played a role in the failure of the attempts to codify English criminal law.

B. Attempts at Codification in England

While the draft criminal code of 1854 stirred stringent reactions (1), the same was not true of the text presented in 1878 (2). Today, codification seems better understood, though it is unlikely to ever come about in England (3).

1. The Attempt of 1854

In the 1820s, in the midst of the Industrial Revolution, English society felt the need to modernize its legal system. There were critics on all sides and reforms seemed inevitable. Nevertheless, Bentham's radical ideas were quickly dismissed in favour of changes that did note substantially undermine the power of judges. Initially, a debate raged about codification. Discussions centered on the *Code Napoléon*, which had been translated. Some were critical of it for having generated hundreds of works, in the form of commentaries, treatises and collections of jurisprudence; they therefore did not understand that the legislators' aim was not to put an end to these publications. At that time, there was, moreover, a real infatuation with Pothier, who had been translated and had the advantage of having lived before the French Revolution.[91] Traditionally, judges' opinions were perceived as explanations of immanent principles that needed to be adapted to the circumstances of each case. In this sense, the common law was an "unwritten" law, to be deduced from the reasons of judges. Moreover, these reasons took the form of a speech that was transcribed by a publisher serving in a private capacity. In these circumstances, the rules of common law could not be formulated in a definitive way, which ruled out the idea of codification.[92]

In criminal law, the consolidation of statutes, that is, the grouping into a single text of statutes adopted over the centuries, scarcely provoked any objection, nor did the repeal or revision of numerous obsolete and conflicting statutes. This process was successfully completed between 1826 and 1832, and in 1861.[93] While these reforms are sometimes referred to as codifications, this is a misuse of language, since they amounted to an

ordering and updating of the statutes in force. True codification would consist in amalgamating into a new text the rules of common law and legislation, in the form of general principles apt to encompass the whole of the subject and to evolve with jurisprudence.

In 1833, a commission was entrusted with the task of codifying the offences contained in both the statute and the common law. This was the result of an initiative taken by Lord Brougham, who shared Bentham's concerns but was prepared to make compromises abhorred by his master. After a few episodes, a draft code was tabled between 1845 and 1847. While it was not as generally constructed as the French criminal code, its phraseology was less dense compared to the legislation of the time. Numerous notes stated the source of its provisions. In an unusual turn, the terms "wilfully," "maliciously" and "accidentally" were defined.[94]

In 1853, Chancellor Cranworth tabled in the House of Lords bills modelled on the reports filed by this commission. The following year, he asked the higher court judges whether these texts were likely to improve the administration of criminal justice "or the reverse." The fourteen answers he received were instructive.[95] Chief Justice Jervis said he was in favour of the idea of codifying the criminal law but regretted that the bill was not complete; he believed, however, that Parliament would not succeed in adopting a code dealing with controversial matters such as sedition and religion.[96] The other judges were opposed to the idea of abolishing the common law, while stressing that the consolidation of the statutes dealing with the criminal law would be eminently desirable.[97] They argued that a statute was more open to interpretation than the rules of the common law, which in their view were well established.[98] Some believed that only the common law contained principles, for which one would look in vain in legislation.[99]

Unknowingly echoing Portalis, the judges recalled that it was impossible to foresee every eventuality.[100] Consequently, someone who committed an offence recognized by the common law might very well be acquitted if the new code made no reference to it. In contrast, the "elasticity" or flexibility of the common law enabled judges to react to "new combinations of circumstances arising from time to time"[101]. This argument was intended to preserve the power to create new offences, namely, *misdemeanours.*[102] The adaptability of the common law therefore allowed judges to broaden the sphere of the criminal law. We might mention in passing that misdemeanours were punishable by imprisonment or a fine, unlike crimes, the felonies of English law, initially punishable by the confiscation of property and the death penalty.

One final argument is interesting, as it anticipates certain current objections. Whom would the new code benefit?, asked Mr. Justice Coleridge. Neither practitioners, nor students, nor the public, he answered. In fact, a number of terms that appeared in the bill were not defined and came from the common law. It would therefore be necessary to consult scholarly works and cases, not to mention the numerous decisions interpreting the new code. The task of lawyers and students would therefore be the same. As for the general public, assuming they received the code free of charge and read it, very few would retain more than what tradition had already taught them.[103] It is possible to see breaking through here the simplistic conception of codification attributed to Bentham.

At that same time, an anonymous commentary was critical of the idea of codifying the common law:

> The operation is impossible. A code of common law is a contradiction in terms. The function of a statute is to correct and supply the deficiencies of the common law, but not to replace it; and every statute becomes in the course of time the nucleus of a group of common law precedents, by which it is construed and applied.[104]

On the whole, these jurists criticized the rigidity of English statutes that contained a multitude of synonyms and attempted to specify in detail every conceivable situation. They did not seem to be familiar with the French codes, whose very broad provisions covered an infinity of factual situations. For the inherent flexibility of the general expressions favoured by a civil code was precisely its primordial quality!

2. The Attempt of 1878

The idea to codify English law was not, however, abandoned. In India, several codes drafted by English jurists were adopted between 1830 and 1860. The author of the penal code, Thomas Babington Macaulay, also wrote explanatory notes, as Bentham wished; this particularity seems to have contributed to the success of this text, though it must be remembered that it was an imperialist measure designed to repeal the local law.[105] In 1866, a British parliamentary commission invited jurists to submit to it compilations of principles applicable to a given sector. In 1870, the Colonial Office asked R.S. Wright to write a draft penal code for Jamaica. Despite its qualities, it was never adopted in this colony, although it was sometimes used elsewhere.[106] In 1874, this document was revised by James Fitzjames Stephen, who admired the codes of India, where he had served as jurisconsult. He submitted a bill on the crime of homicide in 1874, and another on the rules of evidence, in 1876.

In 1874, a parliamentary committee took note of the opinions of three judges on the bill concerning the crime of homicide; only one of them, Mr. Justice Blackburn, feared that the flexibility of the common law would disappear.[107] Stephen, however, eagerly pointed out that Mr. Justice Bramwell and Mr. Justice Blackburn had expressed before the committee conflicting views about rules of common law of fundamental importance, thus illustrating the need for codification.[108] In a letter sent to the committee, Chief Justice Cockburn said he was very much in favour of codification of the whole criminal law. He was opposed, however, to the bill, which was incomplete, besides having been written in an obscure and overly elaborate style.[109]

In 1877, Stephen published *A Digest of the Criminal Law* that contained abundant notes. His aim was to show that codification was possible. To this end, he simplified the phraseology of the existing statutes considerably; but he refrained from tackling certain general principles, such as *mens rea.*[110] At his request, the government entrusted him with writing a draft code of offences, which was submitted to the House of Commons in 1878.[111] A commission consisting of three judges and of Stephen was formed to study it and make

improvements where necessary. One of the commissioners was Mr. Justice Blackburn, who had accepted in the meantime the merits of such a reform.

In its report of 1879, the commission stated that it had changed nearly every section of the draft of 1878 as well as its outline, notably to give it greater clarity.[112] With regard to theft, forgery and counterfeiting, the draft reiterated Parts of the current legislation, which explains the abundance of distinctions it contained.[113] Generally speaking, the draft was a notable improvement over the statutes of the time, though it deliberately avoided the broad phraseology of the French codes. From the beginning of its report, the commission refuted the criticisms that were generally addressed to codification.[114] It explained that a code would not provide an answer to every question that might arise after its adoption; it was simply impossible to fulfil such a requirement. As for the alleged flexibility of the common law, the common law nearly always provided an answer to the problems posed by new circumstances. The ability of judges to innovate was therefore much reduced. Insofar as a code reproduced rules that already existed, it changed the form of the law rather than its content. In some cases, the draft gave judges and juries more discretionary power. In reality, elasticity was synonymous with uncertainty, but this uncertainty was reduced by the detailed and explicit nature of the rules of common law. It followed that a code reproducing them would be possessed of these same characteristics.[115]

In contrast, in France, where there was no rule of precedent, judges could base their rulings on considerations of justice and expediency while expounding the meaning of an article contained in the criminal code. While they were guided by previous decisions, they were not bound by them. According to the commission, the criminal law of France was therefore infinitely more elastic than that of England. Thus, the *Cour de Cassation* ruled in 1810 that a duel did not amount to murder but it reversed this decision in 1837. Moreover, compared to the English draft, the French and German codes left judges and juries the task of resolving a large number of issues. The commission concluded:

> We may observe, that it is this generality of language, leaving so much to be supplied by judicial discretion, which gives to the foreign Codes this appearance of completeness which creates so much misconception as to what can or ought to be effected by a Code for this country.[116]

In proposing the abolition of common law offences, the commission took considerable discretionary authority away from judges. But it considered that this power properly belonged to Parliament, even though an accused would have to be acquitted if a common law offence were inadvertently omitted from the code. On the other hand, if the omission concerned a defence, it would be unacceptable to convict the accused. That is why a provision of the draft preserved the defences, justifications and excuses provided by the common law.[117] The commission added that in applying a principle to new circumstances, judges relied upon its "substance" rather than the exact wording of previous cases. In a given situation, a legislative provision might very well be either too narrow or too broad. That is why the defence of necessity was removed from the draft and that of constraint reformulated; similarly, error of fact and drunkenness were no longer mentionned.[118] In some cases, this omission may have resulted from a disagreement between commission members.[119] Be that as it may, it seems that certain provisions of

Stephen's draft were intentionally removed to preserve the discretion that judges enjoyed under the common law.

In 1879, the trade unions supported Stephen's draft, but their enthusiasm waned when they noted that its provisions left their members open to prosecution.[120] Though he was personally in favour of codifying the whole of English law, Chief Justice Cockburn wrote two lengthy criticisms of the proposed provisions; the first was published in the Parliamentary Papers.[121] In his opinion, the draft contained numerous flaws; its wording often left something to be desired, notably because it contained many provisos. It was therefore preferable to postpone its adoption.[122] On several occasions, he deplored the use of vague terms, such as "blasphemy" or "breach of the peace"[123]. He vehemently opposed the partial abolition of thirty-nine different statutes, part of which the commissioners had left in place to regulate procedural matters. In his view, the code should contain all the rules of the criminal law, notably those concerning summary procedure, which had been omitted.[124] He was astounded to read that defences provided by the common law would remain in force. His comments are worth citing in full, as they have relevance in the Canadian context:

> Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worthwhile to codify at all, whatever forms a material part of the law should find a place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, forms an essential part of the law, whether unwritten or written. If the unwritten law is, as part of the law, to be embodied in a Code, so material a part of it as that in which we are dealing ought certainly to be carried into the Code, and should not be left at large, to be sought for in the unwritten and traditional law, which, the Code once established, it will be worth no one's while to study, and which will speedily become obsolete. We have done with the common law so far as it relates to criminal matters. No one is henceforth to be indicted under it. Why then is this particular part to be kept alive? Why should not its rules, which it is thus proposed to make applicable to offences under the code, be ascertained, as the enactment in question assumes them to be capable of being, and carried into the Code, and thereby this part of it rendered complete?[125]

The parliamentary debates of 1879 show that the abolition of the common law still created some problems.[126] Some argued that a code would inevitably have to be interpreted or amended in the future;[127] moreover, the draft would, according to a few members, introduce into England principles of French criminal law.[128] Others deplored the partial nature of the measure, at least with respect to offences that would still be contained in separate legislation[129] or pointed out the timeliness of such a reform.[130] The rather intransigent attitude of the Attorney General and lack of time prevented adoption of the draft by the Commons. In 1880, the adoption of a new draft seemed imminent. The same arguments resurfaced, notably the concern about the disappearance of the common law,[131] and the idea that a code would not provide all the answers and would have to be interpreted.[132] On the other hand, some stressed the importance and usefulness of this measure.[133]

Before the draft code could be adopted, Parliament was abruptly dissolved because of a crisis involving Ireland.[134] In 1883, the new government took up the provisions of the

draft governing criminal procedure. It immediately met with opposition from Irish members of Parliament, who felt that these changes would allow the government to wrongfully imprison individuals merely suspected of having committed an offence.[135] Others believed it would introduce an inquisitorial procedure in the French style[136] or felt it contained dangerous innovations.[137] The committee charged with studying this bill did not see its task through to completion.[138]

Political events played a decisive role in the failure of these attempts. However, several members of Parliament were reluctant to do away with the flexibility of the common law. The members of the commission formed in 1878 shared some of these concerns, as they had abandoned the idea of defining certain defences. But several members of Parliament stressed that public opinion was calling for codification; others vaunted the merits of this measure. The incompleteness of the draft, which left intact the provisions of several statutes governing punishments or procedure, and its intrinsic flaws, also weighed in the balance. Overall, while the English had a better understanding of what a code could be, they were not yet convinced of the need to adopt one.

The situation was somewhat different for private law, as drafts of sector-based "codification" prepared by renowned jurists were more favourably received. They led to enactments governing bills of exchange,[139] partnerships[140] and the sale of goods.[141] These texts did not contain all of the principles applied in a given sector. Rather, they took up those that were most common and best defined, leaving the others to jurisprudence. Thus, the word "code" had a different meaning, as it referred to an enactment that set out part of the rules applicable to a given sector. The House of Lords reminded judges, however, that they were to give these provisions their full effect, even if that meant changing or refuting the common law.[142]

3. The Debates in the 20th Century

In English criminal law, the much vaunted flexibility of the common law left bitter memories. A statute of 1800 prohibited coalitions whose avowed object was to increase the remuneration of employees; it was repealed in 1825. The courts found, however, that at common law, a scheme designed to harm a third party, such as a strike, constituted an offence. This doctrine was done away with by statute in 1875. The courts, however, used their powers in civil matters and issued injunctions when they felt that union members caused a nuisance. Parliament intervened again in 1906 to put an end to this jurisprudence.[143] In another vein, in 1962, the House of Lords decided that an act tending to corrupt the morals of society constituted a crime, because this general principle could be derived from precedents. In the case in point, the accused had published a directory containing the names and addresses of prostitutes, an action which had never before been considered a crime.[144] In 1973, the House declared that this offence extended to the publication of classified ads written by homosexuals seeking a partner.[145] However, in 1975, it maintained that it did not have the authority to create new offences, the 1962 ruling being presumed to have been derived from principles contained in certain precedents.[146]

In the 20th century, the idea of codification continued to gain followers. Thus, in 1901, Courtnay Ilbert very effectively described the nature of a code, clearly distinguishing it from a consolidation or revision.[147] A few legal scholars wrote draft codes, without much success. The Law Reform Commission of England, created in 1965, proposed draft codes governing the law of contracts, family law, housing and criminal law (1989). In the absence of political will, nothing came of them, although in 1992,[148] a partial outline of codification was submitted. On the whole, scholars approved of the Draft Criminal Code. However, one British author criticized the Commission for basing itself on a fictitious social consensus, minimizing the amount of reform contained in the draft code and exaggerating its accessibility for non-jurists.[149] The "flexibility of the common law" was no longer an issue; in the United States, there also seems to have been an acceptance of the idea that a code gives courts considerable discretion.[150]

On the whole, it appears that English jurists had two conflicting attitudes about the common law. The first derived from the writings of Bentham, who wanted the legislature to approve detailed reasons specifying the cases to which a code would apply. Codification thus became synonymous with an attempt to eliminate the discretion of judges. This idea was reinforced by the traditionally wordy style of English statutes. All this gave rise to a movement to reject codification, which was especially evident in 1854, but was still present in 1879. Whether they rejoiced in this fact or deplored it, most common law jurists assumed that a code would considerably reduce the latitude enjoyed by judges. Although contemporary scholars have a more accurate view of things, the traditional attitude may explain why English criminal law has yet to be codified. As everyone knows, the situation in Canada is different; we must now turn our attention to the causes of this phenomenon.

IV. The Canadian Experience of Codification

In Canada, the civil law of Quebec was the first to be codified; it is therefore appropriate to recall the conditions in which this reform was carried out (A). Did this experience facilitate the codification of Canadian criminal law? To answer this question, one must examine the reception and implantation of English criminal law in Quebec (B). An attempt must also be made to see how codification was perceived in the 19th century, in order to better understand the consensus surrounding the adoption of the *Criminal Code, 1892* and the difficulties that lie ahead along the road to recodification (C).

A. The Codification of Quebec Civil Law

The evolution of the private law from 1774 to 1857 (1) and the debate surrounding the revision of legislation explain why the the decision to codify the private law of Quebec was greeted with enthusiasm (2). As in France, this measure did not cripple the evolution of the civil law (3).

1. The Causes of Codification

In 1774, the Parliament of Great Britain passed the *Quebec Act*. From that point on, in matters of property and civil rights, that is, for private law, the rules followed in New France at the time of the Conquest of 1760 were to be applied anew, except for the fact that the principle of freedom of willing was introduced.[151] The former laws included the edicts and ordinances of the king of France, local regulations, the *Coutume de Paris* (Custom of Paris), drafted in 1580, and jurisprudence and French doctrine governing the law of obligations, of contract and certain aspects of family law. After 1774, various laws or local ordinances were added to this mass; they sometimes referred to, or were inspired by, English law.

After the adoption of the *Code Napoléon*, in 1804, a discrepancy arose between the civil law of France and that of Quebec. Nevertheless, over time, the French code became a working tool for Quebec jurists, since its provisions governing obligations and contracts had made very few changes to the old French law that was applied in New France. While it did not have force of law, this code was regularly cited by the courts, as was French doctrine.[152] It thus became familiar well before the adoption of its counterpart in Lower Canada (the name given Quebec in 1791). In some cases, it conferred a certain legitimacy on the rules of the old law; other rules seemed to have become inconsistent with the liberalism that dominated Lower Canadian society in the middle of the 19th century.[153] Moreover, for unilingual individuals, the absence of translations created a problem, both for texts of French and English law.

In 1857, the accumulation of disparate rules prompted the legislature to order the codification of the private law of Lower Canada. A commission composed of three judges and two secretaries was entrusted with the task of preparing a draft in both official languages. In 1865, this draft was approved by the legislature, with some changes. On August 1, 1866, the *Civil Code of Lower Canada* came into force.[154] That same year, the *Code of Civil Procedure* was enacted; it came into force in 1867.[155] This reform was preceded by debates on the improvement of legislation which are worth recalling.

2. Revision of the Statutes and Codification

In the 19th century, the proliferation of statutes caused some difficulty, as the legislature rarely indicated to what extent the previous rules were repealed or amended. In 1831, a debate arose surrounding the revision of the laws of Lower Canada. This operation consisted in printing in chronological order the legislative provisions that were still in force and of general and lasting interest. Some parliamentarians favoured a codification that would include the private law of New France, while others considered this task utterly impossible because of the confusion surrounding this question.[156] That same year, a motion of the Legislative Council proposed that a commission of jurists be charged with this task. Nothing came out of these two initiatives because of the chronic confrontation between the two houses of the legislature. During these debates, the *Code Napoléon* and the *Louisiana Civil Code* were cited as examples, as they would be thereafter. On the other hand, the

description of the English statutes at that same time by "Jean-Paul, ploughman" was quite caustic:

> [Translation] These statutes have existed for centuries, they are mummies, antiquities to which each age adds something of its own making, so that there are only very few English statutes against which one might not oppose statutes that order or prohibit precisely the opposite of their content.[157]

Under the *Act of Union*, numerous reforms took place.[158] The legislation of Lower Canada was revised for the first time in 1845; the work was divided into thematic sections within which the statutes were presented chronologically. A true consolidation was carried out in 1861 for Lower Canada; the text of each statute incorporated all the amendments made since its enactment, and the sections were also subdivided and pared down.[159] During this period, several authors called for the codification of the private law and denounced the convoluted style of statutes.[160] In 1857, the legislature decided that the *Civil Code* and the *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.*"[161]

The legislature therefore favoured the very general wording of French law. In this regard, Thomas Ritchie believed, in 1863, that the commissioners had properly fulfilled their mission:

> A Code should be a comprehensive body of practical rules of law, expressed in language pure, concise and unambiguous. It ought to exclude mere definitions and axioms; for it can never supply the place of scientific treatises upon legal subjects. Nor ought it to be encumbered with more details and examples than are absolutely necessary to a practical understanding of the rules laid down. It is scarcely necessary to add that the subtleties in which many of the authors delight, would be entirely out of place in a body of positive legislation such as a Civil Code.[162]

In general, jurists made very few comments on the role of jurisprudence. The commissioners believed that codification would foster in the courts "harmony of opinion and the growth of a sound and consistent jurisprudence". They warned the legislators against hasty interventions, as the purpose of the code was "to cover, either by express terms or by legal implication, all questions." They suggested that the courts draw attention to the difficulties they faced, so that the legislature could make periodic revisions, having in mind the global structure of the code. In this way, "the evil of conflicting judicial decisions and contradictory interpretations by commentators, although it can never be altogether escaped, will be materially diminished"[163]. The commissioners therefore acknowledged that problems of interpretation would arise, though they hoped the legislature would quickly eliminate them. Sixty-three years after Portalis' preliminary discourse, in a jurisdiction where the reasons for judgments were stated at length, as in common law courts, the importance of jurisprudence scarcely stirred debate; there seems to have been few critics who denounced the excessive importance given to precedents.[164]

3. The Civil Law after the Codification of 1865

In Quebec civil law, jurists have often criticized the method of interpretation used by the judges who were called to apply the *Civil Code of Lower Canada,* especially the members of the Supreme Court of Canada and the Judicial Committee of the Privy Council. They argued that the code was treated like an ordinary statute in the common law world, which would not have been the case if its special character had been recognized. More recently, some authors have begun to distinguish different periods and to challenge part of this criticism. On the whole, it appears that after 1970, civil law jurisprudence has been favorably received. It seems fair to say, however, like Demolombe and Carbonnier, that a civil code is a "social constitution." As such, it has authority to govern all relationships of a patrimonial nature, as well as those that relate to personality rights. On the other hand, many civil law scholars rebel against a very widespread tendency to regard the judgments of the Supreme Court of Canada and the Court of Appeal as binding.[165]

Quebec jurisprudence also gave effect to certain principles that appeared nowhere in the text of the code of 1866, such as unjust enrichment,[166] good faith in contractual matters[167] and abuse of rights.[168] In 1991, these rules were given recognition in in specific articles of the *Civil Code of Quebec*.[169] These changes show that civil law jurisprudence is not crippled by a code and can draw on it to devise new solutions. It should be noted, however, that these cases pit businessmen or their guarantors against a bank. On the other hand, judges refused to force the State to compensate individuals who became disabled for life after participating in a mandatory vaccination program;[170] they did not come to the aid of the spouse separated from property whose actions enriched the patrimony of her spouse.[171] The legislature had to step in to fill in these gaps.

The reasons for the adoption of the new civil code are complex.[172] The process began in 1955 and ended, after many ups and downs, in 1991. Among the factors that contributed to the completion of this project, one might mention a concern to streamline and simplify and a desire to add certain mechanisms designed to protect less informed or more vulnerable persons. For the purposes of this study, suffice it to note that the Civil Code Revision Office submitted its report in 1977. The legislature therefore took over fourteen years to produce his own code, which shows the virtue of patience in such matters. After this brief overview of the Quebec civil law experience, it is appropriate to examine the circumstances in which English criminal law was received in Quebec.

B. The Reception of English Criminal Law in Quebec

A priori, the rules of common law on colonial legal systems did not necessarily favour English criminal law (1), even though the latter was applied very soon in Quebec (2). Francophones subsequently idealized this system (3). Yet the criminal law was nearly always practised in the English language and the common law was beginning to come under criticism (4).

1. The Rules of Reception in the 18th Century

In recent years, the rules of reception in the British colonial system have undergone a critical re-examination. Too often, legal scholars in the 20th century have relied on concepts that did not even exist in the period they studied. The case of the so-called settlements colonies is revealing in this regard. In the 18th century, this expression was generally used to designate regions where no one, wheter of Aboriginal or of European origin, was present.[173] Thus, the American colonies were described as conquests. It is true that in that case the settlers called for the application of the common law, since if there had been a conquest, they would have been descended from the conquering people. They did not, however, seek to impose English law on the Aboriginal inhabitants.[174] In 1713, the cession of Acadia to Great Britain posed this problem, as did that of Canada, in 1760. But it was not until the 19th century that the criminal law was imposed on Aboriginal peoples which did not live close to the settlers.[175] Thus, in British Columbia, the colonial authorities had no hesitation in applying "the Queen's law " to natives accused of crimes.[176]

When a Christian people was conquered, the common law held that the local laws and customs remained in force until they were modified or repealed by the conqueror. The relevant cases made no distinction between the private law and the public law: the whole system was retained.[177] In Canada, the first conquered colony was Acadia, which was ceded to Great Britain by the Treaty of Utrecht of 1713. From 1712, the date the French surrendered, to 1749, justice was dispensed by a British governor and his counsellors at Annapolis Royal. When Acadians were involved in a dispute, the council applied the law in force before the conquest. The situation regarding criminal law was less clear. According to his instructions, the governor was to follow pre-established rules—whose content was not specified—before imposing a corporal punishment or pronouncing a death sentence. However, there were not enough people qualified to sit on a jury. The council therefore proceeded informally, calling offences misdemeanours in order to impose lighter sentences. It is difficult to say whether the rules of the common law, or even of French law, were followed.[178]

In 1749, the governor's commission stated that the new civil courts of Nova Scotia were to apply English Law; furthermore, an elected assembly was to be convened; this was not done until 1758, three years after the expulsion of the Acadians. This colony was then placed on the same footing as a territory populated solely by Britons. In such a case, the colonial courts had no difficulty applying the common law of England. The same did not hold true for statutes, which did not apply to those colonies already in existence at the time of their adoption; however, Parliament could make manifest its intention to settle a colonial problem, in which case the statute would be considered an imperial one applicable *ex proprio vigore* (of its own authority). On the other hand, colonies could borrow en masse English statutes that predated their creation, provided they were suitable to their condition. Obviously, this requirement left the colonial courts with a considerable discretion.

There were therefore many exceptions to the rule of reception of the ordinary statutes of the English Parliament, and this created some uncertainty, notably for the criminal law. In Nova Scotia, New Brunswick and Prince Edward Island, no cut-off date was established by statute. Judges had to decide the issue of the reception of English statutes

on a case-by-case basis, and the situation was not always clear; in 1758, Nova Scotia adopted a series of criminal law statute to remedy this problem. In the 19th century, Newfoundland and Ontario set their own reception dates.[179] The other Canadian provinces, with the exception of Quebec, followed suit.[180]

2. The Reception of English Law after the Conquest of 1760

Immediately after the Conquest of 1760, military courts were set up. Courts martial dispensed justice in criminal matters and tried civilians as well as soldiers. The common law was therefore not applied. However, in the summer of 1763, the judge advocate general became aware of this situation and concluded that these courts had excessive powers. But he did not specify how the generals should have proceeded in 1760. On October 7, 1763, the *Royal Proclamation* solved the problem for the future, stipulating that the courts of Quebec were to apply the common law.[181]

Today, it seems self-evident that English criminal law should have applied in Quebec after the Conquest. The opinion of the advocate general, James Marriott, expressed in 1774 on this subject is generally considered conclusive.[182] He stated:

> But whatever the criminal law of England is in the great lines of treason, felony &. I conceive it must of course have taken place in the colony of Canada ; and that no other system of criminal laws could exist there at any instant of time after the conquest : because this part of distributive and executive justice is so inherent in dominion, or, in other words, so attached to every crown, and is so much an immediate emanation of every government, that the very instant a people fall under the protection and dominion of any other state, the criminal, or what is called the crown law of that state, must ipso facto and immediately operate : it cannot be otherwise ; for were it otherwise there would be no effective sovereignty on one side, and no dependence on the other.[183]

However, immediately following this passage, Marriott describes the period of transition after the conquest:

> Till there was an absolute surrender, military law must prevail in every country and supersede the common law ; but the moment the new sovereign is in peaceable possession, the merum imperium, or power of the sword, or the haute justice, as the French civilians call it, to be exercised according to the common law, takes place; and this power must extend to all crimes that concern *the peace and dignity of the crown*. These are *mala in se*, crimes in themselves, and universally known in every nation. Those crimes which arise from prohibitions are not known, and therefore they are not governed by penal statutes antecedent to the conquest. The mixtum imperiium, of personal wrongs and civil property, must be promulged before the ancient law are understood to be altered.
>
> In these views, your Majesty's proclamation [of 1763], declarative of the enjoyment of the laws of England, seems to seems to have been justifiable, and to be rightly uderstood in regard to all your Majesty's subjects in Canada, without distinction of the places of their birth, so far as it relates to the criminal crown law in greater crimes, such as treason and felony ;

> because the proclamation was meant to convey an actual benefit to the Canadians, by putting and end to both, the military law as well as the French criminal law.[184]

At the very end of this quotation, Marriott informs us that although the military had dispensed justice for over three years, it was still necessary to formally repeal French criminal law. Whatever may have been his opinion, this formulation tends to show that the automatic application of criminal law was not taken for granted at the time. The solicitor general, Alexander Wedderburn, did not tackle this question. He merely noted that English criminal law already applied in Quebec; for him, there was no question of restoring French law in this area.[185]

Other jurists felt that the criminal law of a Christian people did not change after a conquest. In 1769, in a criminal law case, Lord Mansfield stated, *obiter dictum,* that "[i]f Jamaica was considered as a conquest, they would retain their own laws, till the conqueror had thought fit to alter them."[186] In 1773, the attorney general, Edouard Thurlow, concurred. After having recalled "that a conquered people retain their ancient customs till the conqueror shall declare new laws"[187], he argued that the introduction of new rules of procedure in civil matters would lead to a period of uncertainty and result in losses for the conquered peoples. He added:

> The same kind of observation applies with still greater force against a change of the criminal law, in proportion as the examples are more striking, and the consequences more important. The general consternation which must follow upon the circumstance of being suddenly subjected to a new criminal law, cannot soon be appeased by the looseness or mildness of the code.
>
> From these observations, I draw it as a consequence that new subjects acquired by conquest, have a right to expect from the benignity and justice of their conqueror, the continuance of all these old laws, and they seem to have no less reason to expect it from his wisdom.[188]

In 1766, Francis Masères had just been appointed attorney general of Quebec. He called on the British Parliament to specify what parts of the English law applied in that province. He wondered what a judge was to do if an act considered criminal in Great Britain was a lawful one by the "Laws of Canada."[189] The question would not have arisen had the criminal law of New France automatically ceased to apply. In short, in reading the opinions written at the time, one notes that this system did not disappear solely because of the conquest. Moreover, in the early 19th century, some British colonies did keep the rules of French criminal law after they were conquered.[190] At present, Scottish criminal law still differs from its English couterpart. In Quebec, there is, however, no doubt that in practice, French criminal law ceased to apply after 1760.

Between 1766 and 1774, various reports proposed restoring in whole or in part the criminal law of New France, although this idea was eventually abandoned.[191] In 1766, attorney general De Grey and solicitor general Charles Yorke spoke of the "certainty" and ”lenity” of English criminal law, an expression that would be used time and again thereafter.[192] For at the time, the criminal law of France acted as a repellent in England, for at least three reasons.[193] First of all, by means of *lettres de cachet*, the king could order, at his sole discretion, that an individual be permanently detained. Next, accused persons

could be tortured. This power was strictly controlled; in 1760, several *parlements* of France exercised it very seldom or refused outright to resort to it. But it still existed; it was not abolished until 1780.[194] Finally, the English thought a number of punishments to be cruel, such as torture on the wheel, which consisted in breaking the convict's limbs with an iron bar. One must guard here against concluding that one people has the monopoly on cruelty: in English law, for high treason, a person sentenced to death was to be hanged; before he died, his entrails were to be pulled out and burned before his eyes. Then his head was to be separated from his body, which was to be divided into four parts and presented to the king. In practice, however, the executioner let the hanging do its work before proceeding to dismember the body.[195]

The people of New France had scarcely been exposed to the brutality of French criminal law: There were no *lettres de cachet*, the use of torture was extremely rare (three cases between 1712 and 1748, or less than 1% of cases), as was the wheel (three cases out of thirty-eight death sentences in this same period.)[196] One therefore searches in vain for expressions of admiration consequent upon the introduction of English criminal law. Nor were there any complaints about it, unlike the situation with regard to the civil law. Of course, the grand jury made liberal use of its right to throw off bills of indictment presented by Crown prosecutors, which could have come as a surprise for observers accustomed to the secrecy of proceedings prevalent in French law. However the former system insured a better protection against unsubstantiated charges; the king's attorney generally dismissed vexatious complaints without ever informing the accused. In contrast, after 1764, some individuals in this situation were detained for several months until they were acquitted after a trial.[197]

Also, proceedings and trials were conducted in English, which meant that depositions had to be translated; this must not have played in favour of the new system. Proportionally, it seemed that far fewer francophones brought charges than anglophones. Finally, far more often than in New France, judges were obliged to impose the death penalty. The grand jury and the petit jury tempered this severity. The former could refuse to indict, while the latter could acquit the accused or find him guilty of a less serious offence. In addition, the accused could be pardoned by the governor.[198] All things considered, the percentage of executions seems to have been the same in certain regions of England, New France and Quebec.[199]

But there is no basis for asserting that, in the eyes of contemporaries, the English criminal law was manifestly "milder" than the French one. Of course today, the absence of torture and the trial by jury seem notable advances. But the vast majority of the population was not in a position to make an enlightened comparison of the two systems. Moreover, in Quebec, jurists seem to have endorsed the thesis of Marriott, for whom the application of English criminal law was an unavoidable consequence of British sovereignty.[200] British administrators, for their part, did not hesitate to draw conclusions for the settlers. In the end, their opinion found its way to section 11 of the *Quebec Act*:

> And whereas the Certainty and Lenity of the Criminal law of *England*, and the Benefits and Advantages resulting from the Use of it, have been sensibly felt by the Inhabitants, from an Experience of more than Nine Years, during which it was uniformly administered ; be it therefore further enacted by the Authority aforesaid,

> That the same shall continue to be administered, and shall be observed as Law in the Province of *Quebec*, as well in the Description and Quality of the Offence as in the Method of Prosecution and Trial ; and the Punishments and Forfeitures thereby inflicted to the exclusion of every other Rule of Criminal law, or Mode of Proceeding thereon, which did or might prevail in the said Province before the year of our Lord One thousand seven hundred and sixty-four […].[201]

3. The Evolution of the Penal Law from 1774 to 1892

Under the terms of section 11 of the *Quebec Act*, the Legislative Council was authorized to amend the rules of English criminal law. However, any ordinance authorizing a punishment greater than a fine or imprisonment for three months had to be approved by the king rather than by the governor.[202] The rules of the game seemed straightforward: English criminal law applied, subject to any amendment contained in a local ordinance. In practice, the reception of the English system caused problems. Thus, the wording of section 11 seemed to refer to the rules in force in 1764, since English criminal law was to "continue to be administered" . But section 4 of the *Quebec Act* repealed the *Royal Proclamation* and all the ordinances made under its authority. Thus, it could be argued that only the act of 1774 effectively introduced English law. A Quebec judgment accepted this interpretation.[203]

Besides this problem of date, it was still difficult to determine whether an English statute that preceded the date of reception could be applied in the colonial context. For instance, in Quebec, the English statutes governing vagrancy and those governing the selection and qualification of jurors were not received.[204] Similar problems surrounded the writ of *habeas corpus*. From 1777 to 1782, some Quebeckers discovered that this remedy was not among the "benefits" and "advantages" of the English criminal law as applied in Quebec. In 1777, Chief Justice Livius disputed this interpretation; it was partly for this reason that he was dismissed soon after by Governor Carleton.[205] An order of 1784 formally granted the right to *habeas corpus.*[206] However, it was suspended in 1838. The courts again had to determine whether this writ was part of the English law that had been introduced by the *Quebec Act*. Two rulings answered this question in the affirmative, but were neutralized by subsequent judgments. Judges Bédard, Panet and Vallières de Saint-Réal were then dismissed for having opposed the executive branch of the colony.[207]

From 1774 to 1837, the legislators had little interest in the criminal law. Usually, he was content to reenact British statutes, often with a delay of a few years; in general, the new acts were intended to reduce the number of crimes punishable by death, which was quite high in the 18th century.[208] In 1836, the right to be represented by a lawyer was finally granted to persons accused of having committed a felony; previously, some ten bills voted by the Legislative Assembly had been rejected by the Legislative Council.[209] On the other hand, an English statute of 1731 remained in force. It required the use of English in “all Proceedings . . . which concern Law and the Administration of Justice” which was held to include legal documents or judgments and hearings.[210] Initially, in Quebec, in criminal matters, trials were therefore conducted in English; over time, this requirement applied only to the indictment.[211]

As for the common law, very few measures were taken to make this system more accessible to francophones. It is true that a translation of Blackstone was available in Quebec as of 1784.[212] The works of Joseph-François Perrault provided some rudiments of criminal law, but they were not likely to clear up the confusion that probably reigned at that time.[213] It was not until 1842 that a well-written introductory work was published.[214] The translation of common law terminology also represented a formidable challenge. It led to the creation of barbarisms borrowed from the English, for example, "*indictement*" instead of "*acte d'accusation*" (indictment) as the former was supposed to be of French origin![215] The words "*assaut et batteries*", which mean respectively a military assault and a violent fight or more commonly a set (of guns, pots etc.) were used for assault and battery, instead of "*agression et voies de fait*"; "*les quartiers généraux de la paix*", which translates as "general headquarters of the peace", referred to quarterly sessions; finally, the term "*burglarieusement*" (burglariously) eloquently attested to the specificity of the vocabulary of the common law.[216]

Despite these linguistic difficulties, francophones had an extremely favourable view of English criminal law, and never demanded its abolition. The French Revolution doubtless had something to do with this. The creation of a parliamentary system and the introduction of trial by jury in France undoubtedly cast in a favourable light the English institutions that existed or were introduced in Lower Canada. Also, the execution of the king and the Reign of Terror helped to turn away from the Republic the province's inhabitants. Throughout the 19th century, Quebec legal scholars could not find terms strong enough to vaunt the merits of the system that eventually was retained in 1774.[217]

The *Act of Union* of 1840 united into a single province Lower Canada and Upper Canada, which became Ontario in 1867; in this colony, the date of reception for English criminal law was 1792.[218] The fact that the criminal law of the two colonies was of English origin made its unification possible within the United Canada. In 1841, the new legislature enacted for the whole province certain statutes of British origin that had had already been introduced in Upper Canada. Thereafter, statutes concerning the criminal law applied to the entire province. In 1859, the statutes applicable to both sections of United Canada were consolidated. This compilation signalled progress compared to the previous situation. It contained an updated version of the criminal laws, which were organized according to a general plan. Inspired by the consolidations of the Maritime Provinces and some American states, it marked a break with the style used in drafting British statutes. These consolidations had no counterpart in England; to some extent, they may have prepared minds for a codification. Throughout this period, the common law continued, however, to supplement legislation, in terms of both the definition of offences and defences.[219]

In 1869, the federal Parliament enacted the first statutes concerning the criminal law. They reproduced, with some minor reworking, a series of British enactments adopted in 1861. The government of the day wanted to avoid favouring the criminal legislation of Nova Scotia, New Brunswick or United Canada. According to John A. Macdonald, the imposition of a uniform criminal law would strengthen a sense of Canadian identity. The English statutes offered him a ready-made solution. They also allowed Canadian judges to take advantage of the English cases in which they were discussed, which were relatively abundant. But they were a step backward from the standpoint of legislative draftsmanship. The sections were lengthy and wordy; some of these acts contained special rules of

procedure. The Canadian changes made to the English statutes were sometimes awkward. And so the flaws that had been eliminated or reduced by the legislative consolidations of United Canada or the Maritime Provinces reappeared. Consequently, the laws of 1869 were frequently amended and the volume of criminal legislation grew by leaps and bounds.[220]

4. Criminal Jurisprudence, 1851 to 1891

If one looks at jurisprudence in Quebec, regular publication of the *Lower Canada Reports (Décisions des tribunaux du Bas-Canada)* began in 1850, followed in 1856 by the *Lower Canada Jurist.*[221] Previously, the work of George O'Kill Stuart contained just one criminal case,[222] and one extradition case.[223] In the 1850s, law report editors seemed to become more interested in the criminal law; in 1852, they even reproduced the proceedings of a trial and some commentaries that had appeared in the newspapers.[224]

Since 1842, the judges of the Court of Queen's Bench were to preside over criminal trials and hear appeals in civil matters. They also constituted a "court of error." As such, they collectively ruled on motions to quash a conviction.[225] In this context, the causes of error had to appear on the face of the record, which did not contain a transcript of the evidence or the judge's notes.[226] Also, the Superior Court could be asked to control lower courts judgments through *certiorari;* here again, the record before it was very incomplete.[227] In 1857, a new procedure was created. A Queen's Bench judge could refer to his colleagues questions that arose during a trial over which he was presiding. These questions were said to be "reserved," and were stated in a written report.[228] This system was of English origin; in that country, it had been put in place in 1848.

In order to assess the state of the law before the codification of 1892, we made arrangements for the reproduction of the criminal cases published in Quebec from 1851 to 1891, and added the judgments contained in the *Supreme Court Reports* published from 1877 to 1892. These decisions were rendered as a result of various remedies which sometimes exceeded the scope of the criminal trial and included judicial review, *habeas corpus* petition, or even extradition proceedings. The sample does not seem to be absolutely complete, but it is large enough to draw some conclusions. To this end, the cases in which no reasons for judgment appear have been excluded, leaving only those where the judges expressed an opinion; in the Court of Queen's Bench, several of them usually did so. Finally, we tried to ascertain if the accused was francophone; if he was anglophone, it was of course perfectly legitimate for the judges to express themselves in English.

A first observation concerns language. We counted thirty-eight cases between 1859 and July 1, 1867; of these, seventeen of the accused had a French-sounding name, but it is important to remind ourselves that this subjective assessment often is erroneous. Nonetheless, in these cases, only two opinions were in the French language.[229] It is true that under the terms of an English statute of 1731, court proceedings and pleadings had to be in English; in practice, judges eventually allowed pleadings and depositions to be made in French.[230] Did the judges believe that this statute applied to their reasons? This is a

possibility. A statute of 1849 authorized the use of French in civil proceedings; it said nothing about the language of criminal proceedings.[231] Be that as it may, the law of 1731 was repealed by section 133 of the *Constitution Act, 1867.*[232]

For the years 1867 to 1876, we examined seventeen lower court cases. Six of them seemed to involve a francophone; only one opinion was written in French.[233] In the Court of Queen's Bench, eleven judgments were selected; five applicants were probably francophones. A single judgment was published entirely in French; to our knowledge, two of the judges who gave their opinion had never used French in another case.[234] It is therefore likely that this judgment was translated by the editor. In two other cases reasons were written in French, notably by Mr. Justice Jean-Thomas Taschereau, who sat on the Court of Queen's Bench from 1873 to 1875, then on the Supreme Court from 1875 to 1878.[235] The derisory number of decisions published in French—four out of twenty-eight—must be considered along with the fact that, prior to 1876, the percentage of francophone lawyers acting in criminal cases was much lower than their proportion within the Quebec Bar.[236] For the years 1877 to 1891, thirty-nine lower court decisions were studied, including twenty that, on the face of it, involved a francophone. In this context, seven sets of reasons were written in French. In the Court of Queen's Bench, thirty-five cases were heard, of which only ten seemed to affect a francophone. In this case, three individual opinions and one anonymous opinion were written in French. In other words, even at that point, the jurisprudence of the Court was virtually all written in English, while more and more lower court decisions were being written in French, though these cases were still largely in the minority.

Moreover, francophone judges contributed to this under-representation. In the Court of Queen's Bench, in decisions rendered in criminal cases, Chief Justice Duval (1864-1874) used French only once, and the report may have been composed by the editor.[237] Antoine-Aimé Dorion, who was chief justice from 1874 to 1891, used only English. While his outstanding ability is not in question, it is a pity he did not use it to add to the documentation in French. Mr. Justice Henri-Elzéar Taschereau, who sat on the Supreme Court from 1878 to 1906, also wrote the vast majority of his (published) reasons for judgment in English, regardless of the area of concern. The same is true of the works he published on criminal law.[238] In contrast, Mr. Justice Fournier did not hesistate to express himself in his mother tongue.[239]

In another vein, the attitude of Queen's Bench judges towards the common law is sometimes surprising. Throughout his career, Mr. Justice Mondelet always showed considerable independence of mind.[240] It is therefore not surprising to note that, unlike his colleagues, he had little patience for the absence of precedents. In three dissenting opinions, he pointed out that these necessarily derived from a new decision, however remote it might be.[241] In another dissenting opinion, he stated that he had more respect for principles and justice than for precedents.[242]

Some judges made a distinction between the rules of common law that dated from the time the English criminal law was received in Quebec and the English decisions that had subsequently modified these principles. They did not consider themselves bound by these modifications.[243] Mr. Justice Ramsay stated that in order to be followed, precedents must be consistent or form a trend of indisputable authority.[244] Others accepted the local practice.[245] Mr. Justice Monk even went so far as to rank the contradictions and reversals of

English jurisprudence as "some of the strangest judicial aberrations on record," which explained why colonial judges did not always bother to follow them.[246]

Other judges attached much more importance to English decisions. In their minds, a statute of Lower Canada similar to an English statute could not confer a broader discretion on judges.[247] For others, the English criminal law received in 1774 included the practice followed at that time.[248] Chief Justice Dorion based his refusal to follow a ruling of his own court on English precedents and authors; Mr. Justice J.-T. Taschereau did not consider himself bound by a decision taken by a majority of one.[249] In general, a number of judges refused to admit that the jurisprudence of their court might deviate from that of England.[250]

As might have been expected, the higher courts of appeal approved of this second trend. The main rulings of the Court of Queen's Bench that were critical of English jurisprudence were overturned or disapproved of by the Supreme Court of Canada. However, the judges did not comment on the proper weight to be accorded to these decisions from across the Atlantic.[251] In the Supreme Court, some judges felt bound by a decision in which they had expressed a dissenting opinion.[252] A single English decision was sometimes considered conclusive.[253]

In 1890, three judges stated that faced with two identical statutes, English jurisprudence was to be followed;[254] but their three colleagues were not persuaded by this argument. Moreover, some judges cited the works of James Fitzjames Stephen,[255] and the reports relating to the draft English criminal codes.[256] While not very common, these citations show that these texts had a certain authority in Canada.

The Privy Council refused to accept that the uncertainties and contradictions of jurisprudence allowed judges to form their own opinion. According to Sir R.P. Collier, "all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been, if properly understood."[257] It was therefore not necessary to assess whether these judgments had moved away from the rules followed when English criminal law was introduced in Quebec.

The attitude of judges towards foreign doctrine evolved over the period in question. In 1860, four judges of the Court of Queen's Bench vehemently protested when a lawyer cited an American author. According to Chief Justice LaFontaine, the government could refuse to execute an accused who had been convicted on the basis of such works! Only Mr. Justice Meredith showed common sense. He stated that in the absence of positive law, when the opinions of English judges were conflicting, he was not disposed to exclude the reasoning of such able jurists . . . particularly as his colleagues consulted these authorities in their chambers.[258] This judicial hostility did not last: from 1867 on, judges cited American authors and decisions.[259] To do so, they obviously required that American law and Canadian law be similar.[260]

The situation was different with respect to French criminal law. Chief Justice Duval refused to even consider its rules, as well as those of European countries or the thirty-one American states; for him, foreign law simply had no place in criminal cases.[261] Mr. Justice Drummond went further: in his view, in a statute of United Canada, the term "bailment" (the

civil law equivalent is “deposit”) was to be given the meaning it had in English law; Mr. Justice Aylwin, dissenting, relied on the civil law principles of Lower Canada.[262] In one nuisance case, lawyers complained that the presiding judge had cited a Latin civil law maxim in his charge to the jury. Mr. Justice Aywlin responded that this maxim was also used by common law judges; for him, it was no more Roman than English.[263] The civil code was even cited at times,[264] as was Demolombe, although this is doubtless evidence of the difficulty encountered by a judge not very familiar with the criminal law.[265]

By way of comparison, it is instructive to examine a case in which a municipality was prosecuted for damages caused by police officers during an unwarranted arrest. Justices Caron, Drummond and Monk relied on the principles of the civil law and found the city liable. In his dissenting opinion, Chief Justice Duval favoured the application of the English law to dismiss the action; Mr. Justice Badgley also dissented, but based his opinion on both systems.[266] As a rule, judges therefore showed no hostility towards the civil law. However, no mention is made of the French criminal code of 1810 or of the literature pertaining to it. The wound inflicted in 1760 had therefore healed and there was no thought of opening it up.

On a number of occasions, judges proved fairly critical of the specific characteristics of Canadian legislation. Usually, technical reasons were given.[267] Some dismissed the French version of the enactment, on the ground that the English version reproduced a British statute.[268] Even the consolidation of the federal laws posed problems. Thus, someone was charged with having committed an offence contained in a chapter of the consolidated statutes. This infraction, however, needed to be completed by a definition that was to be found in another chapter. An acquittal was therefore entered by the court.[269]

Judges' comments sometimes were more problematic. Thus, a Canadian statute ordered husbands and parents to provide the necessaries of life for their wife and children; unlike the English statute, it did not require proof of the fact that the life or physical integrity of the dependants had been jeopardized. Mr. Justice Ramsay thought it inconceivable that Parliament would deviate from his English model; in his view, the husband should not be presumed to be in the wrong.[270] The Queen's Bench judges felt obliged, however, to enforce the law, even though they disapproved of it.[271]

The remedies offered after an accused had been found guilty also stirred debate. Thus, if a felony had been committed, a new trial could not be ordered.[272] Subsequently, a statute of 1869 expressly stated that this power did not exist.[273] In the case of a misdemeanour, the judges felt, however, that they could grant this remedy.[274] In Quebec, the system put in place in 1857 was still in force.[275] The judge could therefore refer to his colleagues from the Queen's Bench a question that had arisen during the trial. Moreover, the accused was given the right to challenge his conviction before this same court. However, the federal statute of 1869 imposed a condition not contained in the English legislation: the application had to raise an issue that the trial judge could not have referred, or had refused to refer, to the Court of Queen's Bench.[276]

These provisions posed a problem if an irregularity occurred when empanelling the jury. There was actually an English precedent in which twelve judges were evenly split on the issue of the proper remedy in such a case. Epic debates ensued, culminating in a

decision in which the six Supreme Court judges also were evenly split.[277] The difficulty was as follows: Was the judge obliged to submit to the Court of Queen's Bench the questions concerning the jury selection procedure, or must the accused ask the Court to quash the conviction? In 1888, the Supreme Court decided that events that had occurred after the trial had ended could not be the subject of a reserved question; in that case, after the conviction, it was discovered that a juror had served under his brother's name.[278] Two years later, an accused challenged the procedure followed during jury selection, and requested the quashing of the conviction by means of a writ of error. The Court of Queen's Bench rejected this defence on the ground that this question should have been referred to it by the trial judge. This ruling was upheld in the Supreme Court by a split vote.[279] We might note in this regard that the writ of error was abolished by the *Criminal Code* of 1892.[280]

Of course, the common law sometimes fairly readily allowed certain questions to be settled. Thus, when an indictment identified the victim by a Western name and an aboriginal name, it was sufficient to prove that the victim bore one of these names. In that case the Court applied to the second name the rule concerning indictments in which the true name was followed by the expression "alias" so-and-so.[281] In rape cases, judges considered the right of the accused to question the plaintiff about her sexual relationships indisputable. Some added, relying on English cases, that the judge could allow the witness to refuse to answer the question.[282]

The brief analysis just presented does not cover a good many issues, such as the study of specific offenses, defences or general principles of the criminal law. It also does not examine the use of this system by the establishment and the elite, or sexual offences. Finally, it is limited to the case of Quebec. Nevertheless, in this limited context, some observations concerning methodology can be made. First of all, in Quebec, judges specialized in the criminal law, even those of francophone origin, expressed themselves mostly in English. Documentation in the French language was accordingly limited, which created a psychological barrier for those wishing to work in French. Then, some Quebec judges—all anglophones—seemed prepared to deviate from English jurisprudence, which they criticized as uncertain and random. They soon encountered opposition from their colleagues and the Supreme Court of Canada or the Judicial Committee of the Privy Council. With the exception of one isolated ruling, American doctrine was generally well received, while French doctrine did not seem to be taken into consideration. The works of Stephen and the reports of commissions charged with codifying the English criminal law were occasionally cited. Finally, several cases concerned questions of procedure or arose from the flawed drafting of federal statutes.

All of these factors were, in a way, conditions necessary but not sufficient for the codification of Canadian criminal law. The conditions in which this process was carried out therefore have still to be examined.

C. The Codification of 1892

The idea of codifying Canadian criminal law is not new (1). Codification itself gave rise to many comments during the 19th century (2) which cleared the way for the

codification of 1892 (3). Since then, the common law has continued to play a fundamental role, which may be an obstacle to attempts at recodification (4).

1. The First Plans to Codify the Criminal Law

As early as 1769, Francis Masères advocated the drafting of a code to properly inform the people about the law being applied in Quebec. This idea, however, seemed quite ahead of its time and was not implemented.[283] At that time and later, the English term "code" had another accepted meaning. It often designates a heteregenous set of laws applied in a given area, especially in criminal law.[284]

In 1847, an anonymous author called for the codification of the law of Lower Canada. While most of his remarks concerned the civil law, he did not ignore the criminal law: concerning "the criminal code, it can be said that the salutary statutes introduced by the Honourable Mr. Black, have provided the main outline of the reform to be carried out" [translation], namely, codification.[285] This may, however, have meant a series of statutes rather than a true codification. The idea nevertheless seems to have been in the air. In 1850, William Badgley submitted a bill for codification of the criminal law and a draft code of criminal procedure. These texts drew on the reports submitted by the commission set up by Lord Brougham in England, as well as on the legislation of the Maritime Provinces and other American States. This member of Parliament from Lower Canada was sitting in the Opposition. He wanted his bill printed and distributed to the members of the bar and the judiciary in order to have it debated during the next session. The House passed a motion to this effect, prompting a brief debate. Louis-Hippolyte LaFontaine, the attorney general of Lower Canada, refused to approve the principle of the bill, as members of Parliament did not have enough time to read it in advance. Robert Baldwin, the attorney general of Upper Canada, stated that the government was not ready to take a position on the wisdom of codification. In his view, where it had been adopted, this measure did not always meet with the success that had been hoped for. Another member of Parliament from Upper Canada, Henry Smith, was in favour of codification, as were Louis-Joseph Papineau and the solicitor general of Lower Canada, Lewis T. Drummond.[286]

The following year, Mr. Badgley resubmitted his two bills. On June 30, 1851, the House agreed to their second reading. A committee was formed to study them. It consisted of Badgley, the solicitors general of each province, Drummond and Macdonald, and House members Macdonald, Cameron, Smith, Chabot, Richards and Ross. On August 8, a brief report was presented to the House, stating that insofar as local conditions made it possible, the legislature had always tried to ensure that the laws of United Canada were consistent with those of Great Britain. The committee went on to say:

> The body of this Law in this Province is composed of a vast collection of subsisting as well as obsolete but unrepealed statutory enactments, and of Judicial opinions frequently conflicting, requiring great and laborious research and study for their discovery and comprehension, even by its Professors, and to the same degree difficult to be known by the large class of official persons who are called upon to carry out its requirements, whilst it is utterly unknown to the great mass of the people who are subject to its penalties.

> (...)
> Your Committee do not consider it necessary to advert to the admitted advantages of the assimilation of the Law, and its administration throughout United *Canada*, or of the perfecting of such a Code as much as possible in its details.

The committee did not recommend the immediate adoption of the two bills. Rather, it suggested that they be revised by a commission of government-appointed experts charged with giving its opinion and proposing changes; a similar commission was to see to the consolidation of statutes. On August 29, a motion to this effect was passed.[287] In practice, however, it was not until 1856 that the consolidation commission was established; no commission was ever created to study Badgley's bills. The fact that a parliamentary committee considered them is nevertheless significant. It shows that the idea of codifying the criminal law was favourably received. Of course, a group of jurists would eventually have been charged with studying the matter more closely; in the end, it might have issued a negative opinion. But it must be remembered that at the time, codification seems to have had the wind in its sails.[288]

In Montreal, the debates of 1851 drew the attention of Maximilien Bibaud, who had just founded a law school. He submitted to the journal *La Minerve* a critical review of the Badgley Code (*Revue critique du Code Badgley*) which appeared in several issues. Very independent of mind and an ardent Catholic, he took the opportunity to point out the qualities of the Roman law and of criminal law of several European countries, without closing his eyes to the abuses that may have occurred in France's *Ancien Régime*.

Bibaud could sometimes be progressive. He emphasized that in trials for rape or adultery, women "well born" [translation] endured the unwholesome curiosity of the public.[289] Badgley's bill proposed punishing drunkenness, as opposed to the offence committed in a state of drunkenness, unless the offence was premeditated.[290] It imposed the death penalty only in cases of murder.[291] Bibaud approved both these suggestions. However, he thought imprisonment far too severe for a crime against nature "at least when there is no bestiality"[292] [translation]. He maintained that the State "is obliged to feed those who are hungry, or to obtain work for them"[293] [translation]. He deplored the sometimes absurd severity of English statutes which were designed to protect the interests of owners,[294] while acknowledging that the situation had improved in England and United Canada.

Bibaud protested against "too slavish an attachment to certain maxims of the old common law" [translation], and was concerned about the small number of statutes reforming the criminal law.[295] He criticized several provisions of the Badgley draft. If they were adopted, "Canadians themselves would soon have to blush at our first attempt at codification where antinomies are the necessary outcome of the complete lack of order"[296] [translation]. In his view, a commission of several jurists should study the matter. We have seen that this solution was adopted by the parliamentary committee that reported on these bills on August 8, 1851. Bibaud also wanted a close examination of the law of the countries of Continental Europe. In conclusion, he clearly favoured a code of the civil law type:

> [Translation] A defect of our modern legislation and that of Canada in particular, is that they are too specific, too detailed. They foresee less in their desire to foresee more, they do not lay down, they avoid laying down principles, content to settle

> everything, and to bend all to mandatory provisions, and often substituting for these principles, which are elusive, needless rigour. I ask is this not the nature of English legislation?
>
> When it is necessary to strip the new principle of a special provision to decide unforeseen cases, one emerges uncertain from this quest, from this difficult search. The legislature itself, failing to express the principles, has merely badly understood iis provision. How can it be thought that the lacunas will not multiply, if no generative principle is brought to light?[297]

2. The Perception of Codification Prior to 1892

The debates about codification were not confined to Lower Canada. In the United States, some have spoken of a full-blown "movement" in favour of this reform. In 1826, the lawyer Edward Livingston submitted to the Louisiana legislature a draft code, but it would not be adopted; he stood apart from the other codifiers in proposing the abolition of the death penalty.[298] In other states, the idea of reducing into writing the rules of the common law aroused the hostility of many lawyers. Legislators ended up consolidating their legislation in order to simplify its often verbose phraseology. Through a kind of perverse effect, after this success, pressure to codify the common law dwindled.[299] However, in 1847, the constitution of the State of New York was amended. Judicial procedure was to be reformed; moreover, commissioners were to prepare a code covering all or certain parts of the law of this state. The code of procedure was drafted by three commissioners, including the famous David Dudley Field; it became law in 1848. Made up of brief and very general articles, it was to be amended every year, perhaps because of hostility on the part of practitioners. It was repealed in 1877; by that year, its volume had increased nearly tenfold since 1848. This unfortunate experience would often be cited by those who opposed codification.

For the general codification of the law of New York, the commissioners who had been appointed in 1847 for a two-year term were unable to submit a draft. A statute appointed their successors, but it was repealed in 1849. In 1857, another statute provided for the appointment of three commissioners who were to work for free. One of them was David Dudley Field. At virtually the same time, an enactment decreed the codification of the civil law of Lower Canada.[300] The New York commissioners were to submit their draft to those responsible for the administration of justice before tabling it in the legislature. They completed their work in 1865, having produced a draft political, criminal and civil code. Only a portion of the criminal code was adopted in 1881, but some western states, notably California, adopted the civil code[301], which had been approved twice by New York legislators before being vetoed by the governor.[302]

The legal peridocials of United Canada, which have been examined in detail by Joanie Schwartz, devoted several articles to the debates surrounding codification.[303] Some jurists of Upper Canada were very well acquainted with the New York initiative.[304] By all appearances, they were also aware of the opposition of English judges to the draft code submitted in 1854. One article published in 1858 attacked head-on the idea attributed to Bentham: it was utopian to expect that a pocket code whose meaning would be apparent to

everyone could be drafted. As proof, the five codes of France had been amended often, not to mention the many laws enacted annually. Moreover, numerous commentaries were published (mentioned here are Touiller, Traplong [sic], Paillet, D'Auvilliers and Teulet). The author wondered what was the advantage of codification. In his opinion, a code could never have the "elasticity" and "omnipotence" of the common law. Moreover, codification was a dangerous experiment, since the wording of existing statutes would be modified. In fact, there was a risk of creating more obscurity and uncertainty than before! Even the consolidation of statutes was a questionable endeavor.[305] The following year, one author asserted that it would be absurd to expect to put an end to the evolution of legislation by adopting a code.[306] On the other hand, the utility of a consolidation was admitted, notably because of the overly elaborate phraseology of statutes.[307]

In another article initially published in England, one can read that: "[w]here the unwritten law is settled, a code is not wanted; where it is unsettled, the formation of a code would be impracticable."[308] While the utility of the codification of the civil law of Lower Canada was not questioned, the codification of the common law was deemed impossible and risky.[309] Apparently these jurists had no idea that French legislators had deliberately chosen general formulas in order to leave to the judge all the desired latitude. At that time, the author of the editorials in the *Upper Canadian Law Journal*, James R. Gowan, was in favour of a consolidation of statutes, but he opposed codification.[310] A decade later, we will see that he had come to support codification of the criminal law.

Law books published prior to 1892 did not seem to discuss codification of the criminal law.[311] Thus, while they did not hesitate to refer to French doctrine, Raoul Dandurand and Charles Lanctôt remained silent on this question.[312] It is therefore necessary to turn the legal periodicals.[313] In 1874, in addressing the grand jury of the district of Richelieu, Mr. Justice Thomas Jean-Jacques Loranger called for the codification of the criminal law. After pointing out the deplorable state of the legislation and the uncertain nature of the rules of common law, he stated: "the criminal law, like the civil law, must be known by everyone, and like the civil law it will never be popularized unless it is codified"[314] [translation]. In his view, codification of the criminal law was to francophones what codification of the civil law and of procedure was to anglophones in Quebec.[315] From 1879 on, the journal *Legal News* published several articles on the English and American codification bills. In 1880, one author quoted Stephen, who felt it would be extremely beneficial to codify the rules of the common law, and went on to say that despite its imperfections, the *Civil Code of Lower Canada* had amply proven its utility.[316]

J.B. Miller, a New York author, believed that codes had destroyed the natural law of the inhabitants of European countries; in his view, if they became accustomed to the forms of the common law, they would find that it was better suited to their needs. The editor of *Legal News*, a Quebec periodical, responded as follows:

> If Mr. Miller cares to have our experience of a Code, it may be given in two words,- that in spite of all the dissatisfaction and complaint which its defects and errors have excited, and reference to which may be found scattered through many judicial decisions, we have, nevertheless, found it useful ; we cling to it, and would not willingly be without it.[317]

The idealistic arguments of some supporters of codification were quickly condemned. Various authors reminded their readers that after the adoption of a code, citizens still needed to rely on lawyers; that problems of interpretation continued to surface; that law reports were published; that reversals of jurisprudence could occur; and that, at first glance, the number of lawsuits did not appear to be declining.[318] An editorial in the *Canada Law Times*, in all likelihood written by the publisher, Douglas Armour, summarized this position as follows:

> Without denying that many beneficial results must certainly flow from codification where codification is practicable we do not think that those most desirable ends, certainty, cheapness, convenience, and universal knowledge of the law, will ever be attained by simply codifying the law.[319]

Ontarian jurists acknowledged, however, that the common law was often confused or contradictory and that the wording of statutes left much to be desired.[320] They therefore felt somewhat ambivalent about codification. Thus, in 1884, the tabling in the Senate of a draft criminal code prompted a curious comment: the adoption of this text would be a beneficial measure, as the Canadian law, as far as possible, should be identical to that of England, so that the jurisprudence of that country would continue to receive application. The author therefore assumed that England would pass such a bill, which seemed quite unlikely in 1884.[321] If one extends the logic of this argument, Canada should have refrained from codifying the criminal law until England did so. In 1890, on learning that a draft criminal code was in preparation, one author expressed scant enthusiasm: its adoption might be desirable, he wrote, provided Parliament did not continually amend it thereafter.[322]

While these authors were divided with regard to a general codification of the private law, they remained favourable to the adoption of thematic codes, such as the one enacted in Great Britain governing bills of exchange.[323] On this subject, a Quebec author wrote perspicuoulsy that "some of the statutes which exist in countries not under code rule, are in fact sections of a code."[324] The commentaries published in Ontario therefore acknowledged that codification had its advantages, while pointing out that it did not eliminate the disadvantages attributed to the common law; they seem to have admitted the existence of the latter.

In 1893, the *Canada Law Journal* stated that the *Criminal Code* of 1892 was not perfect, as "[t]he age of miracles is past." The author nevertheless felt a sense of pride which he thought could be shared by the entire country.[325] The evolution of the thinking of Ontario jurists could not be better summed up: resolutely hostile in the 1850s, they were prepared to recognize the merits of codification in the 1880s. This balanced view of codification, fuelled by the American debates and the Quebec experience, most likely paved the way for the adoption of the *Criminal Code, 1892*.

3. The Adoption of the Code of 1892

One of the initiators of the plan to codify the criminal law was Mr. Justice James R. Gowan, on whom John A. Macdonald often relied to draft bills; he was named a senator in

1885. In 1871, Gowan met in England with Robert Wright, who had written a draft criminal code for Jamaica, and with the daughter of Edward Livingston, a Louisianan who had also written a draft code. He also served on the Royal Commission that investigated the Pacific Railway scandal of 1873 with Charles Dewey Day, one of the three commissioners that drafted the *Civil Code of Lower Canada*. In Canada, after the Conservatives returned to power in 1878, the minister of justice undertook first to consolidate the federal statutes. In this context, the deputy minister of justice, George Wheelock Burbidge, prepared in 1884 a draft criminal code which appeared in the report on the consolidation of statutes tabled in the Senate. In 1889, Henri Elzéar Taschereau, a renowned criminal jurist and a Supreme Court of Canada judge, in turn offered to prepare a code. The minister of justice, John Thompson, may have feared that he would thus be deprived of the credit for this initiative.[326] On October 29, 1890, Thompson wrote to the judges announcing that he intended to table a draft criminal code; he asked them to state whether they were in favour of abolishing the grand jury. In Quebec, Mr. Justice Bourgeois seized the opportunity to state tersely that the "codification of our criminal laws as suggested in the circular is very desirable"[327]. In 1891, a draft code was widely distributed; several proposed changes were then sent to the minister.[328] The decision to codify stirred no opposition; at times, it was even described in laudatory terms.[329]

At the time, the department of justice had some ten employees, only one of whom was francophone; an anglophone jurist had also been educated in Quebec.[330] The influence of civil law specialists therefore seems to have been negligible. According to professor Desmond Brown, Thompson was surrounded by supporters convinced of the need for codification, who did not wish to trail behind England in this area: they were Burbidge, who had been appointed to the Exchequer Court, Senator James R. Gowan,[331] the clerk of this court, Charles Masters, and the new deputy minister of justice, Robert Sedgewick. In 1890, this group drafted a bill that was tabled in the House of Commons in 1891. However, it could not be debated before the end of the parliamentary session. Thompson tried again in March 1892. A joint committee of the Senate and House of Commons was formed. The Commons then studied the report of this committee. After the adoption of the text by the Senate, royal assent was given on July 8, 1892. The *Criminal Code* came into force on July 1, 1893.[332]

Thompson's group seemed to have learned some lessons from the failures that had occurred in England. Thus, all offences created by British statutes were repealed, except those that were made expressly applicable in the colonies by the imperial legislature.[333] The new code defined the crimes and offences that were dealt with by way of summary conviction proceedings, as well as the rules of procedure applicable in this event. Unlike the English drafts, the Canadian code contained no provision repealing en masse the rules of common law; it expressly preserved those that provided a defence, a justification or an excuse.[334] James Gowan wished to codify the latter but considered it more prudent to stick to the text of the English draft.[335]

Usually, the drafters echoed the provisions of the bill of 1880, which had first been written by Stephen in 1878 before being revised by a commission of judges in 1879. Towards the end of the parliamentary debates, Senator Power discovered, however, that some changes made to the English text had not been brought to the attention of the members of the joint committee of the Senate and House of Commons. But the matter went

no further.[336] For the rest, the code often repeated the provisions of Canadian legislation. If one includes the sections that were written or amended in Canada, Brown estimates that 75% of the code did not come solely from English law. In his opinion, Thompson did everything possible to deflect attention from this fact.[337] Robert Sedgwick had quite a different view. In a confidential, and therefore presumably credible, memorandum to Thompson in 1893, he reminded the minister that “you know how careful we were, as well as before the Joint Committee as in the House to point out any change made by the bill, either in the common or in the statute law.”[338] In actual fact, the bill of 1880 restated several provisions that had been enacted in England in 1861 and adopted in Canada in 1869. In this regard, it was more like a consolidation than a modification of the law.

Thompson dropped very quickly a controversial part of the bill which would have granted the accused the right to testify, which was denied him by the common law at that time. This change was made the following year, just before the new code came into force.[339] In England, it was not until 1898 that the accused was granted this right, notably because of opposition from Irish members of Parliament.[340]

The debates of the House of Commons were marked by their seriousmindedness; Wilfrid Laurier called for a full reading of each section.[341] Besides Thompson and Laurier, the main protagonists were David Mills and Louis Davies, who would later be ministers in Laurier's government and judges on the Supreme Court of Canada, as well as Thomas Mulock, who would also be a minister in this same government before being appointed to the High Court of Justice for Ontario, and becoming the chief justice of that province. Thompson proved to be a fine tactician. He tried his best to respond to the critics, if possible by recalling that the British parliamentary commission was made up of distinguished judges. When he did not manage to defuse the criticism, he sometimes agreed to amendments proposed by the opposition. If this was not possible, he set aside the disputed provision so that common ground could later be found.[342]

By way of illustration, some Maritime members of Parliament were concerned about the scope of one offence, obstructing a public official in the execution of his duty, which was punishable by ten years imprisonments. In their view, this should not protect all public officers, for example those in the department of fisheries, who could seize, without prior authorization, the nets and boats of fishermen. Mulock declared that this was a case of "bureaucracy gone mad.[343]" In the end, the definition of public official was changed.[344]

As a rule, francophones seldom intervened. A legal scholar as eminent as François-Charles-Stanislas Langelier spoke only once. He asked whether the provisions governing the provincial courts fell within the jurisdiction of the federal parliament.[345] The session of June 24 was, however, an exception to the rule: Joseph-Adolphe Chapleau and Joseph-Aldéric Ouimet, both of whom had argued criminal cases, criticized a section that allowed the judge to interrupt a trial before jury if the accused was caught off guard. Wilfrid Laurier did not deem it desirable to move ahead of England on this question; in fact, all but one member present found this innovation unnecessary. In the end, the idea was dropped.[346] Also, the member Choquette asked that Ontario's francophones have the right to be tried by a mixed, bilingual jury made up of six anglophones and six francophones, as was the case in Quebec and Manitoba.[347] Thompson replied that these francophones "speak better English than some of their neighbours". Besides, if there were many in the region, they

would be represented on the jury. In any event, in the other provinces, trials were to be conducted in English.[348]

The justification of the bill proposed by the minister was fairly brief: it consisted in vaunting the merits of the work done in England by the authors of the bills of 1878 to 1880, underlining that they had attempted to simplify the law and eliminate obscurities and technical vocabulary. Thompson explained that the code would replace all statutes creating offences without, however, doing away with the common law. This would preserve the elasticity which was so dear to the opponents of codification. The minister then described the most important changes contained in the bill, notably the elimination of the term "malice" and of the distinction between crimes and misdemeanours, the replacement of the term "larceny" with the word "theft," and the granting to courts of appeal of the power to order a new trial. The idea of abolishing the grand jury, discussed since 1889, was abandoned.[349]

In general, the Liberal Opposition approved codification. However, early on in the debates of the Committee of the Whole, Richard Cartwright refused to adopt a bill that had been rejected by the British Parliament because of its imperfections. Thompson retorted that there had been no opposition to the bill itself. As for Chief Justice Cockburn, he was among those who opposed anything done by anybody but themselves. Wilfrid Laurier then pointed out that the bill would be “transferring our text books into a statute”. Thompson replied that this was not entirely true. Nevertheless, where it had seemed useful to the drafters to set out the law in detail, this had been done. At that point, discussion of the precise wording of the section resumed and the question was shelved.[350]

A similar debate took place on the subject of seditious libel. Louis Davies opposed the whole definition of sedition, in order to allow juries to shape this notion over time. In his view, this is what was meant by the “elasticity of the common law”. The Minister of Justice allowed himself to be persuaded.[351] In 1951, the rejection of Stephen's definition played a decisive role in the acquittal of Jehovah's Witnesses charged with sedition.[352] The provision governing defamatory libel was also criticized. According to Thompson, the bill simply echoed a rule of common law, which judges would continue to apply as they had in the past. Laurier retorted that incorporating the rule into a legislative provision deprived it of its elasticity. Again, the issue was left unresolved.[353]

The debates in the Senate were much shorter. The first reading took place in April; on this occasion, James Gowan gave a laudatory presentation of the draft, underscoring its innovative and unprecedented nature, the very opposite of Thompson's strategy. The joint committee of the House of Commons and the Senate was then set up.[354] It was not until July 4 that the bill adopted by the Commons and sent to the Upper House. Senator Bellerose immediately protested, as the amendments adopted by the Lower House had not been translated. He explained that he was not in the habit of causing problems in this regard, but that he needed the French version to fully understand the meaning of so important a text.[355] Prime Minister Abbott promised that the text would not be adopted until the French version was ready.[356] On July 6, the translation was still unavailable. Francophones agreed, however, to allow the proceedings to begin. Abbott promised to postpone the study of a provision if they wished to see the French text; the translation would be completed before the adoption of the bill.[357] This illustrates just how little importance was generally accorded to this version.

It was at this time that the leader of the Opposition, Richard William Scott, chose to lead an all-out attack on the code. In his view, it would replace the common law and the wisdom and experience acquired over centuries would be discarded. Moreover, on many points, the bill significantly changed the law. During the parliamentary debates, this was the first sustained criticism of the decision to codify. However, Scott had been appointed to the joint committee of the Commons and the Senate that was to examine and improve the bill. He admitted that he did not have the time to take part in its work. This fact reduced the weight of his arguments considerably. In the end, his attempt to convince his colleagues to postpone the study of the bill ended in failure.[358] Several senators, all anglophones, pointed out, moreover, that the adoption of the code was desired from one end of the country to the other.[359]

The debates took place in the month of July, at a time when the parliamentary session had generally come to an end. Senator Kaulbach maintained that he had never heard a speaker read the provisions of a bill so quickly. He asked that they be read clearly.[360] Despite this fact, the debates on second reading lasted barely three days. Nevertheless, the senators found time to oppose an amendment adopted by the Commons. This last-minute change exempted companies that were specially authorized to set up a lottery by a provincial or federal statute from the prohibition against organizing such an activity. In practice, this exception applied only in Quebec, where the lottery of the Société Saint-Jean-Baptiste stirred up a real frenzy. Senator Abbott asked in vain that the will of the people be respected: the exemption was deleted and the Commons were forced to accept this amendment.[361] At a time when it is least expected, the distinct society suddenly makes a brief appearance ...

Throughout the debates, no mention was made of the *Civil Code of Lower Canada*. The private law concepts on which the members of Parliament sometimes relied derived solely from the common law system; this was the case when they considered whether the holder of an easement had possession of this right or whether the interests of a mortgagee needed to be protected.[362] It is quite paradoxical to note that Wilfrid Laurier feared losing the elasticity of the common law while the vast majority of common law jurists uttered not a word on this question. It seems that francophone jurists had little interest in this reform. In any event, they had no desire to challenge the compromise reached with the *Quebec Act*.

In the end, this reform seems to have been carried out with some indifference. This is evident notably from the lack of in-depth discussion in the newspapers. At most, they criticized or praised the bill, without ever stirring any real debate.[363] This should not come as a surprise, as the minister had stressed the fact that the code would not significantly change the Canadian criminal law. As far as we know, it must be concluded that the very few francophones called for codification of the criminal law; in this regard, their particular needs went unmentioned during the parliamentary debates. However, there seems to have been a consensus throughout Canada on the need for this reform, which may have been at least partly attributable to the desire to get out of the confusion into which England's jurisprudence seemed to be sinking. But this criticism of the common law was confined to legal journals and a few judicial opinions. Parliamentarians could not express it aloud without violating what was still a taboo.

By relying on the reputation of certain English jurists, the minister was able to successfully bring about in Canada a reform that had failed in England. In the long term, the code was sure to strengthen the Canadian identity; in the short term, it was presented as a borrowing, even though in actual fact, a fair number of its provisions simply restated the existing legislation.

4. Codification From 1892 to the Present

(a) The Role of the Common Law

In 1892, Mr. Justice Henri-Elzéar Taschereau published a letter to the minister of justice harshly critical of the new code. Besides many inconsistencies regarding punishments, formulation or the plan that was followed, he protested against the incompleteness of the text:

> That our code of 1893 is deficient, in respect of completeness, to a still greater degree than that one in reference to which the Lord Chief Justice [of England] so expressed its views on the essential requisites of a codification, must, it seems to me, be conceded, when it is taken into consideration that, whilst the latter superseded all the common law, the former leaves all of it in force, with, besides, a number of important enactments, scattered over all the statute book. So that, in future, any one desirous of ascertaining what is, on a given point, the criminal law of the country will have to refer first, to the common law, secondly, to our unrepealed statutory law, thirdly, to the case law, fourthly, to the Imperial special statutory enactments on the subject in force in Canada, not even alluded to in the code, and fifthly, to the code.[364]

Taschereau deplored the absence of certain fundamental rules in criminal law, such as the requirement of *mens rea*.[365] Thus far, he had always believed that the codification would be beneficial; now he had some doubts about this.[366]

Taschereau's criticism did not sway the department's lawyers.[367] According to Robert Sedgwick, a code could not contain the whole of the law applicable in a given sector.[368] Moreover, the Canadian Parliament could not amend imperial statutes that expressly provided for their application to Canada.[369] As for common law offences not covered by the code, according to Sedgick they "involve such a breach of moral law that the offender knows when he commits the offence that he is doing wrong and violating the law." What is more, these offences had been deliberately omitted from the code.[370] In some cases, such as champerty and maintenance, it was not deemed desirable to point out the existence of crimes that had become obsolete.[371] In his view, it was desirable that the common law be able to supplement the offences contained in the code[372] It also must continue to provide the accused with defences in unforeseen circumstances:

> It is not every mind that has such a sublime confidence and conceit in its own powers as to feel safe in declaring that a statement of rules of excuses or justification is so complete as to justify the exclusion of the common law.[373]

Sedgwick also pointed out in general that the code was not intended to change the law.[374] Aside from a few drafting errors, he concluded that the judge's criticisms were unfounded.

As everyone knows, after the code came into force, the common law continued to play a fundamental role in Canadian criminal law. It could still be a source of offences independently of any statute.[375] In 1950, the Supreme Court of Canada ruled that only Parliament could create new crimes, as opposed to those which had already been recognized by the common law.[376] When the Code was revised, in 1954, Parliament reformulated section 5 of the code of 1892; it repealed the offences contained in a British statute or a statute that predated the entry of a province or territory into the Canadian Confederation, as well as imperial enactments that extended to British dominions. It also did away with common law offences, with the exception of "the power . . . to impose punishment for contempt of court"; this provision became section 9 of the current code. Moreover, the rules of common law which constituted a justification, excuse or defence remained in force.[377]

The definition of a "defence" has created a controversy. Must we speak of a "defence" each time the accused can argue that the requirements of the relevant section of the code are negated by the evidence? Or is it necessary to rely on a rule that is separate and distinct from these requirements, whether *actus reus* or *mens rea*?[378] The question was pointedly raised in the Jobidon case.[379] Section 265(1) provides that a person committs an assault when he applies force intentionally to another without that person's consent, but it does not define that concept; section 265(3) states that no consent is obtained in a number of cases that do not include fistfights. The Supreme Court of Canada held that in such a situation consent was not valid if the participants intended to injure each other.

The majority opinion, written by Mr. Justice Gonthier, considered absence of consent to be a defence, even though it was an element of the *actus reus* that the crown had to prove beyond a reasonable doubt.[380] Such being the case, the principles of the common law could still be relied upon to decide whether this notion was limited on grounds of public policy. In listing exceptions in section 265(3) of the *Criminal Code*, Parliament did not clearly evince an intention to exclude the common law.[381] The minority opinion of Mr. Justice Sopinka argued that in dispensing with the requirement that absence of consent be proven, contrary to the text of the relevant section, the majority in effect created an offence that derived solely from the common law, running afoul of section 9(a) of the code. Moreover, this undermined "the importance of certainty in determining what conduct constitutes a criminal offence," which is the justification for codification.[382] But the minority seems to equate the *actus reus* with the elements that must be proven by the crown. Yet the circumstances in which no offence is committed can still be considered a defence even if the crown must disprove their existence. The fact that they appear next to the elements of the *actus reus* is hardly conclusive. If the rule concerning consent appeared in a separate paragraph and the burden of proof rested on the accused, would it be possible to deny that this was a defence? It would seem then any set of circumstances that negate the existence of an offence is in reality a defence, whatever its location within the code.

This case shed light on the special role of statutes in a common law system. The code can always be supplemented by principles of common law which maintain no

apparent connection with its provisions. In a civil law system, the articles of the code can be considered an application of broader principles to which judges may decide to give effect when no provision clearly applies.[383] In this regard, the *Jobidon* decision is at the crossroads. Section 265(3) does not state that the list of cases of nullity of consent it provides is exhaustive. One can therefore attempt to find a common denominator to these exceptions—that is the civil law method—-or abandon the text to analyse the rules of common law antecedent to its adoption, even if it means recognizing an exception that had not been foreseen by the legislature.[384] Mr. Justice Gonthier seems to combine both these methods.[385]

There is, however, another approach: some decisions have found that the wording of the code deviates from the principles of common law and constitutes a fresh start.[386] In this context, the English term "codification" may refer to the process that consists in transforming a rule of common law into a legislative provision; it therefore differs from a change of the law. In French, the term "codification" encompasses at once the enunciation and the improvement of the rules followed in a given area; it is not readily used when referring to a single section.

The Supreme Court has also been called to consider the rule of common law that allows courts to punish criminal contempt; this power is expressly preserved by section 9 of the current code. Criminal contempt occurs when a person's refusal to comply with a court order amounts to public defiance. In this case, there are no limits to the sentence that may be imposed. However, the mere fact of violating such an order also constitutes a civil contempt; in such a case, the punishment is set by provincial laws. In 1992, a court confirmed an order prohibiting a nurses' union from going on strike. The union members flouted the law and two convictions of criminal contempt were handed down; fines of $250,000 and $150,000 were imposed, in contrast to the maximum of $1,000 stipulated by provincial law. The Court of Appeal of Alberta upheld these convictions.

Before the Supreme Court, the union cited "the principle that there must be no crime or punishment except in accordance with fixed, pre-determined law." Only the majority judges ruled on this question. In their opinion, "the absence of codification does not mean that a law violates this principle." Two reasons were cited in support of this assertion: for centuries, common law crimes were not viewed as violating this rule; and recourse to the common law was sometimes necessary to determine the scope of codified crimes. In short, the absence of codification alone is not fatal, as the common law has played and continues to play an important role in the criminal law.[387] This puts little store by the many English or Canadian jurists who, since the 19th century, have criticized the arbitrariness of offences arising from the common law. Were his embalmed body not being well cared for by London's *University College*, Jeremy Bentham would have turned in his grave.

The Court's finding is, however, justified by section 11(g) of the *Canadian Charter of Rights and Freedoms*. According to this provision, a finding of guilt must not be based on any act or omission "unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations."[388] It follows that an offence may derive solely from the common law, since it is obviously part of the "Canadian law," and need not be covered by an enactment.[389]

As for vagueness, criminal contempt requires that the accused must have defied or disobeyed a court order with knowledge of the fact that this public disobedience will tend to depreciate the authority of the court.[390] Criminal contempt is therefore said to be "neither vague nor arbitrary", since it would be possible to predict in advance whether a particular conduct constituted a crime.[391] With respect to contempt of court, the area of risk referred to by Mr. Justice Gonthier in *Nova Scotia Pharmaceuticals* is certainly quite broad. Overall, the jurisprudence of the court has clearly recognized that an offence may be derived solely from the common law, as in the case of criminal contempt. The scope of the constitutive elements of an offence may also be broadened by the common law. The *Criminal Code* thus appears to be a collection of principles whose scope the common law may modulate according to the circumstances, as jurisprudence is able to do in a system of codified law.

(b) Towards a Recodification of the Canadian Criminal Law?

Today, the phraseology and organization of the current code, inherited from the text of 1892, are quite widely disparaged.[392] This is the result partly of the many changes made over a century, which from the outset have taken on a markedly repressive bent.[393] Moreover, proportionally far fewer francophones have called for amendments in the decades that followed the adoption of the code.[394] No less than legislation, jurisprudence plays a fundamental role in Canadian criminal law, but it also doubtless increases its complexity. In these circumstances, no one argues any more that codification has crippled the evolution of the law.

What became of the plan to recodify the Canadian criminal law? It is known that the Law Reform Commission of Canada prepared a draft code[395] in the hopes of rendering the criminal law more accessible, clear and coherent.[396] Parliament did not pursue this plan for complex reasons.[397] Without discussing its merits, one might ask whether there has been in Canada a hostility similar to the one encountered in England in the 19th century[398] We might also point out that for some feminist legal scholars, recodification is not advisable because the criminal law is too insensitive to the problems encountered by women.[399]

The idea of including a definition of defences sometimes causes disconcerting reactions. There is a fondness for repeating Portalis' saying "*Tout prévoir*, est un but qu'il est impossible d'atteindre"[400] (to foresee everything is a goal impossible to achieve) without mentioning the fundamental importance of jurisprudence in a system of codified law. Yet it does play an essential role in French criminal law. Thus, with regard to the mental element of an offence, the French code of 1810 and the Canadian code of 1892 were equally incomplete. Yet judges developed rules in this regard.[401] The same is true for the defence of necessity. In England, Stephen wanted to include it in his code, but his colleagues were opposed to it[402]; the *Criminal Code* therefore made no provision for it. In France, the *Code Pénal* of 1810, which was just as silent on the subject, expressly declared that "an excuse or a mitigation of punishment must be expressly provided for by legislation" [translation]. Yet French and Canadian judges came to recognize this defence.[403]

In Canada, it would perhaps be unconstitutional to prohibit the recognition of a ground of defence not provided for by the code.[404] Attempting to list them exhaustively is actually a very risky endeavour.[405] This in no way changes the fact that it would be

beneficial to codify those defences recognized in jurisprudence, employing general formulas likely to encompass a very large number of cases. In this regard, can it be said that the resort to "vague" standards will be done at the expense of completeness and accessibility, and that it would have been desirable to be more specific in the draft of the Law Reform Commission of Canada, in order to limit the need to consult other sources?[406] Yes, if one believes that the reader must have information that is as detailed as possible; no, if one thinks that general information in the form of a principle is sometimes preferable, even if jurisprudence and scholarly opinion will have to specify the extent of its application.[407] It is not self-evident that non-jurists want to have access to all the criminal law, even if it were possible for experts themselves to acquire this knowledge.

The main users of the code are jurists and, to a lesser extent, law enforcement officials. For these individuals, the readability of an enactment is not a negligible benefit, even though jurisprudence and legal literature play an essential role. Non-jurists also get something out of it, for example if they serve on a jury or wish to obtain information for themselves. In this latter case, a codified general principle is always a helpful starting point; moreover, a code whose outline and provisions are easy to grasp can, in some cases, quickly yield an answer. Although it does not happen often, such a concern is legitimate. It would be appalling to dismiss it out of hand.

V. Conclusion

Jurists' perception of the phenomenon of codification varies depending on the system in which they operate. In civil law, jurisprudence plays a fundamental role both in applying the code's general principles as in creating solutions when unforeseen circumstances arise. That is Portalis' view, echoed in French criminal law, subject to the rule that offences must be created by legislation. In England, legal scholars have long adhered to Bentham's view, whether they approved or rejected his solution. From this perspective, the purpose of codification is to eliminate or considerably limit judicial discretion, as a statute does in the common law system. It then becomes necessary to enumerate in detail the situations contemplated by the legislator. To some extent, the draft prepared by Stephen in 1878 moved away from this model, but we know that it was not adopted by Parliament. In Canada, the idea of codifying the criminal law was favourably received by civil law experts in Quebec, both anglophone and francophone. The same was true of the majority of Ontario and Canadian jurists, who may have sought thereby to promote a sense of Canadian identity.

Thus, in the late 19th century, influential members of the Canadian government adhered to the philosophy of the English codifiers. The *Criminal Code, 1892* which resulted from their activities reserved a large place for jurisprudence, whose role was somewhat limited in 1954, when common law offences were repealed. If we examine the French criminal code of 1810, the summary treatment of defences in the Canadian code is not surprising. However, in the late 20th century, this shortcoming seems abnormal in the Western world; it is difficult to justify when we know that in the United States, many states have adopted a more complete criminal code.[408] Of course, the Supreme Court of Canada

has ruled there is no obligation to codify. It is also true that judges charged with interpreting a new code would still rely on certain common law concepts, provided they did not conflict with the new act. Without doing away with jurisprudence or the problems of interpretation, recodification would, at the very least, have the advantage of simplifying the task of individuals who must be familiar with the criminal law.

In 1975, Mr. Justice Pigeon criticized the changes made to the *Criminal Code* by the drafters of the *Revised Statutes of Canada* of 1906. His comments remain valid today:

> What those actually responsible for these unfortunate changes—the ill results of which persist to this day—failed to appreciate was that they could not possibly give to the changes they were making the kind of exhaustive consideration that had been given by the framers of the original *Code*. They also did not take into consideration something which the authors of the original *Code* had not overlooked, namely, the importance of having such statutes in readable form. By this I mean enactments that are readily understandable upon hearing them read. This is especially desirable with respect to such provisions as the definitions of crimes which must be read to the juries. For readability, it is necessary that sentences be short and unencumbered by incidentals, lists and enumerations.[409]

In conclusion, we would like to cite the comment of the Attorney General of the United Kingdon, John Holker, to the House of Commons in 1879:

> If we do nothing more than make the Criminal Law plain, simple, and easy of comprehension, we may not accomplish anything very heroic, but we shall, I think, do a great good to the community; because it is desirable that all the law, especially the Criminal Law, should be made certain and intelligible to the people, so that they may understand what acts are right, and what acts are prohibited, and what acts, if committed by them, render them liable to punishment.[410]

It is still to be hoped that the idea of recodifying Canadian criminal law will not suffer the fate of the English draft code of 1879.

Endnotes

* The author has completely revised the translation that first appeared in *Perspectives on Legislation, Essays from the 1999 Legal Dimensions Initiative*; he has also made a few very minor modifications or additions to the initial text. Part of the research for this paper was made possible by a grant of the Quebec Bar Foundation for the preparation of a textbook on the legal history of Quebec. The author would like to thank the Law Commission of Canada, Catherine Moroz of the New York and Quebec Bar and Stephane Cliche of the Quebec Bar for their work as research assistants, as well as Dominique Gaurier, André Jodouin, Daniel Jutras, Nicholas Kasirer and Barry Wright for their comments on a previous version, as well as Roderick A. Macdonald, who reviewed the present version. As usual , the author remains entirely responsible for any shortcoming in the final product.

[1] André Jodouin, "La légitimité des sources du droit pénal (réflexions d'un agnostique sur les certitudes fondamentales du droit répressif)," to be published in *Les certitudes du droit*, Thémis; available on the Internet, http://www.crdp.umontreal.ca/fr/conferences.

[2] Jean-Pierre Boyer, *Histoire de la justice en France*, 2e éd., (Paris: PUF, 1996), p. 190.

[3] Jean-Louis Halperin, *L'impossible Code civil*, (Paris: PUF, 1992), p. 182.

[4] Boyer, see note 2 above, pp. 61-63.

[5] Yves-Louis Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, (Paris: PUF, 1965), pp. 14-16.

[6] Jean-Louis Halperin, *Le Tribunal de Cassation et les pouvoirs sous la Révolution (1790-1799)*, (Paris: LGDJ, 1987), pp. 256-261; Hufteau, see note 5 above, pp. 78-89.

[7] Hufteau, see note 5 above, pp. 131-133.

[8] Halperin, see note 3 above, pp. 12-15.

[9] *Ibid.*, pp. 252 and 267.

[10] A. Fenet, *Recueil complet des travaux préparatoires du Code civil*, 15 vol., (Paris: Au dépôt, 1827-1832); Jean-Guillaume Locré de Roissy, *La législation civile, commerciale et criminelle de la France*, (Paris: Truettel et Wurtz, 1827-1832), 31 vol.

[11] Jean-Marie Augustin, "Les premières années d'interprétation du Code civil français (1804-1837)," in Pierre-André Côté (dir.), *Le nouveau code civil, interprétation et application - Journées Maximillien Caron 1992*, (Montreal: Éditions Thémis, 1993), p. 32.

[12] Adhémar Esmein, "L'originalité du Code civil," in *Le Code civil, 1804-1904, Livre du Centenaire*, (Paris: Rousseau, 1904), p. 5.

[13] Halperin, see note 6 above, pp. 71-73; Hufteau, see note 5 above, pp. 40-42.

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[19] Hufteau, see note 5 above, pp. 131-133.

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[27] Lascousmes *et al.,* p. 226.

[28] Locré, see note 10 above, t. 29, p. 2.

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[30] *Ibid*., t. 29, p. 423.

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[32] *Ibid*., t. 31, p. 170.

[33] *Ibid*., p. 176.

[34] *Ibid*., p. 276.

[35] *Ibid*., t. 29, p. 216 (Dhaubesart); t. 31, p. 145 (Faure), 274 (Nougarède).

[36] *Ibid*., t. 30, p. 524; t. 29, p. 281-282 (Riboud).

[37] *Ibid*., t. 31, p. 272 (Nougarède).

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[47] *Ibid*., p. 643.

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[57] *Perka v. The Queen*, [1984] 2 S.C.R. 232.

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[104] (1853) 17 *Jur.* 458, 459, quoted in Manchester, see note 63 above, p. 22.

[105] Sanford H. Kadish, "Codifiers of the Criminal Law: Weshler's Predecessors," (1978) 78 Colum. L.R. 1099, pp. 1112-1113.

[106] Martin L. Friedland, *A Century of Criminal Justice*, (Toronto: Carswell, 1984), p. 1.

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[109] *Ibid.*, pp. 172-174.

[110] James Fitzjames Stephen, *A Digest of the Criminal Law*, (London: Macmillan and Co., 1877), pp. xix-xx and xxix.

[111] Brown, see note 93 above, pp. 27-29.

[112] "Report of the Royal Commission appointed to Consider the Law Relating to Indictable Offences", in *Irish University Press Series of British Parliamentary Papers*, see note 94 above, vol. 6, pp. 381-382 (herein after "Report of the Royal Commission, 1879").

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1879", see note 113 above, p. 417-526). By relying on current legislation, the Commission increased the complexity of the draft and retained many superfluous distinctions.

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[115] *Ibid.*, pp. 374-376.

[116] *Ibid.*, p. 376.

[117] *Ibid.*, pp. 378-379.

[118] *Ibid.*, pp. 378-379 and 386-387.

[119] *Ibid.*, pp. 411-412.

[120] Friedland, see note 106 above, pp. 18-20.

[121] Cockburn, see note 67 above; A. E. Cockburn, "Chief Justice Cockburn's second letter on the Criminal Code," (1880) 15 Law Journal, pp. 184 and 202; Stephen White, "Lord Chief Justice Cockburn's Letters on the Criminal Code Bill of 1879" [1990] Crim. L. R. 315.

[122] Cockburn, see note 67 above, pp. 1-2.

[123] Cockburn 1880, see note 121 above, pp. 185-188, 203, 205-206.

[124] Cockburn 1878, see note 67 above, pp. 6 and 8-10.

[125] *Ibid.*, p. 14.

[126] *Hansard's Parliamentary Debates, 3rd series*, 1879, April 3rd[d], col. 324-328; May 5th, col. 1751.

[127] *Ibid.*, col. 326.

[128] *Ibid.*, col. 326; col. 1766.

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[134] Brown, see note 93 above, pp. 23-37.

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[137] *Ibid.*, col. 138.

[138] *British Parliamentary Papers*, 1883, 26, No. 225.

[139] *Bills of Exchange Act, 1882,* 45-46 Vict., c. 61.

[140] *Partnership Act, 1890*, 53-54 Vict., c. 39.

[141] *Sale of Goods Act, 1893*, 56-57 Vict., c. 71.

[142] *Bank of England v. Vagliano Brothers*, see note 69 above, pp. 120 (Lord Halsbury), 129-130 (Lord Selborne), 134 (Lord Watson), 144-145 (Lord Hershell), 160-161 (Lord MacNaghton), 161-162 (Lord Morris).

[143] Manchester, see note 63 above, pp. 327-347.

[144] *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220.

[145] *Knuller Publishing (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions*, [1973] A.C. 435.

[146] *Director of Public Prosecutions v. Whiters*, [1975] A.C. 842.

[147] Ilbert, see note 64 above, pp. 122 *et seq*.

[148] George P. Fletcher, "Truth in Codification," (1998) 31 U.C. Davis L.Rev. 765; James Gordley, Codification and Legal Scholarship," (1998) 31 U.C. Davis L.Rev. 735.

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[170] *Lapierre v. Attorney General of Québec*, [1985] 1 S.C.R. 241.

[171] *Lebrun v. Rodier*, [1978] C.A. 380, 381.

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[202] *Ibid.,* s. 15.

[203] *Ex parte Rousse*, [1834] *Stuart's Reports* 321; Morel, see note 182 above, p. 472.

[204] Jacques Crémazie, *Les lois criminelles anglaises, traduites et compilées de Blackstone, Chitty, Russell et autres criminalistes anglais, et telles que suivis au Canada: arrangées suivant le dispositions introduites dans le code criminel de cette province par les statuts provinciaux 4 et 5 Victoria, c. 24-27. Comprenant aussi un précis des statuts pénaux de la ci-devant Province du Bas-Canada*, (Québec: Fréchette & Cie., 1842), pp. pages 20 note (c), 61, note (b) and 265, note (b).

[205] Douglas Hay and Jean-Marie Fecteau, "*Government by Will and Pleasure Instead of Law*: Military Justice and the Legal System in Quebec, 1775-1783," in Greenwood and Wright, see note 173 above, p. 129.

[206] *An* Ordinance *for securing the Liberty of the Subject, and for the prevention of Imprisonments out of this Province*, 24 Geo. III, c. 3, Arthur G. Doughty, *Report of the Public Archives of Canada for the years 1914 and 1915*, (Ottawa: J. de L. Taché, King's Printer, 1917), app. C, p. 139.

[207] Crémazie, see note 204 above, pp. 281-318.

[208] Claude Désaulniers, "La peine de mort dans la législation criminelle de 1760 à 1892, " (1977) R.G.D. 141.

[209] Fecteau, see note 182 above; Morel, see note 182 above, pp. 478-479.

[210] *An Act that all Proceedings in Courts of Justice within that Part of* Great Britain *called* England, *and in the Court of Exchequer in* Scotland, *shall be in the* English *Language*, 4 Geo. II, 1732 (U.K.), c. 26.

[211] Morel, see note 182 above, p. 536.

[212] Jean-Pierre Wallot, *Un Québec qui bougeait*, (Montréal: Boréal Express, 1973), p. 299, note 47.

[213] Joseph-François Perrault (éd.), *Le juge à Paix et officier de Paroisse, extrait de Richard Burn, traduit par Jos.-F. Perrault*, (Montréal: Fleury Mesplet, 1789); Perrault, *Questions et réponses sur le droit criminel au Bas-Canada*, (Quebec: C. Lefrançois, 1814).

[214] Crémazie, see note 204 above.

[215] Perrault (1789), see note 213 above, p. 525.

[216] Crémazie, see note 204 above, p. 427; Nicholas Kasirer, "The Annotated Criminal Code *en version québécoise*: Signs of Territoriality in Canadian Criminal Law," (1990) 13 Dal L.J. 520, pp. 555-557; André Morel, "La langue et l'acculturation juridique au Québec depuis 1760," (1990) 24 R.J.T. 99.

[217] Morel, see note 182 above, pp. 509-514.

[218] *An Act for the further introduction of the Criminal Law of England in this Province, and for the more effectual punishment of certain offenders*, 40 Geo. III, S.H.C. 1800, c. 1.

[219] Brown, see note 93 above, pp. 70-92.

[220] *Ibid.,* pp. 92-93.

[221] Raymonde Crête, Sylvio Normand and Thomas Copeland, "Law Reporting in Nineteenth Century Quebec" (1995) 16 Legal History 147.

[222] *Ex parte Rousse,* see note 203 above.

[223] *Re Fisher*, [1834] Stuart's Report 245.

[224] *R. v. Bérubé,* (1852) 3 L.C.J. 212 (B.R.).

[225] *An Act for the establishment of a better Court of Appeals in Lower Canada*, S.P.C. 1843, 7 Vict., c. 18.

[226] *R. v. Duval*, (1864) 14 L.C.J. 52 (B.R.).

[227] *Ex parte Ledoux*, (1858) 8 L.C.J. 255 (C.S.).

[228] *An Act to amend the Judicature Acts of Lower Canada*, S.P.C. 1857, 20 Vict., c. 44, ss. 22 and 23.

[229] *R. v. Barbeau*, (1851) 1 L.C.R. 320 (B.R.), 321 (Duval, J.); *R. c. Duval*, see note 226 above, 54 (B.R.), 64-70 (Mondelet, J., diss).

[230] *Geo. II,* see note 210; Morel, see note 182 above, p. 536.

[231] *An Act to establish a Court having jurisdiction in Appeals and Criminal Matters, for Lower Canada,* S.P.C. 1849, 12 Vict., c. 37, ss. 14, 23 and 28.

[232] *R. v. Chouinard*, (1878) 4 Q.L.R. 220 (B.R., 1874).

[233] *Ex parte Taschemacher*, (1874) 6 R.L. 328 (C.S.).

[234] *R. v. Morrison & Pagnuelo*, (1871) 3 R.L. 525 (B.R).

[235] *R. v. Deery*, (1882) 26 L.C.J. 129 (B.R., 1874).

[236] Morel, see note 182 above, pp. 529-532; Kasirer, see note 216 above.

[237] *R. v. Barbeau*, see note 229 above.

[238] Henri-Elzéar Taschereau, *The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict. For the Dominion of Canada, as Amended and in force on the 1st Day of November, 1874, in the Provinces Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba and on the 1st Day of January, 1875, in British Columbia, with Notes, Commentaries, Precedents of Indictments, etc., etc.* (Montreal: Lovell, 1874); *Ibid.,* (Toronto: Hunter & Rose, 1875); Henri-Elzéar Taschereau, *The Criminal Statute Law of the Dominion of Canada, relating to Indictable Offences, with Full Text as Revised in 1886, and put into Force by Royal Proclamation on the 1st Day of March, 1887, and Cases, Notes, Commentaries, Forms, etc., etc*. (Toronto: Carswell, 1888).

[239] *Brisebois v. The Queen*, (1888) 15 S.C.R. 421, 434-438; *In re Sproule*, (1886) 12 S.C.R. 140, 213-226; *Morin v. The Queen*, (1890) 18 S.C.R. 407, 430-443; but see *Preeper v. The Queen*, (1888) 15 S.C.R. 401, 411-412, in English.

[240] Michel Morin, see note 152 above, p. 1.

[241] *Duval v. The Queen*, see note 226 above, 52 (B.R.), 65; *R. v. Daoust*, (1867) 10 L.C.J. 221 (B.R.), 222 (B.R.); *Ramsay v. The Queen*, (1867) 11 L.C.J. 158 (B.R.), 159.

[242] *Ex parte Blossom*, (1867) 10 L.C.J. 46 (B.R.), 52.

[243] *R. v. Daoust*, see note 241 above, pp. 223 (Meredith, J.), 224-225 (Drummond. J.); *R. v. Roy*, (1866) 11 L.C.J. 89 (B.R.), 92 (Drummond, J.); *R. v. Scott*, (1877) 21 L.C.J. 225 (B.R.), 229-230 (Ramsay, J.).

[244] *R. v. Feore*, (1877) 3 Q.L.R. 219 (B.R.), 229).

[245] *R. v. Fraser*, (1870) 14 L.C.J. 245 (B.R.), 251 (Monk and Drummond, JJ. diss.); *R. v. Abrahams*, (1880) 24 L.C.J. 325 (B.R.), 340 (Ramsay, J.); see also *R. v. Leboeuf*, (1866) 9 L.C.J. 197 (B.R.), 198 (Meredith, J.); *R. v. Vonhoff*, (1867) 10 L.C.J. 292 (B.R.), 294 (Drummond, J.); *R. v. Lacombe*, (1869) 13 L.C.J. 259 (B.R.).

[246] *R. v. Scott*, see note 243 above, p. 229.

[247] *Ex parte Blossom*, see note 242 above, pp. 70-71 (Meredith, J.).

[248] *Notman v. The Queen*, (1869) 13 L.C.J. 255 (B.R.), 257 (Badley, J.).

[249] *R. v. Deery*, see note 235 above, 133 (the Chief Justice) and 135 (Taschereau, J.).

[250] *Notman v. The Queen*, see note 248 above, pp. 258 (Badgley, J.); *R. v. Scott*, see note 243 above, pp. 228 (Chief Justice Dorion, diss.) and 228-229 (Sanborn, J., diss.); *In re Eno*, (1884) 10 Q.L.R. 194 (C.S.P.), 219 (Caron, J.).

[251] *Scott v. The Queen*, (1878) 2 S.C.R. 349; *Abrahams v. The Queen*, (1881) 6 S.C.R. 10; *Brisebois v. The Queen*, (1888) 15 S.C.R. 421, 440 (Taschereau, J.) and 442 (Gwynne, J.), regarding *R. v. Feore*, see note 244 above, p. 219; *Morin v. The Queen*, see note 239 above, p. 407, regarding *R. v. Lacombe*, (1869) 13 L.C.J. 259 (B.R.).

[252] *Morin v. The Queen*, see note 239 above, pp. 407, 427-428 (Strong, J.) and 436 (Fournier, J.).

[253] *Laliberté v. The Queen*, (1878) 1 S.C.R. 117, 130-131 (Chief Justice Richards).

[254] *Morin v. The Queen*, see note 239 above, pp. 407, 447 (Taschereau, J.), 456-458 (Gwynne, J.) and 471 (Patterson, J.).

[255] *In re Eno*, see note 250 above, pp. 210 (Caron, J.); *R. v. Leblanc* (1885) 8 L.N. 114 (B.R.), 114 (Ramsay, J.).

[256] *R. v. Abrahams,* (1880), see note 245 above, p. 341 (Ramsay, J.); *R. v. Leblanc* (1885) 8 L.N. 114 (B.R.), 114 (Ramsay, J.); *In re Sproule*, see note 239 above, p. 245 (Taschereau, J.); *John v. The Queen*, (1888)15 S.C.R. 384, 387 (Strong, J.).

[257] *R. v. Coote*, (1871) L.R. 4 P.C. 599, 605.

[258] *R. v. Creamer*, (1860) 10 L.C.J. 404 (B.R.), 406 (Chief Justice Duval), 407 (Aylwin, J.) and 407-408 (Meredith, J.); *erratum*, p. 450.

[259] *Ramsay v. The Queen*, (1867) 11 L.C.J. 158 (B.R.), 163-164 (Badgley, J.); *R. v. Roy*, (1867) 11 L.C.J. 89 (B.R.), 93 (Drummond, J.); *R. c. Deery*, see note 235 above, p. 133 (Chief Justice Dorion, diss.); *Preeper v. The Queen*, see note 239 above, pp. 401, 411 (Strong, J.) and 418-419 (Gwynne, J.); *Morin v. The Queen*, see note 239 above, pp. 407, 442 (Fournier, J.).

[260] *R v. Wyllie*, (1880) 3 L.N. 139 (B.R.), 140 (Dunkin, J.); *In re Sproule*, see note 239 above, pp. 140, 198 (Chief Justice Ritchie) and 247 (Taschereau, J.).

[261] *Notman v. The Queen*, see note 248 above, p. 259.

[262] *R. v. Leboeuf*, (1866) 9 L.C.J. 245 (B.R.), 247.

[263] *R. v. Bruce*, (1860) 10 L.C.J. 117 (B.R.), 120; *In re Sproule*, see note 239 above, pp. 140, 242 (Taschereau, J.).

[264] *Kelly v. The Queen*, (1883) 3 D.C.A. 49 (B.R.), 50-51 (Chief Justice Dorion).

[265] *R. v. Lemieux,* (1879) 5 Q.L.R. 261 (C.S.), 262 (Routhier, J.).

[266] *Corporation of the City of Montreal v. Doolan,* (1874) 18 L.C.J. 124 (B.R., 1874), 124-126 (Badgley, J.), 126-127 (Chief Justice), 127 (Caron, J.), 127-128 (Drummond, J.) and 128 (Monk, J.).

[267] *Ex parte Williams*, (1875) 19 L.C.J. 120 (S.C.); *R. v. Lynch*, (1875) 7 R.L. 553 (B.R.); *R. v. Bissonette*, (1879) 23 L.C.J. 249 (B.R.); *R. v. Berthe*, (1880) 3 L.N. 266 (B.R.); *Kelly v. The Queen*, see note 264 above.

[268] *R. v. Maher*, (1884) 7 L.N. 82 (B.R.), 83 (Ramsay, J.); others preferred the English version if it was more favourable to the accused: *Brossoit v. Turcotte*, (1877) 20 L.C.J. 141 (B.R.), 143 (Chief Justice Dorion); see also *Ex parte Thompson*, (1863) 7 L.C.J. 10 (C.S.) (Smith, J.).

[269] *R. v. Doonan*, (1890) 6 M.L.R.Q.B. 186.

[270] *R. v. Smith*, (1879) 2 L.N. 223 (B.R.), 223-224.

[271] *R. v. Scott*, (1884) 4 D.C.A. 50 (B.R.); *contra*: *R. v. Maher*, see note 268 above.

[272] *R. v. Daoust*, see note 241 above.

[273] *Laliberté v. The Queen*, see note 253 above, pp. 117 and 136.

[274] *R. v. Feore*, see note 244 above; *R. v. Bain*, (1879) 23 L.C.J. 327 (B.R., 1877).

[275] Taschereau 1875, see note 237 above, p. 375.

[276] *Ibid.*, p. 361.

[277] *Morin v. The Queen*, see note 239 above.

[278] *Brisebois v. The Queen,* see note 239 above.

[279] *Morin v. The Queen*, see note 239 above.

[280] S.C. 1892, c. 29, s. 743.

[281] *Jacobs v. The Queen*, (1889) 16 S.C.R. 433.

[282] *Laliberté v. The Queen*, see note 253 above, pp. 117, 131 (Chief Justice Richards), 139 (Ritchie, J.), 141 (Strong, J.).

[283] Morel, see note 182 above, p. 518.

[284] See the title of Marriott's report, see note 183 above; letter of Wedderburn to Darmouth, May 2, 1774, reproduced Shortt and Doughty, see note 182 above, p. 377, note (1); this usage was also widespread in Quebec (see the title of the work by Crémazie, note 204 above); Perrault 1814, see note 213 above, p. 365; also Jacques Vanderlinden, *Le concept de code en Europe occidentale du XIII^e^ au XIX^e^ siècle*, Essai de définition, (Bruxelles: Éditions de l'Institut de sociologie de l'Université Libre de Bruxelles, 1967).

[285] Anonymous, "De la codification des lois du Canada," (1845-46) 1 *R. de L. et de J.* 337, 340).

[286] Elisabeth Gibbs (ed.) *Debates of the Legislative Assembly of United Canada*, (Montréal: Centre de recherche en histoire économique du Canada français, 1970), vol. IX, part II, pp. 1139-1141.

[287] *Journaux de l'Assemblée législative de la Province du Canada*, 1851, vol. 10, Ottawa, Imprimés par ordre de l'Assemblée législative, pp. 127, 249 and 344.

[288] Brown, see note 93 above, p. 88.

[289] Maximillien Bibaud, "Revue critique du Code Badgley," *La Minerve*, May 30, 1851.

[290] *Ibid.*, June 5.

[291] *Ibid.*, June 18.

[292] *Ibid.*, June 23.

[293] *Ibid.*, July 5.

[294] *Ibid.*, June 23, July 1.

[295] *Ibid.*, June 2.

[296] *Ibid.*, July 5.

[297] *Ibid.*, July 5.

[298] Kadish, see note 105 above, pp. 1099 *et seq.*

[299] Charles M. Cook*, The American Codification Movement*, A Study of Antebllum Legal Reform, (Westport: Greenwood Press, 1981); Shael Herman, "The Fate and Future of Codification in America," (1996) Am.J.Leg.His. 407.

[300] Normand, see note 153 above, p. 58.

[301] Cook, see note 299 above, pp. 189-198.

[302] Seton W. Gordon, “Codification of the Law,” (1883) 3 C.L.T. 139, p. 141; Anonymous, "Codification," (1887) 10 L.N. 225, 228.

[303] Joanie Schwartz, “The Criminal Code and the English Media in 19th Century Canada,” Master's thesis, University of Ottawa, 1993.

[304] Anonymous, "Codification of the Law of New York," (1858) 4 *U.C.L.J.* 125.

[305] Anonymous, "Consolidation and codification," (1858) 4 *U.C.L.J.* 147.

[306] Anonymous, "Consolidation of the Statutes," (1859) 5 *U.C.L.J.* 73, p. 74.

[307] Anonymous, "The Statute Law. - Consolidation" (1859) 5 *U.C.L.J.* 6; Anonymous, "The Consolidated Statutes" (1859) 5 *U.C.L.J.* 123.

[308] Anonymous, "Consolidation and codification," (1859) 5 *U.C.L.J.* 56, p. 57.

[309] Anonymous, "Codification and Consolidation," (1860) 6 *U.C.L.J.* 220.

[310] Desmond H. Brown (ed.), *The Birth of the Canadian Criminal Code, The Evolution of Canada’s Justice System*, (Toronto: University of Toronto Press, 1995) p. 27.

[311] Graham Parker, “The Origins of the Canadian Criminal Code,” in David H. Flaherty (ed.), *Essays in the History of Canadian Law*, (Toronto: Osgoode Society, 1986), p. 249; Kasirer, see note 216 above.

[312] Raoul Dandurand and Charles Lanctôt, *Traité théorique et pratique de droit criminel*, (Montréal: Périard, 1890).

[313] Schwartz, see note 303 above.

[314] Thomas Jean-Jacques Loranger, "De la codification des lois criminelles," (1879) 1 La Thémis 269, p. 273.

[315] *Ibid.*, p. 274; Nicholas Kasirer, “Canada’s Criminal Law Codification Viewed and Reviewed” (1990) 35 McGill L.J. 841.

[316] Anonymous, "Codes," (1880) 3 L.N. 113.

[317] Anonymous, "Codification," (1882) 5 L.N. 353.

[318] Anonyme, "Codes," (1880) 3 L.N. 169; Gordon, see note 302 above, pp. 142-143; Anonymous, "A Naive Expedient," (1884) 7 L.N. 33; Anonymous, "Codification," (1886) 12 *C.L.T.* 133; Anonymous, untitled, (1890) 13 L.N. 9.

[319] Douglas Armour, “Editorial Review, Codification” (1887) 7 C.L.T. 219.

[320] *Ibid.*, p. 221; Gordon, see note 302 above, pp. 141-142.

[321] [Douglas Armour], “The Consolidation of the Statutes” (1884) 4 C.L.T. 432.

[322] Anonymous, untitled (1890) 26 *C.L.J.* 577.

[323] Anonymous, "Codification," (1886) 22 *C.L.J.* 133; Armour, see note 321 above, pp. 432-433; Gordon, see note 302 above, p. 143.

[324] Anonymous, untitled (1890) 13 L.N. 9.

[325] Anonyme, "The Criminal Code," (1893) 29 *C.L.J.* 94, 95; see also Anonymous, "The Canadian Criminal Code," (1892) 15 L.N. 333.

[326] Brown, see note 93 above, pp. 120-121; the reference to Gowan and Day serving on the same commission is found in N. Kasirer, see note 315, above, pp. 879.

[327] *Sessional papers, First Session of the Seventh Parliament of the Dominion of Canada, Session 1891*, vol. 17, no. 66, p. 47.

[328] *National Archives of Canada, RG 13,* vol. 2273-2274; excerpts of this correspondence are reproduced in Brown, see note 310 above, pp. 68-255.

[329] *Ibid.*, vol. 2273 (n.p.), L.P. Archambault to J.D. Thompson, 4 April 1892; "this work was long required and your bill will supply a great want in this country": vol. 2274 (n.p.), A. Maughe to J.D. Thompson, 4 September 1891; "many difficulties which have been brought to my notice in practice have been removed": vol. 2274 (s.p.), W.E. Rose to J.D. Thompson, 18 May 1892.

[330] Brown, see note 310 above, pp. 14 and 18.

[331] Brown, see note 310 above, pp. 52, 200-201, 204, 206, 234, 237.

[332] *An Act respecting the criminal law*, S.C. 1892, c. 29, hereafter the *Criminal Code, 1892*.

[333] *Criminal Code, 1892*, s. 5.

[334] *Ibid.*, s. 7.

[335] Brown, see note 310 above, p. 200.

[336] Brown, see note 310 above, p. 451.

[337] Brown, see note 93 above, pp. 132-133.

[338] "Memorandum as to Mr. Justice Taschereau's open letter on the Criminal Code, 3rd February 1893, *National Archives of Canada, R.G. 13*, vol. 2274, p. 10.

[339] *The Canada Evidence Act*, S.C. 1893, c. 31; Desmond H. Brown, "Be Sworn and Give Evidence: The Evolution of the Competent Witness in the Context of the Canada Evidence Act," (1994) 22 Man. L.J. 360.

[340] *Criminal Evidence Act*, 1898 (Engl.), 61-62 Vict., c. 36; Brown, see note 339 above, pp. 363-365.

[341] Brown, see note 310 above, p. 274.

[342] Brown, see note 93 above, p. 139.

[343] Brown, see note 310 above, p. 322.

[344] *Ibid.*, pp. 318-326 and 398; *Criminal Code*, 1982, s. 3(q).

[345] Brown, see note 310 above, pp. 272-273.

[346] *Ibid.*, pp. 379-389.

[347] *Criminal Code*, 1892, ss. 664 and 665; on the situation in Manitoba, see the letter from Mr. Justice Joseph Dubuc, Brown, see note 310 above, p. 164.

[348] *Ibid.*, p. 378.

[349] *Ibid.*, pp. 258-262.

[350] Brown, see note 310 above, pp. 288-289.

[351] *Ibid.*, pp. 308-317.

[352] *Boucher v. The King*, [1951] S.C.R. 265.

[353] Brown, see note 310 above, pp. 352-353.

[354] *Ibid.*, p. 405.

[355] *Ibid.*, pp. 407-408; see also pp. 64 and 67.

[356] *Ibid.*, p. 422.

[357] *Ibid.*, p. 431.

[358] *Ibid.*, pp. 410-413 and 432-434.

[359] *Ibid.*, pp. 417, 427, 439, 443, 450, 464.

[360] *Ibid.*, p. 464.

[361] *Ibid.*, pp. 400 and 465-469; *Criminal Code, 1892*, s. 205; R.C. McLeod, "The Shaping of Canadian Criminal Law, 1892 to 1902" [1978] Communications Historiques 72; see also *Association St-Jean-Baptiste de Montréal v. Brault*, (1901) 30 S.C.R. 598.

[362] Brown, see note 310 above, pp. 296-300, 401-403.

[363] Brown, see note 93 above, pp. 145 and 224, note 114; Scwartz, see note 303 above.

[364] Henri-Elzéar Taschereau, "The Canadian Criminal Code," (1893) 16 L.N. 36.

[365] *Ibid.*, p. 38.

[366] *Ibid.*, p. 45.

[367] Brown, see note 310 above, p. 250.

[368] See note 338 above, p. 1.

[369] *Ibid.*, pp. 3-4 and 9.

[370] *Ibid.*, p. 4.

[371] *Ibid.*, p. 7.

[372] *Ibid.*, pp. 4 and 8.

[373] *Ibid.*, p. 15.

[374] *Ibid.*, p. 26.

[375] See, for example, the cases concerning the crime of *champerty* or *maintenance*, *Méloche v. Déguire*, (1903) 34 S.C.R. 24; *R. v. Goodman*, [1939] S.C.R. 446; Elizabeth Bennett, "Common Law Inroads into the Criminal Code," in Josiah Wood and Richard C. Peck (eds.), *100 years of the Criminal Code in Canada*, (Ottawa: Canadian Bar Association, 1993) pp. 99-103.

[376] *Frey v. Fedoruk*, [1950] S.C.R. 517.

[377] Section 8(3) of the *Criminal Code*, which echoes section 7 of the code of 1892.

[378] On the meaning of the word defense, see *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

[379] *R. v. Jobidon*, [1991] 2 S.C.R. 714.

[380] *Ibid.*, pp. 735-739.

[381] *Ibid.*, pp. 742-745.

[382] *Ibid.*, pp. 774-774; Bennett, see note 375 above, pp. 105-110.

[383] *Bank of Montreal* v. *NG*, [1989] 2 S.C.R. 429, 442-445; *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530, 560.

[384] *R. v. Salituro*, [1991] 3 S.C.R. 654, 678-679.

[385] *R. v. Jobidon*, [1991] 2 S.C.R. 714, 739, 744-745 and 765.

[386] *R. v. Brodie*, [1936] SR.C.R. 188, 199-200; *R. v. Natarelli*, [1967] S.C.R. 539; *Gaysek v. The Queen*, [1971] S.C.R. 888, 897; *R. v. McIntosh*, [1995] 1 S.C.R. 666; *R. v. Gladue*, [1999] 1 S.C.R. 688, par. 31-33 and 39-44. The Supreme Court of Canada has also relied on Stephen's *Digest* (see above, note 110) and on the report of the Royal Commission of 1879 (see above, note 112) to clarify the meaning of some sections of the *Criminal Code* that were taken word for word from the English draft: *R. v. Vasil*, [1981] 1 S.C.R. 469, 486-490 ; *Bergstrom v. The Queen*, [1981] 1 S.C.R. 539, 544-552 ; *Sleeth v. Humbert*, (1896) 25 S.C.R. 620, 627 (per Sedgewick J.). However, in *Gaysek v. The Queen*, [1971] S.C.R. 888, Rithchie J. ruled that the court could not derive assistance from the Report of the Royal Commission on the Revision of the Criminal Law of 1952 (at pp. 894-895), whereas Laskin J., in dissent, quoted the English draft code of 1878, 1879 and 1880 (at p. 904).

[387] *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, 930-931.

[388] André Jodouin, "La Charte canadienne et la nouvelle légalité" in Gérald A. Beaudouin and Errol P. Mendes, *Charte canadienne des droits et libertés*, 3e éd, (Montréal: Wilson et Lafleur, 1996) p. 786.

[389] For an example of the use of international law in this context, see *R. v. Finta*, [1994] 1 S.C.R. 701.

[390] *United Nurses of Alberta,* see note 387 above, p. 933.

[391] *Ibid.*, pp. 933-934.

[392] Fernando Acosta, "Récit de voyage à l'intérieur du *Code criminel* de 1892, où entres autres mention est faite des peines auxquelles ses transgresseurs s'exposent," (1995) 28 Criminologie 81.

[393] André Cellard and Gérald Pelletier, "Le Code criminel canadien 1892-1927: Étude des acteurs sociaux," (1998) Canadian Historical Review 261.

[394] *Ibid.*, pp. 266 and 301.

[395] Law Reform Commission of Canada, *Recodifying Criminal Procedure*, Report no. 31, (Ottawa: The Commission, 1987); Law Reform Commission of Canada, *Recodifying Criminal Procedure*, Report no. 33, (Ottawa: The Commission, 1991).

[396] Gilles Létourneau, "Le Code criminel et la faillite du pouvoir législatif canadien," Wood and Peck, see note 375 above, p. 67; Allen Linden, "After a Century, Canada Needs a New Criminal Code," in Wood and Peck, see note 375 above.

[397] Stanley A. Cohen, "Law Reform, the Charter and the Future of the Criminal Law," in Jamie Cameron (ed.) *The Charter's Impact on the Criminal Justice System*, (Scarborough: Carswell, 1996), p. 345; Gerry Ferguson, "From Jeremy Bentham to Anne McLellan: Lessons in Criminal Law Codification" in Don Stuart, R.J. Delisle, and Allan Manson (eds.), *Towards a Clear and Just Criminal Law: A Criminal Reports Forum*, (Scarborough: Carswell, 1999); Jodouin, see note 388 above; Don Stuart, "A Case for A General Part" in Stuart, Delisle and Manson, above p. 95.

[398] Law Reform Commission of Canada, *Towards a codification of Canadian criminal law*, (Ottawa: The Commission, 1976), pp. 16-22.

[399] Lucinda Vandervort, "To Codify or Not to Codify the Principles of Criminal Responsibility: A Question of Fundamental Justice and Equality," in Stuart, Delisle and Manson, see note 397 above, p. 231; See Christine Boyle, "Commentary," in Stuart, Delisle and Manson, see note 397 above, p. 146.

[400] Kasirer, see note 315 above, p. 871; Dennis R. Klinck, "The Language of Codification," (1989) 14 Queen's L.J. 33.

[401] *Supra*, Part I. C. 1

[402] *Supra*, II B. 2

[403] *Supra*, I. C. 2

[404] Kasirer, see note 315 above, p. 871.

[405] See Eric Colvin, "Criminal Law and the Rule of Law," in Fitzgerald see note 149 above, pp. 142-143.

[406] Klinck, see note 400 above, pp. 50-58. Also see Ronald J. Delisle, "Summary of Proceedings: General Philosophies of Criminal Law and Codification," (1989) 14 Queen's L.J. 31.

[407] Commission, see note 398 above; Colvin, see note 405 above, pp. 144-145.

[408] Kadish, see note 105 above, pp. 1138-1144; Herbert Weschler, "Revision and Codification of Penal Law in the United States," (1983) 7 Dal. L.J. 219.

[409] *R. v. Popovic*, [1976] 2 S.C.R. 308, 314-315.

[410] *Hansard's Parliamentary Debates*, 3rd series, London, 1879, May 5, 1879, col. 1770.

Of Pigeon Holes and Principals: A Reconsideration of Discrimination Law*

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I. Introduction

The common law has never developed a cause of action for discrimination. Instead, the legislatures have stepped in, initially to simply prohibit through a quasi-criminal form of regulation; later to create a civil remedy.[1] When the issue of a common law remedy was raised again in 1980 in *Bhadauria*[2], the Supreme Court held that human rights legislation had occupied the field, obviating common law development in the area. To create a common law right would simply be to duplicate the mechanism put in place by the legislature. Most of the debate about the wisdom of the decision in *Bhadauria* has turned on the importance of the benefits at the margin of having an additional remedial avenue. The common law, it has been argued, gives a plaintiff greater control over the litigation; its damages principles are potentially more generous, for example. While this debate is important, and is likely to heat up again in light of the substantial backlogs plaguing the human rights dispute resolution processes, in this paper I explore not whether there should be a cause of action for discrimination at common law, but whether our thinking about discrimination as a legally cognizable phenomenon would benefit from drawing upon common law methodology.

I begin by distinguishing two contrasting methodologies for the design and development over time of legal norms: the top-down model of the comprehensive code designed to bring to life a grand theory about the norms regulating human interaction, and the bottom-up model of case-by-case analysis aiming toward the development, informed by concrete experience, of a set of principles explaining and justifying the individual decisions. I argue that each has its place, but that the latter is perhaps better suited to creating and changing norms in the discrimination law area. However, the abdication of responsibility by the common law courts - the chief practitioners of the art of bottom-up law-making - led to the legislatures intervening in their typical top-down style. Unfortunately, the efforts to devise comprehensive human rights codes have not been undertaken with the benefit of the kind of grand theory needed to sustain them. Lacking such a foundation, the resulting statutory rules have something of the quality of arbitrary pigeon holes into which complainants must fit their fact situation or fail.

In this paper I demonstrate the pigeon hole-like quality that current codes have taken on over the course of their development and examine three issues that reveal the detrimental impact of this law-making strategy. The first two of these issues concern the difficulties encountered in determining which attributes come within the protection of the law through being designated as prohibited grounds of discrimination; the last is a reexamination of a central aspect of the scope of the concept of discrimination - whether it is confined to differential treatment motivated by prejudice or encompasses causing adverse effects upon vulnerable groups and individuals. Throughout I make some first steps towards showing how discrimination law could develop differently if we were to adopt something more like the common law method of norm creation and change. Necessarily only first steps are possible here - the common law method is an incrementalist one, fully developed theories of liability developing only gradually as a result of many minds thinking through many cases. Producing a full-blown account of

where we might be now had this process been underway for the last thirty five years is a tall order.

For the purposes of this essay, I do not engage the debate about whether adjudication in this area should remain under the auspices of administrative tribunals or be returned to the jurisdiction of the common law courts. There are arguments on both sides. I am more concerned with how we think about discrimination as a legal problem whatever institution is charged with the formulation and adjudication of its rules. As will be clear from what I have already said, this argument about which is the best approach to norm making is directed at the central substantive rules defining the rights and responsibilities that directly regulate human relationships in this area, not the rules that govern other more administrative functions of human rights commissions.

II. Two Models of Law-Making

The two approaches to norm creation and interpretation I distinguish here are two ends of a continuum and in real life shade into one another. It is worth articulating the two extremes as models for the purposes of explicating the attitude towards law-making that underlies each. Neither is all good or all bad; rather, different legal problems may lend themselves better to the use of one rather than the other. Law consists of "general standards of conduct" rather than "particular directions given to each individual separately".[3] While both models involve the creation of general standards of conduct, such standards can be drafted in terms of greater or lesser abstraction and generality. And it is competing senses of the interplay between abstraction and specificity that divides the two models here outlined. The first model operates in a top-down fashion; it is associated with the legislative approach to norm creation. The second exemplifies a bottom-up methodology, and is based on the common law process. However, my analysis initially pries apart the abstract methodology and the character of the institution employing it; I return below to questions arising out of the adoption of a particular model by a particular institution. The top-down model is Benthamite in character, while the bottom-up model owes more to the Blackstonian tradition.[4] In identifying the models with these larger schools of thought, I do not, however, mean to take on board the full debate between these two schools. For present purposes, I remain aloof from the deeper theoretical debate about the extent to which these two schools exemplify competing accounts of what counts as law or what accounts for the authoritative status of legal rules. Similarly, I need not enter the debate about whether the norms that come out of each of these processes properly deserve to be called 'rules'.[5] My objective is to isolate the methodology of norm creation associated with each of these traditions in order to examine the usefulness of each in the discrimination law context. As I deploy them, each model is highly idealized. Each produces its own distinctive style of judging that flows from its conception of how norm creation is done.

In its ideal form, the top-down model conceptualizes the law-making enterprise as the task of stating a comprehensive system of detailed, precise rules grounded in a

sound moral theory and designed to cover exhaustively every situation to be regulated. The authoritative determination, in advance, of the lawfulness of all behaviour is its ambition. The first step in the process is to decide which moral theory or value structure is to be adopted. Are we to subject all matters to a utility calculus, or reject trading off one person's well-being against that of others? Shall we treat autonomy as more important, or virtue? Do we take morality to be monistic or pluralistic? In light of the answers to these and many more questions we can then proceed to derive and enact more specific rules to deal with the collection of government revenue, automobile accidents, human cloning, monopolistic behaviour, etc. Such a model requires, as Hart pointed out, both determinacy of aims or values and determinacy of fact in order to work: "If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility."[6] Combined with the availability of a comprehensive and determinate theory of the principles governing human relations, determinacy of fact would, in principle, allow us to work out in detail our normative responses to all the possible fact-situations and decide in advance how each ought to be formulated. In such a world, the law-making enterprise would be a one-off event. In one authoritative document all the laws could be stated - no gaps would exist; no change would ever be needed.

On this model, although the law-making process may start with grand principles of morality, the task of the law-maker, ultimately, is to formulate a precise system of rules regulating behaviour and describing the consequences of non-conformity with the law; the complementary task of the adjudicator is to apply the rules as written. The conventional image of the law-maker on this model is that of the drafter of a complete code of laws delimiting all unlawful behaviour or wrongdoing, while the adjudicator's job is to sort fact situations to determine which are covered by the provisions laid down.

At the other end of the spectrum from the top-down model is what might best be described as a bottom-up model of norm creation. This model holds that although we may, at a sufficiently abstract level, agree on and be deeply committed to certain values or principles, we cannot anticipate all the fact situations in which they may be implicated, nor have fully mapped out a comprehensive view of the concrete consequences implicated by those values.[7] We want our legal system to be just and informed by principles of liberty and equality, for example, but these are multi-faceted concepts the full meaning of which is contested, even unknown, if we are being modest. In such situations, it is wise not to attempt a comprehensive theory ultimately issuing in a precise network of rules at the outset, but rather to let the implications of the abstract principles be revealed incrementally through thinking through fact situations on a case-by-case basis.

The process, ideally, begins with the application of the abstract principle to paradigm cases in which there is both widespread consensus and firm conviction as to the right outcome. Reasons will be offered as to why particular cases fall under the law's protection. Normally, decision-making in these paradigm cases will yield relatively precise rules that cover the standard features of the cases thought to be paradigmatic. Consideration of a range of such paradigm cases as they have emerged over time will normally provide an opportunity to reformulate the abstract principle or value, allowing us

to be somewhat more precise about its contours as we understand it so far. This reformulation may well include within its purview cases that would not have been anticipated, or if anticipated, would not have been considered within its scope at the start of the process. This exercise may also recast some cases originally thought to fall within the principle as excluded by it. In other words, reformulation will make the original abstract principle more determinate in ways that may expand or contract initial judgments about its application. The development of our thinking radiates out from there to take in situations that are closely analogous, each possible analogy serving to test the scope of the principle as previously articulated. Decisions about whether to include an analogous situation under the principle or not make still more determinate the scope of the principle. Again, after some experience of working through analogous situations, (revised) rules will be able to be formulated that make sense of the types of cases dealt with so far. The process continues indefinitely - taking stock of where the extension by analogy has taken us so as to reformulate the principle anew, and then starting again to consider further analogies as actual disputes present themselves for resolution. Within this model, the process of norm creation is an ongoing matter - any case might be an opportunity for extension by analogy or other reshaping of the principle. Mere rule application is therefore not easily distinguished from changing or adapting the rule to meet changing needs or understandings of the problem at hand.

Lord Atkin's approach in the landmark negligence case, *Donoghue v. Stephenson*[8], illustrates this dynamic approach to norm creation in the common law context, in contrast with his colleague, Lord Buckmaster. When faced with the question whether a consumer could recover in negligence directly from a manufacturer even though she had not purchased the good directly from the manufacturer, Lord Buckmaster, in dissent, argued that since there had been no similar case in the past holding that a consumer could so recover, the court ought to deny the claim. He treated the past cases as rigid pigeon holes into which any new fact situation must be fitted in order to succeed. Lord Atkin, however, saw those instances in which plaintiffs had been successful in the past as examples of "some general conception of relations giving rise to a duty of care"[9]. There must be, he thought, "some element common"[10] in underlying the past cases. He understood it to be the judges' role to articulate that common element in order to be able to generate a general principle uniting the case law and capable of guiding decision in novel cases.[11]

Whether this approach permits of a more expansive interpretation of the legal rule at stake than Lord Buckmaster's approach depends, of course, on how broadly or narrowly the general principle is framed that is argued for as the explanation of the individual cases already decided. If one were able to craft a general principle that fit all and only the existing precedents, the outcome in a given case would be exactly the same as that arrived at by a judge in search of a pigeon hole. If, on the other hand, a judge moves to a higher level of abstraction to frame the relevant principle, the resulting standard may not only exclude some of the outcomes in past cases, but also extend beyond existing case law, thereby creating room for the recognition of new types of fact situation, not merely variations on pre-existing themes, as falling within the reach of the law. This approach understands law as needing to adapt to new social conditions and changing social mores, as capable of and needing to accommodate growth over time. Typically, there is more than one general principle that might be offered to rationalize an

area of law, so that the locus of controversy within such an approach is whether a particular judgment goes farther than is legitimate. The more abstract the principle offered, the more room it creates for growth or change in the law, but the more adventurous is the act of norm creation involved. At the extreme, a judge who offered the general principle "People ought to be good" to explain the case law in a given area would be giving herself and future judges discretion to expand the law as far as any plausible conception of "good" would take her. This is no constraint at all. This brings out the latent legitimacy dilemma with the bottom-up method. Adaptation to change keeps the law supple, yet the more creative a new formulation of an old principle, the more it is likely to provoke questions about the nature of the decision-maker doing the reformulating.

The Blackstonian tradition has always recognized this potential for abuse of the injunction to search for the common element underlying the existing cases. In typical Blackstonian fashion, Lord Atkin built limitations into his methodology to contain it. He acknowledged that "the more general the definition [of an underlying principle] the more likely it is to omit essentials or to introduce non-essentials".[12] He therefore argued that judges should not state a principle any wider than is necessary to decide the case at hand. In all cases, any general principle offered to explain the outcome in a novel case should be regarded as provisional only - as new fact situations present themselves to the courts, judges may have good reason to expand or narrow any particular principle in light of the considerations that become apparent arising out of the new fact scenario. This methodology, therefore, involves dialectic between the concrete facts of cases that arise for disposition and the effort to articulate a more abstract principle that will account for all the cases decided so far. The general principle can transcend the particular cases out of which it is constructed, but it ought not go too far, in any one step, beyond the past; and any proffered principle is subject to revision based on our experience arising out of the effort to grapple with future concrete cases. Perhaps the essence of this approach can be captured by imagining Lord Atkin's reply to Lord Buckmaster's challenge that if the one step of extending liability to the manufacturer-consumer relationship were taken, "why not fifty?". I imagine Lord Atkin's response to be "although I can justify the extension of the law in this case, I cannot presently anticipate all the factors that might be relevant in deciding whether the fiftieth extension would be legitimate. We shall have to take matters one step at a time and see what the world looks like when we get to number fifty. If at that point step fifty seems sensible, it is neither here nor there that it seems outlandish now."

Ultimately, the bottom-up approach pushes legal analysis in the direction of formulating a theory of liability in each area of law - that is, an account of the justification for imposing liability. Such a theory is constructed out of our considered judgments about particular cases. Only such a theory can contain and support the search for general principles to explain existing case law.[13] So, for example, in negligence law the theory underlying the Neighbour Principle articulated by Lord Atkin as the relevant explanatory duty of care principle might make reference to the human interests that are important enough to deserve the law's protection, or to some account of moral agency and why the law should reflect it, or to an account of *culpa*, as Lord Atkin himself suggested. Although judges rarely attempt to articulate such a theory in any kind of detail, their judgments are usually informed by intuitions that can be fitted into some

theoretical framework. And although the process should be thought of as inherently open-ended, so that we should never be too confident that we have found the theory that settles everything once and for all, the effort, periodically, to formulate a rationale that goes beyond existing particular instances is a crucial step in the development of the law. By contrast, the top-down model starts with a general theory and derives more precise rules for concrete cases from it, which rules guide and constrain adjudication of disputes. The theorizing is mostly the job of the law-maker. If it does its job properly, both of working out a comprehensive moral theory and drafting the specific rules necessary to deal with all possible fact situations, there should be little need for adjudicators to engage with the large moral principles underlying the rules.

As is already apparent, the bottom-up model combines the law-making and adjudicative functions of a legal system. The process of resolving individual disputes is also the process of developing or changing the norms to encompass new situations or to take account of new conditions. The separation of these two functions is more natural to the top-down model. In a democratic age, it is natural to expect that a democratically representative body would be charged with the task of norm creation. The job of adjudication in the ideal version of this world would be a modest one. It would be confined to settling factual disputes and deciding whether a given set of facts fall within or without the rules laid down. Any more ambitious activity on the part of adjudicators would be properly characterized as a usurpation of the democratic process.

The top-down model is idealized in postulating the law-maker's ability to articulate a comprehensive moral theory and then anticipate all possible fact situations in order to be able to draft precise rules to deal with them. A more realistic version would acknowledge that full determinacy in these matters is not possible. We can neither fully anticipate all the fact situations to arise for consideration, nor the value judgments to be made when they do arise. A law-maker may still strive under these conditions to articulate a comprehensive system of values in a determinate way and draft a body of precise rules instantiating them, but the scheme will be based on what we know now and what we think about it now. Gaps will appear in the framework as new situations arise, or as we change our minds about the appropriate norms to govern. Small gaps may be able to be filled through interpretation of the rules laid down, but the greater the degree of precision employed in the drafting of the rules, the less leeway there will be for interpretation. The scheme will therefore need to be revised from time to time, as we better understand the world and our normative response to it.

The revision process would, in essence, repeat the process undertaken the first time - articulate the values that should govern and lay down precise rules derived from them. The same process would be reiterated over time as needed. How onerous this task would be for the law-maker depends on our sense of how serious are the indeterminacy's that plague us. In cases in which our values and objectives are clear and the range of fact situations that implicate them unlikely to change much over time, the prospects of producing a scheme that lays down clear, precise, enduring rules is good. To the extent, though, that we seek to regulate murkier issues, frequent revision will be needed. In the context of a separation of legislative and adjudicative functions, legitimacy concerns will confine the creative urges of adjudicators. Democratic principles again press in the direction of giving the amendment task, beyond minor

interpretive adjustments, to a democratically representative body. The task of adjudicators remains the modest one of rule application, perhaps with the addition of identifying those fact situations that give rise to a need for reassessment, while handing that task of reassessment over to the legislature.

This acknowledgment of indeterminacy brings out a pitfall of the top-down model. Its ideal functioning depends on the law-maker having worked out a general theory that grounds the rules, even though typically only the rules themselves will be enacted. If the ambition of drafting a web of specific rules is pursued in circumstances in which the law-maker has been unable to work from a comprehensive moral theory or unable to anticipate the range of fact situations likely to arise and calling for regulation, the rules drafted will be without adequate moral foundation and seriously incomplete. Yet their precision will hinder adjudicators from filling the gaps that will inevitably come to light over time. The rules enacted will be mere pigeon holes - lists of 'does' and 'don'ts', 'cans' and 'can'ts', without grounding in a durable theory of human interaction. If the rules can be amended or changed with ease, the need for constant revision may not be a significant burden. However, if change is cumbersome and therefore happens only infrequently, the existing pigeon holes will seem increasingly arbitrary to those unfairly squeezed in or left out. If the standing weakness of the bottom-up method is a susceptibility to challenge to its legitimacy when the over-eager principle seeker becomes too adventurous, the comparable weakness of the top-down model is its inflexibility when faced with unanticipated situations.

In summary, both models in their ideal form include both a general moral theory governing human interaction and more precise rules regulating concrete action. The top-down model starts with the theory and derives from it the concrete rules. The bottom-up model starts with paradigm fact situations and works up from the reasons for decision in such cases to intermediate general principles and ultimately up to a (provisional) general theory. Some connection to the general theory is the lifeblood of the concrete rules. If the connection is cut, rule application becomes mere pigeonholing. Each approach must find its own response to the central dilemma of law-making: combining flexibility with political accountability.

In our legal tradition, these models are associated with the legislature and the common law courts, respectively, but there is no intrinsic connection between either and the particular institutions of Parliament or the common law courts. Either institution can employ either model. In the early stages of the development of doctrine, the common law courts must pursue something like the process I outline as the bottom-up model. The institutional limitations on adjudicative bodies are well-known and much analyzed. They do not have the necessary resources, nor do the data of individual cases give them sufficient material to work with to develop from scratch a comprehensive theory to regulate a particular field. But once an area of doctrine has become richly developed and much analyzed, larger theories do develop, and decision-making in particular cases becomes more like the application of a general set of principles to individual fact situations.

On the other hand, there is a corrupt version of the bottom-up model that reproduces the inflexibility to which the top-down model is prone. The bottom-up model,

as I have articulated it, requires adjudicators to take on the responsibility of trying to move progressively toward a more determinate justification for legal doctrine while continuing to test emerging theories against our reactions to their consequences in new concrete cases. In the hands of adjudicators who do not fully take up this challenge, the bottom-up method has no 'up' - decision-making remains mired in the facts of particular cases, and courts stick closely to the decided case law - a self-imposed exercise in pigeonholing. There have been periods during which this arid approach characterized the common law, and of course, it continues to tempt some of the judges some of the time, as illustrated most explicitly by Lord Buckmaster's dissenting speech[14] in *Donoghue v. Stephenson*. Although he conceded that the principles of the common law are "capable of application to meet new conditions not contemplated when the law was laid down", he argued that "these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit."[15] In the context of manufacturer liability for defective goods, although the exception to the general rule against liability other than to parties to the contract of sale recognized in the case of goods dangerous in themselves could be applied to a new sort of dangerous good not in existence when this exception was first recognized, it would be illegitimate to otherwise narrow or qualify the general rule. This is to treat not only the number, but the size of the pigeon holes in the board as fixed.

Similarly, there is no guarantee that all statutes will be the product of a comprehensive moral theory which has been converted into an accurate and precise system of rules. Instead, legislation may start the law-making process in a way that mimics the bottom-up method - with little more than a vague sense of the values at stake and a firm conviction about how they apply in a handful of concrete types of situation. If a law-maker so situated enacts rules that narrowly deal only with the easy cases anticipated, the conventional understanding of the division of labour between legislators and adjudicators will produce a board of pigeonholes little different from Lord Buckmaster's. Its inflexibility will plague such a statute (or, more precisely, those subjected to its regulation). Avoiding this result requires either fast-tracking necessary legislative reforms as the need for them becomes apparent, or drafting the norms in such a way as to confer discretion on adjudicators to do the work of developing the indeterminate norms with which the legislature started. The former strategy will often not be feasible; the latter prompts the same legitimacy issues that law-making by adjudicators always arouses.

Any complex legal system is likely to employ both abstract law making methods. Which is employed in any given area ought to depend on our conception of the nature of the phenomenon to be regulated. If the issue at hand involves clear, relatively determinate objectives and the situation in which it arises is stable, greater precision is possible. However, in a great many areas of law such precision is neither possible nor desirable. To pursue the top-down model in circumstances to which it is ill-suited is likely to result merely, as Hart warned, in "settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified."[16] In the presence of significant indeterminacy's of either value or facts, issues are perhaps better left to be worked out over time through the bottom-up method. This contrast between two philosophies of norm creation and adjudication is common knowledge; I claim no originality for it. But the development over time of human rights legislation[17] and the

form current codes typically take can be usefully examined in its light. I argue that the history of law-making in the discrimination law area has been characterized more by pigeonholing than working from or toward a general theory about what discrimination is and why it is wrong.

Is discrimination capable of being defined in a cut and dry manner, our having anticipated all possible scenarios and decided which should be regulated and how, or does it refer to a problem of human interaction that is fluid and constantly manifesting itself in new forms such that we have no clear sense of all the circumstances in which it might arise in future or what to do about them? If the latter, our method of designing norms to regulate it should be equally fluid and open to change. To judge from the pattern of development of our anti-discrimination law one would have to conclude that a complete general theory of discrimination has never informed legislative efforts and is still unavailable. Yet much of the law is drafted with the precision that would be appropriate only if dictated by such a theory in the validity of which we could have confidence. This gives little discretion to the adjudicator to adapt the law to accommodate a new, but deserving situation, even though life is bound continually to throw up cases which do not fit the existing legal categories. These complainants will have to be told that there is no remedy for what happened to them until the legislature amends the law.[18] The precision of the rules also creates little incentive for adjudicators to search for a theory capable of explaining the rationale for the rules and guiding their intelligent development over time. Indeed, the more precise the rules are, the more likely that adjudicative attempts to fill in gaps and develop norms will be met with the criticism that adjudicators have no authority to amend the rules laid down by Parliament. The lower status in the legal hierarchy of administrative tribunals, who are charged with first instance adjudication in the discrimination context, only exacerbates this tendency. The problem of discrimination law over the last fifty years has been that of bringing into alignment the nature of the phenomenon and our grasp of it, and the norm creation and adjudication process that suits it.

III. Pigeonholing Discrimination

The story of the refusal of Canadian courts to use their authority to create a cause of action for any form of discrimination is well known. Invited to hold that public policy could be invoked to render unlawful a tavern owner's refusal to serve a Black man, the Supreme Court, in *Christie v. York*[19], refused to ride that unruly horse. Although *Christie* was decided under Quebec law, courts in common law provinces accepted it as authority for upholding freedom of contract even at the expense of turning a blind eye to discrimination.[20] The courts' refusal to make law in the area left it up to legislatures to fill the gap.[21] Although I think the case can be made that these judgments unfortunately represent a pigeonholing mindset within the relevant areas of the common law, spelling out how it might have been different at common law is not part of my present purpose.[22] Instead, taking the lack of imagination initially exhibited by the courts as given, I want to examine how the legislatures responded to the task of creating norms to deal with the problem of discrimination.[23]

Legislative rule making in this area can be characterized as a legislative version of a bottom-up approach without the 'up'. Rather than starting with a comprehensive theory of equality, the legislature has identified, as one operating under the bottom-up model might, successive paradigmatic cases of behaviour that should be prohibited, and has 'decided' each particular case by drafting precise rules targeting that behaviour.[24] Three aspects of the paradigmatic cases that have been provided for stand out. The first is the type of good or opportunity that is denied - in other words, the contexts within which discrimination is prohibited. The second is the grounds upon which an individual is denied a good or opportunity - or, the bases of unlawful discrimination. The last covers the circumstances that make a denial unlawful, or what I would call the fault standard for discrimination.

Legislation with respect to the first two aspects of unlawful discrimination has developed into a quite detailed system of rules about who can't do what to whom in what context. For some time, the third aspect - the heart of discrimination law - was much less precisely articulated in the legislation, although I shall argue below that even here there are signs that the legislature was operating with a paradigm case in mind and the legislation reflects it in its precise exemption of some forms of behaviour from the general prohibition of discrimination. In any event, although we have now developed a fairly detailed web of rules - far more complex and intricate than the original legislation in the area -, it is not clear that we are much closer to a theory that animates the scheme.

After illustrating the case-by-case methodology that the legislature seems to have followed by tracing the legislative history of the provisions governing the contexts in which discrimination is prohibited and the prohibited grounds of discrimination, I will briefly examine two issues that have arisen in the interpretation of the prohibited grounds in order to demonstrate the stifling effects of this pigeonholing. In the process, I will argue that only the search for a more principled formulation of the prohibited grounds will push us in the direction of a better understanding of the prohibition and enable the legal system to deal creatively and effectively with changes in circumstances and our understanding of those circumstances. I will then turn to the question of what I refer to as the fault standard in discrimination law to show that, in a more subtle way, its elaboration too is plagued by the same problems and requires the same kind of solution.

My conclusion is that given the indeterminacy's surrounding the phenomenon of discrimination, the legal rules governing it must build in the possibility of growth and incremental change. So far, law making has tended to pronounce on particular types of concrete case without incorporating into the law sufficient reference to or flavour of the underlying values that inform the particular judgments. Adjudicators are therefore left applying relatively static rules. The legislature would have been better advised to have included a further aspect of the bottom-up method, adapted to its purposes. The better approach would have been to enact core principles, not purporting to constitute a complete theory but pitched at an intermediate level of abstraction, explicitly leaving it up to adjudicators to do the work of case-by-case development and refinement of the principles through interpretation in the context of concrete fact situations.[25] Using as a model the typical process of reasoning that informs tort law doctrine, I will say something

about how some core elements of the cause of action for discrimination could be reconceptualized.

IV. Contexts and Grounds: The Apotheosis of the Pigeon Hole

With respect to the contexts in which discrimination is prohibited, the Ontario legislature began in the '40's by targeting a single, narrowly defined problem: the phenomenon of shopkeepers and other service providers announcing their unwillingness to deal with non-white members of the public by displaying "Whites Only" signs. This was prohibited through the *Racial Discrimination Act*[26]. Within a decade, it was decided that discrimination in employment was objectionable, and so *The Fair Employment Practices Act*[27] was enacted. Around the same time, the legislature decided that it really was unfair to pay women less for the same work performed by a male employee, so that was prohibited in *The Female Employees Fair Remuneration Act, 1951*[28]. Shortly thereafter, the legislature decided that it wasn't enough to prohibit the posting or publishing of notices of a discriminatory sort to ensure equal access to goods and services, so it prohibited the denial of "accommodation, services or facilities available in any place to which the public is customarily admitted" on discriminatory grounds.[29] A few years later, the problem of people being denied rental accommodation on the private market came to the legislature's attention; so the latter legislation was amended to prohibit discriminatory denial of occupancy in any building containing more than six units.[30] Some time later, the legislation was expanded to prohibit discrimination in the provision of all goods, services, and facilities.[31] This was a response to organizations such as children's sports leagues slipping out of liability for excluding girls by arguing that this was not a service or facility customarily available to the public but rather customarily available only to boys.

Each new statute added a separate pigeon hole - a new, relatively precise prohibition to the overall scheme. The first consolidation of all these anti-discrimination provisions was the *Ontario Human Rights Code* of 1962[32]. It simply collected in a single statute the various contexts in which discrimination had been prohibited in the past. Periodic reconsolidations have followed the same pattern. Thus the modern codes typically include provisions creating a cause of action for discrimination in employment, housing, and provision of goods and services. Since 1962, Ontario has added a general prohibition on discrimination in contracting to round out the modern contexts within which discrimination is prohibited.

A similar pattern can be traced with respect to the prohibited grounds of discrimination. The list of grounds has grown over the years, but that growth looks less like the result of the legislature's attempts to work out a general theory about who deserves the law's protection, than the *ad hoc* application of Band-Aids as the Human Rights Commission has publicized the plight of groups of people left out of the Code's protection. Anti-discrimination legislation in Ontario started by identifying the paradigm

cases of race and religion. If anything was an improper ground for discrimination, one might say intuitively, it is race and religion. Given the monumental struggles to liberate Blacks from slavery and the rise of anti-Semitism throughout the western world in the 1930's, the case for protecting these groups from discrimination in various contexts was an easy one.

New grounds were added only gradually as cases arose and the victims of these forms of discrimination had to be turned away by the system. In the midst of an immigration boom, the first employment discrimination law sensibly went beyond the protected categories of race and creed present in the *Racial Discrimination Act, 1944* to encompass "colour, nationality, ancestry or place of origin"[33] as well. But it neglected to include sex, marital status, family status, or age, not to mention sexual orientation, disability, or poverty. These other grounds were added in dribs and drabs: age discrimination was dealt with in a separate statute in 1966[34], sex and marital status, were not included until 1972[35], family status and handicap in 1981[36], sexual orientation only in 1986[37]. This process of piecemeal reform led the Ontario Human Rights Commission in its 1977 report, *Life Together*, to complain that "the legislation is now riddled with anomalies and hamstrung by limitations which render it increasingly unable to address the burgeoning human rights needs of this province."[38]

It is hard to avoid the conclusion that, in respect of both these aspects of the problem of discrimination, the legislature has adopted the bottom-up method of case-by-case rule-making - waiting for fact situations not yet covered by the rules to present themselves and then deciding how they should be handled. Given our legal system's lack of experience with equality as a legal norm, perhaps a case-by-case method was the best way to start. It is not to be expected that the legislature would be able to articulate at the outset a comprehensive theory in such uncharted territory. But it is not clear that the legislature has taken the next step - moving towards an articulation of the deeper principles that explain the concrete cases. At least is has not done so in the statute itself. Yet the enactment of precisely enumerated contexts within which discrimination is prohibited and prohibited grounds of differentiation has given adjudicators little leeway to develop such principles on the basis of which coverage to new categories could be extended. Instead, every time a new deserving case crops up, it requires an act of the legislature to deal with it, with all the delays attendant upon gearing up such a complex machine to handle what are often fine matters of detail, not to mention the risk of political opportunism or obstructionism at the expense of vulnerable minority groups. The result is a statute that resembles a board of pigeon holes, not very different from Lord Buckmaster's image of the common law, requiring legislative intervention to add new holes as needed.

V. The Interpretive Effects of Pigeonholing Prohibited Grounds

A. Square Pegs into Round Holes

A more fluid form of norm creation is necessary to give adjudicators the tools to gradually extend the coverage of the code as new variations on the discrimination theme arise. The process of enumerating discrete prohibited grounds of discrimination has been going on for over fifty years, and still there are deserving groups left out. Despite these continuing gaps, there has been no attempt to reformulate the criteria for inclusion in the Code's protection in terms of a general principle, even though we have enough experience now to do so. Let me illustrate the inadequacies of the existing pigeon holes and the superiority of a principled approach through the example of the struggle to obtain coverage for the obese.[39] Obesity is not itself a prohibited ground of discrimination under the Ontario Code, nor does it comfortably fit under any of the other grounds that are enumerated. Efforts have been made to argue that it is a form of discrimination on the basis of disability or "handicap", as it is labeled in *the Ontario Human Rights Code*, but the definition of handicap in the Ontario Code is rendered in rather precise terms.[40] In particular, it ties disability to the effects of "bodily injury, birth defect or illness", whereas the causes of obesity are often unknown, making it often impossible to establish the link to illness. Occasionally, complainants may succeed in fitting their claim into the category of sexual harassment, when it has been clear that the respondent's behaviour was informed by derogatory attitudes about gender, but this covers only a subset of obesity cases.

Yet it is clear that the obese suffer many of the same forms of disadvantage in the workforce, in acquiring accommodation, and in access to goods and services as those in protected categories: they are stigmatized, denied opportunities, paid less than others - all without sound basis.[41] The assault on human dignity is as severe as in other cases of discrimination; the tangible disadvantage as harmful. So once more, if this group is to be recognized another amendment to the legislation will be necessary. But even assuming that the amendment is forthcoming, it will merely add another pigeon hole to the board. By itself, this moves us no closer to a theory about why these various groups deserve protection. And the fact that the existing enumerated grounds function as discrete pigeon holes means that adjudicators have little incentive or place to develop one. Instead they get wrapped up in trying to fit square pegs into round holes - determining whether there is sufficient evidence of a physiological cause of this complainant's obesity to justify fitting it under the rubric of illness and therefore disability even though it is plain that prejudice against the obese is usually based on the belief that it is *not* an illness, but rather due to lack of self-discipline.

With each debate about the addition of a new pigeon hole, we have in fact been developing an implicit sense of what sorts of attributes should not be used as a basis for decisions having a detrimental impact on the individual. It is long overdue to attempt to render this in an abstract principle, leaving its further concrete extension to be managed by adjudicators. Legislation making it unlawful to discriminate on the basis of an

attribute that is relatively immutable, or that it would be unfair to require an individual to change in order to enjoy full participation in society, or that has been or comes to be the basis of unfair derogatory stereotypes would make it possible for coverage to be naturally extended to the obese (and other new cases). This way of conceptualizing the forbidden bases of discrimination is intrinsically tied, as it should be, to the developing understanding of the human interests discrimination legislation should be seeking to protect. I take those interests to include at least these two: the protection of human dignity, and of fair opportunity to enjoy access to important goods. The elaboration of the dignity interest at stake will go hand in hand with the developing understanding of the ways in which categorization on the basis of various attributes is stigmatizing, demeaning, or disrespectful. The idea that there are some things about oneself one shouldn't have to change in order to get ahead will inform and be informed by our developing sense of what the fair opportunity for full participation in society means. The Supreme Court has recently reiterated its commitment to this sort of approach in the context of constitutional equality rights[42]; a principled approach is not less important in working out equality related rights and responsibilities obtaining between private actors.

B. Intersectionality Revisited

The effort to state the basis upon which discrimination is impermissible in a more principled fashion would also help alleviate another problem created by a pigeonholing mentality. Nitya Iyer has effectively illustrated how the pigeon holes that currently define the prohibited grounds of discrimination can work injustice upon those who find themselves disadvantaged because of a combination of enumerated attributes.[43] The itemization of grounds encourages adjudicators to analyze fact situations through the lens of one alleged ground of discrimination at a time.[44] In analyzing what is wrong with this approach, we can illustrate once more the value of going beyond the enumerated grounds of discrimination as inert categories stating conditions for the imposition of liability to articulate principles explaining why discrimination on these bases is unacceptable. The treatment of the statutorily enumerated grounds as both "isolated" and "homogenous"[45] gives rise to two main problems.

The first involves situations in which adjudicators fail to notice how the combination of factors actually compounds the injury to the complainant. The case of *Alexander v. British Columbia*[46] illustrates the problem very well. The respondent liquor store manager refused to serve Alexander because he thought she was drunk. In fact, she had a motor impairment that affected her gait and speech, and was also partially blind. She was also a First Nation's woman. The tribunal found for the complainant, but characterized the discrimination as being solely on the basis of disability. Here the worry is that the adjudicator's tendency to focus on a single (perhaps the strongest) ground for the complaint means that the full flavour of the injury is overlooked. Perhaps the adjudicator read these facts correctly - perhaps the respondent would have treated anyone with this disability this way, regardless of her race. But it would scarcely stretch credulity to imagine that the respondent was influenced by the fact that the complainant was Aboriginal, perhaps assuming too quickly that she must be drunk because she was Aboriginal. In focusing exclusively on the disability basis of the complaint, the tribunal

missed an opportunity to examine how much more insulting it is likely to be to a First Nation's person than to others to be treated this way. In other words, using the enumerated grounds as pigeon holes - as mutually exclusive logical categories into only one of which a single individual can fit - obscures a central issue in the case: what was the harm done to the complainant by the respondent's behaviour?

The second kind of intersectionality case that has been badly handled is one in which the two (or more) grounds of discrimination are both necessary and are jointly sufficient conditions of the bad treatment - i.e. had either not been present the other would not have elicited the discriminatory conduct or effect. The situation is illustrated by *De Graffenreid v. General Motors*[47], in which a Black woman was not allowed to make a Title VII complaint that the respondent discriminated against those who were both Black and women. The argument against recovery in these sorts of cases seems to be that if the respondent can show that he has hired Black men and has hired white women, the argument that there has been either race discrimination or sex discrimination is undercut - the hiring of Black men shows the employer does not discriminate of the basis of race and its hiring of white women shows it does not discriminate on the basis of sex. In such cases, the focus on each ground to the exclusion of the other makes the discrimination disappear. The enumeration of discrete prohibited grounds seems to foster this approach - as though the correct procedure were to run one's finger down the list of prohibited grounds and, noting that 'Black women' is not one of the categories, denying the claim, just as one would a claim to recovery for discrimination on the basis of obesity because it is an attribute that is not on the list. At a deeper level, this result implies that discrimination on the basis of a particular factor is uniform, so that all members of a given group must be similarly affected or discrimination is not made out[48]; it conveys the impression that there is a homogeneity to each category as well as a separation between them.

The physicality of the pigeon hole image captures well the implicit approach in both these kinds of situations.[49] If the complainant has already been put into one pigeon hole, the same peg can't also occupy another, different hole; a complainant who straddles two such pigeon holes doesn't properly fit into either of them.

So how would the pursuit of a more bottom-up method make a difference? To begin with, ideally we would be working not with a code that lists prohibited grounds, but rather that gives a more general description of sorts of attributes that ought not to be belittled or used to restrict opportunity. This would make it natural to examine hard cases not by merely looking for a perfectly fitting pigeon hole, but by examining whether the case in hand exemplifies the form of harm that the statute seeks to protect against. But even if we must work from an enumerated list, that list could be treated as the equivalent of the initial range of easy cases decided through a case-by-case method - raw material out of which to construct a more general principle. That would require asking deeper questions about why each of these attributes might be on the list and using that inquiry in the interpretive exercise of responding to a fact situation involving the intersection of two or more factors.

Even a sophomoric effort in this direction would tell us that the list includes examples of attributes toward which some people have derogatory attitudes leading

them to stigmatize others as inferior. This we understand to constitute a serious harm to human dignity, so denying someone access to a good or opportunity because one thinks him or her unworthy of common respect is prohibited. With this understanding of at least part of the point of discrimination law,[50] there is no need to separate the two aspects of the complainant's complaint - and personality - in a case like *Alexander*. The law defines acting with certain reasons as discriminatory because it is an assault on dignity. If someone performs a given act for more than one of the outlawed reasons, he has, insofar as the dignitary interest at stake is concerned, committed two wrongs. Each wrongful reason constitutes an independent insult; together they magnify the harm suffered.

In other words, focusing on only one of two interacting grounds of discrimination extends the pigeonholing approach beyond the drafting style of the statute to our understanding of the harm of discrimination, preventing adjudicators from seeing the whole wrong and its impact on the whole person. There is more than a passing resemblance here to the difficulty some judges have had in the past with the idea of concurrent liability in tort and contract. There have been times when tort and contract were treated as mutually exclusive pigeon holes, forcing plaintiffs to choose which category to use to describe the wrong done to them. But, of course, it is now readily understood that a single act can constitute more than one wrong.[51] Indeed, this now seems self-evident in a way that makes us wonder how judges could ever not have seen it. It is only the idea that slotting fact situations into specific pigeon holes is the way to decide cases that obscures the truth. Once we see its inadequacy, all that is left is to work through the remedial implications of overlapping grounds of liability to make sure that the plaintiff/complainant is not doubly compensated.

If we pay attention to the roots of each of the enumerated grounds in discrimination law in the interest in human dignity, instead of insisting on putting each case in a single pigeon hole and then confining the discussion to how the complainant was affected in that respect, the various aspects of the respondent's attitude toward the complainant simply come together to contribute to an analysis of the total indignity inflicted on the complainant.[52] There is a tendency, as Iyer points out, to award higher damages in cases involving complainants who fall into more than one disadvantaged group, indicating that this point is sometimes at least implicitly understood.[53] Yet it would better ensure that complainants received full compensation and at the same time contribute more to our developing understanding of the phenomenon to have a discussion of these matters on the record, not simply operating behind the scenes.[54] Such a discussion would develop our thinking about the human interests that ought to be being protected by discrimination law - a fundamental element in our conception of the cause of action.

A similar analysis can be offered of the difference it makes to the second type of intersectionality fact situation to take a principled approach. Coming at these cases from the perspective of a tort lawyer, I have always found them the most puzzling. An allegation that Black women have been discriminated against can be broken down into the claim that it was because of the complainant's race *and* because of her sex that she was denied some opportunity. In causal terms, each of the attributes of race (being Black) and sex (being female) is necessary for the harm to arise, but neither is sufficient.

But, of course, in no other civil claim is it necessary to establish that there is a single, sufficient cause or explanation of the harm suffered in order to succeed. Normally, all that matters is that the alleged wrongdoing is a 'but for' cause or necessary condition; the existence of multiple necessary conditions that come together to create the harm is no bar to recovery - especially when both causes are alleged to be unlawful behaviour. By this standard, provided that a Black female complainant can show that had she been white, or had she been male she would have been hired (or her chances would have been improved), she ought to be considered to have made out both race and sex discrimination, not neither.

To explain what's wrong with the reasoning in *De Graffenreid*, we need first to distinguish between discrimination that involves acting on prejudice from adverse effect discrimination. The first involves performing an act that disadvantages another for particular, disrespectful reasons. The latter involves denying access to goods, services or opportunities, whatever the reasons, if that denial cannot be justified.[55] A principled approach would require asking not whether 'Black women' are on the list, but whether the employer's behaviour reveals the imposition or reinforcement of inequality - an instance of disrespectful treatment or denial of fair participation rights. It is possible for an employer to hold attitudes that are disrespectful toward or based on stereotype about not all members of a racial group, but only the women. Indeed, many racist attitudes and stereotypes are bifurcated along gender lines. Black *men* are associated in the bigot's mind with violence or criminality, Black *women* with promiscuity, for example. If there is reason to believe that some prejudiced, sex-specific attitude underlay this employer's behaviour, why should it matter that he does not treat men in this group badly? It may be that he has learned to think better of previously held derogatory attitudes toward the men, but has not yet been confronted about his attitudes toward the women. It may simply be that whatever derogatory views he holds about the men do not come into play in this work situation in a way that creates unfair hiring criteria or working conditions. Whatever the explanation for why the men in the group are not badly treated, it is beside the point if derogatory attitudes toward the women insult their dignity. What this reveals is that the apparent assumption underlying the pigeonholing approach that each protected category is homogenous has a corollary: that prejudice towards members of each group is equally homogenous. Once that assumption is exploded, there should be no further obstacle to grounding a complaint on the intersection of two forms of prejudice.

Similarly, it is possible that an employer's policies, while not grounded in prejudice, could have side effects that disproportionally affect not all members of a racialized minority or all women, but primarily racial minority women. Imagine a case in which an educational requirement is imposed which, because of different social conditions affecting Black women is harder for them to meet than for white women or Black men. If this barrier cannot be justified according to the usual tests, why should it be allowed to stand once its effect on vulnerable members of society in restricting opportunity and full participation is established? Again, the assumption that the enumerated grounds are homogenous carries the implication that any given act will affect all members of a particular category in exactly the same way. More careful analysis of intersectionality cases - or life, for that matter, - demonstrates the falsity of this premise. If we let these cases be an opportunity for understanding the subtleties of

discrimination and its harmful effects, rather than an exercise in fitting human beings into prefab categories, they will often go from being hard cases to being easy ones – from no discrimination to multiply grounded discrimination.

VI. What Counts as Discrimination?: Developing a Fault Standard for Discrimination

The very fact that the Code has developed through the elaboration of ever longer lists of prohibited grounds and the gluing together of independent contexts within which discrimination is prohibited itself indicates that there is no general theory of the wrong of discrimination informing the legislation. However, the best evidence of this lack of theory is that the central concept of discrimination law - "discrimination" - goes unexplicated in the statute.[56] In contrast with the precise list-drawing elsewhere, this looks on the surface like the incorporation of a very abstract concept, leaving much interpretive room for adjudicators to use it to adapt to changing conceptions of equality based on growing experience of the prevalence and effects of inequality. But a closer look makes this less clear. While legislatures have shied away from directly defining discrimination, they have tended to lard their statutes with rules around the edges of the central concept itself that have constrained the efforts of adjudicators to undertake the process of adapting the abstract concept of equality to meet our changing conception of the nature of the problem and the appropriate solutions. This has provoked what I see as an unnecessary crisis of legitimacy in respect of a central aspect of the cause of action for discrimination as adjudicators have had to struggle against the wording of the statute to do what is clearly required to keep the law relevant to modern conditions.

Let me illustrate with an analysis of the debate over whether only intentional conduct can constitute discrimination. The issue was raised squarely in *O'Malley*[57], in which an employee of Simpsons-Sears was demoted to part time work because she refused to violate her religious beliefs by working on Saturdays as required by the employer's policy that all full time employees be available for work on two out of every three Saturdays. The employer argued that its policy was based on the needs of the workplace, Saturday being the busiest day of the week, and not on any intention to harm the complainant. At the time, the relevant provision (s. 4(1)(g)) of the *Ontario Human Rights Code* said simply "No person shall...discriminate against any employee with regard to any term or condition of employment because of...creed...of such...employee". The complainant argued for a conception of discrimination based on the disadvantaging effect on her due to her religion of the employer's policy rather than the intention in instituting it. Yet it was clear that to read the legislation as strictly prohibiting any action that happened to have a detrimental impact on members of protected groups would be unreasonable. In particular, such an interpretation would give no room for considering the legitimate interests of employers in running their businesses efficiently. As Mr Ratushny, the adjudicator in the first instance, noted, this interpretation would make it unlawful for someone operating a business that only opened on Saturday to refuse to

hire someone who observed the Sabbath on that day and hence would never be available for work.[58]

It seemed reasonable, if discrimination were to be interpreted broadly as argued for by the complainant, that employers be able to counter the claim by showing that being unable to impose the challenged rule would seriously undermine their enterprise. Yet the legislation contained no general qualification on the prohibition of discrimination - no license to create a general opportunity for respondents to argue that their behaviour, while disadvantaging, was justified. Worse still, the legislation did include one specific qualification, in s. 4(6), of the prohibition on discrimination: "The provisions of this section relating to any discrimination... based on age, sex or marital status do not apply where age, sex or marital status is a *bona fide* occupational qualification and requirement for the position of employment". This provision does anticipate that there may be cases in which the employer's interests can be taken into account to conclude that discrimination is justified, thereby excluding liability, but it confines those circumstances to age, sex or marital status discrimination when it is found to be a 'bfor'. Since the allegation in *O'Malley* was religious discrimination, this exception to the main prohibition was not available to the employer. The inclusion of a specific exception was fastened upon by the Ontario Supreme Court[59] (with whom the Court of Appeal agreed[60]) as justification for concluding that this was the only exception the legislature intended. This left standing unqualified the prohibition of discrimination on the basis of creed (*inter alia*). If the court were to interpret discrimination to include causing an adverse impact on a member of a protected group whether intentionally or not, this would leave respondents liable for any behaviour, however reasonable, that happened to have a discriminatory effect. Under these circumstances, the court thought it only fair to read the legislation narrowly, to prohibit only intentional discrimination.

This result was overturned ultimately by the Supreme Court of Canada.[61] Discrimination was interpreted to include the imposition of a general policy that has the effect of disadvantaging members of a protected group, but the Court, recognizing the potential unfairness to employers and the legislature's failure explicitly to take account of this, read into the legislation a proviso that a respondent could exonerate himself by showing that he had made reasonable efforts to accommodate the complainant's situation. In other words, the Court, realizing that a broad interpretation of discrimination created a "gap" in the legislation, decided to fill it with a general doctrine of reasonable accommodation.

Although the Supreme Court's decision better reflects the needs of our society, the lower courts' interpretation was, I think, more faithful to the statute as written. If discrimination is limited to differential treatment motivated by a protected characteristic, the explicit exception for age, sex and marital status differentiations that can be judged *bona fide* makes perfect sense, since there are obvious examples of situations in which even explicit differentiation on these grounds would be justified. (The sex of restroom attendants is perhaps the most used example of legitimate differentiation.) And there is no need to invent any further exceptions. The broader interpretation opens up a gap in the legislation which the courts must then fill. It invites us to ask why, if the legislature intended a broad interpretation of discrimination, did it not provide the obviously necessary provision to take account of legitimate competing interests? It is more

plausible, I think, to suppose that the legislation was drafted with the easy case of discrimination in mind - treating someone worse for the reason that she is female, or non-white, or a member of a religious minority, etc. Although that is not made explicit in the discrimination provision itself, it is betrayed by the narrowness of the one exception that is made to it. That is not to say that the legislature intended that adverse effect discrimination not be prohibited; more likely that no one thought about it. The facts of a case like *O'Malley* were not anticipated by the legislature and therefore the value judgment that its resolution requires was not confronted.

I don't want here to join the debate about whether the Supreme Court's exercise of judicial power was legitimate in this case. The point is that even if one thinks the right answer was reached, one has to admit that it was in the teeth of the legislation rather than with its help. And not because we have reason to believe that the legislature had decided against this expansive meaning of discrimination, but because the legislation included specific provisions drafted around the paradigm case of bigotry even though this area is one in which we cannot plausibly claim to have a developed theory of equality in hand and a fully fleshed out sense of the range of fact situations likely to engage our attention into the distant future that might ground a claim that the legislature meant to confine the scope of discrimination. Indeed, the confirmation that the result reached by the Supreme Court was in keeping with the legislature's sense of where the law should be lies in the fact that as *O'Malley* was winding its way through the system, the Ontario legislature was amending the Code to explicitly include liability for what it calls constructive discrimination.

It is telling, however, that even as it enlarged the scope of liability, the legislature chose once again to do it through the construction of a new pigeon hole. Instead of revising the basic provisions of the Code making discrimination unlawful so as to directly expand the notion of discrimination to encompass the adverse effect concept, the legislature enacted a separate provision making it an infringement of rights "Where a requirement… is imposed *that is not discrimination on a prohibited ground* but that would result in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination…".[62] This formulation seems to concede that adverse effect "discrimination" is not really discrimination, but will be made unlawful anyway. It creates a new basis for liability, but not by creating a new concept of discrimination.[63]

The absence of a definition of discrimination in human rights codes has been remarked upon by commentators, often with at least a tinge of disapproval.[64] But we should, I think, be neither surprised nor particularly regretful at the absence of a definition. Definitions are all very well if we know precisely what we want and can capture it adequately in a verbal formula. A definition here would require a comprehensive theory of equality, a highly contested and very complex matter, and something that presently eludes us. Under these circumstances an early attempt to define the concept with precision would only have more tightly confined us to society's understanding of the paradigm cases at the time of enactment. And that would be to put a brake on the ability of the law to develop as it confronts new fact situations until the legislature could get around to amending the legislation. Pressed to define discrimination, the drafters of the Ontario Code in force when the *O'Malley* situation

arose would likely have done so in terms of the paradigm of differential treatment based on prejudice. With open efforts to segregate the races everywhere visible at the time, it is not surprising that this should be considered the paradigmatic evil to be addressed. At that point in time it was no more to be expected that a legislature could anticipate the need to encompass effects as well as intentions than to imagine an eighteenth century common law judge working with images of typical trespass cases foreseeing the development of trespass on the case and the opening up of negligence law it made possible.

It would be unfair to blame legislatures for not embarking on the task of defining discrimination under conditions of such uncertainty, but that is not to say that their approach was beyond criticism. While declining to explicitly define the concept, they nevertheless implicitly signaled a limited conception in allowing the drafting of the exception clause to be informed by a narrow understanding of the paradigm case of discrimination. When a court, operating under the bottom-up method, contents itself with announcing an outcome for a given fact situation rather than contributing to the ongoing construction of a theory, it is generally understood that later courts are in no way precluded from considering new fact situations, or making a more ambitious attempt to rationalize the existing case law. However, when the legislature lays down precise rules for particular cases, this is commonly seen to preclude regulation of uncovered situations. Democratic conceptions of legitimacy prescribe that it should be the legislature that makes decisions about how and when the law is to be extended. Therefore, to legislate with more precision than the subject matter makes sensible inhibits the organic development of the law. Instead of being changed and adapted incrementally, the law lurches from plateau to plateau. Or, if adjudicators try to keep the law abreast of social conditions, their efforts are likely to provoke unnecessary crises of legitimacy. Furthermore, the art of statute drafting does not easily lend itself to detailed theoretical explanations of why the law takes the shape it does. A fuller understanding of the rationale behind a statute is usually a product of the adjudicative process. If, however, the excessive precision of the statute inhibits adjudicative development of such an understanding by encouraging mere pigeonholing or narrow interpretation, the whole body of law remains undertheorized.

It should be recognized that the rights and responsibilities that constitute discrimination law are not capable of precise determination, and laws in the area must be drafted accordingly. This should be obvious if we see discrimination law as an extension of the realm of nonvoluntary obligations centred in the law of tort. Tort law is the home of the ongoing articulation of the general duties we owe to one another to take care for the well-being of others. Historically, tort law has concentrated on the protection of physical security and the security of property, but has also begun to reach into the realm of pure economic interests[65] and, more slowly, emotional harm[66] often grounded in a violation of dignity. The scope of involuntary obligation has grown considerably over the last century. Over the history of its development, an ongoing battle has been waged to determine which obligations will be treated as truly involuntary, and which will be subject to override through contract or treated as created only by agreement. Through human rights statutes, the law of involuntary obligation has been extended to offer some protection to a range of dignity interests and the economic and social interest in employment, accommodation, and access to services. In doing so, it has to negotiate

many of the tensions characteristic of tort law. It has long been recognized, if there was ever any doubt, that tort law is not capable of definition.[67] Instead, doctrine tends to be constructed around a sense of the human interests at stake in enjoying some form of protection and in being required to provide it, and the need to balance these in some way that gives fair consideration to each. This is the general result of successive efforts to convert the outcomes in particular cases into more general principles purporting to explain those outcomes. It is precisely because the interests on neither side are capable of precise articulation that the process remains an open-ended one, with each extension of the harm from which people should be protected being met with a re-examination of the legitimate competing interests in the freedom to pursue legitimate ends.

If I am right that discrimination law is best seen as a statutory part of the law of nonvoluntary obligation traditionally identified with tort law, and that it partakes of the same sorts of indeterminacy's and the same conceptual structure, if follows that law making and norm development in this area should mimic that in the area of tort. This process in tort law necessarily pursues the bottom-up method because tort has been left to the courts to administer. Short of returning these issues to the common law courts - a strategy that has many institutional and political implications beyond the scope of this paper - the legislature could draft a discrimination statute that reproduces, to some extent, the process of bottom-up reasoning. Such a statute would identify, in general terms, the human interests that the legislation seeks to protect as well as the legitimate competing interests in play, and formulate general principles to guide the creation of a system of rights and duties, leaving it up to adjudicators to work out the full implications in a given fact situation and the appropriate balance between interests. Given the considerable amount of value indeterminacy that characterizes our thinking about these issues, it would be wise to formulate these general interests in a way that quite deliberately allows room for growth, or not, as it comes to make sense when worked through particular fact situations. This would allow for the development over time, through the reasons articulated in each case, of a fuller theory of equality and its role in regulating human interactions.

For example, the relevant harms could be described in the abstract as encompassing, first, insult or harm to dignity, and, second, denial of the opportunity to participate fully in important aspects of social life. This captures the wrong of the easy case of differentiation based on prejudice while being capable of extension to new scenarios such as that in *O'Malley*. Similarly, an exception could be included that is the statutory equivalent of that created judicially in *O'Malley* - it is the *unreasonable* impairing of participation that is unlawful, so that if the respondent can show that he has legitimate reason for acting as he did and could not have done otherwise without suffering undue hardship himself, no liability will ensue. To ease the worries of those who find this formulation of the "rule" uncomfortably vague, I invoke once more the example of tort law. Everyone knows that the Neighbour Principle is not capable of application in rule-like fashion; yet it forms the bedrock of negligence law. It is not true, strictly speaking, that liability ensues whenever one causes foreseeable harm, yet the balancing of competing interests embodied by the principle creates the framework within which refinements and deviations are developed.

This is, of course, only a small first step in the direction of trying to reformulate discrimination law norms. A thorough job would require going through all the areas of recognized liability, breaking them down into their constituent components, and comprehensively performing the operation of converting the established instances of application into more general principles capable of organic growth. Legislating in such open-ended terms may give rise to legitimacy concerns because it does confer a considerable amount of discretion on adjudicators. This does not mean, however, that the legislature need completely abdicate moral and political responsibility in this area, any more than it does in areas under traditional common law regulation. It remains open to the legislature to police the developing framework as it is created by the adjudicators by changing the legislation if necessary in order to close a door that the adjudicators have improperly opened or open one that adjudicators have too timidly left closed. However, given the history of skepticism, at least in some constituencies, toward the legitimacy of administrative tribunal decision-making in such an important area, it would be advisable for legislatures, while retaining oversight, to make clear the discretionary authority that is being conferred on human rights adjudicators to work with the organic principles provided to deal fairly with the disputes before them.[68]

VII. Conclusion

With more than fifty years' experience in dealing with discrimination under our belt we have, I think, outgrown the method of law-making that consists of using the legislative machinery to enact successive new pigeon holes each time a new kind of fact situation arises that deserves protection. It is time for a change. The human phenomenon of discrimination – of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage – is not capable of being codified in precise terms of the sort that have characterized past legislative efforts. In retrospect, this law-making strategy has been as ill-conceived as if legislatures had preempted initial judicial reluctance to develop the action for trespass on the case by legislating negligence law in a similar manner. Just imagine what the law of negligence would have looked like: first a statute imposing liability on the drivers of horse drawn coaches (later updated for automobiles), then another for manufacturers or household products, then another for landlords, followed by one for construction companies, after which one for accountants - each specifying what counts as negligence as understood at the time, and therefore having to be constantly updated to include new forms of negligence in the context. Given the boundless ingenuity of the human species in finding new ways to harm one another, this approach to negligence would have been madness.

Entrusted with working out general principles that keep the law relevant to the social conditions with which it must deal, the adjudicators charged with the task in that context - the common law courts - have shown themselves more or less up to the task.[69] In the process and over the long run a practice of thinking creatively about those principles has thriven, and our understanding of the normative foundations governing potentially harmful interactions between people has grown. This, in turn, arguably

alleviates concerns about the courts as decision-makers by making debates about underlying values more transparent. It is time we recognize that discrimination law is an extension of the enterprise of figuring out how much care we each ought to take for the well-being of others. The specificities of human interaction that might give rise to a complaint of discrimination are as unlimited as in the context of negligence or tort more generally and hence equally indefinable. Given the openness of the enterprise at hand, norm creation within it requires flexibility. As Lord Macmillan once said, "The categories of negligence are never closed".[70] What we need is a way of formulating laws in the discrimination context that would allow us to say that the categories of discrimination are likewise never closed.

Fostering a culture of principled debate about discrimination law principles may contribute to the process of more securely embedding these principles in legal consciousness. If their interpretation, growth, and extension are understood as part of the same process of argument and debate that surround other important legal principles, instead of discrimination liability rules being perceived as more or less arbitrary pigeon holes that may exclude or trap, this may militate against the tendency of constituencies inclined to resist the imposition of human rights norms to dismiss human rights statutes as an exercise in pandering to 'special interest groups'. Without an articulated foundation in principle, discrimination law can only ever oscillate between competing political camps - each trying to secure the enactment of its preferred pigeon holes. The role of egalitarian values in defining citizens' rights and obligations vis-à-vis each other is too important not to try to do better.

Endnotes

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1 The legislative history is traced in W. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Scarborough: Carswell, 1994) c. 1.

2 *Bhadauria* v. *Board of Governors of Seneca College* [1981] 2 S.C.R. 181.

3 H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) at 124.

4 For a full length treatment of the tug of war between these two traditions of legal thought, see Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

5 For a recent stab at analyzing how rules, standards, principles, and factors play different roles in legal reasoning, see Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996) c. 1.

6 *Hart, supra* note 3 at 128.

[7] *Sunstein, supra* note 5, c. 2, characterizes such circumstances as situations of incompletely theorized agreement.

[8] [1932] A.C. 562.

[9] *Ibid*. at 580.

[10] *Ibid*.

[11] For an exposition of the Blackstonian roots of this conception of the connection between concrete cases and more general principles, see *Postema*, *supra* note 4 at 30-38.

[12] *Donoghue* v. *Stephenson*, *supra* note 8 at 580.

[13] Although Sunstein argues that rules amounting to incompletely theorized judgments are common in law and even crucial to the ability of the system to contain the various political pressures it is subjected to, it seems to me that the urge at least to try to move to a more completely theorized level is also pervasive. This is not to say that every judge faced with a controversial matter makes the attempt, nor that every attempt is successful. But it is no accident that important moments in a legal system's development are typically characterized by such an attempt. *Sunstein*, *supra* note 5, c. 2.

[14] *Supra* note 8 at 566.

[15] *Ibid*. at 567.

[16] *Hart*, *supra* note 3 at 130.

[17] I will mainly refer to the Ontario legislation, but much the same story could be told about most, if not all, Canadian codes.

[18] In rare instances, a complainant will be able to invoke the Charter to fill a gap in the statute, as happened in *Vriend* v. *The Queen in Right of Alberta*, [1998] 1 S.C.R. 493. The analysis of the wisdom of Charter intervention in such cases should produce the kind of search for principle that ought to inform equality litigation. However, from the point of view of the average complainant in a discrimination action, Charter litigation is the most expensive and least accessible form of adjudicative norm development.

[19] [1940] S.C.R. 139. For the most exhaustive discussion of the case see James Walker, *Race Rights and the Law in the Supreme Court of Canada* (Osgoode Society for Canadian Legal History and Wilfred Laurier University Press, 1997).

[20] *Tarnopolsky and Pentney*, *supra* note 1 at 1-24.

[21] According to James Walker, the legislature was not initially eager to step in, preferring to pass the buck back to the courts: *Race, Rights and the Law*, *supra* note 19 at 143-44.

[22] This task has been taken up by Amnon Reichman, "Overlooking the Common Law: The False Premise of *Vriend*", manuscript on file with the author, and H.L. Molot, "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation" (1968) 46 Can. Bar Rev. 612.

[23] Again, in extolling the virtues of the bottom-up methodology usually considered at home in the common law courts, I do not mean to paper over the flaws of the courts as historical institutions. I do mean to separate the methodology within the common law from the ultra-conservative, laissez-faire political values that have sometimes informed its use. I take this to

be no different from the way that the top-down method can be used by one legislature to institute a progressive legal scheme and by another in pursuit of a conservative agenda.

[24] I am building, here, on an argument made by Neena Gupta, *Reconsidering Bhadauria: A Re-examination of the Roles of the Ontario Human Rights Commission and the Courts in the Fight Against Discrimination*, LL.M. Thesis, Faculty of Law, University of Toronto, 1993, Chapter 4.

[25] According to Michel Morin, "Portalis c. Bentham?: De la souplesse des systèmes de droit codifié" (manuscript on file with the author), another of the papers produced for the Law Commission's Legal Dimensions Initiative, my suggested approach has much in common with that of Portalis, the celebrated drafter of the first French Code civil, perhaps confirming that the common law method, which inspires my efforts, and the codification approach, within which Portalis was working, need not be considered sharply contrasting methods of norm creation.

[26] S.O. 1944, c. 51.

[27] S.O. 1951, c. 24.

[28] S.O. 1951, c. 26.

[29] *Fair Accommodation Practices Act, 1954,* S.O. 1954, c. 28.

[30] *Fair Accommodation Practices Amendment Act, 1960-61*, S.O. 1960-61, c. 28.

[31] See *Re Ontario Human Rights Commission and Ontario Rural Softball Association* (1979), 102 D.L.R. (3d) 303 (C.A.); *Re Cummings and Ontario Minor Hockey Association* (1979), 26 O.R. (2d) 7 (C.A.) The legislation was amended in 1981, see S.O. 1981, c. 53, s. 1. In recommending this expansion, the Ontario Human Rights Commission, in its 1977 report, *Life Together: A Report on Human Rights in Ontario*, (Thomas Symons, Chairman, Ontario: Queen's Printer, 1977) remarked that the limitation to places to which the public is customarily admitted "had particular relevance in the 1950's and 1960's to the elimination of discrimination in hotels and restaurants" (p. 48), the very contexts in which the common law judges failed to act, thus provoking the legislative initiative.

[32] S.O. 1961-62, c. 93.

[33] *Fair Employment Practices Act, 1951*, *supra* note 27.

[34] *The Age Discrimination Act, 1966*, S.O. 1966, c. 3, s. 2

[35] S.O. 1972, c. 119.

[36] *Human Rights Code*, 1981, S.O. 1981, c. 53

[37] *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64.

[38] *Life Together*, *supra*, note 31, p. 8.

[39] See also *Gupta, supra* note 24. The leading Canadian cases are *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425, and *Davison v. St. Paul Lutheran Home of Melville, Sask.* (1993) 19 C.H.R.R. D/437. A similar story could be told using the attempts to portray pregnancy discrimination and sexual harassment as sex discrimination, or sexual orientation discrimination as family status discrimination. Some success was met with in the former (*Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219; *Janzen v. Platy Enterprises* (1989), 59 D.L.R. (4th) 352 (S.C.C.)), but not in the latter case (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554).

[40] The full definition is as follows: s. 10 (1): “because of handicap” means for the reason that the person has or has had, or is believed to have or have had,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree or paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,

(b) a condition of mental retardation or impairment,

(c) a learning disability, or a disfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under *Workers Compensation Act*;

[41] J. Paul R. Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17 Advocates Quarterly 338.

[42] *Law* v*. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[43] Nitya Iyer(Duclos), “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 C.J.W.L. 25.

[44] The same tendency seems to affect cases in which there is some dispute about whether to find discrimination on the basis of a prohibited ground occurred or to attribute the respondent's behaviour to an attribute not protected by the law. As illustrated by *Mossop*, *supra* note 38, this can result in the complainant being placed exclusively in the no-liability pigeon hole, through a finding that the alleged discrimination was based on a non-prohibited ground. For a discussion of this tendency, see Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 Q.L.J. 194 ff.

[45] *Iyer*, *ibid*. at 192-93.

[46] (1989), 10 C.H.R.R. D/5871.

[47] 413 F.Supp. 142 (E.D. Mo. 1976).

[48] *Iyer, supra* note 43 at 34, 43; *Iyer, supra* note 44.

[49] *Iyer, supra* note 44, uses the image of 'pockets' to convey a similar sense of the physical impossibility of occupying two categories at the same time.

[50] I emphasize that this is only part of the purpose of discrimination law. I would not want to be taken to be arguing that discrimination law is limited to the control of bigoted behaviour.

[51] Of course, there remains a lively debate about the limits of concurrency - the circumstances in which the imposition of liability in tort would unacceptably undermine an exclusionary rule in contract. In such cases a decision does have to be made about which ground of liability takes precedence. But I can see no such potential conflict between a finding of liability for discriminating on racial grounds and a finding of liability for discriminating on disability grounds.

[52] However, if we focus exclusively on the frustration of the complainant's tangible ends (obtaining a particular service) as the relevant harm, such cases represent harm that is overdetermined by wrongful conduct. If we take the remedial point of a complaint to be to put the person back in the position he or she would have enjoyed if not for the wrongful action, the complainant is entitled to compensation only once for the harm of not being allowed to make a purchase. The respondent's dual motives do not increase this aspect of the harm suffered. The two (or more) types of harm caused by discrimination are often not clearly distinguished. Another way to articulate the critique offered here is to say that the pigeonholing mentality has inhibited adjudicators from embarking on a more principled investigation of the harms to be redressed by discrimination law. As ever, some conception of the human interests protected by a cause of action is the conceptual companion of an account of the harms for which redress is available.

[53] *Supra* note 43 at 41.

[54] *Ibid*. Similarly, as Iyer also points out, it would help provide a more nuanced understanding of sexual harassment to acknowledge the ways in which racial and other forms of stereotyping inform such behaviour, contributing to the harm experienced by the victim.

[55] This formulation skates around the many difficult questions about what constitutes justification for actions having an adverse effect, but it will serve for present purposes.

[56] As noted by *Tarnopolsky and Pentney, supra* note 1 at 4-1, this absence of a definition is true of all but the Manitoba and Quebec statutes.

[57] *O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (S.C.C.), *rev'g* (1982), 38 O.R. (2d) 423 (Ont. C.A.), *aff'g* (1982), 36 O.R. (2d) 59 (Ont. Div. Ct.), *aff'g* (1980), 2 C.H.R.R. D/267 (Bd. of Inq.)

[58] *O'Malley v. Simpsons-Sears* (1980), 2 C.H.R.R. D/267 at D/268.

[59] (1982), 36 O.R. (2d) 59.

[60] (1982), 38 O.R. (2d) 423.

[61] [1985] 2 S.C.R. 536

[62] S.O. 1981, c. 53, s. 10 (now s. 11), amended, *Equality Rights Statute Law Amendment Act*, S.O. 1986, c. 64.

[63] When the Supreme Court later, in *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561, read such blanket exceptions to the duty not to discriminate as applying to employer policies as a whole rather than their application to individuals, thereby negating the possibility of a duty to accommodate created in *O'Malley*, the legislature was forced to revise the statute yet again.

[64] W. Tarnopolsky and W.F. Pentney *Discrimination and the Law, supra* note 1 at 4-1 – 4-4; Beatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 36; J. Keene, *Human Rights in Ontario* (Toronto: Carswell, 1992) at 6.

[65] The courts in some jurisdictions are reaching further than others. After starting the ball rolling, with the landmark decisions in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520, the U.K House of Lords has cut back considerably on the scope of recovery for pure economic loss. See *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908. However, the Canadian, Australian, and New Zealand courts continue cautiously to extend obligations in this area. In the Canadian context, see *Canadian National Railway v. Norsk Pacific Steamship* (1992), 91 D.L.R. (4th)

289 (S.C.C.), *Winnipeg Condominium Corp. No. 36 v. Bird Construction* (1995), 121 D.L.R. (4th) 193 (S.C.C.), and *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210.

[66] This development has been taken place under the rubric of the tort of intentional infliction of nervous shock, often referred in more recent decisions as the intentional infliction of emotional distress. See, for example, *Rahemtulla v Vanfed Credit Union*, [1984] 3 W.W.R. 310 (B.C.S.C.); *Canada v. Boothman* (1993), 49 C.C.E.L. 109 (Fed. T.D.); *Clark v. The Queen* (1994), 94 C.L.L.C. 14,028 (Fed. T.D.).

[67] For a classic attempt, fully appreciative of the impossibility of the task, see Percy H. Winfield, *The Province of the Law of Tort*, Cambridge: Cambridge University Press, 1931.

[68] There is, of course, a larger debate that could be pursued here about how much discretion it is appropriate to confer on administrative tribunals and how those tribunals ought to be designed in order to be up to the task. These questions will have to await another occasion.

[69] Sometimes more and sometimes less. I do not mean to deny that there has at various times been intense controversy over particular adaptations or refusals thereof. But such controversy is considered to be part of the process from which the courts, like other legal participants learn.

[70] *Donoghue v. Stephenson*, *supra* note 8 at 619.

Privacy and Electronic Commerce: Legislating Conflicting Interests

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I. Introduction

In the fall of 1998, the federal government brought before Parliament the draft *Personal Information Protection and Electronic Documents Act*, Bill C-54. The Bill, which was hotly debated and subject to numerous amendments, failed to pass before the end of the spring session of Parliament in 1999. The controversy over the Bill is not surprising given its subject matter; it is most prominently known for its attempt to set a national standard for the protection of personal data from undue[1] collection, use and disclosure by the private sector. Unsurprisingly, critics challenged the substance of the Bill. Some argued it did not go far enough, others argued that it went too far, or that it was unnecessary to begin with. These debates are expected to be revived in the fall of 1999, as word is that the Bill will be reintroduced in the next sitting of Parliament.[2]

Although controversial, Bill C-54 is not just interesting because of its content. The form and structure of the Bill raises numerous questions: questions about the role of industry in normative rule making, the relationship between industry, cabinet and the legislature, the ability of the legislature to use traditional forms of legislation to cope with rapid technological and social change, and the impact of globalization on law-making within a federal framework. In addition, the stated purposes of the Bill reflect a fundamental ambivalence about its role, and perhaps even hint at the conflict of interest inherent in government regulation of information privacy. In this paper, I propose to explore these issues raised by Bill C-54.

I should state at the outset that I view privacy as a fundamental human rights issue. As a result, I see personal information protection legislation as belonging, by legislative genre, to the category of human rights legislation. To some extent, my critique of this Bill is affected by the fact that it fits very poorly, for a range of reasons, into this category. Beginning with the fact that the Bill is being put forward by the Department of Industry rather than Justice, and ending with the form and style of drafting, this Bill is a legislative oddity.

Perhaps this is a reflection of the dual forces of technology and globalization that made it necessary. Perhaps it is also attributable to the fact that it is legislation on a topic which may have already moved beyond the curative reach of legislation.[3] A recent article on information privacy in *The Economist* notes that: "Despite a raft of laws, treaties and constitutional provisions, privacy has been eroded for decades. This trend is now likely to accelerate sharply."[4] The article goes on to note that:

> Corporate and government officials can often find ways to delay or evade individual requests for information. Policing the rising tide of data collection and trading is probably beyond the capability of any government without a crackdown so massive that it could stop the new information economy in its tracks.[5]

Significantly, this Bill claims both to protect personal data and to facilitate electronic commerce — claims which may well be in direct conflict with one another.

II. The Normative Heart of the Bill: The CSA Model Code

One of the most interesting formal aspects of the Bill is that the normative provisions relating specifically to the protection of personal data are not contained in the actual text of the Bill, but rather are added as a schedule. Schedule 1 is, in effect, the Canadian Standards Association *Model Code for the Protection of Personal Information*. While the numbered sections of the Bill refer to the Schedule, and in some cases offer clarifications to its wording, or provide modifications to the general principles,[6] the Bill itself, without the Schedule, contains no normative provisions.[7] It is worth, therefore, exploring the origin of the CSA Code and tracing its path to the point of its incorporation into legislation.

The Canadian Standards Association (CSA), in existence since 1919, is a voluntary membership, not-for-profit association which has as its goal the development of standards, and the granting of certification. According to their own literature, "Their standards reflect a national consensus of producers and users and are used widely by industry and commerce."[8] CSA standards are developed across a wide range of industries, from electrical to life sciences and business management.

In the early 1990's, the CSA turned its attention to developing a standard for businesses which collected, used or distributed personal information. For this purpose, the CSA gathered representatives from a range of sectors including "the public sector, industries (including transportation, telecommunications, information technology, insurance, health and banking), consumer advocacy groups, unions and other general interest groups"[9] for the purposes of discussions relating to the development of a common code. The Code that was developed, the CSA Model Code, used the OECD guidelines on personal data protection[10] as a departure point. It was adopted by the Standards Council of Canada as a national standard in 1996.[11] The designation of National Standard is available only when certain criteria are met. These criteria require that the standard "must be developed by consensus of a balanced committee representing producers, consumers and other relevant interests. It must undergo a public review process, [and] be available in both official languages..."[12]

The Standards Council of Canada (SCC) is a federal Crown corporation which reports to Parliament through the Minister of Industry. The basic mandate of the SCC is to "promote efficient and effective voluntary standardization in Canada, where standardization is not expressly provided for by law"[13]. The Council is mandated to serve a range of interests:

> In order to advance the national economy, support sustainable development, benefit the health, safety and welfare of workers and the public, assist and protect consumers, facilitate domestic and international trade and further international cooperation in relation to standardization."[14]

Part of the mandate of the SCC also includes the making of recommendations to the Minister regarding standards, "including voluntary standards that are appropriate for incorporation by reference in any law".[15]

In its *Discussion Paper* on the protection of personal information, the Task Force on Electronic Commerce noted that the CSA Standard was the first such standard to be recognized as a national standard by any country, and that it had generated significant interest from other countries and international organizations. Indeed, the International Standards Organization voted in favour of developing an international standard that would be based on the CSA Model Code. This development is not insignificant. As the Canadian government seeks to position itself as a player in global electronic commerce, the acceptance of a Canadian standard for data protection and privacy would be an important achievement. If that standard actually formed the heart of Canada's privacy legislation, one could assume, that the government would be in a position to claim that its legislation set an international standard for approaching data protection issues. Further, as the Task Force noted, in the context of the CSA Code alone, "If ISO accepts the CSA Standard as the basis for an international standard, Canadian companies that have already applied the principles of the Standard will have a significant advantage".[16] Thus there are both political and economic motivations behind the elevation of the CSA Standard from a voluntary code to law.

In its *Discussion Paper*, the Task Force on Electronic Commerce indicated that it was looking to "build on the work that has already been done to develop the Standard, as well as the work that various industries have done to implement it."[17] While this makes a certain amount of sense on one level, it is not a complete answer to why the CSA Standard was adopted as the normative heart of the legislation. After all, in seeking to build on work already done, the government had other legislative models to consider such as the Quebec private sector privacy legislation[18], the European Directive,[19] and the efforts being made by various European nations to implement the European Directive. Certainly, the other legislative models were much more oriented towards balancing the complex interests in relation to personal information which compete in a national privacy standard than is the CSA Code, which is primarily an industry code.

The *Discussion Paper* indicates that the major shortcomings of the CSA Standard, from a legislative point of view, were its voluntariness, lack of oversight, and lack of provision for consumer redress. It is not surprising, therefore, that the bulk of the Bill's provisions, independent from the substantive portions contained in Schedule 1, are aimed at broad implementation of the Bill (extending it across the country to apply to both federal and provincial organizations), and at providing an oversight and enforcement mechanism. Far less attention was paid to crafting exemptions for particular sectors, or types of information use, access or disclosure. While some exemptions are present in the Bill, they are far less comprehensive than those contemplated, for example, in the European Directive.[20] They are also less detailed than those contained in the Quebec legislation.[21] The lack of comprehensiveness, in the case of law enforcement, is amply illustrated by the series of amendments brought forward in Parliament to address these lacunae.[22]

Anticipating the policy direction to be taken by government in Bill C-54, the Task Force served as an apologist for the adoption of the CSA Standard within Bill C-54. The *Discussion Paper* states:

> The CSA Standard has a number of advantages as a starting point for legislation. First, it represents a consensus among key stakeholders from the private sector, consumer and other public interest organizations, and some government bodies. Second, the CSA Standard provides flexibility; it was designed to serve as a

> model for more specific industry codes. Third, the CSA Standard is technologically neutral; its principles go beyond specific industry applications....Ideal legislation for Canada would build on the successes in voluntary compliance experienced with the CSA Standard while ensuring its rapid, widespread implementation.[23]

These justifications for adopting the Standard require some scrutiny. The first point regarding consensus has some merit — the CSA approached the development of the Code with a view to seeking broad-based input from industry and consumer groups.[24] However, the focus of the Standard was on an industry code, and the groups chosen to participate might well have been different from those who would have sought to have input in the drafting of provisions governing the collection, use and disclosure of personal information across a much broader range of sectors.

The voluntary nature of the Code may also have been a strong factor in the kind of norms ultimately developed. For example, the approach which a consumer group might take in lobbying for concessions from industry for a voluntary code, (where strict norms might result in non-compliance), might well be different from the approach it would take to lobbying for mandatory legislation. Without overt compliance mechanisms, a great deal of compromise might be necessary to ensure that a basic level of compliance is achieved. On the flip side, it is also interesting that among those private sector groups identified in the *Discussion Paper* as having voted unanimously in support of the CSA Code, a number raised objections to the Code becoming law in Bill C-54.[25] The ability of some industry groups to support the Code, therefore, also depended on its character as a standard based on voluntary compliance.

Although a consensus document, the Code did not involve the participation of all groups ultimately affected by the reach of Bill C-54. Interests such as law enforcement and the medical and research communities did not form a part of the CSA standard development process. Particular issues around the special needs of children with respect to their personal information do not appear to have been a matter for discussion, even those these interests form the basis for a recent Bill before Congress in the United States.[26] The interests of these diverse communities are key to a balancing of rights within any such standard, and their absence from the “consensus” is significant.

The final point made in the *Discussion Paper* in favour of the Code, its technical neutrality, is also not a “clincher”. While it is true that the Code is drafted in the kind of general, principle-based language that allows for flexible application, it is not clear that this result could not have been achieved by ordinary drafting processes, or from following other existing legislative models. Technological neutrality is a virtue in such legislation, but it is not impossible for legislative drafters to achieve this neutrality without copying the CSA Standard.

One key consideration for government in choosing to incorporate the CSA Code was likely expediency. The Code was already drafted, and had been adopted by a range of different private sector companies. In an environment where there was perceived to be some urgency, and where any personal data protection legislation was likely to be hugely disruptive to existing business practices,[27] the CSA Code offered a means of proceeding that was expedient, that represented a partial consensus, and that

would not disrupt those businesses that had already sought to comply with the voluntary standards.

Following the promotion of the CSA Standard as a departure point for legislation in the *Discussion Paper*, the Task Force on Electronic Commerce sought input on whether this standard should be "the base from which to start in drafting legislation". In the Detailed Analysis of Submissions the Task Force sought to synthesize responses. Stating that the idea of legislation was fully supported by "All privacy commissioners, consumer groups, public institutes, academics, privacy experts, consultants and other individuals…"[28] the Task Force noted that support for legislation was much lower in the private sector and federally regulated telecommunications and cable industries. Many within these sectors favoured self-regulation over legislation. The Task Force noted that "Regardless of their views on the need for legislation, virtually all respondents accept the CSA Standard as a good starting point."[29]

Be this as it may, there must be some distinction made between a starting point and an end point. While many groups may have accepted the CSA Standard as a good beginning, this does not suggest that there was a consensus about adopting the Standard as the normative centre of any legislation. In fact, most consumer groups and privacy commissioners noted that there were significant defects with the CSA Standard.[30] It was criticized for lacking sufficient precision in a number of areas[31], and substantial concerns were raised about the definition of "consent" within the Code.[32]

Even acknowledging the advantages in using the CSA Standard as the core of the legislation, issues remain about this expedient/least disruptive approach to legislating in such a crucial area of privacy concerns. For a range of reasons discussed in this paper, this discomfort deepens. While it is possible to fatalistically declare that privacy is, in any event, a chimera, something might be said for at least appearing to make the effort to protect it in a manner befitting a core value of our democracy.

III. Ambivalence as a Purpose

The Bill, as drafted, creates a certain degree of ambivalence surrounding its purpose. This ambivalence is accentuated by the fact that different views of the purpose of the Bill were likely held by those who appeared before the Standing Committee and who debated the Bill in Parliament. The roots of this ambivalence lie in the fact that the drafting of the privacy provisions of Bill C-54 was clearly motivated by a number of different factors. From one perspective, it could be said that concern about personal privacy and the threat posed by automatic collection, processing, use and disclosure of vast amounts of personal data was a prime motivating factor behind the legislation. Certainly, from the point of view of privacy advocates, this was a central concern. Flaherty notes that "Public opinion polls continue to suggest that the protection of personal privacy is among the most important issues in every Western nation."[33] The *Discussion Paper* released by the Task Force on Electronic Commerce in relation to personal data protection and privacy certainly linked information privacy to "values such as liberty, freedom of expression and freedom of association."[34] It also noted the impact

which collected data can have on decisions taken by others which affect individuals in terms of their social and economic status.

In spite of the public concern over information privacy, a review of the *Discussion Paper*, makes it very difficult to see information privacy and human rights concerns as a prime motivating factor for the introduction of this Bill. In fact, even before the mention of the fundamental importance of privacy as a human right, the authors of the *Discussion Paper* note that a lack of consumer confidence in personal data protection by the private sector could hinder the growth of electronic commerce. Thus, personal concerns about privacy appear overshadowed by the threat that such unalleviated concerns would pose to e-commerce. In his speech to the Industry Committee on Bill C-54, Minister Manley stated that: "for electronic commerce to flourish in Canada, citizens must be confident about how personal information is gathered, stored and used."[35]

The primacy of electronic commerce over privacy concerns is also indicated by the fact that the Bill is not really just one piece of legislation; rather, it is two separate and arguably distinct pieces of legislation which have been fused together in an ungainly whole. The first part of the Bill relates to the protection of personal data, while the second part is titled the *Electronic Documents Act*. The two parts have little in common unless one considers the overarching theme of the Bill to be the promotion and facilitation of electronic commerce. It is only if you think of personal data protection legislation as being human rights or consumer protection legislation that the combination becomes jarring.

This focus on electronic commerce is made very apparent by the fact that the introduction to the *Discussion Paper* is titled "Building Canada's Information Economy and Society". The *Discussion Paper* notes that: "For electronic commerce to flourish in Canada, it requires a clear, predictable and supportive environment where citizens, institutions and businesses can feel comfortable, secure and confident."[36] The anthropomorphization of institutions and businesses is interesting: they become not so much the subject of regulation in the public interest, but part of the vulnerable public which the legislature must seek to protect. Citizens, institutions and businesses are assigned the same level of vulnerability.

Both the *Discussion Paper* and press releases by government heralding the tabling of the Bill in the House of Commons emphasize the role of the Bill in enabling Canada to become a world leader in electronic commerce.[37] The *Discussion Paper* wavers between rhetoric about the protection of personal privacy, and the desire to facilitate economic growth in this area such that the goal of legislation becomes one of assuaging, rather than resolving, concerns about personal privacy. Perhaps appropriate to its commerce-promoting orientation, the proposed legislation is described in the *Discussion Paper* as needing to be "light but effective" in language reminiscent of marketing claims for anti-perspirants or hair sprays.

The way in which the Bill is drafted is quite instructive about the government agenda in formulating it. Notably absent from the Bill is any statement of principle regarding the fundamental values of personal privacy, individual rights, or liberty. Rather, the preamble of the Bill describes it, in its first sentence, as "An Act to support and promote electronic commerce by protecting personal information". This point was

also noted by the office of the Quebec Access to Information Commission in their report on Bill C-54. They noted that:

> Contrairement à la loi québécoise qui se veut d'abord une loi de mise en application du droit à la vie privée et qui s'applique a l'ensemble des renseignements personnels détenus par le secteur privé, le projet de loi fédérale laisse clairement entrevoir que la notion de commercialité et d'échanges interprovinciaux ou internationaux en est le cur [sic]. On peut donc présumer que l'application et l'interprétation de la loi fédérale seront fortement influencées par cette orientation spécifique.[38]

In Bill C-54, the protection of personal information is clearly subservient to the desire to support and promote electronic commerce. This is perhaps not surprising given that the lead role in drafting the legislation was given to Industry Canada, rather than the Department of Justice.

IV. Defining Privacy

If the protection of privacy were truly the focus of the proposed legislation, one might expect to see a little more elaboration of the concept of privacy and the nature of the right. However, this is not the case. Significantly, for example, the title of the Bill contains no mention of privacy. Rather, the title addresses the protection of personal information — not personal privacy.[39] This is an interesting formulation, as it is not really the personal information which is vulnerable, but rather the individual whose privacy is compromised by the collection, use and disclosure of their personal information. Notably, the OECD guidelines and the Quebec privacy legislation specifically mention personal privacy in their titles, while the *European Directive* refers to the "protection of individuals" with respect to the processing of personal data. It is only the Canadian Bill which omits any reference either to the protection of privacy or of individuals in its title. Although it is not clear what conclusions can be drawn from the mere choice of title, the depersonalization of the issue by focusing on protecting information rather than individuals is at least troubling. By contrast, the Federal *Privacy Act*, which is also, by genre, a personal information protection Act, refers to privacy in both its title and statement of purpose.[40]

The first mention of a right to privacy in Bill C-54 appears in s. 3, where it is stated that "the purpose of this Part is to provide Canadians with a right of privacy with respect to their personal information that is collected, used or disclosed in an era in which technology increasingly facilitates the collection and free flow of information." There are two points which can be made with respect to this provision. First, although privacy is mentioned, it is not defined. Of course, the concept is one which is elusive and difficult to reduce to a simple definition. Nevertheless, some attempt to articulate the values encompassed by a right of privacy might well be significant, particularly in assessing or interpreting whether organizations have sufficiently complied with the requirements of Schedule 1. The *Discussion Paper* contained a fairly broad definition in its glossary, which reads:

> Privacy: Most often defined as the right to be left alone, free from intrusion or interruption, privacy is an umbrella term, encompassing elements such as physical privacy, communications privacy, and information privacy. Privacy is linked to other fundamental human rights such as freedom and personal autonomy.[41]

While somewhat vague[42], this "definition" at least identifies the fact that the notion of privacy is complex and broad ranging.

The lack of a definition in Bill C-54 could be explained by the explicit linking of privacy to personal information, thus arguably narrowing the scope of meaning of the term. However, information privacy is a significant aspect of privacy, particularly where personal information is defined in s. 2 of the Bill as "information about an identifiable individual that is recorded in any form". In fact, the *Discussion Paper* contains a separate definition of information privacy:

> Information Privacy: A subset of privacy, it involves the right of individuals to determine when, how and to what extent they will share personal information about themselves with others. Protecting information privacy involves protecting personal information.[43]

The Bill lacks even the more narrow definition of information privacy.

One might wonder how significant the absence of a definition of privacy actually is. Certainly, in a Bill which contains such thin references to the privacy right, any additional references would help to bolster the place of the individual in this regulatory scheme. The Task Force's definition of information privacy establishes the individual as an autonomous actor exercising control over his or her personal information. The Bill as drafted currently reflects a model where "organizations" act in relation to personal information within certain parameters. Even the consent provisions guide organizations in how they may obtain consent from individuals. The lack of definition may contribute to this displacement of personal autonomy.

V. The Place of the Individual

With the exception of s. 3, no provision in the Bill or in Schedule 1 mentions the rights of individuals. In fact, the Schedule is framed in terms of obligations of organizations, rather than rights of individuals. For example, rather than state that an individual has the right to be informed of the purposes for which personal information is collected, principle 4.2 of Schedule 1 is framed in more passive terms: "The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected." The individual is absent from this wording, which frames an obligation, rather than a right.[44] This is somewhat different from other legislation protecting human rights. For example, the *Canadian Charter of Rights and Freedoms* clearly sets out rights of individuals. Federal and provincial human rights statutes tend to be a mixture of rights and obligations. Such legislation tends to begin with a declaration of rights which is later clarified by a series of obligations placed on the

regulated sector. By contrast, Bill C-54 does not declare any fundamental right of privacy. Instead, it suggests that any such right is originated by the legislation itself, stating that "the purpose of this Part is to provide Canadians with a right of privacy." The Bill therefore becomes the source and delimitation of the right, rather than an articulation of the means by which an existing fundamental right is to be realized or protected.

VI. Privacy Interests

One of the justifications for adopting the CSA Code as the normative heart of the Bill was the fact that it was considered a consensus document arrived at through consultation with a broad range of interests. The CSA Code was then presented to the public in the *Discussion Paper*, and input was sought on a range of issues, the first of which explicitly addressed whether the CSA Code should be the starting point for legislation.[45]

Bill C-54 sets standards for personal information collection, use or disclosure by anyone fitting the definition of an organization, which includes "an association, a partnership, a person and a trade union". The normative provisions are drafted in fairly broad and general terms with a view to making the Bill flexible enough to be adapted to the multiplicity of data collecting "organizations" in Canada. While the Bill appears to identify what it protects (personal data) and who is regulated (organizations), it is much less clear about the diversity of interests that exist in relation to personal information. This lack of clarity is perhaps directly attributable to the fact that the normative provisions of the Bill are adopted wholesale from a Code developed as an industry standard. As noted in the *Discussion Paper*, the CSA:

> gathered representatives from the public sector, industries (including transportation, telecommunication, information technology, insurance, health, and banking), consumer advocacy groups, unions and other general interest groups to discuss the need for a common code to protect personal information in the private sector.[46]

In spite of the broad representation, however, it is to be expected that a group selected for the purposes of generating a model voluntary code for the private sector might well not take into account the range of privacy interests likely to be affected by mandatory legislation governing all "organizations" broadly defined.

Arguably, the primary privacy interests are those of the so-called data subjects themselves -- ordinary consumers and citizens who are the subject of personal data collection. As noted earlier, this interest is less than clearly expressed in the legislation. While the Schedule is reasonably clear in outlining the obligations of organizations that collect their personal data or information, as noted above, it does not frame these obligations in terms of rights owed to individuals. Further, there is no statement in the legislation which describes or defines any personal privacy interest. By contrast, the Quebec *Civil Code* provisions on privacy, which are a foundation stone for the Quebec legislation regarding protection of personal privacy in the private sector, state quite clearly that "every person has a right to the respect of his reputation and privacy".[47] Further, art. 36 *C.C.Q.* elaborates acts which constitute an invasion of personal privacy,

while arts. 37 to 41 outline the rights of individuals *vis à vis* anyone who establishes a file on them.

A second interest in personal data is the commercial interest. With the automation of data collection and processing, businesses have come increasingly to collect, rely upon, sell, share and manipulate personal information gathered from their clients. While some of the data collection is done for the purpose of improving the businesses' marketing strategies or their service to customers, businesses have also profited from selling the information gathered to other companies.[48] Further, the automation of data collection and processing has given birth to a whole new data mining industry which is based on the collection and manipulation of information gathered or purchased from a variety of sources.[49] Personal profiles of individual customers or potential customers have a real market value, as does more aggregate consumer information. It is clear that these commercial interests are treated with significant care in the proposed privacy legislation, as the Code itself was developed with these interests at the forefront.[50] Of course, the diversity of such interests meant that the Code would not satisfy all. For example, the Canadian Newspaper Association expressed concerns about the Code in terms of "its scope and application in terms of media compliance" and the extent to which it "undermines editorial independence."[51] A number of key players in health care industries, including "major insurance and drug industry associations" argued for the exclusion of medical information from the reach of Bill C-54 to avoid "major inefficiencies in the health care sector."[52]

Personal information is also sought after and used by the scientific and medical research communities. While in many cases researchers are required to use information stripped of all personal identifiers, nonetheless, the existence of banks of information which can be accessed in this manner for the purposes of research is important. There is also an interest in other information which might not be classified as confidential in the medical sense, but which might also be of use in establishing correlations and detecting trends and patterns. Depending on how they are drafted, restrictions on the collection, use and disclosure of such information may have a real impact on the activities of scientific and medial researchers. It should be noted, of course, that much of this research has commercial application, although where the purposes for collection and use of the data are research oriented, the interests diverge from collection and use that is oriented towards marketing and customer profiling. It is not clear that these interests were at all represented in the drafting of the Model Code. In submissions to the Task Force in response to the *Discussion Paper*, representatives of the health care sector identified a number of changes to the Code that they deemed necessary. These included a legislative distinction between "person-identifiable, non-identifiable and anonymous data", and "a differentiation between private non-profit and private for-profit uses."[53]

Law enforcement officials also claim an interest in personal information either gathered by themselves, or by other agencies or corporations. In some instances, access to such information may be crucial to crime prevention, detection or prosecution or to state security. Of course, real privacy issues are raised when information is being used for crime detection purposes. Nonetheless, these interests exist, and must be taken into account in the drafting of any personal information protection legislation. In many instances, allowances for such uses of data can be made in the form of exceptions to general rules, as is also the case with medical and scientific research uses. The

drafting of the exceptions is critical to the protection or limitation of these interests. Significantly, the version of Bill C-54 brought before the legislature was considered so notably deficient in its consideration of these issues that the bulk of amendments proposed to the Bill have been aimed at strengthening access to personal information for the purposes of state security and law enforcement activity.[54]

A further interest which must be taken into account is the public or state interest in health and safety. Circumstances may arise where access to information gathered in the private sector may be important to resolving issues of health and safety. In other circumstances, corporations which gather information may wish to disclose data they have gathered where it raises such concerns. In either event, personal information legislation should be expected to address such interests.

Finally, the interests of non-medical and non-scientific researchers must be taken into account. Such researchers may be interested in population trends, consumer trends, and a range of sociological issues which can be illuminated by a study of personal information gathered in a range of contexts. Whether these researchers are the primary gatherers of such information, or whether they seek to rely on information collected by others, the terms and provisions of personal data protection legislation will doubtless have an impact on them and their activities.[55]

The measure of the success of legislation dealing with personal data privacy protection undoubtedly turns upon the extent to which such legislation is able to balance the range of competing interests with respect to the data. It is instructive, therefore, that the federal government chose the approach of adopting a code developed primarily by private sector commercial interests, with the input of certain consumer groups. Although the code contains some exceptions, and the Bill crafts a few additional modifications, the heart of the personal data protection legislation remains the normative standards set by an organization with a primary view to facilitating commercial use of personal data while providing some privacy assurances for consumers.[56] The proposed breadth of application of the legislation, reaching beyond those interests included in the drafting of the model code, strongly suggests that the model code may, at best, represent a partial and imperfect consensus. This in turn may help to explain the failure of the Bill to become law during the last session of Parliament.

VII. Normative Language

One interesting feature of the Bill is the nature of the normative language used. The Schedule, designed originally as a voluntary Code, uses both the permissive “should” as well as the obligatory “shall”. While “shall” is used more often than “should”, and is used in all the basic principles, the use of “should” or “may” occurs quite frequently in the elaborations of those principles. The Bill addresses this language use in s. 5(2), stating that: “The word “should”, when used in Schedule 1, indicates a recommendation and does not impose an obligation.” While this is consistent with ordinary grammatical usage, it does, on closer examination, raise some interesting issues around the normative provisions. For example, while stating in the second principle that “The purposes for which personal information is collected *shall* be identified by the organization at or before the time the information is collected”, the elaborations on

this principle state that: "The identified purposes *should* be specified at or before the time of collection to the individual from whom the personal information is collected." One is left wondering precisely what the rule is.

The provisions regarding consent are similarly confusing. The third principle states that: "The knowledge and consent of the individual *are required* for the collection, use, or disclosure of personal information, except where inappropriate." The elaborations on the consent principle, however, repeatedly use a more permissive voice: "The form of the consent sought by the organization may vary", "The way in which an organization seeks consent may vary", and "Individuals can give consent in many ways". The water is further muddied by phrases such as: "An organization should generally seek express [as opposed to implied] consent when the information is likely to be considered sensitive". If this is not a situation for mandated express consent, it is difficult to see what would be. Further, in setting out the ways in which individuals give consent, the Code allows for a kind of "reverse option" consent: "a checkoff box may be used to allow individuals to request that their names and addresses not be given to other organizations. Individuals who do not check the box are assumed to consent to the transfer of this information to third parties."[57] Finally, there is no guarantee in the Bill that goods or services cannot be withheld where a consumer refuses to consent to disclosure of personal information.[58]

A further effect of the wholesale incorporation of an industry code into legislation is the introduction of a rather "chatty" tone into the normative provisions of the legislation. For example, while the general principles are stated in fairly standard normative language (eg: "The collection of personal information shall be limited..."), the elaborations of the principles can be quite discursive. For example, in elaborating on one aspect of consent, paragraph 4.3.5 states that:

> [a]n individual buying a subscription to a magazine should reasonably expect that the organization, in addition to using the individual's name and address for mailing and billing purposes, would also contact the person to solicit the renewal of the subscription. In this case, the organization can assume that the individual's request constitutes consent for specific purposes. On the other hand, an individual would not reasonably expect that personal information given to a health-care professional would be given to a company selling health-care products, unless consent were obtained.[59]

It is certainly unusual for legislation to be drafted to interpret itself in that much detail. It is not clear whether this form of drafting makes the legislation more "user friendly" by making it clearer, easier to understand and easier to read, or whether it usurps an interpretive or judicial function by limiting the scope of interpretation of the legislation.

One feature of the Bill that takes away from its ease of comprehension is the way in which, while placing the normative provisions of the Bill in a Schedule, Bill C-54 nonetheless offers numerous modifications to those principles in its core provisions. Sections 7, 8 and 9 of the Bill specify situations where there is deviation from the rules set out in the Schedule. For example, the introductory phrases for ss. 7(1)(2) and (3) all read "For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause...". Clearly some form of cross-referencing by the reader is required in order to remind him or her to disregard the rather lengthy note which

accompanies clause 4.3 of Schedule 1. Sections 7(4), 7(5), and 8(8) of the Bill begin: "Despite clause 4.5 of Schedule 1...", again directing the reader to disregard a part of the Schedule in certain circumstances. In s. 8(1), the Bill specifies that the request referred to in clause 4.9 of Schedule 1 must be in writing. Section 8 goes on to provide a detailed elaboration of the process by which such requests may take place. Finally, s. 9(1) offers further modification to the Schedule, by stating "Despite clause 4.5 of Schedule 1...", and in 9(3) also states "Despite the note that accompanies clause 4.9 of Schedule 1....". This cross-referencing and modification is awkward, cumbersome, and detracts from the readability and accessibility of the Bill.[60] In this regard, it is notably different from other human rights legislation or consumer protection legislation.

VIII. Amending the Bill

It is customary that amendments to the normative provisions of legislation are the responsibility of the appropriate legislature or Parliament. This is because principles of accountability and representation within a democracy require a public debate and discussion of the substantive provisions of laws and their amendments. For purposes of legislative economy, regulation making powers may be delegated to the Governor-in-Council, a Minister, or even an agency itself, so long as those regulations deal with essentially procedural or non-substantive issues.

Bill C-54 makes an interesting departure from that custom. The Bill provides for amendments to the normative provisions *via* a section of the statute which allows the Governor- in-Council to adopt and incorporate any changes made by the CSA to its Code into the Schedule.[61] This not only allows for the circumvention of the normal parliamentary process for what are key provisions of the Bill, it allows for the impetus for the changes to come from a private sector organization. While the Governor-in-Council (or cabinet) cannot alter the exceptions and exemptions contained in the Bill, nor can they modify the oversight and enforcement mechanisms, they can alter, in this manner, such fundamental provisions as those relating to consent, purposes of collection, limiting use and access. In his submission to the Standing Committee on Industry, Murray Mollard of the B.C. Civil Liberties Association expressed concerns about:

> ...the idea of core obligations being in an appendix that can be changed merely by a cabinet decision as opposed to legislative changes. That technique really cuts both ways. It makes it easier to make changes that would augment privacy, but it would also be easier to make changes that undermine privacy interests. We think it is better to put those obligations in the bill and make them subject to legislative amendment.[62]

This rather undemocratic infelicity is perhaps the direct result of the decision to incorporate an industry code into a Schedule of the Bill, while at the same time allowing it to form the normative heart. Suggestions were made before the Standing Committee that the law should at least incorporate the ten basic principles, not only to make the law easier to read and understand, but to place those principles out of reach of expedient and non-parliamentary amendment.

IX. Global Aspects

In preparing to legislate for the protection of personal information, the federal government was certainly cognizant of international pressures prompted by the realities of global markets for goods, services and personal information. Thus, another motivating factor behind the drafting of the Bill was growing international pressure to address the issue of personal data protection in order to facilitate international trade, and to prevent the emergence of "data havens". Clearly, if Canada were to become a leader in electronic commerce, it would need to develop legislation to meet emerging international norms regarding the collection, use and disclosure of personal information. The *European Directive on Personal Data Protection*, which placed obligations on its member states to enact legislation by October 24, 1998[63], and which proposed limiting data flow to countries without equivalent protections[64], posed a very real deadline to be met before lack of overt compliance with international norms began to pose a trade barrier for Canada in its relations with European countries.[65]

International concern relating to personal data protection is not recent, at least in electronic age terms. In 1980, the OECD released *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. Expressing concerns that different norms and standards in various countries might hinder transborder flows of data,[66] the OECD set out a series of data protection principles which could provide for a shared basis for legislation by member states. Emphasizing the need to balance privacy concerns with interests in the free flow of information, the OECD hinted at a possible long term goal of international privacy standards along the lines of the *Berne Convention* in the area of copyright law. The international pressures to provide some form of personal data protection were not lost on the Canadian drafters. The *Discussion Paper* notes that "The ability to provide effective protection for personal information may be crucial to Canada's ability to remain competitive internationally in the global information economy."[67]

In building on the theme of international pressures, the report goes on to note that "The global challenge to compete in the electronic commerce marketplace means that we do not have time for a slow, evolutionary approach to building up the protection of personal information and consumer trust."[68] While this statement is telling because it suggests that the urgency behind the legislation lies in economic rather than in human rights concerns, it also flags the next issue — the perceived need to move quickly, and to set a uniform national standard in order to meet "the global challenge". In an address to the Industry Committee on Bill C-54, the Minister of Industry also noted that the need to move quickly was motivated by financial considerations: "If we develop the proper framework [for electronic commerce], we could increase our market share to $C 33 billion leading to new business opportunities and job creation."[69]

In its move to set a national standard, Bill C-54 does in fact appear to tread on provincial jurisdictional turf. The Bill is designed to apply to all organizations, regardless of whether they are federal works or undertakings, operate interprovincially, or operate solely within a province.[70] To soften the reach of the law, the Bill makes provision for a three year grace period for the provinces to develop legislation of equivalent scope. Where such legislation is enacted and deemed equivalent to or stronger than the Bill, the provincial law will apply.[71] Bill C-54 also provides for the devolution of oversight functions to provincial privacy commissioners in certain circumstances.[72] However, the

overarching aim is to ensure a certain national consistency in standards and oversight mechanisms. Thus the federal government will set the ground rules, even within areas normally within provincial legislative competence. The *Discussion Paper* had hinted at a need for a national standard, although it did so in terms of rhetoric about the need for cooperation. It stated:

> If truly comprehensive privacy protection for all Canadians is to be achieved, then the federal, provincial and territorial governments will have to work closely and cooperatively to ensure a harmonized approach in all jurisdictions. This is vital for interprovincial trade, as well as for international trade.[73]

The end result of the Bill, however, pre-empts co-operative discussion and drafting processes, and provides a framework for limited provincial autonomy, with the Bill as a universal default standard.

Not surprisingly, this aspect of the Bill has proven particularly controversial in Quebec. The Bloc Québecois vigorously opposed the Bill in Parliament on the basis that it infringed upon provincial jurisdiction. Although many have noted that Quebec's more stringent private sector privacy laws will allow it to be exempted from the application of the federal norms, this has not seemed to assuage the concerns of Bloc members of Parliament.

In any event, the opt-out provisions of the Bill have provoked other criticisms. It has been suggested that the structure of the Bill, allowing for exemptions to be made for particular organizations or sectors where provincial legislation is considered to be at least as strong, "might well implement different rules based on areas of activity and the regions of Canada."[74] Another critic has stated that:

> I have difficulty with the fact that on the one hand they are using powers related to trade, which theoretically should apply everywhere, and on the other hand, they are prepared to make orders whereby the federal law will only apply in one or two provinces. This seems somewhat paradoxical if not illogical.[75]

As drafted, the Bill leaves open the possibility that the more stringent rules in Quebec may result in different standards for data use, collection and disclosure as between that province and others which either fall under the federal legislation or opt for laws closer to the federal model. From a consumer point of view, it may also mean that within a single province such as Quebec, the rules regarding collection, use and disclosure of information will vary depending on whether the consumer is dealing with a federal company, a company engaged in interprovincial trade, or one operating solely within Quebec.[76] The situation is made more murky by s. 27(2)(d) of the Bill, which would further allow the cabinet to exempt "organizations or classes of organizations" from the application of the Bill if particular provincial laws set sufficient standards for these organizations. The potential for a confusing array of different privacy protection standards, both within and between provinces, is significant.

Apart from these concerns, it should be noted that it may also be difficult for private sector intra-provincial businesses to prepare for compliance with the requirements of the law, since they will be left wondering what precise standards they may be held to in three years time. The confusion would also exist for any organizations or classes of organizations which might at some point be exempted from the provisions

of Bill C-54 and held to a different standard. The confusion will not just be for businesses. The Quebec Access to Information Commission was critical of the power of cabinet to declare some organizations to be exempt from Bill C-54 because of the inappropriate uncertainties it would cause:

> ...la Commission s'étonne que l'exclusion d'organisations ou d'activités puisse faire l'objet d'un pouvoir discrétionnaire du governeur en conseil. Ne serait-il pas plus approprié qu'une loi dont l'un des objectifs est le respect de la vie privée soit rédigée de façon à ce que les citoyens sachent clairement quels sont leurs droits en la matière et quelles sont les entreprises visées?[77]

In this context, one can wonder whether the spirit of Canadian compromise has added further layers of complication to the establishment of uniform personal data protection. The federal government could have arguably asserted its general trade and commerce power to create a single, uniform and unyielding national standard. Failing that, we are left with a patchwork arrangement whose pitfalls remain to be fully explored in the coming years.

The pressure to enact a uniform national standard in order to enhance Canada's status as a leader in lucrative electronic commerce is not likely to be unique to the area of personal information protection. There will be a range of issues, from database protection to commercial law standards for electronic commerce which will, by their very trans-border nature, cry out for national solutions in line with international standards. In such a context, the route chosen to achieve national standards in Bill C-54 is one that deserves some scrutiny, as it may serve as a test case for future legislative initiatives.

X. Conclusion

In spite of the many problems or deficiencies of Bill C-54, there was a general sense of dismay when it died on the order paper in June of 1999. Although the failure of Bill C-54 was a disappointment for many industry and privacy advocates alike, the shared regret at the inability to turn Bill C-54 into law did not necessarily stem from the same set of concerns. It is perhaps the nature of the global technological society that created the sense of urgency on the part of industry, and the increasing erosion of personal privacy that created the sense of urgency among privacy and consumer advocates. That these two conflicting interest groups came together in mourning the demise of the Bill is a further reflection of the uneasy attempt at accommodating the two interests in the legislative initiative.

It is indeed troubling that the situation, whether characterized as Canada's electronic commerce future, or the personal privacy of Canadians, is perceived as being so dire that such a deeply flawed Bill should be lamented in its failure. From problems with the articulated purpose of the Bill and its normative language, to complicated jurisdictional questions and disturbing powers of amendment, the Bill deserves a major rethinking and rewriting. That it is unlikely to get this much-needed attention seems clear. One is left to wonder whether the problems of Bill C-54 are a legislative anomaly, or whether they reflect the beginning of a trend in legislating to address rapid changes,

spurred by technology and globalization, that are threatening to rapidly move beyond the reach of the legislature and citizens alike.

Endnotes

[1] Note that the Bill does not in any way seek to prevent the collection, use or disclosure of personal information; rather, it aims to set the standards by which such collection, use and disclosure takes place.

[2] Jennifer Ditchburn, "Privacy legislation delayed indefinitely" *Canadian Press Newswire* (10 June 1999).

[3] David Flaherty, *Protecting Privacy in Surveillance Societies* (Chapel Hill, N.C.: University of North Carolina Press, 1989) at 1.

[4] "The End of Privacy" *The Economist* (1 May 1999) at 21.

[5] *Ibid*. at 23. *The Economist* article is extremely sceptical about the future of privacy.

[6] For example, s. 7 of the Bill clarifies the circumstances in which an organization may collect personal information without the knowledge or consent of the individual.

[7] The Bill does contain modifications to the principles, exceptions, oversight and administrative provisions, and provisions for remedies and recourse.

[8] Online: Canadian Standards Association web site <http://www.cssinfo.com/info/csa.html>

[9] Task Force on Electronic Commerce, *The Protection of Personal Information: Building Canada's Information Economy and Society* (Ottawa: Industry Canada, 1998) at 9. [hereinafter *Discussion Paper*].

[10] OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, adopted September 23, 1980. Online: Organisation for Economic Co-operation and Development <http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM>

[11] Pursuant to the *Standards Council of Canada Act*, R.S.C. 1970, (1st Supp.), c. 41, as am. by s. 4(2)(e). See also, *Discussion Paper*, *supra* note 9 at 9.

[12] Online: Standards Council of Canada web site <http://www.scc.ca/about/index.html>

[13] *Standards Council of Canada Act*, s. 4(1). Note that in the case of Bill C-54 a standard adopted "where standardization is not expressly provided for by law" is chosen to become the actual law.

[14] *Ibid.*

[15] *Standards Council of Canada Act*, s. 4(2)(m). Of course, there is a distinction between incorporating a standard by reference, and making one the heart of a new piece of legislation, as has happened with Bill C-54.

[16] *Discussion Paper*, *supra* note 9 at 10.

[17] *Ibid.*

[18] *An Act respecting the protection of personal information in the private sector*, S.Q. 1993, c. 17. Note that in representations to the Standing Committee on Industry, a Bloc Quebecois MP, Francine Lalonde observed that "One might have expected to see this new bill based on the Quebec Law". Tuesday, February 9, 1999, 1620.

[19] European Union *Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, 1995. Online: I*M Legal Issues <http://www2.echo.lu/legal/en/dataprot/directiv/directiv.html>

[20] The *European Directive*, for example, creates special categories of data for which processing is more strictly controlled. These categories include data revealing "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and the processing of data concerning health or sex life." (*European Directive*, art. 8). Article 13 of the Directive allows member states to adopt legislation to provide for limitations on the scope of rights and obligations for a range of interests which include: national security, defence, public security, crime prevention, detection or prosecution, breaches of professional ethics, state economic or financial interests, regulatory functions, and protection of the data subject.

[21] Section 18 of the Quebec legislation (*supra*, note 18) provides for extensive exemptions for disclosure without consent. These include disclosures related to the prosecution of offences, to life, health and safety, study, research or statistical purposes, debt collection, and so on. Specific conditions are set out in s. 21 regarding disclosure of information for study, research or statistical purposes, which go well beyond the provisions in Bill C-54.

[22] Order Paper & Notice Paper (No. 220) Online: Parliamentary Internet <http://www.parl.gc.ca/36/1/parlbus/chambus/house/orderpaper/ordrs-e.html>

[23] *Discussion Paper*, *supra* note 9 at 13.

[24] Although reference is made throughout numerous CSA and government documents to the diversity of representatives involved in the drafting of the Model Code, it is difficult to get an actual accounting of who the participants were.

[25] For example, the *Discussion Paper* notes that the Cable Television Standards Foundation, Canadian Cable Television Association and Stentor Telecom Policy Inc. all voted unanimously in favour of the CSA Model Code. Notwithstanding this, of the 9 submissions from the Telecommunications/Cable Sector received by the Task Force in response to the *Discussion Paper*, only 2 openly expressed support for the legislation (*Discussion Paper*, *supra* note 9 at 19). The objections from this sector were not so much to the CSA Code, but to the fact that it would be made mandatory through the legislation. Similarly, the Canadian Bankers' Association, which supported the CSA Code, raised objections to it becoming a part of private sector privacy legislation (*Discussion Paper*, *supra* note 9 at 20).

[26] *Children's Privacy Protection and Parental Empowerment Act*, HR 369 IH (106th Congress) January 19, 1999.

[27] For example, in a study of on-line privacy practices, the U.S. Federal Trade Commission found that: "despite the Commission's three-year privacy initiative supporting a self-regulatory response to consumers' privacy concerns, the vast majority of on-line businesses have yet to adopt even the most fundamental fair information practice (notice/awareness). Federal Trade Commission, "Privacy Online: A Report to Congress", June 1998. Online: Federal Trade Commission <http://www.ftc.gov/reports/privacy3> quote from <http://www.ftc.gov/reports/privacy3/conclu.htm>

[28] Task Force on Electronic Commerce, *The Protection of Personal Information: Building Canada's Information Economy and Society: Detailed Analysis of Submissions* (Ottawa: Queen's Printer, 1998) at 11 [hereinafter *Detailed Analysis*]. Online: Task Force on Electronic Commerce <http://strategis.ic.gc.ca/privacy>

[29] *Ibid*. at 12.

[30] In fact, the Task Force noted that "All privacy commissioners support statutory privacy legislation, but all view the CSA Standard as requiring substantive improvements if it is to become the basis for a privacy law". (*Detailed Analysis*, at 13.) Similarly, the Task Force noted that "All consumer organizations support a federal private sector privacy law, but none believe the CSA Standard is currently sufficient as a basis for legislation." (*Detailed Analysis*, at 15.)

[31] *Ibid*. at 12.

[32] See, for example, recommendation 2 in Valerie Steeves, "Private Forum: An Experiment in Electronic Democracy" (Ottawa, March 27, 1998). at 4. Online: Media Awareness Network <http://www.media-awareness.ca/eng/issues/priv/resource/forumrpt.htm> and the submissions in Richard S. Rosenberg "Appearance before the standing committee on industry" (February 9, 1999). Online: Electronic Frontier Canada

<http://insight.mcmaster.ca/org/efc/pages/doc/efc-rosen-c54.09feb99.html> Of course, the view that the Code was only a starting point did not mean that consumer groups and privacy commissioners opposed the Bill's passage. The view that it is definitely better than nothing was shared by many groups. As Pippa Lawson of the Public Interest Advocacy Centre states, "the most important thing for the Canadian public is to get...some minimum standards in place". (Jennifer Ditchburn, "Time running out for privacy legislation" *Canadian Press Newswire* (June 2, 1999).

[33] *Flaherty*, *supra* note 3 at 7.

[34] *Discussion Paper*, *supra* note 9, at 5.

[35] Speech of Minister John Manley to the Industry Committee on Bill C-54 (1 December 1998). Online: Taskforce on Electronic Commerce main page

<http://strategis.ic.gc.ca/virtual_hosts/e-com/english/speeches/42d6.html>

[36] *Discussion Paper*, *supra* note 9 at 1-2.

[37] *Manley*, *supra* note 35: "We will be well on our way to making Canada a world leader in electronic commerce."

[38] *Avis de la Commission d'Acces à l'Information du Québec concernant le Projet de Loi C-54*, (November 1998). Online: Commission d'Acces à l'Information du Québec <http://www.cai.gouv.qc.ca/a981514.htm>

[39] The protection of personal information is considered by some to be a subset of privacy law. For example, the *Handbook Exploring the Legal Context for Information Policy in Canada* states "There is a narrower set of issues in the context of privacy which is centred in information rights (as distinct from other human rights) and has come to be labelled personal data protection issues". (Barry Cleaver, et. al., *Handbook Exploring the Legal Context for Information Policy in Canada*, (Faxon Canada Ltd., 1992) at 10). The Task Force, in the *Discussion Paper*, also describes information privacy as a subset of privacy, and defines it as "the right of individuals to determine when, how and to what extent they will share personal information about themselves with others." (*Discussion Paper*, *supra* note 9 at 5) However, regardless of whether it is a subset, the protection of personal data is a crucial aspect of personal privacy.

[40] In s. 2 it states: "The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves..." *Privacy Act*, Ch. P-21, s. 2. Note that Flaherty points out that even in this Act, "The term privacy is not further defined, which is regrettable". (*Flaherty*, *supra* note 3 at 253).

[41] *Discussion Paper*, *supra* note 9 at 28.

[42] A recent article in the *Economist* noted that: "...privacy lawsuits hardly ever succeed, except in France, and even there they are rare. Courts find it almost impossible to pin down a precise enough legal definition of privacy." (*The Economist*, *supra* note 4 at 22).

[43] *Discussion Paper*, *supra* note 9 at 28. Note that in its critique of the Bill, the Privacy Forum noted that: "The value of privacy as a human right must be made explicit, and the legislation should incorporate and adopt the definitions of 'privacy' and 'information privacy' set out in the glossary to the discussion paper." (*Steeves*, *supra* note 32 at 5). Art. 36 C.C.Q. contains a list of examples of invasions of privacy in the broad sense, which would also cover information privacy. The Recitals to the *European Directive* mention fundamental human rights in each of the first three recitals. The first article of the *Directive* states that: "In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data." (*European Directive*, *supra* note 19) - though it contains no definition of privacy per se.

[44] Note that this formulation of obligations rather than rights may be directly attributable to the decision to adopt an industry code as the normative heart of the legislation. Such a code would necessarily be drafted with a view to establishing rules of conduct for businesses, rather than rights of individuals.

[45] The question, as stated in the *Discussion Paper* is: "Is the CSA Standard the base from which to start in drafting legislation? Is it precise enough in setting out obligations or do some obligations require further elaboration? Are there any additional obligations not set out in the CSA Standard that should be included in the legislation?" (*Discussion Paper*, *supra* note 9 at 25).

[46] *Ibid.* at 9.

[47] Art. 35 C.C.Q.

[48] For a sense of the range of business activities involving personal data, see Ian Lawson, *Privacy and Free Enterprise: The Legal Protection of Personal Information in the Private Sector* (Ottawa: Public Interest Advocacy Centre, 1992) at 8-13.

[49] See, for example, Bret Dawson, "Invasion of the Data Snatchers", *shift>magazine*, September 1997, 54-60. See also *The Economist*, *supra* note 4.

[50] For example, Bill C-54 is self-described as an Act to "support and promote electronic commerce". Further, the breadth of the definition of consent in clause 4.3.7 is indicative of the industry orientation.

[51] *Detailed Analysis*, *supra* note 28 at 21. These concerns have been in part addressed by s. 7(1)(c) of the Bill which allows for collection of personal information without knowledge or consent if "the collection is solely for journalistic, artistic or literary purposes.".

[52] Jennifer Ditchburn, "Time running out for privacy legislation" *Canadian Press Newswire* (2 June 1999).

[53] *Detailed Analysis*, *supra* note 28 at 17.

[54] See the list of amendments to Bill C-54, Online: Parliamentary Internet <http://www.parl.gc.ca/36/1/parlbus/chambus/house/orderpaper/ordrs-e.html>

[55] Section 7(3)(f) allows for the disclosure of personal information without the knowledge or consent of the individual if such disclosure is "for statistical, or scholarly study or research purposes… it is impractical to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed."

[56] The raft of amendments to Bill C-54 indicate that, at the very least, the national security and law enforcement communities were not part of the original consensus. In addition, the continuing criticism of parts of the Bill by consumer and public interest groups suggest that the consensus document may not have adequately reflected those interests. The Bill was also roundly criticized by the Canadian Bar Association and the insurance industry. A recent news report noted that: "the most virulent opposition to the Bill came from the Ontario Ministry of Health, the Canadian Dental Association and the Ontario Medical Association, who said C-54 would create major inefficiencies and should not apply to the health sector." (Jennifer Ditchburn, "Privacy legislation in parliamentary limbo" *Canadian Press Newswire* (3 May 1999).

[57] Schedule 1, clause 4.3.7(b). This can be compared with the Quebec legislation which, in s. 14, states that: "consent to the communication or use of personal information must be manifest, free, and enlightened, and must be given for specific purposes." The European Directive requires, in art. 7, that Member States ensure that personal data will only be processed if: "the data subject has unambiguously given his consent".

[58] Section 9 of the Quebec legislation sets out limited circumstances in which goods, services or employment can be withheld because of a refusal to disclose personal information.

[59] Bill C-54, 1st Sess., 36th Parl., 1997-98-99, Sch. 1, cl. 4.3.5.

[60] This awkward formulation has been picked up on by other critics of the Bill. For example, Marie Vallée of the group Action reseau consommateur stated in her remarks to the Standing Committee on Industry that: "The rules, which are split between the body of the legislation and the appendix, are not easy to understand." (Standing Committee on Industry, Tuesday February 9, 1999, at 1550) Online: Parliamentary Internet <http://www.parl.gc.ca/InfoComDoc/36/1/INDY/Meetings/Evidence/indyev85-e.htm> Jacques St. Amant, an attorney for Action reseau consommateur and Option consommateurs suggested in the same proceedings that the basic principles should be removed from the Schedule and incorporated into the Bill, leaving the elaborations in the Schedule as a guide to interpretation. In his view, this would "make things easier to apply and more readily understood for the parties concerned" (*Standing Committee, ibid.* at 1650).

[61] Section 27(2) states that "The Governor in Council may, by order, ...(b) amend Schedule 1 to reflect revisions to the National Standard of Canada entitled *Model Code for the Protection of Personal Information*, CAN/CSA-Q830-96".

[62] Murray Mollard, addressing the Standing Committee on Industry on February 9, 1999, *supra* note 60 at para.1545.

[63] Art. 32 of the *Directive* gives member states 3 years from the date of adoption of the Directive to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive". The *Directive* was adopted on October 24, 1995.

[64] Art. 25(1) of the *Directive* provides that any transfers of data to third countries for processing "may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection." The factors to be considered in assessing whether the third

country provides and adequate level of protection are set out in art. 25(2), and include: "the rules of law, both general and sectoral, in force in the third country in question".

[65] Indeed, in the *Discussion Paper*, it is noted that "This Directive has the potential to make the protection of personal information a major non-tariff trade barrier with Canada. Failure to provide adequate protection for personal information may put Canada at risk of having "data flows" from the European Union blocked." (*Discussion Paper*, supra note 9 at 8). This concern is also reiterated in the speech of the Minister of Industry to the Industry Committee on Bill C-54, where he states that the European Directive "has the capacity to block data flows to and from Canada, if we do not have adequate privacy protection." (*Manley*, *supra* note 35). However, the *Economist* notes that it may not be in Europe's interest to force the privacy issue: "If, on the other hand, the EU insists on barring data exports, not only might a trade war be started but also the development of electronic commerce in Europe could come screeching to a complete halt, inflicting a huge cost on the EU's economy." (*The Economist*, supra note 4 at 23).

[66] The report noted that: "The disparities in legislation may create obstacles to the free flow of information between countries. Such flows have greatly increased in recent years and are bound to continue to grow as a result of the introduction of new computer and communication technology." (OECD, Explanatory Memorandum (23 September 1980)) at 6 of 23. Online: Organisation for Economic Co-operation and Development <http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM#4>

[67] *Discussion Paper*, *supra* note 9 at 7.

[68] *Ibid*. at 8.

[69] *Manley*, *supra* note 35. Minister Manley went on to describe Canada as participating in a "global race".

[70] Bill C-54, s. 4.

[71] Section 30 of the Bill provides for the delayed application of the Bill to intraprovincial collections, uses and disclosures of personal information which are within the jurisdiction of the provinces. The delay is for a period of 3 years from the coming into force of the Bill. Section 27(2)(d) of the Bill allows the Governor-in-Council to exempt organizations or classes of organizations from the application of the Bill if those organizations are governed by "legislation of a province that is substantially similar to this Part".

[72] Bill C-54, s. 25.

[73] *Discussion Paper*, *supra* note 9 at 12.

[74] Marie Vallée, submissions to the Standing Committee on Industry, *supra* note 60 at para 1550.

[75] Jacques St. Amant, *ibid*. at para. 1610. St. Amant goes on to note that the exemptions allowed for in s. 27(2)(d) "could possibly lead to an absolutely phenomenal carve-out. We could find ourselves, in certain provinces, with a law that may or may not be basically the same and even, in the case of such a carve-out arrangement between organizations and between activities, with federal businesses being subject to another system. The citizen will be totally confused and the business itself may be somewhat perplexed." (*Ibid*. at para. 1635)

[76] The confusing nature of the opt-in and opt-out provisions of Bill C-54 are discussed by the Quebec Access to Information Commission in their report on Bill C-54, *supra* note 38 at 12 of 23.

[77] *Avis de la Commission d'Access à l'Information*, *supra* note 38 at 13.