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Résumé de l'article

En 1892, le parlement canadien adopte le code criminel proposé par Sir John Thompson, et, l'année suivante, il accepte également une loi complémentaire soumise par le même concernant les témoignages de procès. Ces deux lois marquaient une nette réforme de la loi criminelle existante et l'auteur se penche sur les intentions, les motifs, ou encore, les agissements qui ont pu présider à la passation de ces actes de même qu'aux nombreux amendements apportés au code dans la décennie qui suivit.

Au premier plan, on retrouve Thompson avec son prestige, ses talents de persuasion, son désir de réforme et sa conviction que le parlement se devait d'être le principal instigateur de tout changement légal au pays. Cette conviction coïncidait d'ailleurs assez bien avec les désirs du parlement qui démontra bien ses intentions à cet égard par le soin et l'attention qu'il apporta à l'étude des divers amendements proposés.

D'autres éléments contribuèrent également à amener des changements. De par son caractère national, le code attira l'attention de nombreux groupes de pression qui demandèrent qu'on légifère sur les loteries, les paris, ou encore, sur la boisson. A l'époque, on était convaincu qu'il était possible d'améliorer la société en prohibant certains comportements et, de fait, la majorité des amendements adoptés entre 1892 et 1902 apportait des restrictions à la loi, créait de nouvelles offenses ou multipliait les pénalités.

En somme, les réformateurs du dix-neuvième siècle croyaient pouvoir changer la société par le biais de la loi criminelle, convaincus qu'ils étaient qu'une loi plus rationnelle profite à tous. L'on comprend que, pour eux, ceci se soit traduit par un resserrement de la loi. De nos jours, le terme réforme est plutôt synonyme d'adoucissement mais, nous dit l'auteur, ceci relève sans doute de notre vision plus pessimiste du citoyen qui nous fait le considérer comme victime possible de la justice plutôt que bénéficiaire.

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The Shaping of Canadian Criminal Law, 1892 to 1902

R.C. MACLEOD

This paper is an effort to examine the forces operating to change Canadian criminal law in the first decade after the passage of the Criminal Code in 1892. It does not purport to establish what the criminal law was during that decade in a way that a lawyer would find satisfactory. Instead the paper focuses more narrowly on the intentions and actions of Parliament and largely ignores the development of case law. The historian can take such liberties and can even interest himself in proposals which never became law, whereas the lawyer is professionally uninterested in the motivation of the legislature. The narrowness of focus is defensible because of the special circumstances that prevailed at the end of the last century. The passage of the Criminal Code in 1892 was a major event in Canadian legal history, one of those rare occasions when options are open and basic positions are re-thought. At such times it is often possible to discern the beginnings of trends. In this case, perhaps it will be possible to catch a glimpse of the distinctive character of Canadian law.

The very fact that Canadian criminal law was codified at this time is interesting. Elsewhere in countries which shared the British legal tradition, the times were distinctly hostile to such changes. The British parliament had turned down Sir James Stephen's draft code ten years earlier.[1] Only a handful of American states, most notably California and New York, had passed criminal codes in the late nineteenth century.[2] In the United States the enthusiasm aroused by David Dudley Field's mid-century campaign for codification had long since waned. James C. Carter's doctrine of judge-made law was in full flower and the courts had dealt harshly with the few existing codes.[3] In Canada, however, Sir John Thompson was able to push through a Criminal Code with scarcely a ripple of opposition. The Canadian code in addition was more comprehensive than Stephen's draft code or any of the American ones.[4] It is common to find the word

1. Glanville Williams, *Criminal Law* (London, 1961) chapter 12; Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (London, 1895), pp. 380-1.
2. Lawrence M. Friedman, *A History of American Law* (New York, 1973), p. 353.
3. *Ibid.*, p. 354.
4. The Canadian code includes both summary and indictable offences as well as procedure. The New York code, for example, did not include procedure and Stephen's draft code left out summary offences. See Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law, 1969 Bill* and *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (C. 2345, 1879).

"code" used loosely by laymen and even by legal writers. In countries which derive their legal tradition from England, a law code means a statute which brings together all the law in a given area.[5] A criminal code should ideally be exhaustive of the criminal law; no offences should be recognized which are not specified in the code. The main object of a code is to remove the conflicts, inconsistencies and obscurities that inevitably characterize uncodified law. For the layman the chief benefit of codification is to make the law more knowable, to rescue it from the feudal maze of the common law which is accessible only to a few specialists. In the words of the British Royal Commission on the Criminal Law of 1879, codification means "the reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities and other defects. . . ."[6]

This seems to constitute a genuine sort of law reform even by twentieth century standards, but a difficulty exists. The father of the Criminal Code, Sir John Thompson, specifically denied during the debate on the Criminal Code bill in 1892 that any reform was intended. The existing law, he insisted, was being changed as little as possible.[7] The few people who have since written about this part of the history of the Criminal Code have tended to accept Thompson's statement at face value.[8] In fact the claim was deliberately misleading, a tactical manoeuvre by Thompson designed to help ensure passage of the bill. Because of the enormous size and complexity of the bill, 983 sections in its original form, any determined opposition could have prevented its passage. Therefore, opposition had to be avoided and not met head on. As it was, even with skilful management, the bill narrowly avoided defeat in the Senate.[9]

Although it is clear from the debates in Parliament on the Code and from the general reaction of the Canadian bar that there was no deep-seated opposition to codification, some resistance was inevitable. A vested interest was being threatened for one thing. As Senator Richard Scott put it, "It is a Bill that alters very materially the criminal law of Canada, the law under which we have been brought up, the law in which our judges have been educated and which is understood by the stipendiary magistrates and the officials who are entrusted with the administration of justice."[10] For another thing the British parliament had declined to move on codification and the imperial precedent was not lightly ignored in Canada in the late nineteenth century. To overcome these obstacles and get the bill through, Thompson counted first of all on his own immense and well-

5. Law Reform Commission of Canada, Study Paper #8, *Criminal Law: Towards a Codification* (Ottawa, 1976). This pamphlet has a very interesting discussion of what constitutes a code.
6. *Royal Commission on Indictable Offences*, p. 7. This passage was quoted by Thompson in his speech introducing the Criminal Code bill in 1892.
7. Canada. House of Commons *Debates*, 12 April 1892, 1313.
8. Law Reform Commission, *Criminal Law;* and Alan M. Mewett, "The Criminal Law 1867-1967", *Canadian Bar Review*, Vol. XLV, 1967, p. 726.
9. Public Archives of Canada, James Robert Gowan Papers (M.G. 21-I-E-17), Reel M-1900, Thompson to Gowan, 5 July 1892. Thompson was in doubt about the fate of the bill as late as this date.
10. Canada. Senate *Debates*, 6 July 1892, 464.

deserved prestige as a lawyer. He also counted on a general ignorance of the criminal law on the part of the opposition. This assessment proved accurate. Only three opposition members spoke at any length in the debate: Wilfrid Laurier and two of his future cabinet ministers, David Mills and Louis H. Davies.[11] Thompson found the quality of the opposition little more important than the quantity. In a letter to Senator J.R. Gowan he wrote, "Mills is well-read, Laurier far from it and Davies is a mere gabbler of phrases which he has picked up in a very inferior practice."[12]

But even if these worthies lacked Thompson's grasp of the law, an opposition must be seen to oppose. Thompson recognized this and had ready to hand an expendable item designed to divert attention from the main issue. In the first draft of the Criminal Code which was introduced in the session of 1891, Thompson had proposed to abolish the grand jury.[13] With at least a show of reluctance he had concluded by 1892 that the constitutional validity of such a move was dubious. The 1892 version of the Code made no mention of the grand jury. Yet, in his opening speech on the Criminal Code, Thompson defended the original proposal to eliminate it at some length.[14] The opposition seized this red herring gratefully and both Laurier and Mills made impassioned defences of an institution that the government had just announced it did not propose to touch! The rest of the debate in the House of Commons, though lengthy, went smoothly enough and the bill emerged virtually untouched.

At this point, July 4, 1892, the bill went to the Senate where it nearly foundered. The Liberal leader there, Senator R.W. Scott, was the only member of either house to oppose codification in principle. Scott did his best to convince his colleagues, but his credibility was undermined because he had failed to attend the meetings of the joint Senate-Commons committee which had discussed the bill.[15] A more serious threat to the passage of the Code emerged from the lateness of the session. In that leisurely age, Senators were accustomed to fleeing the sticky July heat of Ottawa for their summer cottages. To receive such a massive bill from the lower house so late in the season was almost unprecedented. Some Senators felt that the dignity of the house had been offended and argued in favor of teaching the Commons a lesson by throwing the bill out. Finally they decided that the insult was not sufficient to kill such an important measure and it passed on July 8.[16]

In summary, Thompson's statements about his intentions must be taken in context as part of his campaign to push the Criminal Code through. In such circumstances actions always speak louder than words. The Code as it emerged from Parliament incorporated many more changes in the existing law than Thompson

11. It is clear from the debates in both houses of Parliament that lawyers who specialized in the criminal law were as rare then as now. A number of the lawyers who did speak said that the criminal law was an esoteric specialty best left to experts.
12. Gowan Papers, Reel M-1900, Thompson to Gowan, 1 June 1892.
13. Canada. House of Commons *Debates*, 12 April 1892, 1314.
14. *Ibid.*, 1314-5.
15. Canada. Senate *Debates*, 4 July 1892, 389.
16. *Ibid.*, 8 July 1892, 495.

was prepared to admit, at least in public. In reality he was pushing for as much reform as he could manage without arousing suspicion. Fortunately for Thompson, it was not until after the Code had passed that a real authority on the criminal law took a hard look at it. Mr. Justice H.E. Taschereau of the Supreme Court, author of a French language digest of Canadian criminal law, had, like almost everyone else, presumably accepted at face value Thompson's assurances that the existing law had been changed as little as possible in drafting the Code. When he did get around to making a comparison, Taschereau discovered to his dismay that much of his book was now obsolete. He was understandably indignant and set forth his complaints in an open letter to Thompson which was published in the *Legal News* early in 1893.[17] Taschereau's detailed criticisms were far too lengthy to go into here, but he concluded that "the changes and innovations are numerous and of a sweeping character, both in the substantive and in the adjective law."[18]

There can be no doubt that Taschereau was correct in his reading of the new Code. One change, for example, was the elimination of the old distinction between felonies and misdemeanours. The Code substituted summary and indictable offences. Thompson dismissed this change in a sentence as if it was a mere change in terminology. In fact it meant that all offences had been re-classified according to their seriousness in a more logical manner than before. Since this classification affected procedure in such areas as the right to a jury trial, it was of great importance. The Justice Department took Taschereau's challenge seriously enough to prepare a lengthy—and frequently ingenuous—refutation of his open letter for use in case it provoked a reaction from the legal community.[19] No such protest appeared and, apart from a brief statement in Parliament, Taschereau was ignored.

Thompson's zeal for reform can be seen even more clearly the following year when Parliament passed the companion piece to the Criminal Code, the Canada Evidence Act.[20] This act, as originally introduced, was a radical departure from the existing law relating to testimony of the accused. The common law had prohibited all testimony by the accused. Canadian law before 1893 had relaxed this severity to a degree and permitted testimony in some circumstances. Thompson proposed to go far beyond this and make the accused not only a competent witness but compellable, that is, required to testify in all cases. The same rule would apply to the spouse of the accused.[21]

This proposal was simple and logical in the sense that it harmonized with another section of the bill which specifically disallowed refusal to testify on grounds

17. *The Legal News,* 15 February 1893.
18. *Ibid.*
19. Department of Justice, File 63/1894. I would like to acknowledge the kind cooperation of Miles H. Pepper, Legislative Section, Department of Justice, in helping me obtain access to this document.
20. Although the Canada Evidence Act was passed nearly a year later, it came into effect on the same date as the Criminal Code, 1 July 1893.
21. Canada. House of Commons *Debates*, 3 March 1893, 1675.

of self-incrimination. It would also have placed the criminal law of evidence on the same footing as in civil cases, but it proved too much for Parliament to swallow. The Commons passed it but, after a fierce debate, the Senate eliminated the element of compulsion.[22] As he had done earlier with the Criminal Code, Thompson argued that he really was not changing the law very much since the defendant was a compellable witness in civil cases in some provinces.[23] This argument was too thin for even Thompson's reputation to sustain and Parliament, unhindered by the massive detail of the Criminal Code, saw it. Thompson was forced to fall back on arguments that were essentially philosophical and which undoubtedly represented his real views. Thompson's intentions were clear and unwavering in all his dealings with the criminal law. He sought reform and he sought to make Parliament the main source of legal change.

By passing the Criminal Code and the Canada Evidence Act, Parliament decisively controlled the direction of change in the law in 1892 and 1893. What happened in the ensuing decade was almost as important. This was the period when the channels were formed along which legal change would run right up to the present. Legal change is constant and irresistible. Like running water it can be dammed for a time, but never stopped. If the legislature refuses to make changes, then the courts will do so. If the courts also refuse, then the law will be made in the streets. Essentially what was decided in Canada in the 1890's was that Parliament would be the principal source of change in the criminal law. Rather than leaving it entirely to the courts to adjust the law, Parliament made frequent amendments to the Criminal Code. By 1902 the Justice Department had evolved a regular procedure for handling amendments.[24]

This line of development was by no means a foregone conclusion. Its greatest champion, Thompson, died in 1894 and no lawyer of comparable talents held the Justice portfolio until Charles Fitzpatrick took over in 1902.[25] The mid 1890's were also politically chaotic due to the Manitoba Schools issue, the disintegration of the Conservative party and the triumph of the Liberals in 1896. Immigration and economic growth based on extensive western settlement were beginning to take off. Under the circumstances it was remarkable that Parliament found time to debate Criminal Code amendments every year but one. The first few amendment bills were non-controversial, consisting largely of corrections of technical

22. 56 Victoria, Chap. 31, section 4.
23. Canada. House of Commons *Debates*, 3 March 1893, 1688.
24. The difference discussed here is a matter of degree. The courts always have a large role interpreting the law and Parliament, of course, always had the option of altering the law by statute.
25. The Conservative Justice Ministers after Thompson—Sir Charles Hibbert Tupper, Thomas Mayne Daley and A.R. Dickey—made no impact on the criminal law whatsoever. The first two Liberal Justice Ministers after the Laurier victory, Sir Oliver Mowat and David Mills, were both in the Senate. This meant that all amendments to the Criminal Code from 1896 to 1902 were first introduced in the Senate and many of the most interesting debates took place in the upper house. Mowat lasted a little over a year and never seemed to get a very firm grip on the work of the Department. David Mills was an improvement, but was more interested in civil rather than criminal law.

errors.[26] When substantive changes were introduced, however, resistance began to appear. In the upper house, Senator James Lougheed championed the doctrine that amendment was undesirable in principle and should only be permitted when numerous court cases demonstrated a need.[27] There was less resistance in the House of Commons, although M.C. Cameron objected in principle to frequent amendments of the Code in 1898. In the debate on the 1900 amendment bill, J.-G.-H. Bergeron complained that "There have already been so many changes that we can hardly recognize the old law."[28]

This concept of legal change suffered a decisive defeat in 1900 when the Minister of Justice, David Mills, put through an extensive amendment bill changing sixty-five sections of the Criminal Code.[29] These changes were drawn from a wide variety of sources and had been accumulating in the files of the Justice Department for several years. To make the government's attitude unmistakable, the Solicitor-General, Charles Fitzpatrick, invited further suggestions for change from the House of Commons. "Everything is open. I look upon this as a measure that we are all interested in to make as perfect as possible. . . ."[30] Change was not to be avoided, but accepted as normal and necessary. Benjamin Russell, Member for Halifax, former law professor and later a judge, summarized the change in attitude:

> Of course our system has been based on the principle of never providing for a case until that case occurred. . . . But the modern theory of legislation is to anticipate these and provide against them. Even if we know of no actual cases, it would be entirely proper for us to provide for those that we can think of as likely to occur.[31]

The amendment bill of 1900 set the pattern which prevailed until the 1950's. Roughly every eight years, sometimes more, sometimes less, a comprehensive amendment bill would be introduced. In between these overhauls, only urgent matters were the subject of brief amendment bills.[32]

Changes in the Criminal Code after 1892 were continuous, but never haphazard. There was a modest growth from 983 to 1,152 sections by 1907, where after it levelled off.[33] This was nothing compared to the elephantiasis that sometimes afflicted other codes. The New York civil procedure code, for example, grew from four hundred to 3,356 sections in a thirty year period.[34] The rationality of the change that took place in the Criminal Code owed much to the expertise of the Justice Department where the Deputy Minister and his assistants carefully

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26. 56 Victoria, Chap. 32; and 57-58 Victoria, Chap. 57.
27. Canada. Senate *Debates*, 4 June 1897, 481; and 20 June 1899, 405.
28. Canada. House of Commons *Debates*, 31 March 1898, 2894; and 14 May 1900, 5264.
29. 63-64 Victoria, Chap. 46.
30. Canada. House of Commons *Debates*, 14 May 1900, 5291.
31. *Ibid.*, 18 May 1900, 5715.
32. See, for example, the Criminal Code amendments for 1895, 1901 and 1903.
33. The total number of sections was unchanged twenty years later after the 1927 consolidation, in spite of numerous amendments.
34. Friedman, *History of American Law*, p. 342.

checked each proposed amendment. Those which duplicated existing provisions or which violated the principles of the Code were discarded and the remainder carefully integrated.[35] Obsolete sections were repealed almost as often as new ones were added, which meant that such logic and internal consistency as the Code initially possessed were not sacrificed as the price of change.

In 1899 David Mills, then Minister of Justice, said that 90 per cent of the changes in the Code originated in the courts.[36] This estimate was almost certainly wrong for that date, although it may well have been true ten years earlier before codification. The criminal justice system itself continued to be the largest source of new law, but it no longer had a near monopoly. Grand juries, crown prosecutors, coroners, judges, provincial attorneys-general and even an obscure law student in Regina on one occasion: all encountered situations which were not covered by the existing law and wrote in to suggest amendments.[37] Most suggested changes from this source dealt with procedure, whereas those from laymen were concerned entirely with substantive law.[38] Mills' estimate had some basis in fact, but more important it reflected what many people believed was and should be the case. The machinery had been set in motion in 1892 and now required only the attention of specialists to supply routine maintenance. A fine, mechanistic Victorian image, but one which was less and less real.

A new source of change in the law was becoming increasingly important. This was lobbying by a whole range of pressure groups. One of the theoretical advantages of codification of the law is that it provides a more visible target for the reformer. In the case of the Criminal Code, this is exactly what happened. Before 1892 letters from pressure groups to the Justice Department were relatively rare. Once the Code passed, a growing list of organizations—unions, women's groups, children's aid societies, business organizations, churches, charitable organizations, humane societies, and undifferentiated citizen's groups—wrote in with suggestions and demands for change.[39] Parliament was hostile at first to this kind of outside pressure. Some members warned against being pushed into hasty action by groups knowing little about the principles of legislation. Others worried about being "driven by mob opinion."[40]

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35. P.A.C., Justice Department Records (R.G. 13), Central Registry Files, 1859-1934 (section A-2). See especially file 262/1916. This file contains the Deputy Minister's comments and recommendations on a number of suggested amendments. Unfortunately, most such files are still held by the Justice Department and are not available to researchers.
36. Canada. Senate *Debates,* 23 June 1899, 456.
37. Canada. House of Commons Debates, 1 April 1900, 3282.
38. P.A.C., R.G. 13, A-2, files 50/1893, 790/1898, 876/1901, 95/1902, 208/1902, 224/1902.
39. P.A.C., R.G. 13, A-2, files 974/1894, 1043/1894, 124/1897, 326/1897. By 1911 correspondence concerning the Criminal Code was more extensive than that on all other statutes. See P.A.C., R.G. 13, Indexes and Registers (A-1).
40. Canada. House of Commons *Debates*, 30 March 1900, 2916. Alexander McNeill (Bruce North).

If public pressure was widespread and persistent, Parliament would usually give in. But if Members became convinced that only a narrow range of interests was affected, they could be very stubborn indeed. John Charlton carried on a twenty year crusade, supported by various women's organizations, to raise the age of consent.[41] Every year Charlton would submit a bill to this effect and every year it would be thrown out. In 1899 Charlton changed tactics slightly and asked that the age be raised to eighteen instead of twenty-one.[42] This bill passed the House of Commons, but the Senate was less charitable and threw it out as usual, even though some Senators gave it strong support. Senator W.J. Almon of Halifax, a physician by profession, even proposed in all seriousness that the age of consent be raised to age forty-five, "when a woman's passions generally cease."[43]

In addition to the sources of new law described above, at least two others exist: the example of other countries and philosophical principles. Nevertheless, no amendment between 1892 and 1902 originated from either of these, although examples of their use as supporting arguments were not uncommon. British precedents, naturally enough, appeared most frequently. Increasingly, however, American innovations were cited favourably, and not as horrible examples. David Mills in particular had a wide acquaintance among the American bar and watched developments there closely.[44] Generally speaking, ideas which originated in border states like Maine and Michigan had more impact than those farther south. Arguments based on general or philosophical principle were less frequent and tended to be mildly platitudinous when they did appear, although Jeremy Bentham was quoted on at least one occasion.[45] Parliament's nervousness in the face of arguments based on philosophy was well expressed by Fitzpatrick in 1900:

> . . . if we were to endeavour to base the criminal law on philosophic principles, I think, we would have to begin by destroying the present code, and making a new one.That may be done in the future, possibly in the near future; but for the present we are trying as far as we can to amend the code that we have before us.[46]

One reason that the Criminal Code attracted the attention of pressure groups was its national character. If the criminal law could be stretched far enough to achieve a social objective, then it was infinitely easier to do so than to attempt to have similar laws passed in each of the provinces. This was also an age in which people believed strongly that positive social goals could be achieved by negative means, that is, by prohibiting certain kinds of behaviour. The classic example, of course, was the prohibition movement. But while the courts had already decided that liquor regulation was not a federal responsibility in Canada, there were many

41. R.R. Hett, "John Charlton: Liberal Politician and Free Trade Advocate", (Ph.D. thesis, University of Rochester, 1969).
42. Canada. House of Commons *Debates,* 10 May 1899, 2930.
43. Canada. Senate *Debates,* 4 June 1897, 480.
44. *Ibid.,* 482.
45. Canada. House of Commons *Debates,* 14 May 1900, 5286.
46. *Ibid.,* 5236.

other causes.[47] Gambling was the most popular target around the turn of the century, especially lotteries. As Senator Joseph Bolduc put it, "Lotteries are the curse of the country, more particularly in the province of Quebec."[48] Since the Criminal Code prohibited lotteries, it might be supposed that reformers would have nothing to criticize, but a loophole existed.

There was in England at this time an entirely legitimate body called the London Art Union which held lotteries, the prizes of which were the paintings of Union members. In this way struggling artists made a little money on a more or less regular basis and their work was widely distributed. The London Art Union had spread to Canada's larger cities by the 1890's and the Criminal Code in its original form exempted this kind of lottery from the general prohibition.[49] The gambling fraternity in Montreal quickly seized this opportunity. Lotteries were arranged with pictures as the prize, but the organizers would buy back the picture immediately for an agreed sum in cash. After years of debate and lobbying by church groups and other reformers, Parliament closed the loophole.[50] When this goal was achieved, the reformers moved on to try to eliminate betting at race tracks. Here resistance stiffened. Senators and Members were more likely to frequent race tracks than buy lottery tickets.[51]

One of the more interesting failures of the reformers to expand the boundaries of the criminal law occurred in 1897. This was a case, the first of many, in which technology created a new situation not covered by existing law. Under the Criminal Code prize fights were illegal in Canada. A few American states allowed prize fighting, however, and, as it happened, one of the earliest motion pictures exhibited in Canada was of the famous Corbett-Fitzsimmons fight.[52] Ever alert to new threats to public morals, the Woman's Christian Temperance Union asked for a Code amendment banning such movies.[53] After all, if the fights themselves had a corrupting and brutalizing effect on the populace, would not movies of fights have the same effect? At first the government was inclined to agree. The 1897 Criminal Code amendment bill introduced in the Senate by the Justice Minister, Oliver Mowat, included a clause which provided a five-thousand dollar fine or forty-two months imprisonment for those convicted of showing motion pictures of prize fights.[54] In the debate on this clause, it gradually became apparent that the principle involved had quite breathtaking implications. One senator suggested outlawing movies of football games which he felt were quite as brutalizing as prize fights.[55] Another demanded that the principle be applied to ban newspaper descriptions of fights as well. Would Parliament be faced with

47. G.F.G. Stanley, *A Short History of the Canadian Constitution* (Toronto, 1969), pp. 117-123.
48. Canada. Senate *Debates,* 2 April 1900, 415.
49. Section 205 (c).
50. 58-59 Victoria, Chap. 40.
51. P.A.C., R.G. 13, A-2, files 373/1904, 430/1907, 464/1907, 506/1908.
52. Canada. Senate *Debates,* 2 June 1897, 440-1.
53. P.A.C., R.G. 13, A-2, file 326/1897.
54. Canada. Senate *Debates,* 2 June 1897, 432.
55. *Ibid.,* 17 May 1897, 345.

legislating against movies of all other illegal acts? In the end the senate decided that the new gadget was better left to municipal regulation.[56]

Business organizations saw similar advantages in extending the boundaries of the criminal law. Interestingly, Parliament was warier of the businessmen than of the social reformers. In 1900 W.S. Maclaren tried to introduce an amendment that would have made it a criminal offence to leave a hotel or boarding house without paying the bill.[57] Here was an area that was squarely on the borderline between civil and criminal law. On the one hand, to put those who would not pay in jail appeared to many Members uncomfortably close to imprisonment for debt. On the other hand, the great bulk of such offenders were demonstrably beyond the reach of the civil process. Those who suffered were often single women or widows lacking other means of support. The Justice Department strongly opposed the measure and it failed in 1900.[58] The pressure was kept up by interested groups and at last in 1913 they got their way.[59] A similar and even longer struggle took place over the question of making N.S.F. cheques a criminal offence. Business organizations lobbied for nearly twenty years before they were able to insert that provision in the Criminal Code.[60]

The general trend of amendments to the Code between 1892 and 1902 was in the direction of tightening up the law. Up to the end of the Great War, in fact, most amendments either created new offences, broadened the definition of existing ones or increased penalties. Nicholas Flood Davin, for example, found little difficulty in convincing Parliament to add a section prohibiting obscene stage performances to the part of the Code dealing with obscene literature.[61] It was a punitive age and, on the face of it, the Criminal Code was a punitive document which became slightly more so in this decade. Some twenty-one separate offences carried the death penalty and no less than ninety-six earned life imprisonment.[62] These were maximum penalties, however, and it seems likely that the courts seldom imposed them.

Corporal punishment was very popular at this time, although more so with the public than with Parliament.[63] In 1897 an amendment was introduced to permit whipping of burglars caught with offensive weapons. Senator James Lougheed made the only comment, "Why not whip them anyway?"[64] No doubt he reflected the opinion of a majority in the country. An effort by the Senate to introduce whipping instead of imprisonment for juvenile offenders in certain cases failed to pass the House of Commons in 1900.[65] Parliament was less

56. *Ibid.*, 14 June 1897, 589.
57. Canada. House of Commons *Debates*, 5 March 1900, 1287.
58. *Ibid.*, 18 May 1900, 5720.
59. Criminal Code 1913, section 407B.
60. The first request to include it came in 1913 and it was not finally added to the Code until 1932. See P.A.C., R.G. 13, A-2, file 1379/1913.
61. 3 Edward VII, Chap. 13.
62. The Criminal Code, 55-56 Victoria, Chap. 29.
63. P.A.C., R.G. 13, A-2, files, 124/1897, 1206/1906, 1065/1908, 293/1909, 78/1910.
64. Canada. Senate *Debates*, 10 June 1897, 558.
65. Canada. House of Commons *Debates*, 18 May 1900, 5711.

ferocious than the public in other areas as well, steadfastly rejecting calls for minimum and indeterminate sentences.[66]

It would be easy to interpret Parliament's approach to the criminal law in this period as class legislation, designed to make the world comfortable for the well-to-do. This was unquestionably one of the effects, but to see it solely in these terms is too one-dimensional. For one thing the laws protecting property were changed relatively little at this time. In any case the poor man's property is no less precious to him than that of the rich man. It was certainly more often at risk and less easily replaced. Legislators at the turn of the century acted on this perfectly valid assumption. In the instance where whipping was added to the penalty for burglary, it only applied to the carrying of weapons and therefore aimed to preserve life, not property.

There were even instances of change which favoured the working class. In 1899 the government sought to amend section 520 of the Code which defined and prohibited combinations in restraint of trade. In the amendment bill introduced in the Senate that year, Mowat added a clause specifically exempting trade unions from this provision.[67] The majority of the Senate was outraged and the measure was denounced as an unfair advantage to labour, creeping socialism and an incentive to strike. Mowat protested mildly that strikes were occasionally necessary, but the clause was voted out.[68] Two years later the government tried again and again the senators refused to pass it. In 1900 the same thing happened, but this time the government was not to be denied. The Commons re-inserted the clause along with several others and sent it back to the Senate.[69] The Senate accepted some of the changes insisted upon by the lower house, but the amendment to section 520 was again voted down. When the Commons sent it back for the third time, the Senators finally gave in.[70]

It has become fashionable in recent years to deny the significance of the nineteenth-century movement for codification. Writing of American efforts, Lawrence M. Friedman says:

> Behind the work of the law reformers was a sort of theory: that legal system is best, and works best and does most for society, which conforms to the idea of legal rationality. . . .
> This theory was rarely made explicit, and of course never tested. It was in all probability false, since it is hard to see how society can be changed by reforms which only rearrange laws on paper. One child labor act or one homestead act had more potential power than volumes of codes.[71]

66. See P.A.C., R.G. 13, A-2, file 123/1905 for suggestions by various groups concerning indeterminate sentences.
67. Canada. Senate *Debates*, 26 June 1899, 492.
68. *Ibid.*, 496.
69. Canada. House of Commons *Debates*, 3 July 1900, 8951.
70. Canada. Senate *Debates*, 16 July 1900, 1185.
71. Friedman, *History of American Law*, p. 354.

Some Canadian writers have echoed this view.[72] As an historical judgment, this suffers from the same lack of evidence and testing of which Friedman complains concerning nineteenth-century reformers. As far as the criminal law in Canada is concerned, it seems quite irrelevant. One can understand the nineteenth-century reformers expecting to change society through the criminal law. There is less excuse for those of us who enjoy the benefit of hindsight.

The criminal law is an exceedingly clumsy instrument of social change. It is the sheet anchor of society, not the rudder, and should be judged on its own terms. This does not mean that the reform of this branch of the law is unimportant. The law has many functions; social change is only one and not the most vital. In our own time reform automatically suggests a relaxation of the criminal law. Eighty years ago it generally meant the opposite. The difference lies not in the absence of a reform impulse at that time, but in the reformer's view of the citizen. Our era pessimistically views the citizen as potential victim of the criminal justice system. Their concept of reform was fuelled by the more optimistic idea that all stand to benefit from a more rational law.

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72. Law Reform Commission, *Criminal Law: Towards a Codification,* Mewett, "The Criminal Law 1867-1967".

Résumé

En 1892, le parlement canadien adopte le code criminel proposé par Sir John Thompson, et, l'année suivante, il accepte également une loi complémentaire soumise par le même concernant les témoignages de procès. Ces deux lois marquaient une nette réforme de la loi criminelle existante et l'auteur se penche sur les intentions, les motifs, ou encore, les agissements qui ont pu présider à la passation de ces actes de même qu'aux nombreux amendements apportés au code dans la décennie qui suivit.

Au premier plan, on retrouve Thompson avec son prestige, ses talents de persuasion, son désir de réforme et sa conviction que le parlement se devait d'être le principal instigateur de tout changement légal au pays. Cette conviction coïncidait d'ailleurs assez bien avec les désirs du parlement qui démontra bien ses intentions à cet égard par le soin et l'attention qu'il apporta à l'étude des divers amendements proposés.

D'autres éléments contribuèrent également à amener des changements. De par son caractère national, le code attira l'attention de nombreux groupes de pression qui demandèrent qu'on légifère sur les loteries, les paris, ou encore, sur la boisson. A l'époque, on était convaincu qu'il était possible d'améliorer la société en prohibant certains comportements et, de fait, la majorité des amendements adoptés entre 1892 et 1902 apportait des restrictions à la loi, créait de nouvelles offenses ou multipliait les pénalités.

En somme, les réformateurs du dix-neuvième siècle croyaient pouvoir changer la société par le biais de la loi criminelle, convaincus qu'ils étaient qu'une loi plus rationnelle profite à tous. L'on comprend que, pour eux, ceci se soit traduit par un resserrement de la loi. De nos jours, le terme réforme est plutôt synonyme d'adoucissement mais, nous dit l'auteur, ceci relève sans doute de notre vision plus pessimiste du citoyen qui nous fait le considérer comme victime possible de la justice plutôt que bénéficiaire.