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UNIVERSITY OF OTTAWA

THE CRIMINAL CODE AND THE ENGLISH
MEDIA IN 19TH CENTURY CANADA

PRESENTED BY

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054285

SUBMITTED TO THE DEPARTMENT OF CRIMINOLOGY,
UNIVERSITY OF OTTAWA, IN PARTIAL FULFILMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
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ABSTRACT

The principle objective of this study is to examine how penal codification was received and interpreted by the media. The media sources to be used are English newspapers and professional legal English Journals.

With respect to the legal journals (the first source of data) three journals were selected (two from Ontario, one from Quebec where they already experienced codification). The period examined is from each journal's founding date until 1900. Therefore, the examination of the Legal News was from 1886 - 1900, the Canada Law Journal was from 1855 - 1900, and the Canadian Law Times was from 1881 - 1900. It should be noted that the Canada Law Journal was the successor of the Upper Canada Law Journal beginning in 1868.

The three newspapers examined for this study (the second source of data) representing either the conservative, liberal or radical label were: The Montreal Gazette (conservative), The Toronto Globe (liberal) and The Toronto Mail (radical). The period examined was 1886 - 1893 for the two former newspapers and 1890, 1891 and 1892 for the latter newspaper.

All articles relating to the criminal law, the criminal code and codification were analyzed for both sources of data. In examining what opinions were expressed this study attempted to establish whether the focus was on codification or specific topics of the code as well as whether the reactions to the code, if any, changed after its inception.

The Legal Journals in general provided brief details chronicling the Criminal Code's history from draft to law. Several editorials and discussions on codification were provided, focusing mainly on the debate surrounding the need for codification and whether codification would remedy the problems with the laws. The idea and meaning of codification were not debated or discussed in any great detail. It appears that the opinions expressed in the journals viewed the code as 'genuine' code as it conformed with their 19th century definition of codification.

Initially the focus of the coverage by the three newspapers was on criminal law reform in general. However in 1891 the focus shifted to the code itself which involved mainly following the code's evolution to law. The coverage of the code centred mainly on reporting daily parliamentary proceedings and detailing specific topics relating to the criminal code instead of discussing or debating codification.

Therefore, in general there were not a considerable amount of articles written in either the legal journals or the newspapers with respect to the criminal law codification. Codifying the criminal law did not appear to pose any difficulties for the codifiers. This may not be surprising considering the fact that the codification did not accomplish any major revision of the existing criminal law.

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INTRODUCTION

On July 9, 1892 the Canadian Criminal Code received royal assent making Canada the first self-governing jurisdiction in the British empire to codify its criminal law. (Brown, 1989:4) 1992 will mark the 100th anniversary of the code, thus providing occasion to reflect on an important case of penal reform.

Although the Code has undergone revisions and reforms in 1906, 1927, and 1955 there is little difference in language or in basic design as compared to the 1892 Code. According to the Law Reform Commission (1976) the reforms did not call into question the philosophy, methods or forms of expression of the original code. (p. 27) Therefore, there have been few changes of principle since the legislation was drafted and in fact, the basic structure of the code has withstood the test of time.

This study comprises exploratory research which is descriptive and historical in nature. This examination however, is a component of a larger analysis of the Canadian Criminal Code. In fact, because this year, 1992, the Canadian Criminal Code will be 100 years old, it was considered important to explore the impact and the consequences of reforms introduced since the first Criminal Code of 1892, the role of the different social actors concerned with the creation of the law and finally the philosophical orientations adopted or developed with respect to penal intervention. The larger study aims at effecting a

socio-juridical analysis of the first Criminal Code and a socio-historical reconstruction of the Criminal Code reforms and attempted reforms in the past one hundred years.

The goal of this study in light of the above-mentioned research consists of examining the importance of the coverage given by certain english publications and examining the questions raised during the creation of the first Canadian Criminal Code. This study utilizes two types of publications. The first type of publication is english daily newspapers and the second is english legal journals.

It should be noted that this study does not consist of examining the image of the criminal as depicted in the publications nor does it address the types of crimes reviewed by the publications chosen. The purpose of this study is only to review media coverage of the creation of the Canadian Criminal Code.

In order to examine the coverage given to the Canadian Criminal Code, 1892 by the media, this thesis will be divided into 3 chapters. The first section of the first chapter will trace the history of Canadian criminal law until codification. The second section will outline the principal debates pertaining to the Canadian Criminal Code, 1892. Firstly, whether the code was a 'genuine' code and secondly, whether the code's inception or creation served some political purpose. The second chapter will detail the research method

employed. The final chapter will contain the analysis of the media coverage. The first section will examine the coverage found in the english legal journals and the second section will examine the coverage found in the english daily newspapers.

CHAPTER I
LITERATURE REVIEW

The history of the land which would eventually become Canada is typified by the ongoing struggle for Empire which raged between England and France. In 1534, Jacques Cartier claimed the land in the St. Lawrence Valley region for France. The first permanent French settlement in New France, was based in Quebec, in 1608, which remained the centre of government throughout the French régime. In 1627, the colony of New France was granted to the Company of New France. In 1663, the Company surrendered its charter to King Louis XIV who undertook the responsibility for governing the colony. The law which then applied to New France was therefore, French civil law, in terms of both civil and criminal matters.

Unrest continued as the British began to settle in territory claimed by France. The ongoing struggles ended in 1763 when all French claims in North America became British. New France, together with Cape Breton and other east coast islands, was ceded to Britain.

Territory in British North America was either conquered (ceded) by the British Crown, or taken over by settlement. If the territory was taken over by settlement or occupancy, the settling British subjects were deemed to have brought the British Common Law with them, unless of course, the law was inapplicable to the new circumstances. Statutes were not brought unless they were obviously applicable and necessary. Therefore, with respect to the Common Law, any exclusion formed the exception; whereas, in the statute law,

the reception formed the exception. From the moment of their first settlement, therefore, the territories of Canada possessed a criminal law, that is, the criminal law of England as of the date of their settlement. (Clarke & Sheppard, 1882, Mewett & Manning, 1978)

In the case of conquered or ceded territory which was already settled, the rule first enunciated in Calvin's Case in 1608 applied. "...The laws existing at the time of the conquest, except such as are contrary to the laws of God, remain in force until altered by the conquering power." (Clarke & Sheppard, 1882:1) The application of English law was not automatic, however, as André Morel (1978) points out, the Royal Proclamation of 1764 abrogated all Canadian law in effect prior to the conquest and substituted it with English Law. The Canadiens immediately began to resist the implementation of English Law to govern civil affairs, French civil law was always retained. However they did not react either positively or negatively regarding the implementation of English criminal law. Morel points out that the absence of any significant reaction or their apparent indifference should not be interpreted to mean complete satisfaction with the new system. In fact he claims that there were many reasons to be dissatisfied with English criminal law, which in 1763 was extremely cruel. (p. 505) Morel suggests that perhaps the Canadiens were more anxious to reinstate the laws of Canada as they felt it was a matter of justice, but the criminal law was

not viewed in the same manner. Perhaps the Canadiens felt that a sad consequence of the conquest was the application of English criminal law. (p. 506) In this way, their indifference is not seen as a value judgement on English criminal law, that is, it does not signify satisfaction. Therefore, the Canadiens continued resistance to the imposition of English law in civil matters resulted in the Quebec Act, 1774, which allowed civil laws to be tried by the laws of Canada but imposed the law of England for criminal matters.

The doctrine of reception of law, which governs when and how much English law is to be "received" into a colony, applies to both conquered and settled territory. This concept is important as it illustrates why pre-confederation criminal law in the colonies of Canada was in such a confusing state. According to Laskin (1969) this pre-packaged body of law could be changed by local legislation, subject to the superior dictate of the British Parliament. Laskin further contends that the total tradition was never fully introduced. And what survived was a product of the realities of small settlements, with hardly any resources or professional manpower and beset by difficulties of communication. The colonies often developed their legal systems in isolation. Therefore, prior to official reception dates, legal institutions and the law in the first North American colonies had already been developed. (Brown, 1989)

Hence, the basic criminal law of a territory varied according to the date of conquering or settlement. These dates are fixed at October 1763 for Quebec, September 17, 1792 for Ontario, November 19, 1858 for British Columbia, and July 15, 1870 for Manitoba, Alberta, Saskatchewan, Northwest Territories and the Yukon. (Mewett & Manning, 1978:4) The dates for the reception of English law in Nova Scotia and New Brunswick are not as clear, Brown (1989) puts the dates at 1497 for the former and 1758 for the latter, (p. 59)¹ however others have recorded the date as 1758 for both provinces. (Coté, 1977:87, Mewett & Manning, 1978:4)

CONSOLIDATION AND CODIFICATION PRIOR TO 1867

As stated above, legal institutions in the first North American colonies developed largely in isolation. Written law was codified and rooted from several sources including English common and statute law, the Bible, and the settlers' own experience. In the 18th century, criminal law in the colonies was short, concise and relatively benign as compared to that of England. Because of the differences between British North America and English legal systems it was expected that the colonies would view systematizing the law differently than

¹. It should be noted that Brown (1989) claims that Nova Scotia refused to take any English statutes enacted after 1497 as the "early legislatures were controlled by the New Englanders who had earlier forced the change in the court system and who, by the convention of the first assembly in 1758, had become the 'merchants of Halifax'. For the most part, Nova Scotia statutes were 'home-made' by these men.

that of England, as was the case. (Brown, 1989:70)

It should be noted that the term "code" was controversial and problematic during the entire period preceding the Civil Code of 1866 and the Criminal Code of 1892, and in fact, even after their inception. Even today there does not seem to be one accepted view of what a code "is".

Certain present day authors, such as Desmond Brown (1989) have used the term "code" when discussing particular notable initiatives and efforts to consolidate and unify the laws prior to the civil or criminal codes. Other contemporary authors however have avoided using such terminology. The resulting effect is that different authors have identified different initiatives as being not only "codes" but specifically being the "first code" depending on their representation of what a code is. Kasirer (1990) highlights this point when he states that "over the years all manner of statutes have been dubbed codes in Canada, both formally and informally, and it seems fair to suspect that, at the very least, Quebeckers and non-Quebeckers use the term differently."(1990:867)

NOVA SCOTIA

As in all the other colonies, a large portion of the law in Nova Scotia was the Common law, "which had been considered by the highest jurisdictions in the parent country,

and by the legislatures of every colony, to be the prevailing law in all cases not expressly altered by statute, or by an old local usage of the colonist." (Haliburton in Brown, 1989:42) Nova Scotia did not accept English statutes on or enacted after 1497, unless expressly adopted.

Although the first wave of immigrants into Nova Scotia were mostly British born, soon after New England traders became the dominant element, due to opportunity in the region. The New Englanders greatly influenced the legal system and the laws in Nova Scotia. In fact, the criminal law was patterned on that of Massachusetts.

In 1805, Nova Scotia published the first authorized collection of the statutes in any jurisdiction of the British Empire. The collection was updated in 1818, 1825 and 1835. In 1849, it was decided that the statutes of the province 'be consolidated, simplified in their language and republished in one uniform code.'² In 1851, the revised statutes were produced. According to Brown this effort resulted in "the first code of statute law in British North America." (p.82) Brown was not the only person who viewed the Revised Statutes of Nova Scotia as a code. In discussing Quebec Civil Law codification, Brierley quotes Caron (the head of the commission) as stating that the Revised Statutes of Nova Scotia "ressemble beaucoup à une codification." (in Brierley,

². The council and assembly of Nova Scotia initiated this reform causing the lieutenant-governor to appoint a commission to implement this resolution. (Brown, D., 1989:80)

1968:555) It should be noted that prior to codifying the civil law of Quebec, 3 persons were appointed to act as Commissioners to codify the law. The Commission, composed of René-Edouard Caron, Charles Dewey Day and A. N. Morin, issued periodic reports on their work and progress until the code's final inception on August 1, 1866. It was stated in the Commissioners First Report that "...[Nova Scotia] had attempted a philosophical and comprehensive arrangement of the law in one uniform code..." (p. 555)

Although not without defects, the Revised Statutes of Nova Scotia was an innovative work that made the whole of the public statute law accessible to all. A topically ordered table of contents revealed that the code was divided into 4 parts, 41 titles and 170 chapters. Part 4, which contained 15 chapters, set out the whole of the statutory penal law. (Brown, 1989:81) This was the first occasion when all substantive and procedural criminal law was in one system.

It should also be noted that Nova Scotia became the leader for the jurisdictions in British North America attempting to rationalize and humanize the criminal law, that is, to mitigate the severity of the statutes. In 1851, only two capital felonies remained in force in Nova Scotia. This was the case at the time of confederation.

NEW BRUNSWICK

The population of Nova Scotia increased dramatically

during the early 1780's due to the British defeat in the American Revolution. The loyalist immigrants settled in virgin territory and began petitioning for the creation of their own province. The colony of New Brunswick was the result.

In 1838 the Acts of the General Assembly of New Brunswick were published. The collection covered the period 1786 to 1836. In 1849, Lemuel Wilmot, the attorney general and the first premier of the colony, introduced 4 bills to consolidate all the penal statutes and to codify the provisions relating to felonies and misdemeanours. The New Brunswick Indictable Offenses Act became, according to Brown, "the first codified enactment of legislation in British North America." (p. 79)³ The Revised Statutes of New Brunswick were enacted in 1854 and were modelled after the Nova Scotia Code. Substantive and procedural criminal law was systematized, and formed the fourth part of the code.

New Brunswick was the first jurisdiction in British North America to mitigate the severity of the statutes. In 1831, they reduced their capital felonies to 10. This amount remained until confederation.

³. Brown (1989) labels the Nova Scotia code as the "first code of statute law" and the New Brunswick code as "the first codified enactment of legislation". It is difficult to determine the difference between the two "first codes" however, it seems that the distinction refers to the fact that the New Brunswick code deals solely with penal law while the Nova Scotia code concerns all statute law.

THE CANADAS

It must be noted that the colony of Quebec in the 1700's included both Ontario and Quebec (in fact it involved a very large area of land extending into the United States as far as Louisiana). When Britain initially invaded the colony in 1759 and until its absolute surrender in 1763, a military regime was imposed. All criminal and civil courts ceased to function. The Treaty of Paris ended the struggle and the subsequent Royal Proclamation required Quebec to take English law. Chaos resulted as the French found it difficult to comply. The resulting Quebec Act of 1774 granted civil suits to be tried by the "laws of Canada", that is, French law. However, the criminal courts were to continue to adjudicate using the English penal law. To satisfy both English and French Canadians, Quebec was divided, by virtue of the Canada Act, in 1791 into the provinces of Upper and Lower Canada, the boundary line being the Ottawa River. Lower Canada retained French law for civil matters, however, English law was maintained for criminal matters. In Upper Canada, civil and criminal law followed the English tradition. In 1841, the Act of Union, created the United Province of Canada: Canada east being Quebec; and Canada west being Ontario.

The criminal law of Lower Canada was taken from the vast number of cruel English statutes of 1763. The criminal laws of Upper Canada, taken from 1792, were less cruel and more benign. Hence, in 1841 when Upper and Lower Canada were

united into one province, the immediate task was to consolidate the criminal law. The bills introduced made the substantive and procedural law relating to penal offenses uniform across the province and repealed all previous legislation on the subject. Further amendments to procedural law were made in 1851 and 1859, the substantive law was not amended until confederation.

Since Lower Canada took its criminal law from 1763, then at its most cruel, it had many offenses punishable by death. Upper Canada had eleven capital offenses at the time when the jurisdictions were united into the Province of Canada. When the bills to consolidate the criminal law of the united province of Canada were introduced, the number of capital felonies was eleven. This amount which continued until confederation ameliorated the laws of Lower Canada but not Upper Canada.

Three distinct jurisdictions emerged in Canada. Lower Canada had its civilian *canadien* law, Upper Canada had its English common law in civil matters, and there was some law common to both sections of the province, e.g. criminal law. The bills to consolidate the Statutes of Upper Canada received royal assent in 1859 as did the consolidated statutes of Canada. The consolidated bills of Lower Canada received royal assent in 1860. Criminal law was situated in the final division -title eleven- of the Consolidated statutes. The subcode consisted of 23 chapters and 257 pages. Unlike the

maritime legislation, it was not a continuous text. Each chapter stood as a separate statute.

CODIFICATION OF THE CIVIL LAW IN QUEBEC.

The situation with respect to the civil law in Quebec (Lower Canada/Canada East) prior to confederation is important to examine as it represents one of Canada's first experiences with codification. On August 1, 1866 the Civil Code came into force, "ten years after the mechanism for its compilation had been set up in virtue of the enabling legislation of 1857." (Brierley, 1968:526) Brierley believes that the reasoning behind the project of codifying the civil laws of Lower Canada were mainly technical or legal in nature. It is important to understand the codification of the civil law of Lower Canada at least on a basic level due to the similarity between some of the reasons illustrated by Brierley with respect to the 1866 codification of the Quebec private law and the Criminal Code, 1892. According to Kasirer (1990) who emphasizes this point in his work,

Both [are] closely based on foreign models from a mother country. Both were adopted in response to an urgent sense that the protracted and peculiar development of received law had gone awry. Both were preceded by a consolidation of applicable statutory law that was more normative than administrative in its design and execution. Both were the work of law reform commissions dominated by a handful of strong personalities. Both codifications had, for some, wider symbolic importance in the political communities into which they were introduced. And, most strikingly and most underexplored, the final products bear comparison. (p. 844-845)

The four main principal factors were according to Brierley: "i) the diversity of sources, ii) the problem of the language of the law, iii) the absence of legislative or doctrinal synthesis, and iv) the availability of foreign models." (p. 533-534)

Brierley quotes the first factor to which the preamble of the 1857 Act refers to illustrate his first point.

[T]he laws of Lower Canada in Civil Matters [it narrates] are mainly those which, at the time of the Cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases. (p. 534)

The problem pertaining to the language was due to the fact that both English and French speaking people resided in Lower Canada. All of the laws existed in either one or the other language but not in both, rendering the laws not always accessible to all portions of the population.

With respect to the absence of legislative or doctrinal synthesis, it seems that the old laws which were still in force in Lower Canada, were no longer re-printed or commented upon in France.

Lower Canada's legal system was denied any continuing nourishment, so to speak, from the legal system of the country which was the seat of the tradition that had produced it; the source from which it sprang was stopped off by the transformation of the uncodified ancien droit into a modern code, and the consequential change in the viewpoint of French legal writers. (p. 538)

Therefore, the actual content of the legal system of Lower

Canada was not easily established by suitable doctrinal synthesis.

Finally, Brierley points out that the technique of codification was perfected, in different parts of the world, in the 19th century. What most interested the commissioners involved in the codification of Lower Canada were the French Code Civil and the Code of Louisiana.

The above reasons led to the establishment of a commission whose task was more than a mere consolidation of past but still existing legal sources. The compilation acquired the status of a "true" codification due to the commissions second instruction - "the observation of the same general plan, and the inclusion of the same amount of detail, as found in the French Civil Code." (in Brierley, 1968:543)

PRINCE EDWARD ISLAND & BRITISH COLUMBIA

The colony of St. John was separated from Nova Scotia and granted independent status in 1769. In 1799 it was renamed Prince Edward Island. In 1792, the penal statutes of P.E.I. became virtually identical to those of Nova Scotia. In 1815, the Acts of the General Assembly of P.E.I., 1773 - 1814, were published. The collection was updated in 1836 and again in 1852. It should be emphasized that according to Brown (1989) although Prince Edward Island published a collection of their statutes, they never went so far as a consolidation or codification.

British Columbia adopted the body of English law of 1858. British Columbia, similar to Prince Edward Island, never consolidated or codified their statutes.

According to Brown (1989) on the eve of confederation there were six different statute books relating to criminal law in British North America. That is, those belonging to: Nova Scotia, New Brunswick, Prince Edward Island, British Columbia, Upper Canada and Lower Canada. Although all were rooted in the English experience, each began with the law of a different time. "In applying these statutes and in generating precedents, the senior criminal court of each colony was a law unto itself." (p. 59) Brown further contends that although all colonial courts were subordinate and bound by the decisions of the Judicial Committee of the Privy Council from 1833, and to the King's Council prior to that, virtually no body of case law had been generated by these tribunals. Therefore, the high courts of criminal jurisdiction in British North America were unsupervised tribunals of equal or concurrent jurisdiction, each of which developed and administered its own body of law. "The system as a whole resembled the decentralized civilian jurisdictions of France and Germany rather than the common law parent in England." (p. 59) Therefore, as the law developed in British North America it branched away from that of England due to social, economic and moral differences of the two societies.

Similarly, the colonies of British North America were composed of people from different races and religions leading to discrepancies in their criminal laws.

By the time of confederation, all the British North American colonies (except for P.E.I. and B.C.) managed to consolidate and "codify" the public statute law of each jurisdiction and to repeal all the law that preceded it. Each "code" or consolidation had a criminal law subcode, which ranged from the 18 chapters and 50 pages of the Revised Statutes of New Brunswick to the 22 chapters and 257 pages of the Consolidated Statutes of Canada. Despite their differences the codes not only reduced the bulk of the law and arranged it systematically but they also introduced styles of drafting which helped to increase the accessibility and readability of the law. (Brown, 1989:91)

1867 - 1892

At the time of confederation it was felt that the determination of what crime is, what is not, and how crime should be punished would be best left up to the federal government. Therefore, s.91 of the British North America Act of 1867 conferred to the Parliament of Canada the jurisdiction to legislate over the criminal law. The provinces included in Canada at the time of confederation were: Ontario, Quebec, New Brunswick and Nova Scotia. Since each jurisdiction had a "code" of criminal statutes law not equal in style, content

and punishment, Sir John A. Macdonald decided to adopt Greave's Criminal Consolidation Acts (suitably amended and taken directly from the Imperial Criminal Law Consolidation Acts of 1861) instead of choosing between those of the provinces.

On June 22, 1869 the criminal law consolidation bills, consisting of 31 Acts covering 364 pages, were given Royal Assent. However, as Brown (1989) points out, although the bills exerted a unifying influence on Canada and they avoided the problem of having to compare former colonial penal codes, many of the bills were based on English laws which brought to the colonies laws which were not previously in effect. Furthermore, they were regressive in that they brought back the style of the past. Confusion ensued and by 1874, penal law covered 445 pages due to the growing number of 'acts to amend acts' since the bills inception.

It should also be noted that in 1874 Justice Taschereau published the first volume of the Criminal Law Consolidation and Amendment Acts.

Between 1875 and 1880, 50 additional penal laws were enacted, 7 of which were amending acts. 115 pages were added to the book of criminal statutes bringing the total to well over 500 pages.

In 1880 plans began for the consolidation of the Dominion Statutes. The commission asked to work on the consolidation were also given special orders to concentrate on

the collection of statutes relating to the criminal law and to consolidate them into a bill to be introduced into Parliament in the next several years. (Brown, D.H., 1989:107) In 1886, the Revised Statutes of Canada received Royal Assent and came into force in 1887. With its enactment 25 years of legislative output was repealed and replaced by 2 volumes. The Penal Statutes were found in 2 locations in the statutes consisting of 49 chapters covering 444 pages. Although the revised statutes were a remarkable achievement they were not without fault. As Brown notes

The law had not been altered in any major provision; it had merely been rearranged. No definitions had been supplied, and no attempt had been made to integrate any of the common law...And for reasons that were not given, the critical apparatus of clearly defined topics marked off by titles and subtitles, which was such a desirable feature of all the previous collections, was omitted altogether. (p. 118)

THE CANADIAN CRIMINAL CODE, 1892

According to Mewett & Manning (1978), at about 1892, the criminal law of Canada consisted of the common law and statute law of England as of the various reception dates, the statutory law of the individual provinces that may have changed that common law or English statutory law, and the new federal legislation that may, in turn have altered the first two. (p. 5)

It is apparent that the situation in Canada with respect to the criminal law was one of increasing confusion. Consequently people began advocating what they considered to

be a "great and necessary reform: the amelioration and systematization of the cruel, capricious, and obscure criminal law by a process of substantive amendment and codification." (Brown, 1989:3)

According to Brown's (1989) version of the events, the idea of developing a Canadian Criminal Code was presented to the Minister of Justice, Sir John Thompson, by Mr. Justice Taschereau in the summer of 1889. Apparently Sir John liked the idea but being a conservative he did not want Taschereau, a liberal appointee, involved in its production. Thompson procured George Burbidge, a judge and former Deputy Minister of Justice, to draft the necessary legislation. With the aid of Charles Masters, Bill 32, a Criminal Law Act, was introduced into Parliament in the spring of 1891.

Although a great portion of the draft criminal code and the Criminal Code, 1892, was original to the Canadian codifiers, the bill closely resembled the English draft bills, in particular Sir James Fitzjames Stephen's draft code. In fact, Burbidge, who conceived a draft criminal code in 1884, requested 6 copies of Stephen's draft code and a personal copy of Stephen's digest. It seems that Burbidge was interested in Stephen's viewpoint of codification and it is what the 1891 draft criminal code for Canada was based on.

The draft code was comprehensive in that it included both indictable and summary offenses. Some of the changes proposed by the law included: the replacement of the word

'theft' for 'larceny', 'murder', 'assault' and 'rape' were defined and the abolition of the distinction between felony and misdemeanour. Every 'part' in the substantive titles began with a definition of the crime to be dealt with in that division, which was unique in 1891.

During the summer, 2000 copies of the bill were distributed to bench, bar and leading members of the public in order to get feedback. Amendments, mostly concerning details, were achieved, and Bill 7, the 1892 draft code, was first read on March 8, 1892. A joint committee, of the House and Senate, was formed to consider the measure, through which the Bill passed smoothly. The Bill was then brought to committee of the Whole to be read clause by clause. When the criminal code was finally enacted, after passing through the senate, it comprised 983 sections, of which 736 (75%) were new or from Canadian models.

The code in its final form did not contain a general part. It did not claim to be exhaustive of the penal law nor did it contain a condition to abrogate the common law. (Brown, 1989:126)

PRINCIPAL DEBATES SURROUNDING THE CRIMINAL CODE, 1892

The purpose behind discussing the principal issues/debates surrounding the Criminal Code, 1892, is one of discovery rather than determination.

I) THE CRIMINAL CODE OF 1892 IS IT A "TRUE" CODE?

One of the fundamental debates surrounding the Criminal Code, 1892, is whether the code was in fact a genuine/true code. A review of the literature reveals two positions. One position asserts that the code was not a genuine code whereas others contend that the 19th century law reformers actually created a true code.

Graham Parker (1981) who is among those who maintain that the Criminal Code, 1892 was not a "true" code, is of the opinion that the team involved in drafting the 1892 code, Burbidge and Sedgwick, were good legal technocrats and fair draftsmen but were not law reformers or radical codifiers. He continues by asserting that the code was only a half hearted attempt at comprehensive codification as sections of the Code depended on the common law to fill the gaps the Code left. Furthermore, the lack of general principle, that is, the "underlying theory of the general part of a code which would be the intellectual foundation for the more specialized parts of the enactment" (p. 271) was another grave problem. As stated by Parker, "in other words, Canada was engaging in moderate codification, expressing the common law in neat statutory language to be interpreted by common law judges."

(p. 263)

The Law Reform Commission of Canada (1976) agrees that the Code of 1893 was not a genuine code. It is stated that

the 1955 Criminal Code [a comparison between the 1955 and 1893 Codes shows little difference in language or in basic design.] thus suffers from a lack of internal logic. The sequence of its sections is almost a matter of chance. The Code, moreover, does not deal comprehensively with the general principles of criminal law....What the Canadian Parliament has achieved so far must therefore, be considered merely a first step toward a true codification. (p. 28)

The Law Reform Commission further claims that because the Criminal Code of 1893 was not a genuine code and did not provide judges with "any statement of the principles of Canadian penal philosophy, the basic rules of criminal law, or their underlying social postulates" (p. 33) Canadian judges treated and interpreted the Code as they would any other statute. In fact,

They followed the best traditions of statutory interpretation by using and relying on the common law to construe the Criminal Code and by giving some provisions of the Code a purely literal interpretation. (p. 33)

In viewing the Code as "expressing the common law in neat statutory language", instead of trying to determine legislative intention behind a particular code provision, the courts often based their decisions on precedents. For example, as the code fails to state the required mental element for an offence, the courts have turned to the case law of other commonwealth countries to discover the legal requirements of criminal guilt.

This problem arose because according to the Law Reform Commission, in the purest British Tradition, statutes were viewed as restrictions on the courts creative power and therefore, should be written extremely precisely and detailed since literal and restrictive interpretations were favoured. Conversely, for the Civil Law tradition written law is recognized as the primary source of law and thus statutes were rarely interpreted restrictively, instead judges sought the legislator's will when interpreting a statute. Therefore, civilian judges did not require statutes to be written precisely and with great detail as they used general principles to determine the meaning of the legislation. However, from the common law judges viewpoint, treating the Code as a statute and not as a fundamental law that must be interpreted as such, has prompted the common law courts to give to it a strictly literal interpretation, as they would any other statute.

Therefore, because the Code was not a genuine Code which did not impart general principles to reinforce its application, it prompted Canadian Common Law judges to interpret it as they would any other ordinary statute, strictly and literally.

In providing objectives to be sought to achieve codification, the Law Reform Commission delineates what is lacking in the present Criminal Code which divests it of its "genuineness". For the creation of a genuine code

from a practical point of view, codification of the criminal law should be both a comprehensive expression of existing positive law and be sufficiently clear to be accessible not only to the legal profession but to the general public. From a scientific point of view, codification should reflect the legal reality of Canada faithfully and should allow for, not hinder, the adaptation of the laws to social change. (p. 40)

What is needed, according to the Law Reform Commission which is not provided in the present code, "is an instrument of fundamental provisions at the same time selective and comprehensive and setting forth a hierarchy of written sources." (p. 40) Hence, progress should be made to incorporate existing criminal statutes into the criminal code however, this alone would not make the code "genuine". The code must possess internal logic which may require supplemental criminal statutes outside the Code.

However, the argument most often employed to confirm that the 1892 codification did not result in a code at all is summarized by Kasirer (1990) when he states, that "the usual focus is on the ability of judges to create criminal law outside of the ambit of the Code which is therefore not comprehensive and it is thus not a true code." (p. 870) Although the Law Reform Commission would agree that the lack of comprehensiveness deprives the code of its genuineness, comprehensiveness alone would not effect a "true" code.

Of those who posit that the Criminal Code, 1892 was a "genuine" code, Desmond Brown (1989) believes that in order to properly assess the Code of 1892, one must view it not with

the benefit of 100 years hindsight, but rather in its original context. In terms of whether or not the Canadian criminal code was a 'genuine' code, Brown states that there are as many variants on the concept of 'code' as there are codes themselves.

Firstly, the definition of a 'code' according to Webster's Third New International Dictionary (1986) is a "systematic complete written collection of law arranged logically with index and table of contents and covering fully one or more subjects of law." (p. 437) Parker (1981) points out that although codification was frequently discussed in the 19th century, it did not have one accepted meaning. According to Brown (1989), Jeremy Bentham first used the verb 'to codify' in the legal sense at around 1800. He was the first to use the term codification although for both the verb and the noun he did not offer any definitions. Brown argues that reviewing Bentham's writing helps to understand what he meant as he stated that a code should be a complete digest, whatever is not in the code should not be law. A revision of the existing law should be effected by rejecting the old and useless portions and making those to be saved more clear and precise. He stated further that both judge-made law and enacted law should be included. (p. 6) Parker (1981) points out, Bentham's concept of a code was one that would supplant the common law and provide a new approach, a fundamental rethinking of the law.

Brown (1989) explains that enacted codes have been diverse in form, content, arrangement and emphasis demonstrating the different meanings it carried. For example, the United States Code comprises all the statutes in force, collected, consolidated and arranged in a comprehensible manner. It does not repeal any of the original statutes nor does it include any part of the common law. The French Civil Code, conversely, is a digest or condensation of the prior statutory and customary law that was not abolished during the revolution, various old royal ordinances, and the revolutionary laws. All this material repealed once the code came into force. (Brown, 1989:10)

According to the Law Reform Commission of Canada (1976), a code, unlike a statute, is based on generality, simplicity and conciseness. They continue by stating

Its only purpose is to lay down the basic principles of the law from which practical applications can then logically be derived. Being abstract and general, it is able to include all cases within its scope without explicitly solving each one, thus leaving sufficient room for a large amount of judicial creativity. (p. 19)

To codify serves to reconsider and reorganize the existing statutory law, to regroup rules into a single and understandable whole, and to systematize the principles underlying them. Codification according to the British Royal Commission on the Criminal Law of 1879 meant "the reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities and other defects...."(in

Macleod, 1978:65) According to Macleod (1978) the word "code" has been used loosely by laymen and legal writers. He claims that in common law countries a code means "a statute which brings together all the law in a given area." (p. 65) A criminal code should ideally be exhaustive of the criminal law, that is, no offenses should be recognized unless specified by the code. The main object of a code, according to Macleod, "is to remove the conflicts, inconsistencies and obscurities that inevitably characterize uncodified law." (p. 65)

According to Brown (1989), the element common to all codes and to everyone's definition is the systematization of an existing body of law. One clear definition does not seem to be in force. He continues by stating that all codes examined, for example, the United States code and the French Code Civil, are all "within the accepted legal definition of the word as laid down in authoritative English, French...sources." (p. 11) This he feels, must be emphasized, in order to illustrate that the Canadian Criminal Code of 1892, was in fact a 'code'. Furthermore, the forefathers of the code truly believed their endeavour comprised genuine codification.

Macleod (1978) agrees with Brown in labelling the Criminal Code, 1892 a "genuine" code and contends that Sir John Thompson employed great tactics in order for his code to pass quietly through Parliament. Outloud, Sir John claimed

that his draft code bill did not intend to reform the criminal law in any substantial way. However, Macleod claims that Sir John did in fact seek to reform, and he sought to make Parliament the main source of legal change, "this seems to constitute a genuine sort of law reform even by twentieth century standards". (p. 65) Furthermore, The Canadian code was more comprehensive than Stephen's draft code or any of the American codes. (Macleod, 1978:64)

Kasirer (1990) also acknowledges that "some form of systematization appears at the heart of the matter." (p. 869) But must the 'system' be complete or comprehensive in order to be termed a 'true' code? And complete in terms of what? Kasirer (1990) tries to answer these questions in establishing a definition of the terms "code" and "codification" and to help decide if the Criminal Code, 1892 was a "genuine" code. He claims that perhaps comprehensiveness as a goal is not possible and it is naive to think that any code could be complete in that sense. Perhaps systematization does not refer to completeness but to the coherence of the legislative expression, that is, a code is a system with an inner logic. (p. 873) Inner logic, according to Kasirer, is rooted in its organization and style. In this respect, unity in terms of language used and the plan may be a measure of the success of a code. However, Kasirer (1990) points out that those who view codes as 'systems' and argue that organizational unity is the fundamental factor fail to explain "what the 'fil

conducteur' of that unity is." In this respect, Kasirer (1990) claims that

is spite of its reputed incoherence it [the Criminal Code] is more philosophically homogeneous than the [Quebec] Civil Code. An individualist approach to culpability based on subjective moral blameworthiness was and is the cardinal philosophical feature of Parliament's hundred year-old Code, and for some, this is its system-defining quality. (p. 877)

Although Kasirer (1990) does not find one clear definition of what constitutes a code, after examining certain codes and relevant literature, he concludes by stating that "about the only sure thing that codes seem to have in common ... is that they are more durable than ordinary statutes." (p. 876) This fact can definitely be attributed to the Criminal Code, 1892 which is now 100 years old.

Kasirer (1990) further concludes "by observing the difficulty in finding any truly universal meaning for codification that might transcend different disciplines of law, different legal traditions and different historical circumstances." (p. 841) Therefore, the ideas provided by Kasirer support the inference that he would agree with Desmond Brown that the Criminal Code, 1892 is in fact a "true" code although he does not specifically state so. Kasirer (1990) would agree with Brown (1989) when he states that "it is apparent that there may be as many variants of the concept of "code" as there are codes themselves." (p. 11) To these authors, the Criminal Code, 1892 clearly satisfies one

variation.

It should be noted that although the above authors would consider the Criminal Code, 1892 to be a "code" it does not imply that they view the Code as a perfect piece of legislation requiring little or no improvement or revision.

In conclusion, the issue of whether or not the Criminal Code of 1892 is a 'true' code is controversial and difficult to ascertain as there does not seem to be one common meaning to the terms code, codify and codification.

II) THE CRIMINAL CODE: A POLITICAL DEVICE?

There has been debate surrounding codes and codification in general as to whether they serve some political end or purpose. Gaudemet (1986) points out that codes can serve many different types of political purposes. For instance codes can help facilitate the union of people of different origin and tradition. Furthermore, codes can be an expression of autonomy for people who have acquired their independence as well as being an expression of the almighty sovereign. (p. 240, 254) Gaudemet cites many examples of codes and the political objective they serve. The Justinian compilation, the code and the digest, is cited as an example of a code as the expression of the almighty. The German code was seen as one whose function was that of cementing national unity. One of the first acts by the government of the newly independent Belgium was to oppose the implementation of the Netherlands civil code. The civil code of Quebec, 1866, according to Gaudemet, with its distinct French influence, was inspired by Quebecker's opposition to anglo-saxon law. (p. 256)

Brierley (1967) considers the political factors influencing the creation of the Quebec Civil Code, 1866 and concludes that the project stemmed from technical rather than political factors. (p. 533) Brierley claims that the idea that the codification was the instrument used to affirm the "French fact" is questionable as the implicit assumption to

this assertion, that the French Law of Lower Canada was threatened by extinction or absorption by the surrounding common law jurisdictions is difficult to demonstrate. In fact Brierley points out that the droit civil was constitutionally secure. (p. 532) Brierley dismisses the contention that the code represented "an instrument of legal nationalism" as he claims that there is no evidence that the codification was born with such considerations. He claims that the code was not designed to protect or define a political community and characterizes its genesis as "intelligent law reform" rather than politics. (Kasirer, 1990:848)

Turning to the Criminal Code, 1892, did its creation and inception serve some political purpose? Did it act as a harmonizing political force linked to national unity? A review of the literature reveals two positions. For instance Brown (1989), argues that at the time of confederation, Sir. John A. MacDonald was interested in engendering a sense of national unity among Canadian people. He felt that the union could be cemented via a national criminal law. Therefore, the power to legislate over criminal matters was conferred to the federal government. Brown further contends that the impetus to codify the criminal law in 1892 was due to the same political motive.

A.W.M. (1975) agrees with Brown with respect to the purpose of the criminal law in unifying the nation. A. W. M. claims that

the criminal law is a phenomenon that must have both a distinctive Canadian character and a common character within Canada. If anything is the cement of Confederation it is a common criminal law, acceptable to the Canadian community in general ... (p. 125)

Therefore, A.W.M. believes that one essential purpose of the criminal law is its cohesive role. The criminal code in this sense is viewed as a unifying factor in Canada.

Maintaining the contrary view, Parker (1981) states that although "folklore" would have it that Sir John A. MacDonald felt that a federal criminal law would help unify the country it probably more accurate that he wanted uniformity in the criminal law. (p. 252) Parker continues by stating that Sir John A. MacDonald believed that one of defects of United States Constitution was the legislative powers of the States with regard to criminal law. Therefore, he viewed the central government's criminal jurisdiction as a priority. Kasirer (1990) agrees with Parker as illustrated by his statement that "codification was intended in 1892 to unify criminal law, not unify Canada as a nation ..." (p. 849)

Therefore, in theory two positions exist with respect to whether the Criminal Code, 1892 served some political purpose. On the one hand, we have seen that certain authors contend that the Code's creation was intended to unify the nation, whereas others believe the purpose of the code was merely to unify the criminal law. However, because it is difficult to determine the codifiers' intention one could look at the consequences of codification without trying to

determine the intention behind the reform. It appears that the codification resulted in the unification of the criminal law regardless of the codifiers' intentions. Thus, perhaps Kasirer and Parker are referring to the actual consequence of the codification and not to the supposed intention behind it when they claim that the code served no political purpose but merely united the criminal law of the newly formed country. A law that we have seen was different in every part of the land.

It is interesting to note that in his editorial "Criminal Law and Confederation", A.W.M. (1975) points out that if the criminal law were to achieve its purpose of unifying the nation the criminal law must be uniform. This signifies uniformity of its interpretation, its enforcement and imposition of sanctions. A.W.M. claims that none of these are uniform, as all vary from province to province. Therefore, according A.W.M. the practical consequences of codification, that is, the unification of the criminal law has not been achieved.

Thus, a review of the literature reveals two distinct positions regarding the political purpose of the Criminal Code, 1892. It is obviously a difficult issue to ascertain as it requires determining the intentions of the codifiers' 100 years ago. Regardless of their intention the consequence of the code appears to have been the unification of the criminal law across the nation. However, debate exists as to whether

the code has achieved this effect.

CHAPTER TWO
RESEARCH METHODOLOGY

This study constitutes exploratory research, descriptive in nature with the principle objective of examining how penal codification was received and interpreted by the media. More specifically, this study will focus on the attention given to the penal codification project by the media, the viewpoints expressed and how they were distributed through time. The media sources to be used are English newspapers and professional English legal journals.

NEWSPAPER SELECTION

Since one source of data used in this study is newspapers, it is important to understand, if only briefly, the way the press operated in the late 19th century. Moreover, understanding 19th century newspaper practices will help to establish the criteria employed in choosing the different newspapers used in this study.

In the 19th century newspaper publishers employed one of two methods to gain popularity and readership. Quality journalism entailed going 'upmarket' to win a sophisticated readership. Quality journals supplied a more extensive fare of up-to-date news, high toned comment and a wealth of special features. The 'up market' daily reached a selected clientele of men (professionals, businessmen and the 'leisured') with considerable purchasing power so that it could charge higher prices. (Rutherford, 1982:10) People's journal's, conversely, applied a 'down market' strategy to give the masses their own

paper. These journals perfected a sensational style and a radical purpose suited to the tastes and interests of the common man. They provided news as entertainment geared for people with little sophistication and limited education. Although this type of newspaper might reach a much broader spectrum of the population, the audience included many women and workingmen who would only excite advertisers interested in mass selling. (Rutherford, 1982:101) According to Rutherford (1982), all newspapers concentrated upon Ottawa especially when Parliament met, to keep the readers "abreast of partisan doings." (p. 135) In fact, Rutherford quotes someone saying, in the early 1880's that "the attention paid by nearly every male adult in Canada to the science of government has earned us the reputation of having more politics to the square mile than any other country in the world." (In Rutherford, 1982:136) However, according to Rutherford,

the Quality dailies strove to supply a routine, detailed survey of public affairs everywhere, suited to highbrow tastes, whereas the people's dailies rigorously abbreviated their coverage afraid of boring the lowbrow reader. (p. 136)

Due to the desire to determine the attention given by the newspapers to the Criminal Code of 1892 it was decided that the Quality journals, with their above stated objective, would be best suited and were thus chosen for this study.

It should also be noted that newspapers during the 19th century had several loyalties which dictated the paper's opinion. According to Rutherford (1982) the first and

sometimes the foremost loyalty was to a party. Readers could choose from either the conservative, liberal or radical label. The conservative label, first launched in the 1870's, signified an absolute

commitment to the community, supposedly bound together by tradition and self interest which translated into a strategy of preservation emphasizing resistance to social and political change as well as a strategy of nation-building emphasizing growth and bigness, railways and factories. (p. 148)

The liberal label

revolved around the concept of liberty, freeing the individual from the rule of privilege and the dead hand of the past to deliver up a better world, a credo that could justify free trade, provincial rights even prohibition. (p. 148)

The radical banner which was born in the people's journals but also appealed to several mavericks and independents who found the status quo oppressive, was slightly more confused as it did not have a major party backing its claims.

Generally speaking this perspective stressed the idea of democracy, the liberation of the masses (or, in the case of the Mail, the 'classes'!) that would work a grand transformation of society and politics. That goal led its champions to boost a grab bag of schemes: protection, anti-monopoly, national independence... A radical paper fell easily into the pose of a populist tribune striking out against the powers of the day. (p. 148)

Data will be collected from 3 newspapers, each representing one of the above labels. The Toronto Globe, according to Rutherford (1982) was the first newspaper to merit the term popular. It was established in 1844 when a

group of Reformers and Free Kirk Presbyterians contributed funds to enable George Brown, the publisher, to set up a new Toronto organ. The Toronto Globe was a liberal paper which became "the political bible of many a reform household in Western Ontario." (p. 42) In fact Rutherford (1982) quotes an anonymous reporter who, in 1876, "called the Globe the most successful and profitable daily journal in the Dominion, boasting immense political influence and a large revenue." (p. 42)

The Montreal Gazette, a conservative newspaper, was considered "the best medium of general knowledge in the city, heavily commercial but attempting a much more detailed coverage of affairs and life at home and abroad." (p. 47)

The Toronto Mail, initially conservative, was launched in an attempt to combat the Toronto Globe. According to Rutherford (1982), in 1885 the Toronto Mail broke free from the conservative party in order to advocate its own views and search for a new party. The formal break with the conservative party was in 1887. During its break from the conservative party the Mail was considered to be a great newspaper.

The Mail, in fact, had realized the ideal of quality journalism: full of news and features, boasting a superb editorial page devoted to 'a cause, and not a party.' The Mail's crusades tapped the malaise, the anxiety of a bourgeois public upset by social change and national stagnation, to such an extent that it might fairly be called the leading organ of the 'classes' in Ontario. (p. 60)

The two Toronto newspapers were chosen as they have been noted for providing the best coverage of the evolution of the code. (Brown, 1989:176) The Montreal English newspaper was chosen as it was considered to be a major newspaper during the period of time. Furthermore, the perspective of a different province was sought.

NEWSPAPER ARTICLE SELECTION

With respect to newspapers, the period to be studied is 1886 - 1893. It has been noted above that the Revised Statutes of Canada, in which 2 chapters considered penal statutes, came into force in 1887. Hence, the collection and compilation of Canadian criminal law started in that year. Data will be collected beginning in the year 1886 in order to examine what was being written before the first compilation. Collection of data will extend 1 year past the year the criminal code was introduced, 1892, to determine what immediate reactions, if any, were recorded. The examination will entail looking at the newspaper everyday within the period specified above.

Although the period studied was 1886 - 1893 for the above stated reasons, data was collected from The Toronto Mail for the years 1890, 1891 and 1892. The Toronto Mail was the last newspaper examined and it was determined when surveying The Toronto Globe and The Montreal Gazette that the most

significant amount of data was collected from 1890, 1891 and 1892. Due to time constraints those three years were chosen when examining The Toronto Mail.

All articles relating to criminal law, the Criminal Code and codification will be analyzed. Firstly, the number of articles related to the code, in the time frame, will be examined. Secondly, what was being said, how and by whom will also be established. Was the focus on codification or specific articles or topics of the code? If the focus was on specific articles or topics, what were they? Examining media reception will enable us to determine what the media judged to be important, whether pressure groups in society used the media as an arena for public debates.

LEGAL JOURNAL SELECTION

The second source of data will be collected from the legal journals. Legal journals present the legal professionals perspective and viewpoint with respect to all legal issues including codification. Data will be collected from 3 journals: Legal News, published in Montreal, Quebec and founded in 1886, Canada Law Journal published in Ontario and founded in 1855, and the Canadian Law Times published in Ontario and founded in 1881. It should be noted that the Canada Law Journal was the successor of the Upper Canada Law Journal. The Upper Canada Law Journal was published from 1855

until 1867 and in 1868 the journal became the Canada Law Journal.

The Legal News was selected to provide the viewpoint of a profession who already had experience with codification, that is the Quebec Civil Code, 1866. The two Ontario Journals were chosen as they were the most prevalent Ontario journals in the 19th century.

LEGAL JOURNAL ARTICLE SELECTION

The period to be examined is from each journals founding date until 1900. Therefore, as seen above, the examination of the Legal News was from 1878 - 1900, the Canada Law Journal was from 1855 - 1900 and the Canadian Law Times was from 1881 - 1900. Data will be collected if possible, to include the year 1867 as it was not only the year of confederation but was the year in which Canada was faced with the task of unifying and consolidating the Canadian Criminal Law. The collection will extend several years past 1893, the in force date of the code, to determine possible long term reaction concerning the code.

All articles relating to codification in general as well as those more specific to criminal law and the Canadian Criminal Code, will be examined. Are the legal professionals in favour of codification in general? Are they in favour of codification more specifically relating to the criminal law?

What immediate reactions, if any, were written with respect to the code, more specifically, did they view the code as an important piece of legislation? What are the reactions, relating to the idea of codification before the implementation of the Criminal Code? And has there been a change in the views expressed in the legal journals throughout the span of years following the implementation of the Code? All these questions will be answered in the hope of determining whether or not legal professionals viewed the code as an important piece of legislation.

It should be noted that Brown (1989) refers to newspaper articles in his analysis of the code, however, it is apparent that he referred to the media only on the dates of specific events. There is no evidence that he engaged in a systematic analysis. Furthermore, Graham Parker (1981) refers to legal journals in his analysis of the Canadian Criminal Code. His analysis however, does not cover the period during which the code was implemented, nor does it cover any of the years following its inception. The earlier dates are required for this analysis in order to compare the reactions to codification before and after the implementation of the legislation.

Finally, using two sources of data, i.e. newspapers and legal journals, will enable us to examine whether there is a difference in the opinions expressed by the newspapers and the professional journals.

TABLE 1
NUMBER OF ARTICLES FOUND IN THE LEGAL JOURNALS
AND THE NEWSPAPERS FOR THE PERIOD STUDIED

NAMES	YEARS STUDIED	NUMBER OF ARTICLES
<u>LEGAL JOURNALS</u>		
LEGAL NEWS	1878 - 1900	43
CANADIAN LAW TIMES	1881 - 1900	8
UPPER CANADA AND CANADA LAW JOURNAL	1855 - 1900	30
<u>NEWSPAPERS</u>		
TORONTO GLOBE	1886 - 1893	47
TORONTO MAIL	1890 - 1892	55
MONTREAL GAZETTE	1886 - 1893	53

CHAPTER THREE

ANALYSIS

LEGAL JOURNALS

In order to examine the coverage of the codification of the criminal law by the legal profession, three legal journals were surveyed. All articles relating to codification and consolidation in general as well as those more specific to criminal law and the Canadian Criminal Code were analyzed. The purpose of the study was to determine whether the legal professionals were in favour of codifying the criminal law, as well as to determine whether any immediate reaction to the code were recorded with the intention of discovering whether they viewed the Canadian Criminal Code, 1892 as a significant piece of legislation. It can be inferred by analyzing the amount and the content of the articles found that in general, codification and more specifically, codification of the criminal law were not significant or major topics of information. The Legal News published articles which discussed codification, criminal law and the Canadian Criminal Code, 1892 in the greatest detail (of the journals studied). The Upper Canada Law Journal and its successor the Canada Law Journal provided articles which consistently discussed the issues, however, the Upper Canada Law Journal's coverage was more detailed. Articles on the Criminal Code and codification subsided with the beginning of the Canada Law Journal. The Canadian Law Times did not publish many articles which discussed the issues to any great extent illustrating that

TABLE 2
NUMBER OF ARTICLES FOUND IN THE LEGAL JOURNALS BY YEAR

YEAR	LEGAL NEWS	CANADIAN LAW TIMES	UPPER CANADA AND CANADA LAW JOURNAL
1856 - 1860	not published	not published	7
1861 - 1865	not published	not published	0
1866 - 1870	not published	not published	2
1871 - 1875	not published	not published	5
1876 - 1880	12	not published	6
1881 - 1885	15	3	1
1886 - 1890	7 one in 1890	1	3 one in 1890
1891	2	1	0
1892	5	0	2
1893 - 1897	2	3	4
TOTAL	43	8	30

they did not believe that the codification effort was of concern to their readers. Although it is unclear why the issues were not of great importance to any of the journals, the Legal News may have demonstrated the most interest, illustrated by their selection of articles published, as it was published in Montreal, where codes and codification were already a reality. Their experience might have caused them to be more interested in discussing the topic and in determining others' point of view. Furthermore, Quebec's civil law followed the civil law tradition where codification was viewed favourably and not the common law where codification was deplored. Hence, Quebec was used to codified law even though their criminal law followed the common law tradition. The Upper Canada Law Journal and its successor the Canada Law Journal and the Canadian Law Times were published in Ontario where codification was not only not a reality but generally disliked due to the adherence to the common law tradition. This might help to explain why codification, criminal law and the Canadian Criminal Code, 1892 were not considered relevant topics.

When reviewing the amount of articles printed by each journal relating to codification, it is important to note that the period studied varied with each journal as its inception date served as the point of departure. Therefore, 1878 - 1900 was the period studied for the Legal News and in that period

43 articles relating to codification were published. The Upper Canada Law Journal and its successor the Canada Law Journal printed 30 articles beginning in 1855 and ending in 1900. Finally, 8 articles were published in the Canadian Law Times from its inception date of 1881 until 1900.

Another interesting subject which requires consideration concerns the authors of the articles and the issue of whose opinion is being expressed. It can easily be inferred that when an article is signed the opinion cited therein belongs to the author. However, difficulty arises in establishing whose opinion is being expressed when the article is anonymous. The question is whether the unsigned articles represent the opinion of the journal or merely of the anonymous author. Furthermore, with respect to the signed articles, it is difficult to ascertain whether the author's opinions represent those of the journal, that is, their common beliefs being the reason the article was published in the particular journal, or whether the opinions expressed belong solely to the author.

It is therefore often difficult to ascertain whose viewpoint is being expressed as many articles found were unsigned. However, this issue did not arise with respect to the Canadian Law Times as all the articles found were either editorials or signed. The Upper Canada Law Journal, its successor the Canada Law Journal and the Legal News all published unsigned articles.

Sometimes studying the particular article can help to determine whether the opinion expressed represents that of the journal or not. For example, an article in the Upper Canada Law Journal ends by claiming,

Consolidation or codification is the order of the day. Each has its advocates. We, for the present, reserve the expression of our opinion as between these two mighty reforms.
(Upper Canada Law Journal, Vol. 4, 1858:126)

In this instance it seems that the "we" indicates that the opinion being presented represents the journal.

This issue appears in the Legal News and it is apparent that it is not easy to decide whose opinion is being expressed. For example:

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.
(Legal News, Vol. 5, 1882:356)

In this particular instance it seems that "we" refers to the people of Quebec and it is not clear whether the opinion stated represents that of the journal as well.

Therefore, when the journal provides unsigned articles it is difficult to determine whose opinions are being expressed. In fact, even when the article is signed it is not clear whether the opinion being expressed belongs solely to the writer or to the journal as well. Often, deciding whose

opinion is being represented requires analyzing each article individually and it may also be dependent upon the reader's point of view.

We will now turn to a more detailed analysis of the articles collected from each journal.

WHY SHOULD WE CONSIDER CODIFICATION?

What is agreed on by the articles printed in all the journals is that the law is in an undoubtedly confused condition.

Our law is undoubtedly in somewhat confused condition. It rests, as has been said, partly upon tradition; but for the greater part, it is to be found scattered through thousands of volumes, most of them practically inaccessible to the majority of men.
(Canadian Law Times, Vol. 3, 1883:141)

One of the most popular subjects of experiment for the legislative theorists during the last few years, has been the criminal law. The present session has lasted about a month, an already seven bills have been introduced to affect the criminal law, either by creating new offences or by rendering its application more arbitrary and uncertain.
(Legal News, Vol. 9, 1886:97)

...But as human law is in theory a complex science, and in practice the collection of the accumulated wisdom of years, as it grows old it grows confusing.
(Upper Canada Law Journal, Vol. 5, 1859:73)

Therefore, the opinions cited in the journals agree that the law is in a confused state, however, the disagreement arises

with respect to whether codes can remedy the situation.

PRO CODIFICATION OR ANTI CODIFICATION

The opinions quoted in the journals did not agree that codification would remedy the state of the law. Therefore, it is interesting to consider whether the articles in the journals claimed to be pro-codification or anti-codification.

On this seemingly clear cut issue, only the Legal News published articles which provided a direct answer. That is, the opinions quoted in the article were consistently positive throughout the years prior to and subsequent to the code's inception. Their approval of codes and codification is understandable considering that the Legal News was published in Quebec who, since 1866, had the experience of a civil code.

...If Mr. Miller cares to have our experience of codes may be given in two words, -
...we have nevertheless, found it useful; we cling to it, and would not willingly be without it.
(Legal News, Vol. 5, 1882:356)

In this part of Canada we have been enjoying the advantages of a Code for seventeen years - not "a hastily prepared code," but one compiled with great deliberation by jurists of eminent standing and long experience.
(Legal News, Vol. 7, 1884:33)

The usefulness of codification in respect of many branches of the law cannot be denied.
(Legal News, Vol. 13, 1890:9)

At last the accomplished Minister of justice of Canada, Sir John Thompson, had the courage to introduce the code, and the tact and ability to secure its

passing through Parliament.
 (Legal News, Vol. 15, 1892:111)

It must be noted that although the opinion towards codification indicated by the authors in the Legal News is considerably positive in that they acknowledge that many beneficial results will certainly follow codification, they do not contend that codes are problem free nor do they insist that codes will solve all of the difficulties advocates claim that it will. While codification will not result in certainty of the law, it will increase knowledge of the law, convenience or efficiency.

Codes, like other acts of the legislature, may cover up some points to which special attention has been directed, but taking them as a whole, it is usually found that the Courts and the lawyers have abundant occupation in finding out what the codifiers meant, and in applying the rules which they have laid down, to the varied business of life. This seems to be the experience of all code-governed countries alike; nor do we imagine that an end to litigation is likely to be reached by any code of the future.
 (Legal News, Vol. 2, 1890:149)

It is one of their chief beliefs that codification was not a panacea for the quantity the law was in, the opinion quoted in the Legal News was such that is useful and necessary:

we, who have had fifteen years' experience of a Code, are well aware that it is not free from difficulty and embarrassment, but we also know that it has supplied a certain rule on many doubtful questions. We cling to it, and would not willingly do without it.
 (Legal News, Vol. 3, 1893:253-254)

The two points to be in advocating codification, the opinion

presented in the Legal News is that unreasonable expectations of the benefits to be derived from the reform should not be formed.

The articles in the Canadian Law Times do not specifically state whether they are generally for or against codification. Agreeing with the opinions presented in the Legal News, the viewpoint expressed in the Canadian Law Times is that codification will not necessarily remedy what its advocates claim that it will, however, it is acknowledged that several benefits will certainly be derived from codifying the laws:

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.
(Canadian Law Times, Vol. 7, 1887:221)

A signed editorial printed in the Canadian Law Times reiterates this viewpoint that one should be wary of codification. W. Seton Gordon claims:

There remains room for grave doubts, therefore, whether the benefits claimed for codification are not overbalanced by its well recognized dangers.
(Canadian Law Times, Vol. 3, 1883:143)

It appears that W. Seton Gordon did not want to advocate clearly for or against codification but instead preferred to highlight the good and the bad. It seems that he was of the opinion that codification alone would not remedy the mess the law was in and that something else was needed. He did not

however state what else was needed to remedy the situation.

The opinions quoted in the Canada Law Journal are perhaps the most difficult to understand as they are clearly against codification prior to the code's inception however, once the code became law, the opinions expressed become positive and proud of the creation. However, it should be noted that the Canada Law Journal was the successor of the Upper Canada Law Journal. It is the opinions quoted in the Upper Canada Law Journal which are clearly negative towards codification. Its successor, the Canada Law Journal did not provide articles which discussed codification to the same extent and was not as opinionated either negatively or positively.

We are not believers in codification.
(Upper Canada Law Journal, Vol. 5, 1859:73)

...But when he advocates codification of the law of England, we must be allowed to say that in our humble opinion he advocates an impossibility...codification of the *lex nonscripta* or common law is, we think, for all practical purposes, impossible, and that the attempt would be imprudent.
(Upper Canada Law Journal, Vol. 6, 1860:220)

Closer to the time when the code became law, the opinions expressed Canada Law Journal began to become less negative:

We are informed that Sir John Thompson is at work on a bill for the codification of the criminal law of Canada...This action may possibly be desirable.
(Canada Law Journal, Vol. 26, 1890:371)

The opinion quoted in the Upper Canada Law Journal clearly expresses the view that codification is not a desired

reform. However, when the code was closer to being formed the opinion quoted in the Canada Law Journal was more positive. In fact, the opinions expressed in the Canada Law Journal when the code became law in 1892 were favourable to the reform. It is not clear whether the opinion expressed relates only to codifying the criminal law or if relates to codification in general.

Of course the code is not perfect. The age of miracles is past. We never heard of a code or any human production that was perfect. At the same time we confess that we have, with others, felt some natural pride in the Canadian Criminal Code. We think it is something which the country at large may, on the whole, be proud.
(Canada Law Journal, Vol. 29, 1893:95)

REASONS FOR CODIFICATION

Much of the discussion in all three journals focuses on addressing the reasons for and against codification. With respect to those who advocate codification,

The first point in favour of a Code is expressed as follows: Because the common law is uncertain, fluctuating, inaccessible, inconvenient, expensive, without authority.
(Canadian Law Times, Vol. 7, 1887:219)

The uncertainty stems from the fact that it is difficult to determine what is intended by the law. It is difficult to decide what the law proposes.

The inconvenience refers to having so many books to consult and the expense of buying them. Added to this is the expense due to the amount of litigation necessary to

understand what the law intends. Because there is often disagreement as to the meaning of the law and since it is only the court that can settle what a particular act means, litigation increases. But, the problem is such that it is the individual litigant who brings a case before the court. The particular case may become a general law for the determination of all other cases, all at the individual litigant's expense.

The problem with the inaccessibility of the law by the citizens is clearly stated:

If the State imposes upon the subject the duty of making himself acquainted with the laws, and holds him accountable for his ignorance, the subject has, it is claimed, a right to demand of the State that these laws should be as few in number, clearly defined and accessible as they can be made. (Canadian Law Times, Vol. 3, 1883:142)

Concerning fluctuations of the law it is stated that:

First, the judges distinguish a case; next, they limit it; they criticize it; then they doubt it; then they deny it; and at length, familiarity having bred contempt they overrule it. (Canadian Law Times, Vol. 7, 1887:221)

It is proposed that since the law is unquestionably in a state of perplexity a remedy to the situation is required. Some believe that codifying the law would serve to rectify the problems with law. It is believed that a code would relieve the uncertainty, expense, fluctuations and inaccessibility of the law by authoritatively expressing the law. The Canada Law Journal quotes from an article in the American Law Review where the author concludes:

The argument of the merits, can be summed up, codified, if you please, in a sentence. What is well settled, can be expressed, and what is doubtful, ought to be made certain, by legislative enactment.

(Canada Law Journal, Vol. 22, 1886:133)

Those who argue against codification basically do not concur that the condition the law is in will be corrected merely by means of a code. In fact, although the opinions quoted in the Legal News are pro-codification, the authors are the first to admit that codes do not solve the problems its advocates claim that it will. They claim that although some areas of the law are made clearer with a code, lawyers and judges have ample work to discern what the codifiers meant. Thus, litigation is not likely to be lessened with a code, nor is uncertainty or fluctuations of the law.

Nevertheless, great expectations are not thus far justified by experience of codes. One test which may be applied - an imperfect one, of course, - is whether they diminish the work of the courts. Is there less litigation in one province [i.e. Quebec which has a code and Ontario which does not] than in the other? We do not find such to be the case... Therefore, one great argument which the friends of codification in the United States are constantly urging - that it will make the law certain - does not appear to unassailable.

(Legal News, Vol. 13, 1890:9)

Since it has been shown that litigation is not necessarily lessened with a code, than neither will the expense of the system. Furthermore, it is also not very likely that the citizen would better understand a code. The law would most

likely remain inaccessible to most people:

Despite the opinion of theorist, the great body of the law must of necessity, from the unavoidable intricacy of the subject, remain forever a sealed book to a large portion of the community...Codes do not necessarily simplify law: in Continental countries where codes are in force, people are not less dependent upon advocates, nor have they any fuller knowledge of the law, so far as known, than in England and America.
(Canadian Law Times, Vol. 3, 1883:142)

It is believed that the laws could never be written, codified or not, in such clear and simple language so that differences in opinion of their intention would ever arise. In fact, more uncertainty may be possibly be introduced by a code, due to the imperfection of the language used. It is also pointed out in the Upper Canada Law Journal that words, which would inevitably be used in the code, such as fraud and negligence, don't really have a precise and definite meaning apart from the circumstances of particular cases. Hence, "no acuteness on jurists would enable them to frame an explicit code capable of interpreting itself without the aid of decided cases."
(Canada Law Journal, Vol. 5, 1859) Furthermore, in the case of conflicting decisions, it is assumed that Parliament would not appreciate the task of deciding which judge is right and would most likely avoid the task. To conclude the point,

...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.
(Canadian Law Times, Vol. 7, 1887:221)

Therefore, it is accepted that the law is in a confused condition. Disagreement centres on whether codifying the law will remedy the problems. The question is however, whether it is worth it to have a code even if it does not or might not solve all the problems that its advocates claim that it will? Those in Quebec who have had the experience of a code believe that it is worth it even though certainty, amount of litigation (thus the expense) and universal knowledge of the laws are not found to be rectified by codification. For those who advocate codification, absolute perfection from a code is not and should not be an expectation. The position is such that a code is worthwhile if it helps to clear up any points of contention, though not necessarily all.

Le Code, avec ses imperfections, a été d'un avantage immense en donnant des règles certaines sur un grand nombre de questions, dont la solution était douteuse, sinon impossible, et en faisant disparaître de nos lois un grand nombre de dispositions qui n'étaient plus en harmonie avec les idées maintenant reçues.
(Legal News, Vol. 3, 1880:113)

In fact, Sir James Stephens, whose draft of the English Criminal Code forms the basis of the Canadian Criminal Code is quoted in the Legal News as confirming the idea that a code is still worthwhile even though it does not solve all the problems its advocates claim that it will.

When a sufficient number of judicial decisions have clearly defined a principle, or laid down a rule, an authoritative statutory statement of that principle or rule superseding the cases on which it depends is a great convenience on many

well-known grounds, and especially because it abbreviates the law and renders it distinct to an incredible extent.
(Legal News, Vol. 3, 1880:113)

It should be apparent that those who advocate codification believe that it is worthwhile despite its imperfections and those who argue against codification do not believe it to be worthwhile at all.

Surprisingly, with the ongoing discussion as to whether a code will make the law more certain, decrease the burden on the courts and on lawyers and make knowledge of the law more universal, for the eight years following the code's inception, that is, from 1893 to 1900, not one article in any of the journals examined these issues and commented on whether the code was a success in this sense or a failure. What would seem to be good source of information to help resolve an important debate was never discussed in any of the journals.

THE CODE AS A POLITICAL DEVICE

An interesting argument favouring the need to codify the law discussed earlier is whether codes are political in purpose acting to unify nations. We have seen that this debate has not yet been settled. One position contends that Sir John A. MacDonald thought that a federal criminal code would help to unify the newly formed country, while others claim that the code was merely intended to unify the criminal law. With the first settlers, the different cultures, religions and language of the people of Canada conflicted.

Paul Rutherford (1982) explains that french speaking Canadians believed that a Canadian unity was possible without people giving up the language and the customs of their forefathers. That is, they envisioned a Canada founded on equality of races and not the absorption of one into the other. English Canadians assumed that "time and the superior ways of anglo-saxons would slowly undo the Quebecois nationality." (p. 168) This illustrates that some people believed that Canada did in fact require some unifying and that perhaps a criminal code could help accomplish this task. Only one journal printed an article which discussed this view of a code helping to unify a nation. However, it was not discussed with respect to the criminal code, but to civil laws. The Canada Law Journal quotes the German jurist Thibault in what they consider to be the grandest argument for codification ever written:

Thibault expresses the view that in confederating the German States the 'only unity practicable and needful was that of law'; and he lays down the bold proposition that the promulgation of a code, at once 'clear, precise and adapted to the requirements of the time,' is one of the chief essentials of a strong and enduring confederation.

(Canada Law Journal, Vol. 32, 1896:498)

The opinion cited in the Canada Law Journal is such that they claim that Thibault's views are pertinent to Canada as it is believed that Quebec would no longer be isolated and separated from Canada, if its laws were uniform with the rest of Canada. Although this argument is not discussed with respect to the criminal code, perhaps the viewpoint would be the same, that

is, that the code served to unify the nation as well.

DEFINING CODIFICATION

With all the discussion on whether the journals are for or against codification, why one should or should not codify, it is interesting to note that not one of the journals specifies what is meant by codification of the law, nor do they specify its goals and expectations. The opinion quoted in the Upper Canada Law Journal specifies what is meant by advocating consolidation which is recommended instead of codification.

Consolidation of the laws...reducing the whole body of the law into compact form, simplifying the language and improving the arrangement and classification of the statutes.

(Upper Canada Law Journal, Vol. 5, 1859:7)

Accordingly, consolidation is meant to allow lawyers to discover the whole law on a given subject. It is also intended that the laws be written in the simplest language possible in order for even ordinary educated men to understand them. The underlying assumption being that disagreement as to the meaning and intention of the law causes a significant amount of unnecessary litigation. The benefits to be gained by consolidating the laws would be great as "the more simple and more accessible the law is, the more useful its is." (Canadian Law Journal, Vol. 5, 1859:73). Therefore, we notice that the articles provided in the Upper Canada Law Journal advocate consolidation in the belief that it will accomplish

what those who advocate codification believe it will accomplish. However, the articles do not discuss the difference between consolidation and codification.

The opinion quoted in the Upper Canada Law Journal does concede that codification and consolidation are in some respects very similar, however the difference is considered to be immense. Consolidation is strongly and clearly advocated over codification.

The benefits to be derived from the consolidation of our law will be immense... And yet we admit that some of the merits of consolidation are its approximation to codification. Consolidation is codification stripped of the ridiculous - it is the reduction and systematization of existing laws, with a view if necessary to future legislation.
(Upper Canada Law Journal, Vol. 5, 1859:73-74)

As stated above, the articles printed in the journals do not provide any strict definition of codification. The articles in the Upper Canada Law Journal do provide clues as to what they a code or codification signifies. The main reason that the articles in the Upper Canada Law Journal do not advocate codification is the belief that it will confine the growth of legislation.

It is neither possible nor reasonable to confine the growth of legislation... Law must grow - it must expand. If by codification is meant finality in legislation, there is meant an absurdity as egregious as it is unpardonable.
(Upper Canada Law Journal, Vol. 5, 1859:73-74)

Furthermore, one of the most common arguments against codification is that it would remove the greatest feature of

the common law, its elasticity.

The principles of the common law are not to be collected and engraved on the statute book by any body of men. The elasticity of the common law is its great feature; and if ever deprived of that, to be confined in four sides of a page of the statute book, the result will be not only unsatisfactory, but most pernicious.

(Upper Canada Law Journal, Vol. 6, 1860:220)

Therefore, it is apparent that certain adversaries of codification assume that it entails a loss of growth and elasticity.

Throughout the discourse by those who support codification we could however, extricate certain representations and images that these people have of codification. One debate surrounding codification which has persisted even into the 20th century is whether codification means comprehensiveness or completeness. Whether a code is complete or comprehensive can be understood in two ways. Firstly, it may mean that codification implies that all cases or combination of facts should be incorporated into the code. That is, that the code should have the capacity to foresee all the particular applications of the law. At this time, many seem to believe in this image as a goal and consequence of codification. Others who advocate codification do not believe this to be goal or desire. In fact, the Canada Law Journal quotes an advocate of codification who is weary of the dangers of over expectation due to this 'goal' of a code being complete in order to be considered a true code.

Nor must we form unreasonable expectations of the benefits to be derived from codification, no matter how well it may be performed. It is not possible, and, therefore, not desirable, to attempt to make any enactment so comprehensive as to embrace all cases or combinations of fact which will arise, nor is it possible to make statutes so clear and precise as to avoid the necessity of judicial interpretation and construction. ...'The law itself should be reduced, so far as possible, to the form of a statute'; not with the expectation that the work of judicial interpretation will be no longer necessary, but with a view to reduce the necessity of judicial legislation and of judicial interpretation to the narrowest possible limits, and to remove as far as may be the existing uncertainty in the law. (Canada Law Journal, Vol. 22, 1886:133)

Therefore, in this specific point of view, codification does not signify total comprehensiveness. Accordingly, the code could not be criticized on this point, as not only is comprehensiveness not a goal of codification, it is not desirable regardless.

The second sense of the terms refers to whether all existing criminal legislation are found in the code thus making it comprehensive. In this view, the code should not be supplemented by additional statutes or sources. In fact Justice Taschereau who was the first person (it seems the only person as well) to publicly criticize the code when it was first introduced, quoted the Chief Justice of England when emphasizing his point that the code was defective due partly to its incompleteness.

The main purpose of the codification of the law is utterly defeated by leaving the code to be supplemented by references

viewed as if it were simply another law relating to criminal matters and not as a major source of principles whose role is to guide the courts. It is for this reason that the code of 1892 is not, according to them, a 'true' code.

In effect, the Law Reform Commission (1976) suggests that confusion exists between the terms code and statute. In the purest British tradition, a statute should be precise and particular, that is, it should spell out everything down to the smallest detail. A code, however, is based on essentially different criteria of generality, simplicity and conciseness. Its only purpose is to lay down the basic principles of the law from which practical applications can then logically be derived. The Law Reform Commission (1976) contends that:

Canadian Judges, with rare exceptions, considered the Code in force as simply another statute and treated it as such. They followed the best traditions of statutory interpretation by using and relying on the common law to construe the Criminal Code and by giving some provisions of the Code a purely literal interpretation. (p. 22)

In viewing the Criminal Code simply as traditional common law compiled in statutory form, the courts felt that they should faithfully reflect the common law. Instead of trying to ascertain the legislative intention behind a particular Code provision, they often based their decisions on precedents, elevating the authority of the latter and treating legislative enactments as not more than codified precedents. (p. 22-23)

The problem expressed by the Law Reform Commission (1976) is that the difference between a code and a statute has been

misunderstood, and thus the Code has been misinterpreted by the courts and has been treated as a statute. What is interesting about this point is that it was noted above that Sir James Stephens is quoted in the Legal News supporting his draft Code. He states once again

When a sufficient number of judicial decisions have clearly defined a principle, or laid down a rule, an authoritative statutory statement of that statement or rule ... is a great convenience...
(Legal News, Vol. 3, 1880:113)

Perhaps by using the term statutory statement he illustrates that he views a code as a compilation of the common law in statutory form, the mistake that the Law Reform Commission (1976) refer to. Therefore, we notice that the Canadian Criminal Code which is based upon Stephens draft code, is founded on this idea. It is not surprising to find that the courts have treated the code as a statute since its creator viewed codification in this manner. Although today, the Law Reform Commission (1976) would not consider the code to be a "true" code due to this issue, in the late nineteenth century the concept of a code was apparently different. This point helps to understand what codification signified to the 19th century reformers. It is also apparent that today, codification is viewed differently.

The journals in general provided brief details chronicling the Criminal Code's history from draft to law, as well as providing brief details of codification efforts in the United States and in Great Britain and excerpts from foreign journals. Several editorials and discussions on codification were provided, focusing mainly on the debate surrounding the need for codification and whether codification would remedy the problems with the laws. The idea and meaning of codification were not debated or discussed in any great detail. Several hints are provided as to respective viewpoints as to what a code signifies but no clear picture is provided.

NEWSPAPERS

The primary question is to determine the attention accorded by the newspapers to penal codification. What becomes clear when studying all three newspapers is that the criminal code, codification and penal reform was not given very much consideration by the media.

Table 3 provides an analysis of the entire number of articles found in the three newspapers by year. The five articles discovered in the period between 1886 and 1888 were excluded from the analysis as they were not found to be pertinent to our study as they related to issues not directly associated with the criminal code in general or any specific topics. Two other articles, one from 1889 and the other from 1890 were also eliminated from the study for the same reasons. That is, although relating to some aspects of the criminal law they were not relevant to our analysis of the criminal code or specific topics. For example, one article published in 1890 discussed the law and how it deals with criminals, while the other article, published in 1889 discussed some changes proposed by the criminal law bill which consisted basically of an outline too little detail for our purposes. In effect, we retained 148 articles to complete our analysis.

TABLE 3
NUMBER OF NEWSPAPER ARTICLES FOUND BY YEAR

YEAR	MONTREAL GAZETTE	TORONTO GLOBE	TORONTO MAIL
1886 - 1888	4	1	NOT CONSIDERED
1889	1	1	NOT CONSIDERED
1890	5	6	13
1891	5	1	7
1892	23	21	35
1893	15	17	NOT CONSIDERED
TOTAL (N = 155)	53	47	55

This material can be divided into two categories. The articles pertaining to the criminal code in their entirety (N = 32) and those articles pertaining to several specific topics (N = 116).⁴ In the first part of this section we will examine the articles relating to the criminal code in general, and in the second part we will focus on the specific themes.

CRIMINAL CODE - GENERAL ARTICLES

We will see later that the 32 general articles pertaining to the criminal code are found between 1891 and 1893. That is, in the three years surrounding the creation of the criminal code (1891 = 7; 1892 = 20; 1893 = 5). However, it must be remembered that in the year 1893 only two journals

⁴. See Table 4 below.

(The Toronto Globe and The Montreal Gazette) were examined.

The idea of codification was not discussed or debated at all in the media. The public, illustrated by the fact that virtually no letters to the editor were published discussing the merits or pitfalls of the criminal code, did not seem to participate in the debate. Or perhaps the editors did not feel that the topic should be debated and therefore, did not print any of the letters. Hence, due to the lack of discussion written on the criminal code during the 8 years studied, it would seem that the editors of the newspapers did not view the code to be an important piece of legislation. However, it should be noted that the Criminal Code, 1892 did not reform the criminal law in any significant manner which might explain why it was not a great source of interest to the editors.

It is clear that the media's focus was not on discussing or debating codification. Their coverage of the reform concentrated on reporting the daily parliamentary proceedings focusing on specific articles of the code. The reporting was descriptive in nature, printing parts of the debates verbatim. For example,

The Criminal Code occupied the afternoon and the early part of the evening, the results of the discussion being the passing of about sixty clauses, which is progress almost double that of yesterday.
(The Toronto Mail, Thurs. May 19, 1892:1)

The House again went into committee on the Criminal Law bill. A large number

of clauses were passed and at 6 o'clock the speaker left the chair.
(The Montreal Gazette, Thurs. May 19, 1892:8)

After routine the House again went into committee on the Criminal Code bill. Clause 100 was objected to by Mr. Mulock as unnecessarily severe....The clause was agreed to.
(The Montreal Gazette, Friday May 20, 1892:5)

The House resumed consideration of the Criminal Law bill. Mr. Davin called the attention of the committee to the definition of defamatory libel, which provided that defamatory matter might be expressed by insinuation or irony. He considered the definition rather severe....[Mr. Laurier also] objected to the definition because it went to far....The definition was passed without change.
(The Toronto Globe, Sat. June 4, 1892:20)

Initially, from 1886 - 1890, the focus was on criminal law reform in general, that is, not related to the creation of the criminal code but merely specific criminal laws that needed to be revised or created. In 1891, the focus became the criminal code. However, the reporting was mainly a chronology of events. That is, describing the bill's movement from the House of Commons, through the Joint Committee, through the Senate, until it became law.

As stated above, none of the newspapers discussed or debated the idea of codification in its editorials, letters to the editor or articles. However, several specific articles of the code were singled out at this point and comments about the code were infrequently scattered which indicated whether the newspaper was negative or positive towards the code. As noted above, journalism and party were inextricably linked by

tradition and necessity. In fact, according to Rutherford (1982) Party organs featured parliamentary proceedings and speeches designed to please the conservative, liberal or radical reader. (p. 136) The Canadian Criminal Code, 1892, was produced by the conservative government, that is, by Sir John Thompson under the leadership of Sir John A. MacDonald. Considering this and the fact that each newspaper framed their editorials, parliamentary speeches and proceedings to please their readers, it is not surprising that it was determined that the Liberal Toronto Globe's coverage of the codification was laced with negative comments.

The Globe pointed out recently that the sixth clause of Sir John Thompson's bill to amend the Criminal Law had the effect of Making criminal such marriages as that of a man with his deceased wife's sister. This obnoxious provision, we are glad to learn, has been eliminated...
(The Toronto Globe, March 10, 1890:4)

The English press does not think much of Sir John Thompson's new code. The Newcastle Chronicle says "it seems to place it in the power of the Government to punish anybody for anything whatever," and warns Sir John that "un-English legislation of this sort is hardly calculated to attract settlers" to Canada, since "there is nothing the average Briton hates more than grandmotherly legislation." The code will stand, until repealed, as a monument to the perspicacity of the Old Man, who always said that Sir John Thompson was nothing more than a lay Monk.
(The Toronto Globe, June 22, 1892:4)

The new criminal code passes into force of law on this day...The wisdom of these numerous amendments we shall not now question or discuss, but some of the anomalies and absurdities of our criminal

law as it now stand, pointed out by the learned author [Mr. Justice Taschereau], are worthy to note.

(The Toronto Globe, July 1, 1893:8)

The whole act has been called a mass of confusion and of turgid verbosity, and the severe criticisms it has been subjected to in England and in the United States seem, unfortunately, but too well deserved.

(The Toronto Globe, July 1, 1893:8)

The Radical Toronto Mail recorded only one negative editorial with respect to the code. The fact that they were not as negative as The Toronto Globe could be due to the fact that although The Toronto Mail was considered to be radical from 1887 - 1895, prior to and subsequent to that time, the newspaper was conservative. The editorial in The Toronto Mail deals with the idea of codifying customary law. The view stated was that Canadians should not codify the customary laws of England as they, that is Canadians, unlike Britains, do not realize that customs always change rendering in the course of its growth, some 'dead wood'. The article printed in The Toronto Mail claims that only those to whom the law is native understand this.

...This code purports to be in general a transcript of the criminal law of England, and that a particular enactment has been transcribed from the English statute book appears to be taken as a sufficient answer to any criticism. But upon this there are two remarks to be made. The first is that, however strong the bond between Canada and England may be, Canada is not England. The law of England, in its political portions at least, is that of a monarchy of the Old World, while Canada is an industrial democracy of the

New World...This leads to the second remark, which is that the law of England is still in its general character customary, law into a code must always be a critical operation...but as custom, with circumstances and sentiment, is always changing, a customary law in the course of its growth is always making dead wood. The judiciary and magistracy of the country to which the law is native understand this, and tacitly treat the dead wood as dead. But the codifier can make no distinction between one portion of his material and another. To him the dead wood is still part of the living tree, and he incorporates all alike into his code.
(The Toronto Mail, June 17, 1892:4)

The editorial in The Toronto Mail concludes by claiming that the law in England has been inspired by a love of personal liberty. In determining whether this spirit of liberty will be retained when the law is transformed into a code, the author of the editorial in The Toronto Mail looks to the creator of the code, Sir John Thompson.

The framer of the Thompsonian code is a pronounced specimen of that colonial Toryism which is always narrower, more intolerant, and more tyrannical than the Toryism of the Mother Country, while he has shown that his general temperament corresponds by renouncing Protestant liberty for the Church of ecclesiastical authority and reaction. It will not be surprising if some effects of his idiosyncrasy were to come to light hereafter in the application of his code.
(The Toronto Mail, June 17, 1892:4)

Therefore, the editorial in The Toronto Mail discusses the implication of codifying English customary laws however, the editorial never goes so far as to comment on whether it is pro or anti codification.

The articles presented in The Montreal Gazette, a conservative newspaper, did not express any negative comments towards the code. In fact, The Montreal Gazette reported several positive comments about the code.

It [the Criminal Law Bill, 1891] represents a large amount of thought and work and indicates that the Minister of Justice is a worker during recess as well as during the session.

(The Montreal Gazette, July 31, 1891:4)

...As a result, the inestimable boon of a codified criminal law, the first in our history, has been bestowed, and if the session had produced no other fruits in the way of legislation its work would still have remained memorable by reason of its usefulness. In this connection it needs only to be added that the credit for the inception, preparation and passage of the bill is attributable principally to Sir John Thompson, who has employed upon it an immense amount of labour.

(The Montreal Gazette, July 11, 1892:4)

The Toronto Globe also provided a comment that illustrated that some individuals were anti codification and fearful that codification would ruin the common law, by removing its elasticity.

He [Mr. Laurier] objected to the definition because it went too far. It might be a fair exposition of the common law, but the statutory law lost the elasticity of the common law.

(The Toronto Globe, June 4, 1892:20)

It is interesting to note that the discussion on this point was not pursued by the newspaper nor does it seem to have been discussed further in Parliament. However, as seen above The Toronto Mail also discussed the problems of codifying the

common or customary law. The Toronto Globe states that the definition that was being debated was passed without any changes.

Added to this point is the fact that it was noted in all the newspapers, since they all concentrated on reporting daily Parliamentary proceedings that the Criminal Code was initially titled the "Criminal Law Act of 1892". It was only through a recommendation by the Joint Committee that the title was changed to "The Criminal Code."

Sir John Thompson stated that the amendments proposed by the Special Committee were few, and mainly of verbal character. The first of these was to make the title "The Criminal Code," instead of the "Criminal Law Act of 1892."

(The Toronto Mail, May 18, 1892:2)

It does not discuss why the title was changed from an Act to a Code. Did the creators of the draft believe it to be a code or merely another criminal law statute? The Newspapers do not provide an answer to this question.

What is provided in The Montreal Gazette and The Toronto Mail, both dated April 13, 1892, is Sir John Thompson's speech outlining his criminal law bill. The Montreal Gazette provided a more detailed version of the speech than did The Toronto Mail⁵. The Toronto Globe only commented on the speech and did not provide any details. Sir

⁵. See appendix for detailed tables concerning the breakdown of the articles found.

John's explanation of the bill began by stating its objects by quoting the report written by the Royal Commission. He continued by stating:

The present bill did not aim at superseding the common law, but did aim at superseding the statutory law relating to crime. In other words, the common law would still exist and be referred to and in that respect the code, if it should be adopted, would have the elasticity which had been so much desired by those who opposed codification on general principles... Substantially the bill would follow the existing law.

(The Montreal Gazette, April 13, 1892:8)

Although Sir John denied that any reform of the law was intended with the creation of the Criminal Code and that the existing law was being changed as little as possible, several people (Macleod, R.C., 1978, Brown, D, 1989:132) believe that this claim was deliberately misleading. That is, a tactical manoeuvre designed to ensure that the bill gets passed. According to Macleod (1978)

The Code as it emerged from Parliament incorporated many more changes in the existing law than Thompson was prepared to admit, at least in public. In reality he was pushing for as much reform as he could manage without arousing suspicion. (p. 66-67)⁶

Therefore, we have evidence to believe that Sir John intended to codify the law, and thus reform Canadian Criminal Law.

⁶. The reform to which Macleod refers is that Sir John Thompson was changing the form of the criminal law, which would become code based instead of being solely founded on the common law. He was not arguing that the code served to change the substance of the criminal law to any great extent.

However the newspapers did not discuss this fact as they may not have been aware of it. It seems that Sir John was a very good tactician who was able to achieve great change without the public's knowledge.

The remainder of the articles found in the newspapers are more general issues relating to the code. That is, they focus on following the code through the course of becoming law, they discuss the size of the code, and the general changes furnished by the code. For example, the fact that it abolished the distinction between felony and misdemeanour, abolished the term larceny and substituted the term 'theft' and discontinued using the term 'malice'. All three newspapers commented on the discussion of the Criminal Code in the Senate. The Code was brought before the Senate for consideration only days before the session was supposed to end. This created quite a furore in the Senate as it was felt that more time was needed for such an important and large piece of legislation. Senator Scott asked that the bill be held over until the next session, however the Senate was convinced by the Prime Minister, to consider it immediately, which is what the Senate did. Senator Scott argued that the Code changed the law quite drastically and to consider it hastily will not be very useful.

Hon. Mr. Scott, in a strong speech protested against the Senate being asked in the last days of its session to review the most important bill presented to Parliament during the last ten years, a bill intimately

connected with the social life of the community and the liberty of the subject. It made a departure in criminal law from the *lex non scripta* which had existed for centuries in England, and with which all judges and lawyers were familiar.
(The Toronto Globe, July 5, 1892:4)

According to Brown (1989), Senator Scott was part of the Joint Committee of the House and the Senate which was created to examine the Criminal Code. However, Senator Scott did not attend any of the sessions which would have enabled him to voice any concerns he had of the Bill. As a result his protests and complaints which he voiced when the Bill reached the Senate were not upheld and the Bill was considered by the Senate nonetheless.

After several other Senators had spoken in favour of holding over the bill, the Premier said that the Senators could provide no stronger argument for the abolition of their Chamber than that which would be based upon the holding over of the bill until the next session. ...We have hardly done any more than enough to vindicate our existence... The bill should be gone on with as far as possible...He moved that the Senate go into committee on the bill at the evening session. The motion was carried without division.
(The Toronto Mail, July 7, 1892:8)

All three newspapers reported the debate in the Senate regarding the code, some more detailed than others. Both The Toronto Mail and The Toronto Globe provided more details than The Montreal Gazette which is not surprising since the Conservative Montreal Gazette would not want to provide negative press on the code.

SPECIFIC THEMES DISCUSSED IN THE NEWSPAPERS

Table 4 provides a look at the different themes considered and the number of articles published for the period between 1889 until 1893. As stated earlier, we excluded 5 articles published from 1886 - 1888 and 2 articles published in 1889 and 1890 respectively. We therefore examined a total of 148 articles of which 116 pertained to specific themes.

As discussed above, the newspapers' focus was not on codification and debating its merits and pitfalls but instead the coverage centred on specific articles of the criminal law and the code. Therefore, our discussion now will focus on the specific topics that were selected.

TABLE 4
SPECIFIC THEMES FOUND IN THE NEWSPAPERS

TOPICS	1889*	1890	1891	1892	1893*	TOTAL
POLY - GAMY	-	8	-	-	-	8
INCEST	-	9	-	-	-	9
SEDUCT- ION OF WOMEN	-	12	-	2	6	20
LIBEL	-	-	-	19	2	21
LOTTER- IES AND GAMB- LING	-	-	-	17	5	22
SEDITION	-	-	1	10	-	11
ABOLIT- ION OF GRAND JURIES	1	3	4	7	-	15
ACCUSED TO TESTIFY	-	-	3	2	2	7
TAKING VERDICT ON SUN DAY	-	-	-	-	3	3
TOTAL						116

* IN THESE YEARS ONLY THE MONTREAL GAZETTE AND THE TORONTO GLOBE WERE EXAMINED

It should be noted that 32 articles are not included in this table as they consist of articles relating to the criminal code in general and not specific themes.

1) POLYGAMY, INCEST AND SEDUCTION OF WOMEN

After 1881 and into 20th century, but most significantly from 1896 to 1914, the urban population in Canada increased dramatically. As Rutherford (1971) points out although Canadians in the 1860's hoped for a populated future, their vision was one of agricultural nation and not an urban frontier, as it was quickly becoming. (p. 304) In fact, as early as the 1870's people steadily drifted towards the cities. Although at one level the city was regarded as the "physical embodiment of progress" (p. 304) generally it was viewed unfavourably.

Even urban writers admitted that there was a dark side to the city where disease, crime, prostitution, and general misery flourished. In the city all the ills of modern society were concentrated and highly visible. (Rutherford, 1971:304)

Actually, as the city became more prominent and congested an attempt was being made to make the city healthy, moral and equitable. According to Rutherford (1971), during the 1880's clergymen, temperance societies, and women's organizations set out on a campaign to purify the city. These crusaders were famous for their attacks on 'organized sin - the saloon, the gambling den, the house of prostitution, even the theatre.' (p. 306) They believed that 'vice' was a threat to national destiny as it was so embedded in city life. Therefore, late nineteenth century Canada was a Victorian commonwealth in which, according to Rutherford (1975), "the bourgeois ethos was predominant." That ethos presumed that society was held

together by a variety of social disciplines and authorities: Christianity (and the Church), marriage and family, education, work, the law and courts (p. 170). This fixation on morality characterized the Victorian era in the late nineteenth century.

This preoccupation with morals and keeping society intact led newspaper editors to focus on specific articles of the criminal laws, those which most threatened the desired harmony. Rutherford (1982:174) explains why the editors did not focus on describing the criminal laws and the new criminal code. He claims that the emphasis was on obedience. The preservation of order was more important than anything. It was believed that the basis of society was obedience to the law and if the law could not carry out this important mandate, society will fall to pieces (p. 174).

Such a presumption made crime a sin, the criminal someone beyond the pale, whose actions were proof of wickedness, deserving only punishment.
(Rutherford, P. 1982:174)

Therefore, the focus was not on making Canadians aware of the laws, discussing the new Criminal Code or debating its merits or drawbacks but on stressing the punishment and the sin.

According to Rutherford (1982), the daily press helped to popularize the above stated belief that community was bound by several moral and social disciplines. One of these disciplines, the family, was viewed as a necessary fortress against the 'hurly-burly' of a busy world, an abode of those

civilized values that must guide a person's life. In fact, Rutherford, (1982) claims that his romance with the family explains the jaundiced view which editors took of any moves to weaken the ties of marriage (p. 172). Marriage and the home fostered self-control, restraining not just the sexual urge but rampant selfishness so making for a moral populace. Therefore, the focus was on maintaining harmony and preserving morality. This helps to explain why all three newspapers focused on the criminal law amendment bills which were executed to 'aid morality', such as: polygamy, incest and seduction of women. Of course, the three provision above are concerned with marriage and family ties. These three themes together represent 25% of all of the news published on the criminal law and the criminal code between 1889 and 1893 (37/148) and 32% of all articles pertaining to specific themes (37/116, excluding the general news relating to the criminal code).

A very important amendment to the criminal law, designed to check gross immoralities, was introduced by the Minister of Justice today. The first clause declares that any parent or guardian who procures or permits the debauching of any girl or woman in his charge shall, if the female is under 13, be guilty of a felony and be liable to 14 years imprisonment, and if the girl is above 13 and under 21 is guilty of a misdemeanour, punishable with 5 years imprisonment...

(The Toronto Mail, Feb. 8, 1890:8)

As the tariff was not taken up to-day, Sir John Thompson went on with his bill to amend the criminal law. The measure, as already explained is designed primarily

to protect female factory operatives from assaults by employers, and wards from assaults by guardians. It also aims at the prevention of the spread of the destructive Mormon practice in the NorthWest.

(The Toronto Mail, April 11, 1890:1)

The destructive Mormon practice to which The Toronto Mail refers to is that of polygamy. What is interesting to note is that polygamy was made illegal before it was believed to exist in Canada. The Canadian Government was so fearful that the mormons would immigrate to Canada and commence their usual practice of polygamy which would serve to break down the country's morality.

The eighth clause was intended to make polygamy an offence. He was not aware that it existed in Canada, but they were threatened with it, and he thought it would be much more prudent that legislation should be adopted at once in anticipation of the advance of polygamy if there was any possibility of its introduction rather than wait until the practice became established in Canada.

(The Toronto Mail, April 11, 1890:5)

The Toronto Globe also provides articles which discuss the provisions of the criminal law amendments which related to morality. The newspaper provided a fairly detailed discussion of the debate in Parliament surrounding many of the provisions. Editorials focused on the provision relating to incest as it was felt that it was the most unsatisfactory and enabled the liberal Toronto Globe to criticize the conservative government.

It is being alleged at Ottawa that certain provisions of Sir John Thompson's bill to amend the Criminal Law refer only to the crime of incest outside the marital relation, and do not prohibit marriage between parties related to one another by affinity within the prescribed limits. This may have been the intention of the Minister of Justice, but the language of the bill as it stands will not bear that interpretation...This clause clearly prohibits marriage between people related to each other by affinity within the fourth degree. Perhaps the obnoxious provision is due to a mistake in draughting or printing the bill.

(The Toronto Globe, Feb. 28, 1890:4)

The Montreal Gazette also considered the same provision as the other newspapers. The Montreal Gazette also provided a fairly detailed discussion of some of the provisions deliberated in Parliament. Their focus, in the form of an added editorial, was on the clause relating to polygamy. This increased interest in polygamy may be due to the fact that Quebec, which contained mostly catholics, may have found the practice disgraceful.

There was not doubt he [Mr. Blake] said, that the reasons which caused the removal of the Mormons from Utah was because of the law of the United States which prevented polygamy. There was an extreme difficulty, as shown by their history in the United States, in preventing them from following these practices. We should in every possible way at the earliest hour give every discouragement of the arrival in our midst of these Mormons with their views and practices in regard to civil government and the marriage question...They ought not to get any encouragement, and certainly thy have received no encouragement

from the Government.
 (The Montreal Gazette, April 11, 1890:5)

The passage of Sir John Thompson's bill now before the House of Commons, should prove an effective stop to polygamy in the Mormon settlement in the NorthWest. That it is necessary, as it is severe, must be admitted. Though these people came into Canadian territory professing a desire to obey the law, it is evident that they regard polygamy as an institution with religious sanction, if not a solemn duty.
 (The Montreal Gazette, April 14, 1890:4)

Therefore, although each newspaper did highlight those provisions relating to morality, they each focused on specific topics in relation to their own concerns.

The Montreal Gazette provides in their editorials and letters to the editor an interesting debate concerning the interpretation of certain provisions of the Criminal Code. The authors of the articles did not seem to agree on the scope and effect of several codal provisions. It seems that Mr. Rev. Douglas and Mr. Watt of Montreal were both under the impression that the Criminal Code favours the rich and discriminates against the poor. The contention is that :

In his criminal code we find the most shameless discrimination between rich and poor. For the daughters of wealth there is the protection from villains till the age of twenty-one. If the abductor of the heiress be brought to conviction, for him there is rightly the penalty of fourteen years in the penitentiary, but for the daughter of the Proletaire, the humble poor, there is not protection beyond sixteen years.
 (The Montreal Gazette, Jan. 2, 1893:4)

The Montreal Gazette provided an article which refutes the claims that the Code favours the rich over the poor. On January 4, 5 and 6, 1893 The Montreal Gazette published letters from D. A. Watt and JAS. Crankshaw who continue to debate the topic. Mr. Watt was inflexible in his contention that the code favours the rich and declared that under the code, the guarded heiress is protected until 21 years, the guarded non-heiress is protected until 16 years and the unguarded non-heiress is only protected until her thirteenth year. Mr. Crankshaw quotes the code to assert his position that no discrimination exists. He claims that the clauses have been misinterpreted by Mr. Watt and Mr. Rev. Douglas. The matter is not brought to a conclusion. Both sides cease debating without a resolution. The articles provided in The Montreal Gazette, to refute Mr. Watt and Mr. Rev. Douglas seem quite adamant that the Code and its creator Sir John Thompson could do no wrong.

The topics examined above relate not specifically to the criminal code but to amendments to the criminal law prior to the creation of the code.⁷ They help to understand the Victorian society of the late nineteenth century. The

⁷. The section above relating to the debate on kidnapping found in The Montreal Gazette does deal with provisions in the Criminal Code and not amendments made to the criminal law prior to codification. This issue was included in the section on polygamy, incest and seduction of women as it was considered to be a related concern.

Criminal Code did not incite much discussion aside from technical every day reporting of events. However, certain provisions did cause some consideration.

2) LOTTERIES

In the 1880's and 1890's hard work was seen as the most certain means to personal success in Canada. According to Rutherford (1982) work was considered important as it produced habits of self-reliance in the population which inevitably benefitted society at large. Editors were quick to react when they detected a threat to the discipline and work. As a result, English language newspapers were ready to denounce gambling in whatever form, but most especially Quebec lotteries.

The draft of the 1892 Criminal Code made gambling and lotteries illegal in all of Canada except in Quebec. Lotteries were considered to be a part of Quebec culture, unlike anywhere else in Canada. The draft was passed through the House of Commons without being changed, however the Senate struck down the clause. All three newspapers discussed the lottery issue.

The Quebec gentlemen have squeezed into Sir John Thompson's criminal code a little amendment declaring that the Dominion prohibition of lotteries shall not apply to their province. Thus the result of opposing the lotteries has been a move towards their legalization, so far as Quebec is concerned. This addition to the law which authorizes the most dangerous

and seductive form of gambling is commended to the attention of the Senate. Their Honours are serious men, interested in the morals of the people and superior to sectional prejudices.

(The Toronto Mail, July 4, 1892:4)

When the lottery clauses of the bill were before the Commons a section was inserted exempting Quebec from their operations. The injustice of making one rule for Quebec and another for all the rest of the Dominion must have been clear to all, but fear of antagonizing the contingent from that province by taking a stand on what might be made a race question killed all determined opposition to it. Possibly the exemption of Quebec was assented to in the Commons in the expectation that the Senate would strike it out. That is the course the Upper House has taken.

(The Toronto Mail, July 9, 1892:2)

In the Senate when the lottery clauses were reached Mr. Vidal moved to strike out sub-section "D" exempting lotteries working under a Provincial charter... Mr. Power said they might as well enact that stealing was no crime if committed in the Province of Quebec, which was the only Province where Provincial lottery existed.

(The Toronto Globe, July 8, 1892:2)

The exception made by the House of Commons in the clauses of the Criminal Code dealing with lotteries, like the exception in the clauses dealing with gambling, will tend to bring all the provisions under these two heads into disrespect. To legalize betting and pool selling on a race course and lotteries when conducted by the Province of Quebec speculators is a move in weakness, not a vindication of justice. Law makers should adhere to principles.

(The Montreal Gazette, July 1, 1892:4)

The Senate can rectify an error of the House of Commons and put itself in touch with the intelligent sentiment of the country by amending the exceptions in favour of gambling and lotteries out of the criminal code. Let gambling be gambling, and lotteries be lotteries, and the bill be symmetrical (The Montreal Gazette, July 8, 1892:4)

The Senate, while removing from the criminal code the provision that made the Province of Quebec lottery speculation legal, has declined to interfere with that authorizing betting and, it would appear pool selling on incorporated race tracks. The peculiar state of affairs will thus exist.
(The Montreal Gazette, July 9, 1892:4)

Although it is noted above that all three newspapers discussed or commented on the gambling question, The Montreal Gazette gave the issue more attention than both the Ontario newspapers.⁸ This is interesting considering Paul Rutherford's (1982) comment that gambling in whatever form but especially Quebec lotteries were quickly denounced by the English Newspapers. Added of course, is the fact that The Montreal Gazette, a Quebec English newspaper denounced the lotteries in its own province more than the newspapers from the Province of Ontario. Perhaps this is because gambling was a French Canadian practice and in the late nineteenth century tension existed between French and English Canadians and their cultures. This tension would manifest itself more in Montreal where there was a greater french population than anywhere else

⁸. The Montreal Gazette published 10 articles, The Toronto Globe published 7; The Toronto Mail published 5.

in Canada. In fact, Rutherford (1982) discusses throughout his book the tension that existed between French and English Canada. For example, French Canadians sanctified confederation as the guardian of a Quebecois nationality. French editors insisted that confederation rested upon a guarantee of the rights of French and catholic minorities, indeed a guarantee of Quebec nationality. That is, they envisioned a pact between English and French speaking races, a perception of a Canadian mosaic founded on equality of races and not the absorption of one into the other. Accordingly, a Canadian unity was possible without people giving up the language and the customs of their forefathers without forgetting their history and without sacrificing their pride of nationality (p. 168). English Canada, however viewed things differently. Confederation in their eyes was seen as the foundation for a pan Canadian nationality. That is, "time and the superior ways of the anglo-saxons would slowly undo the Quebecois nationality" (p. 168). This helps to illustrate that tension existed between the French and the English people which might help to explain why English Quebecers were more likely to criticize French Quebecers.

In fact Miller (1985) points out that during Victoria's reign hostility towards Roman Catholicism was a common phenomenon. Protestants believed that Roman Catholicism was contrary to the social well being of and material progress of Canada. The apprehension centred around

the belief that Roman Catholic societies were in every way inferior.

'They increase taxation for the poor. They render necessary a strong police. They are the keepers of our low tippling houses. They are our chief rioters...were it not for them our poorhouses, jails, penitentiaries, and Magdalen Asylums would be far less necessary, and frequently empty.' Similarly, criminal statistics of 1889 that showed convictions for offences against the person were 418 for Roman Catholics, 123 for Anglicans, 76 for Methodists, 58 for Presbyterians, and 15 for Baptists speak for themselves. (Miller, R. J. 1985:480)

The fact that the Catholic Church condoned and in Quebec was allowed to conduct gambling in the form of lotteries, only served to make matters worse. The continuing struggles between Catholics and Protestants were fuelled by the conviction that Catholicism meant a type of society and country that Protestant Canadians were not prepared to accept. According to Miller (1985)

It was the very length and familiarity of that anti-Catholic heritage that gave Protestant militancy much of its fervour and strength in the Victorian period (p. 494).

The Toronto Mail provides an article discussing the lottery issue which reiterates what has been stated above, that this form of gambling was honoured by French-Canadians. The system came from France and although it had been abolished there, it was re-established upon their arrival in Canada.

But upon arriving here it received an ecclesiastical welcome, for it was

used to promote religious enterprises, such as the erection of new churches and monasteries and the colonization of waste lands under the auspices of the clergy. Everybody went in for lottery tickets, understanding that the purchase would probably produce a double blessing. (The Toronto Mail, July 4, 1892:4)

3) LIBEL

A libertarian rationale for the Mass Media prevailed in Canada even during the nineteenth century. According to Kesterton (1967), an event which contributed immensely to this rationale of English speaking journalism occurred in 1859 with the publishing of John Stuart Mill's essay 'on Liberty'. The thesis of his writing according to Kesterton (1967), was that

From the unrestricted clash and interplay of opinion in the free marketplace of ideas, and through the operation of what was called a "self righting process", truth would become known to all men and would carry the day (p. 56)

The libertarian viewpoint was such that all opinions deserved an expression and a hearing. The chief purpose of mass media is "to inform, entertain, sell - but chiefly to help discover truth, and to check government." (in Curran, J., p. 52) Between 1858 and 1900 although the Canadian newspapers did not receive a libertarian status completely conforming to John Stewart Mill, a body of laws was placed on Canadian Statute books which gave some certainty to the limits of freedom and license within which Canadian journalism could function. According to Kesterton (1967), it is the credo of the

libertarian that, whereas prior censorship and licensing, retroactive legislation and government ownership are unacceptable devices for the control of the press, the sense of responsibility of the journalist and the due process of law are legitimate means of press control (p. 57). The libel laws served to define what a newspaper was and what privileges and responsibilities it had in respect to libel, defamation and related matters. The definition was important. In Canada, the measures enacted were part of both the criminal code, in which they had a uniform, nation-wide application and of the civil code, in which enactments varied from province to province. The libel laws were a necessary mechanism of community control over an institution able to have a devastating effect on the reputation of an individual. Criminal libel was more distressing but less common than civil suits. According to Rutherford (1982), although the press was rarely treated with undue severity by its victims or the courts, by the 1890's the publishers seemed fed up. The Canadian Press Association went to great pains to investigate libel and to lobby for changes - Federal and Provincial. According to Rutherford (1982), the libel laws, however justified in principle seemed an affront and a danger to a free press and so to the new democracy.

Libel was of interest to all three newspapers, however the Ontario newspapers focused on the libel laws twice as much

as the Quebec newspaper.⁹

The doctrine that libel is a crime because it may provoke a breach of the peace is somewhat archaic and casuistical; but, if the offence as such is to be retained on the statute book, its form of enforcing a remedy for a wrong which may, as a rule, be just as effectively enforced by civil process, should be made as unoppressive as possible. We hope Parliament may be induced to take a liberal view of the amendments, and embody them amongst the other provisions of the criminal code.
(The Toronto Mail, March 26, 1892:8)

The article provided in The Toronto Mail seems to express the opinion that the proposed amendments to the libel laws are fair and just.

The following amendments of the libel sections of the Criminal Law bill have been submitted to the Minister of Justice as being fair and reasonable in the interest of the newspapers and periodical press.
(The Toronto Mail, March 26, 1892:12)

The Toronto Globe provides articles which discuss the libel laws, civil and criminal, frequently. Prior to the code, the libel laws were not satisfactory. The proposed laws for the code were deemed fair however, the amendments put into the code did not grant publishers all their requests.

Canadian journalists have had good reason to complain of the harshness of our criminal procedure in libel causes...As the law is now, criminal proceedings for libel are too easily initiated against journalists, and are frequently commenced in cases that should form the subject of civil

⁹. The Montreal Gazette published 4 articles; The Toronto Globe published 9; The Toronto Mail published 8.

actions for damages, instead of criminal prosecutions...Whatever may be done in the matter it is very evident that the present law is far from satisfactory, either to the press or the newspaper public.
(The Toronto Globe, August 15, 1889:4)

....The proposed changes have evidently been well thought over, and will doubtless be carefully considered by the Minister of Justice.
(The Toronto Globe, April 15, 1892:4)

The amendments put into the Criminal Law Bill, recently passed by Parliament do not give newspaper publishers all the protection for which they have been asking. Three important amendments asked by the Canadian Press Association are not in the bill.
(The Toronto Globe, July 29, 1892:5)

Aside from briefly reporting the debate in Parliament relating to the libel laws, The Montreal Gazette only discusses libel prior to the code's inception. Their discussion centres on the fact that the amendments to the libel laws need to be made by the Minister of Justice.

The Minister of Justice has undertaken, at the request of the newspaper publishers of the country, to introduce a bill at the next session of the Dominion Parliament amending the law of libel in criminal cases so as to afford reasonable protection to the press in matters of public interest and concern.
(The Montreal Gazette, August 19, 1887:4)

4) SEDITION / SEDITIOUS INTENTION

Another topic which was discussed in all three newspapers was that of seditious intention. The definition incited debate in Parliament due to the fact that the

opposition felt that the clause served to restrict the liberty of the subject. It was also believed that although the law would be necessary in some parts of England, it was not necessary in Canada. The opposition asked that the clause be left undefined.

Mr. Mills contended that obnoxious Acts of Parliament might be proposed and carried by a majority. It was the right of the people to resist an improper measure as a breach of the public trust, a right to be sure only to be resorted to in extreme cases. This clause was establishing a high prerogative. It could only be free from danger if it remained a dead letter on the statute.

(The Toronto Mail, May 20, 1892:5)

With all the opposition the definition of sedition was left undefined by the code.

5) GRAND JURY

Another topic discussed by the newspapers related to the code was that of whether or not to abolish the Grand Jury. Although the Grand Jury system remained intact with the inception of the Criminal Code, its abolition was under debate for many months prior to the code's becoming law. However a discrepancy in reporting was quite pronounced. The Toronto Mail discussed the abolition of the Grand Jury on 11 separate occasions, whereas The Montreal Gazette discussed it three times and The Toronto Globe discussed it only once. The Minister of Justice asked the judges of the Canadian courts, lawyers and the Attorney-Generals of the Provinces to give

their opinion on whether or not the Grand Jury system should be abolished. We found in The Toronto Globe a discussion concerning the reasons some people had for retaining the system or abolishing the system. They sum up the argument for the retention of the system:

The strongest argument for the retention of the system is that the grand jury may be the means of putting an end to a prosecution which is the result of mere malice, and saving an innocent man from the shame and exposure of a criminal trial.
(The Toronto Globe, Nov. 10, 1890:4)

The argument for the abolition of the system is summed up in an article printed in The Toronto Globe:

The sum of all these arguments is that the grand jury system is more often a defence to the guilty than to the innocent. It is also contended that the abolition of the grand juries would set free some better material for the composition of petit juries.
(The Toronto Globe, Nov. 10, 1890:4)

Although the articles presented in The Toronto Globe do not provide an opinion on whether they believe the system should or should not be retained they do state that they don't believe that lawyers would want it abolished.

Lawyers are usually conservative in matters relating to their own profession, and it is probable that a large proportion of the answers which the Ministers will receive will be adverse to change.
(The Toronto Globe, Nov. 10, 1890:4)

The Montreal Gazette did not print any articles which provide an opinion as to whether they want the system

abolished or retained however, articles are provided which appear to favourable towards the abolition of the Grand Jury. For example, a letter to the editor relates the following viewpoint:

I believe that the usefulness of the jury in criminal matters is gone, that its abolition will be an immense improvement to secure the conviction of criminals and the maintenance of good order in society, and that the sooner the jury goes the better it will be for all except the criminals.
(The Montreal Gazette, April 2, 1889:5)

The Montreal Gazette also provides a discussion by Senator Gowan on the response received by the Minister of Justice on the Grand Jury issue. Senator Gowan is in favour of abolishing the system and seems quite surprised at those who don't hold his opinion.

While on the other side, [retaining the system] ...I certainly felt surprised when I saw the name of Hon. Mr. Mowat, attorney-general of Ontario, opposed to the change...I am somewhat surprised that so able a man and so valuable a man, as a law reformer, has taken the view that he appears, on this occasion, to have taken.
(The Montreal Gazette, July 1, 1891:7)

Although The Toronto Mail provides articles which discuss the Grand Jury question to a greater extent than the other newspapers, the opinions expressed in the paper do not take a position on the subject. The Toronto Mail similar to The Toronto Globe provide articles which express the opinion that they do not believe the system will be abolished. The opinion stated is that without an alternative plan, the system

must remain.

So far the opinions given by judges and juries on the subject of change are not favourable. There need be no surprise then if the days of the grand juries are not shortened.
(The Toronto Mail, Nov. 24, 1890:4)

Certainly the grand jury cannot be abolished unless some other plan of making preliminary enquiry into accusations be adopted.
(The Toronto Mail, Nov. 10, 1890:4)

Debates surrounding codification were considerable during the nineteenth century in England and the United States. In the early 1880's the British Parliament turned down Sir James Stephen's draft code expressing hostility toward the idea of codification. However in Canada, Sir John Thompson was able to codify Canadian Criminal Law without very much opposition. According to R. C. Macleod (1978), Sir John Thompson was prepared for opposition to his proposal to codify the criminal law and therefore provided an expendable item to divert the attention from the main issue. This expendable item, according to Macleod (1978), was the Grand Jury issue. Accordingly, in 1891 Sir John Thompson proposed to abolish the Grand Jury in his draft code. The Grand Jury issue was not mentioned in the 1892 version of the code due to the reluctance he encountered the previous year, nevertheless, in his opening speech on the Criminal Code, Sir John defended his initial proposal to abolish the system.

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. (Macleod, 1978:66)

6) ACCUSED TO TESTIFY ON HIS OWN BEHALF

The fact that public opinion and Parliament appeared to be too conservative to change the Grand Jury system is interesting to note especially with respect to the subject of allowing the accused to testify on his own behalf. Although this topic was not discussed by the newspapers to the same extent as the Grand Jury question, it was considered by all three newspapers. What is important to note is that the Criminal Code allowed the accused to testify on his behalf even though many believed it should not be allowed. While the Grand Jury may be set

aside, another feature of our criminal jurisprudence, that which prohibits the accused from testifying on his own behalf, will no doubt go. Sir John MacDonald always opposed the admission of the evidence of prisoners, but Sir John Thompson is not so conservative a Sir John as was the former leader of the House, and he thinks that accused individuals should be allowed to enter the witness box.

(The Toronto Mail, Feb. 24, 1892:4)

The opinions expressed in The Toronto Globe seems favourable towards allowing the accused to testify on his own behalf. The opinion expressed in The Toronto Globe is such

that the main argument for allowing the accused to testify is that the court should use every possible means to learn the truth, and that the accused knows the truth more than anyone else. The objection to the bill is that allowing the accused to testify or remain silent, if an accused chooses to remain silent, his silence will be taken as proof of his guilt. However, the opinion expressed in The Toronto Globe is that:

These objections hardly outweigh the disadvantages of the present system.
(The Toronto Globe, June 10, 1891:4)

Furthermore, the opinion expressed in The Toronto Globe states that the new law "is a revolutionary step in the administration of criminal justice" (December 8, 1891:1).

The articles printed in The Montreal Gazette do not express a clear opinion regarding the accused testimony, however they print an editorial which claims that Sir James Stephens agrees that justice would be served if the accused were able to provide his own testimony.

Therefore, with respect to the public's opinion as presented in the newspapers regarding whether or not the accused should be allowed to testify on his own behalf, it seems largely favourable. This helps to explain why this aspect of the law was changed with the advent of the Criminal Code.

To conclude, the reporting by the Newspapers on the codification of the Criminal law was mostly technical in nature. The reform did not incite any sort of debate whatsoever on the merits or otherwise of codification. It would seem that the criminal code was not very important to the editors of the newspapers. If one could conclude that the editors reported what the public was interested in, then it could be concluded that the criminal code was not of interest to the public.

The newspaper coverage did not provide any information on the issue of whether the code was created to unite the new founded confederation or whether the code was merely created to unite the criminal laws of the country. This topic was not mentioned in any context in any of the newspapers.

The newspapers did not provide any definition of codification. The only definition that is provided is from Sir John Thompson when he explained his code in Parliament. His definition is quoted from the British Draft code, which never became law. We have seen that controversy exists over what Sir John Thompson was prepared to tell the public vis-a-vis his criminal code. It has been contended that Sir John succeeded in greatly reforming the criminal law by being a very good tactician and having the ability to get people to see only what he wanted them to see. Therefore, perhaps the newspapers did not discuss the code or codification to any great extent as they were not aware of its implications.

Finally, discrepancies in reporting issues was most apparent with respect to the abolition of grand juries, the lottery issue and the libel clauses. With respect to the lottery issue explanations for the difference in reporting has been provided, however no convenient explanation exists for the other differences found.

CONCLUSION

The Canadian Criminal Code received royal assent on July 9, 1892. As noted above, this resulted in making Canada the first self-governing jurisdiction in the British empire to codify its criminal law. (Brown, 1989:4) The goal of the present study consisted of examining the importance of the coverage given by certain English publications and examining the questions raised during the creation of the first Canadian Criminal Code. This study involved exploratory research which was descriptive in nature.

The study examined two types of publications. The first type of publication is English daily newspapers and second is English legal journals. The legal journals studied were the Legal News, the Canadian Law Times and the Upper Canada Law Journal and its successor the Canada Law Journal. The newspapers examined were the Toronto Globe, Toronto Mail and the Montreal Gazette.

In order to examine the coverage given to the Canadian Criminal Code, 1892 by the media, this thesis was divided into three chapters. The first chapter traced the history of Canadian criminal law until codification. Then, we proceeded to outline the principle debates pertaining to the Canadian Criminal Code, 1892. Firstly, whether the code was a 'genuine' code and secondly, whether the code's inception or creation served some political purpose. The second chapter detailed the research method employed. The first section of the final chapter analyzed and examined the coverage found in the English legal journals and the second section examined the

coverage found in the English daily newspapers.

With respect to the analysis of the three journals, this study attempted to establish whether the respective journals were in favour of codification in general and more specifically penal codification and whether their reaction to the criminal code changed after its inception. We were concerned with determining whether the articles published in the journals considered the criminal code to be an important piece of legislation. That is, were there many articles printed on the codification effort and were the opinions cited positive in nature. Finally, we were interested in discovering how the authors of the articles appraised the code and whether they believed it served some political purpose.

The opinions expressed in all three journals was that the criminal law prior to codification was in a state of chaos. But people did not agree upon the method to be employed to remedy the situation. The articles published in the Legal News were clearly in favour of codifying the criminal law. This is easily understood by the fact that the Legal News was established in Quebec where they already had experience with codification in the form of a civil code. It should be noted that although the articles in the Legal News promoted codification the opinions cited in the journal did not insist that codification would solve all the problems evidenced in the state of the law. The opinion was expressed in the journal that regardless of the imperfections of

codifying the law it was still a necessary and worthwhile reform.

The articles in the Canadian Law Times did not take a stand with respect to codification instead the journal published articles which highlighted the good and the bad points. Although the articles provided in the Upper Canada Law Journal expressed a very negative view towards codifying the criminal law, the articles printed in its successor, the Canada Law Journal were positive towards the criminal code.

Very few articles on the Criminal Code, 1892 were published after its inception providing little information as to whether the journals reaction to the code changed. All the articles written after however were positive except for editorials by Taschereau who was very negative towards the Criminal Code.

Although all the journals had articles on the codification of the criminal law, it did not appear to be of the utmost importance as evidenced by the number of articles written and by the terse writing style exhibited in some of the articles. The modest number of articles indicate that codification and the Canadian Criminal Code, 1892 was not the most significant piece of legislation nor the greatest reform of the nineteenth century.

Articles provided in all three journals agreed that the law was in a condition which required revision and reform however there was no agreement on the method needed.

Notwithstanding the discussion for or against codification it is interesting to note that the articles presented in the journals did not state what they meant by codification nor did they provide a definition of codification. Some clues however were provided. For instance, articles in the Upper Canada Law Journal indicated that codification signifies confining the growth of legislation and the loss of elasticity.

With respect to the debate as to whether the Criminal Code, 1892 was in fact a 'genuine' code the three journals provide little explicit information. Of course, this can be understood by the fact that at the time of reform, it was believed that what was being created was in fact a code. Therefore, whether the code was 'genuine' or not was not an issue at that time. In the view of Law Reform Commission (1976), common law lawyers and judges misinterpreted the intention of a code and codification. The Law Reform Commission (1976) contends that common law courts have had a tendency to treat the code as a statute. That is, the code has been viewed as a compilation of the common law in neat statutory language. Although the Law Reform Commission (1976) contends that this view of the code renders it 'un-genuine', several articles in the journals indicate that the view of codification in the nineteenth century was that a code does and should in fact consist of the compilation of the common law in statutory form. The articles provided in the journals appear to agree with Desmond Brown (1989) when he claims that

"it is apparent that there may be as many variants of the concept of 'code' as there are codes themselves ... the Canadian Criminal Code of 1892 was yet another variant." (p. 11) Furthermore, the creators of the code of 1892 believed their code to be a 'true' code.

The articles provided in the journals, agreeing with Desmond Brown (1989), suggest that what was being created was in fact a 'true' code. However, it should be noted that this type of discussion, that is, whether or not the code is a 'genuine' code, is difficult to conduct. Evidenced by the fact that virtually no discussion centred on defining codification and that several articles quote Sir James Stephens, whose draft code serves as the basis for the Canadian Criminal Code of 1892, who equates a code to an authoritative statutory statement. The journals indicate that the nineteenth century view of codification was such that a code consists of the common law in statutory language. Therefore, the journals viewed the code as a 'genuine' code as it conformed with this definition of codification.

Except for one article in the Canada Law Journal there was no discussion or information provided on the second debate surrounding the code, that is whether the Criminal Code, 1892 was implemented to further the political purpose of unifying the country. It should be noted that the article found did not focus on the Canadian Criminal Code, 1892 but on the German Code and how codification in general may be used as

tool to help unify a nation. However, as noted above, throughout the discussion on codification the journals continually discussed the disorganized state of the law. Due to this, it could be argued that the journals considered the purpose of the code was to unify the criminal law and perhaps not to unify the nation.

The coverage of the Canadian Criminal Code, 1892 by the three legal journals indicates an overall general positive attitude towards codifying the criminal law as well as the belief that what was being created was in fact a 'true' code, at least by nineteenth century standards. However, it should be noted that due to the limited amount of articles it appears that the Canadian Criminal Code, 1892 was not considered to be a reform of paramount importance.

The coverage of the codification of the Canadian Criminal Code, 1892 by the three newspapers examined centred on reporting the daily parliamentary proceeding and focusing on particular criminal laws and codal provisions. The reporting was very descriptive in nature. The idea of codification was not discussed or debated at all in any of the three newspapers. Codification as such was not regarded as an issue to be dealt with or considered.

Initially all three newspapers focused on criminal law reform in general. That is, because the period covered began in 1886 several years prior to codification, parliament's focus was on amending the criminal law and not drafting the

criminal code. The analysis shifted to the Canadian Criminal Code in 1891 when the first draft was read in the House of Commons.

The coverage of the Code itself consisted mostly of following the code's evolution up until it became law. That is, reporting the code's movement from the House of Commons through to the Senate until it received Royal Assent. Coverage also focused on detailing the size of the Code and the general changes to the criminal law it contemplated. As we have seen above, the coverage also detailed "specific topics" relating to the criminal code and the criminal law.

In the nineteenth century newspapers were linked with a political party. As a result each newspaper framed their editorials to please their readership, be it conservative, liberal or radical. Therefore, it was observed the liberal newspaper, The Toronto Globe, scattered their coverage of the codification of the criminal law with negative comments about the endeavour. This is most likely due to the fact that the Canadian Criminal Code, 1892 was a conservative undertaking. Not surprisingly, the conservative Montreal Gazette's coverage included only positive comments. The radical Toronto Mail only had one negative comment the rest were either neutral or positive.

In addition to the comments, either negative or positive, produced by the newspapers it becomes apparent from their coverage that they consider a code to be the compilation

of the common law in statutory form. Coinciding with what was established when analyzing the coverage of the Criminal Code, 1892 by the legal journals. This demonstrates that the definition of a code might not be the same today as it was in the nineteenth century. Furthermore, it seems that the creators of the Criminal Code, 1892 did in fact believe their reform represented true codification.

It should be noted that the press did not provide any information on the debate as to whether the code was intended as a political device to unite the nation.

The coverage of the codification of the criminal law by the press was consistent with Paul Rutherford's (1982) claim that in the nineteenth century the fixation was on morality, with the preservation of order being more important than anything else. Therefore, the focus by the public and the media was on punishment and sin and not on describing the criminal laws and the new criminal code. The preoccupation was with morals and keeping society in tact. The press therefore, focused on the articles in the criminal code which most threatened the desired harmony. The family and the work ethic were considered important factors which bind and strengthen a society. As a result any move to weaken family ties or threaten work were viewed very negatively.

A considerable amount of the press coverage on the code focused on the laws relating to polygamy as it directly weakened family ties. Similarly, all three newspapers

detailed the laws on gambling and lotteries as they directly threatened the work ethic. However it should be noted that The Montreal Gazette reported on the lottery issue much more than the two Ontario newspapers. This is surprising considering that the laws made lotteries legal in Quebec. Nevertheless we have seen that tension existed between the french and the english in Canada and especially in Quebec in the nineteenth century and because lotteries were a french Canadian practice it is not really odd that an english newspaper such as The Montreal Gazette would be negative about a french Canadian custom.

The coverage of the codification was generally the same for all three newspapers. However, discrepancies were found with respect to lotteries, discussed above, the abolition of the grand jury and the libel laws. It is difficult to ascertain the reason for the discrepancy with respect to the two latter issues.

In general, there was not a considerable amount of articles written in either the legal journals or the newspapers with respect to the criminal law codification. It seems that the coverage was the minimum that was necessary for such a reform. Basically, the coverage consisted of detailing the progress of the code's becoming law with little regard for its substance or its implications. There was no discussion or debate on the merits or pitfalls of codifying the criminal law

nor was there any attempt to define codification. No issues were raised with respect to the reform which would have incited argument or discussion. It appears that codifying the Canadian criminal law did not pose any difficulty for the codifiers. This is not surprising considering the fact that the codification did not accomplish any major reform or revision of the existing criminal law.

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APPENDIX

ISSUES DEALT WITH IN THE NEWSPAPERS

Each newspaper will be divided in terms of the following six issues: polygamy, incest, seduction of women and girls, lotteries and betting, abolition of Grand Juries, and libel.

Other topics were considered in the newspapers however, these seemed to be the most widely discussed.

ISSUE = POLYGAMY

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	3
TORONTO GLOBE	1
TORONTO MAIL	5

DATES

Montreal Gazette - March 5, 1890, April 11, 1890, April 14, 1890

Toronto Globe - April 11, 1890

Toronto Mail - February 8, 1890, February 8, 1890, March 5, 1890, April 11, 1890, April 11, 1890

ISSUE = INCEST

MEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	3
TORONTO GLOBE	3
TORONTO MAIL	3

DATES

Montreal Gazette - March 5, 1890, April 11, 1890, April 16, 1890

Toronto Globe - February 28, 1890, March 10, 1890, April 11, 1890

Toronto Mail - February 8, 1890, March 1, 1890, April 11, 1890

ISSUE = SEDUCTION OF WOMEN (includes seduction of women in the workplace, seduction of servants by guardians and seduction/abduction of young women and children)

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	9
TORONTO GLOBE	3
TORONTO MAIL	8

DATES

Montreal Gazette - April 11, 1890, April 16, 1890, April 17, 1890, January 2, 1893, January 4, 1893, January 5, 1893, January 5, 1893
January 6, 1893, January 6, 1893

Toronto Globe - April 11, 1890, April 17, 1890, June 25, 1892

Toronto Mail - February 8, 1890, February 8, 1890, April 11, 1890, April 11, 1890, April 17, 1890, April 17, 1890, April 25, 1890 June 25, 1892

ISSUE = LOTTERIES & GAMBLING

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	10
TORONTO GLOBE	7
TORONTO MAIL	5

DATES

Montreal Gazette - May 27, 1892, June 25, 1892, June 29, 1892, July 1, 1892, July 4, 1892, July 8, 1892, July 8, 1892, July 9, 1892, February 16, 1893, March 7, 1893

Toronto Globe - May 26, 1892, June 29, 1892, July 7, 1892, July 8, 1892, March 11, 1893, April 15, 1893, June 29, 1893

Toronto Mail - May 26, 1892, June 30, 1892, July 4, 1892, July 7, 1892, July 9, 1892

ISSUE = ABOLITION OF GRAND JURIES

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	3
TORONTO GLOBE	1
TORONTO MAIL	11

DATES

Montreal Gazette - April 2, 1889, July 1, 1891, April 13, 1892

Toronto Globe - November 10, 1890

Toronto Mail - November 10, 1890, November 24, 1890, May 13, 1891, June 29, 1891, October 16, 1891, January 25, 1892, February 24, 1892, March 9, 1892, April 13, 1892, April 13, 1892, June 25, 1892

ISSUE = LIBEL

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	8
TORONTO GLOBE	18
TORONTO MAIL	8

DATES

Montreal Gazette - May 27, 1887, August 19, 1887, October 18, 1887, January 21, 1889, May 20, 1892, May 26, 1892, June 4, 1892, June 29, 1892

Toronto Globe - April 13, 1887 (Provincial?) April 14, 1887 (Provincial?) April 25, 1887 (Provincial?) June 13, 1887, November 1, 1887, March 23, 1888, May 4, 1888, December 19, 1888, August 15, 1889, April 5, 1892, May 20, 1892, May 20, 1892, May 26, 1892, June 4, 1892, June 29, 1892, July 29, 1892, February 11, 1893, June 29, 1893

Toronto Mail - March 26, 1892, March 26, 1892, April 28, 1892, May 4, 1892, May 20, 1892, May 26, 1892, June 4, 1892, June 30, 1892

CRIMINAL CODE - general comments relating to the code, those articles which discuss the code in general (the general changes proposed by the code, weaknesses, size etc) but not specific clauses of the code.

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	10
TORONTO GLOBE	9
TORONTO MAIL	13

DATES

Montreal Gazette - May 2, 1891, May 13, 1891, July 31, 1891, February 23, 1892, February 25, 1892, March 9, 1892, April 13, 1892, July 11, 1892, July 11, 1892, February 14, 1893

Toronto Globe - July 31, 1891, June 22, 1892, July 5, 1892, July 7, 1892, July 7, 1892, February 11, 1893, June 28, 1893, July 1, 1893, July 1, 1893

Toronto Mail - August 8, 1891, May 13, 1891, May 13, 1891, January 25, 1892, February 24, 1892, March 9, 1892, April 13, 1892, April 13, 1892, April 13, 1892, April 28, 1892, May 18, 1892, June 17, 1892, July 7, 1892

ADDITIONAL TOPICS

The following topics were also discussed in the Newspapers.

ISSUE = ACCUSED TO TESTIFY

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	3
TORONTO GLOBE	8
TORONTO MAIL	4

DATES

Montreal Gazette - July 28, 1891, August 1, 1891, November 3, 1893

Toronto Globe - August 23, 1890, September 29, 1890, June 10, 1891, July 28, 1891, July 31, 1891, December 3, 1891, November 7, 1892, March 4, 1893

Toronto Mail - July 28, 1891, July 28, 1891, February 24, 1892, April 25, 1892

ISSUE = TAKING A VERDICT ON SUNDAY

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	2
TORONTO GLOBE	1
TORONTO MAIL	0

DATES

Montreal Gazette - March 20, 1893, March 25, 1893

Toronto Globe - March 27, 1893

ISSUE = SEDITION / SEDITIOUS INTENTION

NEWSPAPER	NO. OF ARTICLES
MONTREAL GAZETTE	2
TORONTO GLOBE	4
TORONTO MAIL	5

DATES

Montreal Gazette - May 20, 1892, May 26, 1892

Toronto Globe - May 20, 1892, May 20, 1892, May 26, 1892, June 29, 1892

Toronto Mail - August 8, 1891, April 28, 1892, May 20, 1892, May 26, 1892, June 30 1892