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## The Annotated Criminal Code en Version Quebecois: Signs of Territoriality in Canadian Criminal Law

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Souvent, dans ma longue carrière, spécialement consacrée à l'administration de la justice criminelle, j'ai senti la nécessité d'un livre, véritable "vade mecum" qui vous apporte des solutions toutes faites avec l'indication des sources qui les expliquent et les justifient.

On objectera peut-être le vieil adage classique: "*Melius est petere fontes quam sectare rivulus*". Sans doute, je n'en disconviens pas; la vérité intégrale est dans la source; mais je veux que l'on me permette de boire cette même vérité à la rivière qui n'est que la surabondance de la source et qu'on me laisse tout loisir de remonter cette rivière jusqu'à la source quand je désire vérifier la provenance de mon breuvage.

C'est même là un procédé naturel de l'esprit humain, très en faveur de nos jours et qui rentre dans la méthode expérimentale si féconde en excellents résultats.<sup>1</sup>

Sir Charles Fitzpatrick, Chief Justice of Canada, in the introduction to Quebec Judge Charles Langelier's *La procédure criminelle d'après le code et la jurisprudence*, published in 1916.

### Introduction

Why bother annotating the *Criminal Code*? At first blush the answer seems as plain to the casual reader as it did to Sir Charles: judges and others join Parliament in making criminal law. Indeed, despite the promise implicit in its short title, the *Criminal Code* is no more than *An Act respecting the Criminal Law*<sup>2</sup> — a near-code which was and is a boat designed to be full of holes, to the great comfort of those standing by as it was launched in 1892<sup>3</sup> and, to a lesser extent, those hard at work

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\*\*I am grateful to G. Blaine Baker, Patrick Healy, Daniel Jutras, Roderick A. Macdonald and Yves-Marie Morissette for their comments on an earlier draft of this paper.

1. (Québec: Imp. cie du "Telegraph", 1916) at p. IV. Roughly translated, the *latim maxim* cited by the Chief Justice reads "Better to seek out the source than to follow the river".

2. This is the full name of the federal statute which is short-titled the *Criminal Code*, R.S.C. 1985, c. C-46.

3. *The Criminal Code*, 1892, S.C. 1892, c. 29. On second reading of the bill, Prime Minister and Minister of Justice Sir John Thompson explained to the House of Commons that "The common law will exist and be referred to; and in that respect the Code will have the elasticity so much desired by those who are opposed to codification on general principles": Canada, *Debates of the House of Commons* (12 April 1892), reprinted with the entire 1892 *Code* debates as an appendix to James Crankshaw's annotated *The Criminal Code of Canada* (Montreal: Whiteford & Theoret, 1894).

bailing it out today.<sup>4</sup> Today's *Code* admits to being an incomplete catalogue of the law of crime and, in a sense, Parliament has mandated judges (and perhaps others) to fill in the gaps when necessary. Moreover, when the *Code* purports to account comprehensively for any given rule, the interpretive task assumed by judges and others is generally accepted as necessary to flesh out the text. Custom and cases make sense of the *Criminal Code*.

Because the *Code* may not be a code, and in deference to the prominent place given to decided cases in the conventional theory of sources of criminal law, lawyers accept that annotations of decided cases are necessary, at a minimum, to complete the text. The expression *mens rea*, to take the plainest example, may not be used by Parliament, but judges say that it is part of every true crime. Parliament left out the defence of necessity, but judges filled the apparent gap. Parliament says that a person convicted of sexual assault gets something between nothing and ten years in jail, but judges have devised a more precise rule. Unwritten custom accounts for much of this uncoded criminal law, but even the most experienced criminal lawyer must go to the cases to get a sense of how a particular provision operates in its formal deployments. This typically means, at least as a first point of reference, a *Criminal Code* supplemented with references to the "most up-to-date" court decisions, to quote the warranty offered by legal publishing houses in advertisements for their annotated *Criminal Codes*. Furthermore, whether by convenience, reliability or force of habit, these annotated codes are very often used by lawyers and judges for consulting the text of the *Code* itself.

Yet while the readers of the *Code* would cheerfully admit that custom and law written (or not) elsewhere can complete the rules found in the statute itself, many of these same judges and lawyers cling to the idea that there is, after all the annotations have been compiled and digested, one criminal law for all of Canada. The conventional theory of sources of substantive criminal law does not contemplate regional disparity. Wherever in Canada one may be accused of a crime defined in the *Code*, a single body of national criminal law is brought to bear when sorting out guilt or innocence, leaving aside provincial variation relating to different regimes for the administration of criminal justice. The idea that there is

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4. The Law Reform Commission of Canada has recently proposed (in an annotated form) a criminal code designed to be far more complete an expression of the criminal law than the one currently in force. The Commission does, however, suggest that the courts could continue to develop uncoded defences, as they always have, when mandated to do so by the "principles of fundamental justice" entrenched in the *Canadian Charter of Rights and Freedoms*: see Report 31 [:] *Recodifying Criminal Law* (Ottawa: L.R.C.C., 1987) at p. 28. The proposal is thus a new near-*Code*.

one national body of criminal law — one Canadian criminal *droit uniforme* — has been the prevailing wisdom since Confederation, or shortly thereafter when Parliament adopted the criminal law consolidation and amendment legislation in 1869.<sup>5</sup> Even before the first *Code* gave so significant a shape to Canadian criminal law, this conception of a national *droit uniforme* was generally accepted in post-Confederation Canada. The sense of a national criminal law, expressed in the preface to Ontario Barrister Samuel Robinson Clarke's *A Treatise on Criminal law as Applicable to the Dominion of Canada*, is as current today as it was in 1872:

... there is one uniform Code of Criminal Jurisprudence prevailing from the Atlantic to the Pacific.

It is obvious that ... the decisions of each Province are of essential importance in expounding the law now prevailing in all; and the contemplated establishment of a Supreme Court for the Dominion renders it very desirable that the administration and interpretation of the laws should not vary in different Provinces.<sup>6</sup>

The tradition of publishing annotated criminal codes in which decisions from courts across the country are cited to illustrate the operation of the *Code* is consonant with the idea of a Canadian criminal *droit uniforme*. Courts of the same level seated in different provinces are, according to this view, equally authoritative and equally deserving of annotation.

This view of a pan-Canadian criminal law is in keeping with a common perception that national law is necessarily a harmonizing political force, and appears linked in some people's minds to national unity and all things Canadian.<sup>7</sup> One rather colourful expression of this

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5. 32-3 Vict., c. 18 *et seq.* See e.g. the preamble to c. 18 recognizing that it was "expedient to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting the indictable offences relating to coin, and to extend the same, as consolidated, to all of Canada". These statutes were eventually extended by special legislation to other provinces. Some pre-Confederation criminal legislation remained in effect well after 1867 and, in that sense, the perceived *droit uniforme* which I criticize in this paper may not have completely emerged until later. The 1869 legislation and the province-to-province variation which lingered in Canada up to codification in 1892 is detailed in Desmond Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Soc., 1989) at p. 67 *et seq.* and appendices.

6. (Toronto: R. Carswell Law Booksellers and Pub., 1872) at p. v.. Needless to say, Mr. Clarke's reference to "Code of Criminal Jurisprudence" was metaphorical.

7. Martin Friedland, *A Century of Criminal Justice* (Toronto: Carswell, 1984) notes at p. 51 that "federal jurisdiction over criminal law has been a very positive force in the development of this country". This essentially political view jibes with the accepted wisdom in constitutional law as to the broad federal power over "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" under s. 91(27) of the *Constitution Act, 1867*, and explained in cases such as *Can. Federation of Agriculture v. A.-G. Quebec*, [1949] S.C.R. 1 (per Rand J.).

sentiment was explained in 1975 by Ontario law professor and sometime *Criminal Code* annotator Alan Mewett:

The criminal law is a phenomenon that must have both 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, not bilingualism with its bad French-speaking anglophones or its rather better bad English-speaking francophones. Nor is it biculturalism, which turns out to be the preservation of quaint folk songs. Both at great expense.<sup>8</sup>

Another perspective is, of course, possible. One might view a systemic tolerance for an uneven application of national law as itself having more of a positive influence on “nation-building”. As it happens, the view that Canadian criminal law is (or should be) a uniform body of law is difficult to reconcile with the signals actually coming out of courts in different Canadian provinces. In no place are those signals stronger than in Quebec.

The Quebec courts have not participated in the elaboration of what is perceived in the rest of the country as the *droit uniforme* to the same extent as their English Canadian counterparts. It would do Quebec judges an injustice to attribute this only to a lack of good ideas. Why are Quebec courts so lacking in influence outside of Quebec? Why is their influence so substantial within Quebec? Is criminal law practised differently in Quebec? Is Quebec criminal law distinct?

These are questions of such dimension as to go to the roots of conventional perceptions of the Canadian legal system, and it would be unlikely that a study of annotated criminal codes could provide the basis for any conclusive findings. Yet I have chosen to focus on as unassuming a source as the annotated codes precisely because they are unassuming. In the day-to-day workings of the Canadian criminal justice system, these annotated codes are extremely influential documents, yet little time has been devoted to considering what precisely these documents are or the manner in which they influence judicial and prosecutorial decision-making. The codes have been widely used and widely relied upon by lawyers and judges for generations in both English and French Canada and, for this reason alone, I sense that a study of them may provide some insight into the legal cultures in which they have enjoyed success. This said, the annotated codes are lawyers’ tools and little insight can be gleaned from them into the social relations that shape the Canadian justice system. But however small a window onto legal culture they provide, I believe that the language, structure, and content of these texts

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8. “Editorial [:] Criminal Law and Confederation” (1975), 17 *Crim. L. Q.* 125 at p. 125. The author went on to explain that what he saw as the regrettable absence of uniformity in the criminal law in Canada meant that the law fell short of its potential as a unifying force in the country.

reinforce the view that criminal law, in its sources and its practice, is different for lawyers and judges in Quebec than elsewhere in Canada.

Thus in a further sense this is an essay about sources of criminal law and the territoriality of "persuasive" and "binding" authority.<sup>9</sup> Others have suggested, perhaps too casually, that Quebec criminal lawyers treat *doctrine*<sup>10</sup> and cases differently than do lawyers trained elsewhere in Canada, at arm's length from the *Civil Code of Lower Canada* and the world view that it imposes. While this may be true, my conclusions will be more modest. I will suggest that language and, to a lesser extent, local custom among lawyers, have manipulated the use of conventional sources before Quebec courts in criminal matters. Annotated codes and similar lawyers' tools suggest that there are informal hierarchies of formal sources depending on where you are in Canada and what you can read. The Quebec codes promote the view that the Quebec lawyers who rely upon them place local *jurisprudence* in a more prominent position than cases decided elsewhere in Canada. Conversely, non-Quebec annotated codes suggest that their readers are less deferential to Quebec cases than to cases decided in English Canada, or at least cases in which the judgment is rendered in English. There is an informal, and yet rigorously respected ranking of sources inside and outside of Quebec creating the potential for parallel sub-systems within the Canadian criminal law. At present this ordering principle — itself a rule having persuasive authority — is under-recognized, particularly by jurists outside of Quebec.

This study will nevertheless hint strongly at the existence of an unspoken customary norm as to the relative force of so-called "binding" authority in Canadian criminal law as applied and interpreted inside and outside of Quebec. Moreover, I shall argue that within each of these parallel sub-systems inside and outside of Quebec, there are an indefinite number of "incomplete" sub-systems also created by informal sources such as custom among lawyers. In this sense, local custom may promote the emergence of a criminal law which is out of step with the *droit uniforme* in, say, the judicial district of Montreal, the judicial district of Terrebonne, of Kootenay County, of Cariboo County, and so on.

Finally, this study is something of a sketch for a more ambitious exercise in comparative law. While some might shy away from terming analysis of technically intra-jurisdictional differences "comparative law", it has all the makings of just that if comparative law is taken in its fullest, most modern sense.<sup>11</sup> Even if criminal law is, strictly speaking, a matter

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9. In "Persuasive Authority" (1987), 32 *McGill L. J.* 261 at p. 263, H.P. Glenn describes authority as "persuasive" when it "attracts adherence as opposed to obliging it".

10. *Doctrine* is defined as the "pensée des auteurs" in R. Guillien *et al.*, *Lexique de termes juridiques* (Paris: Dalloz, 1985) at p. 169. But not just any "pensée" will qualify; nor does every "auteur" who happens to luck into print or even have the misfortune to die.

11. As H. P. Glenn says in «Le droit comparé et la Cour suprême du Canada», *Mélanges Louis-Philippe Pigeon* (Montréal: Wilson & Lafleur, 1989) 197 at 197, «Le raisonnement juridique est un raisonnement comparatif».

of federal jurisdiction, different sources and indeed different theories of sources within the federation may make for specificity where specificity has been denied in the past. Comparing solutions to similar problems arising inside and outside of Quebec may be inappropriate without a technique of analysis that recognizes and allows for the influence of these systemic differences. When the boundaries of legal sub-cultures of Quebec and non-Quebec criminal law (and perhaps other boundaries) are properly charted, the advantages of genuinely comparative legal methodology for this seemingly parochial concern might be more fully recognized.

Describing the annotated criminal codes and how they reflect legal culture is a first order task (I). Next I will examine the Quebec annotated codes to see if they suggest a distinctive approach by Quebec jurists to issues in Canadian criminal law. Are the Quebec materials tempered by advocates' local customs in a way which might suggest a distinct approach to criminal law inside Quebec? (II.A) Do Quebec annotated codes share in a linguistic mission that reflects the distinctiveness of a criminal law sub-culture? (II.B)

## *I Annotated Criminal Codes and Their Vocation*

### *(A) The Quebec Criminal Codes*

The tradition of reprinting and annotating criminal statutes applicable in Canada pre-dates codification in 1892 and, while there has been considerable variation in the format of these documents over the years, most have followed the same (more or less) commercially-successful formula: provisions of a statute are reproduced followed by notes or short clips from cases from across the country and beyond which, once distilled by the reader, are designed to reveal the true meaning of the rule in accordance with the *droit uniforme*. And as advocate, judge and sometime *Allô Police* columnist Dollard Dansereau observed in his review of Judge Irénée Lagarde's monumental 1955 *Code criminel annoté*: "la tâche n'était pas sans de grandes difficultés, même d'ordre pratique, si l'on considère l'abandon de la matière et l'obligation d'en vérifier toutes les parties".<sup>12</sup>

It is most remarkable that this form of legal writing which has been so prominent on the shelves of successive generations of lawyers and judges in both French and English Canada has generated so little critical attention. Perhaps this is because even the very best of these books were and continue to be perceived simply as oracles of the *droit uniforme* — one's critical attention is better focussed on the *Code* itself and on the cases which supplement and interpret the *Code*, rather than on the

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12. Dollard Dansereau, «*Le Code criminel annoté*, par le juge Irénée Lagarde, Montréal, 1955» (1956), 16 R. du B. 101 at 101.

vehicle which is perceived as merely reproducing them. The current crop of annotated codes is held up against the standard text, *Martin's Annual Criminal Code 1990*<sup>13</sup> which is true to this tradition of presenting the *droit uniforme* in such a way as not to obscure the text with opinion, and is devoted to maintaining the "completeness, currency and accuracy"<sup>14</sup> of the presentation. *Martin's* has a venerable and successful history,<sup>15</sup> going back to the first edition for general distribution published in 1955, which was and remains a valuable piece of scholarship.<sup>16</sup> Today the vocation of the annual edition has changed, and the editors appear to content themselves with the publication of an English-language working tool for lawyers across the country, which is indeed the place it occupies among the very mixed fare offered to the reader on criminal law every year in Canada.

Like the current *Martin's*, the leading French-language annotated *Code* is first and foremost a lawyers' tool. When it initially appeared in the early 1980s, the *Code criminel annoté et lois connexes* edited by Montreal advocate Alain Dubois sought, like *Martin's*, to include annotations from courts across Canada, though "une emphase particulière a été mise sur les arrêts émanant des cours du Québec",<sup>17</sup> recognizing that these cases were either not properly annotated elsewhere or that they enjoyed some kind of exalted status in the eyes of the Quebec judges before whom Dubois' readers would appear. This focus on Quebec *jurisprudence* continued through successive editions, and the 1989 edition contains only annotations to decisions of Quebec courts and the Supreme Court of Canada, in what might be taken as a strong signal of the authors' emerging consciousness of an ordering principle for those sorting out the relative weight of persuasive authority before Quebec courts.<sup>18</sup>

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13. (Toronto: Canada Law Book, 1989).

14. *Martin's* editor, Toronto barrister Edward Greenspan, cited these as three cardinal virtues of the book in the preface to the 1990 edition, *ibid.*, at p. v.

15. Edward Greenspan is the fourth editor of *Martin's*. After J.C. Martin, Professor Alan W. Mewett took on editorial duties from 1963 to 1968, describing the annual as "a reliable, practical working tool for day-to-day practice in the courts": *Martin's Annual Criminal Code* (Toronto: Canada Law Book, 1963) at p. vii. Ontario barrister Ian Cartwright edited the annual between 1968 and 1977, describing his task in a similar manner: "This edition contains all of the important Canadian cases reported to May 31, 1968, relevant to interpreting the Criminal Code": *Martin's Annual Criminal Code 1968* (Toronto: Canada Law Book Ltd., 1968) at p. v.

16. J.C. Martin, *The Criminal Code of Canada with Annotations and Notes* (Toronto: Cartwright & Sons, 1955) which remains useful today for its references to Canadian statutory history, to the English draft code of 1878 and its introduction, which sets out the changes envisaged by the 1954 codifiers, among whom numbered the author. Martin's first annotated *Code* was published privately some short time earlier for the Royal Canadian Mounted Police, according to P.J. O Hearn in a book review, (1955), 33 *Can. Bar Rev.* 734 at 735.

17. *Code criminel annoté et lois connexes 1981* (Montreal: Éd. Yvon Blais, 1981) p. vi.

18. Alain Dubois & Philip Schneider eds., *Dubois Code criminel annoté et lois connexes* (Cowansville: Éd. Yvon Blais, 1989).



Differing styles, biases and methods brought to bear by those involved in these laborious ventures mean that categorizing the various statute primers, magistrates' manuals, annotated codes and the like would be an exercise in frustration. Suffice to say that Quebeckers published these lawyers' tools in all manner of shapes and sizes and in the four working languages of the Quebec courts: English, French, anglicized French and gallicized English. The selection that follows is not complete.

Those who associate the current publications with Ontario and points west may be surprised to learn that most of the early annotated materials prepared for Canadian criminal lawyers were published in Quebec. More surprising still is the fact that many of the early Quebec texts were published in English, reflecting the prominent place of the English language at the Quebec criminal bench and bar in the latter years of the nineteenth century.<sup>19</sup> Indeed as lawyers' courtroom tools, the pre-*Code*, English-language annotated statutory materials remain important records of the activities, interests and perspectives of this segment of the Quebec legal community of the day.<sup>20</sup> Most prominent among these was *The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict., for the Dominion of Canada*,<sup>21</sup> with "notes commentaries, precedents of indictments &c., &c." offered by Henri Elzéar Taschereau, then one of judges of the Superior Court of the Province of Quebec. The work spoke (two) volumes of the author's affection and trust for the English criminal law,<sup>22</sup> though sources were chosen "to ensure, for the work, an equal

19. T. Loranger, "Codification des lois criminelles" (1879), 1 *La Thémis* 272, cited by A. Morel, "La réception du droit criminel anglais au Québec (1760-1892)" (1978), 13 *R.J.T.* 449 at 529.

20. See e.g. John Henry Willan, *A Manual of the Criminal Law of Canada* (Quebec, 1861). A well-written and often humorous text penned by a well-read and opinionated advocate, the *Manual* encouraged lawyers to cite not just English and local cases, but authorities from the United States and beyond. The book was designed for courtroom use: Willan's appendices include separate sections on Upper and Lower Canadian, Nova Scotian, New Brunswick and Imperial statutes as well as, interestingly, the Code of Criminal Procedure of the State of New York. The Queen's Printer for the province of Canada published a series of English language collections for Lower Canadians such as *A Collection of Some of the Most Useful Acts and Ordinances in Force in Lower Canada Relating to Criminal Law and the Duties of Magistrates* (Quebec: Derbishire & Debarats, 1854). Another such English-language text was written by an advocate who wrote prolifically on matters of Quebec civil procedure: Thomas P. Foran, *Digest of Reported Cases Touching the Criminal Law of Canada with References to the Statutes and an Index* (Toronto: Carswell & Co., 1889).

21. (Montreal: Lovell Printing & Pub. Co., 1874 (I)); (Toronto: Hunter, Rose & Co., 1875 (II)).

22. G. Parker contends that this book is an expression of the author's anglophilia which was typical of the period: "The Origins of the Canadian Criminal Code" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 249 at p. 260. In "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987), 32 *McGill L. J.* 523, David Howes offers a compelling argument in favour of a more balanced Taschereau, more "cosmophilic" than anglophilic, whose work is tempered

usefulness throughout the whole Dominion".<sup>23</sup> The first edition is remarkably eclectic, including an astounding number of English case-annotations, many references to Canadian developments in spite of what he promised not to include in the preface, correlations and comments in respect of Imperial statutes, annotated *Lord Campbell's Acts*, speculation about the constitutionality of Dominion legislation that Taschereau was not shy to impugn, mini-dissertations on various areas of the law, criticisms, and sundry suggestions for lawyers and legislators.

In 1888, Taschereau, by then one of the puisne judges of the Supreme Court of Canada, published a second edition that contained a very significant number of Canadian annotations and, in particular, a substantial number of references to decisions from his home province of Quebec. It was followed by a third edition, published in 1893<sup>24</sup> after the adoption of *The Criminal Code, 1892*. Plainly the imperative to remain in print as the leading text in the field induced Taschereau to bury the sharp hatchet he had drawn for those who penned the incomplete *Code* based on the Sir James Fitzjames Stephen's draft code which had died on the order paper at Westminster in 1880.<sup>25</sup> Taschereau's books may well be, in spite of his taste for more exotic sources, colossal works of colonial proportion, but they are of interest for our purposes because of the prominent and equal place the author gave to Quebec sources alongside sources originating elsewhere in Canada.

The adoption of the *Code* in 1892 induced other Quebecers to publish English-language materials, the most prominent of which was no doubt the annotated code edited by Montreal advocate and sometime McGill professor of criminal law James Crankshaw.<sup>26</sup> Crankshaw's first edition included the English-language version of the new *Code*, cross-referenced to the English draft of 1878 and swelled with an enormous number of annotations to both Dominion and English decisions, as well as notes to certain leading decisions from the United States courts. Crankshaw supplemented his own opinions with those of the leading treatise writers of the day in England and included, in an appendix, the full House of Commons debates regarding the adoption of the Canadian *Code*. The second edition, published in 1902, was expanded in size and

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by polyjurality. Howes' view is substantiated by the notes in Taschereau's later editions which show his interest in Australian, American and British North American sources of different stripes.

23. Preface to vol I, *supra*, note 21 at p. iii.

24. *The Criminal Code of Canada, as amended in 1893, with Commentaries, Annotations and Precedents* (Toronto: Carswell, 1893).

25. Taschereau signed a spirited attack on the new *Code* in a letter published in (1893), 16 *Legal News* 36, reprinted in J. Boucher & A. Morel, eds., *De l'ordonnance criminelle au code pénal* (Montreal: U. de M. polycopie, 1974) at pp. 102-3.

26. *Supra*, note 3.

scope.<sup>27</sup> Crankshaw's notes were stretched in some cases to mini-dissertations and he added considerable references to British, Canadian and notably Quebec case law, as well as references to developments in the United States and even notes on U.S. constitutional law. The locus of his own practice meant that the author's work was marked with considerable sensitivity to the criminal law as it developed inside Quebec. In all the editions of the *Crankshaw Codes* with which he was involved, Quebec cases received as prominent attention as any others decided in the country, if not more. Designed from the start as a lawyers' tool for use across British North America, the *Crankshaw Codes* remained front and center on criminal lawyers' shelves through a series of supplements and new editions involving several Quebec advocates, both French and English-speaking,<sup>28</sup> and down to recent days when the *Crankshaw Code* became an Ontario-based enterprise, as it is today in its nine-volume loose-leaf incarnation.<sup>29</sup>

The first edition of the *Crankshaw Code* in 1894 was followed by other English-language annotated codes published by Quebecers, including one by the prolific criminal lawyer Charles Lanctôt<sup>30</sup> as well as the early editions of *Snow's Annotated Criminal Code*<sup>31</sup> which remains in print today, calling Toronto and not Montreal home.<sup>32</sup> *Snow's* was published, in at least its first and second editions, in Montreal, and the frontispiece of the second edition attests to the fact that it was annotated (in English) by a French-speaking Quebec advocate, J. Edouard Coulin. Coulin's edition has a remarkable number of early Quebec cases cited in the annotations, although it has considerably less commentary than either of the Crankshaw or Taschereau *Codes*. While the materials of Crankshaw, Taschereau, Coulin and the others varied widely in depth and scope, these English-language Quebec annotated statutes distinguished themselves from the materials appearing elsewhere in the country in that they accorded Quebec developments — including judicial

27. *The Criminal Code of Canada and the Canada Evidence Act*, 2nd ed. (Montreal: C. Theoret, Law Bookseller, 1902).

28. These included J. E. Crankshaw, the original editor's son, and Alexandre Chevalier, a French-speaking Montreal lawyer who co-edited the 1924 edition and was wrongly identified by his *confrère* Dollard Dansereau as the "first" French-Canadian to undertake such a venture: *supra*, note 12 at p. 101. Taschereau preceded Chevalier, among others, including Jacques Crémazie, *infra*, note 34, in 1842.

29. Gary Rodrigues, ed., *Crankshaw's Criminal Code*, 8th ed. (Toronto: Carswell, 1979, loose-leaf).

30. *The Criminal Code of Canada as in Force on January 1st 1901 with Reported Cases and Appendices* (Montreal: W.J. Wilson, Law Publisher, 1901).

31. *Snow's Criminal Code of Canada*, (Montreal, F. Longueville Snow (?), 1901) and J. Edouard Coulin, *Snow's Criminal Code of Canada*, 2nd ed. (Montreal: John Lovell & Son, 1908).

32. R. Heather, Q.C. "of the Ontario Bar", *Snow's Annotated Criminal Code* (Toronto: Carswell, 1989, loose-leaf).

decisions rendered in French — a full role in the account of the perceived *droit uniforme*.

There has been, of course, a long tradition of publishing the *Code* and pre-*Code* statutes in French, reflecting more the private sector demand rather than the constitutional obligation which resulted in a (small) public sector supply.<sup>33</sup> Many of the early French-language materials did not follow the classical annotation form later taken up by, among others, the editors of the *Code Dubois* currently in print. Yet much of the early *doctrine*, while it did not fit the rule-annotation model, is properly lumped in with the annotated codes because of their primitive vocation. Often these masqueraded as textbooks, but careful examination shows them up as closely linked to the organization of the statutory material upon which they intend to comment. They are, for all intents and purposes, annotated statutes designed for courtroom criminal lawyers. In this group one should properly include works such as Me Jacques Crémazie's iconoclastic 1842 primer, *Les lois criminelles anglaises, traduites et compilées de Blackstone, Chitty, Russell et autres criminalistes anglais, et telles que suivies en Canada: arrangées suivant les dispositions introduites dans le Code criminel de cette province par les statuts provinciaux 4 et 5 Victoria, chap. 24, 25, 26 et 27 comprenant aussi un précis des statuts pénaux de la ci-devant province de Bas-Canada*, which the author himself described in the following terms: "Nous nous sommes efforcé de rendre exactement le sens des auteurs anglais, sans nous occuper de la beauté du style, de la perfection de la langue".<sup>34</sup> The work is essentially a transcription of what the author perceived to be the law in force in Lower Canada, organized by a *plan détaillé* which gave expression to Crémazie's own sense of right and wrong<sup>35</sup>, and yet seeking all the same to follow the logic of the statutes commented upon.

A not insignificant number of French-language works followed that of Crémazie. One particular form which enjoyed favour for some time was a statute followed by commentary arranged as a detailed alphabetical index, complete with case and summaries and comments designed for daily consultation, such as the one offered by advocate and Montreal recorder B.-A.T. de Montigny, *Droit criminel des arrestations comprenant un index détaillé des offenses criminelles et leur classification*.<sup>36</sup> This

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33. Parker, *supra*, note 22 at p. 261 discovered that the original Queen's Printer run of the French version of the 1892 *Code* was one quarter that of the English version.

34. (Quebec: Imp. de Fréchette & Cie, 1842) at p. v.

35. The text is divided into four parts, the third being the French translation of the legislation that, according to the author, was applicable at the time in Lower Canada. The first part, devoted to substantive criminal law, begins with sections on crimes against God, crimes against morality and decency and crimes against the law of nations, and relegates the law relating to crimes against persons to the bottom of the pile.

36. (Montreal: Eusèbe Senécal & Fils, 1882).

book, in addition to being a forty-page monograph on the law of arrest, is perhaps more important as a detailed index which sought to provide the practitioner with a working guide to offences and procedures by name rather than number — a kind of annotated statute on its head. Other early French-language lawyers' tools, such as advocate J.A. Chagnon's *Études sur la loi criminelle du Canada en rapport avec les lois pénales de la Province de Québec*,<sup>37</sup> and Judge Charles Langelier's 1916 work, *La procédure criminelle d'après le code et la jurisprudence*,<sup>38</sup> can also be viewed as variations on the theme of the annotated materials which have become fixtures in Canadian courtrooms. And each of these texts, like their Quebec counterparts today, rely on Quebec sources of criminal law in their account of the *droit uniforme* perceived to make up Canadian criminal law.

Yet the most substantial Quebec annotated code, both in terms of its influence and its scope, was undoubtedly the multiple-volume, multiple-edition work edited by Irénée Lagarde, judge of the Court of Sessions of Montreal and long-time professor of criminal law at the Université de Montréal.<sup>39</sup> Lagarde, who died in 1989, wrote literally thousands of pages of books for lawyers between 1954 and 1974, all with a single purpose: to present in French "ce que le praticien canadien-français est en droit d'exiger".<sup>40</sup> In his French-language annotated materials, Judge Lagarde followed the by then established (English-language) style: the French version of the *Code* was reprinted, measured as against the English text, explained in light of its legislative origins, cross-referenced to related sections of the *Code*, then fleshed out (only in French) with various "annotations", "jurisprudence", "jugements", long translations from cases or from English authors, and often detailed and opinionated comments offered by the Judge himself. Related statutes were also reprinted and annotated in French, making the whole an enormously cumbersome lawyers' tool for which the author apologized in each successive edition. Most striking is the number of references and

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37. (St. Hyacinthe: Presses à Vapeur de l'Union, 1891). This 47-page pamphlet purported to define, comment upon and annotate all of Canadian and Quebec penal law, the author noting (incorrectly) that "Mon travail n'aurait-il d'autre mérite que celui d'être le *premier-né* dans la langue française sur le droit criminel" (p. i).

38. *Supra*, note 1.

39. *Code criminel annoté*, t. I ("les actes criminels et les infractions") and t. II ("la procédure criminelle") (Montreal, polycopie, 1954); *Nouveau Code criminel annoté* (Montreal: Wilson & Lafleur, 1957); *Supplément au nouveau Code criminel annoté 1958* (Montreal: Wilson & Lafleur, 1958); *Supplément du droit pénal canadien* (Montreal: Wilson & Lafleur, 1967); *2ème supplément du droit pénal canadien*, (Montreal: Wilson & Lafleur, 1970); *Droit pénal canadien*, 3 vol., broken into 4 *tômes*: t. I ("Code"), t. II ("Loi de la preuve au Canada"), t. III ("Règles de preuve et de pratique"), t. IV ("Lois statutaires et lexique latin-français"), (Montreal: Wilson & Lafleur, 1974, loose-leaf).

40. *Nouveau Code criminel annoté*, *ibid.*, at p. vii.

annotations to Canadian cases and the emphasis Lagarde gives to the Canadian sources (without, needless to say, neglecting Quebec developments) in exposing the *droit pénal canadien*. By 1974 the huge edition was far too big for any sole practitioner to lug into a courtroom, and Lagarde and his publishers decided to resort to loose-leaf up-dates to ensure a more secure shelf-life for the book.<sup>41</sup> Lagarde seemed less and less concerned with the provenance of cases from within the anglo-Canadian criminal law family, reproducing long extracts from English and Canadian cases in translation almost indifferently in his efforts to further his massive purpose: the book was to be “une oeuvre complète où les renvois, les annotations, les commentaires ou les simples opinions complètent les textes des lois et dirigent le lecteur dans le dédale des jugements souvent contradictoires”.<sup>42</sup>

Not surprisingly, alongside French and English-language texts, a number of truly bilingual annotated and unannotated *Criminal Codes* have been published by Quebeckers and, to differing degrees, have found favour with Quebec lawyers, particularly one private loose-leaf edition without notes which remains one of the most used of today's codes.<sup>43</sup> One suspects that the publication of side-by-side versions of the English and French texts was not simply a response to the limited talent for language of some readers, nor simply the following of a tradition established by various private publications of the *Civil Code of Lower Canada*<sup>44</sup> but was, as I will suggest below, at least an oblique recognition that the two versions are not normatively identical. Université Laval professor and practising criminal lawyer, Antoine Rivard, hinted at this in the preface to his 1939 bilingual edition: “[Cet ouvrage] contient les textes officiels français et anglais juxtaposés. La disposition de ces textes français et anglais est un avantage que je crois considérable pour celui qui veut citer et interpréter le code<sup>45</sup>”.

The bilingual annotated code offered by Montreal advocate Léopold Houle in 1917 bears special mention. Houle announced his off colours to his readers in the preface to his two-volume work:

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41. *Supra*, note 39. The work remained that of Lagarde, but parts of the double-columned, single-spaced, 4000-page “library” for the Quebec practitioner were written by judges Albert Malouf, Maurice Rousseau, Henri Masson Loranger and Roger Lagarde. Even with help, Lagarde's work could not be kept *à jour*: only a few loose-leaf updates were circulated to subscribers, the last of which appeared in 1975.

42. *Ibid.*, at preface.

43. Centre doc. jur. Qué., eds., *Code criminel/Criminel Code* (Montreal: Wilson & Lafleur, 1989, loose-leaf).

44. In “La domestication de la pensée juridique québécoise” (1989), 13 *Anthr. & sociétés* 103 at pp. 115 *et seq.*, David Howes offers a convincing argument that the way in which the *Civil Code* has been produced has fashioned, in part, the way in which it has been perceived.

45. *Code criminel du Canada comprenant les modifications depuis 1907* (Montreal: Les Éditions Légales de Lamirande, 1939) at preface.

Certaines modifications apportées au code depuis quelques années n'ont servi, malheureusement, qu'à le rendre plus confus.

L'immutabilité de la loi criminelle devrait être, enfin, proclamée.

Le meurtrier et le voleur de nos jours n'emploient pourtant pas de moyens plus perfectionnés que ceux dont se servaient les meurtriers et les voleurs d'autrefois.<sup>46</sup>

The annotations that Houle offered his readers, while they may have reflected the conservatism that he brought to the enterprise implicit in the above statement of principle, were truly bilingual: the note under each judgment was penned in the language of the case. Ironically, bilingualism here served to reinforce inaccessibility, if an English or French-language decision was Greek to the reader in the original, it was no less Greek in annotation. The book has nothing of the scope of Crankshaw which preceded it or Lagarde which followed, but there are a substantial number of Canadian and particularly Quebec judgments annotated, although English cases remained *de rigueur* for Houle, who also included some Australian and American cases. A significant number of annotations appear for statutes specific to a Quebec criminal lawyer's practice and he included a bilingual version of the (unilingual) *British North America Act* with a substantial number of insubstantial annotations on constitutional matters. Above all the work is the reflection of the tastes of its author who, one must infer, was most interested in procedure as it was relevant to a criminal practice before the Quebec courts of the period and, judging from the remarkable number of Quebec cases he cited, was sensitive to those courts' predilection for their own precedent.

The annotated materials have come in different packages, and mention should be made of the most notable of the historical cousins of today's codes: the flood of manuals published for justices of the peace across the country, mostly during the middle and later years of the nineteenth century. For an important stretch in the history of guilt and innocence in Canada, the administration of justice was in the hands not only of judges, but a motley crew of magistrates who sometimes had only the rudiments of an education, to say nothing of a legal education. Manuals appeared across the country each reflecting, in one way or another, the particular needs and prejudices of the community in which the magistrate found himself and, depending on the moment, the local nature of his jurisdiction. Yet when treating aspects of the magistrates' power that was rooted in the perceived national *droit uniforme*, many of the manuals purported to offer a scientific, pan-Canadian overview of the law in a

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46. *Le Code criminel du Canada* 2 vol. (Montreal: Wilson & Lafleur, 1917), preface to volume I.

format that would make them everyday tools for judges and *ad hoc* judges charged with the administration of justice in different parts of the country.

Quebec too, had its share of manuals addressing the specificity of the problem facing the administration of justice in the province and the peculiarities of the local magistrates' jurisdiction. Like the annotated codes, the manuals' first-order mission (as perceived by their authors) was to present the law in a scientific, accessible manner.<sup>47</sup> It is fair, I think, to view these texts as the forerunners of the annotated codes despite their different and specialized readership. And the Quebec manuals, just like the Quebec magistrates, were different. Among the leading Quebec texts was undoubtedly Magloire Lanctôt's *Le livre du magistrat*, written by a magistrate and advocate mindful of the special linguistic mission of his work for his Quebec *confères* "qui ne parlent que le français [et qui] déplorent leur impossibilité de s'éclairer sur leurs devoirs faute de quelque traité spécial dans leur langue sur ce sujet".<sup>48</sup> Advocates Raoul Dandurand and Charles Lanctôt, who went on to publish an influential treatise on criminal law as well as a book of annotated statutes, justified the publication of their 1891 manual on the basis that the anglo-Canadian equivalents were inappropriate for the Quebec magistrates "qui sont inaccoutumées au langage judiciaire et qui n'entendent que la langue française".<sup>49</sup> Some of the English-language manuals were published by English-speaking Quebecers, including Montreal advocate Hugh Taylor,<sup>50</sup> sometime McGill Law Dean William Kerr,<sup>51</sup> and James Crankshaw,<sup>52</sup> whose manuals purported to apply to all of Canada though each of which showed more interest in problems and

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47. Consider the manner in which one Quebec manual-writer described his readership: "Tous ont la bonne volonté de remplir consciencieusement leurs devoirs de magistrats, mais bien peu savent se servir de l'arme dangereuse que les législateurs leur ont placée dans les mains": J.-H. Paré, *Manuel pratique des juges de paix de la Province de Québec* (Amos: Presses de l'Action Sociale, 1922) at preface.

48. *Le livre du magistrat* (Montreal: Des Preses de la Minerve, 1874) at p. v. . A second edition of Lanctôt's text was edited by the prolific B.-A.T. de Montigny, *Le livre du magistrat, deuxième édition, mise en concordance avec le code criminel 1892 et la loi concernant la preuve 1893* (Montreal, J.-M. Valois & cie Éd., 1896).

49. *Manuel du juge de paix* (Montreal: C.O. Beauchemin, 1891), preface at p. 7.

50. *Manual of the Offices, Duties, and Liabilities of a Justice of the Peace with Practical Forms for the Use of Magistrates out of Session* (Montreal: Armour & Ramsay, 1843), the introduction of which includes a colourful expression of the author's perceived mission to state the law scientifically to his audience.

51. *The Magistrates Act of 1869, Annotated for the Use of Magistrates with forms, precedents and an introduction to the law of evidence* (Montreal: Dawson Bros. Pub., 1871).

52. *A Practical Guide to Police Magistrates and Justices of the Peace* (Montreal: Whiteford & Theoret, 1895).



rules specific to Quebec magistrates, but not, it seems, in a language useful to all of this class of reader.

Alongside the magistrates manuals were a variety of other Quebec books on criminal law, such as the police codes<sup>53</sup> and the coroners' handbooks<sup>54</sup> and reprints of provincial penal and quasi-penal statutes<sup>55</sup> which also had specialized audiences. Generally speaking, these texts were also close cousins to the annotated statutes. They were designed in many instances to supplement a legislative text with a scientific overview of the law under consideration, and provide a working substitute for the statute in question as a practitioners' tool. These were often variations on the theme of annotated legislation which would later establish itself as the first-order lawyers' tool before the criminal courts. The tradition of annotated cousins to the *Code* flourishes beyond the *Code* today in Quebec: annotated French-language (provincial) *Summary Convictions Acts*<sup>56</sup> and (federal) *Young Offenders Act*<sup>57</sup> continue to find favour among readers in the province.

### (B) *Reading the Annotations*

Annotated *Criminal Codes* are not, of course, codes at all. They are secondary, not primary, sources in a discipline that puts a special premium on how its sources are ranked. Though typically not recognized as such, these annotated materials are first and foremost interpretive works bearing the distinctive stamp of their authors. And if their publishers, authors and readers might have it otherwise, these documents are not simply reprints of legislation and case law, but texts which

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53. See e.g. P.A. Juneau, *Code de la police* (Quebec: Éd. Municipales, 1939) which also appeared in English as *Police Code* (Quebec: Police Pub. Co., 1939), the introduction of which explains its modest purpose in a manner that gives pause: "... they [the police] have to apply the provisions of the Criminal Code and very few are those who have had the occasion to read it."

54. See e.g. Edmon McMahon, *A Practical Guide to the Coroner and his Duties at Inquests Without and With Jury, in Quebec, and in other Provinces of Canada* (Montreal: Wilson & Lafleur, 1907); and Edmond Lortie, *Le guide des coroners* (Quebec: Le Soliel, 1902) which compares the coroner system in Quebec to that of France and which also appeared in an English translation — *The Coroner's Guide-book* — between the same covers.

55. See e.g. Philippe Ferland, *Commentaire sur les lois des liqueurs et de la possession (S.R.Q. 1941, ch. 255 et 256)* (Montreal: Wilson & Lafleur, 1949), dedicated to the work ethic ("l'esprit de labeur") of the then Premier Maurice Duplessis, who took a special interest in this legislation; and J.-F. Saint-Cyr, *Loi des licences de Québec annotée (Quebec Liquor License Law)* (Montreal: Wilson & Lafleur, 1911), a bilingual annotated statute with notes to cases and legislation in the other provinces and in England, written by a district magistrate.

56. Lucien Leblanc & Gilles Létourneau, *Loi annotée sur les poursuites sommaires*, 2nd ed. (Quebec: SOQUIJ, 1983).

57. Reprinted as a related statute in the *Code Dubois*, *supra*, note 18 at p. 921.

interpret legislation and case law. The annotated statutes are best thought of, in my view, as a low-grade form of *doctrine* masquerading as something less subjective, more scientific and more official than a critical read and the Queen's Printer would allow. By low-grade I mean primitive, not of poor quality: as I have said, the first editions of James Crankshaw's and J.C. Martin's annotated codes, to name but these two, are both substantial, scholarly works. And good or bad as they may be as works of scholarship, the annotated codes should be recognized as providing analysis and criticism instead of a faceless, scientific exposé of the rules contained in the *Criminal Code*. Furthermore, as telling as they may or may not be as to the state of the criminal law in respect of any given legislative rule, they are as revealing of the author's views, his or her biases in criminal law and perhaps even something of the sub-set of the criminal justice system within Canada of which he or she is as product.

Yet they are all lawyers' tools: while scholars, students, police officers and the curious may have occasion to consult the codes, they are geared first to a courtroom readership. Furthermore their authors are lawyers, judges and, very occasionally, law teachers. Consequently it would be unfair to see them as reflecting anything more than what one scholar has called a "legal view of social relations"<sup>58</sup> if even that, and it is perhaps more appropriate to describe the necessarily limited perspective of these works (and whatever conclusions one may infer from them) as a 'legal view of legal relations'. This seriously limits the conclusions that one can draw from these sources: books written by lawyers and judges for lawyers and judges cannot account for much of the social reality which underlies the vocation of Canadian criminal law in Quebec<sup>59</sup> — a social reality that historians are documenting for lawyers who have trouble doing so elsewhere. This said, many of the texts examined here are rich in lawyers' sub-text — sub-text which I seek to explore in the pages which follow.

Why this instinct to annotate? Plainly much of the reason is that canvassed at the outset of this essay: that decided cases are generally perceived to be a form of binding authority and lawyers and judges sense that they must get at the cases before they "know" the law. And preferably *all* the cases. James Crankshaw's 1894 annotated code offered

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58. Peter Linebaugh, "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein" (1985), 60 *N.Y.U. L. Rev.* 212 at p. 212.

59. The difficulty in gauging perceptions of the criminal justice system is explained by Douglas Hay in "The Meanings of the Criminal Law in Quebec, 1764-1774", Louis A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: W.L. Univ. Press, 1981) 77 at p. 80: "Legal culture, particularly that of criminal law, is a focus of powerful emotional currents in most societies . . . . To understand the unexpressed purpose of the law in even one historical society is very difficult given the nature of the sources."

what the Montreal lawyer called a “full, general view of the criminal law and criminal procedure”<sup>60</sup> and others, before and since, have sought to provide their own readers with an omniscient *Code*, an “intelligent citator”.<sup>61</sup> The quest for total information has been helped, or perhaps hindered, by the advent of more and more reliable reporting services. Annotating is part of human nature — or at least lawyers’ nature — as part of a desperate attempt to impose order upon that which is impossible to organize. Annotations soften the chaos with an index. So lawyers seek to annotate the *Criminal Code* as they annotate so many of the tools of their trade: constitutions, statutory instruments from far and wide, good old books, and even standard-form contracts<sup>62</sup> to achieve a heightened state of normative awareness.

Interestingly, as reporting of cases becomes even less arbitrary and even less selective, the interpretive task of annotated codes will become more obvious and pressure may be felt to acknowledge openly that a scientific, objective presentation of the criminal law is both impossible and less desirable. More “total information” only increases the chaos. Judges, lawyers and other hangers-on have neither the time nor the energy to read all the cases before they have to come up with an answer to the question at hand.<sup>63</sup> The most perfect annotator — that unintelligent citator the computer-run data-base — may kill the annotated code unless the code admits to itself that it does not only report, it also interprets, albeit at a low-grade. Only lawyer laziness would prevent the data-base from radically changing preparation for pleadings, and it is likely that technology will change the practice of criminal law in the way in which the photocopier and the word-processor have rocked the notarial profession. The annotated codes may go the way of the hand-drafted *copie conforme*. On the other hand, lawyers’ force of habit and their confidence in “hard copy” could protect the market share of these courtroom tools which may show the same sort of inexplicable tenacity that newspapers have demonstrated as against some of their high-tech competitors.

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60. *Supra*, note 3 at preface.

61. In the 1955 book review of *Snow's Annotated Criminal Code*, lawyer P.J. O Hearn called this form of literature “intelligent citators”: *supra*, note 16 at p. 734.

62. Consider the interplay of consensual law, statutory law, case law, customary law, doctrinal interpretation and language in Ontario lawyer Harvey J. Kirsch's *Annotated Stipulated Price Construction Contract* (Aurora: Canada Law Book, 1989).

63. This usually goes unadmitted, since we are conditioned to think that total information is a precondition to right answers. But not always, as made plain by Hetherington J.A. of the Alberta Court of Appeal in *R. v. Wald* (1989), 47 C.C.C. (3d) 315 at p. 335: “There is, of course, a great volume of written material which is relevant to this issue. I have examined some of it. However, I will refer only to the authorities which I have found most helpful.”

Not only do the demands of their readership shape the objectives of these books, but so too does the commercial viability of putting and keeping them in print. While the current edition of *Martin's* may be a minor commercial success, its antecedents were plainly not money-makers, if the belly-aching of their learned authors is to be believed.<sup>64</sup> Commercial and linguistic exigencies tend to coincide, which meant that some French-speaking Quebec criminal lawyers have decided to publish these and other like works in English invoking the logic well understood by the less political of today's Quebec pop music and film stars. Their *confrères* who published in French have faced the difficulty — on top of all the others that a French-language text presented — of a tiny readership which historically had little affinity for the practice of criminal law.<sup>65</sup> Some annotated codes in French had no hope of being graced with new editions, let alone of becoming annual affairs.

It seems remarkable in this age of easy access to legislative instruments that, as throughout their history, these commercially-published reprints of the *Criminal Code* and other related criminal statutes have come to be a nearly universally-used replacement for the official version published in the Revised Statutes of Canada, as amended. Alongside the advice to be found in the annotations, they provide readers with a reliable, up-to-date<sup>66</sup> version of the law as Parliament would have it. Sometimes the statute appears without case annotations altogether, its sole purpose being the presentation of the text of the *Code* in some unparliamentary fashion in order to make things easier for the reader. It is this role of providing a handy text of the *Code* that represents a commercially-published codes' best guarantee of commercial success.

Indeed the judges, clerks, and lawyers who use annotated codes plainly put great confidence in the proof-readers of the annual commercially-published codes, especially given that when push comes to shove, the

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64. Consider the complaints of Justice Taschereau in the preface to the first volume of his annotations to the 1869 statutes, *supra*, note 21 at p. v: "But a condition, which must be admitted to be a fair one, is attached to the publication of the second Volume: it is, that the expenses incurred in the publication of the first be reimbursed. The experience of others teaches that, in this Country, one would be greatly mistaken if he expected a pecuniary reward for a law publication, but it would not be just to ask the addition of a pecuniary sacrifice to the no small labour bestowed on these pages."

65. See Morel, *supra*, note 19 at p. 529 regarding the activity of French-speaking advocates at the criminal bar in the nineteenth century.

66. An annual version of the *Criminal Code* has the significant advantage of fixing the rules not only in space, but also in time. When the rolls in courts of appeal push hearing dates ever forward and the loose-leaf page on which the provision of the repealed or amended statute has long since left its three-ring home, the exasperation which judges and appellate court advocates feel with the form chosen for the official text is most understandable.

commercially-published codes are worth something less than the paper on which they are written.<sup>67</sup> Readers are sometimes given fair warning<sup>68</sup>, but if current practice is any indication, they still rely heavily on the commercial reprints as a substitute for the original. And why not? — even the Queen's Printer makes mistakes.<sup>69</sup>

The mere reprinting of the *Code* is an exacting exercise and, in a sense, an interpretive endeavour which justifies classifying these texts as *doctrine*, albeit of the lowest grade. If clear to no-one else, this is well-understood by those who painstakingly review the official texts, those making tables of concordance, who decide to print one or another (or both) of the French and English versions, who choose related statutes and rules, who compile the index (in itself an immensely interpretive exercise) and who concoct a user's guide to the legislative materials. Staking out the boundary between form and content of the *Code* is more difficult than those who have the finished version of the *Code* before them might care to admit. Consider editor Bruce C. Milligan's description of the fourth edition of his (unannotated) (unilingual) *Milligan's Correlated Criminal Code*: "the most complete and the most correct Criminal Code available to the public or the practitioner in Canada".<sup>70</sup>

If it is plain that the decision to reprint the criminal statute in one form or another is itself an interpretive task, it should be all the more obvious that the process of annotating the provisions of the *Code* also involves an interpretive analysis. The annotator chooses which cases to annotate and which cases to leave out. A summary may be offered in the annotator's own words — «glanures»<sup>71</sup> as one annotator described his accounts of appellate court decisions — but even when the annotator seeks objectivity by quoting rather than summarizing, the very choice of

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67. The *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 19 secures a job for the Queen's Printer by directing that only the latter's reprints of Acts of Parliament are evidence of the Act and its contents.

68. Consider that offered by the editors of *Code Dubois*, *supra*, note 17, at p. ii: "La présente compilation n'a aucune sanction officielle. Pour appliquer et interpréter les lois et règlements qui y sont contenus, il faut se reporter aux textes officiels."

69. See, e.g., *R. v. Welsh and Iannuzzi* (1977), 15 O.R. (2d) 1 (C.A.) in which the Queen's Printer substituted an "or" for an "and" between paragraphs of its reprint of both the English and French versions of the former s. 178.13 (1) of the *Criminal Code*, thereby appearing to lighten the pre-conditions for a court-authorized wiretap. The Ontario Court of Appeal preferred a true copy of the original Act certified by the Clerk of Parliament. Not surprisingly, the 1977 edition of *Martin's Annual Criminal Code*, Ian Cartwright ed., (Agincourt: Canada Law Book Ltd., 1977) at p. 141 made the same honest, reasonable mistake as did the Queen's Printer.

70. (Toronto: Butterworth & Co., 1984) at preface.

71. Léopold Houle, *supra*, note 44 at preface to volume I.

quotation involves a degree of analysis which renders the annotation a secondary and not a primary source.

Interpretive and high-minded are, of course, not one and the same. As Roderick Macdonald has argued, *doctrine* might be doctrinal or critical and still qualify, for what the qualification is worth, as *doctrine*.<sup>72</sup> The critical perspective of the annotated codes was and is limited by design: most authors decide to devote themselves to an exhaustive account of the *droit uniforme* and many have been sufficiently happy with their final products in this regard to dedicate them to the incumbent Minister of Justice. But the fact of the matter is that the interpretive aspect of these texts runs afoul with the 'objective account' image the codes try to foster commercially. Mostly, it runs afoul with the authors' own view of the work — seen as a simple exposé of the *droit uniforme*. While nearly all of these texts include very plausible expressions of modesty of purpose by the author in the work's preface — (what could be more immodest a task than exposing the *droit uniforme*!) — the better view is that, as with all doctrinal works, the text bears the special imprint of the author. And the talent and bias of the author is as important to understanding an annotated *Criminal Code* as a more conventional monograph or case critique. Some biases are unwittingly announced, as was the case for the conservatism that animates the work of Léopold Houle,<sup>73</sup> and Irénée Lagarde.<sup>74</sup> Other biases are unannounced, but not necessarily unrecognized,<sup>75</sup> while other annotated codes have been blasted for not being sufficiently objective.<sup>76</sup>

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72. R.A. Macdonald, "Understanding Civil Law Scholarship" (1985), 23 *Osgoode Hall L.J.* 573.

73. *Supra*, note 44.

74. Lagarde's conservatism emerges plainly from certain annotations in *Droit pénal annoté*, *supra*, note 39: see his chosen language for the offence of kidnapping (t. I at pp. 676-7), the defence of drunkenness (t. III at p. 2685 *et seq.*), the crime of abortion (t. I at p. 683 *et seq.*), and generally his approach to evidentiary matters connected with police behaviour such as confessions (t. I at p. 1155 *et seq.*). While Lagarde's politics may seem conservative to the reader, he was reputed to look more kindly upon defence counsel arguments as he advanced in his career, according to a former colleague of his.

75. Arthur E. Maloney noted a bias in J.C. Martin's 1955 annotated *Code* given what he perceived to be Martin's close connection with the legislative revision team: (1956), 34 *Can. Bar Rev.* 491 at p. 492. Conversely the new editor of the annual Alan Mewett said Martin was "incapable of partisanship" in the dedication to the 1963 edition: *Martin's Annual Criminal Code* (Toronto: Canada Law Book, 1963) at p. v.

76. O Hearn, *supra*, note 16 at p. 734 criticized Austin O'Connor, *An Analysis of and a Guide to the New Criminal Code of Canada* (Toronto: Carswell, 1955): "The lack of authorities means that the reader is thrown back on the authority of the author, and though he, as an experienced magistrate, is entitled to respect for his views, they will have merely persuasive force."

If the annotated materials are *doctrine*, where do they fit in the theory of criminal law sources where learned writing is seen as taking a back seat to law made by parliaments and judges? Is there no analytical consequence in annotations, as *doctrine*, playing a role in isolating the law-making vocation of cases subject to annotation? Isn't the paradox made more paradoxical when the annotator is also a judge, such as Taschereau and Lagarde? Are questions of methodology of criminal law really so pointless?

While it is hard to argue that these texts are not works of *doctrine* (at least at some level), the conventional theory of criminal law sources, bent on evaluating the authority of ideas on the strength of their form of expression, still might have trouble characterizing an idea which takes shape as annotation. Was Moisan J. of the Quebec Superior Court citing case-law or learned commentary in *Nicolas v. Québec (Substitut du Procureur Général)* when he leaned on the authority of Lucien Leblanc and Gilles Létourneau's *Loi annotée sur les poursuites sommaires*<sup>77</sup> in the following terms: "... l'examen des causes *Major, Côté* et de nombreuses autres décisions citées dans la *Loi sur les poursuites sommaires* montre que le juge chargé d'entendre la cause a droit de remédier aux irrégularités de rédaction de la plainte de manière à ce que celle-ci soit conforme à la preuve fait devant lui."<sup>78</sup> . . .?

It is this kind of question which shows up the silliness in relying on form — the sacred cow of methodology of criminal law — to gauge the force of legal authorities. The shape in which an idea finds expression is plainly far less relevant than the idea itself (assuming they can be separated) in evaluating that idea's punch as persuasive authority. When measuring the influence, then, of the annotated materials, it is less important to observe that annotations are interpretive and thus represent a form of authority distinct from the case annotated. What is more relevant, of course, is to consider what (if any) idea underlies the decision to annotate that case in those terms at that place in the *Code* or statute. To say the least, putting form before substance when testing the law-making vocation of an idea is not much of a problem-solving technique when a person's future behind bars is at issue.

The Quebec annotated codes show up a series of ideas that, irrespective of the formal rank of the source with which the idea is most closely associated, can best be linked to specific authors working in a given professional and intellectual milieu. This *doctrine* may be doctrinal, at best, or pedantic, at worst, but the fact that these texts have been so

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77. *Supra*, note 56.

78. [1989] R.J.Q. 1491 at pp. 1493-4.

relied upon to make sense of anglo-Canadian criminal law in the province means that they may shed light on what was and is practised as criminal law in Quebec.

## II *The Quebec Codes and Signs of Specificity*

Lawyers may be lawyers but Quebec advocates and judges are distinctive, as against other Canadian lawyers, both in the manner in which they are trained as lawyers and in the language in which they generally contemplate legal argument. Sociologists and historians might single out other more striking differences between Quebec lawyers and their non-Quebec counterparts, but these two differences, at the very least, have given Quebec a bar 'not like the others' since the profession first took shape in the province.

Civil law training and the predominant use of French are both part of a wider series of local influences on the practice of law in Quebec that bear comparison to local influences on the practice elsewhere in Canada. As in any jurisdiction, local customs and rituals among lawyers determine in large measure what it is to be a lawyer in that jurisdiction. In Quebec, as elsewhere, lawyers' customs shape how lawyers practise and, accordingly, how they participate in the creation of law before the courts and elsewhere. It is, therefore, a fair assumption that these lawyers' customs have some part in shaping the substance of the criminal law as elaborated by lawyers and judges. Language is a particularly important influence on practice for Quebec lawyers and it would not be surprising to learn that language differences have shaped the emergence of Canadian criminal law as understood in Quebec. Custom not related to language may also influence the practice — especially the procedural routine — and consequently criminal law itself. In the remainder of this essay I will endeavour to examine the influence of local custom among lawyers in the province with a view to revealing a specifically Quebec brand of criminal law. My focus will be both on custom associated with language and those local customs not related to language.

Testing this kind of thesis comprehensively would be an immensely difficult if not impossible task. Arguably even the most complete comparative reading of the whole of Quebec jurisprudence and *jurisprudence* would at best only permit one to catalogue differences and not necessarily account for those differences. And my study, intentionally limited to annotated codes, limits still further the basis for conclusive findings. Yet even the primitive lawyer's tools reveal one plain and not so subtle difference: Quebec annotated materials make much more considerable reference to Quebec cases than do the analogous tools used by lawyers in the rest of the country. The problem is to determine what



explains this, and whether it is a sign of the specificity which one senses is there, but remains so difficult to document. In my view even these most primitive sources point to subtle differences in the methodology of criminal law as understood by lawyers and judges inside and outside of Quebec. While they by no means prove a different regime of sources of law applicable to Quebec, they point to the existence of an ordering principle as the relative weight of Quebec sources within and without of the province. The key is determining what is at the root of this ordering principle.

In his important article, “La réception du droit criminel au Québec (1760-1892)”, André Morel argued forcefully that English criminal law, while technically received in Quebec at the conquest in 1760, did not take root in Quebec culture until codification, if at all: “L’enracinement du droit criminel, dans la société québécoise, semblait donc devoir passer nécessairement par la codification, parce que la codification paraissait être finalement le seul moyen de renverser la double barrière de la langue et de l’ignorance qui avait été constamment en travers de la route que l’on a suivi depuis 1760”.<sup>79</sup>

While Morel’s work has been criticized by historians and lawyers who object to the scope of his conclusions given the ambit of his inquiry,<sup>80</sup> my sense is that much of what Morel argues for in this particular piece is not only true, but well substantiated in respect of the community of *lawyers* making up the Quebec criminal bench and bar. Morel’s sources do demonstrate that English criminal law did not take root through the effect of the conquest or the *Quebec Act* of 1774 among lawyers, but, for that narrow segment of the Quebec population, language as well as unfamiliar legal materials and sources slowed the *enracinement*.

Morel hints that even the 1892 codification, which presented the French-speaking jurist with a document both in a familiar form and, in spite of an at times maladroit translation, a very familiar language, did not enable the anglo-Canadian criminal law to take root.<sup>81</sup> Is it possible

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79. *Supra*, note 19 at p. 553.

80. The authors of a bibliography of Quebec legal history chide Morel for his “methodological conservatism”: G. Blaine Baker, *et al.*, *Sources in the Law Library of McGill University for a Reconstruction of the Legal Culture of Quebec, 1760-1890* (Montreal: McGill Univ. unpub. monogr., 1987) at p. 26. Despite the criticisms, it is hard to name a current work which gives the reader a better insight into lawyers’ criminal law in Quebec. In the same spirit in which B.-A.T. de Montigny suggested readings in English criminal law to Quebecers anxious to understand anglo-Canadian criminal law in «*Guide dans l’étude du droit criminel*» (1883), 5 *La Thémis* 21, I would suggest Morel’s text as required reading for non-Quebeckers anxious to look in.

81. Morel, *supra*, note 19 at p. 541.

to build on this view to argue that different local customs among lawyers in Quebec mean that a different criminal law took root in Quebec? Have lawyers' customs, relating to language and otherwise, continued to contribute to this law taking root in a distinctive way, creating a territorial sub-system for Canadian criminal law among Quebec jurists? To what extent do the primitive documents examined here reflect that specificity if it at all exists? I will first examine the Quebec codes to measure their sensitivity to lawyers' customs not related to language. But it is the influence of language, which I will trace in a second chapter, that makes the Quebec annotated codes and the criminal law they reflect most distinct.

#### A. *The Influence of Lawyers' Custom Unrelated to Language*

J'ai tenté, dans mes essais antérieurs, de «latiniser» l'étude d'un droit typiquement anglo-saxon. Cette méthode m'a paru heureuse et je l'ai développée.

Irée Lagarde, *Nouveau Code  
criminel annoté* (1957)<sup>82</sup>

Does local custom among lawyers, including those relating to the different way in which Quebec lawyers are trained, show up in the Quebec annotated codes?

In Canada — Quebec included — public lawyers are also private lawyers, if not by predisposition, at least by training. One of the last bastions of meaning for the private law-public law distinction is indeed in the university legal curriculum, where, in Quebec at any rate, future *publicistes* and *privatistes* have been trained side-by-side for generations. Thus a Quebec criminal lawyer is likely to have been trained largely through reading the *Civil Code for Lower Canada* and related texts throughout most of modern Quebec history.<sup>83</sup>

There are those who have argued, in other public law disciplines, that private law concepts and training are unsuited to public law reasoning. It is popular in some quarters, for example, to complain that private law constructs are too influential in public international law: a treaty is not a contract, diplomacy is by no means a form of mandate, and so on. Yet whatever its shortcomings, this style of reasoning by analogy is easy to explain: try stopping any group of people from explaining things to one another using a (code) language that they all understand.

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82. *Supra*, note 39 at p. VII.

83. See J.E.C. Brierley, "Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities" (1986), 10 *Dalhousie L.J.* 5.

The obvious commonality between the methods and style of reasoning used by lawyers in common law jurisdictions in private law matters and criminal law probably gave common lawyers a head start in Canada in the practice of criminal law. One might expect that this analytical advantage was reduced when statutory law became more prevalent in Canada and, notably, when the *Code* was adopted in 1892 in a form, at least in its outward appearance, most familiar to civilians. In other words, criminal law was analytically foreign to Quebec lawyers trained in a different legal tradition and only became fully accessible when it could be understood by them as a code even if it was not a code at all. Indeed André Morel has argued that Quebec criminal lawyers needed the codification of criminal law in order to stave off the “dépaysement dans lequel les plongeait un droit de Common Law”.<sup>84</sup> The difficulty implicit in this argument is plain: many Quebec advocates practising when codification of the criminal law was first contemplated were trained in the pre-*Civil Code* era, and some of them were hostile to private law codification.<sup>85</sup> Moreover, no self-respecting civilian in 1892 or thereafter could mistake the *Criminal Code* for a code. Yet Morel may be right at some subtle level of perception: codification may have furthered the *enracinement* of the criminal law among civilians who later began to live by the (incomplete) logic of a code in private law.

Using Morel's thesis as a point of departure, it is tempting to argue that this different approach to “codified” criminal law means that in Quebec lawyers treated and continue to treat the *Criminal Code* differently so that the law is substantively not the same in the Quebec courts as elsewhere. Indeed it may well be possible to argue that the Quebec legal community modelled their view of a manageable collection of criminal laws on a complete code, similar in vocation to the *Civil Code of Lower Canada* and in keeping with that vocation currently promised by the Quebec legislator for its new *Civil Code*: “un ensemble de règles qui en toutes matières auxquelles se rapportent la lettre, l'esprit ou l'objet de ses dispositions, établit, en termes exprès ou de façon implicite, le droit commun”.<sup>86</sup> Some have certainly clamoured for that before and since. Others have extended the thesis and have argued that Quebec jurists,

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84. Morel, *supra*, note 19, at p. 539.

85. See Howes, *supra*, note 22 at pp. 527 *et seq.* who explains some of this hostility. It may well be the obsession with codes that Morel implicitly ascribes to Quebec lawyers around 1892 did not in fact emerge until later, perhaps as much as thirty years later, when P.B. Mignault made his mark on *droit civil canadien*. For a suggestion of this see Glenn, *supra*, note 11 at pp. 208-9.

86. «Disposition préliminaire», *Loi portant réforme au Code civil du Québec du droit des personnes, des successions et des biens*, L.Q. 1987, c. 18.

steeped in the civilian mindset, approach criminal law differently because of this different legal tradition. Basing herself on fifty-two appellate court decisions from the 1970s relating to the law of murder, Louise Arbour observed a "legal biculturalism" in criminal law and that "the Quebec mixed legal culture" was in part responsible for divergences between the approach demonstrated by the Quebec and Ontario courts of appeal in these cases.<sup>87</sup> Professor Arbour, who is now a judge, noted a series of anomalies: Quebec courts were ruling on matters of evidence and procedure while the Ontario courts focussed more on substantive law; Quebec judgments were shorter, cited more *doctrine* and treated case law "in a more cavalier fashion".<sup>88</sup> Yet as Arbour herself acknowledged, these limited findings can hardly be the basis for a conclusion that a different kind of criminal law is practised in Quebec. Others have been shyer than Arbour to recognize evidence of a specifically civilian approach to criminal matters and contend that techniques in criminal law inside and outside of Quebec are either identical or they have merged.<sup>89</sup>

Certainly even the most primitive lawyers' tools can show up, in sometimes subtle ways, the civilian imprint which some criminal lawyers might bring to criminal law in Quebec.<sup>90</sup> There are, of course, examples of narrative and formal styles borrowed from the civil law *doctrine* for the purposes of presenting issues in criminal law, especially in the turn-of-the-century literature.<sup>91</sup> Perhaps something can be made of this: legal historians have tracked signs of civilian influence on legal literature in North America well beyond the reach of the *Civil Code of Lower*

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87. "Comparative Judicial Styles: The Development of the Law of Murder in the Quebec and Ontario Courts of Appeal" (1980), 11 *R.D.U.S.* 197 at p. 198.

88. *Ibid.*, at p. 203 and *passim*.

89. Don Stuart, *Canadian Criminal Law*, 2nd ed. (Toronto: Carswell, 1987) at p. 9n is of this view, although he notes that "Lagardee [*sic*], *Droit Penal* [*sic*] *Canadian* [*sic*], the most scholarly annotated code, is virtually ignored in English Canada".

90. In 1899, James Crankshaw published *An Analytical Synopsis of the Criminal Code and of the Canada Evidence Act* (Montreal: C. Theoret, Law Book-Publisher, 1899) which he described as a "general analytical outline, — free from minor detail, — of the criminal law of Canada as continued in the Code and in the Canada Evidence Act" for use across the country (preface). Adopting the civil law *précis* style which was very popular at the time as nutshells in France in private law, he sought to present diagrammatically the criminal law as a series of logical propositions, each having clauses worthy of separate analysis, in the same way civilians depicted the *Civil Code*.

91. See e.g. J.-M. Alfred Morriseau, *Le Médecin devant la Loi [:] la responsabilité médicale d'après le Code criminel et le Code civil* (Montreal: Imp. Guertin, 1907) and Ch. C. de Lorimier, "Les aliénés devant la loi pénale" (1881), 3 *La Thémis* 193, the latter text analyzing the insanity defence using concepts of imputability taken from the classical theory of private law fault in civil law. These are just two examples of a wide body of literature where criminal law matters which special private law contexts show up civil law training.

*Canada*.<sup>92</sup> Traces of what one American author called the “geometric paradigm”<sup>93</sup> which find expression in the earlier Quebec criminal law materials may be a manifestation of a more widespread nineteenth century phenomenon. One can turn up examples of ‘geometric’, rationalist form in the non-Quebec public law literature of a period which may be more closely linked to the influence of Roman law generally, rather than the influence of the *droit civil* of Quebec.<sup>94</sup>

But those seeking to show a Quebec civilian mark on Quebec criminal law would find some solace in the durability of the phenomenon in the province. Arguably, the style employed in the leading Quebec texts in criminal law today bear the imprint of the civil law doctrine.<sup>95</sup> Indeed, comparing the explanations of the role of case-law in the formation of criminal law given in Quebec and non-Quebec basic texts or suggests what might be a subtle difference in the perception of the conventional theory of criminal law sources by civilians and non-civilians. For example, in their influential *Traité de droit pénal canadien*, Jacques Fortin and Louis Viau explained that the common law has a two-fold impact on Canadian criminal law: “Elle [*i.e.* the influence] est directe si le *Common Law* énonce un principe sur lequel la loi canadienne est silencieuse; elle est indirecte si le principe ou la règle énoncés par la loi canadienne sont interprétés par les tribunaux à la lumière du *Common Law*”.<sup>96</sup> Conversely, both leading English-language texts make light of what is depicted as rather a false distinction as between judge-made law under statutory direction or by interpretation.<sup>97</sup>

For the courtroom materials, such as the annotated statutes prepared by Judge Lagarde, part of the challenge for the author was presenting the criminal law in such a way that it would be analytically “conforme à l’esprit français”.<sup>98</sup> Whatever that *esprit* was in Lagarde’s mind, it plainly

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92. See for example, Peter Stein, “The Attraction of the Civil Law in Post-Revolution America” (1966), 52 *Va L. Rev.* 403 and M.H. Hoeflich, “Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey” (1984), *U. Ill. L. Rev.* 719.

93. M.H. Hoeflich, “Law & Geometry: Legal Science from Leibniz to Langdell” (1986), 30 *Am. J. Leg. Hist.* 95, at pp. 108 *et seq.*

94. A possible example might be Ontario Barrister A.H.F. LeFroy’s *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Co., 1897-8) in which the constitutional law of Canada is presented as 68 rational propositions.

95. See, for example, Gisèle Côté-Harper *et al.*, *Droit pénal canadien*, 3rd ed. (Cowansville: Éd. Yvon Blais, 1989) with its table of contents broken down into Parts, Titles, Chapters, Sections, Sub-sections, Paragraphs and Sub-paragraphs in the grand civilian style.

96. (Montreal: Éd. Thémis, 1982) at para. 18.

97. See Eric Colvin, *Principles of Criminal Law* (Toronto: Carswell, 1986) at p. 16-18 and Stuart, *supra*, note 89 at pp. 5 *et seq.*

98. *Précis de la Loi et Règles de la Preuve en matière criminelle* (Montreal: polycopie, 1954) at preface.

went beyond language, as he explained in the first edition of his *Code criminel annoté*:

J'ai cru aider les praticiens et les étudiants en Droit de cette province en présentant — à l'aurore de sa promulgation — le nouveau Code criminel. (. . .)

Nos compatriotes de langue anglaise ont tenté, avec quelque difficulté, de nous habituer à la formule de leurs livres de droit. Pour ma part, je me suis essayé à suivre celle du "Cours de droit civil" de Langelier.<sup>99</sup>

With these promises in mind, it is in a sense disappointing to observe that, in the main, the more primitive texts which have been in Quebec criminal lawyers' hands through the daily grind of practice before the courts reveal no analytical specificity relating to a "civilian" approach to criminal law. On the contrary, the number of advocates trained in the civil law — both French and English-speaking — who wrote and edited the early texts designed for consumption across the country dispels the idea that Quebec lawyers were incapable of internalizing the anglo-Canadian law or that they internalize it differently. This is in part a function of what the codes are: as I observed earlier these annotated materials are interpretive works but not, perhaps, true works of scholarship, and this lack of overtly critical perspective preclude them from revealing what may be a truly distinct approach to Canadian criminal law in Quebec. The annotated codes appear to have little aptitude for showing up differences in approach to criminal law generally based on whether the annotator (and those being annotated) has a civilians' approach to legal problems. Maybe this is because no such approach exists, or at least its impact is not felt in criminal law matters, or is edited out, or unrecognized in the selection of cases.

Whatever the impact of the civilian tradition on the Quebec lawyer's approach to criminal law, it surely represents just one aspect of a series of local matters that might loosely be termed customary influences on the practice. It is possible to ascribe variations observed in the application of criminal law across the country not only to different legal traditions or to different applicable legal rules, but to differences in style and customs among lawyers associated with different judicial districts in the country. No community, including the many communities in Quebec, would be immune from the variation brought on by these local lawyers' customs and more general customs rooted in the community in which a lawyer

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99. *Code criminel annoté* (1954), note 39, t. I at p. A. Lagarde said he sought to imitate Judge F. Langelier's multiple-volume, *Cours de droit civil de la Province de Québec* (Montreal: Wilson & Lafleur, 1905-1911), an annotated *Civil Code* which was more than a code, more than a book, but in fact a "bibliothèque" of civil law as Howes has described such texts: *supra*, note 44 at p. 116.

practises. One very plausible explanation is the idea that local custom before the courts constitutes a significant source of law or, at the very least, patterns of behaviour that, when invoked as rules, have the force of persuasive authority.

Here again, the Quebec annotated codes and similar forms of primitive *doctrine* have little aptitude for revealing the subtle influence that custom — even custom as formalized as courtroom practice — bears on the criminal law. Furthermore, the variation in the application of law attributable to custom is less likely to be Quebec versus non-Quebec custom or province by province: it is far more likely to be a more parochial affair, with differences appearing in the law as applied and interpreted in one judicial district as opposed to another or from one crown prosecution office to another. The conventional theory of sources and the annotated materials which are so deferential thereto tend to undervalue the significance of local custom as a source of law, even when the highest authority brings it into focus. Consider Lamer J.'s decision for the full Supreme Court in *Korponay v. The Attorney-General of Canada*,<sup>100</sup> sitting in appeal from a judgment of the Quebec Court of Appeal in a drug possession case.

The accused argued that, at first instance, the Court of the Sessions of the Peace had proceeded without jurisdiction because the accused's re-election for trial by judge alone had not been in accordance with the terms of s. 492 (now s. 561) of the *Code*. The Supreme Court allowed the appeal on other grounds, but decided that, in the circumstances, the accused had waived his procedural right to re-election provided for in s. 492. The decision is remembered for the principle that a party may waive certain procedural requirements enacted for his or her benefit but, as often is the case, the reasoning is more telling than the *ratio*. Lamer J. decided that the manner in which the waiver by the accused took place, though in conflict with the procedure set out in the *Code*, was in keeping with a local custom: "The events took place in the judicial district of Montreal. Pursuant to questions by this Court at the hearing, attorney for the appellant acknowledged the existence of a practice particular to that district as regards re-election. . . . That this be the practice in the judicial district of Montreal, appellant does not contest. He questions however the validity of that practice as not being in accordance with s. 492".<sup>101</sup> Lamer J. held that the fact that the attorney for the accused was fully aware of

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100. [1982] 1 S.C.R. 41. Justice Fred Kaufman underlines the importance of this reading of *Korponay* in his preface to the English edition of P. Béliveau *et al.*, *On Criminal Procedure*, J. Muskatel, trans. (Cowansville: Éd. Yvon Blais, 1982) at p. 28n.

101. *Ibid.*, at pp. 51-2.

the practice meant that the accused had notionally waived his s. 492 right. And the waiver, in keeping with local custom, was binding on the accused. Unwritten local custom, as a source of law, trumped the rule set by Parliament.

This local practice, peculiar to the judicial district of Montreal, became part of the law for all of Canada thanks as much, one supposes, to former criminal law advocate Lamer J.'s familiarity with the workings of Montreal's courts as to the arguments from the talented Crown counsel involved in the case. Other local practices that complete the law set out by Parliament in the *Code* can also take shape as rules of law and encourage variation in the application of a law which is not, in principle, supposed to vary. Sentencing is an obvious example.<sup>102</sup> The regional variation in the prosecution and punishment of narcotics offences is another.<sup>103</sup> But the annotated codes are poor records of these local practices, perhaps because of the authors' sense that local practice is not relevant to statements concerning a national *droit uniforme*. It is indeed odd that *Korponay* does not rank a mention in the current edition of the French-language *Code Dubois* while the editors of *Martin's* do include it with the annotations under the new s. 561, although without reference to the use of custom as a source of law.

These practices are emphatically local, linked more readily to geography than anything else, which promote the view that within the national criminal justice system there are sub-systems, a product solely of informal (but rigorously adhered to) lawyers' custom. Quebec has its fair share of these "incomplete" sub-systems, some turning on practice as local as those of a particular crown office while others are attributable to more widespread lawyers' custom. One example of the latter relates to the Quebec practice of arraigning an accused at his or her first appearance in court. In Quebec, an accused's *comparution* typically includes a plea or election, contrary to the custom prevailing in the "provinces anglaises".<sup>104</sup> Such local Quebec practices, rooted in habits

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102. Sentencing practices, well-documented as varying considerably from judge to judge, court to court and province to province, are an acute affront to those who link fairness to national uniformity in punishment. The Canadian Sentencing Commission recently called this kind of variation "unwarranted" when rooted in different local standards unconnected to, say, the perceived severity of the offence in the community: *Sentencing Reform* [:] *A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at p. 72 and *passim*.

103. See for example G.F. Murray & P.G. Erikson, "Regional Variation in Criminal Justice System Practices: Cannabis Possession in Ontario" (1983), 26 *Crim. L. Q.* 74 who effectively debunk expectations for uniform practices under national narcotics control legislation and conclude that the "monolithic criminal justice system . . . is a myth" (pp. 93-4).

104. In "Les perquisitions, la comparution et la réoption" (1986-87), C.F.P.B.Q. 1 at p. 35, B. Grenier & J. Letellier explained the local practice to students at the Quebec Bar by way of



among lawyers and judges are as numerous as they are notorious among the cognoscenti,<sup>105</sup> and are no doubt an affront to any view of the *droit uniforme*. Yet in some cases judges have recognized the usefulness of these practices and have upheld them, even when the local custom appears to contradict flatly the terms of the *Code*.<sup>106</sup> Lawyers are currently arguing before appellate courts across the country that, in some instances, variation in the application of criminal law from province to province may be unconstitutional, since the variation would violate the equality rights guaranteed in the *Charter*.<sup>107</sup> Whatever protection s. 15 of the *Charter* affords against these differences, it is likely that courts will have to face up to the territoriality of a criminal law that does not remain uniform across a country in which nothing is uniform. Alternatively, we may have to rethink what uniformity means in law.

Finding and then measuring local custom as felt through the criminal justice system in Quebec is an immensely complex endeavour. Even limiting our inquiry to lawyers' custom does not make the process much more manageable. Whatever the influence of the civilian mindset may or may not have on the approach to criminal law — to take that example — little difference is evidenced in the texts of the primitive courtroom tools used by lawyers and judges. Irénée Lagarde's promise, cited at the outset of this part of the essay, to "latiniser" the *Criminal Code* was more properly a promise to gallicize it. His massive books bear a stamp — his

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comparison: "La comparution en tant qu'étape autonome, comme nous la connaissons au Québec, ne tire son existence d'aucune disposition du Code criminel. D'ailleurs, dans les provinces anglaises, le prévenu qui est amené devant le juge de paix dans les heures qui suivent son arrestation, ne comparait pas au sens juridique dans la mesure où il n'opte pas ou ne plaide pas. . . . Ici, au contraire, l'accusé fait option ou plaide coupable dès sa première présence à la cour".

105. One such example is the so-called "enquête préliminaire 'pro forma'", a technique used by Quebec counsel to obtain disclosure of evidence by the prosecution in order to use more effectively the preliminary inquiry proper if and when this procedure comes to pass. The 'pro forma' is not provided for in the *Code*, but it was recognized and reviewed by the Quebec Court of Appeal in *Mayrand v. Cronier* (1981), 23 C.R. (3d) 114, and discussed on its merits as a practice with a potential for the whole country in Law Reform Commission of Canada, *Disclosure by the Prosecution* (Ottawa: Supply and Services, 1984) at pp. 6 *et seq.*

106. Another example relates to the practice in some Quebec judicial districts according to which the judge presiding at a preliminary inquiry may fix the time and place for trial immediately which, in some circumstances, violates s. 560. In *A.-G. Que. v. Labelle Prov. J.* (1979), 11 C.R. (3d) 370, the Superior Court of Montreal upheld this practice which has, according to Landry J., "avantages pour les justiciables et l'administration de la justice" (p.377).

107. See, e.g., *Regina v. Ellsworth* (1988), 46 C.C.C. (3d) 442 (Que. C.A.) in which a criminal law provision not proclaimed in all provinces was held not to violate equality rights. See also *Regina v. S.(G.)* (1988), 46 C.C.C. (3d) 332 (Ont. C.A.) in which provincial Attorney-General's power to establish alternative measures' scheme under the federal *Young Offenders Act* was held not in violation of equality rights.

own — but they are not particularly civilian in their outlook. But Lagarde's code is, however, a French-language *Code* with French-language annotations of Quebec and non-Quebec cases. And efforts such as Lagarde's which were intended to open up the anglo-Canadian criminal law to Quebec lawyers also serve to indicate how Quebec approaches to Canadian criminal law are distinct. And this distinctiveness is rooted in language.

### B. *The Quebec Codes and Their Linguistic Mission*

Student: Does that photocopy machine make copies in English?

Library Photocopy Technician: (puzzled) . . . well, of course . . .

Student: Does it make copies in French?

Library Photocopy Technician: (patience tested) . . . yes. . .

Student: Well, would you make a photocopy of this Quebec Court of Appeal case in English, please?

Overheard in the McGill Law Library (and retold with aplomb by one of my colleagues)

The student in the above story is not only poking fun at the librarian guarding the photocopy machine, but also at a persistent myth in Canadian legal circles that official French and English legal texts can be identical in meaning, accessibility and influence. A variation on the theme that there is only one criminal law for all of Canada is the idea that there is only one *Criminal Code*: that the French and English versions are identical expressions of one chant of the *volonté du législateur*. According to this view the French version is the mirror image of the English, both reflecting one message: that of the *droit uniforme*. The chosen language itself is perceived as some kind of neutral agent: a made-in-Canada saran wrap for the Canadian criminal law which itself has no specific effect on meaning or on the normative content of the *Criminal Code*. Single language reprints of the *Code* fit perfectly with this view. Reprinting only the French version or only the English version of the *Code* does no disservice to meaning since meaning is perceived to transcend the language in which the rules find expression.

Needless to say, one need only state this view to show up how naive in fact it is. Indeed it is hard to know if anyone really believes it. Even in the single linguistic dimension, the language of criminal law codification cannot simply be pierced to reveal some pure underlying meaning: as Dennis Klinck has argued, the many functions of language stand between author and reader and criminal law is as much the slave of language as it is its master.<sup>108</sup> When two languages are interposed

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108. "The Language of Codification" (1989), 14 *Queen's L. J.* 33.

between author and reader the myth is doubly difficult to believe. Interpreting bilingual legislation has emerged as a technique and has been used with some regularity, even in the criminal law, when English versions and French versions of the *Code* appear to be at odds.<sup>109</sup> One need not scratch too far below the Ottawa surface to show up the myth. There is, as Roderick Macdonald has pointed out, a normativity in legal bilingualism which does not command the attention that it deserves.<sup>110</sup>

So the bilingual *Criminal Code* first enacted in 1892 is founded on a myth that no-one really believes, but that everyone swears by: that, as the *Official Languages Act*<sup>111</sup> implores, both the French and the English versions are equally authentic in the interpretation of the *Code's* provisions. And yet the anglo-Canadian tradition in criminal law is deeply rooted in the English language and everyone knows it, especially the Quebec practitioner called upon to read English-language cases in order to plead the *droit uniforme* in French before the Quebec courts. Even Parliament admitted this in the official French version of *The Criminal Code, 1892* which referred, in its definitional sections, to the equally official English version to ensure that the French definitions make sense,<sup>112</sup> leaving no doubt in anyone's mind as to which came first. Ironically, the mirror-image 1892 *Codes* had different titles<sup>113</sup> and, in some of their most important sections, were radically incompatible.<sup>114</sup> In a sense there have always been two layers of language obscuring the French version of the *Code*, as opposed to only one blocking the truth

109. Judges tend to apply the version which is most kind to the accused when the two versions are interpreted as being irreconcilable. See, e.g., *R. v. Woods and Gruener* (1980), 19 C.R. (3d) 136 (Ont. C.A.). It is certainly true that there are pockets of the Canadian legal community for which bilingualism before the criminal courts is a matter of everyday business, and as I will suggest below, this linguistically rich minority may practise a different criminal law that their unilingual counterparts. Furthermore a combination of astuteness and *astuce* has established a tradition among members of the criminal defence bar of looking over at the language of the "other" official version in the elephant gun approach to raising a reasonable doubt. But a French restaurant command of the language suffices for this kind of tactic.

110. "Legal Bilingualism" (April 14, 1988, McGill Univ., unpub. manus.).

111. R.S.C. 1985, c. 0-3, s. 9 (1).

112. *Code criminel, 1892*, 55-56 Victoria, c. 29 (Ottawa: Samuel. Edw. Dawson, Imp. de la Reine, 1892), art. 3b) «Les expressions "acte d'accusation" (*indictment*) et "chef d'accusation" (*count*) . . . »

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

114. Were common law or customary law defences preserved by the sections 7 of the 1892 *Codes*? In English s. 7 read, "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to a charge, shall remain in force. . .", while in French the text ran "Toutes règles et tous principes de droit coutumier qui font de quelque circonstance une justification ou une excuse d'un acte, ou un moyen de défense contre une accusation, resteront en vigueur . . .".

underlying the English version, if such a truth can be said to exist independently from the language chosen for its expression.<sup>115</sup>

So Canadian criminal law has always been English law in two senses. To ignore the importance of the English language to the expression of Canadian criminal law is to do the translated French version an injustice. This plainly created and continues to create difficulties for French-speaking lawyers for whom access to the first official version may be limited — a problem comparable to, but much more striking than that faced by the English-speaking jurist coming to terms with Quebec private law.<sup>116</sup> Consequently, the primitive annotated materials in Quebec have always had, as a first order mission, the *vulgarisation* of this English criminal law, and this typically meant spreading the word, translated into French. And this has been an avowed purpose of these texts from the publication of Jacques Crémazie's 1842 treatise until today. Crémazie's book is a case in point. He promised a compilation and translation of Blackstone, Chitty, Russell and various Imperial and Canadian statutory instruments and he delivered on his promise, noting in the preface a problem that has dogged criminal lawyers in Quebec ever since:

Nous avons conservé dans le cours de cette traduction, la nomenclature anglaise, parce qu'en général, il est impossible de trouver dans la langue française, une expression correspondante aux mots techniques ou autres usités en Angleterre, soit dans la loi ou la pratique criminelle; et que d'ailleurs, cette nomenclature invariablement suivie dans les tribunaux du pays, est plus ou moins familière à tout le monde.<sup>117</sup>

One common thread among all the French-language annotated materials is the commitment that all their authors had to making the English (and English-language) criminal law accessible to a readership that otherwise would have gone ahead and practised without it. Implicit in this mission is an idea that the English-language statutory text is considered the truer version, which a successful French-version could (at best) mirror. In the test questions that prothonotary J.-F. Perrault

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115. Occasionally there is a near mirror-image to be found in the two *Codes*. One such example might be the offence of "book-making" (s. 202(1)(e)) or, in the French version, "bookmaking" (which is also a French word). In *R. v. Dessaint*, JE89-1163 (2 May 1989), Judge Jean Massé of the Municipal Court of Montreal felt justified in citing French and English dictionaries indifferently before choosing an interpretation that resulted in acquittal.

116. In "Quebec's Civil Law Codification Viewed and Reviewed" (1968), 14 *McGill L. J.* 521 at pp. 535-538, J.E.C. Brierley explains that while English-speaking jurists faced some handicaps because of untranslated legal materials in French, particularly in respect of the *ancien droit civil*, English participation in the drafting of the Civil Code of Lower Canada meant that the French and English draft of the Civil Code were "really 'originals' since both were discussed and evolved together, rather than one being a simple translation of the other" (p. 537).

117. *Ibid.*, at pp. v-vi.

prepared for students at the bar in 1814, the form employed reflects the author's sense of the aspect of his task:

Q. Qu'entend-on par BRIS EN PRISON, en Anglois, *Prison Breaking?* . . .

Q. Qu'entend-on par BOURGERIE, en Anglois, *Buggery?* . . .

Q. Qu'est-ce qu'un CONNETABLE, en Anglois, *Constable?* . . .

Q. Qu'entend-on par FELONIE, en Anglois, *Félony* [*sic*]?<sup>118</sup>

The idea that the normative point of reference is the English-language criminal law has been consistently reflected from this first Quebec lawyers' tool down to the materials published today. This nagging sense that the English version must be translated before it can properly exist in Quebec law has consistently been the principal preoccupation of the authors responsible for these works. Indeed this has been recognized, perhaps even before the actual content of the materials, as the first-order contribution of the French-language annotated codes. Guy Duguay's review of the first edition of Lagarde's annotated code in 1954 expressed appreciation for this endeavour in the following terms:

Le travail du juge Lagarde tente de réaliser un tour de force, une étude et une adaptation à la française d'un droit d'origine anglaise. Plusieurs articles de notre Code criminel, qui étaient demeurés obscurs pour nous à cause de leur tournure anglaise, se sont trouvés reconstruits par le juge Lagarde, d'une clarté et d'un [*sic*] signification très précise.<sup>119</sup>

For these authors, the English version had a normative sub-text which they felt they obliged to translate as precisely as possible by reprinting and presenting the English statutory material in French. The authors' indices of the statutes offer telling examples of this vocation, many of which contain anglicisms, English words, and even rather raw colloquialisms in order to further accessibility of the text for their readers.<sup>120</sup> Translating and interpreting tended to go hand in hand. In an annotation under the *Code* section which permits re-election by an accused before a judge alone, Irénée Lagarde wrote in his first edition:

(2) *Traduction défectueuse de la version française de l'article 476:*

La version française de l'article 476, telle qu'imprimée par l'imprimeur de la Reine, traduit: "within 14 days of the opening of the sittings or session

118. *Questions et réponses sur le droit criminel du Bas-Canada* (Quebec: C. LeFrançois, 1814) at *passim*. Often the form chosen by Perrault got the better of him. Students must have had some difficulty with questions such as "Q. Qu'entend-on par FEMMES, en Anglois, *Women?*" or "Est-il défendu de voler des NAVETS, en Anglois, *Turnips?*"

119. «*Code criminel annoté par Irénée Lagarde*» (1954), 14 *Thémis* 125 at p. 125.

120. See the index to the 1989 *Code Dubois*, *supra*, note 18 which includes a series of English words (e.g. "trespass"), anglicisms (e.g. "*exhibit*") and slang-words (including the distasteful "*shylocking*", used in some Quebec circles to designate lending at a criminal rate of interest) — all to enhance to accessibility of the text for Quebec readers.

of the court” par “dans les 14 jours qui SUIVENT l’ouverture de la session de la cour”. C’est tout à fait erroné. Il faut lire, comme nous le disons à l’article 476: “dans les 14 jours précédant l’ouverture du terme de la cour”. En effet, mot à mot, nous devrions traduire: “en dedans des 14 jours de l’ouverture du terme” . . .<sup>121</sup>

By rendering accessible the statutory materials in French and through the annotations of cases, particularly English-language decisions, in French, the French-language annotated materials not only participated in, but reinforced the practice of criminal law in French in Quebec. As the annotated materials increased the accessibility of the English criminal law, they also promoted a French-language tradition in criminal law. Hand in hand with *vulgarisation* went and goes *diffusion*. In fact Quebec jurisprudence was disseminated not just in the French annotated materials, but also in those English-language texts written by lawyers who were comfortable annotating French-language cases. This tended to be a class restricted to the Quebec lawyers who wrote in English. James Crankshaw’s code, for example, and its subsequent editions published by Quebeckers included a significant number of annotations of French-language cases, and thereby promoted the French-language tradition in criminal law in Quebec, as did Snow’s, and Justice Taschereau’s later editions. These annotations far outstripped their non-Quebec counterparts in citing Quebec cases and joined the bilingual and the French annotated codes in reinforcing a Quebec brand of criminal law.

Ironically, then, just as the publication of French-language materials in annotated codes and elsewhere has been premised on making the criminal law more accessible to a segment of the Canadian legal community, it has also served to create barriers between that community and the English-speaking bar. The French-language materials both enfranchise and disenfranchise French-speaking criminal lawyers in the process of elaborating the criminal law in Canada. The more prolific French-speaking judges and commentators become, the more considerable the body of literature they create that remains inaccessible to the English-speaking legal community.

So as the *vulgarisation* of the anglo-Canadian criminal law through primitive legal materials brings non-Quebec cases and commentary to the attention of Quebec readers, non-Quebec readers have no equivalent materials to render French-language cases more accessible to them. The annotated codes in English Canada do not have, as part of their mission, the popularization of Quebec legal thinking, whatever their avowed commitment to the *droit uniforme*. While it may be an exaggeration to

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121. *Droit criminel annoté* (1954), *supra*, note 39, vol. II at p. 119.

say that their readers only get half the story, it is certainly true that much of the potential meaning of the rule with which the accused is being clubbed is kept from them. This is less of a problem in Quebec, where French-language materials have traditionally annotated English cases and where (more) bilingual criminal lawyers canvass English-language cases with relative ease. Furthermore, if English-only lawyers and judges inhibit access to both *Codes*, their presence also inhibits access to the law expressed outside the *Code* in the disenfranchised language. English-speaking criminal lawyers generally do not read the French-version of the *Code* and, at their peril, they often ignore cases and *doctrine* which appear in French. One might argue that today, the language problem runs only down river. Among the losers in this sad state of affairs are of course the readers who ignore and *ignorent* an often progressive collection of French-language materials. One cannot help but smile at claims of completeness, total information and intelligence of some of the unilingual (English) annotated citators.

Those disenfranchised are more inclined to wince than smile. When one recognizes that language shapes accessibility of ideas and that accessibility of ideas in turn shapes the relative force of persuasive authority in criminal law, one can understand the disappointment of those who write books and cases which the great majority of Canadian lawyers and judges do not read. This is a reality for French-speaking and French-writing academic lawyers who live the frustrations of a small readership and a wider public that ignores<sup>122</sup> (or all but ignores<sup>123</sup>) ideas that should be no less relevant outside Quebec than inside — if we subscribe to the conventional view that there is one criminal *droit uniforme* for Canada. The insensitivity to Quebec legal scholarship in criminal law outside the province is particularly regrettable given the ambitions of the Quebec literature in this field. To those conditioned to

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122. Consider the claim made by S.R. Clarke that his 1872 treatise, *supra*, note 6, was the first published in Canada. This was wrong: one need only go back to the 1842 Crémazie compilation, *supra* note 34, to show up Clarke's linguistic bias. Clarke's same claim in respect of his *The Magistrates' Manual, being annotations of the various acts relating to the rights, powers, and duties of justices of the peace; with a summary of the Criminal law* (Toronto: Hart & Rawlinson, 1878) at p. iii was similarly overstated: among the other Canadians to publish texts on magisterial law before Clarke were at least two Quebecers: advocates Hugh Taylor in English, *infra*, note 50, and Magloire Lanctôt in French, *infra*, note 48.

123. In her important article on how women's issues are often silenced in the teaching of criminal law, "Criminal Law and Procedure: Who Needs Tenure?" (1985), 23 *Osgoode Hall L.J.* 427, Christine Boyle broke tradition for English-language criminal lawyers and candidly set out one of the limitations on her perspective: "I have not attempted to expand my limited knowledge of the extensive French writing in the field. In failing to do this, I am very much part of the mainstream of English academics" (p. 429n).

think that history and language have limited the Quebec jurists' affinity for criminal law, the breadth and seriousness of this work is surprising<sup>124</sup> — just as surprising as the lack of usefulness of these practical tools outside of Quebec.

It is principally for reasons of language, then, that Quebec *doctrine* and cases are so lacking in influence outside of the province. Non-Quebec judges get along fine, thank you very much, but they do so without factoring in French Quebec's full contribution to what they themselves perceive to be the *droit uniforme*. With the exception of those Quebec judges who write criminal judgments in English, the Quebec bench is silenced outside of the province, or nearly. While it is hard to think of the French-language jurists, as well-fed a community as they are, as one that has been "silenced", that is the end result of the language barrier. Those affected have spoken out — this is one silenced community that does have (part of) the ear of those who silence it. Some Quebec judges have not shied away from denouncing the poor reading habits of English-speaking criminal lawyers as inappropriately diminishing the law-making vocation of their work. Justice Claude Bisson, now Chief Justice of Quebec, spoke out strongly in 1983 on the occasion of the translation into French of the widely-used text on criminal procedure,<sup>125</sup> as did Justice Fred Kaufman,<sup>126</sup> a judge who writes nearly exclusively in English, but who was a leading figure in the Montreal bar for many years where language is a day-to-day preoccupation. In 1978, Jules Deschênes, then Chief Justice of the Superior Court of Quebec, pleaded the case (in English) for his (French-language) cases decided in "federal" matters before the august Law Society of Upper Canada in the following terms:

Québec has shown the willingness and the ability to contribute to the building of such a national scheme of federal law, but the legal community in the rest of Canada has, by and large, closed itself off and away by simply ignoring the Québec contribution. . . . The situation is rooted in a

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124. Bibliographers Baker *et al.*, *supra*, note 80 at p. 25 observe that: "Criminal justice is perhaps the aspect of Quebec's legal history which stands out in terms of scope and quality of past research." See also V. Masciotra, "Quebec Legal Historiography, 1760-1900" (1987), 32 *McGill L. J.* 712, at p. 719.

125. See Justice Bisson's introduction to V.M. Del Buono ed., *Procédure pénale au Canada* (Montreal: Wilson & Lafleur Ltée, 1983), E. Groffier, transl.: "... il faut espérer que la pensée juridique d'expression française en matière de droit pénal canadien connaîtra elle aussi une diffusion dans la communauté légale des autres provinces: comment y parvenir, si à ton [*sic*] tour, cette pensée n'est pas rendue accessible dans la langue dans laquelle elle doit y être consultée, comprise et citée: l'anglais? Je suis persuadé que l'approche des juristes du Québec serait un précieux apport à la littérature juridique canadienne en droit pénal. Encore faut-il prendre les moyens pour en assurer la diffusion."

126. *Supra*, note 99 at p. 27.



language difficulty which idealism would overcome with bilingualism, but realism teaches us can only be cured successfully through a permanent translation process.<sup>127</sup>

As these judges all suggest, the impact of language on the force of persuasive authority is not equally felt by both communities. We all take judicial notice of the fact that French-speaking lawyers and judges manage better in English than do their English-speaking counterparts outside of Quebec in French. The consequence is obvious: the impact of language on the authoritative weight of a legal idea is of a different order depending on whether one goes from French to English or from English to French. Thus, taking the Canadian criminal law as a national whole, the Quebec courts do not participate in the law-making process in the same way as do, say, the Ontario courts. The Quebec cases rendered in French are less likely to persuade other judges faced with similar problems outside of Quebec. The same cannot be said of what is accessible to lawyers and judges who read both English and French, most of whom are concentrated in Quebec. They can read and cite the persuasive authority that their English-speaking counterparts generate outside (and inside) Quebec. Here is one more good reason for insisting that federally-appointed judges read French and English with ease. But more significantly, one observes that the ranges of materials that can make law or influence law-making is different inside Quebec than outside. The Quebec voice is ostensibly heard only within Quebec, giving it an influence there that it does not have elsewhere.

This reality of a different regime of sources of Canadian criminal law is well-reflected in the primitive annotated materials. The cost of the linguistic mission of the authors of the French annotated materials is to limit the *rayonnement* of their ideas and the ideas of the cases they annotate. By citing fewer Quebec cases than should otherwise be cited, the authors of the non-Quebec (English-language) codes recognize and feed the territoriality of Canadian criminal law and show up the myth of the *droit uniforme*. Annotated codes originating inside and outside of Quebec record the power of language in shaping the usefulness of sources for lawyers and judges who rely on them. The leading non-Quebec English-language codes consistently cite fewer French-language cases in explaining what they offer as a nutshell of the *droit uniforme* for the

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127. "On Legal Separatism in Canada" (1978), 12 *L.S.U.C. Gaz.* 1, at pp. 2 and 9. There is some irony in this intervention. Justice Deschênes wrote a considerable number of his opinions in English only, in deference to English-speaking parties, while the Law Society has recently institutionalized a wide-range of bilingual services in deference to its French-speaking membership.

country. The number of Quebec cases in *Martin's*,<sup>128</sup> *Tremear's*,<sup>129</sup> and the modern-day (non-Quebec) *Snow's*<sup>130</sup> and *Crankshaw's*<sup>131</sup> pale in comparison to those cited for Ontario, for example, where the numbers should be comparable. On closer examination one discovers that many of the Quebec cases cited in these codes were either written in English or available in translation. Thus it appears that lawyers relying on these texts (and they are legion) place Quebec cases in a less prominent position than those decided in English when sorting out authorities in criminal law. Consequently, Quebec judges do not participate in the elaboration of what is perceived to be the national *droit uniforme* and, furthermore, we can say with a greater degree of certainty that the *droit uniforme* is not much more than a myth.

Inside Quebec, English-language cases and *doctrine* are not silenced and, in theory, play an equal role in the elaboration of the *droit uniforme*. In a sense, the only place that the national *droit uniforme* can flourish is Quebec, which gives a particular irony to the claim that some have made that it is the national criminal law which helps Canada stick together. But even for Quebec there is no Canadian criminal *droit uniforme*: the annotated materials published in Quebec have consistently given a more prominent place to Quebec cases as compared to any other Canadian province. Today's *Code Dubois* makes the point most clearly by citing only decisions from Quebec courts and those of the Supreme Court of Canada. Even if this is just parochialism, it nevertheless indicates that local cases play a more considerable role in lawyers' minds in solving problems arising before Quebec courts. This suggests an informal hierarchy of formal sources for Quebec criminal law whereby Quebec cases place ahead of non-Quebec cases. So Quebec lawyers, like those outside of Quebec, have an ordering principle which ranks persuasive authority where the conventional theory of sources of criminal law refuses to do so. Language is largely responsible for the presence of these non-binding norms as to the relative force of "binding" authority inside and outside of Quebec.

Translation and bilingualism have, in some measure, stemmed the tide of territoriality. French-language *doctrine* and cases<sup>132</sup> are regularly

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128. *Supra*, note 13.

129. Justice David Watt & Michelle Fuerst, *The Annotated Tremear's Criminal Code 1990* (Toronto: Carswell, 1989).

130. *Supra*, note 32.

131. *Supra*, note 29. While *Crankshaw's* now has a francophone contributing editor in Jean Ouellet, it remains thin in respect of Quebec cases when compared to the references to, say, those decided in Ontario.

132. The Criminal Reports, one of the two best-circulated criminal law reporting services both inside and outside of Quebec, has maintained the tradition of a Quebec editor for many years.

translated in order to promote their accessibility and this has certainly had a degree of success in bringing developments in Quebec in criminal law to the attention of jurists outside of Quebec. Perhaps the most significant institution in the *vulgarisation* of criminal law developments in Quebec has been the Supreme Court of Canada or, more precisely, the Surpeme Court Reports which has published criminal law judgments in both languages since the late 1960s. French-speaking Quebecers have of course profited<sup>133</sup> from having an easy access to the thinking of McIntyre J. and others, including prominent Quebec members of the Court, who wrote or write criminal judgments primarily in English. But needless to say, even the very expert translators at the Supreme Court of Canada do not achieve “transparency” between French and English versions which, along with the judges, they readily acknowledge.<sup>134</sup> It is hard to measure the consequences of not reading the original but, knowing how difficult translation is and recognizing that choice of language is best viewed as a matter of substance rather than form. Bilingualism, even where fully practised, cannot compensate fully for the effect of the choice of language on what is being said. No more elegant a statement demonstrating this reality is to be found than that in Spence J.’s reasons for judgment in *Hutt v. The Queen*, a case which turned largely of the definition of the word “solicit” used in the *Criminal Code* offence of soliciting. In the official French version his Lordship explained part of his reasons for judgment in the following terms:

Il faut remarquer, comme l’ont fait les cours d’instance inférieure, que le mot «solicite» n’est pas défini au *Code criminel*. Ces cours ont adopté à mon avis une méthode adéquate en recourant aux dictionnaires anglais reconnus pour y trouver la définition de ce mot. Le premier réflexe est de consulter le *Shorter Oxford Dictionary*. . . .<sup>135</sup>

This goes a long way to support Macdonald’s thesis that legal bilingualism has an under-recognized normativity or, as he asks rhetorically, “Given legal bilingualism, how is it possible?”<sup>136</sup> It is not.

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133. Louise Viau’s recent casebook for first-year law students *Recueil d’arrêts en droit pénal général 1988* (Montreal: Ed. Thémis, 1988) is largely made up of the French version of English original Supreme Court judgments, which she explains is to encourage their accessibility for her readers (p. vi).

134. Very often the translated version of a judgment appearing in the S.C.R.s is identified by a preface “version française” or “English version”, depending on the case, leaving no secret as to which is the original. In a recent Quebec Court of Appeal judgment, Bernier J.A. cited the French version of Chief Justice Dickson’s reasons from a Supreme Court case and, noting a discrepancy between what he called “cette «version française»” and the English text, Bernier J.A. chose the latter: *R. c. Ayotte*, [1989] R.J.Q. 1434 at p. 1439n.

135. [1978] 2 S.C.R. 476 at p. 481.

136. *Supra*, note 108, at p. 6.

Macdonald contends that the current practice of legal bilingualism breeds legal dualism, which describes exactly the two regimes of sources at work in a technically bilingual Canadian criminal law: “. . . the mythology of a national legal system explodes. If the invocation and interpretation of legal materials depends on the language employed by the lawyer or judge, the role of national legal rules are undermined. Again when the interpretation of texts is not open to external censure, texts themselves become trivialized.”<sup>137</sup> As it happens, if legal bilingualism was to be the ticket to a national *droit uniforme* in criminal law, the annotated criminal codes suggest that it has flopped.

### Conclusion

Annotated criminal codes are, in a sense, a banal form in a very great and old tradition of illuminating manuscripts whereby texts were brought to life by others re-working without rewording of the work of the original author. The image of a painstaking monk bent over a desk, contorting sketches of birds and animals into letters of the alphabet or transforming margins into playgrounds for the seven deadly sins in blues and golds hardly evokes the travails of Judges Taschereau and Lagarde.<sup>138</sup> And yet the comparison is not so far-fetched. The annotated codes, like the illuminated MSS., make the copy more precious than the original and add to the text a message that the original did not hold. Moreover, both illuminations and annotations speak volumes of the context and time in which they were prepared.

But the parallel must end there for while the illuminations are doubtless an art form distinct (and often greater than) the MSS. illuminated, the annotations and the *Code* are hopelessly connected. Beyond the *Code*, the annotations account for little of the reality of Canadian criminal law, and even together, as I said at the outset of this essay, Parliament's *Code* and lawyers' scribblings allow for only the most modest of conclusions. *Mea culpa*. But it does seem that some rather striking inferences can be drawn from these prominent if unambitious lawyers tools. The Quebec codes are different. They reflect a language (or an affinity for language in the case of the English-Quebec materials) and a relationship between language and persuasive authority that has been ignored or denied by those who cling to the idea of a national criminal *droit uniforme*. The barriers created by language which find expression in

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137. *Ibid.*, at p. 27.

138. But see the posthumous tribute to Judge Lagarde, “Irénée Lagarde: Hommage à un grand avocat, mon ami . . .” by the Hon. Omer Côté in terms no less poetic: (1989), 8 *Maitres* 45.

the content of the Quebec annotated codes indicate that there is a different ranking of sources inside and outside of Quebec depending, at the very least, on the language of those sources. This ordering principle has created at least two parallel sub-systems of Canadian criminal law. Alongside these are a number of incomplete sub-systems, springing up on the strength of local lawyers' custom and threatening the *droit uniforme* once again.

Once these sub-systems are recognized, comparing solutions reached by criminal courts inside and outside of Quebec and even within Quebec itself then requires special techniques of analysis to allow for the systemic differences which contributed to the solutions. This approach may seem out of step with what is conventionally understood to be appropriate legal method for Canadian criminal law, but understanding Quebec's distinctiveness from the outside is a task for modern comparative lawyers.