

## Codification in the Commonwealth: Earlier Efforts\*

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Some years ago I published an article on a forgotten criminal code prepared in the 1870s for the island of Jamaica by an English barrister, Mr. R.S. Wright, later Mr. Justice Wright.<sup>1</sup> My conclusion to the article was the "obvious one that law reform is affected by a great number of factors apart from the merits of the proposals. Then, as now, a combination of politics, personalities and pressure groups affected the outcome. The crucial events seem, in retrospect, largely unplotted and accidental . . ." <sup>2</sup>

In the last quarter of the nineteenth century, Wright's Code<sup>3</sup> was a rival to James Fitzjames Stephen's Draft Code of 1878,<sup>4</sup> which formed

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<sup>1</sup> Friedland, *R.S. Wright's Model Criminal Code*, 1 *Oxford J. Legal Stud.* 307 (1981), reprinted in M. Friedland, *A Century of Criminal Justice* ch. 1 (1984); full references to the Public Record Office (London) materials used for the study can be found in either publication.

<sup>2</sup> Friedland, *supra* note 1, at 345.

<sup>3</sup> R.S. Wright, *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica, with an Explanatory Memorandum*, 1877, Command No. 1893 [hereinafter Wright's Code].

<sup>4</sup> Parliamentary Papers, Bill 178, Criminal Code (Indictable Offences) Bill, 1878 [hereinafter Stephen's Code]. On Stephen and his role in codification, see K.J.M.

the basis for the English Criminal Code Commission's Draft Bill of 1879<sup>5</sup> and served as the foundation for most criminal codes in the Commonwealth. Wright's Code, in contrast, came into force in only a handful of relatively minor countries. This article examines some of the "crucial events" in the divergent histories of these two early efforts to codify the criminal law.

Another conclusion on codification that I drew from preparing the article on Wright—perhaps also an obvious one—is that any code reflects the philosophy of its drafter. Wright was a far more liberal, progressive reformer than Stephen and this is clearly reflected in his code. Stephen was a conservative, establishment figure and this, too, is reflected in his code. This theme runs through the following account.

Still another conclusion emerges from studying earlier attempts at codification—codifying the criminal law requires great patience. We can certainly see that in the present day. England started producing a new criminal code in 1968;<sup>6</sup> it has not yet been enacted.<sup>7</sup> The United States government appointed a National Commission on Reform of Federal Criminal Laws in 1966,<sup>8</sup> and the commission's 1971 report still has not been implemented.<sup>9</sup> To give one more example, when the Law Reform Commission of Canada was established in 1971, it was charged with completely rewriting the criminal law "as one of its first tasks";<sup>10</sup> a new code has not yet been adopted in Canada.

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Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988); D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989).

<sup>5</sup> *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences, with an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners*, 1879, Command No. 2345.

<sup>6</sup> See Law Comm'n, Report No. 15, *Third Annual Report, 1967-68* (1968).

<sup>7</sup> See 1 Law Comm'n, Report No. 177, *A Criminal Code for England and Wales* (1989).

<sup>8</sup> See generally Schwartz, *Reform of the Federal Criminal Laws*, 1977 Duke L.J. 171; Drinan, Ward & Beier, *The Federal Criminal Code: The Houses Are Divided*, 18 Am. Crim. L. Rev. 509 (1981).

<sup>9</sup> See generally Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L. Forum 99 (1989).

<sup>10</sup> Hansard, House of Commons, Canada, remarks by the Minister of Justice, Feb. 23, 1970, at 3963.

## BENTHAM AND MACAULAY

The “intellectual father of codification generally and of penal codification in particular”<sup>11</sup> in the English-speaking world was Jeremy Bentham. Surprisingly, Bentham never produced a criminal code himself. As Sanford Kadish states:

While he wrote far and wide to obtain a codification commission—to the English Home Secretary, to President Madison (twice), to the Governor of Pennsylvania, to all the American governors and to the Russian Emperor—he never obtained one; nor did he ever produce a completed code, penal or otherwise (which might have been just as well, to judge from the specimen of part of a penal code he did leave behind).<sup>12</sup>

The first criminal code enacted in the British Empire was Thomas Babington Macaulay’s Indian Penal Code,<sup>13</sup> produced in 1837 but not adopted until 1860, possibly in response to the Indian Mutiny of several years earlier. Macaulay, the great historian, was a fine writer and this is reflected in his code. Indeed, good writing was one of his main objectives:

I am firmly convinced that the style of laws is of scarcely less importance than their substance. When we are laying down the rules according to which millions are, at their peril, to shape their actions, we are surely bound to put those rules into such a form that it shall not require any painful effort of attention or any extraordinary quickness of intellect to comprehend them.<sup>14</sup>

Those words are equally applicable today.

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<sup>11</sup> Kadish, *Codifiers of the Criminal Law*, 78 Colum. L. Rev. 1098, 1099 (1978); see also Kadish, *The Model Penal Code’s Historical Antecedents*, 19 Rutgers L.J. 521 (1988).

<sup>12</sup> Kadish, *Codifiers of the Criminal Law*, 78 Colum. L. Rev. 1098, 1099 (1978).

<sup>13</sup> See generally *id.* at 1106–21.

<sup>14</sup> *Id.* at 1108 n.80 (quoting T. Macaulay, *Minute*, May 11, 1835).

## WRIGHT AND STEPHEN

Let us turn now to the Wright and Stephen codes.<sup>15</sup> Wright produced his code in the early 1870s at the request of the British Colonial Office. Stephen produced his in the late 1870s at the request of the Lord Chancellor's Office.

Wright, a thirty-one-year-old barrister and fellow of Oriel College, Oxford, who had done some earlier impressive work for the Colonial Office, was asked to draft a criminal code for Jamaica that could serve as a model for all the colonies, the Crown colonies, as well as the self-governing. Indeed, some in the Colonial Office hoped that this document would form the basis for a code for England as well. The idea of producing a criminal code for the colonies came from Sir Henry Taylor, a then well-known literary figure who had been a powerful force in the Colonial Office for the previous half century. Sir Henry, who was not a lawyer, had originally hoped to stimulate legal change in England itself. In 1868 he published a letter to the Prime Minister, William Gladstone, entitled "Crime Considered," in which he proposed a number of changes in the criminal law.<sup>16</sup> The government was not interested in these proposals and so Sir Henry turned to a captive audience, the Crown colonies.

When Wright completed the Jamaican Code, the Colonial Office asked Stephen for detailed comments. Stephen was a well-known author, barrister, and expert on criminal law who had returned to England several years earlier from his position as the law member of the Indian Supreme Council. Stephen's work on Wright's Code may well have provoked Stephen into drafting a code of his own. It was precisely at the time he was completing his memorandum on Wright's Code that, according to his letters, he re-

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<sup>15</sup> A complete survey of earlier codification efforts would also include discussion of the abortive work of the English Criminal Law Commissioners, appointed in 1833 by Lord Brougham with the task of making a complete examination of the criminal law; this commission had produced thirteen reports by 1849. See generally Cross, *The Reports of the Criminal Law Commissioners*, in *Reshaping the Criminal Law* 5 (P. Glazebrook ed. 1978); 5 L. Radzinowicz & R. Hood, *A History of English Criminal Law* ch. 22 (1986).

<sup>16</sup> See sources cited *supra* note 1.

solved to draft both a penal code and code of criminal procedure.<sup>17</sup> Ultimately, Stephen decided to convert the second edition of a book he had originally published in 1863, *A General View of the Criminal Law of England*, into a code or digest—a task he completed some years later, in the spring of 1877.<sup>18</sup>

Wright and Stephen had different ideas of how a criminal code should be drafted. I will give two examples. In his memorandum to the Colonial Office, Stephen objected to what he considered to be the overelaboration of parts of Wright's draft.<sup>19</sup> Wright firmly defended his approach; he wanted to supply the judiciary with more concrete answers than Stephen, who was willing to leave greater scope to the bench. Wright stated in reply to Stephen's memorandum:

[T]he great bulk of those special provisions to which Mr. Stephen's objection is applied in his remarks on particular passages of the Draft are in my judgment essential to the safe working of such a code. Things cannot be made simpler than they are, and law is not and never can be simple in all its parts. If a particular provision will be necessary to meet a case when it arises, it is in my judgment no justification for omitting such a provision that the case is extraordinary or unusual, so long as it cannot be called unnatural or very extreme; as a section would be (e.g.) which should provide for such a case as that of the Siamese twins. If a particular provision, although not absolutely necessary, is yet right and not such as to be obvious, so that a judge who has to supply it without much time for consideration is likely to be puzzled in its absence, it ought to be supplied for him.<sup>20</sup>

That is still a good test to follow. In particular, Wright's Code supplied detailed rules to determine when one person is under a duty to supply another with the necessities of life, and to determine when justifiable force may be used. With regard to the latter, Wright argued, "There is no civil code in

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<sup>17</sup> Stephen's papers are in the University Library, Add. MSS 7349, University of Cambridge, Cambridge, England.

<sup>18</sup> J.F. Stephen, *A Digest of the Criminal Law* (1877).

<sup>19</sup> See sources cited *supra* note 1.

<sup>20</sup> *Id.*

existence from which a man can learn when he may or may not strike a blow. Failing such a code it seems to me essential that the Criminal Code should tell him."<sup>21</sup>

Stephen also objected to Wright's "very general propositions about the mental elements of crime."<sup>22</sup> Wright had adopted the technique, which one now finds in the American Law Institute's Model Penal Code<sup>23</sup> and the state codes based upon it, and in virtually all codes presently under consideration, of carefully defining the mental elements of offenses:

A code without general definitions of general elements would miss the greatest advantage of codification. I cannot suppose that Mr. Stephen means what some of his expressions . . . seem to imply, that definitions of intention, negligence, etc. should be repeated at length in the definition of each particular crime.<sup>24</sup>

Of course, what Stephen really meant, as we can see from his own Draft Code of 1878, was that these terms should be left undefined.

The differences between Wright and Stephen were resolved, in part, by a conference between the two lawyers and finally by the Colonial Secretary.

After he drafted the Criminal Code for Jamaica, Wright prepared a Code of Criminal Procedure, which he submitted to the Colonial Office in 1876. To a considerable extent, Wright based the Code of Criminal Procedure for Jamaica on the Indian Code of Criminal Procedure because he felt the latter contained "most of the elements necessary for a completely satisfactory system of procedure."<sup>25</sup> Wright's Code of Criminal Procedure contained a number of innovations, including the appointment of a public prosecutor, a provision for examining accused persons, and rights of appeal. Before I tell the fate of Wright's Code,<sup>26</sup> let me say something about codification in England.

As he said he would, Stephen drafted a code in 1877 in the form of a

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> American Law Inst., *Model Penal Code: Official Draft and Explanatory Notes* (1985).

<sup>24</sup> See sources cited *supra* note 1.

<sup>25</sup> *Id.*

<sup>26</sup> See *infra* pp. 156-58.

digest of criminal law.<sup>27</sup> Stephen then set out to persuade the government to give him the task of preparing an official code. When the British Trades Union Congress asked Stephen to give an address on the subject of codification, he seized the opportunity (although in his private correspondence he remarked on his “very strange bed fellows”),<sup>28</sup> and then wrote to the Lord Chancellor that “there is a feeling in the country which is rapidly gaining strength that something ought to be done.”<sup>29</sup>

Labor was interested in codification as a means of preventing the use of the criminal law to curtail the power of unions. Wright was the lawyer most active in assisting the Trades Union Congress in preparing draft legislation on a number of issues. His well-known book on conspiracy<sup>30</sup> was not, as I had previously thought, an academic discussion of an interesting criminal offense, but a pro-labor brief to keep the judiciary from using the offense of conspiracy to prevent workers from striking. At the meeting Stephen addressed, Wright spoke in favor of a resolution that “the time has now arrived when it is incumbent upon the government to codify the criminal laws of the country.”<sup>31</sup> Stephen, as we know, got the job of drafting the government code.

Not surprisingly, labor was disappointed in Stephen’s Code. Stephen, a conservative, was not a friend of labor. His code took a moralistic, authoritarian, and anti-labor position. The left insisted that a criminal code commission be established to prevent enactment of the code and it hoped, naturally, to see a labor supporter among the commissioners. Although the Blackburn Royal Commission was established, it included no friend of labor. To the contrary, Stephen was appointed as a commissioner and was the driving force in producing the Criminal Code Commission’s Draft Bill of 1879.<sup>32</sup> When Benjamin Disraeli was defeated in 1880 and the Liberals under Gladstone were returned to power, the Criminal Code Commission’s authoritarian code had little chance of being enacted. The fight between the left and the right still plays a major role in the question of whether a new

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<sup>27</sup> See *supra* note 18.

<sup>28</sup> See source cited *supra* note 17.

<sup>29</sup> See sources cited *supra* note 1.

<sup>30</sup> R.S. Wright, *The Law Relating to Criminal Conspiracies and Agreements* (1873).

<sup>31</sup> See sources cited *supra* note 1.

<sup>32</sup> See *supra* note 5.

code will be enacted—as the drafters of the various versions of the proposed United States federal code can testify.<sup>33</sup>

The Criminal Code Commission's draft also proved unsatisfactory because it was not particularly well constructed. Government officials liked Wright's Code better. In 1900, Sir Courtenay Ilbert, a leading parliamentary draftsman, wrote in a confidential memorandum to the Colonial Office: "The two draft Codes are framed on different principles and different lines, and in the opinion of many, perhaps of most, competent authorities, the Jamaica draft is the better work of the two."<sup>34</sup> Sir Courtenay went on to say:

The Commissioners' Code, notwithstanding the high authority of its framers, especially of the late Sir James Fitzjames Stephen, was found on examination to require material alterations both in form and in substance, and this is probably the reason why it was not carried further in Parliament.<sup>35</sup>

The civil service posed a further obstacle to enacting the commission's Draft Bill—many civil servants favored a more gradual approach to codification. The advisory Statute Law Committee, an influential body, expressed concern about the desirability of combining significant changes in the law with an accurate statement of the law. "The danger," the committee told the Lord Chancellor, in opposition to Stephen, "is that the two kinds of improvements may clash, and obstruct one another."<sup>36</sup> The committee favored law reform in three categories—"amendment of the law; consolidation of the law, and finally, codification."<sup>37</sup> Then, as now, major changes in the law at the same time as codification will arouse hostility from many quarters and interest groups and make the passage of such legislation more difficult.

So, to the usual list of reasons why the Criminal Code Commission's draft was never enacted—lack of parliamentary time, change of government, and strong public criticism from Chief Justice Alexander Cockburn—we can add organized labor's reservations about the code; concern about the quality of Stephen's work, shared by a number of influential people; and the

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<sup>33</sup> See Schwartz, *supra* note 8.

<sup>34</sup> See sources cited *supra* note 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

detailed program of gradual reform put forward by the Statute Law Committee.

I said earlier that a code reflects the philosophy of its drafter. Let us compare some aspects of the two codes.

As I noted at the outset,<sup>38</sup> Stephen was a conservative; Wright, a radical. It is not surprising, therefore, that Stephen allowed far less scope for criticizing the government than Wright. Stephen included in his definition of sedition an intention to bring "the Government and Constitution of the United Kingdom or any part of it" into "hatred or contempt" or "to raise discontent or disaffection amongst Her Majesty's subjects."<sup>39</sup> Wright's sedition section, in contrast, was limited to "a purpose to excite any of Her Majesty's subjects to the obtaining by force or other unlawful means of an alteration in the laws or in the form of government . . . ."<sup>40</sup> Note that Wright's sedition provision required the use of "force or other unlawful means";<sup>41</sup> Stephen's did not.<sup>42</sup>

There is also a sharp cleavage between Wright's and Stephen's codes on the issue of law and morality. John Stuart Mill's view, expressed in the essay "On Liberty," that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"<sup>43</sup> is, to a great extent, reflected in Wright's Code. Stephen, as is well known, opposed Mill's view in Stephen's own book *Liberty, Equality, Fraternity*.<sup>44</sup>

Attempted suicide, for example, constituted an offense in Stephen's Code<sup>45</sup> but not under Wright's Code. Wright followed Mill, stating, "it may be added to the usual arguments based on the absence of injury to any other person, that to impose a punishment for the attempt would be merely to supply an additional motive for taking care to ensure the success of the attempt."<sup>46</sup>

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<sup>38</sup> See *supra* p. 146.

<sup>39</sup> Stephen's Code, *supra* note 4, § 55.

<sup>40</sup> Wright's Code, *supra* note 3, § 243.

<sup>41</sup> *Id.*

<sup>42</sup> Stephen's Code, *supra* note 4, § 55.

<sup>43</sup> J.S. Mill, *On Liberty* 68 (1974).

<sup>44</sup> J.F. Stephen, *Liberty, Equality, Fraternity* (R.J. White ed. 1967).

<sup>45</sup> Stephen's Code, *supra* note 4, § 145.

<sup>46</sup> Wright's Code, *supra* note 3, at 108.

Sodomy also was treated differently in the codes. Stephen's Code provided for penal servitude for life (with a *minimum* penalty of ten years) for buggery or bestiality.<sup>47</sup> Wright's Code placed buggery (with consent) and bestiality in the section headed "Public Nuisances" and originally provided for a maximum two-year penalty.<sup>48</sup>

Wright also included a much more liberal abortion provision than did Stephen, stating that "any act which is done in good faith and without negligence for the purposes of medical or surgical treatment of a pregnant woman is justifiable, although it cause or be intended to cause miscarriage or abortion, or premature delivery, or the death of the child."<sup>49</sup> Stephen, in contrast, restricted justifiable abortion to cases where it was "reasonably necessary . . . for the preservation of the life of the mother,"<sup>50</sup> a much more difficult test for a pregnant woman to pass.

Let us turn next to the question of how much scope should be left to the judiciary for expanding the criminal law. Wright, following Bentham, did not like judge-made law. So he specifically eliminated all common law crimes and attempted to be exhaustive as to defenses. Stephen did not exclude common law offenses—except to the extent that the matter was covered by legislation.<sup>51</sup> In particular, Wright eliminated the offense of common law conspiracy, restricting conspiracy to the commission of a "crime," that is, an offense punishable on indictment.<sup>52</sup> Wright earlier had espoused this view in his book on criminal conspiracies,<sup>53</sup> a book inspired by his sympathy

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<sup>47</sup> Stephen's Code, *supra* note 4, § 101.

<sup>48</sup> Wright's Code, *supra* note 3, § 345.

<sup>49</sup> *Id.* § 132(ii).

<sup>50</sup> Stephen's Code, *supra* note 4, § 168.

<sup>51</sup> Stephen attempted to be exhaustive with respect to defenses (such as necessity) without actually excluding the possibility of judges' recognizing new ones. The Blackburn Royal Commission reversed Stephen's approach. The commission eliminated common law offenses but specifically left many defenses to the development of the common law. See *supra* note 5. Stephen supported the commission's position in Stephen, *The Criminal Code (1879)*, 7 *Nineteenth Century* 136, 154 (1880).

<sup>52</sup> Wright's Code, *supra* note 3, § 19.

<sup>53</sup> R.S. Wright, *supra* note 30, at 86. Not only did Wright want to exclude any major judicial development of offenses or defenses but also he wanted to eliminate reliance on earlier cases. He provided: "In the interpretation of this Code, a

for the labor movement. Stephen's Code is not clear on the subject. Conspiracy was certainly to apply to offenses punishable on summary conviction and most probably to conduct that was not itself subject to a criminal penalty.<sup>54</sup>

The final illustration of Wright's and Stephen's differing philosophies is their treatment of the law of attempts. Wright took the view that the purpose of sentencing is deterrence.<sup>55</sup> Thus, with respect to the punishment of attempts, Wright followed the French Criminal Code and punished the attempt in the same manner as the completed crime.<sup>56</sup> Most other codes of the day made the punishment for attempt half that for the completed crime.<sup>57</sup> Since Wright's Code rested on the concept of deterrence, there was no reason for him to mitigate the punishment except in cases where the accused voluntarily desisted from completion. Stephen, on the contrary, taking the view that one of the purposes of punishment is to permit vengeance by society ("vengeance affects, and ought to affect, the amount of punishment"),<sup>58</sup> thought that a lesser punishment would be needed if the crime were not completed. So we find Stephen's Code punishing attempt far less harshly than the completed crime.<sup>59</sup>

As with attempts, Wright's desire to deter persons from engaging in criminal conduct also led him to provide for conviction in cases of impossibility, including cases where the crime was not possible "by reason of the absence of [the] person or thing."<sup>60</sup> Not surprisingly, Stephen took the opposite view and provided that "an act done with intent to commit an offence, the commission of which in the manner proposed was, in fact, impossible, is not an attempt to commit that offence."<sup>61</sup>

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court shall not be bound by any judicial decision or opinion on the construction of any other statute or of the common law as to the definition of any crime or of any element of any crime." Wright's Code, *supra* note 3, § 8(iii).

<sup>54</sup> Stephen's Code, *supra* note 4, § 33(c).

<sup>55</sup> See, in the sources cited *supra* note 1, Wright's Prison Report to the Colonial Office, 1867, Command No. 3961.

<sup>56</sup> Wright's Code, *supra* note 3, § 30(ii).

<sup>57</sup> See *id.* at 103.

<sup>58</sup> J.F. Stephen, *supra* note 44, at 152.

<sup>59</sup> Stephen's Code, *supra* note 4, § 33.

<sup>60</sup> Wright's Code, *supra* note 3, § 30(i).

<sup>61</sup> Stephen's Code, *supra* note 4, § 32.

## WRIGHT'S AND STEPHEN'S CODES: THEIR LATER HISTORY

The Jamaica Legislative Council passed Wright's Criminal Code and Code of Criminal Procedure in 1879. As it turned out, however, these instruments were never brought into force on the island because the Colonial Office decided to put off giving its requisite approval until it was clear what Parliament would do with Stephen's Code. When the Liberals came back into power in 1880, the new Colonial Secretary, Lord Kimberley, wanted to amend Wright's Code to permit accused persons to testify at their own trials—an innovation that was not adopted in England until 1898.<sup>62</sup> Hostility toward Wright's Code started to grow, in particular because of Lord Kimberley's proposal. When Jamaica suggested that the Criminal Code, but not the Code of Criminal Procedure, be implemented, Wright took the position that it should be all or nothing. Finally, as opposition to Wright's Code grew—officials thought that Jamaica was the "victim to an experiment, which certain members of the legal profession at home desired to try"<sup>63</sup>—both codes were repealed. Once again, the lesson may be not to include highly controversial changes in a new or revised code.

The Colonial Office still pressed for the adoption of Wright's Code in other colonies, and it was brought into force in the Caribbean in British Honduras, Tobago, and St. Lucia. The Criminal Code, but not the Code of Criminal Procedure, was adopted in the Gold Coast and may well have swept across the British possessions in Africa but for an interesting turn of events.

In 1899, the Chief Justice of Queensland (Australia), Sir Samuel Griffith, prepared a code based on Stephen's Draft Code of 1878. This code, which substantially modified Stephen's, came into operation in Queensland in 1901.<sup>64</sup> Two years later, in 1903, the Chief Justice of Northern Nigeria, H.C. Gollan, decided to adopt the Queensland Code for his colony.<sup>65</sup>

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<sup>62</sup> Criminal Evidence Act, 1898, ch. 36.

<sup>63</sup> See sources cited *supra* note 1.

<sup>64</sup> Western Australia adopted the Queensland Code in 1902; British New Guinea, in 1903. See generally R. O'Regan, *New Essays in the Australian Criminal Codes* (1988).

<sup>65</sup> Perhaps the fact that Wright's Code had not been adopted by Jamaica, for which it had been drafted, rendered it suspect.

Via Northern Nigeria, the Queensland Code, with various modifications, swept slowly across Africa.<sup>66</sup> Although Southern Nigeria wanted a code based on the Indian model, with which its governor was familiar, the Colonial Office made sure that Southern Nigeria adopted the same code as Northern Nigeria. At the further insistence of the Colonial Office, the Nigerian Code replaced the Indian Penal Code in East Africa. Why the Colonial Office was so keen on eliminating the Indian Code is not entirely clear, but it seems to have stemmed from a bias among the white colonial population, shared by the Colonial Office, in favor of an "English" code. The fact that Macaulay had drafted the Indian Code seems to have been overlooked. The particular "English" code adopted was less important to the Colonial Office than the widespread objection to the Indian or yet another new code. The Queensland Code went on to be adopted in Kenya, Uganda, Tanganyika (now Tanzania), and Nyasaland (now Malawi) in 1930 and Northern Rhodesia (now Zambia) in 1931.

The Queensland Code was also widely adopted outside the African portions of the Commonwealth. Cyprus adopted it in 1928 and Palestine in 1936.<sup>67</sup> Indeed, this code forms the basis of the present Israeli Criminal Code.<sup>68</sup> Stephen's Code also served as the foundation for the Canadian Criminal Code of 1892<sup>69</sup> and the New Zealand Crimes Act of 1893.<sup>70</sup>

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<sup>66</sup> See Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935*, 18 J. Afr. L. 6 (1974).

<sup>67</sup> See O'Regan, *supra* note 64, at 121.

<sup>68</sup> See Shachar, *The Sources of the Criminal Code Ordinance 1936*, 7 *Iyunei Mishpat* 75 (1979) (Hebrew, with English summary); Abrams, *Interpreting the Criminal Code Ordinance, 1936*, 7 *Isr. L. Rev.* 25 (1972).

<sup>69</sup> Can. Stat., 1892, ch. 29, which came into force on July 1, 1893.

The history of the enactment of the Canadian Criminal Code is noteworthy. See generally D.H. Brown, *supra* note 4; Linden, *Recodifying Criminal Law*, 14 *Queen's L.J.* 3 (1989). Sir James Robert Gowan, a member of the Canadian Senate, had played a key role, when he was a county court judge, in the criminal law consolidations enacted shortly after Confederation. Gowan was interested in codification and had met Wright in England in 1871, when the latter was drafting the Jamaican Code. In the early 1870s, Gowan tried to interest the Prime Minister, Sir John A. Macdonald, in codification, but Sir John was preoccupied with the so-called Pacific scandal. In 1877, Gowan approached the Minister of Justice, Sir Edward Blake, on the subject of codification, but Sir Edward was unwilling to take on the task. A dozen years later, Sir John Thompson, then Minister of

There is another curious twist to this story. In 1900 James Fitzjames Stephen's forty-year-old son, a relatively unsuccessful barrister, proposed to the Colonial Office that he redraft Wright's "obsolete" code. The Colonial Office was not enthusiastic about Henry Lushington Stephen's plan. Sir Courtenay<sup>71</sup> warned that "it would be unadvisable to select as a draftsman any person who proceeds on the assumption that the Commissioners' Code of 1879 is the proper model to be followed."<sup>72</sup> Another official counseled the Colonial Secretary, Joseph Chamberlain, that the son's "natural respect for his father's work and great legal attainments may lead him to regard the work from one point of view only."<sup>73</sup> Notwithstanding these concerns, H.L. Stephen was chosen to redraft Wright's Code—perhaps because he was asking only £50 (whereas his father had received £1,500 over twenty years earlier) at a time when the Colonial Office was in a tight financial situation or perhaps because Chamberlain had been a close friend of the elder Stephen. H.L. Stephen's Code of 1901 was a second-rate piece of work. He took out all the good parts of Wright's Code and, in effect, transformed it into his father's code. The result was that the Colonial Office now had two codes, and Wright's Code lost its primacy. The Colonial Office no longer encouraged colonies to adopt the latter. Thus, it is not surprising that the Colonial Office permitted Northern Nigeria to adopt Griffith's Queensland Code in 1903.

That completes my brief history of earlier efforts at codification in the Commonwealth. As I stated at the outset, law reform is normally affected by a great number of factors apart from the merits of the proposals—politics, personalities, and pressure groups, to name several. The crucial events seem, in retrospect, largely unplotted and accidental. In the case of Wright's

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Justice and later Prime Minister of Canada, was more receptive. Two successive Deputy Ministers of Justice, George Burbridge and Robert Sedgewick, actually drafted the code. After enactment, Gowan sent Wright a copy, stating that the drafters had taken as their model "the abundant labour of the great Jurist at home . . . and built on and around that good solid English foundation." See, in the sources cited *supra* note 1, the complete citation to the Public Archives of Canada. In Gowan's eyes, however, "the great Jurist" was Stephen, not Wright.

<sup>70</sup> See F. Adams, *Criminal Law and Practice in New Zealand* (2d ed. 1971).

<sup>71</sup> See *supra* p. 152.

<sup>72</sup> See sources cited *supra* note 1.

<sup>73</sup> *Id.*

Code, these included labor's backing of Stephen's codification efforts; Lord Kimberley's proposal to permit accused persons to give evidence on their own behalf; Wright's objection to enactment of the Jamaican Criminal Code without enactment of the Code of Criminal Procedure; the Colonial Office's decision to appoint Stephen's son to revise Wright's Code; and Northern Nigeria's adoption of the Queensland Code. No doubt, when the codes proposed for England and Wales, the United States, and Canada are finally adopted, the crucial events in their histories will also seem to have been largely unplotted and accidental.