Bijuralism as an Assimilation Tool: Lord Durham's Assessment of the Louisiana Legal System

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I. INTRODUCTION

On June 20, 1837, eighteen-year old Princess Alexandrina Victoria of Kent ascended to the throne of the United Kingdom of Great Britain and Ireland following the death of her uncle, King William IV.¹ The British public knew little about their new queen because Victoria’s overbearing and politically out-of-favor mother had effectively cloistered the young princess behind the impenetrable walls of Kensington Palace throughout much of Victoria’s childhood and adolescence. Yet, despite the lack of familiarity with their sovereign, the British welcomed Victoria’s accession to the throne and saw her as a harbinger of a gilded age for the United Kingdom and its vast empire.²

Indeed, the people of United Kingdom seemed to have every reason to exude self-confidence in 1837. The British nation was an undisputed world power; its empire encircled the globe, and its people found themselves the fortunate benefactors of a mercantile prosperity unparalleled in the annals of modern history. Britannia not only ruled the waves, as the song goes; it ruled the world.³ The feelings of pride and optimism that the British possessed for their nation and empire carried over in the form of widespread popular support for the young queen.

¹. “I was awoke at 6 o’clock by Mamma [The Duchess of Kent], who told me that the Archbishop of Canterbury and Lord Conyngham were there, and wished to see me. I got out of bed and went to my sitting-room (only in my dressing gown) and alone, and saw them. Lord Conyngham (the Lord Chamberlain) then acquainted me that my poor Uncle, the King, was no more, and had expired at 12 minutes passed 2 this morning, and consequently that I am Queen.” Extracts from the Queen’s Journal (June 20, 1837), in The Letters of Queen Victoria: A Selection from her Majesty’s Correspondence Between the Years 1837 and 1861 in three volumes, at vol I, 75 (London, John Murray ed., 1908).

². Lytton Strachey, Queen Victoria 68 (Harcourt, Brace & Co. 1921). See also Stanley Weintraub, Victoria: An Intimate Biography 97–134 (Truman Talley Books 1987); E.G. Colliu, Queen Victoria (Oxford University Press 1965); Christopher Hibbert, Queen Victoria: A Personal History (Basic Books 2000).

Yet, not everyone in the vast British empire celebrated Victoria's coming to the throne. As history teaches, imperial Britain was forged in part through military conquest and treachery. Consequently, many people who found themselves subject to the British crown had no cultural, historic, linguistic, religious, political, or legal commonality with the United Kingdom or its monarch.

Some of these people saw the transfer of sovereignty from a man widely regarded as a bibulous dolt to an inexperienced teenager as an opportune time to express dissatisfaction with imperial rule. Therefore, in 1837, just as Victoria was garnering the reins of empire, long festering resentment and contempt for British rule erupted into open rebellion when the French-speaking population of the province of Lower Canada [present day Québec] took up arms against British authorities.

The rebellions in Lower Canada rattled the Queen and her ministers. Their concern over events in Lower Canada was heightened as news of similar uprisings against British rule in the adjacent province of Upper Canada [present day Ontario] reached the imperial government in London. It was clear both to the neophyte Queen and her ministers that swift, decisive action was necessary if the flames of revolution spreading throughout the Canadian provinces were to be extinguished with minimal damage to the imperial framework. Indeed, in light of the painful lessons that Victoria's grandfather George III learned as a result of his experiences with the insurgent American colonies, the Queen and her government understood only too well the gravity of the situation.

4. Allan Greer, *The Queen is a Whore!, in The Patriots and the People: the Rebellion of 1837 in Rural Lower Canada* 189–218 (University of Toronto Press).
7. Upper Canada was English-speaking and virtually indistinguishable from the former British colonies that became the United States of America. It was in Lower Canada where anti-British sentiment was the strongest. Sir Reginald Coupland, *The Durham Report: An Abridged Version with an Introduction and Notes* (Clarendon Press 1945).
America, both the Queen and her ministers were savvy enough to appreciate the dual importance of crushing the rebellions and stamping out the root causes of discontent that triggered the explosive situation in the first place.

British troops garrisoned in Upper and Lower Canada were quickly and easily able to suppress the rebellions in the provinces, putting an almost immediate end to what had become the first imperial crisis to face the fledgling Queen's government. However, understanding the subcutaneous causes of the unrest in the Canadian provinces would not be as expeditious.

The apparent disloyalty of her Canadian colonies bore heavily on Queen Victoria. After consulting with her Prime Minister, Lord Melbourne, the Queen concluded that a thorough assessment of the Canadian provinces was warranted. The challenge of analyzing the causes of strife in the Canadian provinces, as well as the responsibility of formulating recommendations to the Crown on how to best avoid future malaise between the people and the provincial governments in Upper and Lower Canada, was offered to Lord Melbourne's political rival, John George Lambton, Lord Durham.

Initially, Lord Durham declined the appointment. However, after receiving a personal plea from the Queen and being granted near dictatorial powers, Lord Durham accepted the mission and subsequently was appointed Governor-General and High Commissioner of British North America. After a minor delay, Lord Durham arrived in Canada on May 27, 1838, and immediately began the painstaking process of restoring the absolute authority of the British Crown in both Upper and Lower Canada. Many of Lord Durham's actions proved controversial and he soon found himself alienated from the imperial government in London. Because of this lack of support and poor health, Lord Durham resigned his position as Governor-General after spending only about six months in the Canadian provinces. However, whereas Lord Durham had spent much of his time in Canada engaged in the study of the political, economic, cultural, and social composition of the colonies, he believed that he had gained significant insight into the

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9. Queen Victoria to the King of the Belgians (Dec. 25, 1837), in The Letters of Queen Victoria, supra note 1, at 97.
10. Algernon Cecil, Queen Victoria and her Prime Ministers (Eyre & Spottiswoode 1953).
13. Id.
14. Id.
root causes of unrest in Canada. He also concluded that he had developed a firm understanding of what steps needed to be taken to ensure that Upper and Lower Canada remained under the ironclad control of the British Crown.\textsuperscript{15}

Lord Durham’s findings, as well as his recommendations, were presented to the Crown on February 11, 1839, in the form of the Report on the Affairs of British North America, commonly referred to as The Durham Report.\textsuperscript{16} The crux of his findings are found in the famous passage: “I expected to find a contest between a government and a people: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.”\textsuperscript{17}

Writing in an unarguably racist and arrogant manner, Lord Durham derided the French in Lower Canada for clinging to French institutions: “They remain an old and stationary society, in a new and progressive order...They [cling] to ancient prejudices, ancient customs and ancient laws, not from any strong sense of their beneficial effects, but with the unreasoning tenacity of an uneducated and unprogressive people.”\textsuperscript{18} Moreover, emphasizing the superiority of British law, commerce, culture, and society, Durham concluded that the North American continent was not big enough for both French and English institutions. If North America were ever to realize its fullest potential, “Lower Canada must be English, at the expense, if necessary, of not being British.”\textsuperscript{19} After all, according to Durham, Lower Canada, as well as the whole of British North America, was “the rightful patrimony of the English people.”\textsuperscript{20}

In short, Lord Durham advocated the need for the “inferior” French population of Lower Canada to assimilate:

I entertain no doubts as to the national character which must be given to Lower Canada; it must be that of the British Empire.

\textsuperscript{17} \textit{Id.} at Vol. 2, 16.
\textsuperscript{18} \textit{Id.} at Vol. 2, 30–31.
\textsuperscript{19} \textit{Id.} at Vol. 2, 61.
\textsuperscript{20} \textit{Id.} at Vol. 2, 13. “The country which has founded and maintained [the Canadian] colonies at a vast expense of blood and treasure, may justly expect its compensation in turning their unappropriated resources to the account of its own redundant population.” Here, Durham uses the term “English” to refer to all English-speaking people.
The language, the laws, the character of the North American Continent are English; and every race but the English (I apply this to all who speak the English language) appears there in a condition of inferiority. It is to elevate them from that inferiority that I desire to give to the Canadians our English character.\(^{21}\)

To effectuate the assimilation of French-Canadians as quickly as possible, Lord Durham advocated that the imperial parliament pass a bill uniting Upper and Lower Canada under a single parliament. The supposition was that the French-speaking population of Lower Canada would forever abandon their “vain endeavor to preserve a French Canadian nationality,” once they were subject to the “vigorous rule of an English majority.”\(^{22}\) In 1840, acting on Lord Durham’s recommendation, the British Parliament passed the Union Act uniting the Canadian provinces, thus creating an English-speaking majority in the united provinces, thereafter known as Canada East and Canada West.\(^{23}\)

Lord Durham’s *Report on the Affairs of British North America* is to French-Canadians what Adolf Hitler’s *Mein Kampf* is to Jews. Its glaring racism, chauvinism, arrogance, and prejudicial views of French institutions and laws, and apparent advocacy for the eradication of the French in Lower Canada have earned Lord Durham undying infamy among French-speaking Canadians.

Although Lord Durham and Adolf Hitler are often compared to one another, the former often portrayed as a nineteenth century version of the latter, they are, in fact, quite different.\(^{24}\) Adolf Hitler advocated the annihilation of Jewish institutions and people from the earth and found his Final Solution in theretofore obscure places such as Auschwitz, Treblinka, and Dachau. In contrast, Lord Durham called for co-existence of French and English people and institutions in Canada. By giving equal footing to both French and English institutions, Lord Durham believed that French-Canadians eventually would comprehend the “hopeless inferiority” of French institutions, particularly French legal institutions, and, consequently, would become Anglicized in an almost imperceptible manner. This

\(^{21}\) Id.


\(^{23}\) Lord Elton, supra note 6, at 279–97.

benevolent assimilation would result in the extermination of the French language and legal institutions from the North American Continent.

Lord Durham's Final Solution was not found in Canada, or remote eastern European villages; it was, interestingly, found among land of cypress trees, alligator and mosquito-infested swamps, and murky bayous: Louisiana. Indeed, it was in Louisiana where Lord Durham believed the Final Solution to the French-Canadian problem lie.

Upon transfer of sovereignty of Louisiana from France to the United States in 1803, the Americans seemingly took no steps to forcefully purge the territory of its French language and civil law. On the contrary, as the French constituted the majority of the population in Louisiana, the French language appeared firmly embroidered into the fabric of Louisiana society. In addition, although Thomas Jefferson would have preferred the total exorcism of French civil law from Louisiana, Louisianians opted to retain it as the substantive private law of the state. The public, procedural, and criminal laws of Louisiana, however, became Americanized.

Thus, with the advent of American control, Louisiana became legally a mixed or bijural legal system. The mixed character of the legal system in Louisiana, together with the gradual influx of English-speaking Americans, resulted in the steady but sure erosion of French law, language, and customs in Louisiana. Moreover, as Lord Durham saw it, the ostensible parity of language and law in Louisiana effectuated the Anglicization of Louisiana in a manner that the French-speaking population was incapable of perceiving or halting. Thus, for Lord Durham, Louisiana and its mixed legal system presented a perfect and humane model for the eradication of an undesirable minority. Indeed, the benign manner in which the Louisiana mixed legal system facilitated the assimilation of the French-speaking population of Louisiana into the American fold was exactly what was needed in Canada where the Francophone population remained resolutely opposed to the adoption of English language and law. Lord Durham's Report recommended implementation of the Louisiana model in Lower Canada to achieve similar results.

For Louisiana-trained lawyers, Lord Durham's Report should be of particular interest. It delves into the same French versus English, civil-law versus common-law issues that have peppered the legal history of the state. While studying at any one of the state's four law schools, a budding law student is taught to admire both the beauty and simplicity of the civil law as well as to develop an appreciation for the uniqueness of Louisiana's bijural legal system. In addition, in recent years, there have been several conferences and scholarly publications
celebrating the mixed character of the Louisiana legal system. Yet, not so long ago, a relatively obscure British official concluded that Romano-Germanic based civil law was archaic and counterproductive to the commercial development of the North American Continent. This official further surmised that the mixed legal system that is so widely praised today was of tremendous benefit in that it had a far more sinister and diabolical use, and by looking southward to Louisiana, one could see the effectiveness of the mixed legal system as an assimilation tool.

Lord Durham’s assessment of the Louisiana legal system hitherto has received no relevant treatment in the collective legal writings of Louisiana. Therefore, in an effort to introduce Lord Durham into the legal scholarship of the state, this paper serves to provide a limited overview of Lord Durham’s infamous Report of the Affairs of British North America. It will include a discussion of Lord Durham’s findings, attitudes toward the French, and views on the civil law in force in portions of Lower Canada. Following this discussion, this paper will provide a summary of how Lord Durham perceived the Louisiana legal system and why he considered it as the ideal model for carrying out the assimilation of the French-speaking people of Lower Canada. Finally, this paper will conclude with a discussion of whether Lord Durham’s assessment of the Louisiana bijuralism as an assimilation tool was, in fact, totally accurate.

II. THE DURHAM REPORT

Notwithstanding the vilification The Durham Report has received for its racist and prejudicial statements, it has long been recognized as the greatest state document in British imperial history. The Report began with an introduction of the importance of the mission the Queen had entrusted to Lord Durham and then launched into a description of British North America and the ills facing it. Lower Canada was dealt with in the greatest detail, most likely because this province served as the focal point of unrest in British North America. Treatment of Lower Canada was followed by an exposé on the predominantly English-speaking province of Upper Canada. Newfoundland, and the Eastern Provinces (New Brunswick, Nova

26. Treatment of the Durham Report in its entirety is beyond the scope of this short paper.
27. Coupland, supra note 7, at xivi.
28. Id.
Scotia, and Prince Edward's Island), were discussed only briefly, followed by discussions on public lands and emigration. The Report concluded with an analysis of Lord Durham's findings and the recommendations needed to alleviate the problems causing sedition within Britain's North American colonies.

At the outset, Lord Durham indicated that prior to beginning his study he assumed the causes of strife in the Canadian colonies to be political, "a quarrel between the executive government and the popular branch of the legislature." He explained his preconceived notions regarding the Canadian provinces as follows: "I...imagined that the original and constant source of the evil was to be found in the defects of the political institutions of the Provinces; that a reform of the constitution, or perhaps merely the introduction of a sounder practice of administration of government, would remove all the causes of contest and complaint."

However, as Lord Durham's investigation progressed, he came to appreciate that the real nature of the problem in the Canadian provinces, specifically Lower Canada, was not political. He discovered that "there existed a far deeper and far more efficient cause [of strife], a cause which penetrated beneath the political institutions into its social state, a cause which no reform of constitution or laws...could remove." This cause, this "great parent evil of Lower Canada," was, Durham inferred, "the hostile division of races." Discord that seemed to emanate from a political origin was, according to Durham, but a form of a "constant and all-pervading quarrel [between] French and English." Lord Durham expected to find a contest of classes. What he found was a contest of races, or, as stated in the previous section, "two nations warring in the bosom of a single state."

At first, Lord Durham was reluctant to accept his own conclusion that the primordial cause of unrest in the Canadian provinces was apolitical: "A quarrel based on the mere ground of national animosity, appears so revolting to the notions of good sense and charity prevalent in the civilized world." Further, he found it "difficult...to comprehend the intensity of the hatred which the difference of language, of laws, and of manners, creates between those who inhabit

30. Id. at 15.
31. Id.
32. Id.
33. Id.
34. Lucas, supra note 16, at 27.
35. Id. at 16.
36. Id. at 21.
the same village, and are citizens of the same state.”\textsuperscript{37} However, as Lord Durham delved further into his study of the social, legal, and political institutions of Lower Canada, it became clear to him that the underlying and common denominator of all unrest in the province was the animosity between the French and English:

At the root of the disorders of Lower Canada, lies the conflict of the two races which compose its population; until this is settled, no good government is practicable; for whether the political institutions be reformed or left unchanged, whether of the powers of the Government be entrusted to the majority or the minority, we may rest assured, that while the hostility of the races continues, whichever of them is entrusted with power, will use it for partial purposes.\textsuperscript{38}

Having identified the source of unrest in the provinces, Lord Durham devoted much of his \textit{Report} to analyzing the differences between the French and English in Canada. This analysis served several purposes. First, it sought to place the blame for unrest in Canada squarely on the French. Second, it attempted to demonstrate the superiority of the all things English while simultaneously debasing all things French. Finally, by stressing the English superiority in intelligence, industry, manner, and laws, Lord Durham laid the foundation for his conclusion that French-speaking Canadians needed to be Anglicized.

Lord Durham characterized the French-Canadians as the “remains of an ancient colonization [who] are and ever must be isolated in the midst of an Anglo-Saxon world.”\textsuperscript{39} This “conquered people”\textsuperscript{40} was “uninstructed, inactive, unprogressive,” and “wanting in education.”\textsuperscript{41} Lord Durham’s less-than-objective assessment of the French is best demonstrated in the following passage:

There can hardly be conceived a nationality more destitute of all that can invigorate and elevate a people, than that which is exhibited by the descendants of the French in Lower Canada, owing to their retaining their peculiar language and manners. They are a people with no history, and no literature. The literature of England is written in a language that is not theirs; and the only literature which their language renders familiar to them, is that of a nation from which they have been separated by eighty years of foreign rule, and still more by those changes

\textsuperscript{37.} Id. at 17.  
\textsuperscript{38.} Id. at 72.  
\textsuperscript{39.} Id. at 291.  
\textsuperscript{40.} Lucas, \textit{supra} note 16, at 289.  
\textsuperscript{41.} Id. at 28–29.
which the Revolution and its consequences have wrought in the whole political, moral and social state of France.\textsuperscript{42}

From a legal standpoint, Durham concluded that French-Canadian backwardness was a direct result of blind adherence to "old and defective" laws and institutions of their former colonial master.\textsuperscript{43} Indeed, it was, according to Durham, the repressive institutions of pre-revolutionary France and the antiquated civil law that dulled the intellectual senses and entrepreneurial spirit of the French in Lower Canada in the first place. Durham’s assessment was damning:

The institutions of France, during the period of colonization of Canada, were, perhaps, more than those of any other European nation, calculated to repress the intelligence and freedom of the great mass of the people. These institutions followed the Canadian colonist across the Atlantic. The same central, ill-organized, unimproving and repressive despotism extended over him. Not merely was he allowed no voice in the government of his Province, or the choice of his rulers, but he was not even permitted to associate with his neighbors for the regulation of those municipal affairs, which the central authority neglected under the pretext of managing. He obtained his land on a tenure singularly calculated to promote his immediate comfort, and to check his desire to better his condition; he was placed at once in a life of constant and unvarying labor, of great material comfort, and feudal dependence. The ecclesiastical authority to which he had been accustomed established its institutions around him, and the priest continued to exercise over him his ancient influence. No general provision was made for his education; and, as its necessity was not appreciated, the colonist made no attempt to repair the negligence of his government.\textsuperscript{44}

The continued use of pre-revolutionary French civil laws hindered, if not totally prevented, the French in Lower Canada from ever improving their lot. Until change was effectuated, that is, until common-law was embraced in Lower Canada, Durham concluded that the commercial, societal, and legal advancement of the province would be stymied.

The impact of French property and inheritance law in effect in the French portions of Lower Canada was particularly worrisome for Durham.\textsuperscript{45} In 1627, the French had established a system of seigniorial

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  \item \textsuperscript{42} \textit{Id.} at 294–96.
  \item \textsuperscript{43} \textit{Id.} at 48.
  \item \textsuperscript{44} \textit{Id.} at 30.
  \item \textsuperscript{45} Not all of Lower Canada adhered to French property laws. The Eastern
tenure in New France based on the land tenure system in place in old régime France. Under this system, land was divided into narrow strips moving back from the St. Lawrence River. These plots of land were granted by the French colonial administration to either members of the Roman Catholic clergy or to elite members of the colony. The elites, or the "seigneurs," along with the Roman Catholic Church, became responsible for dividing and administering the land and were required, as a condition to retaining their seigniorial tenure, to grant tracts of land within the seigniory and to populate the land through the recruitment of settlers. The settlers, or habitants, were then granted a plot of land in return for a yearly payment to the seigneur, in cash, produce, or both. The individual plots of land granted to the habitants were further subdivided with the passing of generations and each subsequent heir would receive an ever-smaller share of the original property.

This system of land tenure created feudal obligations between the habitants and the seigneur and tended to bind the habitants and their posterity to the land. Durham viewed the seigneurial tenure as both abusive and dangerous to the future development of Lower Canada and the entire North American Continent. As Durham saw it, there was no place in a large and unsettled continent such as North America for the operation of ancient French property laws that continuously partitioned land among heirs into ever-diminishing parcels to the point where the land became unproductive. These laws tied people to existing tracts of land, prevented efficient land use, fostered complacency, and tended to discourage the adventurous spirit in people so vital for the development of the untapped resources of the continent. French law was, according to Durham, "backwards" and "antiquated," and whereas the whole interior of the British dominions would eventually be filled with an English population, it would be unjust for the "prosperity of this great majority, and of this vast tract of country" to be impeded by the artificial bar of [French] laws. English law, which allowed for the easy alienation of land and provided for the amassing of wealth and the trans-generational

Townships of Lower Canada were primarily English and adhered to the English free and common soccage form of land tenure.


47. Munro, The Seignorial System in Canada: A Study in French Colonial Policy (Longmans, Green Pub. 1907).

enlargement of estates, was, in Durham's opinion, the only acceptable means of developing the North American Continent. If Lower Canada were to ever realize its fullest potential, it had to be governed by an English population utilizing English legal institutions.49

Given the "indisputably superior political and practical intelligence" of the English,50 as well as the historical animosity and prejudices that the English and the French had toward each other,51 it was not surprising that the co-existence of the French and English within in the same geographic confines would be incendiary. Durham recognized the inevitability of collision: "it is scarcely possible to conceive descendants of any of the great European nations more unlike each other in character and temperament, more totally separated from each other by language, laws, and modes of life, or placed in circumstances more calculated to produce mutual misunderstanding, jealousy, and hatred."52

Durham believed that it was jealousy, especially on the part of the French, which was at the core of the problem:

The French could not but feel the superiority of English enterprise; they could not shut their eyes to [English] success in every undertaking in which they came into contact, and to the constant superiority which [the English] were acquiring… The French complained of the arrogance and the injustice of the English.53

The English, on the other hand, were, by virtue of their race, unable to look upon the "strange" manners, customs, and laws of the French with complacency and took no pains to conceal their contempt and intolerance.54 The English resented the French and accused them of "the vices of a weak and conquered people."55 The jealousy between the French and English, Durham believed, would have materialized regardless of what form of government was in place: "A jealousy of two races, so long habituated to regard each other with hereditary enmity, and so differing in habits, in language and in laws, [was] . . . inevitable."56

The French/English clash in Lower Canada had rendered the province ungovernable. Tension among the races had permeated into every fabric of society, including the judiciary where the conflict

49. Id.
50. Id.
51. Id. at 46.
52. Id. at 27.
53. Id. at 38.
55. Id.
56. Id. at 63.
appeared to present "an insurmountable barrier to the impartial administration of justice." In light of the deeply embedded linguistic, cultural, and legal obstacles existing between the French and English Canadians, and considering the intensity of the hatred which each seemed to have for the other, Lord Durham came to the conclusion that any rapprochement between French and English was inconceivable and that differences between both camps were irreconcilable. Peaceful co-existence of the races and legal institutions in Lower Canada was not an option. Lower Canada could not, under these circumstances, be both French and English, if it were ever to prosper. One of them would have to go. The question was, "which one?"

Durham posed the dilemma in the following manner:

Before deciding which of the two races is now to be placed in the ascendant, it is but prudent to inquire which of them must ultimately prevail; for it is not wise to establish today that which must, after a hard struggle, be reversed tomorrow... The question is, by what race is it likely that the wilderness which now covers the rich and ample regions surrounding the comparatively small and contracted districts in which the French Canadians are located, is eventually to be converted into a settled and flourishing country?

For Durham, the answer was obvious. The future of Lower Canada, indeed the future of all Canada and the North American continent, was English, both in language and in law. Until Canada was Anglified, it would be idle for England to devise schemes for its improvement. Indeed, if Canada were not Anglified, it was not worth keeping. Thus, for Lord Durham, the assimilation of the French-speaking people of Lower Canada was crucial to effective and continued British rule.

Having concluded that assimilation was imperative, Durham next turned his attention to how assimilation could be achieved. Like Alexis de Tocqueville, Durham believed that the assimilation of French-Canadians had already begun and that the French were powerless to arrest the process. However, although espousing the

57. Id. at 56. Durham illustrates the breakdown of the jury system in Lower Canada by two cases. The first involved the murderers of a French Canadian loyal to the British crown who were acquitted by a French jury in the face of unquestioned evidence. The second involved a jury that was unable to agree because all its French members were on one side and all its English members were on the other.
58. Id. at 290.
59. Id. at 296.
60. Lucas, supra note 16, at 295; Alexis de Toqueville, Democracy in America,
belief that assimilation was inevitable, Durham surprisingly demonstrated a compassionate air toward the French-Canadians and their English destiny:

It may be said, that, if the French are not so civilized, so energetic, or so money-making a race as that by which they are surrounded, they are an amiable, a virtuous, and a contented people, possessing all the essentials of material comfort, and not to be despised or ill-used, because they seek to enjoy what they have, without emulating the spirit of accumulation, which influences their neighbors. Their nationality is, after all, an inheritance; and they must be not too severely punished, because they have dreamed of maintaining on the distant banks of the St. Lawrence, and transmitting to their posterity, the language, the manners, and the institutions of that great nation, that for two centuries gave the tone of thought to the European Continent. 61

This commiseration led Durham to conclude that assimilation of the French-Canadians must not be undertaken in a manner “so rapidly or so roughly as to shock the feelings and trample on the welfare of existing generations.” 62 Rather, Durham advocated an assimilation process executed over an extended multigenerational period. This gradual approach was to be preferred for the following reasons. First, it would mitigate French-Canadian resentment and resistance. Second, it would obviate the need for heavy-handed forced assimilation, such as the Russians implemented in Poland following the partition of that nation. 63 Third, it would avoid the need to exile mass portions of the Francophone population as had occurred during the exile of French-speaking Acadians in the 18th century. 64 Finally, it would pacify the Americans who Durham believed would see forced assimilation of French-Canadians as British aggression and, in response, potentially could come to the defense of their French-speaking neighbors to the north.

Lord Durham’s assimilation proposal involved several steps. First, and most immediately, it called for the union of Lower and Upper Canada into one province. By doing this, the 400,000 English-

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62. Id. at 288.
64. See Richard Edouard, Acadia: missing link of a lost chapter in American history, by an Acadian (Home Book Co. 1895).
speaking colonists of Upper Canada and the 150,000 English-speaking colonists and 400,000 French-speaking colonists of Lower Canada would be united under one parliament. Under such a system, the French would continue to be the majority population in Lower Canada. However, they would become a minority population in a larger whole, thus, Durham predicted, placing control of the legislative branch in the hands of the English-speaking majority.

The second step of the assimilation proposal involved the development of imperial policies that would encourage emigration of English-speaking colonists to Lower Canada. Durham believed such policies would allow the English speaking population to surpass numerically the French-speaking population in Lower Canada, thus strengthening English domination of the province.

The final step of Lord Durham's assimilation process involved the maintenance of status quo in Lower Canada. Simply put, Durham recommended doing nothing vis-à-vis the French language and French civil law other than letting them continue to exist contemporaneously and equally with English language and common law. Linguistically, Durham advised the government to do nothing to prohibit the French language while taking no steps to either encourage or artificially preserve it. The numerical and commercial superiority of the English would ultimately trigger the French language's demise. Legally, by creating a bijural legal system, antiquated civil law would come face-to-face with the more progressive Anglo-American common law and, through natural selection, the French civil law system eventually would become extinct. Indeed, for Durham, the most effective means of removing the French civil law system would be to tolerate its continued use alongside the common law in a mixed legal system. It is here that Lord Durham directed the Crown's attention to Louisiana and its mixed legal system.

III. THE LOUISIANA MODEL

For Durham, American policy in Louisiana subsequent to its acquisition from France presented an ideal model for effectuating the demise of the French language and law in Lower Canada. Durham initiated his discussion of Louisiana as follows:

65. Lucas, supra note 16, at 299 ("The only power that can be effectual at once in coercing the present dissatisfaction, and thereafter obliterating the nationality of the French Canadians, is that of a numerical majority of a loyal and English population.").

The influence of perfectly equal and popular institutions in effacing distinctions of race without disorder or oppression, and with little more than the ordinary animosities of party in a free country, is memorably exemplified in the history of the state of Louisiana, the laws and population of which were French at the time of its cession to the American Union. And the eminent success of the policy adopted with regard to that State, points out to us the means by which a similar result can be effected in Lower Canada.67

Following this introductory passage, Lord Durham launched into an explanation of the circumstances leading up to Louisiana statehood. He wrote that when the Americans first gained control of the territory that eventually became the State of Louisiana, the United States federal government appointed native-born, English-speaking public officers to govern the majority French-speaking territory. This, according to Durham, was perfectly natural under the circumstances.68 On April 30, 1812, having attained the requisite numerical population, the portion of the Louisiana Purchase known as the Territory of Orleans was granted statehood under the name “Louisiana.” French-speaking Louisiana was admitted to the federal union on precisely the same terms as any other population or territory.69

Durham then turned his attention to the Constitution drafted for the State of Louisiana.70 He noted that the state constitution was framed in a manner that gave precisely the same power to the majority as was enjoyed in the other states of the union.71 In his discussion of the Louisiana Constitution, Lord Durham singled out the clause specifying that the public acts of the state were to be written “in the language in which the constitution of the United States is written,” namely English.72 This clause, Durham remarked, had been interpreted as an indication that the United States federal government had, “in the most violent manner swept away the use of the French language and laws.”73 Nothing, Durham opined, could “be more contrary to the fact.”74

68. Id. at 300.
69. Id.; see also Enabling Act of Feb. 20, 1811, ch. 21, 2 Stat. 641.
70. Durham is referring to the Louisiana Constitution of 1812. See also Warren M. Billings, From this Seed: The Constitution of 1812, in Billings and Haas, In Search of Fundamental Laws: Louisiana’s Constitutions (1993).
71. See Lucas, supra note 16, at 300.
72. La. Const. of 1812 art. VI, § 15.
74. Id. at 300.
Next, Durham turned his attention to the Louisiana legal regime. He asserted that when the Americans assumed control of Louisiana they made "no alteration of the laws." This assertion is clearly erroneous. Although the substantive private law of the state of Louisiana remained civilian in nature, the public, procedural, and criminal laws of the state became Anglo-American shortly after American acquisition of the territory. However, this appears to be a misstatement on Durham's part because he continued his description of the Louisiana legal system with a discussion of Edward Livingston and his attempt to bring clarity to Louisiana law through the development of a code of laws. Therefore, it is logical to assume that Durham, in making this statement, intended to refer to the substantive private law of the state, which remained in its civilian, pre-American form.

"Mr. Livingstone's" [sic] code, which Durham described as "the glory of Louisiana," was "undertaken under the auspices of the legislature, in consequence of the confusion arising in the administration of the English and French system[s] of law in the same courts." While Lord Durham correctly postulated that the decision to prepare a code of the civil laws in force in the Territory of Orleans was an expression of the legislative will of the people of Louisiana, Lord Durham appears to have had no understanding of the underlying reasons behind the decision to draft and adopt a civil code in Louisiana. Indeed, perhaps in his judgment to label everything a contest between French and English, Lord Durham assumed that the purpose behind the Louisiana civil code was to take two legal systems, one civilian and one common, and merge the two into a collective whole. This was, as we know, not the justification for the drafting and subsequent adoption of a civil code for the state of Louisiana. The objective of the initial civil code was to clear up the confusion surrounding the state’s legal system that resulted from the mind-boggling fusion of Spanish and French law that was aggravated by the abrogation of any laws contrary to the Constitution of the United States or irreconcilable with it.

75. Id.
77. See Lucas, supra note 16, at 300.
78. Id. Durham does not clarify whether he is referring to the Civil Code of 1825 or the Code of Practice of 1825, both of which Livingston helped to prepare.
In addition, Lord Durham does not seem to realize that there had been, by the time he wrote his *Report*, two civil codes in effect in Louisiana, nor does he appear aware that others, in addition to Edward Livingston, were responsible for bringing the Louisiana civil codes to fruition. Notwithstanding these factual errors, Lord Durham presented Louisiana to the British imperial government as a tangible example of how two diverse legal traditions could co-exist by combining both systems of law into one code applicable to all. By homogenizing the two legal systems and retaining the best elements of each, Durham explained how Louisiana had produced a mixed system which was palatable to all and prevented the French and English from “forc[ing] their respective laws on each other.”

Following Lord Durham’s “illuminating” glimpse into the development of the civil code and the dual nature of Louisiana law, he provided the Crown with a description of the extent to which the French and English citizens’ involvement in the government was comparable. His description revealed an equal, non-discriminatory process:

Every provision was made in Louisiana for securing to both races a perfectly equal participation in all the benefits of the Government.... In all cases in which convenience requires it, the different parties use their respective languages in the courts of justice, and in both branches of the legislature. In every judicial proceeding, all documents which pass between the parties are required to be in both languages, and the laws are published in both languages. Indeed the equality of the two languages is preserved in the legislature by a very singular contrivance; the French and English members speak their respective languages, and an interpreter, as I was informed, after every speech, explains its purport in the other language.

All things being equal, the French in Louisiana could not, according to Durham, blame their government or legal institutions for any grievances, real or imaginary, that they might have had regarding their social and economic situation. Within Louisiana, the French had the same rights, responsibilities, access to government and the judiciary as their English-speaking compatriots. This equal access to justice and political process removed the government from any conflict that might arise between English and French factions within the state.

82. *Id.*
At first, the French-Louisianians, like the French population in Lower Canada, were deeply resentful and intensely jealous of the English speaking Americans who flooded into the newly-opened territory to "avail themselves of its great natural resources and its unequalled commercial advantages." Like everywhere else on the North American continent, Anglophones, due to their energy, habits, and superior business skills, gained control of most of the commercial activity of the state and accumulated vast wealth.

Although envious, the French, in light of the equal station provided to them under their constitution in the operation of the government, could not claim favoritism or "excite murmurs against the Government," as Anglophone domination of commerce was a direct result of English "superiority in a perfectly free competition."

Following the initial venomous jealousy and enmity, French Louisianians began to understand what it was about the English-speaking Americans that allowed them to be successful in all endeavors. Unrelenting envy, coupled with a newly awakened drive to succeed, caused the French in Louisiana, who Durham described as the "less active race" to emulate English achievement and to enter into open competition with English-speaking Louisianians on every front.

While jealousy between the French and English still existed in Louisiana at the time of the redaction of the Durham Report, it had metastasized into something productive. Moreover, although distinctions between the French and the English still caused division within Louisiana, such divisions, while distinct, were no longer hostile. Louisiana society had become, since statehood, more socially mixed and the divisions on the basis of race had become less pronounced. Instead of quarreling over race, both French and English Louisianians found that their local politics had been merged into those of the American Union and their newspapers contained the same "party recriminations and party arguments" found in all other parts of the American republic. For Durham, the explanation of the détente between the English and French races in Louisiana was clear:

83. *Id.*
84. *Id.* at 302.
85. *Id.*

The jealousies in the city of New Orleans were so great at one time, that the Legislature of the State, at the desire of the English, who complained of the inertness of the French, formed separate municipalities for the French and English parts of the city. These two municipalities are now actuated by a spirit or rivalry, and each undertakes great public works for the ornament and convenience of their respective quarters.

*Id.*

87. *Id.* It is interesting to note the similarity to the Federalist Paper, No. 10.
The French of Louisiana, when they were formed into a state, in which they were a majority, were incorporated into a great nation, of which they constituted an extremely small part. The eye of every ambitious man turned naturally to the great centre of federal affairs, and the high prizes of federal ambition. The tone of politics was taken from those by whose hands its highest powers were wielded; the legislation and government of Louisiana were from the first insignificant, compared with the interests involved in the discussions at Washington. It became the object of every aspiring man to merge his French, and adopt completely an American nationality. What was the interest of individuals, was also the interest of the State. It was its policy to be represented by those who would acquire weight in the councils of the federation. To speak only a language foreign to that of the United States, was consequently a disqualification for a candidate for the posts of either senator or representative; the French qualified themselves by learning English, or submitted to the superior advantages of their English competitors. The representation of Louisiana in Congress is now entirely English, while each of the federal parties in the State conciliates the French feeling, by putting up a candidate of that race. But the result is, that the Union is never disturbed by the quarrels of these races; and the French language and manners bid fair, in no long time, to follow their laws, and pass away like the Dutch peculiarities of New York. 88

If Lower Canada were ever to remedy the disorders ailing it in an orderly and expedient manner, it would need to create a popular government, permanently dominated by an English majority through the unification of the Canadian provinces, thus making French-speaking Lower Canada but a part of a greater English-speaking whole. At the same time, Lower Canada would need to implement a legal system that tolerated, but by no means safeguarded, French language and civil law by placing them at par and in competition with English language and common law. Through English superiority, French inability to comprehend due to feeblemindedness, increased emigration of Anglophones into the colony, and acquiescence of a bijural and bilingual society, Lower Canada could, following the Louisiana model, establish a system that maintained stability while simultaneously ridding the state of the plague that was the French

88. Id. at 303. New York, like Louisiana “suffered the under the same evil” of the existence of conflicting systems of law.
language and civil law. Indeed, Durham was convinced that what he believed to have occurred in Louisiana was duplicable in Lower Canada.

IV. CONCLUSION

Lord Durham’s comprehension of Louisiana history, law, and politics was obviously simplistic and flawed. This lack of understanding, coupled with several false assumptions, clouded his treatment of the dual legal system in Louisiana. One crucial point that Durham seemed to ignore or be unaware of in his study of Louisiana was the fact that the mixed legal system was a deliberate choice of the people of Louisiana as expressed through their Legislature. It was not, as Durham appeared to believe, the result of a calculated policy emanating from those at the helm of federal power.

Nevertheless, Lord Durham’s assimilation proposal, based on what he believed to be the Louisiana experience, shows a side of the mixed jurisdiction not often portrayed. As lawyers, we often dwell on the inherent tension existing within mixed legal systems and the unique results that ensue from such systems. Moreover, we tend to compare and contrast particular civilian and common law principles and study how each provision interacts with the other when found within the same geographic sphere. Mixed jurisdictions are dynamic, exciting, and ever-evolving. In Louisiana, the bijural nature of the legal regime is a source of pride, a thing that makes Louisiana original within the American republic. In general, Louisiana jurists embrace and celebrate the dual legal system notwithstanding the ribbing and ridicule it often receives from their legal brethren in sister states. Yet, it is rarely considered that perhaps such a mixed system has been created and perpetuated for a deadlier political end. Lord Durham presented this view and, as Durham’s case for the mixed jurisdiction as an assimilation tool was premised on the Louisiana legal system, his treatment of Louisiana should receive more widespread attention among Louisiana jurists interested in such matters.

Was Lord Durham correct? Would the fusion of two distinct languages and legal cultures within a single political and geographic jurisdiction spearhead the gradual demise of one of the cultures? Unlike Durham, we have the benefit of history.

In Lower Canada, today Québec, almost one hundred forty years have passed since the creation of the confederation that made Québec a French-speaking province in the majority English-speaking Dominion of Canada. Yet, today, the French language thrives in Québec and is the overwhelming vernacular of the Québécois. Legally, Québec continues to be a mixed legal system, possessing elements of both the civil and common law. It remains a fount of
civilian legal thought on the North American continent, and its civilian character is firmly embedded and seemingly secure.

Louisiana has not fared so well. Although some may disagree, the French language has long ceased to be a working language in Louisiana. The loss of the French language in Louisiana resulted from, as Durham predicted, the influence of an English-speaking majority, the absorption of the state into a larger, English-speaking country, and the refocusing of politics from a local to a national level. Legally, however, Louisiana continues to maintain its civilian based law within its unique bijural system. Although there has been a steady erosion of the civil law in Louisiana, it remains entrenched within the state's judicial scheme.

Thus, at first glance, Lord Durham's assimilation plan modeled in part on the Louisiana mixed legal system appears to be a failure. However, one should not be so quick to conclude Lord Durham was totally wrong. He did, after all, suggest that the process would be lengthy and transcend generations. Perhaps the process is taking longer than even Lord Durham envisioned; perhaps one day he will be vindicated. Only time will tell.