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CRIMINALIZATION OF DRUG ACTIVITY IN CANADA

Robert Montserin

1981

Submitted to the School of Graduate Studies,
University of Ottawa, in partial fulfillment
of the requirements for the degree of
Master of Arts

ACKNOWLEDGEMENTS

Most of the professors at the Department of Criminology have directly or indirectly contributed to the development of this thesis. I want in particular to mention Dr. Jayewardene and Professor Dandurand for their invaluable contributions to my earlier efforts. Especial thanks to Dr. Grygier, my thesis advisor, for his patience, guidance and support, over and above the call of duty.

I am also indebted to Merle and Gloria for the varied support they have provided during the preparation of this thesis.

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CHAPTER I

Introduction

The purpose of this thesis is to throw some light on the existing controversy regarding the traditional consensus theory of law and the new conflict theory of legislation. The method will be essentially historical and confined to one type of legislation--drug laws--in one country, Canada. The thesis will attempt to show how drug laws were enacted; who were the main actors; what were their motives and arguments; and whether the enactment of drug legislation was based on a consensus of norms and values or on conflict of interests.

Drug legislation was chosen as a test case because it can be investigated as the enactment of a new law rather than a change in an existing law. It is also an area in which widespread controversy exists both about the taking of drugs, and the effect of drug legislation on individual freedom and the content of law itself. Finally, whereas in the year 1900 not one single person was in a Canadian prison on account of the drug habit, today there are hundreds of persons in our penal institutions as a result of drug legislation.

The controversy regarding consensus and conflict extends beyond the criminal law. Two different explanations of social groups and social norms, of which legal norms are just a part, coexist at present. Within the more specific

domain of the criminal law, consensus and conflict theories have had somewhat different meanings, and the same applies to the corresponding schools of criminology.

Traditional criminology, which reflects a consensus perspective, has focused on the nature and circumstances of the errant individual, on the degree to which his criminality was within him or was the result of the influence of his own environment, and on the view that behaviours defined as criminal reflect a general consensus of disapprobation. It has concerned itself with the structures created to counter criminal behaviour, to preserve social order and decency, to protect persons and property, and to provide occasional adjustment to the criminal justice machinery. The idea of criminality within the person or his environment is the hallmark of the consensus view of society.

The focus of traditional criminology has been challenged by theoreticians who support the conflict view of society that criminality is defined by a group different from the one to which the offender belongs. They have suggested that normative social problems have been defined in other terms by those individuals who have the power to do so and that the criminality of most offences lies not in the intrinsic nature of the act itself but in the dynamics surrounding the legal definition of the act.

Whether criminologists subscribe to the conflict or

consensus persuasion some of their prime concerns are with stability, justice, and the social order. We seek the ideal of justice in our social relations. The materialist's position holds this to be an illusion created so as to deceive the public and to facilitate a social consensus. Instead, we have law and legal procedures, the legitimacy of which is derived from the authority of the state. - Criminal law varies from time to time and from place to place, and this raises questions as to its objective legitimacy. The special province of law is ideals and concepts while that of the social sciences is observed reality. Law and morality define what we ought to do, the social sciences discover what we actually do. Criminology attempts a link or a marriage between law and the social sciences in which social ideals are sought to be reconciled with the social reality.

A sociological analysis of empirical events should facilitate the clarification of a major question--if all acts are not objectively criminal, then we must ask ourselves why is it that an act becomes defined as criminal? or what are the factors and dynamics involved in the criminalization of a particular act? Chambliss points out that this is the starting point for all systematic study of crime and criminal behaviour (1; p. 102). Nothing is inherently criminal, except in the societal response, and if we are to explain crime we must first explain the major factors and dynamics that cause

some acts to be defined as criminal while others are not.

Fediw suggests that it is apparent that there is no uniformity in the major factors that influence the behaviour of all states (2; p. 6). Neither is there a coherent theory that guides one to decide objectively which variables are most important in any particular case. This leaves the analyst in doubt and leaves the matter open to his own judgement and interpretation, depending on the criteria and orientation that he may bring to bear on the issue. Some things are certain--that in all situations there is an environment, a groups of actors, and there are decision-initiating structures and processes which facilitate or constrain the flow of demands that are generated within the social structure (3; p. 60). It is necessary to explore the content and interrelations of these variables to clarify their influences in the formulation of criminal definitions.

This thesis will investigate the actors in the legislative process, and the circumstances in which legislation takes place, in an attempt to isolate the major factors that influence state behaviour, and to delineate these legislative dynamics by way of a historical-developmental perspective. Once the major factors and the legislative dynamics have been outlined they will be analysed within the framework of the consensus-conflict debate, to see whether evidence supports one or the other more conclusively.

Legislation is a system of action that can be understood by looking systematically at what is taking place at all phases of the process. We cannot say that all law reflects vital social interests. Lived experience indicates otherwise. It therefore becomes necessary to investigate individual instances of the enactment of law to solve the debate not by polemic but by empirical data. A theoretical model should take into account the significant factors in the field and focus attention on the most important and real determinants to try to divulge the inner workings of the criminalization process. If we knew in which circumstances different kinds of law emerged, we might be able to see the limits and uses of our elementary views of order to prepare the way for their reassessment. We could then ascertain the basis of a state's validity when it claims to act in the name of the public good. Finally, we may be able to point out which conditions no longer apply so that the community need not criminalize its citizens uselessly.

Chapter II will examine the claims of the consensus and conflict theories and summarize the factors that will support their position. In Chapter III the events will be outlined from a historical-developmental perspective, using data consisting of excerpts from the legislative debates, and the actual laws passed, to record the progress of drug legislation. Chapter IV will specify the actors and under-

take an explanation of the systemic factors that motivated drug legislation in the first quarter of the twentieth century, and the dynamics which resulted in the definition of drug offences as criminal, using a reconstruction of events in Chapter III. Chapter V will summarize the findings to show whether the data on drug legislation supports the consensus or conflict position and the implications that follow.

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CHAPTER IIConsensus and Conflict

What is the relationship between law and the social order? and what does the criminal law represent? Whose interests does it serve?

Dandurand says that the two models used to explain the persistence of the social order can be applied as parallels to describe the formulation of official criminal definitions and to explain changes in the legal order (5; p. 10). These are the consensus and conflict models. In a similar vein Jayewardene observes:

Recent sociological studies of legislation or enactment criminalization suggest that the focus on people really begins at the rule making stage. These studies are traditionally classified as reflecting two dominant schools of thought. The one--the value consensus model--argues that the law exists for and functions in order to secure the common good while the other--the value conflict model--suggests that the law exists to enhance the goals of only some members of society (11; p. 30).

Before we explore the claims of these models of social order it would be of heuristic value to provide an historical interpretation of the organization of society in which to place the basis and development of the law.

Rusche points out:

Important peculiarities in the contemporary criminal law cannot be explained without a

historical framework. That our criminal law exists in its present-day form is to a large extent comprehensible only through an appreciation of its origins and development. Its present form is, to speak, a projection of the past...Without a historical overview, it is impossible to rationally explain an incomprehensible state of affairs (22; p. 5).

Law and the Organization of Society

Primitive man was dominated by two fears--of the physical and of the unknown. In Van Loon's words the investigations of explorers show that:

Primitive man was an abject and miserable creature who lived in fear and died in terror. Defenceless against microbes and mastodon, ice and heat, he was able to survive because he was able to sink his individuality into the composite character of the tribe...the individual counted for nothing, the community at large counted for everything and the tribe became a roaming fortress which lived for itself, by itself and of itself and found safety only in exclusiveness (27; p. 22).

The first rulers were the chiefs of these roaming tribes, safeguarding them against physical danger. Primitive man relinquished a part of his personal authority to the leaders of the tribe, those persons he considered strong and intelligent enough to make quick decisions to mobilize the tribe's manpower to ensure its survival. This was the basis of the political authority of leaders.

In addition to the burden of physical survival, primitive man laboured under the burden of psychological fear of the unknown. Van Loon suggests that since primitive man

had no insight into causes and effects he reduced every event to the intervention of invisible spirits and lived in constant fear of misfortune that comes as a revenge of the Gods: "It follows that a society in which everything happens as the result of direct interference of an invisible being must depend for its continued existence upon a strict obedience of such laws as seem to appease the wrath of the gods" (27; p. 24). To assuage these fears myths were created by leaders so that man would know "what they were to believe about this universe, what course they were to steer in it, what in this mysterious life of theirs they had to hope for and fear, to do and forebear doing" (9; p. 170). On the basis of these myths, these explanations and assurances, leaders were accorded spiritual authority. They dictated taboos, or laws to be observed, which in time came to be accepted because they had been handed down by ancestors and it was their most sacred duty to keep the law intact and hand it over in its present and perfect form to all their children (27; p. 24). Further, in order "to prevent a change in the laws and other established forms of society immediate punishment of those who refuse to regard common police regulations as an expression of the divine will" was required (27; p. 24).

Political authority provided protection, stability and order. Spiritual authority provided unity and guidance.

In return the leaders were expected to function as revealers of spiritual truth, as promoters of material progress and as levellers of unequal conditions. It was assumed that they were better able to know good from evil, and would choose good. Further they would not judge necessarily on evidence of the senses but on the feeling of righteousness and equity. In time there evolved a political and ecclesiastic authority whose beliefs, ideals and values were henceforth to be the norm of social life, as well as the idea that the authority of leaders came from the gods, and later from God. Religious fervour explains the spirit of deference and disposition to obey that was conceded to rulers. Tytler says:

The Priesthood was anciently exercised by the chief or monarch: but as an empire became extensive, the monarch exercised this office by his delegates; and hence an additional source of veneration for the priesthood. The priests were the framers and administrators of the laws (26; pp. 19-20).

Society, then, was based on spiritual as well as temporal relationships; and hence the inclusion of a strong moral element in the norms of social life became enshrined in law. The concept of morality, inherent in religion, moral philosophies and metaphysical beliefs legitimized the value system; and values legitimized the power system. Legislation is the official pronouncement of the power system. The body of rules that accumulated as a result of official pronouncements has evolved into what we now accept as the law, a product

of social interaction and a social force operating in its own right.

As for the emergence of criminal law Quinney cites Calhoun:

The turning point in the emergence of Criminal law in the Western World occurred in Athens at the beginning of the sixth century B.C. when in order to forestall a possible revolution, the ruling aristocrats granted citizens the right to initiate prosecutions with the support of the state (19; p. 5).

Quinney points out that from this point onwards "the right to act against a wrongdoing was taken out of the hands of the immediate victim and his family and was instead granted to the state, as representative of the people" (19; p. 5). This right was not universal in that it was granted only to citizens.

The advent of Christianity, its members forming a minority group, brought with it the desire to secure a greater measure of universal justice and an attempt to separate the spiritual and political authority of leaders, as exemplified in Christ's exhortation to give unto Caesar the things that are Caesar's and to God the things that are God's. However, when the church became a force to be reckoned with, when the interests of church and state coincided, when the Popes of Rome became temporal rulers themselves, then the church fostered the idea that all authority, whether temporal or spiritual, is ultimately derived from God. This divine

derivation of authority gave the state and the law a moral character and a moral function on which a consensus was based.

In modern times there have been serious deflations in both the spiritual and political authority of rulers. The mind of modern man is mainly directed at things immediately before him. Considerations of Heaven and Hell and a fatalistic acceptance of his lot are no longer primary motivators. Religious leaders are no longer felt to rule by divine right. Instead they are felt to rule in the service of all and at the choice and behest of the masses. Stripped of a considerable amount of the metaphysical and moral basis in which its values are couched for many individuals, legislation and law now rest on their own merits. The decline of the spiritual authority and the new character of the political power leave the traditional postulates of a consensus on values open to serious doubt, and conflict theorists have risen to take up the challenge.

The Consensus Perspective

The discussion about the emergence of law and the organization of society showed how fears of the physical world and the unknown led to a consensus on metaphysical postulates, on moral values, on law, and on government as the arbiter of ultimate authority. It also suggested that in the process of evolution deflations in absolute conceptions of

both the spiritual and political authority of rulers occurred and the traditional basis of consensus has been undermined. Roscoe Pound, the pre-eminent spokesman for the school of sociological jurisprudence, recognizes this as a transition from a "theory of fundamental law of eternal and absolute validity [which] had been rooted in the legal mind" to the emerging "popular theory of sovereignty...which refers everything to the will of the people" (17; p. 91). Pound sums up the effects of this change in perception and the reaction to it:

When absolute theories began to be discarded and ultimate authorities were no longer recognized; when moreover, classes with divergent interests came to hold diverse views upon fundamental points, natural law in the eighteenth-century became impossible. Accordingly in the nineteenth century the historical jurists threw over ideals entirely and metaphysical jurists sought to deduce natural law from some fundamental conception of right or justice (13; p. 628).

With the rise of the social sciences at the beginning of the twentieth century both jurists and social scientists sought a rapprochement of their ideas to account for the social nature of law. Quinney states that "the ideas of the early sociologists directly influenced the development of legal philosophy that became a major force in American legal thought--sociological jurisprudence" (19; p. 21). From a legal standpoint the work of Pound, as exemplar of the sociological jurisprudential school of thought, is the basis

on which the perspective that we refer to as the consensus or value-expression model of social order rests. From a sociological standpoint, Chambliss considers Emile Durkheim the leading exemplar of the structural-functional school of thought and his work the outstanding example of the systematic analysis of law from the consensus perspective (4; p. 96).

Pound's Sociological Jurisprudence

Pound suggests that while there are a number of meanings to the term law:

The jurist is concerned with three, the regime of adjusting relations and ordering conduct through the force of a politically organized society, the body of authoritative guides to decision and patterns of conduct by which the regime is maintained, and the judicial and administrative processes by which those guides are to be determined and applied. He [the jurist] considers that the three are to be unified by the idea of social control, and this is done by looking outside of the immediate science of law and calling to our aid a science of society. We are to study law as a highly specialized control in the modern state (18; p. 345).

He makes a distinction between the two elements of a legal system--the enacted or imperative element and the traditional or habitual element. The traditional element is the older or historical element upon which juristic and judicial development of the law proceeds by analogy. The imperative element comes about through legislation and "in time, legislation becomes absorbed in the traditional element of the legal system, and the enacted rule becomes

a traditional principle or the theoretical basis of a traditional doctrine (16; pp. 9-10).

Pound contends that "the great mass of law arises in society in the form of a spontaneous ordering of social relations" but also that "the state brings law into existence by creating institutions through its power of compulsion and provides them with a legal regulation" (14; p. 136). The great mass of law that arose in a spontaneous ordering of social relationships and enshrined in the traditional element of the legal system is the basis of consensus in society. The task of the imperative element in the law is to make justice prevail by curbing the individual tendency to aggressive self-assertion to satisfy individual desires. Legislation is to be used as a form of social engineering to satisfy the maximum of human claims and desires with the minimum of friction and waste; to accommodate the various interests which Pound sees in society--individual interests, public interests, and social interests. Pound writes:

Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole (15; p. 39).

It seems then that the task of law is to "attempt) to bring order out of chaos for the good of the state" (14; p. 136) and "to strive to maintain a balance between conflicting and overlapping interests," a balance which would be struck "so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization" (15; p. 39). Conflict theorists would suggest that the interests that weigh most are those of the holders of power, and this to the detriment of other interests.

Durkheim's Structural-Functionalism

Chambliss outlines Durkheim's structural-functional consensus position which suggests that "community consensus is the moving force behind the definition of behaviour as criminal and delinquent" (4; p. 101). He states Durkheim's central thesis:

For an act to be a crime that is punishable by law, it must be (1) universally offensive to the collective conscience of the people, (2) strongly opposed, and (3) a clear and precise form of behaviour (4; p. 96).

Chambliss lists the propositions of the prevailing view in modern social thought of both legal and social science that is the essence of the consensus position:

1. The law represents the value-consensus of the society,
2. The law represents those values and perspectives which are fundamental to social order,

3. The law represents those values and perspectives which it is the public interest to protect,
4. The state as represented in the legal system is value-neutral, and
5. In pluralist societies the law represents the interests of the society at large by mediating between interest groups (4; p. 96).

Contemporary Consensus Theory

Contemporary theorists have outlined the main features of the consensus school of thought. Hepburn says that the consensus theory of social order looks upon the criminal law as a conflict regulator in which the interests represented in law originate in widely shared and accepted customs of society (7; p. 78). Akers states that the consensus approach "views the law as growing out of normative consensus in society and serving the broad interests and functions of society as a whole" (1; p. 43). Akers credits Sumner with the classic statement of the consensus explanation of law:

The content of law is formed primarily by the incorporation of prevailing "folkways and mores", unformed intuitive standards of right and wrong, progressively developed through time. While not immutable the folkways and mores are persistent and slow to change: laws are made out of and support the extant mores but legislation cannot make new mores (1; p. 44).

Hills states that the value consensus is one major perspective of legal scholars and social scientists used "to explain the focus and functions of criminal law and the process through which they emerge and change" (8; p. 3).

He writes:

The value-consensus position basically asserts that criminal laws reflect those societal values which transcend the immediate, narrow interests of various individuals and groups, expressing the social consciousness of the whole society. The legal norms embodied in the criminal codes emerge through social change in response to the needs and requirements essential for the well-being of the entire society (8; p. 3).

He cites Jerome Hall to support this view:

Criminal law represents a sustained effort to preserve important social values from serious harm and to do so not arbitrarily but in accordance with rational methods towards the discovery of just ends (8; p. 3).

Hills also declares that the value-consensus theory implicitly assumes a model of society in which there is a well-integrated, relatively stable consensus on basic values among all segments of the society and cites an often quoted statement by Friedman that presents this position:

The state of criminal law continues to be as it should--a decisive reflection of the social consciousness of a society. What kind of conduct an organized community considers, at a given time, sufficiently condemnable to impose official sanctions, impairing the life, liberty, or property of the offender, is a barometer of the moral and social thinking of a community (8; p. 3).

Quinney agrees with Hills on the crux of the consensus position:

Legal norms are an expression of those societal values which transcend the immediate interests of individuals or groups. Legal norms are seen as emerging through the dynamics of cultural processes as a solution of certain needs and

requirements which are essential for maintaining the fabric of society (21; p. 8).

Chambliss affirms that the consensus model declares that "community consensus is the moving force behind the definition of behaviour as criminal and delinquent" (4; p. 101). This model also argues that the state is value neutral. He outlines the consensus position with regard to the state, value neutrality and conflict:

Even if society is racked by conflict, the state is itself value neutral. No matter how antagonistic towards one another the several groups in the society may be, on this much they must agree. The peaceful settlement of conflict is better than violence and open warfare. The state, in this view represents the entire population, but only to a limited degree. Every specific law or activity of the state is value loaded but the machinery by which the state comes to a decision to create and enforce any particular law is itself value neutral, permitting conflict to work itself out peaceably (3; p. 151).

A summary of the essential features of the consensus perspective should provide a yardstick against which the data on drug legislation can be tested to verify the consensus position. This will be presented after the section dealing with the conflict position when the essential features of both perspectives can be viewed in juxtaposition.

The Conflict Perspective

Conflict theorists do not dispute the functional origin of the consensus position. Nor do they dispute the

fact that some acts are objectively condemnable in time and place. They do point out, however, that all acts, even murder, rape, assault and theft, have been permitted and even encouraged by different cultures in some past time or in some other place. Conflict theorists say that modern criminal law is at best only a reflection of former values rather than presently held ones and they make a distinction between acts that are "mala in se" or acts objectively condemnable, and acts that are "mala prohibita" or acts that are condemned because they arise as a result of conflict of interest.

With civilization, the subjection of one's individuality to the idea of a common good gives rise to conflicts of interest and social problems. According to the conflict position dominant elites choose to attribute social problems to defects and inadequacies in people rather than to defects in the social system, and this is used to justify an extension of social control structures. Acts that arise out of social conflict are criminalized to protect and perpetuate elite interests, though ostensibly legislated for the common good. During this process there is no resolution of the conflict as the basic conditions that contribute to the conflict are not addressed. The conflict itself is addressed and force becomes the viable means of resolution, resulting in an extension of the conflict in the arena of the legal

institution. Criminal law, therefore, is the result of the activity of various power brokers seeking to resolve social conflict in a manner that benefits their particular interests.

Modern conflict theory is no longer characterized by the discussion of an entrenched monolithic ruling class that metes and doles unequal laws unto savage underlings. Instead, it is suggested that conflict in society is the result of a struggle between interest groups, between groups with power and those without, and between social and economic classes in a structural hierarchy for scarce economic and political resources; and that entrepreneurs, motivated by moral, political, economic or social considerations, acting alone or in concert, initiate the criminalization process. Underlying all theories in the conflict perspective is the fact of a power imbalance and domination of one group by another. On the role of interest groups Quinney comments:

Behind the formulation of all laws is an enterprising group that stands to benefit in some way from a particular law...criminal laws are formulated within a social context that involves the promotion of the interest groups in society (19; pp. 8-9).

Unlike Pound's conception of the law, operating to accommodate divergent interests, Quinney believes that the law "secures and perpetuates the interest of particular segments [of society] supporting one point of view at the expense of others" (20; p. 40). Supporting this position

Sellin points out that the social values and norms which "receive the protection of the criminal law are ultimately those which are treasured by dominant interest groups" (23; p. 21).

Turk describes the relevance of power in group competition to affect the legal system:

Political power determines legality. In general, legislation is a result of efforts by various parties to affect the process by which legal norms are created...Law is directly tied in with social conflicts; legality depends...upon the ability of some social groupings jointly to preempt the machinery for creating, maintaining, changing and destroying laws. For the groupings powerful enough to have some impact on the legal process, laws will be rather satisfactory regulative compromises. For those groupings who have lost out, or never really competed, in the struggle to control legal mechanisms, laws will be edicts. For them to live in a legal order is to be dominated (24; p. 32).

Commenting on the relationship between law, interest, and power Turk declares:

The empirical reality of law--apparently well understood in practice if not in theory--seems, then, to be that it is a set of resources for which people contend and with which they are better able to promote their own ideas and interests against others...to have and exercise power (25; pp. 279-280).

Recently, conflict theorists, such as Quinney and Chambliss, have drifted away from a pluralist concept of interest group competition towards a marxist orientation of class conflict. Chambliss expresses a moderate marxist view:

The starting point for the conflict theory of legal change is the recognition that modern industrial societies are composed of numerous social classes and interest groups who compete for the favour of the state. The stratification of society into social classes where there are substantial (and at times vast) differences in wealth, power and prestige inevitably leads to conflict between the extant classes. It is in the course of working through and living with these inherent conflicts that the law takes its particular content and form. It is out of the conflicts generated by social class divisions that the definition of some acts as criminal or delinquent emerges (4; p. 101).

An extreme marxist view of the purpose of legislation is expressed by Hepburn:

An examination of the interests represented in the formation and specification of the criminal law at its inception indicates that such laws originate as part of a systematic effort by the state to exert coercive and oppressive social controls over the powerless members of capitalist society. On the other hand, a discussion of the interest preserved and enhanced by the maintenance and enforcement of those criminal laws demonstrates the manner in which they serve to provide continuous ideological and coercive social controls to preserve the false consciousness within which the powerless resolutely accept and perpetuate the existing social and domestic order. By both design and function, the criminal laws are an oppressive tool, working to obscure the inequality and exploitation inherent in a capitalist society (7; p. 77).

Jayewardene makes a distinction between the overt and covert functions of legislation. He says:

Outlawed behaviour seeks to restrain and constrain the activity not of all groups in society but only of certain groups that have lost their usefulness to society.^o Hence enactment criminalization comprises the redefinition of the

internal legal boundaries of the social space not for the prevention of acts considered detrimental to the corporate existence of society but for the exclusion of groups that no longer contribute to the social corporate. It is in this manner that society seeks to ensure its corporate integrity. Enactment criminalization, thus is an actus-status linkage utilized to eliminate from the social corporate redundant groups indentifying them not in status but in actus terms (10; pp. 8-9).

Studies in the Enactment of Legislation

Hall's study of the law of theft (6) and Chambliss' analysis of the law of vagrancy (2) are classic studies of the enactment and development of the respective laws. Hall's analysis of the law of theft differs from the traditional legal approach in that it studies theft as a social problem rather than within the conventional legal boundaries. He addresses himself both to the dynamics of criminalization in the enactment and enforcement of the laws governing theft and the dynamics in the enforcement and enactment decriminalization of capital offences. Hall stresses the importance of social and economic conditions as they affect changes in the law and he attempts to clarify the political, social, economic and religious events that affected the law of theft in England.

The political situation in England prior to the fifteenth century was one in which the monarchy and the wealthy nobility exercised autocratic control over the populace.

They enacted and enforced legislation by virtue of their power, resulting from wealth and tradition. Few questioned the enactment of laws that benefited the wealthy dominant class. The coming of the industrial revolution brought new social relations and a new power group into being--the wealthy mercantile class. Extant laws did not secure the interests of this group. Hall outlines the Carrier case to show how enforcement criminalization reflected the new realities--a gap in the law and the social needs of the time (6; pp. 30-31). Before 1473 it was no offence to come legally into possession of property and later convert it, but the judges in the Carrier case departed from precedent and decided that a person who came legally into possession of property and later converted it was guilty of theft. Hall contends that the new laws against theft were precipitated by the demands of the new mercantile class and acceded to by the King in an effort to win their support.

The sanctions against theft thereafter increased in number and severity to the point of excess. Studies have discussed the enactment of legislation in these times as the means of resolution of class conflict--the haves versus the have nots. The state did not need public support to legitimize its actions. It acted from its traditional position of strength. Resistance towards excessive punishment, however, seems to have enjoyed wide support, and after much suffering,

resulted in the repudiation of a large number of laws with capital penalties.

Following in Hall's footsteps, Chambliss undertakes a sociological analysis of the law of vagrancy (2). His stated intent is "to systematically analyse particular legal categories, to observe the changes which take place in the categories and to explain how these changes are themselves related to, and stimulate, changes in the society (2; p. 6). He states that the first vagrancy laws in 1274 were precipitated by the economic necessity of providing the religious houses with some financial relief from the burden of providing food and shelter to travellers, and the administration of written law began to fail. Though petty theft was tied in with highway robbery and outlawed under the umbrella of general dangerousness, juries and some judges did not believe that theft was an offence which merited capital punishment. Gaps opened between the letter of the law and the social perception of the time. Technicalities and court-invented fiction were resorted to by the judiciary, and juries brought in not guilty verdicts in the face of evidence to the contrary. Police did not always pursue offences dilligently. As a result, the statutory punishment of the death penalty for most felonies; including theft, was eliminated.

Hall contends that punishment influences the social

attitudes of the entire society by creating and enforcing moral standards (2; p. 294). It may be that when the pendulum swings too far in one direction people stand back and reassess their moral standards, and in this reassessment lies the urge to decriminalize. In this instance the original dominant interest groups were the monarch and the nobility. Changes in the political and economic structure created a wealthy mercantile class and they voiced their demands for laws protecting their interest, demands that were reflected in law. The industrial revolution disrupted traditional loyalties and social ties. Adverse economic conditions fostered social conflict and led to a real increase in property crime. But the state reaction was too radical.

The extension of the vagrancy law in 1340 was for a quite different reason. Britain's economic base was an agrarian system controlled by the nobility, and requiring the availability of an adequate supply of cheap labour. Chambliss reports that the crusades and various wars had made money necessary to the landed gentry and as a result they started the practice of selling their serfs their freedom in order to obtain the needed funds. The advent of the industrial revolution provided freed peasants freedom of movement and a higher standard of living. In 1348 the Black Death struck England and decimated more than half of the labour force.

Deteriorating conditions on the land and increasingly favourable prospects in the towns impelled the peasants to flee the land to better their position. The vagrancy legislation of 1349 was designed to curtail the movement of persons from one place to another "to force laborers...to accept employment at a low wage in order to insure the landowner an adequate supply of labor at a price he could afford to pay...to attempt to force a reversal, as it were, of a social process which was well underway" (2; pp. 69-70).

Chambliss notes a period of dormancy, and a shift in focal concern from an earlier concern with labourers to a concern with criminal activities. The rising mercantile class needed protection on the roads and vagrancy statutes were revised and extended to include large numbers of marginal people of the lower classes. Increasing numbers of offences came within the operation of the vagrancy laws and punishment became increasingly harsh. The idea of the vagrant as a tramp changed to the vagrant as a rogue, implying a more disorderly and potentially dangerous person.

Chambliss goes on to record that the vagrancy laws were used in the United States to control undesirables, and criminals. Certain categories of undesirables, such as prostitutes, were explicitly defined as vagrants. In Maryland vagrancy laws were applied to "free" negroes. In the present day the focus of vagrancy legislation is on the

arrest and confinement of the "down and outers" and other marginal groups. This study reveals that the original interest group behind the formulation of vagrancy laws was the religious group who operated the religious houses, but the motivation was economic. Changing social and economic conditions attended the first decimation of the labour force. The demands of the mercantile group in the context of changes in England's social structure and the general insecurity of the times precipitated extensions in the sixteenth century. The state acted from a position of power, needing no legitimation except the demands of this powerful new interest group to enact legislation, first against the "parasites" of society, and later against "the dangerous rogues".

Consensus or Conflict Perspective?

The analysis of specific laws such as Hall's study on theft and Chambliss' study on vagrancy are used by conflict theorists to substantiate their position. Conflict comes with differentiation, with the emergence of power groups which use law as a weapon, not in order to survive but to consolidate and legitimize power. Laws based on conflict usually masquerade as representing consensus. Consensus theory stands on an analysis of the historical development and functional aspects of the law. From its origins in a

tribal society, law based on a social consensus has been a prerequisite of survival. From the consensus perspective, enacted law is absorbed into the great mass of traditional law, and becomes a social fact, a new social reality that commands the acquiescence of most members of the society.

In the next two chapters data on the origin and development of drug laws in Canada in the first quarter of the twentieth century will be presented and analysed. If this data is to substantiate a consensus perspective then it must show that a community consensus transcending the immediate interest of individuals and groups is the moving force behind the enactment of laws; that this consensus is based on widely shared values, interests, and customs essential for maintaining the fabric of society. The data should indicate that the state itself is value neutral as is the machinery by which the state comes to a decision; that the machinery is activated only when the conflict between society as a whole and a deviant minority is so sharp that state interference becomes necessary. Thus legal norms are shared. They emerge slowly by a rational process out of a normative consensus to protect the social corporate and to accommodate the conflicting interests, needs and requirements of the system.

On the other hand, if the conflict perspective is to be substantiated then it must show that legislation is marked by conflict promoting the interests of particular segments

of society at the expense of others. Conflict is generated among divergent interest groups, between dominant and subordinate power groups or between social classes; and the laws that are enacted are not necessarily to prevent acts considered detrimental to the social corporate, but to restrain, constrain, dominate, or exclude some group or groups by identifying them in actus terms rather than status terms.

This thesis' investigation and analysis of drug legislation to substantiate the consensus or conflict perspective is a legitimate mode of inquiry. Johnson cites Parsons to that end:

Propositions about the factors making for maintenance of the system are at the same time propositions about those making for change. The difference is only one of concrete descriptive analysis. There is no difference on the analytical level...The obverse of the analysis of the mechanisms by which it is maintained is the analysis of the forces which tend to alter it. It is impossible to study one without the other (12; p. 11).

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CHAPTER III

Canadian Drug Legislation in the First Quarter of the Twentieth Century

Early drug legislation in Canada can be subsumed under two periods:

1. Prior to the 1920's--the emergence of drug laws.
2. 1920-1923--a period of evil dramatized and liberties curtailed.

Prior to the 1920's: The Emergence of Drug Laws

It seems to be an accepted fact that prior to the twentieth century in North America, heroin, morphine, opium and any other drug were available at the corner drugstore to anyone and without a prescription. "The middle and upper classes purchase more than the lower and working classes and there was no moral stigma attached to narcotic use" (4; p. 3). Bourne says that cocaine was once a standard stimulant and tonic in the United States and from 1880 to 1900 was actually an ingredient in a popular brand of soda pop which derived its name from the drug (1; p. 97). Doctors prescribed various drugs which are now prohibited for several medical reasons, and many people resorted to drugs to enhance their state of psychological well-being. Trasov states that drug addiction had been known in North America for over one hundred years and in British Columbia for over seventy-five years but the

marked hostility to the use of opium did not become apparent until the Chinese became competitors for jobs previously held by white people (14; p. 275).

At the Provincial level the first legislation against drug use was passed in 1884. One item of the Provincial Chinese Regulation Act of 1884 was that opium was to be prohibited (12; p. 109). Morton points out that drug legislation at the Provincial level was only one of a series of measures taken to harass the Chinese and to make life difficult for them. He lists a chronology of Provincial measures against the Chinese since 1860, including recurrent attempts to impose increasingly costly head taxes on them, to ban them from voting, to require that they cut off their pigtails, to levy labour licences on them, and to create difficulties for them in certain types of employment. Nearly every year the province of British Columbia passed acts to prevent Chinese immigration but these acts were disallowed by the Dominion Government. There were numerous instances of Chinese being attacked and in some instances killed. In the Senate Debates of 1908 Mr. Duncan Ross concretizes White British Columbian objections to the Chinese and makes it clear that the Chinese themselves were the objectionable element because:

- they usually get a grip on the country they enter,
- while they come as hewers of wood and drawers of water they do not remain in a servile position,

- they are strangers to our civilization,
- they are out of sympathy with our aspirations,
- given an opportunity, they become capable of doing expert work, and then as all work would be "niggers'" work, there would be nothing for a white man to do,
- they consume less than white men, they are worth less, commercially, to the empire,
- they make the country of no value as a surplus population of Great Britain,
- we want to preserve the British type in our population,
- they create in our people a degraded estimate of manual labour,
- they inevitably force a lower standard of living for the white working class (10; p. 743).

These were racial reasons and the Federal Government was forced to disallow Provincial acts because they could not ethically legislate against a group on the grounds of racism. As Alexander Mackenzie stated:

The principle that some parts of humanity were unfit to be residents of Canada would be contrary to the law of nations and the policy which controlled Canadian life (15; p. 350).

However, in 1907 a series of incidents in British Columbia brought matters to a head. There was an increasing demand for cheap labour by lumbermen and railwaymen. A significant influx of Asians and reports of a large expected number of Japanese combined with a mild recession and several strikes resulted in agitation by the Asiatic Exclusion League. When the Lieutenant Governor refused to sign the Bowser

Natal Act requiring all immigrants landing on British Columbian shores to speak a European language, interest group agitation changed a parade into a riot. A considerable amount of property belonging to Chinese residents was damaged and Mr. Mackenzie King, Deputy Minister of Labour, was appointed as commissioner to investigate and assess the Chinese losses and to settle claims (14; p. 276).

There seems to have been two reasons that Deputy Minister King looked into the drug question. One was the fact that two claims of \$600.00 each were presented to him by Chinese opium merchants for damages and loss of business. Although it was a legal claim, King found it anomalous that a government should make up for losses in a business inimical to the national welfare. The second impetus seems to have been a letter from Peter Hing of the Chinese Daily Newspaper Company requesting that while investigating Chinese affairs he should give some attention to the opium question--"a social evil in this world" (11; p. 5). One result of this investigation was that the Chinese image was not only further tarnished in the eyes of the people of British Columbia, but in the eyes of the legislators in Ottawa as well. King's personal attitude towards Orientals did not bode well for them. Ferguson records King's 1908 observation:

That Canada should desire to restrict immigration from the Orient is regarded as natural, that Canada

should remain a white man's country is believed to be not only desirable for economic and social reasons but highly necessary on political and national grounds (5; p. i).

In the large scale importation and use of drugs King found an issue that Ottawa could legitimately and ethically act against. His report on the need for the suppression of the opium traffic in Canada led to the first enactment of federal drug legislation in Canada, and placed a foot in the doorway for all the punitive legislation that quickly followed. The 1908 legislation relating to narcotics prohibited "the importation, manufacture and sale of opium for other than medicinal purposes" and made it an indictable offence, the prescribed penalty being three years imprisonment or a fine of \$50.00 minimum to \$1,000.00 maximum or both. The act referred only to crude opium or powdered opium. There does not seem to have been any lengthy House discussion. King's report points out that although Provincial legislation governing the licensing of drugs mentioned in a schedule existed, the law was flagrantly violated, no records of opium sale were being kept and sale was carried out in shops rather than in pharmacies as requested by statute. In the face of such open violation he felt that "the only effective remedy is to prohibit the importation, manufacture and sale alike, and this absolutely, save in so far as an exception may be necessary for medicinal purposes only" (11; p. 9).

With an eye on the international scene he adds:

"In enacting legislation to this end, the Parliament of Canada will not only effect one of the most necessary of moral reforms so far as the Dominion is concerned, but will assist in a world movement which has for its object the freeing of a people from a bondage which is worse than slavery" (11; p.9).

To bring his point home to the members of Parliament King reports "The habit of opium smoking was making headway, not only among white men and boys, but also among women and girls" (11; p. 7). He resorts to the spectre of pretty young white women in Chinese opium dens, incidents which the Vancouver news media were using to stir anti-Chinese sentiment:

May Edwards, pretty and young, had been found in a Chinese den. She said she had a husband in Victoria and if allowed to go would return to him. She was allowed to go...Much the sadder of the cases however, was that of Belle Walker. A terrible record of the effects of indulgence was written upon her appearance that morning. She was found by police in an opium den. She had been there for three weeks. Magistrate Williams sent her to prison for six months (11; pp. 7-8).

King's emotionally charged report was one primary factor in the passing of Canada's first Federal drug law. The negative association with an alien element was certainly one reason. Another is the association of drugs with alcohol. Although at that time it was seen as a lesser evil than alcohol, it was also a morally unacceptable item. Trasov suggests that the Federal Government at the time was imbued with the prohibition mentality (14; p. 278). Swept along on the

tide of negative associations with two other problems, drug legislation in 1908 was afforded easy passage into the twentieth century.

The 1911 Debates

From this point the net widens. In 1911 King, then Minister of Labour, reported to the House of Commons that "the manufacture of opium in Canada has been completely suppressed by that Legislation" (6; p. 2742). He now proposed legislation against opium smokers. The act is entitled An Act to Prohibit the Improper Use of Opium and Other Drugs. To facilitate the passage of this act King highlighted the domestic and international implications. On the basis of representations made to him by several interest groups and individuals, which he claimed were unsolicited, he made several value-loaded links and stated his desire to read the communications "in order to avert any opposition that might otherwise arise" (6; p. 2527).

King used communications from a parole officer to establish a link between drugs and criminals, from a probation officer to associate drugs and the corruption of youth, from the police to link drugs and violence, and from numerous religious leaders and groups to confirm a relationship between drugs and immorality. In addition to these representations he cited the media as the source of information and support for measures to prohibit absolutely the smoking of

opium and to regulate the distribution, preparation and use of cocaine, morphine, éucane and their derivatives.

The 1911 legislation resulted in the creation of new criminal offences. Under Article 3 the possession of a drug for other than medicinal or scientific purposes becomes a criminal offence, as does being found in an opium den. Article 5 establishes a system of control for drugs in Canada. Only physicians and pharmacists can deal in drugs and the prescription of drugs is for medicinal purposes only. Records must be kept and preserved. Article 10 places the burden of proof on the defendant to show that drugs found in his possession were for medicinal or scientific purposes. The 1911 act extended the laws dealing with the importation and trafficking in opium to cover the creation of a new type of offender--the addict. It made possession of opium a criminal offence and introduced the notion of the onus of proof on the defendant into drug legislation. Between 1911 and 1920 drug legislation entered a period of dormancy with the only amendment in 1919 which made it mandatory for persons importing or exporting drugs listed in the schedule to first obtain a licence.

At this point we have a picture of drug use as fairly normative in the society at large. There was a recognition that the habit was increasing but there was not much national concern. Systemic factors, riots and political agitation in

British Columbia brought the Chinese into national focus, and highlighted one aspect of the Chinese presence--their involvement in a booming opium business which could be inimical to the public welfare. Canada's first Federal drug law in 1908 was enacted to restrict Chinese predominance in the opium trade. The 1911 prohibitive legislation was aimed specifically at the Chinese and lower classes who associated with them in the smoking of opium, ostensibly in response to international measures to control the opium trade and to prevent Chinese from indulging in their habit and contaminating those with whom they came into contact. The influence of the International Opium Commission is apparent in the debates. Measures dealing with other drugs were regulatory in nature. This is significant because the public representations, on which King legitimized his legislation, were concerned with drugs in general. Only the Chief of Police in Vancouver was specifically concerned with opium. The Chief of Police of Montreal reported that:

According to the medical men the cocaine produces worse effects than opium, and it would be a good occasion to adopt proper legislation to suppress the cocaine traffic and the evils growing out of same (6; P. 2524).

Apart from the Chief of Police of Montreal four other representations mentioned cocaine specifically. No one else mentioned opium. In spite of this, the prohibitive legislation of 1911 concerned itself with opium smoking, the Chinese habit.

The specific relevance of the forces and dynamics leading to early drug legislation in Canada, and their extension in the period that follows, will be discussed within the context of the consensus and conflict theories of the origins of the criminal law in later chapters. However, by now the pattern was set. Drug legislation had entered the legal domain.

The 1920's: A period of Evil Dramatized and Freedom Curtailed

The first legislative movement in the 1920's was regulatory. An amendment to the previous legislation changed the name of the act to "The Opium and Narcotic Drug Act". A broader system of control was introduced, whereby it became mandatory for those who manufacture or sell the drug to first obtain a licence from the Minister (13; p. 23). During the next three years legislative movement peaked.

The 1921 Debates

The 1921 House of Commons Parliamentary Debates were particularly important, as it is the only time that we find the opposing forces clashing head on. Members of Parliament King, Stevens, and Edwards set out to justify excessive increases in punishment. Other members, such as Jacobs, Clark, McGibbon, DuTremblay, Fielding and Currie, advocated common sense and constitutional procedure.

Stevens argues for stiffer penalties and advocates

whipping for purposes of deterrence:

It has been found that in administering the original Act that light penalties and comparatively small fines have really very little deterrent effect (7; p. 2897).

He raises the spectre of deliberate ~~corruption among children~~:

I believe my information is correct, that in many of the large cities drug traffickers actually distribute drugs to high school children in the higher grades of the elementary schools for the purpose of stimulating the drug habit among them. A more diabolical and pernicious practice I cannot conceive of (7; p. 2897).

These drug traffickers deliberately traffic in drugs with young girls of sixteen years of age or thereabouts and also with young boys, especially of the clerical and student class, and many most tragic cases have been brought to light where these young people, especially girls, have been utterly ruined. So I submit to the committee that we cannot make the penalty too severe (7; pp. 2897-2898).

I appeal on behalf of all children and minors, youngsters of the age of fifteen, sixteen, seventeen and eighteen, scores of whom are annually ruined by this thing (7; p. 2901).

King supports him. He says that he has received numerous representations as to the extent of the drug traffic and that the information he received was in accord with Mr. Stevens' statements. He supports strong legislation, even whipping, to put an end to the drug traffic because:

Apparently the existing legislation was not drastic enough, and anything that will help to make it such I would most heartily support (7; p. 2898).

I do not think there is a class of evil that is

more vicious in its possibilities than the attempt to have young children acquire the drug habit, and if there are any fiends of this kind abroad in the community, it seems to me that, if the money penalty is insufficient to restrain them, Parliament should provide more drastic measures (7; p. 2901).

Carried away by the wave of emotionalism and visual images of traffickers corrupting the youth of Canada, Edwards recognises the controversial nature of the measures that are being requested and admits that:

A good many laws have been placed on the statute books which, to my mind, in the punishment prescribed, have been unjust, illogical and unreasonable (7; p. 2904).

[However] I can imagine no more brutal character than he who coolly and deliberately plans for his own financial gain, to absolutely ruin the lives of his fellow-citizens...the law cannot be too severe upon him. Why restrict imprisonment to seven years? What is the use of letting a creature of that kind out after seven years? He is better behind bars for his natural life...The lash will have a deterrent effect, I believe, upon these criminals who are cowards in their nature (7; p. 2904).

The House is impressed by the emotional diatribe. However, some members are taken aback by the excess and the retrogressive aspects of the proposed legislation. Jacobs observes:

In former days people were whipped for almost anything, but the tendency has been to do away with that as far as possible. I would be against the principle of inserting in our laws in this twentieth century penalties of that kind, which have now been almost wiped off our statute book... That is a relic of past ages which should not be reintroduced into our laws...You are putting [this] offence in the same class as treason, murder, and one or two other grave offences. I

am not advocating the case of offenders who traffic in these drugs, but I want to see the symmetry of the law maintained (7; p. 2898).

Maclean supports him:

I quite agree with the observation made by the Honourable member; I think that the penalty provided is so severe that it will never be enforced, even if sentence under it is made by the court. I think it would be unwise, therefore, to place such a penalty in the law (7; p. 2829).

McGibbon points out that on the basis of Stevens' appeal they were over-legislating. However, he states that he would support any penalty in cases of this kind because:

No penalty is too great for men who will commit crimes such as he [Stevens] has recited this afternoon... [However] I sometimes think that we have acquired a sort of mania for restricting and restraining people... I do not object to punishing the drug fiend and the penalties in this respect may be as extreme as is desirable. But I am absolutely opposed to this eternal attempt to restrict the liberties of man... It is not fair that nine hundred and ninety-nine men should be penalized on account of the thousandth (7; pp. 2901-2909).

Clark suggests that it was not the drug habit per se which motivated the British Columbia legislators to seek punitive legislation but their political mentality towards drugs:

I regret to hear of the prevalence of the drug habit in portions of British Columbia. I had observed previous to the war that there was a little weakness in the political mentality of that province. I did not think, however, that the drug habit had gone so far as to be responsible in any degree for that political mentality (7; p. 2902).

He wonders whether the proposed legislation would be more dysfunctional than the offence itself:

I agree with my Honourable friend from North Simcoe that it is doubtful whether the community will not in the long run be affected in a worse degree by the example of the Government along the line of what, after all is a brutal proceeding, than by the prevalence for some time of this drug habit and of the conduct of the people who minister to it in commerce (7; p. 2902).

DuTremblay questions the constitutionality of a proposition placing the burden of proof on the accused:

According to this proposition the burden of proof is thrown on the accused in the event of a drug being found in his place or in his person...It is very difficult sometimes for a person to prove his innocence, and it is contrary to English law to regard a man as guilty unless his guilt is proved (7; p. 2903).

Fielding seeks to refute Stevens' graphic portrayals on practical grounds:

I am not clear that the case made out by the Honourable member for Vancouver is a proper one. Even if the evil which he describes is less than he pictures, it is still a very great evil and should be dealt with by the House in all gravity and seriousness. But I have difficulty, I confess, in quite understanding how this evil of trafficking in drugs with children can be as broad as is alleged. These drugs are expensive, nobody can afford to give them away to school children; and the opportunities of detection would become very large indeed if you deal with school children... Then as to the question of cost, I cannot see where any drug fiend can have any object in spending his money in giving these drugs away to children. I am afraid that aspect of the question is somewhat magnified (7; p. 2903).

Finally, Currie points out to the House that they are

influencing the public mind by their deliberations, exaggerating the whole issue, creating laws which may be wrongly used, and he appeals for common sense in the legislation:

From the time that we are taking over this thing and the speeches we are making and the efforts we are putting forth, the public might naturally come to the conclusion that the whole country is seething with this drug evil...I have seen many cases where innocent men have been badgered by legislation of this kind. If you pass such drastic legislation as this you are putting a weapon into the hands of irresponsible and wicked people to blackmail honest people...We are going to absurd lengths in this matter. Why should we waste time legislating for one case in fifty thousand, as we are doing this afternoon? There are so called social-service workers who are magnifying the effects of these drugs in order that they may draw good salaries; that is about the size of it...Let us apply some common sense to our legislation. Let us not be a nation of uplifters; there is too much hypocrisy in all this legislation. (7; pp. 2905-2906).

The 1921 debates revealed the conflict operating in the legislation process. We saw Stevens advocating extremely punitive legislation which Clark suggested reflects a weak political mentality. We saw Mackenzie King support Stevens overtly because of its alleged deterrence effects. We saw Edwards moved by Stevens' inflammatory rhetoric demanding yet sterner measures, even life imprisonment. Even those who opposed on the grounds of excess, exaggeration, unconstitutionality, over-legislation or dysfunctional aspects accepted the dramatization of evil to some extent. There was a certain objectivity to the debates in that argument focused on the

pros and cons of punitive measures. In the end the pro-punitive forces got much of the legislation they sought.

The penalties for all indictable offences were increased from a term of imprisonment not exceeding one year, to a term of imprisonment not exceeding seven years. The supplying of drugs to a minor was made an indictable offence. The notion of possession was enlarged so as to place the onus of proof of non-possession on the accused. Only the penalty of whipping advocated by Stevens and King was rejected by the committee (13; p. 24).

The 1922 Debates

If in the 1921 debates the drug trafficker preying on the youth of Canada remained a sinister disembodied soul, then the 1922 debates revealed exactly about whom the legislators were thinking. If the 1921 debates were marked by inflammatory imagery portraying the corruption of girls and boys by drug traffickers, then the 1922 debates were marked by acrid vituperation portraying the Chinese as the corruptors.

Ladner, a Member of Parliament from British Columbia, joins Stevens of British Columbia in a campaign of Chinese villification. Their main objective is to persuade the Dominion Government to enact an exclusionary Asiatic policy, and Chinese involvement in drugs is the main point of their argument. In the 1922 debates on Oriental aliens Ladner warns:

In order to indicate the difficulties with which the West is confronted, and with which the whole of Canada will sooner or later be confronted, if this question of immigration is not dealt with promptly and satisfactorily, I have decided to refer for a few minutes to the ramifications of the drug traffic throughout Canada...

This business is mostly engaged in by Chinese and Japanese--not so much by the Japanese; I should say that, but almost entirely by Chinese. The men engaged in the business, the men who sell the drugs, do not take it themselves, because they see the awful human wrecks which are the result of the use of narcotics. In a cold calculating way, therefore, these men carry on this nefarious business distributing the drugs throughout the community (8; p. 1529).

Having isolated his target as the Chinese pusher he goes on to utilize the Stevens method of graphic imagery:

One girl of sixteen became a user of morphine and cocaine and was associated with Chinese, Japanese and Hindus. She appeared before the committee and on that very morning she had yielded to Chinese, Japanese and Hindus in order to gain \$5.50 with which to purchase drugs (8; p. 1530).

Here is the case of a woman who was a clergyman's daughter, accomplished in music, well-educated. She is a subject of morphine and cocaine; she is associated with Chinamen, and at present is serving a jail sentence (8; p. 1530).

I will conclude with one case, that of a man who is related to one of the best known public men in Canada. He served with the Princess Pats overseas, was badly wounded and on his return to Vancouver got into the Chinese quarter and became a dope fiend; now his business is going around and carrying out a function known as "fitting orders" (8; p. 1530).

Ladner makes his point of pinpointing the Chinese and other Asians as corrupting the young and the innocent. Even the white pusher becomes a victim of Chinese manipulation.

With these visual images in the minds of the House members he continues:

From the moral and sociological standpoint alone, if for no other, these immigrants are of a class that we would be a thousand times better off without them irrespective of their effect on our economical, commercial and industrial life (8; 1531).

Then Ladner makes his appeal, the covert reason behind all the agitation for drug legislation from the British Columbian representatives:

In British Columbia, where we realize, more than any other part of the country does, the connection between Canada and the Orient in the supplying of these drugs...we have been asking that those found guilty and convicted in courts shall wherever possible be deported...One of the heaviest blows that could be struck at the traffic would be a vigorous campaign of deportation (8; pp. 2018-2019).

The later 1922 House debates on opium and narcotic drugs again pinpoint the Chinese as the villain and legislation is sought to deport them as one means of solving the oriental question.

Carmichael asks:

In view of the fact that of the 835 convictions last year 634 were Chinese, would it not be advisable to incorporate, as a penalty, that all orientals found trafficking in drugs shall be deported. This would help to some extent to solve the oriental question (8; p. 2824).

Supporting Carmichael, Ladner seeks:

a provision empowering the authorities to deport men or women convicted of the illegal sale of drugs or of the commission of other serious offences under the act. I would also strongly urge upon him the necessity of giving discretionary power

to magistrates to order the lash in those cases where it is proved the accused deliberately and cold-bloodedly induced young people to become drug addicts (8; p. 2824).

Ladner makes a distinction between the addict, as victim who must be treated as a patient, and the trafficker, generally an oriental, a cool calculating fellow who would presumably have been found with the drug on him and would have the onus placed on him to prove that he was not a trafficker. Suggesting public support for the proposed measures Ladner says that he thinks that the amendments have the support of people throughout the country (8; p. 3014). He knows that organizations on the West Coast were urging the Government very strongly to accept the amendments. He goes on again to portray visual images of young girls being seduced by Chinamen, citing his earlier case of the young girl who prostituted herself with Chinamen, Japanese, and Hindus to purchase \$5.50 worth of drugs.

Other legislators take up the hue and cry. Manion states that:

while what the Minister says is true that lashing should be kept for certain crimes of physical violence, I think perhaps moral violence as in this case is a much more serious crime (8; p. 3016).

Stevens contributes his expected support:

I wish the House could fully appreciate the horrible nature of this traffic. I know of no other act that one human being could do to another more despicable and more fraught with utter depravity in its results than to supply

drugs to minors (8; p. 3017).

As does McQuarrie:

This crime, to my mind is even more serious than the crime of robbery with violence... I would much rather have anyone hold me up, and shoot me for that matter, than sell me drugs and cause me to become a drug addict (8; p. 3018).

Brown concedes that the legislation may be going against modern humanitarian trends, but:

I know the tendency of penal legislation in the present day is, perhaps, towards more moderate methods than have been pursued in the past and yet in this particular case it does seem to me that no steps which we can take can be too strong to prevent the degradation and the corruption of the young people of our land (8; p. 3019).

Neill comments in a similar vein:

People say that it [flogging] is out of date and brutalizing, and so it is--I fully believe that conditions justify its use, and no one who has not lived in the west can understand the conditions. While flogging may be unpleasant for the party, think of the living hell these young people are sentenced to by reason of these drugs (8; p. 3020).

Marcil attributes crime and drugs in Montreal to foreigners:

A recent report published a few weeks ago by the Chief of Police, Mr. Belanger, attributed to foreigners the responsibility for, perhaps, 75 percent of the crime committed in the city of Montreal...the people engaged in this drug business are in the worst business, and no penalty is too severe to fit the crime (8; p. 3020).

Beland states the government agreement with the immigration sanction:

For the year ended September 26, 1921, there were in Canada 1,864 drug convictions, and of that number 1,211 were Chinese. So that if the amendment I propose becomes law and that number of Chinamen are affected, there would still be a number at large, but Honourable members will admit that the remedy would be an effective one (8; p. 3016).

Tolmie sums up the feeling of the House:

I am sure we all very greatly appreciate the additions which the Minister has made to the bill with regard to deportation...If we deport those who have been convicted of taking part in this traffic, I can readily see that we are moving in the right direction of solving this oriental question (8; p. 3017).

There was little opposition to the amendment sought during these debates. No one argued against the deportation sanction. Some legislators still resisted the sanction of the lash and others were concerned with provisions which sought to curtail the right of appeal.

Gould observes:

It does seem to me that we are reverting to the dark ages when we ask for that punishment of this kind be administered...This traffic which we all admit is one of the greatest evils extant in the country could be eliminated without the application of the lash (8; p. 3017).

Beland struggles weakly, pointing out that the United States does not resort to the lash for narcotic offences:

I call the attention of the House to the fact that, in the United States, the laws with regards to narcotic drugs do not provide for the application of the lash (8; p. 3019).

Mackenzie also points to the United States example:

The great country to the south of us has not adopted the principle of administering the lash ...I hope we may be able to carry out criminal laws to the extreme, without using the lash (8; p. 3020).

Martel voices his strong disapproval of the proposed curtailment of the right of appeal:

If we persist in amending our laws in such a way that these rights are taken away from the people, we shall soon come to a condition under which a man who is accused of crime, whether there is bona fide reason for the charge or not, will be obliged to prove his innocence rather than have his guilt established by the prosecution... So long as I occupy a seat in this House I shall by my voice and vote uphold the principle that the defendant in an action shall not be deprived of any of his rights; that he shall at least have extended to him the old presumption of British law that he is innocent until proven guilty (8; p. 3023).

Carroll points to the moral element in the legislation and voices his protests against the proposed curtailment of rights in a manner not constitutionally sanctioned:

I must protest against a Government which is uplifting morals by legislation..... I take the ground that every person is entitled to an appeal from the magistrate of a country or district or superior court judge, and if the legislation proposed by the Minister goes through, that right is denied him...It simply means that the magistrate may convict on very slender evidence or no evidence at all, and if he does, there is no appeal from the facts, no right, to take the case to a superior court judge... It looks to me as if the government were taking a stand on a question the soundness of which they were doubtful of...I think we would be well advised to put that kind of illegal traffic out of business by means which were sanctioned under our constitution; and which have been

handed down to us in the British system of law (8; p. 3024).

As a result of the 1922 deliberations judges were given the discretionary power to order whipping of offenders convicted of distributing narcotics to minors. Those found in possession of apparatus designed for the purpose of preparing or smoking opium were also subject to summary conviction. Peace officers were given the authority to search by day or night any store, shop, warehouse, outhouse, garden, yard, vessel or other place where there was reasonable cause to suspect that a prohibited drug was being kept or contained (2; C36, S3). Aliens convicted under the Narcotics Act were to be automatically deported upon the termination of their imprisonment.

The 1922 debates reveal little of the healthy opposition to the punitive measures that marked the 1921 debates. Once the alien element was stigmatized as the offending group, and the principle of evil was accepted, legislators were disposed to respond to the battlecry--protect our youth. There was no mention of drug use among adults. It is anomalous that though drug laws were enacted against Chinese smokers, and that much of their conviction were for drug use, they were portrayed as the trafficking group rather than the using group. Statistics were quoted to prove that they were the villains but these statistics were not used to show that they

were traffickers; they were simply accepted as such.

The only measure sought that was rejected in the 1922 debates was the right to appeal; it was approved after the Senate Debates of 1923. The Senate Debates of this period reflect the hawkish mood of the House legislators but the detailed substance of those deliberations are out of the scope of this paper. Cook reports that the drastic right of search measure was included at the insistence of Senate Daniel when he was satisfied that the arbitrary police search powers were to be used against Chinamen. Similarly the denial of appeal provisions were agreed to in 1923 when the government spokesman made it clear that it would not be applied to all classes but only to those defined as belonging to the criminal class (3; p. 44). The emotionalism generated in the 1922 debates resulted in the eventual enactment of all measures sought.

The 1923 Debates

These debates covered prosecutions and Chinese deportation, touched the enforcement rather than treatment orientation of Federal action, and highlighted the reason why jail sentences were necessary in anti-drug legislation. Beland advises that of 585 drug convictions in the previous year there were 431 Chinese convictions and he assures the House that:

We are deporting Chinamen as fast as we can.
We are making very strenuous efforts to check
this undesirable traffic (9; p. 699).

When asked by Carmichael what efforts were being made to effect a cure for the young girls led innocently into this habit Beland states:

I must confess that the Federal Department of Health has not put forth very great effort in this direction because we realize that it does not come principally under our jurisdiction (9; p. 699).

By the enactment of Federal drug legislation the Federal Government chose to bring the drug problem under their jurisdiction. The sanction of imprisonment was necessary for Chinese exclusion because, as Neill points out:

It was found last year in British Columbia that a number of Chinamen convicted could not be deported on account of the terms under which they had been convicted. It appears that if they were sent to jail they could be deported, but if they were sentenced to a heavy fine, and in default of payment jailed, they could not be deported (9; p. 706).

The 1923 act took care of that oversight. A six month minimum sentence was provided for those charged on indictment or summary conviction of offences in illegal import or export of drugs, illegal possession, and illegal distribution of drugs to minors. The court now lost the power of imposing less than the minimum. In all instances the penalties were increased (13; p. 25). All convicted aliens were now subject to deportation. The 1923 act also added Cannabis to the schedule. There was no House discussion about this inclusion. Beland simply remarked that "there is a new drug in the schedule" (9; p. 2124). Stotland notes that:

One can only speculate as to what were the motives of the legislators: Much discussion had been going on in the United Nations and there was an active movement in favour of placing the drug under international control (13; p. 25).

It is more likely that legislative action was the result of agitation by Mrs. Emily Murphy, a moral entrepreneur and social activist.

The 1923 debates were more muted in tone than the 1922 debates. The common theme of making strenuous efforts to check the undesirable traffic was tied in with deporting Chinamen, but by this time there was no further need to arouse the legislators. In 1923, the Chinese Exclusionary Act, restricting Chinese immigration was passed by the Federal Parliament. Thereafter Chinese villification and the dramatization of evil were no longer vital elements in the passage of drug legislation. The negative perceptions towards the drug culture were established, and enshrined in legislation.

From 1921 to 1923 certain myths, exaggerations and certain patent untruths about an alien in our midst, their habits and their role in the deliberate corruption of our youth were disseminated. A mythology was created which demonized certain people, drugs, addicts and even doctors. Rigid laws were passed and the demonized perception of drugs and drug use became a part of the social consciousness of the country, both as a result of the inculcation of these myths and because the new laws themselves expressed a legalized

reality about drugs. As Currie warned in 1921, the public came to the conclusion that the whole country was seething with this drug evil and their children were at risk. The government did nothing to dispel these views and sporadic drug enactments from time to time only served to reinforce the negative perceptions. After 1923 criminalization of drugs by enactment entered a period of near dormancy and it was not until 1954 that the drug evil reared its head once more, with the focus against a different target group.

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CHAPTER IV

The Dynamics of Legislation

Legislative policy-making, as it operates in the formulation of criminal definitions, may be viewed as a system of actions. Brecher points out:

All social systems comprise an environment, a group of actors, structures through which the units of behaviour respond to challenges and initiate decisions, and processes which sustain or alter the flow of demands and products of the system as a whole. It is possible, indeed, it is necessary for vigorous analysis of domestic policy--to explore the content and interrelations of these key variables: environment, actors, structures, and processes, all placed within a framework of demands on policy or inputs, and products of policy or outputs (2; p. 60)

Following along these lines it can be stated that the successful enactment of a criminal definition is invariably determined by two main inputs into the legislative process--the operational environment and the psychological milieu. The operational environment comprises the various actors in the process and the systemic factors which motivated them. The psychological milieu provides the catalyst to mobilize support, to develop a goal consensus and to facilitate the recruitment of operators for the enactment of legislation. The psychological milieu determines the nature of legislation and the degree of condemnation that characterizes a new law. It is in the interaction between the operational environment and the psychological milieu that the dynamics of legislation unfolds.

The Actors

Among the actors involved in the drug legislation were professional bodies and individuals, business, labour, religious and social groups, the media, the public and the Government.

The Professionals

The professionals were the medical community on one hand, the police and other criminal justice agencies on the other. Unlike Britain and some other countries which chose to consider drug abuse as a medical problem and left drug regulation to varying degrees in the hands of the medical community, Canada may have gone the enforcement route, possibly because the medical profession chose not to take a stand. In fact their approach to the question was divided. Juliani reports:

Many physicians either remained silent or agreed with a legal enforcement approach, while others campaigned to keep the drug problem out of the hands of legislators and the police. Still others believed that if the use of narcotics was prohibited, and if doctors were not allowed to maintain addicts, then their status as "relievers of pain" would be diminished... However, the profession as a group was not supportive, and in conjunction with persecution from the authorities served to negate the medical movement (17; p. 6).

The doctors were discredited by groups opposed to the medical model who portrayed them at best as incompetents and at worst as being in collusion with drug addicts. They were subject to numerous regulations and the onus was placed upon

them to justify prescribing drugs strictly for medical reasons. Undercover police agents often sought to entrap them and, in the end, they abdicated most responsibility in the drug issue. Duster points out:

Doctors abdicated responsibility because of the key issue that they could only prescribe to addicts for legitimate medical purposes. Their evaluation of what was legitimate could have left them liable to prosecution (5; p. 15).

The police, on the other hand, actively pressed for power in their enforcement efforts as statements from the House debates indicate. The police were directly responsible for securing legislation that took away the civil liberties of all citizens. The right to search without warrants, a ban on appeals in matters of fact, the introduction of the writ of assistance and placing the onus of proof on the defendant were measures secured by law enforcement bodies concerned with securing evidence and ensuring convictions. These measures resulted in statutory encroachments on traditional legal safeguards. The law enforcement bodies took upon themselves the status of experts in the field. Officers of the Opium and Drug Branch of the Department of Health, working closely with the Royal Canadian Mounted Police were:

able to suggest changes in legislation with reasonable assurance that they would be introduced as government bills; and it has provided much of Canada's representation on international bodies dealing with narcotics control. This unusual concentration of functions, together with the failure of physicians or other professional groups

to show any interest in the field until the 1950's, meant that the enforcement ideology unobtrusively dominated policy at all levels...[In addition] the enforcement concern with the difficulties of securing evidence and ensuring conviction has been reflected in successive statutory encroachments on traditional legal safeguards (4; p. 20).

The police, advising legislators as experts, were prone to magnify the issue to justify more stringent measures for drug suppression, and they regarded less restrictive approaches as a threat to their own entrenched positions. In addition to the role of the police the debates reveal the roles of other professionals in the Criminal Justice System, the judiciary, parole, probation and the social services pressing for legislation. It was the influence of these professionals that prompted Currie to remark:

There are so-called social service workers who are magnifying the effects of these drugs in order that they may draw good salaries; that is about the size of it (11; p. 2906).

Business and Labour

Big business initially welcomed the Chinese presence and offered them their protection. The frugality and long hours of work of these cheap and docile labourers resulted in considerable service, and surplus, to the mine owners and railroad builders. Business profited from their labour but other workers perceived a loss to themselves because of an undercutting of wage levels and increased job competition.

Gross reports:

An outgrowth of the labour business conflict was the propensity of anti-Chinese British Columbians to blame the Chinese for all and sundry bad features of their society and continually try to rid themselves of Chinese in order to rid themselves of perceived vice, crime and threats to their standard of living. It was felt that anti-Chinese legislation would cure all the ills both from the view of labour and the provincial government (6; pp. 11-12).

Animosity increased with the completion of the railroad as:

The ex-construction workers flocked to the cities of British Columbia from the interior. The job competition they gave to white residents fanned the flames of agitation because jobs were scarce (6; p. 14).

The Chinese were also used as pawns in business-labour disputes. In 1877, 1883, 1884 and 1890 the Dunsmuir mine owners used the Chinese as strikebreakers (22)

The result was that this:

did little good for their already tarnished image. Here was a concrete incident where the Chinese, who accepted lower wages, could be blamed for taking the food directly from a white family's mouth (6; p. 18).

By the beginning of the twentieth century the large capitalists in the depressed conditions of that time no longer needed cheap Chinese labour and therefore they no longer felt constrained to protect them. In fact anti-Chinese agitation was functional in that it deflected White working-class anger away from the capitalist and the government and onto the Chinese. From this point onwards working-class and provincial legislative moves to constrain the

Chinese were unimpeded by capitalist interference.

At this time also small businessmen found Asians moving into traditionally White business areas in general and Whites sought to eliminate competition and force the Chinese out of the lucrative drug trade. The Vancouver Board of Trade was one such body as the 1922 House of Commons debates reveal. Juliani cites Musto:

Companies such as Park-Davis and Merc, Sharp and Dome, had been making huge profits from the sale of over-the-counter medicines containing opiate compounds, thus, they would not advocate the complete abolition of all drug use. Their approach was to advocate that opiate compounds be available only by prescriptions, thereby leaving the pharmaceutical industry with a monopoly on narcotics (17; p. 6)

The second period of business-labour conflict arose at the end of the First World War when businessmen and ex-soldiers returning home realized that these aliens were making considerable inroads into their business enterprises. By this time Asians, particularly the Japanese, controlled much of the Province's fruit and vegetable business, and the returning veterans now came up against job competition from aliens in British Columbia. The demand to stop Asian immigration and seek ways to deport those already in the country assumed a new urgency.

Religious and Social Groups

In the 1911 debates King cites several religious and social groups which, he claimed, made representations to him.

Among the religious groups were Bishops and Ministers of the Anglican, Baptist, Methodist and Presbyterian churches, the Clerical Association of Montreal and the Montreal Congregational Council. Among the social groups were the National Council of Women, the Local Council of Ontario, the Montreal Women's Club, the University Settlement of Montreal, the Young Men's Christian Association, and the Dominion Alliance for Suppression of Alcohol.

Their representations showed their concerns to be that drug use, especially cocaine, was becoming increasingly widespread. They were appalled by the sad consequences to the physical and moral well-being of "innocent" users, and they were voicing their support for any immediate action to reduce the habit which threatened to become a social and national peril (9; pp. 2527-2529).

The Media

Provincial anti-Chinese sentiment was continually publicized by the media throughout the last quarter of the nineteenth century. A militant anti-Chinese activist and politician, Amor de Cosmos, owned British Columbia's major paper, The Colonist, and he used this forum to print numerous inflammatory editorials against "the Chinese evil" and "mongolian slave labour" (22; p. 168). The newspapers were instrumental in rousing public fears about Asian inundation. One reason for the 1907 riots was an announcement by the News

Advertiser that 12,000 Japanese were being brought to the province.

After the war of 1914 to 1918, when returning veterans were faced with unemployment, the newspapers undertook to dramatize their plight and throw the blame on Asians in the province. The Vancouver Daily printed statistics of Oriental inroads into labour and business, and inflammatory articles were printed boldly in the newspapers. Morton writes:

The Vancouver World went even further. It sent J. S. Cowper, a former member of the local House on a tour of the provinces. From mid-July until October, over twenty of his articles were printed on the first page of the newspapers, each headed by the title, "The Rising Tide of Asiatics in B. C." (22; p. 235).

In response to proposed legislative changes in 1920, Maclean's magazine commissioned Mrs. Emily Murphy, a prestigious zealot, a social champion and stateswoman, the first woman Judge in the British Empire, to publish a series on the illicit drug trade in Canada. Researchers for the Le Dain commission comment:

Her research was irrevocably tainted by her strict personal morality and was specifically written in a biased sensational fashion to arouse an apathetic Canadian populace (23; p. ii).

Cook reports that Mrs. Murphy was "the most influential advocate of punitive legislation--apart from Mackenzie King and the Vancouver members of Parliament" (4; pp. 18-19).

After the articles for Maclean's were published, she expanded

her views in a book, The Black Candle. The publisher's comments on the jacket of this book say that it was:

An astonishing combination of fantasy, statistical evidence, and bigoted sensationalism, the book was directly responsible for sweeping narcotic legislation throughout Canada, much of which is still in force today....

The pervasive fear behind the book is that other nations and races threaten the Christian, Anglo-Saxon way of life. Mrs. Murphy made a valiant effort to be fair, but she nevertheless managed to perpetuate through this book so many false notions that Canada is still reeling from the impact...

Many of the author's erroneous assumptions are "still accepted by segments of the Canadian public". Thus modern Canadians can trace the history of the drug problem in Canada through this truly staggering book (23).

There were several other publications in a similar vein. In this manner the written word of various publications media were influential in determining the perceptions of legislators and the public.

The Public

The public constitute an important group of actors because much of the pre-legislation activity was addressed to them in order to secure their support and compliance to legitimize state action. The people of British Columbia were the first political constituency that made pressing demands for any legislation that served to harass the Chinese and force them back to China or to prevent more from coming to Canada. It has already been stated that the Canadian public were not unduly concerned with drugs and that generally there

was no stigma attached to drug use. During the period of labour shortage the Chinese were regarded as industrious, sober, economical and law abiding individuals, even though they were seen fit only for more menial work. An early Parliamentary Committee confirmed this opinion. However, when the railroad construction was over and a surplus of labour resulted, the earlier friendly feelings towards the Chinese changed to hostility. Now they became stereotyped as dangerous, dirty, clannish, pushy people who took jobs away from Whites and as people who lounged away their time in opium dens (26; p. 275).

Significant negative public attitudes towards drugs stem from the first negative association of opium with Chinese during a period of social confrontation. Groups claiming to represent the public made demands on the legislature. Juliani records the activities and motivation of one such group:

Lobbying extensively in Parliament, the Anti-Asiatic Exclusion League hoped to use the drug menace as a means of ridding the country of orientals and limiting further immigration (17; p. 9).

In the House debates of 1922 Ladner cites a resolution passed by the Vancouver Board of Trade in which they report that various service clubs and public bodies deem it expedient to arouse the public to the seriousness of the situation. Their solution is:

1. the elimination of fines as a penalty for illegal selling of drugs and narcotics, and the substitution thereof of a prison sentence of one or two years with lashes ...in the discretion of the magistrate,
2. in addition to the above sentence the deportation of all aliens or those possible under the law,
3. in the case of naturalized aliens convicted of selling, cancellation of naturalization papers and deportation after prison sentence (12; p. 3014).

The series of articles written by Judge Emily Murphy for Maclean's magazine were intended to arouse the public and thus influence the government to pass more stringent measures to suppress the drug traffic. It is clear from these initiatives and from the general debates that individuals, groups and organizations at the social center found it necessary to arouse the public to a danger that they perceived, and the legislation they were proposing was aimed at the control and elimination of a particular group from the social scene. All the furore doubtless had an indelible effect on public perception. As Currie pointed out:

From the time that we are taking over this thing and the speeches we are making and the efforts we are putting forth, the public might naturally come to the conclusion that the whole country is seething with this drug evil (11; p. 2905).

The Government

Demands for governmental action came from both domestic and international groups. For years the Provincial legisla-

ture had been demanding that Ottawa act on a number of Anti-Chinese Provincial bills, but the Government was constrained by larger questions of the Canadian image, imperial interests and international policy. The only legislative action that Ottawa took was the imposition of an increasingly onerous head tax on Chinese immigrants that by 1904 was \$500 per head. Otherwise the Federal Government continually rejected bills passed by the British Columbian legislature. Riots in British Columbia and the ensuing Oriental claims for damages forced the Government to intercede. Wynne comments:

If the riots did not bring immediate exclusion of Oriental immigration, they shook an indifferent Federal Government into action. First, damages had to be settled on the spot, and the good name of Canada had to be cleared in the eyes of other nations (28; p. 466).

The drug problem that King found was the one item that the Government could act upon, on the grounds that it was inimical to the public welfare. Most people were shocked by the facts unearthed and the Chinese importers became the logical target in the 1908 situation. Even at that point the international influence was evident. MacFarlane points out that King canvassed the attitudes of other nations about the drug traffic in his report (20; p.17). As a result of this action Canada was seen as a leader in drug legislation. Trasov reports that King admitted that Canada was asked to be represented at the 1909 meeting of the International

Opium Commission in Shanghai because she took an early lead in the enactment of legislation relating to opium (26; p. 278). He further points out that narcotic acts prior to 1954 were designed to fulfill the two-fold purpose of controlling the legal distribution of narcotic drugs and to satisfy international commitments in the prevention of illicit trade in narcotics (26; p. 281). King himself was Canada's representative to the conference because of his reputation as a moral entrepreneur in the field. After the conference King achieved the status of an expert and his word was extremely influential in the House decisions.

The domestic concerns voiced in the 1911 debates set the climate in which Government could take action with public support. The international anti-opium movement not only reinforced and legitimized the Government's position but made it unlikely that Canadian prohibitory measures would ruffle the feathers of Britain or China or any other member of the world community. Thus the 1911 prohibitory legislation against opium smoking, the first enactment of a criminal sanction of drug use in Canada, while directed at the Chinese in particular, was legitimized by the demands on Government from both domestic and international quarters.

The Systemic Determinants: a preamble

An appreciation of the actors involved in the process

of drug legislation in the first quarter of the twentieth century in Canada points to the major factors or the major systemic motivators which influence state behaviour and the nature of that influence. Four primary factors can be isolated-- economic, social, moral and political. These factors are neither exclusive nor exhaustive; they are merely indicative of the underlying pressures in the process of legislative enactment.

The Economic Factor

The economic factor was the initial catalyst that eventually led to drug legislation and it is associated with perceptions of a group's necessity or redundancy in society. When there are scarce resources one group can only enhance its position at the expense of another. The deliberate campaign to exclude the Chinese from various occupations and from Canada relied to a great extent on non-economic arguments but at the heart of the problem was the economic factor. When Mackenzie King spoke on the immigration bill after the 1907 riot in Vancouver he said that:

it was not a local or provincial matter; it was a national and international one. Although it was partly racial and religious in nature, it was first and foremost an economic concern (22; p. 237).

The economic concern speaks for itself. Labour was concerned simply with protecting jobs for the White majority and maintaining minimum economic standards. Enforcement

groups were concerned with guarding and extending their spheres of bureaucratic influence. Business and proprietors were concerned with profit. If weaknesses on the economic front could be attributed to the Chinese then the Chinese could be used as a viable scapegoat for economic ills. Chinese labour was utilized and protected by the capitalists as long as the Chinese served a profitable function. In the periods of economic adversity, when they lost their usefulness, they lost big business support and served instead to take the focus of conflict away from the economic sector and onto themselves. As Himmelstein points out drug legislation was used substantively to deflect White working class anger away from the capitalist and onto the Chinese, thus reinforcing capitalist hegemony (16; p. 47).

The Social Factor

In addition to the economic factor which singled out the Chinese as possible threats to the dominant White population of British Columbia and to their minimally established standard of living, British Columbian residents were plagued by genuine fears of being inundated by the yellow peril--the large scale immigration of Chinese to Canada. When these immigrants were introduced on an equal footing with White labour they inspired hatred and violence. The result was a social class struggle between Whites and Chinese led by British Columbia legislators and the media that became the

basis of the social motivation in drug legislation.

To counter these threats the Whites highlighted the differences between themselves and the Chinese and refused to acknowledge similarities. One feature of the Chinese identity was drug involvement, both as traders and users. As the customary use of opium came to symbolize the differences between the Chinese and the rest of society, and the image of opiates as Chinese-linked came to be widely accepted, perceptions of the Canadian drug using population shifted from middle class to alien and lower class. The 1885 report of the Royal Commission of Chinese Immigration shows the class associations of the opium evil and voices concern about its spread:

Opium is the Chinese evil, and when once the habit is contracted it cannot be got over. This habit has increased with the population. Opium is used in every house, with scarcely an exception. This evil is growing with the whites especially on the United States side. The population who use this are principally workmen such as painters, and white women prostitutes, Indian women, etc. There are not many cases among young and industrious men, but there is danger of it; but I have been told on good authority that white girls of respectable parents use it (25; p. 48).

Duster points out that when an act shifts its class associations from upper or middle to lower it has a greater susceptibility to be labelled as deviant (5; pp. 246-247). Gusfield also suggests that North America is characterized by a struggle among status groups attempting to assert the supremacy of their own way of life, and that the struggle

often becomes a clash between the visible symbols of competing life styles (8). Drug legislation therefore could be seen as a weapon for the social control of the weaker status groups and for the preservation of the old order. In addition White society advanced a philosophy of assimilation that restricted those elements not likely to assimilate to the predominant mores or the predominant ethnic group, physically as well as socially. Himmelstein suggests that the manner in which a society reacts to drug use has less to do with the drug itself than with the factors of class, status, and power in the social context in which it appears and that symbolically the anti-opium crusade was used to reassert the status of the White worker vis-a-vis the Chinese worker (16; p. 46). In British Columbia the Chinese threatened the existing class structure and drug legislation became a symbolic way for that class to reassert its cultural and political dominance.

The Moral Factor

Becker suggests that laws dealing with problems of moral order develop as a result of crusades waged by individuals or groups who take it upon themselves to rouse the public consciousness about particular immoral conditions (1; pp. 147-155). Morality refers to strong feelings about right or wrong and goodness or evil. Associated with perceptions of wrong or evil are judgments of free will, blame and condemnation, and the demand that the negative behaviour should not go unpun-

ished. Individuals like King and Emily Murphy, as well as the religious groups and the media, presented themselves as moral beings with a right and duty to impress their standards on others and they were the actors who were ostensibly motivated by moralistic considerations. These were the moral entrepreneurs who held certain images about the structure of society which reflected their personal interests or prejudices, or deeply held convictions. The moral center establishes the criteria for condemnation and they see the law as the vehicle to buttress their conceptions (5; p. 238).

Unlike statesmen, to whom gradualism is the essence of stability, moral entrepreneurs, or statesmen who see themselves as such, are less concerned with manipulation than in creating reality. They believe in total solutions. What they perceive as right is so important to them that they feel their goal can only be accomplished by drastic solutions.

In the early twentieth century Canada had been ideologically guided by the puritan ethic and Victorian attitudes towards morality. The puritan ethic reflected the view that pleasure was only legitimate as a reward for hard work and that indulgence in pleasure for its own sake was an illicit kind of enjoyment. Opium smoking was considered an illicit activity because the moral entrepreneurs at the center set out to define it as such. It has been suggested that the essential assignment of a moral judgment lies in the assess-

ment of the effect of a man's behaviour on others (27). It was not the fact of drug involvement but activities associated with the opium culture that the moral entrepreneurs deplored. Musto points out that the most passionate support for legal prohibition of narcotics have been associated with the fear that opium smoking facilitated sexual contact between different groups (24; p. 244). Much of the graphic portrayals in the House debates and in the media played upon this point, as were the portrayals of the depravations of the Chinese on the youth of the country. Moral taboos against illicit sex, mixing of the classes, hedonism, pleasure as an end in itself and blatancy of opium use were the mores that the Chinese drug culture were portrayed as challenging, and this induced extreme moral indignation. It became necessary to invoke the moral order in an ostensibly moralistic manner.

One aspect of the Chinese ethnic configuration, opium involvement, was singled out to address the Chinese as a group. Their involvement in the opium scene was used to confer upon them a drug-associated master status, a characterization of their total identity as evil. In effect the whole issue of drugs was used symbolically to demean the character of the Chinese, to symbolize the difference between them and the society, to affirm the values of the dominant group over the inferior Chinese minority. In this way they became subject to marginalization by separation. The Chinese problem could more

viably be addressed when the focus was changed from the moral unacceptability of Chinese to the moral unacceptability of their drug involvement, and, eventually, general unacceptability of drug involvement, especially for the lower classes of Whites.

The Political Factor

Manley says that "all organized societies depend upon a power structure, and politics is the business of power, its acquisition and its use" (21; p. 5). Ideologies, policies and sanctions are the basis on which the state rests and perpetuates itself. Powerful individuals or groups derive their power, or a great part of it, from the fact that they are able to present their position as legitimate, justified and necessary. Power buys legitimacy and the capacity to enforce, reward and punish. Conversely, those without power have the lowest political priority. Perceptions of difference about the powerless and/or their behaviours by the holders of power preclude the element of empathy, increase social distance and become a sufficient basis to warrant a particular treatment or mistreatment. Politically, punishment is not a function of malice per se but a function of efficiency within the context of existing circumstances and sensitivities. Coercive responses and the creation of out-groups serve symbolic and substantive functions in dealing with those whom the state perceives as threatening to the existing

political structure or whom the state decides to define as such for political reasons.

In 1911 and later in the early 1920's the media, the British Columbia legislators and other powerful interest groups deliberately set out to sharpen and clarify certain differences between Whites and the Chinese. They presented the Chinese as challenging the economic, social and moral stability of the country. Legislation is the process by which normative expectations are made official, the structural medium for altering boundaries with the capacity and power to enforce definitions. The politically powerful groups sought to resolve the economic, social and moral problems that existed by the creation of a new norm--the illegality of drug involvement.

The new norms were clearly measures passed to appease the pressure groups, measures that were highly selective and directed against a specific target group. Cook says that in 1911 Senator J.H. Wilson was the only speaker to imply that a political decision was being made when the Chinese were singled out as the offenders (3; p. 39). Further, in spite of all the concerns raised by representations, on which King based his support, with regards to the use of cocaine, the prohibitory measure was against opium smoking--the Chinese habit. From the 1922 Commons and Senate debates the political implications are clear--much of the arbitrary powers given to the police

were allowed when the legislators were satisfied that they would be used only against Chinamen and the criminal class.

Drug legislation, linked to value systems and political power, was motivated by both symbolic and substantive factors. Symbolically it served to differentiate between groups and to affirm the power and normative expectations of one group to the detriment of another. It did not provide for the resolution of economic or social problems and was a response to the users of drugs rather than to drug use. Substantively it enabled the state to isolate, to maintain control of, and to get rid of a large number of social undesirables. As Beland attested "we are getting rid of Chinamen as fast as we can" (13; p. 699). Substantively it also served to mask the economic and social causes of political instability in the country. Once the punitive laws to which groups are subjected become official they are taken for granted and became the reality in which the society operates; later, they are extended to include other groups for purposes of social control.

The Psychological Milieu

Individuals and groups motivated by various systemic factors sought to develop a racist anti-Chinese movement throughout Canada in order to legitimize Federal exclusionary immigration legislation. It is clear from the 1921 and 1922 debates that the larger goal was solving the Oriental question. Those seeking legislation were aware of their own interests,

interests that coincided with theirs and opposing interests. They sought to crystallize unformed or latent opinion by keeping up a steady barrage of persuasive communication about a specific aspect of the Chinese cultural identity to motivate an apathetic public and a reasonably critical Federal legislature. They found it expedient to resort to three strategies to achieve this. First they legitimized their position to maintain a sense of righteousness and to impress upon others that their proposals were legitimate and necessary. Secondly they discredited the opposing forces. Finally they villified the target group in order to justify the punitive nature of their proposed measures and to legitimize the use of coercion and force.

To legitimize their position they supported the negative stereotypes about the Chinese prevalent in British Columbia. These images were presented by Ross in the 1908 debates (15; p. 743). Further, the Chinese were portrayed as dirty people living in unsanitary conditions with a social system apart from the society at large. It was claimed the wealth they acquired never helped Canadian society and they were unassimilable physically and culturally; the men were gamblers and opium addicts and the women prostitutes. (22) Statistics were used by the supporters of drug legislation to show the extent of Chinese involvement in the drug culture and the representations made to them by individuals and

interest groups were cited to claim the support of public opinion and demands of the public for whatever measures were deemed necessary to end the drug evil.

Opposition to the coercive measures rested with the medical profession and some legislators. As already stated the medical profession was discredited. Lindesmith points out that the North American public was not informed that the British and European method of handling the problem was any different from ours or that there was less of an association between their drug culture and crime (19; p. vii). It was suggested that those who held out for the disease concept had unworthy motives (24; p. 249). But then, as the House debates of 1961 made it clear, the rationale for Canadian policy being different from the British policy on drugs lay in the mores and culture of Britain which is a far more homogeneous society than that of North America (14; p. 6002).

The support of the opposing legislators had to be secured. In the 1911 debates, King used the force of representations made to him to avert opposition. He states:

I have found in my limited experience in the House, that it is after the second reading of the Bill that opposition develops. I trust that there will be no opposition when I am through. But I desire to read the communications in order to avert any opposition that might otherwise arise (10; p. 2528).

During the 1920's more was necessary than a discredited opposition and statements of support to motivate the lawmakers. Most legislators were concerned about the narcotics problem but the 1921 debates revealed that there was significant resistance to the measures sought. The punitive faction therefore resorted to a process of villification that incorporated the creation and publication of a mythology about drugs and drug involvement, and the dramatization of people as evil that would cause observers to react with fear, aversion and condemnation.

The Drug Mythology

The tenets of this myth encompassed the drug itself, the user, the doctor and the illegal seller. The drug itself was the demon flower; according to the mythology it was not the circumstances of addiction that caused the problem "but the direct action of the drug itself which impaired such functions as honesty, morality and concern for others" (18; pp. 394-5). The opiates were correctly said to be addictive but addiction was claimed to cause damages not only to the mind and body but to the very soul. The drug itself changed the user into a human fiend. Later in 1923, the mythology about opiates was extended to encompass the users of non-opiates. Murphy describes the consequences of marijuana use:

Persons using this narcotic, smoke the dried leaves of the plant, which has the effect of driving them completely insane. The addict loses all sense

of moral responsibility...While in this condition, they become raving maniacs and are liable to kill or indulge any form of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility. (23; p. 333).

Drug users became "drug fiends, totally dishonest and morally depraved" (18; p. 393). From the debates it is clear that White and Chinese smokers were regarded differently. Whites were presented as the young seduced victims of the Chinese predators. In the 1922 debates Ladner presents the sad story of a White veteran involved in dealing drugs as a victim of the Chinese (12; p. 1530). The Chinese drug fiend was seen as a brutish degenerate who chose his immoral situation and constantly sought to debauch others.

The doctor became the devious doctor. It was suggested that:

Physicians and pharmacologists by the thousands were money grabbing purveyors of evil...and the medical profession had been guilty of misjudging the baneful effects of opium for over two millenia (18; p. 393)

There was some truth to these charges in that doctors had been responsible for much of the prevalent addiction since they had recommended opiates for curative purposes. Also, until the laws were tightened many doctors issued prescriptions on demand. However, at this time the stereotype of the devious doctors as incompetents and money hungry deviants in collusion with addicts was propagated to discredit them

and facilitate the enforcement approach to the drug issue.

Most of the vehemence in the House debates was reserved for the illegal drug trafficker. Throughout the 1921 to 1923 debates it became quite clear that this was the group everybody would accept legislation against. These were the cool calculating brutes who deliberately exploited the young in order to seduce them for financial gain. This was the group which sentenced young lives to a living hell. Chinese drug users as a whole were regarded as drug traffickers who spread their habit to exploit the young, especially females:

Many females are so sexually excited by the smoking of opium during the first few weeks, that old smokers with the sole object of ruining them taught them to smoke (18; p. 398).

The myth of the child-recruiting pedlar was used to generate sympathy and revulsion:

In some manner, by some wily method they have been induced by the Chinese to use the drug. Time was when little girls no older than 12 years were found in Chinese laundries under the influence of the opium. What other crimes were committed in those dark and fetid places when these little innocent victims of the Chinamen's wiles were under the influence of the drug are too horrible to imagine (29; p. 60).

These graphic portrayals and this emotional rhetoric were used to dramatize the Chinese evil. Ye Mark reports:

The association of opium to the Chinese played an important part in the development of the racist anti-Chinese movement in the United States. Chinese had to be defined as distinctly different and inferior to the majority of American society. In other words, Chinese had to

be portrayed as sub-human, evil entities. As a result, the Chinese were strongly associated with the evils of society such as being unsanitary, gamblers, prostitutes, criminals, savage killers of their own new-born, unfair labor competitors, and of course opium fiends (29; p 60).

Links were made between addiction and crime, addiction and sex, addiction and the abuse of the country's youth, addiction and physical degeneration, addiction and immorality. The extent of these links was maximized to support the drug mythology in which each element was characterized by evil and deliberation, to the point where illegal sale of drugs assumed the proportions of psychological murder of the young and innocent. Spurred on by moral righteousness and the instinct of self-preservation it seem necessary that this evil be combatted by the police powers of the state rather than any medical model of intervention.

Racial prejudices towards the Chinese combined with mythological beliefs were disseminated to the public and to legislators by the media, by interest groups and by some members of parliament in various communication forums. Emotional rhetoric, backed by so-called 'expert' testimony, graphic imagery, and exaggerated claims about personal damage and damage to others as a result of drug use were used to heighten public fears and create a hysteria about drugs and drug use, thereby eliciting public and legislative support. The result was that perceptions about the issue changed.

Mild concern changed to genuine alarm. Everyone appeared to agree about the drug evil and that a crisis existed. Since the Chinese were singled out as the villains in the play any action taken against them was legitimized. Drug legislation was utilized to jail and then deport those jailed for drug infractions. But the whole process served the wider aim-- to discredit the Chinese in the eyes of all Canadians so that exclusionary legislation could be legitimated. This goal was achieved in 1923. However, when the concern with the Chinese problem died away the myths remained and became the social reality.

The enactment of early drug legislation in Canada was a political process involving issues of social and moral behaviour where certain groups undertook to exclude an alien race from the Canadian scene, to limit their power and control their behaviour, to reject them on the grounds of morality and by so doing to assert the superiority of the status of the dominant group and their way of life. A coercive action was directed against an act that was really an appendage of a social problem.

The entrepreneurial groups (professionals, business and labour, the media, Provincial and Federal legislators) were the actors, who, motivated by economic, moral or social factors, undertook to influence the House and the public. This was done by producing an emotionally charged atmosphere

in which the target group was demonized, evil was dramatized and the intolerance of an act was linked to other forms of intolerance. A crisis was deemed to exist. Force seemed to be the simplest way by which the crisis could be resolved and legislators grasped for this easy solution to a difficult problem. The general fear of the Chinese drug evil subsided but the machinery continued. Coercive measures were presented as effective. Policies become accepted and are extended to control other groups for whom the original legislation was not intended. After 1923 the myths about drugs came to be so accepted by the Canadian legislature and the Canadian public that:

Stamping out addiction became not merely an enforcement chore but a moral crusade. The stereotype of the addict as an "innocent victim" persisted for some time but in practice the addict was coming to be treated as a criminal. He too became the enemy along with the trafficker (3; p. 43).

Both the myths and the laws themselves served to reinforce public perceptions and facilitate the extension of the enforcement model. As Grygier observes:

To some extent laws always foster or create public opinion; yet they are themselves the product of such opinion. As with religious and moral beliefs, the relationship between law and public opinion is not that of simple cause and effect; it is a relationship of mutual reflection and reinforcement. We make laws in order to preserve the values of our society, but by making laws we also affect the value system (7; p. 32).

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CHAPTER VConclusion and ImplicationsConclusion

Some of the propositions of the consensus perspective of law and the conflict perspective of legislation were outlined in Chapter II. The consensus perspective regards the law as representing a balance between conflicting and overlapping interests in which individual instances of the imperative element (legislation) are absorbed into the traditional element of the legal system (law). The definition of criminality is given by society as a whole, which is in consensus on these matters. In this view society is homogeneous, and is in agreement about right and wrong. Law is a social norm and a form of social control. Society consists of individuals most of whom willingly accept societal norms for the sake of stability, and a few who defy societal norms because of inherent characteristics or because of environmental influences.

The conflict perspective sees society as heterogeneous, composed of groups with competing interests, different value systems and different lifestyles. There is disagreement about objective right and wrong. Individual acts of legislation enable those with power and influence to define social and legal reality in a manner that maintains the status quo, enhances their particular interests and values to the detriment of others, and defines less powerful groups, or those

who threaten the existing arrangements, as criminal because of overt acts, while in fact covertly addressing their status characteristics. Thus legislation acts to make heretics, witches, vagrants and pot heads out of men and, until such time as perceptions about these statuses change, they remain criminals in the eyes of the law. Consensus theorists are reluctant to concede that these designations represent objective law.

Some propositions that arise out of the consensus and conflict perspectives will now be reconciled with the data and analysis in Chapters III and IV to determine which perspective is supported, and the implications that follow. The essential issues that must be considered are whether the new legislation sought to correct contraventions of established norms and deeply shared values, or to achieve an accommodation of competing interests; whether the state and its legislative machinery are value neutral; and finally, whether an overt activity or a status characteristic was being addressed.

Firstly consider whether Federal drug legislation reflected normative denunciation of drugs. If Canadian men went to the Moslem world and continued their normative drinking habits or Canadian women exposed their bodies as they do at home, they would be flaunting basic norms of the Moslem culture. In the analysis of the data it was indicated that drug use in Canada was a normative activity, at least to

the extent that it was widely used. The Chinese were not flaunting established norms about drug use. It is true that there were concerns about drug use, but these concerns were neither widespread nor urgent. The data also indicates that public representations at the national level, which King used to convince the legislature, were mainly concerned with the use of cocaine, which was recognized by the wider national public as dangerous. Neither were these public representations spontaneous, as King would originally have had us believe, nor was the use of cocaine condemned. Instead, opium smoking, one variation of drug use, was condemned. The first Canadian drug prohibition, therefore, did not reflect any flaunting of an established norm, nor did it reflect a community consensus or the consciousness of the whole society about drug smoking. In fact the first drug laws set about creating a new social as well as legal norm and this contradicts the consensus position.

If drug legislation was not enacted because widely shared norms were defied, then what values did drug legislation represent? From the data it was clear that several actors found it necessary to arouse the public to the dangers inherent in the drug scene. There was no serious affront to the collective Canadian conscience until a drug mythology was used to publicize the perception that the children and young men of the nation were being corrupted by an alien

influence, and that all sorts of sexual exploitation faced our young women on account of the drug scene. In effect the youth of Canada were said to face moral and physical degeneration because of this drug evil. These were the overt values that were being threatened and it was unthinkable that everyone would not agree that this evil should be suppressed. We can thus see a shift from the conflict to the consensus perspective, from the concept of law which represented specific powerful interests to a law which represented general agreement.

It is also clear from the data that the covert values which gave rise to drug legislation had more to do with such factors as equality in employment, upward mobility and alien assimilation than with opium in itself. Drug use presented the justification by which the conflict between Chinese and Whites in British Columbia could be couched in moral terms. It is difficult to say whether the national conscience reflected the provincial conscience regarding matters of racial supremacy. What is certain is that, once the myths were disseminated, people seemed disposed to believe them and by the mid 1920's a consensus about drugs was established. Its basis on widely shared values instead of a campaign of indoctrination is questionable.

Did the enactment of drug legislation reflect a balance, an accommodation of competing interests? There

is no evidence in the data to indicate that Chinese interests, in trading or in using their preferred drug, or in remaining in Canada, were anywhere represented or accommodated in the legislative process. The laws themselves were not essential to maintain the fabric of society but were functional in facilitating a one-sided political response to the social conflict between the dominant British Columbian Whites and the subordinate Chinese group. The laws only came about when powerful individuals and interest groups undertook a deliberate propaganda campaign to artificially create widespread anxiety about drugs and drug involvement, with the Chinese as the villain, in order to enable the national audience to deepen its involvement in the rejection process. The intent of the legislation was to widen the legal boundaries to encompass the Chinese and push them out of the physical boundaries of the country.

Far from transcending the immediate interests of the dominant groups seeking drug legislation, or those involved in the legislative process, the data reveals that the new legislation benefitted them at the expense of the Chinese. The focus on the Chinese served to direct attention from the economic and political problems that existed and this benefitted the capitalists and both provincial and federal politicians. Bureaucrats, professionals and the media seeking profit and influence benefitted. Getting rid of

the Chinese served to remove the alleged job and business competition to labour and small businessmen. By their action Ottawa accommodated the pressing demands of the British Columbian political groups and pacified the racist element concerned with the undesirability of assimilation. The satisfaction of some interests to the detriment of others and the exclusion rather than accommodation of one group's interests in the legislative process rejects the claims of the concensus perspective.

Were the state, as embodied in the organization of political groups of people, or the legislative process, the machinery by which laws are made, value neutral? Inherent in the concept of the state is the machinery which makes public or legal policy official. When economic, political or legal demands collide with existing social arrangements it is living persons who collide with one another. In spite of the emotionalism generated by the creation of the drug mythology it would be naive to believe that legislators were not aware that the real issue was the question of Chinese immigration. This is clear from the House of Commons and Senate debates. There was no national immigration problem, simply a matter of too much of the undesirable ethnic group in British Columbia. In the early twentieth century, while British Columbia was trying to exclude the Chinese, the Federal government was paying the passage for European

farmers to come to Canada. Thus the state was not value neutral when they allowed the Chinese to be used as scapegoats to maintain political stability.

In the enactment of legislation that facilitated widespread police powers in matters of search, curtailed the right of appeal, enlarged the notion of possession, decreed mandatory jail sentences and curtailed judicial discretion, the state acted in a manner which resulted in the denial of existing normative guarantees of freedom to the whole community in an effort to discriminate against one group. The 1922 Senate debates showed that the right of search was only approved when the Senators were convinced that the arbitrary police powers were to be used against Chinamen. The House of Commons debates showed that the right of appeal was curtailed to speed up the deportation measures; that mandatory jail sentences were approved because only those sentenced to jail terms were subject to deportation. These instances of selective repression indicate that the legislative machinery was not value neutral.

Thus, neither the state nor the legislative machinery appear to have been value neutral. The common good wherein all members are protected by rules of truth and justice for all persons who stand within an internal political relationship was not the intent of the legislation. Since the repressive laws were founded more on common prejudice and

ignorance than on reasoned argument where all aspects of the activity were clearly and dispassionately considered and alternatives examined, one has to question the value neutrality of the state and its machinery, and this refutes the arguments of the consensus perspective.

Finally, was an overt activity or a status characteristic being addressed? In the enactment of drug legislation we have an instance where a particular subordinate group was not tolerated by the dominant social groups for reasons already stated. Demands were made upon the state to exclude the subordinate groups. A government in a democratic state is committed to accede to the wishes of its powerful and vocal members. Power can only be maintained if the demands of strong interest groups, ostensibly acting in the name of the public good, are met. By not implementing negative legislation with respect to the perceived source of the domestic conflict the Federal government would have been committing political suicide. However, the Chinese could not be rejected on purely racial grounds because, as Alexander MacKenzie pointed out in the debates, such a principle would be contrary to the law of nations and the policy which controlled Canadian life. The state did not want to appear to act immorally. But it became evident that certain pressing interests had to be satisfied. The immorality had to be transferred to the party against which it proposed to take

action so that the state could act from a moral stance against an immoral actor.

Drug involvement was singled out as the most basic element around which a rejection of the Chinese could be articulated. A mythology about drugs and the Chinese involvement was used to change the focus from their social unacceptability to their moral unacceptability, to confer upon them a "drug-associated master status and to present them as a threat to the social corporate.

Consensus theorists suggest that it is only when the conflict between the society and the deviant becomes intolerable that legislation is necessary to correct the situation. Prior to drug legislation we do not see a conflict between the Chinese and society because of their activity but because of their status. It was only when the activity of groups concerned with the control and the exclusion of the Chinese from Canadian society chose to reinterpret a neutral behaviour into one strongly imbued with moral condemnation that the spectre of deviancy arose. The result is that a socio-political issue was turned into a moral issue to generate emotion and consensus, and into a legal issue through the legislative process. The laws, therefore, were enacted to constrain and exclude the Chinese group from the social corporate by identifying them in actus terms rather than in status terms. This supports the conflict perspective.

Implications

The data relating to drug legislation in Canada supports the conflict perspective of social order. However, it is without question that present Canadian society stands in consensus in its condemnation of illegal involvement in drugs. The legislation drew its impetus from the interest groups who actively agitated for its passage and its support from the Canadian public who, out of self-interest, ignorance, irrational fear or social lethargy, allowed it to take such a strong hold on its mind. The law itself legitimized these attitudes and provided the vehicle to rationally dispel any lingering doubts. It is not that legislation against drug involvement would not have arisen at some time in the near future; an international movement against drugs was afoot. But the speed, nature and orientation of drug control in Canada was determined by the social circumstances and social forces operating in the country at the time.

Contemporary consensus theorists or jurists would use the assumption, as Stotland has done, that "opium was the motivating factor in the beginning of drug legislation" in Canada as their starting point (1; p. 31). Our data demonstrates this to be an incomplete and misleading starting point to scientifically investigate the problem of drugs, because to exclude the Chinese factor from the drug debate is to exclude critical information. By taking this position

consensus theorists assume as resolved precisely that which needs to be proven in a scientific examination of the issue.

Yet the data cannot be treated as representing a static picture, valid to this day, supporting the conflict perspective. It represents merely a starting point in an evolution from a clear conflict situation to an apparent consensus situation where the original cause of the conflict is lost but the myth continues, and the activity itself is perceived to be the bone of contention. Thus, acts of legislation based on special interests may change their character and appear to be based on a general consensus but there is also the possibility that the very existence of that act of legislation embraced in the traditional body of law is not the result but the source of consensus.

Two significant questions arise: what are the implications of the consensus or conflict perspective and what is the relevance of the debate to the discipline of criminology? Consensus and conflict perspectives differ from each other in the identification of the criteria that define their boundaries. The consensus perspective represents a conformist obedience to authority, a concept of law as an expression of social agreement where the existence of order is evident. Once an act of legislation is passed the new act becomes a social fact. Whatever the conflictive nature of its origins, whatever its dysfunctional effects, the new act passes into

the great mass of traditional law. An evolutionary transition from legality to legitimacy, both considered in absolute terms, takes place and the essential consideration is not with coercion or dysfunction which may arise but with authority which legitimacy confers. As a social and legal reality we either adjust to the law, or, failing to do so, suffer the consequences. With consensus the law is sacrosanct because it is seen as purposeful, right and necessary, containing its own implicit morality and its own intrinsic moral character. The consensus perspective seeks to preserve and perpetuate the mythologies that support the status quo. This perspective seduces us into believing that we should maintain and, if possible, extend the policies that we have become accustomed to. It sees no need to change, only perhaps to adjust. The consensus perspective sees the law as serving an integrative function. Its focus on criminal behaviour as a human activity keeps punishment and vengeance at the center stage. A consensus creates an attitude of acceptance. With acceptance there is a loss of flexibility of response and of the capacity to innovate that the complex notion of the crime problem requires. This leads to an acceptance of the oversimplified enforcement route and the erosion of those checks and balances designed to protect the individual from abuse, to a strategy of fatalism, not innovation. If certain things are taken as givens there is no impetus to examine, to criticize,

or to change. The law, to which we acquiesce so completely now, was created by our ancestors, not ourselves. If we accept it without question it continues into posterity but with the added force of our present complicity.

The conflict perspective on the other hand advocates a spirit of enquiry and experiment. It suggests that the law consists of acts of legislation, many of which consist of a legalized myth accepted as common sense. The existence of order is problematic. Many laws prohibiting certain actions create circumstances worse than the condition they were intended to control. Understanding is necessary for change to achieve meaningful stability. Conflict theorists seek to debunk social and legal myths, to uncover the unintended and dysfunctional consequences of the criminal law. They seek to start a new discussion at the social center proposing new facts, new solutions. They suggest that the roots of the legal order lie in the coercion of some men by others; that law is not integrative but discriminatory as it favours some at the expense of others. They take into account the influence of special interests in the social definition of behaviour as criminal. Since the actions of the state may act to precipitate deviance instead of preventing it, legality and legitimacy is relative, not absolute, and one should tolerate and treat rather than prohibit and punish. Most of all one should look for solutions in the social system. The onus

rests on us to look for alternate methods of controlling the phenomenon in which we are interested.

A further position of the conflict perspective is that the content and nature of the law is not sacrosanct. The processes by which law is enacted and enforced and the way in which society operates and justifies its actions warrant serious attention and critical scrutiny. This perspective points out that the unity and stability of the social corporate based on conflict, represented in the repression of marginal groups, is dysfunctional and that such stability would most likely be artificial or superficial. Dysfunction is also present when there is evidence that a particular law has no positive effect but instead has the effect of making criminals of persons who otherwise would have been law-abiding citizens. A false stability provides the illusion of security by masking symptoms of social disease with legal and moral prescriptions. The social problems remain, marginals remain, myths remain dormant in the social and legal atmosphere to be resurrected in periods of social conflict against different marginals with new variations.

The value of the conflict perspective lies in its challenge to the various assumptions of the consensus perspective. It challenges traditional theorists to stop justifying things that cannot be justified, to seek justice in action, and to force a re-evaluation and re-examination of

our present values, attitudes and perceptions so that we may find a greater number of options open to us. Conflict theorists face several problems; revealing the conflict may stimulate dissatisfaction and further conflict in the social order; they may be able to question the consensus but may not be able to provide answers to the problems that exist. Finally, if the conflict perspective should predominate, they may fall prey to the very criticisms they reveal, especially the inability to accommodate the other perspective's point of view.

In our examination of drug legislation in Canada we have seen how conflict has passed into consensus. Perhaps other laws that we have taken for granted as supporting consensus have also been derived from conflict. Conversely, laws which now seem to be conflictive in nature may have been derived from consensus. It is necessary to examine and compare the greatest possible number of acts of legislation, even those acts which we now consider mala in se, to see what historical forces push one way or the other, and to determine whether legislation is determined by constant laws.

At the present time the consensus perspective is the accepted yardstick for an explanation of the social order. Our data has demonstrated that if we start our scientific investigation with an assumption of consensus much information is lost. In this respect the conflict perspective promises

to be more heuristic as it digs below the facade to provide a greater scope for movement in science. The criminologist has an important contribution to make in this respect. By clinging to the consensus perspective most criminologists have accepted a mechanical legalistic definition of crime and have operated accordingly.

Neither the structure of our criminal law nor public opinion appear to be swayed by well documented arguments. If sufficient studies by criminologists could demonstrate that what is taken for granted as consensus is in fact conflict masked in the guise of consensus then conflict may become the new dominant perspective, the new yardstick against which social and legal policy can be measured. In that event the community of criminologists could operate at the social center to mold opinion based on scientific discovery and thereby act to influence both legislators and the public. One has to consider that there are elements of both consensus and conflict, not one or the other, in an explanation of social order. Both consensus and conflict are value loaded and therefore only partially true. It is the responsibility of the community of criminologists to decide, on the basis of research, whether it would be more heuristic to continue operating from the present dominant perspective in which the reality of dysfunction and injustice are ignored or to embrace a conflict perspective with which to operate and to take

into consideration the elements of consensus that have proven functional. The dominant paradigm must be circumscribed by the sufficiency of what it explains and demonstrates. It is in this respect that the consensus-conflict debate assumes a significant relevance and it is up to the community of criminologists, rather than its individual members, to assume the effective perspective.

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CRIMINALIZATION OF DRUG ACTIVITY IN CANADA

ABSTRACT

There are several related issues in the field of criminology of which freedom and order, the individual and society, and law and legislation are critical concerns. This thesis attempts a clarification of the controversy regarding the traditional consensus theory of law and the new conflict theory of legislation, two theoretical perspectives used to explain the persistence of social order.

The consensus perspective regards the law as representing a balance between conflicting and overlapping interests in which individual instances of the imperative element (legislation) are absorbed into the traditional element of the legal system (law). The definition of criminality is given by society as a whole, which is in consensus on these matters. In this view society is homogeneous, and is in agreement about right and wrong. Law is a social norm and a form of social control. Society consists of individuals most of whom willingly accept societal norms for the sake of stability, and a few who defy societal norms because of inherent characteristics or because of environmental influences.

The conflict perspective sees society as heterogeneous, composed of groups with competing interests, different value systems and different lifestyles. There is disagreement about objective right and wrong. Individual acts of legislation

enable those with power and influence to define social and legal reality in a manner that maintains the status quo, enhances their particular interests and values to the detriment of others, and defines less powerful groups, or those who threaten the existing arrangements, as criminal because of overt acts, while in fact covertly addressing their status characteristics.

The enactment of drug legislation in Canada in the first quarter of the twentieth century was chosen as a test case to explore the content and interrelations of the variables which resulted in the definition of drug related actions as criminal. The thesis investigated the actors in the legislative process, and the circumstances in which legislation took place, in an attempt to isolate the major factors that influenced state behaviour, and to delineate the legislative dynamics by way of a historical-developmental approach. Data consisted of excerpts from the legislative debates, and the actual laws passed, to record the early progress of drug legislation. Once the major factors and the legislative dynamics were outlined they were analysed within the framework of the consensus-conflict debate, to see whether the evidence supported propositions arising out of one or the other perspective more conclusively.

It was found that early drug legislation was not in response to the flaunting of an established norm, nor did it

reflect a community consensus or the consciousness of the whole society about drug use. In fact the first drug laws set about creating a new social as well as legal norm. In addition the covert values which gave rise to drug legislation had more to do with such factors as equality in employment, upward mobility and alien assimilation than with drugs in themselves. The basis of the legislation on widely shared values instead of a campaign of indoctrination is questionable. Further, the legislation achieved its intended goal of satisfying some interests to the detriment of others and the exclusion rather than accommodation of one group's interests in the legislative process. Neither the state, as embodied in the organization of political groups of people, nor the legislative process, the machinery by which laws are made, were found to be value neutral. Finally, it was apparent that the new legislation was enacted to constrain and exclude the Chinese from the social corporate by identifying them in actus terms rather than in status terms. The evidence supported the conflict perspective of social order.