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CANADIAN ABORTION LEGISLATION:  
CONSENSUS, CONFLICT OR COMPROMISE?

RICHARD BRZOZOWSKI

Submitted to the School of Graduate Studies and Research,  
University of Ottawa, in partial fulfillment of the  
requirements for the degree of Master of Arts in Criminology  
1986

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ABSTRACT

Law has been seen as a response to problems in society which give rise to behaviour deemed unacceptable to a segment of the population. There exist two theories as to how this occurs. The first, known as the consensus theory of legislation, posits an exchange of views which results in the identification of the most objectionable elements and agreement by all parties to deal with them legislatively. The other, conflict theory, posits that those with power in a society will cause laws to be enacted which serve their wishes, their interests and their needs irrespective of whether the other segments of society concur.

Several methods have been used in the study of legislation in light of these two perspectives to identify its theoretical basis. Early research emphasized a philosophical approach towards the examination of the historical development of law as a whole; later, particular laws were examined in historical context. Another approach was to study a variety of laws enacted in a particular jurisdiction, while some investigated the role played by groups with an interest in specific laws. Social and political events surrounding the enactment of legislation have been examined as have sanctions

(iii)

as they relate to the consensus-conflict debate. While others have studied enforcement mechanisms, a final approach has been to investigate the concept of perceptions of seriousness towards various offences.

In this study the law relating to abortion was examined from the perspectives of both enactment and enforcement criminalization. The law was first examined in the context of social and political events to identify any effect on the legal enactments related to the efforts of particular interest groups. It was next examined at the point of enforcement, first in relation to case law and later to economic measures identified as being connected to both the consensus and conflict theories.

The results can be broadly divided into two time frames - from the introduction of abortion law until the mid 1950's, and then up to 1973. During the former period consensus theory found weak support in the examination of legal change and economic variables while in the latter period there is, generally, support for neither the consensus nor conflict theories.

Legal change prior to 1953/54 lends weak support for

consensus theory as does the examination of economic variables. Case law, however, supports neither theory. While legal change in the 1953/54 Criminal Code revision supports consensus theory, both the case law and the statistical analysis interpreted in light of prevailing social and political events lean strongly towards the existence of a third theoretical possibility.

The basis of this new interpretation is the shifting of the focus of the debate both in legal and popular social terms from a crisis associated with social values to a crisis of hegemony - in the case of abortion, from values associated with the life of a foetus to values concerned with the free choice of a woman in relation to her body. This is the theory of socio-legal compromise.

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CHAPTER I  
INTRODUCTION

IDENTIFYING THE PROBLEM

In social or criminological research, as in other research forms, there exist three frequently merging, or simultaneously occurring phases identified as i. a felt difficulty; ii. problem identification and iii. problem formulation. Some generally unidentifiable motivator surrounding or resulting from certain discomfort emerges from the 'felt difficulty'. Polansky indicates that an encountered problem is simply a question for solution. However, he points out "There can be no problem for research unless two conditions exist: A question, that is, an issue, exists about which there is uncertainty, and, (be it a simple question or one of great complexity,) at least two solutions that are possible and can be specified" (1). By this means, he suggests, one might avoid a negative answer to the question "What is it?" Stouffer (2) has suggested that the "What is it?" question is a test of a piece of research. Where only one answer can be found, there exists no question for research.

Problem identification and formulation are the links

between the "felt difficulty" and a design believed capable of resolving the problem. These aspects are related to whether or not there is a researchable question, however, each element must be considered separately. Identification is to "establish the identity of..." (3) or "...to recognize or establish as being a particular person or thing" (4). 'Formulation' is "to put in a systematized statement or expression" (5). However, problem formulation cannot evolve until the problem about which the formulation is to be made has been identified. It would not be hard to follow the temptation gleaming from the midst of the mass of questions surrounding an issue to jump at early questions which might appear. It must be acknowledged that whatever question is formulated at this stage might, during a period of rumination, be reformulated. Further, in the light of emerging information, it might be found that any original question posed may not be answerable and need reformulation to some extent to make it so.

The initial stages then, in identifying the locus of a problem are exploration and diagnosis (6). Should an engulfing myriad of possible questions appear, two tests of research suitability have been proposed by Ripple: (7) i. specificity - which may tend to indicate whether the problem has research potential, and ii. one's attitude towards possible solutions. Ripple suggests, consistent with Stouffer and

Polansky, that "inability to envision two or more possible outcomes may mean either that the primary discomfort is not related to the problem presented or that research is being proposed as a delaying action. Problem formulation, then, clearly begins when the problem has been identified.

Almost daily we are made aware of many conflicting opinions as to whether or not abortion should be within the realm of criminal law; and if it is, or should be, then to what extent. It is well acknowledged that these fundamentally moral questions are very difficult to answer. Callahan (8) tells us:

- (a) Abortion is a nasty problem, a source of social and legal discord, moral uncertainty, medical and psychiatric confusion, and personal anguish.
- (b) Abortion is at once a moral, medical, legal, sociological, philosophical, demographic and psychological problem, not readily amenable to one-dimensional thinking.

Mandy has said of medical doctors:

Whether we like it or not, many doctors think of abortion in one way, speak and write of it in another, and in actual practice conform neither to personally expressed beliefs nor to established legal or social codes (9).

Abortion, then, is a confusing topic of concern to many, raising several difficult questions.

#### THE OFFENCE OF ABORTION

Crimes relating to abortion are to be found in Part VI of the Criminal Code of Canada R.S.C. 1970, Chap. C-34, at section 251, wherein it states:

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

(a) the administration of a drug or other noxious thing,

(b) the use of an instrument, and

(c) manipulation of any kind.

(4) Subsection (1) and (2) do not apply to

(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant,

permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage,

if before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(c) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in

which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(a) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health, (a.1) in the Province of Alberta, the Minister of Hospitals and Medical Care, 1974-75-76, c.93, s.22.1.

(b) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(c) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(d) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within the hospital.

(7) Nothing in subsection (4) shall be construed as

making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person. 1953-54, c.51, s.237; 1968-69, c.38, s.18.

COMMENTS ON THE NATURE OF JUSTICE

c. In coordinating his concept of justice as taking the best from various conceptions of justice, John Rawls identified three requirements for the harmony of individual and collective needs, viz:

- i. Individuals' activities must be compatible with one another, and capable of being carried through without severe disappointment to individual legitimate expectations.
- ii. The execution of the plans should lead to the achievement of social ends in ways that are efficient and consistent with justice.
- iii. The scheme of social cooperation must be stable; it must be more or less regularly complied with and its basic rules willingly acted upon; and when infractions occur, stabilizing forces should exist that prevent further violations and tend to restore the arrangement (10).

These three form the basis of the social contract as viewed by Rawls. Following his contention that all life is inviolable, thereby challenging utilitarian theory, by affirming that "justice denies that the loss of freedom for some

is made right by a greater good shared by others" (11) he contends that freedom before the law, equality of status and entitlement to certain fundamental rights "...are not subject to political bargaining or to the calculus of social interests" (12).

Rawls' aim is to raise the social contract theories of Locke, Rousseau and Kant to a more abstract level - removed somewhat from, and superior to utilitarianism, and, as Rawls puts it "highly Kantian in nature" (13). He points out the need for a concept of justice "for its own sake" adding that notwithstanding its inadequacies and frequent ineffectuality, it should not be dismissed (14).

It is claimed that justice is attained by finding the balance in society amongst competing claims with rights and duties assigned to the purpose of finding "the appropriate division of social advantages" (15). In considering his concept of justice as "justice as fairness", Rawls identifies as essential certain principles viz:

- (a) that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.
- (b) that they are to regulate all further

agreements;

- (c) that specify the kinds of social cooperation that can be entered into and the form of government that can be established.

In this way Rawls contends, justice is attainable through social cooperation in choosing and assigning "basic rights and duties" and determining the "division of social benefits" (16).

In narrowing down his theory, Rawls argues that as individuals we must make judgements concerning those matters which are for our own good, so as a group people must decide what is for their collective good. Whilst acknowledging that through circumstances of birth all are not in one position within the strata of society, he contends that justice as fairness transcends, as far as possible, stratum barriers to attain that fairness necessary for justice (17).

Rawls places considerable restraint on his theory, by using certain provisional fixed points which any concept of justice must accommodate. He asserts that "there are questions which we feel sure must be answered in a particular way. For example, we are confident that religious intolerance and racial discrimination are unjust. We think that we have examined these things with care and have reached what we

believe is an impartial judgement not likely to be distorted by an excessive attention to our own interests (18). It is important to note his contention that "we should view a theory of justice as a guiding framework designed to focus our moral sensibilities and to put before our intuitive capacities more limited and manageable questions for judgement" (19).

In sum, Rawls describes as a state of "reflective equilibrium" the "mutual adjustment of principles and considered judgements" to the end of achieving societal harmony through justice (20).

Rawls' aim is to bring about the greatest possible happiness - consistent with Bentham, and other hedonistic utilitarians (21), whilst at the same time promoting that it be not at the expense of inflicting pain upon the balance. However, as Kelsen points out, following in part Bentham,:

If justice is happiness, a just social order is impossible if justice means individual happiness. But a just social order is impossible even on the supposition that it tries to bring about, not the individual happiness of each, but the greatest possible happiness of the greatest possible number of individuals (22).

In other words, justice appears to be related to social

order and both individual and collective happiness. At the same time, Kelsen further claims that "Justice is primarily a possible, but not a necessary, quality of a social order regulating the mutual relations of men." (23)

#### SOME GENERAL CONCEPTS OF DEVIANCE

Several theories have been developed around the framework of consensus and conflict theories of criminality. Hagan suggests a continuum of deviance through the range of societal norms from clearly criminal through consensus to conflict crimes and "non-criminal forms of deviance - the social deviations and finally the social diversions." (24) McDonald, however, expresses concern with the dispute between the two - consensus and conflict - at theory level, recognizing that most theoretical arguments are between or amongst the various sub-theories within each relatively clear consensus or conflict model (25). Many theorists, however, come to identify differences amongst the relationships of behaviour, legislation and penalty with both the consensual and conflictual models. This distinction is recognized by consensus theorists who identify legislation as the response to the threat posed by criminals. This is in contrast to conflictualists who view the development of legislation as a means to control behaviour for the express purpose of the

power group (26). One major problem, however, in pursuing this comparison, is the accurate identification of public response or feelings about given or suggested legislation. It is not hard to know what highly vocal lobby groups want, but by far the greatest majority of the public fail to express their views, simply accepting that which they are fed.

To the question of public information, or misinformation, Hagan argues that selectivity of enforcement - putting emphasis as to need in the wrong places - is a root of legislative misdirection. He maintains that "...not all acts, even if they could be, need be punished." The consensual result of effective public awareness is contrasted with the conflictual position where deviance is seen as "...more a matter of public evaluation and official response than actual behaviour." (27) He contends there might exist a tendency to categorize laws through moral functionalism (or value consensus) and moral Marxism (or value conflict) theories as "good or bad solutions to problems." (28).

Hagan identifies six sociological approaches to the definition of deviance:

1. Legal - Consensus Approach:

This approach argues that the only clear line

of deviance is as consensually set down in the statutes. Tappan postulates that "Crime is an intentional act in violation of the criminal law...committed without defence or excuse, and penalized by the state..." (29). Hagan argues that the problem with this approach to defining deviance is that it excludes entirely that area of behaviour which is not contrary to a criminal or quasi-criminal law (30).

2. Socio-Legal Approach:

Developed by Sutherland to encompass various types of behaviour, this attempt to define deviance allows that the criminality element remains in terms of (i) a legal description and (ii) legal penalty (31). Again, however, there is little movement away from the legalistic position.

3. Cross - Culture Approach:

Here, Sellin proposes that the existence of deviance is dependent upon the cultural norms common to a given group; concomitant with this view he submits that there exist certain behavioural norms that are common to all groups.

4. Statistical Approach:

This approach taken by Wilkins is based upon the premise that present-day forms of criminality were at one time acceptable forms of behaviour, and suggests that low frequency of behaviour in a society causes that act to be either criminal or saintly - at either end of the behavioural continuum, with the majority behaviours considered normal, hence acceptable and non-criminal (32).

5. Labelling Approach:

Becker (33), following others, including, in part, Tannenbaum claims that one develops one's degree of deviance by being so labelled - deviance begets deviance through cultural recognition of acts as deviant acts and by being associated with them.

6. Utopian - Conflict Approach:

Deviance is viewed by "new criminologists" such as Taylor and his colleagues as a protest against perceived social injustice and, possibly an attempt to right societal wrongs (35).

A simple description of deviance "...variations from the

social norm", proposed by Hagan may be sub-categorized to provide a continuum, similar to Wilkins (36), from the least to the most serious behaviour. Hagan proposes three measures of seriousness:

- i. "...the degree of agreement about the wrongfulness of the act."
- ii. "...the severity of the social response elicited by the act."
- iii. "...a societal evaluation of the harm inflicted by the act." (37).

Here one may distinguish between those crimes considered "victimless" and the remainder - more obviously harmful acts.

However, as Rawls has clearly pointed out, for that which is determined for all to be just and fair for all, everyone must be considered equal from the beginning (38).

#### CONFLICT THEORY

Following World War I conflict theory had almost disappeared in western society, but in Russia it became "the establishment theory" (39). It took forty years before conflict theory seriously emerged again in the West.

Bonger and Kropotkin made morality their spearhead in presenting this theory; however, it never really strayed too far from the political arena, particularly with the works of Dahrendorf, Vold, Comfort, Quinney and more recently Taylor et al (40).

Tannenbaum informed us in 1931 that "The answer to the complicity produced by the new industrialism was an attempt to secure order by an increase in the number of laws" (41), and further that

Out of one hundred thousand persons arrested in Chicago in a recent year, more than one half were held for the violation of legal precepts which did not exist twenty-five years before. Of the inmates of the prisons of the Federal Government (at that time) 76% (were) there for crimes which were not crimes fifteen years (previously)." (42)

This illustrates the enactment of more laws in America during that period for the purpose of controlling the growth of separate interests; and it is the general lack of societal agreement on questions of controlling separate interests that forms the basis for conflictual theories.

In attempting to find a legislative balance, Parliament will probably never be able to please all. Certain types of

behaviour are deemed outrageous and criminal to some, yet at the same time acceptable, even wanted by others: Many would argue that conflict crimes should not exist in criminal law, whilst others would argue that still different conflict crimes should exist. Hagan, agreeing with Turk (43), suggests that it is important to note that whereas those who commit consensus crimes are in many ways dissimilar to the general population, those who commit conflict crimes are not (44). It is because of this distinction that some feel those who commit conflict crimes should be considered something other than criminal.

Three major theories of conflictual crime have been identified:

i. The Subcultural Theory:

Cohen (45) found conflict between North American middle and lower class values and norms. The result is a "...delinquent contra-culture that is non-utilitarian, malicious and negativistic in its values" - expressed more simply by Hagan "...members of the delinquent culture 'raise hell for the hell of it'" (46). Miller (47) at variance with Cohen, sees delinquency a cultural "by-product of...the lower class system", where behaviour is seen to be based upon a hexamorous

focus, with a natural outcome contrary to established legal norms in some cases. Subcultural criminality is based upon a relatively constant propensity to deviance combined with variable incentives, according to Banfield (48). Included in those elements determining propensity is morality which is seen to be of three types, viz.

- i. Preconventional morality where a 'right' action is 'got away with' and a 'wrong' action is not;
- ii. Conventional morality where doing one's duty is 'right'; and
- iii. Post-conventional morality where the 'right' action is in accordance with a principle generally considered to be the best choice.

Although morality is just one element of five viewed as influential upon propensity to deviance (the others being ego strength, time horizon, taste for risk and willingness to inflict injury), it might here be pointed out that it is this morality question which will to some extent be considered in later discussion of the abortion question, to the exclusion of others in Banfield's theory.

ii. Labelling Theory:

Labelling is a societal response to the identification

of deviants. Tannenbaum proposes that environmental factors determine to a considerable extent whether or not a child will become criminalized. He suggests that overcrowding may force children onto the streets and into criminal behaviour, initially not of a serious nature - more like damage. However, the child becomes part of the criminal subculture through the response of police and courts, and the youngster starts on a path of divergence from societal values which will lead him to conflictual views of potentially criminal situations (49). As Hagan informs us, "...where labels are applied, mistakes will occur, and unintentional consequences may follow" (50).

### iii Group Conflict Theory:

Behaviour which deviates from societal norms is not restricted to individuals and inter-group politics may become an integral part of the deviant social sub-structure. According to Vold (51), both people and laws are necessary elements for crime and criminality, but it is suggested that the law is the most crucial element. Whereas delinquencies involve people, it is through the establishment of someone else's law that it becomes so, and in many cases (though he clearly points out not in all), this is developed from the differences in generations, perspectives of 'good' and 'bad',

'right' and 'wrong'. Where criminality becomes a matter of generation differences, clearly we see the conflict as differences among group opinions. However, it need not end there. Concurrent with inter-generation value distinctions, we may observe cross-generation differences of both similar and separate topics. In other words, at one time we may see value differences up and down and age continuum, and across that continuum at any particular point.

Vold suggested four categories of crime to which the group-conflict theory was particularly applicable (52), viz.

- i. political protest movements,
- ii. company versus labour,
- iii. competing union disagreements,
- iv. racial and ethnic clashes.

Clearly there are other areas to which the group conflict theory might be seen to apply and surely abortion is one such offence. Others have seen the limitations of Vold's theory; and in expanding it, Turk develops the position to the societal dichotomy of "...those...who constitute the dominant, decision-making category - the authorities - and those who make up the subordinate category, 'who are affected by, but

scarcely affect the law - the subjects." (53). Hagan points out that no society will completely agree upon which matters should be within or without the law, hence the perpetuality of this conflict is forever a challenge to the authorities (54). Turk considers the existence of lawbreaking an admission by the ruling administration that it has failed to deal with certain unacceptable behaviours. If governments were to outlaw all behaviour there would exist many criminals and much more criminality, however, it is in trying to find an acceptable balance that parliaments find difficulty (55).

With Chamblis and Seidman (56) we see a gradual move towards the highly political criminological assessments of Taylor et al. (57). The former writers are consistent with others who subscribe to varying values across society but go further by claiming that, as Hagan puts it "...the guiding principle of legal bureaucracy is to maximize organizational gains while minimizing organizational strains." (58). Taylor follows Quinney whose conflict, or "moral marxism" theory emphasizes the interest of particular economic and political groups thus:

The state is organized to serve the interests of the dominant economic class, the capitalist ruling class - criminal law is an instrument that the state and dominant ruling class use to maintain and perpetuate the social and

economic order. The contradictions of advanced capitalism...require the subordinate classes remain oppressed by whatever means necessary, especially by the legal system's coercion and violence; only with the collapse of capitalist society based on socialist principles, will there be a solution to the crime problem.(59).

The role of the press is very important to the public concept of amounts of deviance. Quinney and McDonald, Hagan suggests, would argue that, in fact, the amount of deviance may well be manipulated by the press resulting in:

- i. the ignoring of deviance common to powerful interest groups, and
- ii. an exaggeration of the level of deviance amongst less powerful groups (60).

One's "natural fortune or social circumstances", as Rawls puts it, should not cause one to be found in an advantageous position (61).

#### CONSENSUS THEORY

Hagan describes the consensus theory as "moral functionalism" whereby

- (a) values commonly shared by society reflect common interests at an 'institutional level';

- (b) disputes can be settled without violence and without allowing individuals to act for their own interests at the expense of others - this being consensus at the 'procedural level';
- (c) at a 'substantive level' to a utilitarian ethic is added the aim of causing least sacrifice.

It is, in fact, according to Hagan, to a large extent that utilitarian ethic that unites these levels - the aim that the majority should receive the most good (62). Rawls argues, however, that "the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage." (63).

In describing criminal forms of deviance, Hagan looks first to that multitude of crimes which most people at this time would consider to be criminal (64). These forms of behaviour which may not always be considered criminal were described by Jackson Toby (65) as "consensual crimes"; those forms of behaviour which we might consider rendering contrary to the law by general public opinion for the good of all of us. However, as time changes, so does public opinion and earlier 'heinous' crimes fade in their ranking as criminal offences.

Implicit in the consensus theory is the assumption that the majority of people do agree to certain limitations on their behaviour for the good of the majority. Three types of consensus theory have been identified (66) viz:

i. Anomie theory - as conceived by Durkheim (67) in his research into suicide where it was found that people tend to pursue those things they want and where necessary breach laws to attain them, hence failing to comply with the normal social standard. Merton's (68) revamped anomie theory identified "culturally defined goals, and the acceptable means of achieving these goals" as principle elements of societal structure, and found generally acceptable behaviour to exist where "the goals and means of society are acceptable successfully pursued."

ii. Neutralization theory - In the learning of the rationalization of criminal behaviour, the neutralization theory proffered by Sykes and Matza (69) supposes there to be general societal agreement over what constitutes "the good life" and offenders learn

to neutralize their criminal behaviour through rationalization. This brings people to violate rules to which they subscribe. Cohen considers this to be "one of the most fascinating puzzles of human behaviour" (70). The neutralization theory had already been applied to crimes in the boardrooms by Sutherland (71) and Cressey (72).

iii. Control theory - This form of deviance is proposed by those who see each of us to be capable of 'good' and 'bad' behaviour, based upon the belief that society tries to improve upon all those qualities generally believed necessary for good order. It is suggested by Hagan that "...consensus theories generally in sociology assume that the societal purpose involved is that of maintaining a smoothly functioning, stable system of the existing variety." (73) He contends that the control theorist's interest is not in "why do you do it?" but "why don't we all do it?", and he quotes Hirschi's response as "we would if we dared." (74) Controls work from within and without, according to Reckless - the internal

components of self-control and self-opinion work with outer components such as family and community (75). Four elements are suggested by Hirschi as forming the social cohesion that helps prevent criminality, viz: (76)

- i. Attachment - whereby we try to rise to the expectations of others;
- ii. Commitment - the expending of time upon projects towards the achievement of our aim;
- iii. Involvement - simply keeping busy; and
- iv. Belief - where it is proposed that, in part, it is the absence of certain beliefs forbidding deviance that results in deviant behaviour.

Hagan informs in sum that the "...less committed, attached, involved and believing individuals are, the less is their bond to society," thereby giving rise to criminality and deviance (77).

Parsons also saw social control as the response to deviance inkeeping with the control theory. This he claimed to be operative at two levels - the individual level where inter-

nalized behaviour patterns were reorganized, and at the system level where family, schools, and the legal structures control for the general good (78).

In examining the development of the consensus theory over the past century, McDonald, citing Westmark, Hobhouse, Pound, Sorokin, Timasheff and others, contends that theory has evolved from a condition of general moral commitment to a complex combination of moral and theoretical - legal propositions translated into pragmatic terms (79).

#### AN OVERVIEW OF THE RESEARCH PROJECT

The questions of this research project will be limited to identifying the type of legislation the Canadian Government has employed in its efforts to control abortion. The principle question is whether our abortion legislation is conflictual or consensus theory legislation.

CHAPTER II  
METHODOLOGY

A variety of methods have been employed in the analysis of legislation. Roscoe Pound, an eminent jurist of the early part of this century employed a historical approach in his examination of the nature of law. His study, which sought to demonstrate the consensual nature of law, focused not on the content of the law but on its philosophy, tracing its development from the days of ancient Greece to the nineteenth century. He began with Greece because he believed that although the "...law, in the modern sense, begins with the Romans, philosophy of law begins with the Greeks." He claimed that "What went before them is too remote for the present purpose, what went after them was largely shaped by them. Since the Romans took their philosophical ideas from the Greeks, the Greek idea of the end of the law not only governed the Roman world but in consequence in large measure governed the medieval world." (1) Pound points briefly to the presence of conflict in Greek society but insists that the law was seen as a means of maintaining the status quo, "...to keep each man in his appointed groove and thus prevent friction with his fellows." (2) This, of course, was in a society seen not as a conglomeration of men seeking their own level through free enterprise, but one where men were

assigned to their appropriate place according to their demonstrated capabilities (3).

Maintaining the status quo, which Pound had seen as the basis of Greek law, continued through to the Middle Ages. Yet, during this period there developed a change in the basis of legal theory from an appeal to reason in support of authority to an appeal to reason against authority whereby self-assertion could exist to its fullest. Thomas Aquinas, during this time, had developed in detail the natural theory of law as that theory is currently understood. With the Reformation came a strong Germanic thrust toward the power of the state and emphasis on the development of civil law not of a universal nature, but for each state (4).

Spanish jurist - theologians also exerted an influence on the international development of legal thought. The skillful and powerful Jesuit jurists drew together early natural law with the interests of man and the state. They saw law as a means of limiting the activities of men in the interests of other men. This was seen as necessary because all have freedom of will which, together with their ability to direct themselves towards their own interests requires law to create a balance amongst their activities and freedoms. The law was seen to grow by Pound from a means of maintaining

the status quo to an instrument for the maintenance of a natural equality (5), maintaining during the transformation its essential consensual character.

In the seventeenth century, Grotius had viewed law as being related to two sometimes conflicting states. The first was the reasonable limiting of the activities of man in the interest of other men, and the second the inherent right of man to act freely - a right seen to develop from natural law as the result of reason, and not of divinity (6). Pound's historical analysis led him to infer that during the seventeenth century the concept of natural rights grew until the rights became accepted as being beyond the reach of the state. It was as a result of this development that the idea of a contract between the individual and the state, and amongst individuals, developed both in legal and political thought. Such a contract required that rights be upheld and duties performed. While Pound saw the 'social compact' as maintaining the earlier status quo, it also led juristic thought into new directions (7).

Such thought in the eighteenth century was based upon four propositions: (8)

- i. There are natural rights demonstrable by reason. These rights are eternal and absolute. They are valid for all men at all times and in all places.
- ii. Natural law is a body of rules, ascertainable by reason, which perfectly secures all of these natural rights.
- iii. The state exists only to secure men in these natural rights.
- iv. Positive law is the only means by which the state performs this function, and it is obligatory only so far as it conforms to natural law.

In this way, law is seen as a means of securing natural rights which are legal rights. Pound points out, however, that "(p)ushed to its logical limits, this leads straight to anarchy, and, indeed, the philosophical anarchists still proceed upon this line." (9)

Through the eighteenth century, Anglo-American jurists pursued the concept of reason applied to law, and towards the end of that century it was clear that English Common Law was seen as, effectively, the same as natural law in that the end of law was seen to be the protection of individual interests - not only amongst individuals, but of the individual by the arbitrary actions of the state. (10)

~~The~~ natural law traditions of the eighteenth century

became impossible, according to Pound, when "...classes with divergent interests came to hold diverse views upon fundamental points..." (11). At the end of the century Immanuel Kant began the downfall of natural law theory. "If natural rights were inherent moral qualities to be ascertained by reason, granting that reason could deduce infallibly from other premises, how could reason give us the premises? If, on the other hand, natural rights rested on a social contract, how would the details or the implied terms of a contract of a past generation bind the men of today?" (12) Kant searched for a metaphysical principle from which the security of rights might be drawn. This he found in the idea of the freedom of will. Pound said of Kant:

He conceived that the problem of law was to reconcile conflicting free wills. He held that the principle by which this reconciliation would be effected was equality in freedom of will, the application of a universal rule to each action which would enable the free will of the actor to co-exist along with the free will of everyone else (13).

Thus, by the end of the eighteenth century the end of law had developed from maintaining the status quo to allowing a maximum of free will.

The nineteenth century saw five types of juristic

thinkers: (14)

i. Metaphysical jurists - Kant's theory carried on into the nineteenth century. The reciprocal actions of free wills were governed by a universal law necessitated by the degree of freedom inherent in the concept.

ii. English utilitarians saw law as the means by which the greatest happiness should be afforded the greatest number. Bentham's principle was to "(a)llow the maximum of free individual action consistent with general free individual action" (15).

iii. Historical jurists studied law from a historical - metaphysical perspective with individual liberty as the central theme. Much American civil law is based upon the historical school of Sir Henry Maine which, according to Pound, is based only upon Roman Law.

iv. Positivists such as Spencer and Darwin became popular during this period. Their idea of law related to matters which could be observed or experiences - matters of nature.

According to Pound "...this group argued for a free consensual rather than a logical ordering of society, (and) naturally enough it gave us nothing which is of importance for jurisprudence."

v. Social individualism developed through the nineteenth century from the earliest concept of self-assertion. This group saw government control as the most effective means of ensuring maximum liberty through collective action.

Although there are clear indications of conflict in the development of legal jurisprudence, Pound portrayed a consistent consensuality - the consensuality stemming from a consensual resolution of conflict.

Quinney, perhaps the best known proponent of the conflict theory, also utilized the historical approach to present his point of view that legislation and changes in legislation were prompted not to establish a social consensus but to serve the interests of certain segments of society. The methodology adopted by Quinney, however, was different from that adopted by Pound. While Pound surveyed the development

of the philosophy of law, Quinney refers to specific pieces of legislation examining the social circumstances under which the legislation was enacted. He notes that in Greece, around the sixth century B.C. the government, under Solon made the state a victim to all offences against the citizens. He points out that at an earlier period a wealthy oligarchy had enacted laws to control the citizens for the purposes of the powerful. The growth of serious discontent with the oppressive nature of that early Greek law resulted in the ruling aristocrats, under the direction of Solon, establishing courts, with the opportunity for appeal, and to provide all citizens with the opportunity to commence proceedings in cases where they felt wronged (16). Likewise, he points out that in Rome, a central jurisdiction and tribunal were established to control activities such as violence, treason, arson and the like - activities which were seen as specifically threatening to the state, not in an attempt to quell inter-group conflict and produce some form of social consensus, but rather to ensure the maintenance of the state and its power hierarchy. Quinney goes on then to point out how the development of the law and the criminal justice system in England slowly denied individuals the right to take private action to rectify wrongs and introduced a centralized system of control which institutionalized the possibility that one group could use the state to protect its interests while denying other

groups the same opportunity (17).

In the United States, Quinney points to the Sunday Law as an illustration of how government has utilized what was originally designed to be law ensuring a day of rest to its political-economic ends (18). The Sunday closing laws, following biblical direction to keep holy the Sabbath, were originally enacted in 1237 by Henry III who forbade attendance at town markets. The restrictions grew, and were generally based upon religious grounds. During the twentieth century, however, the Sunday closing laws changed, following the previous century's reduction in religious emphasis, to take on an economic dimension. Slowly, various types of business - from frozen custard stands to automobile dealerships - have received approval to operate on a Sunday. What was once a criminal law enacted for religious purposes has become a law applied to control the operation of certain economic interests, according to Quinney, while various labour associations maintain their own interest in the subject to ensure that workers are not forced into working seven days each week. Thus we have a situation where one law may be seen to operate for a variety of reasons and for several interests - be it religious, economic or labour.

The study of a particular type of legislation has been

the most popular approach adopted in the consensus-conflict debate. Hall refers to this technique as the institutional interpretation of history.

Studying the law of theft in England, from the late fifteenth century for two hundred years, he concluded that theft law exemplifies power of the elite to control the development and enforcement of law according to their own needs (19).

It was, however, the Carrier case (20) which best illustrated the use of that power - a position consistent with the conflict perspective of criminality. The case was concerned with the transportation of certain bales to Southampton for the purposes and interest of the owner of the bales. The accused, however, delivered them elsewhere and opened them - for his own interest. The Carrier case occurred at a time when the Common Law, and earlier cases, tended to indicate that in order to commit larceny it was necessary to include the element of trespass, whereby the property was removed not only from the ownership of another, but from his possession also. On this occasion, however, the Court instituted the offence of 'conversion' whereby one with possession of an item of which another maintained ownership could illegally 'convert' the goods to his own use. While such a

judgement might appear to make sense, Hall proposed that the reason for the decision was not one of inherent logic, but a consequence of power being brought to bear upon the Court. It was not uncommon practice until the middle of the seventeenth century for the sovereign to direct the judgement in particular cases - according to Hall, generally those affecting the nobility.

The Carrier case occurred at a time when English wealth was rapidly increasing as a result of expansion, particularly in the manufacturing industry. Edward IV was himself a merchant of the day, and with his many employees, clearly had a profound interest in the outcome of that particular case. In view of this, the judge might have been hard pressed to have delivered a verdict contrary to the economic interests of the Crown.


The decision in the Carrier case was to affect English business profoundly whichever way it went. If a decision had been rendered in favour of the accused it would have meant that anyone in the employ of another, or otherwise in lawful possession of a thing (without having ownership) could do as he wished with it. This, in any less than a perfectly honest society would mean, at least, a partial collapse of the busi-

ness to continue without fear of total or partial undermining by organized or occasional theft.

Chamblis concurred with Hall's interpretation that "...the functioning of courts is significantly related to concomitant cultural needs, and this applies to the law of procedure as well as to substantive law." (21)

English law now clearly distinguishes between the ownership and possession of property. When a person owns something he is said to have 'property', and when he has control over a thing but does not have property, he is deemed to have possession - which may be actual or constructive. A person may, therefore, part with the possession (and control) of an item, but retain property in it (22).

The laws of vagrancy in England from the twelfth century were examined by Chamblis for the purpose of trying to establish whether or not those laws resulted from the demands of the ruling classes, i.e. from a conflict theory perspective. He found that the 1349 revision of the earlier law provided the requirement of citizens to be engaged in some form of labour (23). That law made it an offence to give alms to the poor:



Because that many valiant beggars, as long as they may live of begging, to refuse to labour, giving themselves to idleness and vice, and sometimes to theft and other abominations; it is ordained, that none upon pain of imprisonment shall, under the colour of pity or alms, give any thing to such which may labour, or presume to favour them towards their desires; so that thereby they may be compelled to labour for their necessary living. (23 Ed. 3).

Two years later that Act was amended to prevent any individual moving to a new town for summer employment if there was still work in the old town. (25 Ed. 3 (1351)). This was clearly a move directed towards controlling the nation's productive human resources. Chamblis claims that the Black Death which devastated the labour force around 1348 resulted in such legislation since England's wealth depended upon a cheap labour force. With commercial growth in earlier years and the reduction of the labour force through wars, including the Crusades, the landowners were pushed to ways of ensuring a supply of labour. Vagrancy laws seem to have been the result (24).

Social change which resulted from the Peasants' Revolt in 1381 reduced the need for serfs, and there followed a change in the emphasis of vagrancy laws from the availability of labourers to the activities of criminals. The Act of 1530 provided punishment for those "...using divers and

subtle, crafty and unlawful games and plays, and...feigning themselves to have knowledge of...crafty sciences..." in addition to begging (25). The shift in concern from labour to behaviour continued and in 1535 it became an offence for "...any ruffians...(to)...wander, loiter, or idle themselves and play as vagabonds..." (27 H.VIII.c.25 (1535).), an enactment not vastly different from twentieth century vagrancy law (26).

The basis of the development of vagrancy laws in the sixteenth century was the frequency with which 'vagabonds' would steal from and rob members of the merchant class. Those developing their businesses and transporting goods required protection which, it appears, they received as needed through legislative amendments.

Chamblis' study demonstrates support for this position, that the law was adjusted to accommodate the needs of the ruling classes. At a time when cheap labour was required by the landowners vagrancy law made it possible for them to have it; when the power of those groups diminished there was little application of the law, and when merchants required protection the law was again amended.

Reedie examined treason and sedition laws in Canada

from 1892 to 1976 seeking to find whether they conformed with the consensus or conflict viewpoints. She examined the formulation of the laws considering current social and economic conditions and the incidence of the defined behaviour. Through this examination she showed that

Whenever there appeared to be a threat internal or external to society or a change in the social structure; there has been a re-examination of the law and a re-definition of the parameters of acceptable social behaviour..." (27).

She was able to demonstrate that not only were the legislation changes used to serve the interests of the dominant group, instances of enforcement also, almost without exception, provided such examples. Thus, through enactment criminalization as well as enforcement criminalization she showed that

...a powerful few (were able to) maintain their advantaged position by using state power to coerce the mass of people into doing what is consistent with their best interests (28).

Montserin, in his historical-developmental study of Canadian drug laws during the first quarter of the twentieth century considered events surrounding the legislative process in order to identify any major factors which had influence

upon that process. He attempted to determine whether the drug laws of that time were the result of consensuality or to accommodate the interests of a powerful elite.

He concluded that while there is evidence of the growth of consensus in attitudes towards drugs in general, the legislation of that period has elements of conflict theory. Owing to the 'value loaded' nature of both theories, Montserin claims each is only partly true (29). The historical analysis alone fails to indicate clearly where the truth lies.

This statement is equally applicable to all studies that have used this method. Considering the vagrancy laws, for example, the interpretation made by Chamblis is not the only possible interpretation of the events.

Berk, Brackman and Lesser (30) analyzed changes to the Penal Code of California from 1955 to 1971. Their analysis was designed to identify how law-making was affected by the elements which they believed moulded the law - social structure, values and beliefs, bureaucratic interests and the process of law-making.

Their historical analysis of several bills presented to the legislature revealed that during the period of analysis

several changes occurred. First was the growth of various lobby groups which had a profound effect on the legislative process. There grew an ideological polarization between the conservative and liberal elements in the legislature, and along with this was noticed changes in the intent of various pieces of legislation from the perspectives of both parties.

They also analyzed, quantitatively, almost 700 revisions to the Code during the sixteen year period. Their interest was to see how criminalization, in terms of enforcement and penalties, were affected by the changes. In addition factors such as lobbying, crime rates and public opinion were examined to see how they affected the law-making process. Their significant findings were that the short-term interests of those involved were of major significance to the legislative process. They found that it could not be shown that law results from the efforts of powerful interest groups; however, it is significant to note their conclusion that "...to the degree that State power has been enhanced, the larger interests it most immediately represents have new tools with which to shape society." (31)

A second approach utilized to study the consensus - conflict controversy has been to concentrate on the role played by particular groups of people.

A study of juvenile delinquency by Platt, conducted from a Marxist perspective, indicated to that author that along with a reduction in the effectiveness of capitalism's social controls developed an increased need to find alternative methods of coercion. In the case of juveniles, this coercion, according to Platt was provided by the 'child-savers'. In his examination of the development of state laws relating to the handling of juvenile offenders, he described how socially powerful middle-class women worked to influence the lives of young people. This was seen as a means of restoring some of the authority of the women by opening up new avenues of employment in the area of social work, a level of authority they were seen to have lost through the urbanization of family life (32).

Taking issue with Platt's findings, Hagan and Leon used the development of juvenile delinquency legislation to examine the theoretical and empirical usefulness of the class-conflict approach to the study of the sociology of law. They found that data for Toronto failed to support Platt's position that delinquency legislation resulted from the efforts of the 'child-savers'. It did, they maintain, result from an emphasis on probation work, not imprisonment. The result was not to be greater coercion, but increased emphasis upon social controls

- particularly in the family setting (33).

In a comprehensive analysis of Canadian delinquency legislation, Leon points to a variety of opposing interests associated with various enactments. His study examined the historical development of the law in the context of a variety of interests. Two approaches to the development of delinquency legislation are proposed by Leon; first he emphasizes the need for sound testing of 'treatment' programmes prior to their use or inclusion in law; second he points to the "... ever increasing number of professionals, including social workers, lawyers, administrators, and researchers (who) have developed strong and frequently competing interests in attempting to influence the direction of Canadian juvenile justice. No single interest group can be assumed to objectively profess the "best" method for securing the child's "best interests." (34) In this regard he looks to the development of children's rights.

In a historical account of the American response to juvenile delinquency, Lerman found consistently that, contrary to the traditional American belief in liberty, justice for all and freedom from arbitrary detention, young people have been subjected to detention in what he described as a

'juvenile social control system' (35). Examination of the first nation-wide study of correction, in 1967, led Lerman to infer that "...short-term restraint (social control), not rehabilitative and reintegrative service, is the actual dominant public policy response toward youth." (36)

The delinquency studies just reported utilized Becker's concept of the 'moral entrepreneur'. To Becker there are two types of moral entrepreneur - rule creators and rule enforcers. The 'crusading reformer', such as the 'child-saver', is, to Becker, the prototype of the rule creator. Moral crusaders, whilst often motivated by humanitarian principles, are frequently supported by those with more self-serving interests. One problem encountered by reformers is that when their goal is achieved they are 'out of job', or, "(a) man's preoccupation may become his occupation." To Becker, then, a successful crusader will produce a new group of 'outsiders', whereas an unsuccessful one may continue to search for causes, becoming an outsider himself "...continuing to espouse and preach a doctrine which sounds increasingly queer as time goes on." (37)

Sutherland's study of the history of sexual psychopath laws centered upon the influence of the psychiatrist in their enactment. The indefinite detention of a diagnosed sexual psychopath would result from the following, according to

Sutherland:

First, these laws are customarily enacted after a state of fear has been aroused in a community by a few serious sex crimes committed in quick succession. This is illustrated in Indiana, where a law was passed following three or four sexual attacks in Indianapolis, with murder in two. Heads of families bought guns and watch dogs, and the supply of locks and chains in the hardware stores of the city was completely exhausted...

A second element in the process of developing sexual psychopath laws is the agitated activity of the community in connection with the fear. The attention of the community is focused on sex crimes, and people in the most varied situations envisage dangers and see the need of and possibility for their control... The third phase in the development of these sexual psychopath laws has been the appointment of a committee. The committee gathers as many conflicting recommendations of persons and groups of persons, attempts to determine "facts", studies procedures in other states and makes recommendations, which generally include bills for the legislature. Although the general fear subsides within a few days, a committee has the formal duty of following through until positive action is taken. Terror which does not result in a committee is much less likely to result in a law (38).

Sutherland saw psychiatrists quickly become involved in sexual psychopath legislation:

The psychiatrists, more than any others, have been the interest group back of the laws. A committee of psychiatrists and neurologists in Chicago wrote the bill which became the sexual psychopath law of Illinois; the bill was sponsored by the Chicago Bar Association and by the state's attorney of Cook

County and was enacted with little opposition in the next session of the State Legislature. In Minnesota all the members of the governor's committee except one were psychiatrists. In Wisconsin the Milwaukee Neuropsychiatric Society shared in pressing the Milwaukee Crime Commission for the enactment of a law. In Indiana the attorney general's committee received from the American Psychiatric Association copies of all the sexual psychopath laws which had been enacted in other states (39).

When the drafting of legislation is performed by those with a particular interest, the results must be questioned. Notwithstanding the need for expert psychiatric input into the drafting of such legislation, for absolute control to remain with such a group may lead to the situation, in support of conflict theory, where the only interest really to be satisfied is not that of the psychopath or of society, but the psychiatrists.

The true goals of the U.S. Bureau of Narcotics were, according to Dickson, increased funding and organizational power when they lobbied for the passage of the Marijuana Tax Act in 1937. While there had been little attention paid to drug use previously, that lobby raised public consciousness through the employment of media campaigns to the point where the subject became one of great national importance. Dickson suggests that it was for those self-serving interests only that the Bureau became so vocal (40).

Cook examined the development of Canadian narcotics legislation by analyzing surrounding events from a "...modified version of the 'conflict model' of society" (41). She found that from the time of the passage of Canada's first anti-opium law in 1938, "...a result of Mr. Mackenzie King's private investigation and report on the use of opium in Vancouver" until 1923 when the government decided that convicted illicit traffickers should not be allowed to appeal their convictions since "...this proviso would not apply to honest citizens but only to criminals who, as a rule, had no fixed residence or place of abode and thus simply vanished after serving notice of appeal" (42), the legislation was clearly enacted to support the position of the elite and to control Chinese Canadians and members of non-conforming groups.

The growth of monopolies in the United States during the nineteenth century led to their control by legislation. This brought the government in direct control of the country's economic interests, according to Quinney, notwithstanding the free enterprise nature of that economy (43). The laws developed as a consequence of the interests of numerous, though not always harmonious groups. Small businesses feared they would cease to exist (and many have); labour feared that negotiations with large organizations would be less profitable, and the government feared the loss of control of the

economy - possibly to a foreign nation. The Sherman Act of 1890 which resolved some of these problems was seen as one example of many, by Quinney, of control through the use of legislation for the interests of a small powerful group.

Control of the pharmaceutical industries of the United States and Canada has occurred despite a variety of conflicting private interests. With the great possibility of harm which may be caused by an unregulated pharmaceutical industry, there was clearly need for some means of ensuring public safety. There were (and still are) however, many conflicting interests and opinions as to how this should be achieved. Early regulations were designed for those with the greatest economic interest - the manufacturers. It took some thirty years before the U.S. Food and Drug Act became law. Debate over what is appropriate legislation to control drug safety has not ended. In Canada, as in the States, numerous interest groups - some, representing the manufacturers operating out of lavishly equipped offices and others - usually those who have suffered as a result of the effects of some drug or other operating from a kitchen table - continue to lobby the governments about a variety of drugs. Concerned citizens battle against the private interests of the manufacturers while governments endlessly research the issues.

Roby, like Quinney, emphasized the political nature of law-making from a law's conception to its enforcement. His examination of New York's prostitution laws in the 1960's illustrates how interest group influence can be brought to bear at various stages, and that, even if a law is enacted, the interests of certain powerful groups will decide if, or to what extent, the law will be enforced. In this case, although, after considerable debate, patronage of a prostitute was included in the Act, in practice there was very little enforcement of that section. The selective enforcement was considered to illustrate the political nature of that piece of legislation (44).

In a 1984 study, Boreham attempted to discover whether Canadian law regarding prostitution conforms with the conflict or consensus theories. In addition to a socio-historical review of the legislation, two surveys were conducted. One addressed the issue to the general public, and a second to merchants in the area where prostitutes were known to operate.

While she suggests that "...continued debate and controversy...in other cities gives support to the theory that prostitution in Canada is a conflictual crime", it is interesting to note that there is a fairly sound consensus among those surveyed as to the approach that should be taken in dealing

with prostitutes. It is reported that 85% of the general public and 96% of the merchants "do not think of the prostitute as a criminal but rather as a nuisance." (45) This finding tends to underline the conflictual nature of the present law associated with the behaviour.

Historically, the law of rape has been considered a consensual enactment. It has been argued, however, that such laws have been '...shaped by male interests...' with two sexist assumptions. First, that a woman is the "...exclusive sexual property of a particular male, and that (b) the primary value of a woman lies in her sexual and reproductive function." (46) Thus it would seem that males have established rights of ownership to their female sexual property. Clark maintains that to commit rape then means to commit the economic crime of theft against the male owner of the 'property'. She indicated in a study of the subject that sentences handed down for such crimes were, on average, the same as those for robbery - and both offences carried the same maximum penalty. She proposed that to categorize rape as a form of assault would be the first step to breaking the 'property' notion. This step was taken recently by the Canadian legislators.

Further studies which have addressed the consensus -

conflict debate have focussed attention on the sanctions imposed, and the type of people who were subject to those sanctions.

In their study of draft resisters in the United States from 1963 to 1976, Hagan and Bernstein found differential treatment of those convicted, with the heavier sentences being imposed upon those who actively opposed war and were white. They concluded that the law was applied in a fashion confirming to the conflict perspective, the law being utilized by the authorities to suit their own particular direction (47).

Carter and Clelland examined sentence as a function of social class in three hundred and fifty juvenile cases. They found, generally, that social class is of greater significance in a sentence for crimes committed by juveniles against morals statutes, 'victimless' crimes and status offences than in the case of traditional property crimes. They hypothesized that a sentence for a property offence would not depend upon the degree of stability in the family, however, working class delinquents from unstable backgrounds were found to be more severely dealt with where status, morals or 'victimless' crimes were concerned (48).

In a study of the use of sanctions in more than one

thousand criminal cases in Halifax, Warner and Renner found selectivity in a large number of cases. Generally, those accused were not representative of their society, with seventy-three per cent under twenty-five years of age, sixty-one per cent with less than grade ten education, eighty-three per cent single, eighty-eight per cent male, twenty-eight per cent from low-income districts, forty-nine per cent unemployed and fifteen per cent black - seven times their demographic representation. They found that in excess of fifty per cent of accused charged with summary conviction offences were not represented. Those individuals were found to be both poor and uneducated, and twice as likely to be fined or imprisoned as those who appeared with a lawyer. Further, those represented by legal aid were found to be more likely to be convicted than those privately defended. Colour of the accused was found to be particularly significant. Guilty pleas entered by whites for summary conviction offences brought discharges in approximately twenty-five per cent of the cases, while blacks were not discharged. Those with money were found to be more likely to receive bail or a fine as opposed to incarceration. In a discussion of consensus - conflict issues it is of some importance that Warner and Renner report that when presented with the findings of this study, little concern was expressed by the authorities (49).

In an attempt to identify whether Canadian capital punishment legislation was applied from a conflict theory position, Durie examined 109 capital cases which occurred between 1946 and 1952. While she encountered a number of problems, one was of major significance to her study. That was the absence of significant information in that if the sentencing justice applied his sentence or set out his recommendation for mercy for any reasons other than those readily recorded, the record would not show it. As Durie points out: "The major difficulty...in attempting to test conflict theory, or any theory, from information contained in the written documentation which serves as the basis for a discretionary decision is the inescapable limitation of the written account." (50) It was unclear to Durie which items of information were utilized to make decisions, or what process of information selection and analysis occurred in the minds of the decision-makers (51).

Although she found that the results of her ambitious analyses did not "...reveal sufficient evidence that the conflict theory can explain the application of the death penalty ...", she suggested that:

(t)he extent to which one must conjecture about the reasons behind fundamental decisions in the

criminal justice process provides a strong argument against the validity of consensus theory

and further that:

(t)he frequent practice of invisible decision-making, together with the many legal opportunities for making exceptions to society's rules, at all points in the system, serve to add support to the claim of conflict theorists that the rules are ultimately intended to work in favour of certain members or groups in society and to be used against others (52).

Jacobs' study of the relationship between inequality and the size of a police force is an example of the use of enforcement mechanisms in the testing of consensus and conflict theories.

It has been argued by conflict theorists that control is an essential element employed by the elite to maintain their dominant position. Jacobs hypothesized that, according to conflict theory, there would be more police officers in municipal areas where influence would be applied to control less influential groups. He conducted a quantitative study of American cities with a population in excess of 250,000 and consistently confirmed the hypothesis. Those cities with greater disparity in the distribution of wealth were found to have a greater ratio of police officers to the public than areas where there was a relatively even distribution (53).

One final approach to theory testing involved a large scale examination of public and criminal justice system concepts of the seriousness of various offences.

One such study is the ambitious work of McDonald. A number of crime-sanction indicators were examined for individuals between the ages of ten and forty in forty countries. Crime data from Interpol and the United Nations concerning offences of theft, other property offences, juvenile crimes and murder were compared using variables related to conflict and consensus theories through the eighteenth, nineteenth and twentieth centuries (54).

McDonald found 'idleness' and 'ignorance', measured by the level of unemployment, to be related to twentieth century consensus theory. With economic problems and poverty at the root of crime according to consensus theory, it was hypothesized that the lower the level of unemployment the lower should be the crime rate (55).

With economic problems and poverty comes a reduction in the general wealth measured by the per capita gross national product (G.N.P.). Thus, consensus theory tells us that the greater the per capita G.N.P., the lower would be the crime rate. (56).

For twentieth century conflict theory it was hypothesized that "...the higher the proportion of the population in the paid labour force, the less recourse is practicable to informal means of control. Insofar as the authorities seek a disciplined and dutiful population - necessary for a high level of productivity - they will have to resort to former means". Hence, according to conflict theory, the lower the level of unemployment, the higher will be the level of sanction (57).

To maintain bureaucratic control during time of wealth, according to conflict theory, a greater level of sanction would need to be applied. Utilizing the per capita G.N.P. it was hypothesized by McDonald that the greater the per capita G.N.P., the higher would be the crime rate (58).

McDonald concluded that, generally, the analysis indicated that in the countries and for the offences tested, there was an indication of the exercise of control by the authorities. She found contemporary conflict theory to be the one "...best to survive empirical testing" (59).

In examining the efficacy of the various measures she utilized, McDonald concluded that combining unemployment with G.N.P. proved to be one of the "...combinations that achieved

the highest levels of explanation". Earlier concern over the use of unemployment in twentieth century conflict theory was removed when she found that a "...revised conflict explanation would include the level of unemployment in a society as one of the factors affecting the need for formal control measures." (60)

Hagan, in his 'Disreputable Pleasures' says of McDonald: "This research demonstrates in sophisticated and provocative form that the propositions of conflict theory are not only capable of being tested, but apparently are also supported by an interesting body of research." (61)

As the body of research addressing the consensus - conflict debate indicates, there has been a variety of approaches to the testing of the two theories. Some have examined events leading up to, and at the time of, the enactment of a certain piece of legislation in search of indicators which point to the overriding interests of certain powerful groups - be they the ruling government, specific industries or the merchant class in general. In several instances the political interests of the authors clearly speak to the reader - particularly with such as Quinney:

The importance of criminal justice is that it

moves us dialectically to reject the capitalist order and to struggle for a new society. We are engaged in socialist revolution (62).

and Taylor, Walton and Young:

Crime is ever and always that behaviour seen to be problematic within the framework of (existing) social arrangements: for crime to be abolished, then, those social arrangements themselves must also be subject to fundamental social change (63).

Some have examined instances where a particular law has been applied and searched for evidence of selective application or sentencing, while others, including McDonald first, identified the variables which would affect the two theoretical positions while at once supporting one theory and rejecting the other.

Our system of justice relies upon two processes for the State production of criminalization. The first is where the government - for whatever reason - decides that a certain behaviour will be outside the law and thereby subject to sanction. This has been referred to as 'enactment criminalization' (64). The second occurs in relation to the criminal behaviour - 'enforcement criminalization' (65). This latter concept of criminalization is the consequence of the activities of those members of our criminal justice system who are entrusted with enforcing the laws, prosecuting those who

breach the law, judging cases and carrying out sentences.

In terms of the consensus - conflict debate, this study will utilize both enactment and enforcement criminalization towards the identification of the type of legislation that our abortion laws are, or at various times have been.

First, from the time of its introduction into Canadian law, abortion legislation will be followed to see what amendments have taken place in the context of social changes: Were there political or other forces of interest groups that were applied? This will examine the issues as they relate to enactment criminalization.

Next, at the point of enforcement, those measures identified by McDonald as being related to both consensus and conflict theories will be examined in relation to the level of enforcement. The period covered by the analysis of those measures will be from 1927, the year that accurate abortion charge and conviction statistics were first recorded until 1973 by which time the number of charges laid was reduced to one.

From the information gleaned in its totality a conclusion of the legislative typology of abortion law will be drawn.

CHAPTER IIIA HISTORICAL ANALYSIS OF ABORTION LEGISLATION

During the nineteenth century many countries legislated against abortion. Several reasons have been proposed - that it was the action of an 'enlightened' society; that humanitarian ends were the intention by protecting the life of the mother; and that this was the result of 'puritanical reaction' during this period. Some suggested that anti-abortion law would help curtail immoral behaviour, and others that, with industrialization rapidly increasing - particularly in England - it would, once more, increase the human capital (1).

Although abortion has been considered a serious crime in England since the Middle Ages, it was not until 1803 that it was set down in statute form, known as Lord Ellenborough's Act, wherein it stated:

s.1. If any person or persons shall wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of His Majesty's subjects, any deadly poison, or other noxious or destructive substance or thing, with intent such his Majesty's subject or subjects thereby to murder, or thereby to cause or procure the miscarriage of any woman, then being quick with child, then the person or persons so offending shall be and are hereby declared felons and shall suffer death.

s.2. And where as it may sometimes happen that

poison or some other noxious and destructive substance or thing may be given, or other means used, with intent to procure miscarriage or abortion where the woman may not be quick with child at the time, or it may not be proved she was quick with child, if any person or persons shall wilfully administer to, or cause to be administered to, or taken by any woman, any medicines, drug or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed any instrument or other means whatsoever, with intent thereby to cause or procure the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things or using such means, the person or persons so offending shall be guilty of felony and shall be liable to be fined, imprisoned, set in and upon the pilory publicly or privately whipped, or to suffer one or more the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years (2).

The 'quick' stage of pregnancy is that stage at which a woman will feel the foetus within her start to move.

It is interesting to note that s.1 is limited to the administering of something excluding the use of instruments, in the case where the child has quickened. Further, s.2 was decided to mean that the woman must be pregnant, although she need not be 'quick with child'. This was an 1828 decision of twelve High Court judges. (Anon 3 Camp 73; Scudder 3 Car. at p. 605)

This 1803 Act of the British Parliament became the law of

the Colonies, with amendments made through the years. In 1828, s.1 was amended to include procuring an abortion by use of instruments. Further, that 1828 Act of Lord Lansdowne made it possible for a woman, subject of an abortion, to become an accessory before the fact to an abortion. The death penalty was abolished for abortion in 1837, being replaced by life imprisonment, whether the woman was pregnant or not (3).

The year of 1861 saw the enactment, in England, of the Offences Against the Person Act, (24 and 25 Vict., c. 100 (Imp.)), wherein, at s.58, further changes developed:

Administering drugs or using instruments to procure abortion: Every woman being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other means whatsoever with the like intent and whosoever, with intent to procure miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be liable to be kept in penal servitude for life (4).

Clearly, under this Act, not only would a woman seeking to procure her own miscarriage be guilty of the substantive offence, but the woman, subject of the offence must be pregnant.

### Canadian Abortion Legislation

With Confederation in 1867, the English Offences Against the Person Act was brought into Canadian law, and thus the English law gave birth to the Canadian philosophy and legislation regarding abortion.

S.58 of that Act was adopted into the Canadian Offences Against the Person Act, 32 and 33 Vict. c. 20 (Can.) in 1869.

The earliest Canadian abortion case was recorded in 1879 when the accused, Stitt, was charged with administering a "noxious thing" for the purpose of procuring a miscarriage. In that case the question arose as to whether a thing which, by itself not being noxious or poisonous, may become noxious when administered in large quantity, or to a woman who is pregnant. It was decided that something which is not, generally noxious may, under those circumstances, become so, and a conviction was registered. (R.v. Stitt, (1879) 30 U.C.C.P. 30 (C.A.).).

The first Canadian Criminal Code of 1892 saw slight terminological changes, but the various aspects of the offence

remained similar. However, the change in sentence in cases where a pregnant woman performs the act upon herself should be noted.

272. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent.

273. Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, whether with child or not, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage.

274. Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child (5).

In 1896 Garrow and Creech were convicted of manslaughter resulting from an abortion operation performed upon a woman. One accused was the woman's fiance who had taken her to the other accused, a physician, for treatment. Following the operation the woman had become very ill, and three other physicians had been called in to attend and treat her. At

the trial none of these three was willing to swear that the blood-poisoning and death were due to a miscarriage or that the woman had been pregnant, though one of them stated that the symptoms did point to such a condition. It was contended on appeal that the evidence of the medical witnesses was not sufficient to connect accused with the death. But it was held that the conviction should be affirmed. The surrounding circumstances, as shown in evidence, corroborated the views of the medical witnesses, and the trial Judge had no choice but to leave the case to the jury. There was no rule that the corpus delicti must be expressly proved in every case. (R.v. Garrow and Creech, (1896) 5 B.C.R. 61, 1 C.C.C. 246 (C.A.).).

In 1906, ss. 272, 273 and 274 of the 1892 Code became ss. 303, 304 and 305 respectively, (6) remaining so until 1953-54.

Apart from changes in the numbering of the sections, no change is found in the wording or penalties set down in the Criminal Code respecting abortion until the revision of 1953-54.

During this period there were a number of cases reported, which tended to clarify the law.

In a 1909 case, a physician, McCready, charged with procuring a miscarriage contrary to s.303 of the Code was found not guilty when the prosecution failed to prove that the action was not necessary to save the woman's life. This is the first case to make use of the word 'unlawfully' in that section - an important inclusion for members of the medical profession. (Re McCready, (1909) 10 W.L.R. 32, 2 Sask. L.R. 46, 14 C.C.C. 481.).

A second 1909 case involved charging the accused, Cook, both with unlawfully using an instrument to procure an abortion and with operating for that same purpose. A jury found him not guilty of using an instrument, but guilty of operating. The conviction was appealed, and the appeal court found that, since the accused was found not guilty to having used an instrument and, since section 303 read '...any instrument or other means...', and there was no evidence of any 'other means', the conviction on the second count should be set aside. (R.v. Cook, (1909) 19 O.L.R. 174, 15 C.C.C. 40 (C.A.).)

In 1912, Scott, who was charged with supplying a drug or other noxious thing claimed that there was not sufficient evidence to prove that which he supplied was a drug or other noxious thing. It was held that, since there was 'reasonable

evidence' that the substance was both a drug and a noxious thing (gelsemium, or yellow jasmine) he should be convicted. (R.v. Scott, (1912), 22 O.W.R.9, 3 O.W.N. 1167, 19 C.C.C. 370, 4 D.L.R. 850 (C.A.).).

Sadick Bey, in 1914 applied for leave to appeal a conviction for performing an abortion on the grounds that there was no corroboration of evidence presented. That application was rejected and it was then clearly established that the offence was not one which required corroboration. (R.v. Sadick Bey, (1914) 20 R.L.N.S. 140, 25 C.C.C. 259 (C.A.).).

The following year it was held that a dying declaration made by the subject of an abortion is not admissible against an accused charged with performing the abortion. The accused, Inkster, had originally been charged with manslaughter and performing an abortion, however, since he was found not guilty of the manslaughter charge, and a dying declaration is admissible only in the case of homicide, that statement should not have been used in the abortion charge. (R.v. Inkster, (1915) 8 W.W.R. 1098, 31 W.L.R. 782, 8 Sask. L.R. 233, 24 C.C.C. 294 (C.A.).).

Pettibone, in 1918, was convicted of attempting to administer a noxious thing notwithstanding that the substance

was not used, and it was not proven to be a noxious thing. It was held that it was sufficient that the accused believed that which he had obtained to be noxious and had attempted to get the woman to take it. (R.v. Pettibone (1918) 2 W.W.R. 806, 13 Alta L.R. 463, 30 C.C.C. 164, 41 D.L.R. 411 (C.A.).).

A decision of the English Court of Appeal in 1938 was considered a milestone by the medical profession and provided momentum to a now rolling abortion movement at a time when contraceptive aids and birth control programmes lent to a developing social awakening to the benefits of smaller families (7).

That Court of Appeal upheld a 'not guilty' verdict against Dr. Aleck Bourne, a gynecologist who had performed an abortion on a fifteen year old girl, the victim of a rape attack. The Court held that 'preserving life' by a doctor was not to be narrowly construed as 'preserving the woman from death' but also included the possibility of the woman becoming a 'physical or mental wreck'. This distinction becomes important. 'Preservation from death' is a scientific or medical term quite soundly based in what will happen; whereas preservation from the possibility of becoming a physical or mental wreck is based upon that which society believes may happen, for reasons

other than, or in addition to, medical reasons - such as social, economic or cultural (8). (Rex v. Bourne (1939); 1 K.B. 687.).

The word 'unlawfully' in the Act was interpreted by the justices in the Bourne case to mean the Crown must prove the act was performed without good faith towards the preservation of the woman's life. Since English law was used as precedent in Canada, the decision was effective here.

The Canadian case of Dale, in 1940, recognized more than one offence of attempting to procure a miscarriage. The accused was charged with unlawfully using an instrument with intent to procure a miscarriage. The judge, however, while instructing the jury there was no evidence of using an instrument did leave them to find the accused guilty of intending to procure the miscarriage by other means. The jury convicted, but on appeal it was held that since the verdict had not been rendered on the charge as laid, it must be quashed. (R.v. Dale, (1940) 1 W.W.R. 375, 54 B.C.R. 134, 72 C.C.C. 191.)

In 1944 an accused was charged under s. 303 with using instruments or means upon a woman with the intention of pro-

curing an abortion. He admitted using the instruments or means, but claimed no intention of inducing a miscarriage, but only to encourage the woman who had threatened suicide. It was held that he must be acquitted since no evidence had been adduced by the Crown to contradict his story, and there was at least a doubt as to his having the requisite intent. (R.v.A. (1944), 83 C.C.C. 94 (Que.)).

In 1947, Campbell was charged with procuring the abortion by a specific means. It was held, as in the 1940 case of Dale, that where the specific means is not proven - in this case an instrument - the case must fail. (R.v. Campbell, 4 C.R. 110, (1947) 1 W.W.R. 145, 63 B.C.R. 307, 99 C.C.C. 41 (C.A.)).

An accused, Doucette, appealed a conviction in 1949 of using an instrument with intent to procure an abortion claiming it was not the instrument - a syringe - that might have induced the abortion but the solution contained in and passed from the syringe. It was held that the conviction should stand since it was clear that the accused, with intent to procure a miscarriage, unlawfully used on the woman an instrument, that is, by inserting into her vagina a syringe. The offence was then complete and it was immediate cause of

the miscarriage or even if no miscarriage followed. (R.v. Doucette, 7 C.R. 117, (1949) 1 W.W.R. 274, 93 C.C.C. 202 (Alta C.A.).).

In the case of Poznansky in 1950, it was held that s.305 must be read as providing for distinct offences, viz, (1) supplying or procuring a drug or other noxious thing, and (2) supplying or procuring an instrument. (c.f. Dale (1940).). It was found, therefore, improper on a charge of supplying a drug under the section, to adduce evidence of instruments found in the accused's possession, or evidence from which the jury may infer the accused used instruments on the girl in question, unless a proper foundation be laid for the admission of such evidence eg. to rebut the accused's defence as to absence of intent. (R.v. Poznansky, 10 C.R. 88, (1950) 2 W.W.R. 43, 97 C.C.C. 208 (B.C.C.A.).).

In 1954 a revised Criminal Code became law and included in it were changes to Canadian abortion legislation.

The 1953-54 Criminal Code reads at s.237:

- (1) Everyone who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his

intention is guilty of an indictable offence and is liable to imprisonment for life.

- (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.
- (3) In this section 'means' includes:
- (a) the administration of a drug or other noxious thing,
  - (b) the use of an instrument, and
  - (c) manipulation of any kind.

s.238 Everyone who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years (9).

Two noteworthy changes in the law were the reduction of the maximum sentence for a woman attempting to procure her own miscarriage from seven years' imprisonment to two years and the omission of the word 'unlawfully' from s.237.

Concern over the exclusion of 'unlawfully' was expressed in the House of Commons when the change from s.303 to s.237 was debated. When member Mr. Knowles sought re-assurance that medical practitioners who performed abortions for the protection of women's lives would be protected from prosecu-

tion; Mr. Garson, the Minister of Justice stated that the exclusion of the word 'unlawfully' would have no effect on doctors since the word 'intent' would be used to show 'mens rea', or the guilty mind necessary for the offence. Mr.

Garson continued:

I am sure my hon. friend would agree that it is very desirable that when that guilty mind is present, in the case of doctor, he should be held to account criminally.

Mr. Knowles: Yes.

Mr. Garson: Most reputable doctors are very hesitant about performing an operation of this kind unless they take very careful precautions against falling into difficulties of this sort.

Mr. Knowles: Is the minister satisfied that the principle of mens rea covers that?

Mr. Garson: Yes.

Mr. Fulton: Who is to say whether it is justified?

Mr. Garson: Whether it is justified or not is a question of fact for the court to decide (10).

This was not the first time confusion had arisen over the word 'unlawfully' in abortion legislation. The Commissioners who had drawn up the Criminal Law Report in the United Kingdom in 1846 had suggested that abortion be allowed when necessary to save the life of a mother. The inclusion of the word 'unlawfully' in the 1861 Offences Against the

Person Act caused some confusion for it was not clear whether its inclusion was to cover that class of circumstances. In 1929, the British Parliament cleared up this matter with the passing of the Infant Life (Preservation) Act.

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purposes of preserving the life of the mother (11).

However, the exclusion of 'unlawfully' did cause concern amongst doctors, and deValk suggests that it may have been this possibly absolute state of denial of abortions that led the Canadian Medical Association to favour revision of the abortion law (12).

Case law indicates other changes as well. The 1957 case of Lariviere v.R. specified that there was no material difference between s.303 of the 1927 Code and the new s.237, and it was held that the Crown was not required under either section to specify the "means" alleged to have been used by an accused to induce an abortion. Referring to the earlier cases of Cook (1909), Campbell (1947) and Poznansky (1950) where it was, in each case held that since a particular 'means' was alleged, and a conviction could not be brought

on a different 'means' - since the essence of the offence, under both the old section and the new, was the intent to procure an abortion, and it be immaterial whether or not the woman was in fact, pregnant, it followed that the Crown was not required to prove that an abortion was in fact induced. (Lariviere v.R. (1957), 25 C.R. 279 (Que. C.A.).).

In a 1960 case, an accused was charged under s.24 of the Code with attempting to use slippery elm with intent to procure a miscarriage. The magistrate dismissed the charge on the ground that there was no evidence that slippery elm could be used to procure an abortion, and that the three pieces of wood entered as exhibits did not come within the definition of "means" in s. 237(3). On appeal, it was held that the appeal should be allowed under s. 24. There was no burden on the Crown to prove that the slippery elm could be used to procure an abortion, and the question was whether the accused had the intent to bring about a miscarriage, and whether he attempted to do so by the use of "any means" as provided by s. 237(1). It was not necessary to prove that the means proposed to be used could have procured an abortion, and the definition of "means" in s. 237(3) was not an all-inclusive definition, but merely stated three things which were included in the words "any means" as used in s. 237(1). (R.v. Smith (1960), 32 W.W.R. 396, 128 C.C.C. 140 (B.C.C.A.).).

A similar verdict was made in the case of Malcolm Irwin who was charged with supplying a drug for the purpose of procuring an abortion. In this case, a policeman and policewoman went in plain clothes to a drug store where the policeman told the accused that his girlfriend was pregnant and wanted to "get something" for that condition. The accused supplied pills to induce a miscarriage. The accused was convicted at trial which was affirmed on appeal, of unlawfully supplying the drug "knowing" that it was intended to be used to procure a miscarriage contrary to s. 238. The accused appealed the conviction and argued that he could not know it was intended to be so used when there was no such intention in fact. However, the appeal was dismissed as s. 238 did not require the unlawful intention of any person other than the supplier. It was sufficient that the accused supplied the drug believing it would be so used. (Irwin v. R., (1968) S.C.R. 462, 3 C.R.N.S. 377, 64 W.W.R. 441, (1968) 4 C.C.C. 119, 68 D.L.R. (2d) 485, affirming 61 W.W.W. 103, (1968) 2 C.C.C. 50.)

Since the 1954 revision, several occurrences fired an abortion reform movement, and many of these began in England. The most important was the 1957 Report of the Committee on Homosexuality and Prostitution - the Wolfenden Report - which raised certain questions relevant in their broad context to

the issue of abortion. Generally it asked what acts ought to be punished by the State. In part answer it was concluded that there existed areas of private morality and immorality which are not the law's business (13).

There exist, probably, two grounds for the ideological basis for the broadening of laws relating to abortion in Canada originating in Great Britain. First, English speaking Canadians tend to reflect British moral attitudes, and, second were the ideological similarities between political parties of both those countries (14).

In 1966 David Steele, a United Kingdom Liberal put before the Labour Government a private member's Bill to reform abortion law. This became law in October 1967, making England the second major West European or American country, following Sweden, to considerably liberalize abortion laws. The Act provided for four legally justifiable classes of abortion, viz:

- i. Where there is 'serious risk to the life, or grave injury to the health, whether physical or mental' of the pregnant woman, 'before, at or after the birth of a child',
- ii. Where 'there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.'

- iii. Where 'the pregnant woman's capacity as a mother' would be 'severely overstrained by the care of the child or of another child, as the case may be',
- iv. Where the woman becomes pregnant whilst under sixteen years of age or as the result of rape (15).

A major initiative towards change in Canada was taken in 1959 when, in the August edition of *Chatelaine*, Joan Finigan espoused the need for abortion law amendment, calling Canada's law "the world's harshest", using what was to become popular supportive evidence - the backroom abortionist - as justification, combined with the movements in the United Kingdom and the United States (16).

The United Church lent ecclesiastical support of change with a statement, at its 19th General Council in 1960, that abortion should be permitted for physical or mental reasons'. However, changes in thinking amongst most churches - the Roman Catholic Church notably excluded - developed to the point where, in 1971, the Council of Canadian churches recognized abortion as a private matter between the patient and her doctor - extending their grounds to cover social and economic circumstances as well as health (17).

Since its involvement in the abortion issue in the early

1960's, the Toronto Globe and Mail has been highly instrumental in maintaining public interest in the subject, always from a pro-abortion stand. On August 31st, 1961, that paper published a Canadian Press story in which Prof. Michael Wheeler of the University of British Columbia School of Social Work proffered that abortion should not be subject of the criminal law, "But", he said, "the chances of getting agreement on this in Canada are about as good as those for the reunification of Germany" (18). The paper continued with this question the following day claiming "the churches have a right to present their view of the moral issue to their adherents; but is this perhaps where their rights should stop and that of the individual begin? A law which is rejected by the public is seldom a sound law..." (19).

Having found the topic of considerable interest to the public the Globe and Mail felt the time ripe for the pursuit of reform. However, following a series of articles expressing differing views (with only the representatives of the Roman Catholic Church opposed totally to abortion), interest waned until 1963 when the paper congratulated Oakville judge Ken Langdon for his recommendations that unmarried girls under 16 years, and rape victims be allowed abortions (20). This may have been the refuelling of the reformatory fire.

At the 1963 annual meeting of the Canadian Bar Association meeting at Banff, reform to the abortion legislation was proposed, resulting in a proposed resolution to establish a Termination Board with three ground for legal abortion:

- i. danger to the mother's life or health;
- ii. unwanted pregnancy due to rape or a similar unlawful act;
- iii. danger of physically or mentally defective child (21).

The motion was opposed, however, by the B.C. Catholic Lawyers Guild who expressed Catholic doctrine that the taking of an unborn life is contrary to the law of God; hence the proposal was deferred then, and each year the topic was found too controversial, such that, when the law was eventually amended, in 1969, the Canadian Bar Association was still in a state of indecision as a body.

The Canadian Medical Association took up the abortion question in 1963. In May of that year, the Ontario Medical Association authorized a study of abortion, recognizing that "...the medical aspects, legal requirements and religious implications are three distinct areas which must be taken into account." (22)

Limiting itself to the medical aspects, that association brought together three gynecologists, Dr's. Low, Cannel and Thompkins, and Dr. Gray of the Clark Institute of Psychiatry. All four were much in favour of changes in the law, and in that Committee's report to the Ontario Medical Association Council in May 1965, it recommended abortions be permitted for the preservation of life, physical or mental health of the mother if performed in a qualified place and fashion after approval by an abortion committee (23). It should be mentioned that Dr. Low was also the chief medical advisor on abortion to the United Church of Canada.

The Ontario Medical Association approved the recommendation, and submitted it to the Canadian Medical Association where it was studied in conjunction with the Canadian Bar Association proposals, and the C.M.A. formulated a proposal much the same as that of the O.M.A. (24).

Religion has always posed the basic problem to abortion law reformers. The mid-1960's, however, were to see changes in the interpretation of theological doctrine by many church people.

The Church of England issued a report on 31st December

1965 rejecting abortion on demand, or because of deformity of a foetus, or for victims of rape (25). However, only two weeks later, the Church's proposed legislation left the gate wide open, recommending circumstances where 'serious injury to the mother's physical or mental well-being' be considered in addition to doctors taking into account "...the patient's total environment, actual or reasonably foreseeable." (26)

As the reformation trend continued, the Roman Catholic Church remained the 'odd man out', forever maintaining a position against abortion. As John Cardinal Heenan, Primate of Westminster put it: "It is only because of what is called the liberalizing of the law against abortion that the Catholic attitude has begun to appear eccentric..." (27).

Whilst churches were changing their eccumenical minds, and some doctors and lawyers reassessing their morality, the public Council for Women, Women's Institutes, Catholic Women's Leagues, Action Lifers and others began to lobby for their respective causes. The largest of these groups, the 1,800 organization National Council of Women, with some 800,000 members staunchly advocated legalizing abortions. The Catholic Women's League, on the other hand, with 160,000 members, contended that the government should reject freer

abortion laws (28).

Although health of the mother had been the dominant concern amongst reformists, the religious and philosophical questions had always quietly maintained their presence. For the few members of associations, other than religious associations, who raised those questions of morality, there were many who would be heard above them.

Alex Sarchuk, Winnipeg Crown Prosecutor, used the 'slippery slope' argument in his presentation to the Canadian Bar Association, asserting that life is bestowed by God, and that in following back the birth of a baby to its embryonic stage, life begins upon conception (29).

At that same meeting in 1966, others spoke against abortion, including Sydney Paikin, who quoted the United Nations' 1959 Declaration of Human Rights, which says, in part:

The child, by reason of its physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth (30).

The implacable efforts of, primarily the powerful Canadian Bar Association and Canadian Medical Association, assis-

ted by the might of the voice of the Women's Movements, caused reaction by the Pearson government. On 30th January 1967, the President of the National Council of Women in Canada, called, for the third consecutive year for a royal commission to examine the abortion law. Mr. Pearson's reply indicated the success of their lobby when he informed her that royal commission might not be necessary and that the matter may be considered by that session of Parliament (31).

A private member's bill was placed before the House of Commons by Ian Wahn, Liberal Member for Toronto - St-Paul, and was referred to the Standing Committee on Health and Welfare on 21st February 1966. The bill contained two parts - concerning contraception and abortion. The contraception part of the bill was examined by the Committee, but the abortion portion sat for a year unexamined (32).

What may have been interpreted as an easing of the Roman Catholic position may have resulted from the position presented to that Standing Committee by Rev. Louis Vezina, O.M.I., superior of the Oblate Fathers' Centre for Ecclesiastical Studies, in Ottawa, and Director of the Institute of Pastoral Studies at St-Paul's University, and Jean Guy Lemarier, O.M.I. a moral theologian. They suggested that it would not be morally wrong for Catholics to support the contraception.

changes proposed in Bill C-40 (Ian Wahn's bill). They agreed that the "...function of law is not exactly that of morality and that human law is not meant to forbid or punish all evil actions." (33) This position, as related to contraception was supported by the Catholic Bishops of Canada (34). On 5th December 1966, the Committee on Health and Welfare recommended in its report to the House of Commons that birth control be removed from the Criminal Code (35).

The position of the Catholic church on the matter of revision of divorce law occurring also in 1966 was further likely to effect final voting on abortion law. As with contraception, the Catholic church felt that legal measures would not solve the problem of marriage breakdown. They suggested that the government should become involved in aiding ailing marriages, but did not go so far as to deny this subject to be within the realm of criminal law (36). The Catholic church had, in fact, done little to articulate its objections to abortion - either to its members or the government. It had, however, accepted revision of criminal law in two not unassociated areas - contraception and divorce. With this, a move could be observed in the general direction taken by many reformers - that abortion was a moral question which should be without the realm of the criminal law (37).

The press, generally, identified opposition to abortion reform as emanating from, and almost solely restricted to, the Roman Catholic church. This was, possibly, because that church spoke against it the loudest (38). Whilst the Globe and Mail spoke strongly and frequently in favour of change, it diligently watched the Roman Catholic church with whom it associated greatest objection. This position the paper had gleaned from activities in England and the United States (39). It might be noted that of the 177 active treatment hospitals in Ontario in 1967, only 40 disapproved of abortion - all 40 were Roman Catholic administered (40).

Many spirits were raised and many lowered when, on 23rd February 1967, at a Liberal fund-raising dinner, Prime Minister L. Pearson announced that several matters, including abortion, were in need of reform (41).

In the spring of 1967, the Canadian Catholic Conference of Bishops met in Ottawa, and they sent a letter to the Justice Minister Pierre Trudeau, requesting that no changes to abortion law be made before they had studied the matter. This call for delay was reported in the Globe following an editorial indicating that an opinion poll in Britain indicated that a majority of Catholics favoured abortion where a woman has been raped, or where a child might be born deformed. Further,

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that 44% favoured 'social abortions' (42). However, in contrast, deValk points out that in an English Gallup poll on behalf of the Sunday Telegraph held in March 1967, the first taken amongst British Catholics, 30% approved of abortion where a child would be deformed (with 43% disapproving); 6% in favour of 'social abortions', and 78% against them (43).

In reply by letter to the editor of the Globe and Mail, Archbishop Peacock indicated that the Bishops were, in fact, unsure of their standing on the question of abortion, but did indicate that it caused greater difficulty than the questions of contraception and divorce. It has been suggested that they were unsure of their position "because they themselves had had no time to study it, and that, like everybody else, they too were torn between the traditional abhorrence and condemnation of abortion on the one hand and the powerful public pressure and temptation to find a quick solution to the problem of illegal abortion on the other ." (44) However, the question of the 'common good' brought abortion into the same realm as contraception and divorce, and the Roman Catholic church did not clearly articulate its objections in theological terms, touching more upon the 'common good', tending to transmit its own confusion to its flock.

Throughout early 1967, the Globe and Mail struck out at a government it determined to be out of date. Gynecologists began to admit to having performed abortions for a variety of reasons, which, according to their moral consciences, were apparently necessary. These justifications included psychiatric reasons, as well as risks of being born blind, deaf or malformed (45). The Globe reported in April 1967, that 50 abortions had been performed in six Toronto hospitals in 1966 (46).

Articles in the Globe by Jean Nowarth, and Joan Hollobon's numerous published submissions brought a changing tide in the object of attack. The government was now seen as one which "...treats women where abortion is concerned...as though their bodies were state property...the decision of whether or not to have an abortion (should) reside wholly with the women (47). The Roman Catholic church was attacked by Catholic women - as one letter writer puts it: "I am one of those Catholics who do not feel that they owe their Catholicity to the sayso of the hierarchy, particularly an exclusively male and exclusively celibate hierarchy." (48)

Thus began a move towards, probably, the most powerful of abortion lobby groups - the women's movements - using individual rights as their club - beating an almost exclusi-

vely male opposition into reform.

In June 1967, the Canadian Medical Association included deformity and sexual assaults as grounds for abortion in its adopted position - a considerable liberalization of its earlier stand (49). —

The Standing Committee on Health and Welfare began hearings into three private members' bills concerning abortion on 3rd October 1967. Its report, covering submissions from many interested individuals and groups was completed in March 1968 (50).

The three bills considered were: Bill c-122, sponsored by Grace MacInnis (N.D.P. - Vancouver-Kingsway); Bill c-123, Ian Wahn (L.-St. Paul's, Toronto); Bill c-136, H.W. Herridge (N.D.P. - Kootenay West).

The MacInnis bill followed the C.B.A. and C.M.A. recommendations to include health, deformity and sexual assaults as grounds for abortion.

Wahn pursued his concern that many (100,000 to 300,000) illegal abortions were being performed in Canada (51), and

the thrust of his argument was that illegal abortions should be stopped and current abortion law clarified.

Herridge believed that "the patient's total environment" should be considered, claiming that although this would permit easier abortion, it would not provide abortion on request (52).

Concern over Wahn's position - that it might be interpreted as a call only for clarification of the present law, caused the Globe and Mail to publish editorials of a stronger note than before, questioning the 'timidity' of elected representatives (53).

The Standing Committee, after hearing the proposed private members' bills heard the Canadian Bar Association, whose representatives were taken to task for neglecting completely moral considerations, presenting only a legalistic position (54). The simple response from Gordon Cooper, President of the C.B.A. was that he didn't believe human life was involved. They were attacked by both pro and anti reformers for the poor drafting of their Termination Board sections regarding sexual assault cases. The Toronto Star took up this point claiming that a regular abortion panel would easily do the job of the proposed Termination Board (55).

The Globe and Mail, during the course of the proceedings, possibly felt that the abortion issue might be lost for good, so they attacked the Committee and kept the topic in the news. However, on 19th October 1967, the subject was once more brought to the forefront with Dr. Henry Morgentaler, representing Montreal, Toronto and Victoria chapters of the 'Humanist Fellowship'. He suggested that one should not rely upon the super-natural, but on science, and that women have an inalienable right over their own bodies. His proposal was that abortions be available upon request during the first three months of pregnancy (56).

The C.M.A. in presenting their case submitted that their main interest was to ensure that abortions performed in Canada up to that time had been legally performed (57).

Whilst the Canadian Committee continued its hearings, the British bill received Royal Assent on Friday 27th October 1967, and abortions were legal in England six months thereafter. That bill was quite encompassing, including grounds of danger to life or health, sexual assault and probable deformity as well as 'socio-economic' reasons (58).

In November 1967, the Commons Committee heard AMCAL,

the Association for the Modernization of Canadian Abortion Laws. The founder, Mrs. Lore Perron, from Ottawa, had developed the organization to around 300 members during the previous year. Mrs. Perron's position was, essentially, that women should have control of their own bodies. She contended that those who regarded abortion as murder should not have the right to impose their views on others (59).

Opponents to abortion legislation also presented their cases. In the second week of November 1967, a five week old organization, the "Emergency Organization for the Defence of Unborn Children" strongly argued that no abortions were ever needed. The Catholic Physicians' Guild of Manitoba spoke against the proposed legislation, as did David Dehler, an Ottawa lawyer who was the following year to challenge the Ottawa Civic and Riverside Hospitals' right to perform abortions in the Supreme Court of Ontario (60).

Various church groups presented their positions, both anti and pro.. Of all groups, it was some churches that seemed confused, and in a continuing dilemma. Although the positions of several churches, including the Roman Catholics and Unitarians had changed, it was the Anglican position which best exemplified the dilemma. On 14th December 1967, that

delegation presented to the Committee its brief which exhorted its "responsibility both to uphold and to interpret the long-standing Christian tradition in opposition to abortion", further claiming the need for change owing to changes in medical science, increased biological knowledge and a 'recognition of the place of women'. Their brief further claimed both abortion on demand and prohibition of abortion as 'indefensible positions' (61). Thus the Anglican delegation presented a most confused and confusing brief. They emerged, however, leaving the Committee with the impression that they would support abortion for any serious reason (62).

Of considerable importance to our examination of the type of legislation in question is the behaviour of the government in December 1967. The 14th December saw the Anglican presentation, leaving the final arguments to be made on 19th December by the Catholic Bishops: However, the Committee chairman declared that date an 'in camera' day calling for a January date to be accepted by the Canadian Catholic Conference of Bishops. Following the 19th December 'in camera' meeting, the Committee presented an Interim Report to the Government. This despite the fact that only eleven of the Committee's twenty-four members were present that day. Of these eleven, nine voted in favour of the recommendation to proceed with legislative change (63).

Two days later, 21st December 1967, the House of Commons was presented with a 104 clause Omnibus Bill including revisions to the abortion law. This speedy response, or readied submission by the government brought cries of consternation from the Catholic Churchmen who had suspected that the Minister of Justice, Pierre Trudeau had intended to press ahead with reform regardless. Their call for a Royal Commission to examine the abortion question went unheeded (64). Fr. John Mole accused Trudeau "...of having" abused his office "by throwing the weight of his position behind the pro-abortion lobby. It was "a sheer act of contempt" on Mr. Trudeau's part to have introduced the legislation without hearing from either the Catholic Bishops or the Catholic Hospital Association " (65). The Western Catholic Reporter asked:

Is this a responsible way for the government of Canada to treat the Bishops of a denomination making up nearly half the country's population? Or is this an accurate reflection of the present stage we have entered: that the government does not really care what the Church says even in the most fundamental matters of morality, and is just going through the motions in allowing the bishops to be heard? (66)

This final reference is to the fact that the government had agreed to hear the views of the Canadian Bishops in the spring of 1968.

The Standing Committee hearings resumed on 25th January 1968, on which date the Hamilton Right to Life Committee and the Ottawa Committee for the Defence of Unborn Children presented their views. Several other anti-abortion groups went on to present their briefs, including the Canadian Catholic Hospital Association of Canada. This group of theologians caused some unpleasantness, vigourously - even aggressively protesting the Committee's actions, whilst, at the same time hardly clarifying their position on the subject. Surprise was expressed by the Committee that the Hospital Committee consisted of no medical doctors, yet "more concerned (itself) with the physical and mechanical concept of life than with the so-called spriritual, mental and social aspects of life" (67).

The United Church of Canada was well prepared and represented. Two female medical doctors expressed the views of their Church to be that change in the law was needed, but that socio-economic grounds were not acceptable. However, the World Health Organization definition of 'health' was accepted by them, viz "...a state of complete physical, mental, emotional and social well-being and not merely the absence of disease and physical well-being." They denied favouring abortion on demand (68).

The Canadian Catholic Conference of Bishops did, finally, appear before the Committee on 5th March 1968. The exchange was an orderly one with the Bishops' concern for an increase in the number of abortions performed being expressed. They refused to present what they would consider to be suitable legislation, maintaining that to be the role of the legislators. However, they did not want to see the words "...or health..." included in the changes, concerned that this would be open to broad interpretation. On the moral question of the beginning of human life, it was said: "...that human life begins at the time of conception...is a high probability, a practical certitude, a moral certitude, but not an absolute mathematical certitude.", and that 'revelation neither confirmed nor denied' whether there was human life or an immortal soul at conception (69). When asked whether the Bishops believed that all abortions should be illegal, the Committee was told:

No. As I understand your question, that abortion is illegal under any circumstances, no. The Bishops have never been in favour or tightening the present law so as to exclude abortion. Abortion is permitted under our present Criminal Code, and certainly the Bishops have never moved, do not wish to move in the direction of tightening that. In other words, we do not believe that our moral principle must be emphasized in criminal law (70).

Throughout the proceedings the position of the Catholic church and its faithful was sometimes unclear, at others confusing. This was probably due in no small part to changes not in the philosophical or theological belief of the Church, but to the pronouncements of the Second Vatican Council during the early 1960's that the Church should strengthen its ties with other Churches, and work harmoniously with Governments whilst demonstrating respect for their autonomy.

On 13th March 1968, the Standing Committee presented its final Report to the House of Commons. The Committee expressed a preference for its own proposal over that of the Department of Justice found in the Omnibus Bill. The definition of 'health' had caused great concern, and, rejecting the encompassing World Health Organization definition, proposed that the life of the mother must be endangered or her health directly and seriously threatened. Abortion on socio-economic grounds was rejected.

The Government's position in the Omnibus Bill may be recognized as emerging from the Report of the Wolfenden Committee mentioned earlier. That committee addressed the question of relationships between law and morality in the political legislative context. They searched for the distinction between

crime and sin, asking whether law should be used to forbid sin and immoral behaviour. They maintained:

There must remain a realm of private morality and immorality which is...not the law's business. To say this is not to condone or encourage private immorality (70.1)

The recommendations of the Wolfenden Committee had been made law in 1967 by which time the philosophy of separating law from morality and religion was becoming widely accepted.

Following the 1968 election the former Minister of Justice found himself wearing the Prime Minister's hat, and John Turner was the new Minister of Justice. Turner made several references to the Wolfenden Report during second and third reading debates early in 1969 (71). He approached the moral problem in the questioning manner of Wolfenden:

The problem of trying to render synonymous law and morality is that we then come down to the question: Whose morality? Whose standards of behavior? Whose sense of morality? Who is to determine the standard? Who is to attribute blame? Who is to say what is moral and immoral? Who is to decide when moral responsibility exists in terms of freedom of will, and when it has to be diluted in human terms because of environmental or physical causes?...In a pluralistic society there may be different standards, differing attitudes and the law cannot reflect them all. Public order, in this situation of a pluralistic

society, cannot substitute for private conduct. We believe that morality is a matter for private conscience. Criminal law should reflect the public order only (72).

Turner informed the Commons that "the present state of the law is not clear and one of the overriding purposes of the legislation is to clarify it", claiming abortion would not be permitted "based solely on considerations of eugenics or the commission of sexual offences...(it)...does not authorize the taking of foetal life; it does not promote abortion...(but)...permits it under the restricted circumstances where the mother's life or health might be in danger." (73)

During the period of second reading of the Omnibus Bill, from 23rd January to 26th February 1969, three Liberals spoke against abortion and the proposed amendment, claiming defence of the unborn. A Bill of Rights contravention was claimed by Gordon Sullivan (Hamilton-Mountain) (74). Abortion was presented as a matter of public, not private morality by Ralph Steward (Cochrane), and John Reid (Kenora-Rainy River) claimed abortion to be the same as murder (75). Steward and Reid voted against clause 18 - the abortion clause - when it was presented separately from the Omnibus Bill, and when the whole bill was presented for vote on 14th May 1969, Sullivan was the sole Liberal dissenter.

Aside from those three, the Liberal members supported their government. Many took the approach as penned by John Stewart Mill and quoted by Mark MacGuigan, that "...crime and sin, law and morals, must be distinguished." MacGuigan, whilst claiming to be against abortion since "...the foetus is an actual human being, from the beginning" believed the legislative change was necessary to permit "abortions now taking place in the hospitals...according to the best canons of medical practice", to be clearly legal (76).

The former Vice-Chairman of the Commons Committee on abortion, Dr. Isabelle (Hull) spoke to the fairness of the proposed legislation (77); notwithstanding that he would be absent for the actual vote. Colin Gibson (Hamilton-Wentworth) supported the Bill, though he favoured abortion on request (78), and Mr. Chappel (Peel South) believed a foetus was not "...a life, certainly not at the stage when therapeutic abortion is possible." (79).

To "...express the morality of one group and suppress the freedom of others" should not be the purpose of any legislation, according to Robert Kaplan (Don Valley),\* however, the situation "...where one group's...expression will threaten or undermine the value of the rest to the extent that we cannot

co-exist in harmony" must be avoided. Although Kaplan did not favour "unlimited abortion", he did subscribe to improvements in the quality of life (80).

Mr. Mongrain (Trois-Rivieres) opposed abortion, but stated "I cannot oppose the dictates of my conscience upon others", hence he would support the bill (81).

Gilles Marceau (Lapointe) followed Mongrain by suggesting that "...in our pluralist society everybody has the right to follow the principles that he regards as just, and I do not think I have the right to prevent him from doing what he wishes." (82)

There were nine Liberals who spoke to the proposed changes, and all appeared to have different understandings of why there was to be a change. The Prime Minister did not approve a free vote, but did permit a vote on whether or not the abortion clause, Clause 18, should be removed from the Omnibus Bill and treated separately.

The vote on 9th May 1969 left the clause in with the other matters, but a substantial 68 Liberal members were absent at the time of the vote (83). All parties, other than

the Liberal party allowed members to vote according to their conscience (84).

Sixteen Conservatives spoke on the Bill. Eldon Wooliams (Calgary North) expressed concern over the word 'health' which he felt, in the future "...could have a very wide definition. Words grow with sociological change" he said (85). Erik Nielsen (Yukon) found inconsistent abortion and the recent capital punishment abolition based on the belief that 'we must not kill' (86).

John Diefenbaker, condemning the attitude that abortion and homosexuality "are taking place and, therefore, we ought to legalize them" maintained that neither should be legalized (87). Gordon Fairweather (Fundy Royal) claimed that abortion is a matter "which concerns something womanhood should decide" (88), a position which was to be echoed over two years later by Prime Minister Trudeau, who, when in Halifax, referring to abortion said "I don't feel I can speak with great authority on this because I am not a woman." (89)

Robert McCleave (Halifax-East Hants) suggested that "... if a Roman Catholic woman feels strongly enough about her religion, presumably she would not consent to an abortion in

any case." (90) James McGrath (St. Johns East) objected to "...dealing at once with the very sacred laws of life itself and the rather mundane laws of lotteries and gun control." (91) Melvin McQuaid stated that no "religious group in this country is trying to force its ideas down the throats of the Canadian people," some oppose it "because they are convinced that foetal life is human life and that to destroy human life at any stage is deliberate, premeditated, cold-blooded murder." (92)

Ambrose Peddle (Grand-Falls, Labrador) claimed that Prime Minister Trudeau sought "...to impose his particular belief upon members of (the) House." (93) Whilst Walter Carter (St. Johns West) maintained that a government "...which relaxes...curbs on drugs, makes divorce easier, permits abortion and homosexuality, is in the process of remaking our society. The question which we must ask is, in whose likeness?" he wondered (94).

Mr. Noble (Grey-Simcoe) believed the bill to be "...the thin end of wedge which (will) open the door to removing all provisions in respect of abortion..." claiming "...wanton abortion is murder." (95) Robert Stanfield (Halifax-Leader of the Opposition) objected to the view "...that society has

no right to be concerned about the moral climate in private society." (96) However, Stanfield did vote in favour of the bill on 14th May 1969. Hugh Flemming (Carleton-Charlotte) was concerned that easier abortion laws might lead to "...a lessening of the restraint and respect for embryonic human life." (97)

The New Democratic Party were, generally, in favour of the revisions, and with the exception of John Bruton (Regina East) voted for the change (98).

David Lewis (York South) suggested that "...in our criminal law we ought to amend everything that is a relic of the past and not consistent with modern morality". He stated that when he was a student of the history of law, he learned that:

Much of our law developed during a period when society was governed by the church as well as the state. A good many of our laws can be traced to that historic fact. As society develops, and as the separation of church and state developed, the influence of the church in the formation of law has become less and less.

He urged "...that we do not term public crimes those actions which are matters for an individual's conscience."

He wanted to see law "which is modern, humane, compassionate, responsive to the technological age in which we live..."

He suggested "...the only intelligent and modern way to deal with this question (was) to remove from the Criminal Code any reference to abortion." (99)

Grace MacInnis (Vancouver-Kingsway), a Trojan pro-abortionist, believed that those who favoured abortion should have "...the right to follow the dictates of their consciences and remain within the law" whilst questioning whether opponents insist "...on imposing their views on those who consider it their right to follow their consciences in this matter." She distinguished between 'public crime and private sin' asserting the Prime Minister to be "...quite right in saying the law has no business in the bedrooms of the nation." She regretted that the proposed amendments were not considerably broader. (100)

Stanley Knowles, (Winnipeg North Centre) claimed "...we will not be voting for or against abortion...(but)...whether abortion is a crime or a human problem." He suggested the House "...admit that this is a human and social problem to be dealt with in a humanitarian manner." (101) Arnold Peters (Timiskaming) suggested that "...no church will bury a foetus

that is under seven months of development." (102), an opinion different from that expressed to the Commons Committee by the Canadian Catholic Conference on 5th March 1968. Andre Brewin (Toronto Greenwood) recognized they were "discussing the sanctity of life" and felt that abortion was a "...delicate subject which involves people's deepest religious feelings..." which "...we should remove...from the sphere of criminal law altogether." (103)

Harold Winch (Vancouver East) brought his own experience to support his position:

In going through an institution in New Westminster I have looked down into a baby's crib and have seen what I considered to be a six or seven year old child who was nothing but skin and bone, and later discovered this child was breathing but certainly no living. I have no hesitation in saying that not only must we consider the right to be born but we must also consider the right not to be born a vegetable that medical science can keep alive until you and I are probably long dead (104).

John Burton (Regina East) was the only NDP member opposed to the clause. "The State has an obligation" he claimed "and a duty to protect human life where it exists... (and) ...it is clear that human life does exist prior to birth." He wondered whether, if the bill were to be passed, there should be a review after five years, as in the case of capital punish-

ment (105).

All fourteen Ralliement Creditiste members of the House of Commons opposed the legislation, and the teachings of the Roman Catholic Church were greatly employed in their debates.

Bernard Dumond (Frontenac) quoted from many authoritative sources to support his case for the rights of the unborn and brought reflections of his family visits to use:

Mr. Speaker, my 4-year-old child accompanied us when we went to visit relatives during the Christmas holidays of 1968-69 and getting close to his aunt asked her: "Auntie, may I hear your baby move?" How happy he was when he told us: "Mother, the baby moved." When a 4-year-old child is able to detect the presence of life in the womb of a woman who is 5 months pregnant, one wonders why they try to make us believe in this house that the presence of life in a child only appears in the 9th month of pregnancy or at birth. No, Mr. Speaker, we cannot as Christians accept that theory (106).

Romuald Rodrigue (Beauce) emphasized the right to life as "...a basic human right on which depend all the others that every human being is entitled to claim" (107), whilst Adrien Lambert (Bellechasse) exhorted that "...human capital, the inhabitants themselves are the greatest wealth of our

country". He asserted that God "...has indeed provided our earth with sufficient resources of all kinds to satisfy the need of each one of us." (108)

Lionel Beaudoin (Richmond) was concerned that "...abortion committees would make the law themselves", noting that the Justice Minister had "...asserted that the word 'health' would not be interpreted by Courts of Justice, but by the various therapeutic abortion committees" on a television programme the previous 27th December (109). Henri Latulippe (Compton) believed that "Society must recognize the importance of every individual", claiming that there exists a danger that "...the provisions of this bill dealing with homosexuality and abortion will lead the nation to its own destruction." (110) Roland Godin (Portneuf) went further by enquiring whether "...the present Government with its loathsome laws on divorce, on abortion, on homosexuality, is not simply the tool of a dreadful plot against our civilization." (111)

Gilbert Rondeau (Shefford) made use of several texts relating to rights in his argument, adding "...at one time the execution of pregnant women condemned to death was deferred until the birth of their child." He presented numerous

religious arguments, including a 1958 address by Pope Pius XII to Italian midwives, where he said:

Every human being, even the child in his mother's womb, owes immediately to God, and not to his parents, to society or to human authority his right to live. Therefore, no man, no medical, eugenic, social, economic or moral counsel can produce or confer a judicially valid right to dispose directly and deliberately of an innocent human life, that is, to dispose of it with a view to its intended destruction considered either as an end or as a mean to achieve an end which perhaps in itself is not at all unlawful. ) \*

Rondeau asks, finally, "whom shall we obey? Shall we obey now Caesar or...God?" (112)

Andre Fortin (Lotbiniere) viewed the term 'therapeutic abortion' as one which "constitutes a formal contradiction", and objected to the undefined and vague terms 'endanger', 'would be likely' and 'health', claiming the provisions were "much too broad when one realizes that a pregnancy is not too dangerous." (113) Finally, Real Caouette (Temiscamingue), the Party Leader described the entire Bill as 'a general abortion' (114).

Prior to the third reading, the Standing Committee of Justice and Legal Affairs to which the Bill was referred fol-

Following second reading, approved the provision that abortions could be performed at hospitals approved by Provincial Ministers of Health (115).

Third reading began with vigorous debate over the morals sections of the Bill to which Justice Minister Turner professed that "...morality is a matter of private conscience. Criminal law should reflect the public order." (116) This brought forth several quotes from Mr. Dinsdale (P.G. Brandon-Souris), who maintained the House was entertaining a "... 'playboy' philosophy", remembering Dante had said "the hottest places in Hell are reserved for those who, in a period of moral crisis maintained their neutrality." (117)

Several amendments were proposed but the Justice Minister saw no purpose to them. One, proposed by Liberal Gaston Clermont (Gatineau) was to delete "...or would be likely to..." from the phrase "or would be likely to endanger...", claiming the expression was too open and vague (118). The Justice Minister in response claimed that 'health' was "incapable of definition and this will be left to the good professional judgement of medical practitioners to decide." (119)

The Creditistes made play of the fact that Liberal disunity was evident, but they felt, as Rene Matte (Champlain)

explained "...at a loss to find a way to have our arguments taken into consideration", since, he suggested, everything was already decided (120). Mr. Matte was later curious to understand why, if the Government "really believes that abortion may be only a sin, why does it not delete any mention of it in the Criminal Code?" since the Government was intent on separating sin and crime (121).

Walter Dinsdale expressed further concern for the Government's attitude to what "has been known down through the centuries ...as the Judaeo - Christian ethic" including in his speech this short verse to describe the progress of man:

Man used to be a tadpole learning how to swim  
And then he was a frog with his tail tucked in,  
And then he was a monkey hanging from the tree  
And now he is a professor with a Ph.D. (122).

A further proposal for amendment by Warren Allmand again emphasized Liberal members' concerns over the wording of the section on abortion, but this was also voted down, the Justice Minister maintaining that the words of the section were sufficient:

The bill has rejected the eugenic, sociological or criminal offence reasons. The bill limits the possibility of therapeutic abortion to these

circumstances: It is to be performed by a medical practitioner who is supported by a therapeutic abortion committee of medical practitioners in a certified or approved hospital, and the abortion is to be performed only where the health or life of the mother is in danger (123).

On 14th May 1969, Parliament voted in favour of the Omnibus Bill.

The following day the Ottawa Journal called this "...A Victory for Reform of our Criminal Laws", whilst the Globe and Mail stated:

This bill is important because it is honest, because it cuts clean through the hypocrisy which the puritan ethic had engendered in Canada and writes law that conforms with the views of the majority of Canadians. When then Justice Minister Pierre Trudeau introduced it in December of 1967, it was an act of courage. He was mounting a public defense of personal liberty; he was saying that there is a difference between public morality and private morality, and that the state has no business dictating the conduct of individuals when that conduct injures nobody else. He was saying that the moral or religious views of one group shall not be imposed on another.

After commenting on points in the Omnibus Bill with which it disagreed, the Globe and Mail continued:

But it was the spirit of the bill that was important. It stepped boldly into a great many areas where legislators had never dared to step before. This is an essential spirit in our rapidly changing world...

The man to whom most of the honour must go is Mr. Trudeau (125).

Thus was born the current legislation concerning abortion to be found at s.251 and s.252 of the Criminal Code.

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

- (a) the administration of a drug or other noxious thing,
- (b) the use of an instrument, and
- (c) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

- (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital who in good faith uses in an accredited or approved hospital any means for the purposes of carrying out his

intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(c) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

- (6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(a) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Alberta, Newfoundland and Prince Edward Island, the Minister of Health,

(b) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance.

(c) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(d) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

Supplying noxious things.

252. Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years (126).

Abortion is still viewed by Parliament as a serious offence - all applicable sections remain indictable offences with the same sentences as in the Code of 1953/54. The difference is that under certain circumstances abortions are deemed to be necessary and, hence brought within the law where a 'therapeutic abortion committee' through the majority of its members, deems an abortion necessary where in their opinion "the continuation of the pregnancy...would be likely to endanger her life or health". This, provided that the abortion

is performed in an accredited or approved hospital by a qualified medical practitioner.

It did not take long, following the Omnibus Bill, for the Government to realize that many lobbyists were not going to be satisfied with the new legislation. In 1970, one year after the revisions, the Royal Commission on the Status of Women said:

The current law cannot be relied upon to reduce the number of illegal abortions or the maternal deaths and injuries that follow the improper medical practices used in many illegal abortions...we believe the present abortion law should be amended. As long as it exists in its present form thousand of women will break it. Breaking the law forces them to resort to methods that seriously endanger their physical and emotional health. The present law also discriminates against the poor who do not have the means to get an abortion (127).

In 1975, the positions of five leading women's groups were compared, and although their proposals for reform varied somewhat, they all firmly agreed that present abortion legislation was not working.

The Royal Commission on the Status of Women in Canada has divided pregnancy into two stages:

- i. 12 weeks or less - during which time, they claim, a pregnant woman should be permitted an abortion upon her request to a qualified medical practitioner.
- ii. More than 12 weeks - where, upon the request of a pregnant woman a qualified medical practitioner believes continuation of the pregnancy would endanger the physical or mental health of the woman, or, if the child were to be born, there exists substantial risk it would be mentally or physically handicapped (128).

The Advisory Council on the Status of Women, a federal organization, recommended, in 1973, that abortion be removed from the Criminal Code entirely. That Council reiterated its position in April of 1975 (129).

Probably the most celebrated Canadian abortionist is Dr. Henry Morgentaler. In 1973 he was acquitted by a jury of eleven men and one woman on a charge under s.251 of the Criminal Code, in the Quebec High Court. This decision was reversed by the Quebec Court of Appeal and Morgentaler was sentenced to eighteen months imprisonment, which was appealed. In November of 1975 the Supreme Court of Canada heard the appeal and upheld the Quebec Appeal Court decision at which time the accused began his sentence.

In the fall of 1975, whilst still in jail, Morgentaler was again tried on similar charges. He was once more acquitted by a jury. In January of 1976 he was released from jail and the Crown appealed his second acquittal. A retrial was ordered at which time he was again acquitted (130).

The Ontario Status of Women Council, when requesting the release of Dr. Henry Morgentaler, included in their April 1975 telegram to Prime Minister Trudeau and the Minister of Justice "we further urge you to remove abortion from the Criminal Code." (131)

In another 1975 case, the accused, Parent, was convicted for attempting to induce a miscarriage contrary to s.251 of the Code. He had impregnated a woman and then introduced her to his brother who performed illegal abortions. It was held that, under the circumstances, the accused could properly be convicted as an accomplice of the abortionist under s.251 (1) or as an accomplice of the woman procuring her own abortion under s.251 (2). (R.v. Parent (1975), 24 C.C.C. (2nd) 207 (Que. S.C.A.)).

The Quebec Status of Women Council's position was similar to that of the Royal Commission. In July 1975, the Quebec

Council divided pregnancy into two periods:

- i. 12 weeks or less, during which time a woman should be allowed an abortion with the consent of her physician;
- ii. More than 12 weeks - where the case should be assessed by certain "special services" which include the present therapeutic abortion committee with the addition of specialists such as psychologists and social workers.

They also recommend the definition of 'health' be that used by the World Health Organization, to include complete physical, mental and social well-being. They suggest that abortion operations be performed in circumstances "which do not endanger the woman's life or health" but should be permitted, not only in hospitals, but in other appropriately provided medical premises (132).

Saskatchewan's Council on the Status of Women propose:

- i. Abortion become a matter for decision between the woman and her doctor at all stages of pregnancy, removing references to abortion committees from the Criminal Code;
- ii. Abortions should be performed by qualified medical practitioners in accredited or approved hospitals;
- iii. Prohibit, as presently, abortions in other

circumstances, including self-induced abortions (133).

Since Morgentaler there have been no abortion charges laid under the Code. The debates and civil cases, however, continue.

In 1980, in the Ontario High Court of Justice it was decided that where a wife's procurement of an abortion without her husband's knowledge or consent has some emotional impact upon the husband, but does not have a significant effect on his physical or mental health, and does not, taken alone, or in conjunction with other relevant circumstances, render intolerable continued cohabitation, such conduct does not constitute cruelty within the meaning of 3.3(d) of the Divorce Act, R.S.C. 1970 c. D-8. (Elbaz v. Elbaz (1980) 114 D.L.R. (3rd) 116.).

In 1981, Ottawa lawyer, David Dehler brought an action against the Ottawa Civic and Riverside hospitals on behalf of unborn children, claiming that the Criminal Code provisions relating to abortion were not operative in that they are incompatible with the Canadian Bill of Rights. His initial motion being dismissed, he appealed to the Ontario Court of Appeal where the motion was again dismissed, and

leave to appeal to the Supreme Court of Canada refused.  
(Dehler v. Ottawa Civic Hospital et al (1981) 117 D.L.R.  
(3rd) 512.).

In the British Columbia Supreme Court it was decided in 1981, that where a husband had applied for an injunction to prevent his wife from having an abortion as prescribed within the framework of the law, a Court should not grant an injunction to restrain the wife and hospital from proceeding with the abortion prior to the therapeutic abortion committee considering the matter. (Whalley v. Whalley et al (1981) 112 D.L.R. (3rd) 717.).

Morgentaler, however, has been unrelenting in his challenge to the abortion law, and in recent times has made moves towards the opening of abortion clinics in several provinces. His plan to have 'production-line' abortions for women not more than fifteen weeks into their pregnancy for a fixed fee of \$200.00 has met much opposition.

In 1981, Joe Borowski, Manitoba's anti-abortion crusader brought an action against the Federal Ministers of Justice and Finance to the Supreme Court of Canada seeking a declaration that s.251 (4), (5) and (6) of the Criminal Code were inoperative by reason of the Canadian Bill of Rights. He

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there won the rights to challenge the abortion laws in the Saskatchewan Court of Queen's Bench. That case was heard in 1984 and it was held that a foetus does not fall within the definition of "everyone" as that term is used in the Charter. A foetus has never been recognized as a legal person, and the mere fact that rights are set out and guaranteed in the Charter does not permit the inference that Parliament intended to include foetuses in the term "everyone".

(Borowski v. A.G. Can., (1984), 1 W.W.R. 115, 36 C.R. (3rd) 259, 8 C.C.C. (3rd) 392, 4 D.L.R. (4.H) 112 (Q.B.).)

CHAPTER IV  
STATISTICAL ANALYSIS

The purpose of this chapter is to determine whether or not the enforcement data support the consensus or the conflict position. As pointed out earlier (Chapter II) the analysis undertaken here will follow the McDonald format. First it appears necessary to review the theoretical components of consensus and conflict theories to the extent of identifying those elements pertaining to this analysis.

REVIEW OF THE THEORIES

Consensus theory having its roots in social contract theory, sees legislation a result of a social contract, the contents of which have been identified by Vold as:

- i. The law represents the value consensus of the society.
- ii. The law represents those values and perspectives which are fundamental to the social order.
- iii. The law represents those values and perspectives which it is in the public interest to protect.
- iv. The state as represented in the legal system is neutral.

- v. In pluralistic societies the law represents the interests of the society at large by mediating between competing interest groups (1).

Thus, according to this point of view the purpose of legislation is to maintain general societal harmony in the face of deviant and disrupting behaviour.

It is suggested that according to the consensus theory it is social and economic problems which cause certain pressures, upon both individuals and society in general, which lead to deviance, including crime. It is as a response to this increase in deviance and crime that laws are made. Consensus theory holds, according to McDonald, that in the long run there will be a positive correlation between problems and enforcement or sanctions (2).

Idleness and ignorance, it has been theorized by consensusualists, are primary causes of crime. This idleness has been measured by unemployment. Ignorance, during the eighteenth and nineteenth centuries was measured by illiteracy and the proportion of school-aged children not enrolled in schools. With the passage of time, and improved methods of recording national data, the wealth of citizens was seen to be an important variable in determining whether or not legis-

lation was consensual in nature. McDonald informs us that "...the greater the per capita G.N.P., the lower the crime rates...the greater the participation in the paid labour force, the lower the crime rate should be..." according to consensus theory (3).

In other words, a positive correlation between the ratio of charges laid and the level of unemployment on the one hand, and a negative correlation between charges and per capita gross national product on the other will be indicative of the consensual nature of the legislation.

In supporting the conflict theory through the 'social reality of crime', Quinney identified six propositions regarding crime, viz:

- i. Crime is a definition of human conduct that is created by authorized agents in a politically organized society.
- ii. Criminal definitions describe behaviours that conflict with the interests of the segments of society that have the power to shape public policy.
- iii. Criminal definitions are applied by the segments of society that have the power to shape the enforcement and administration of criminal law.
- iv. Behaviour patterns are structured in segmentally organized society in relation

to criminal definitions, and within this context persons engage in actions that have relative probabilities of being defined as criminal.

- v. Conceptions of crime are constructed and diffused in the segments of society by various means of communications.
- vi. The social reality of crime is constructed by the formulation and application of criminal definitions, the development of behaviour patterns related to criminal definitions, and the construction of criminal conceptions (4).

Clearly, according to conflict theory, we would expect to see both the nature and level of sanctions determined by the holders of power - according to their needs and available resources (5).

A search for appropriate measures of conflict theory was conducted early in this century. Unemployment which had been used during the nineteenth century as a major indicator of conflict theory was found to be "...still a variable consistent with the basic thesis of that approach." (6) Further, the per capita gross national product was popularized as an indicator, with an increase in the G.N.P. believed to result in an increase in the official crime rate (7).

### THE CHOICE OF INDICATORS

For the examination of whether certain legislation is consensual or conflictual, from the point of view of enforcement it is imperative that appropriate units of analysis be employed. McDonald is critical of this aspect of other such studies claiming:

Typically the nature of the data collected permitted only the assessment of certain consensus type hypotheses, relative to other consensus type hypotheses. Insofar as variations in the power structure, legal and enforcement system is restricted, the possibility of the effects of these appearing is limited....It (is) important to choose units such that the elements of both conflict and consensus theory are varied adequately. For conflict theory this (means) units for which the power structure, legal and enforcement systems vary, and for this the nation-state is clearly the best choice....The nation state level (is) appropriate also for consensus theory (8).

Clearly, the greater the number of appropriate data sources supplying a sufficient range of indicators, the increased validity one might expect of a study. It would be dangerous to base conclusions on inadequate data. Further, it would be unsuitable in the present case to use only one measure unless that measure is not only supportive of one position but also both unsupportive and discrediting to the other. The per capita gross national product fulfills these

requirements, for whilst supporting one position it does discredit the other. McDonald found, in exhaustive testing of consensus and conflict theories of criminality, that as indicators, combining unemployment with the per capita G.N.P. "...achieved the highest levels of explanation" (9).

Examination of the rate of unemployment reveals that, as an indicator, this is at the same time, supportive of one position whilst discrediting the other. When unemployment is at a high level, certain social problems exist which may lead to the enactment of laws and increased enforcement and sanctions. Hence, a positive correlation between the rate of unemployment and the rate of an offence would be indicative of a consensus position, whereas a negative correlation between those two would support the conflict argument. This because, with high unemployment it would not be so necessary to enact legislation for a particular power group to maintain control.

With the consensus suggestion that social problems cause criminality, it may be hypothesized that the less wealth to be found amongst the people of a nation the greater will be the reported crime. Hence a negative correlation between wealth and crime will be supportive of the consensus

position. With greater wealth of the citizens comes an increased need to exert pressure through legislation for a power group to maintain control. Thus a positive correlation between wealth and crime supports the conflict theory.

With these indicators, the following relationships are supportive of the stated theories:

- a) Consensus Theory:
  - i. A positive relationship between charges laid and unemployment.
  - ii. A negative relationship between charges laid and per capita G.N.P.
- b) Conflict Theory:
  - iii. A negative relationship between charges laid and unemployment.
  - iv. A positive relationship between charges laid and per capita G.N.P.

#### PERIODS OF CHANGE IN CANADIAN ABORTION LEGISLATION

Canada has seen very little change in its abortion law until 1969. It remained the same from the initial codification in 1892 until the Criminal Code revision of 1953-1954.

The only change at that time was to reduce the penalty in the case where a woman induced her own abortion from a maximum sentence of seven years imprisonment to two years. 1969 saw a considerable change with therapeutic abortions being permitted under certain limited circumstances. Penalties for illegal abortions, or procuring or supplying the means for an abortion were not changed. Thus it has remained to the present time.

CHARGES AND CONVICTIONS: 1926 TO 1973

The rate of abortion charges and convictions from 1920 to 1973 are shown in Table 1 and Figure 1. 1926 is chosen as the initial year for this analysis owing to the availability of data from that year.

While abortion cannot be considered a crime with great frequency, a steady increase in charges laid is recorded from the mid - 1920's until the beginning of the second world war in 1939. The date indicates a quadrupling of abortion charges between 1926 and 1932, while a relatively low conviction rate is observed (see Table 1). However, there was an almost 300% increase in the number of convictions during the period. The 1930's saw a relatively high frequency of charges laid with a parallel level of convictions.

TABLE I

ABORTION CHARGES AND CONVICTIONS, G.N.P. AND UNEMPLOYMENT RATES  
(CANADA) 1926 - 1973

Year	Number of Abortion Charges	Charges Rate per 100,000 pop	Number of Abortion Convictions	Convictions Rate per 100,000 pop	G.N.P. per capita (dollars)	Unemployment Rate per 1,000 pop.
1926	11	.12	9	.10	544	11.43
1927	16	.17	13	.13	577	6.95
1928	24	.24	13	.13	615	6.61
1929	18	.18	11	.11	612	11.57
1930	33	.32	22	.22	506	36.34
1931	31	.30	17	.16	452	46.36
1932	48	.46	30	.29	363	70.50
1933	41	.39	27	.25	328	77.68
1934	44	.41	28	.26	370	58.75
1935	39	.36	26	.24	397	57.64
1936	49	.45	28	.26	423	52.15
1937	43	.39	26	.24	475	37.21
1938	46	.41	28	.25	473	46.81
1939	51	.45	37	.33	499	46.95
1940	35	.31	25	.22	590	37.17
1941	29	.25	21	.18	720	16.95
1942	48	.41	23	.20	881	11.58
1943	52	.44	35	.30	937	6.44
1944	39	.33	26	.22	992	5.27
1945	25	.21	16	.13	983	6.05
1946	55	.45	47	.38	967	13.26
1947	40	.32	24	.19	1073	8.76
1948	18	.14	10	.08	1209	8.89
1949	41	.30	31	.23	1249	11.38

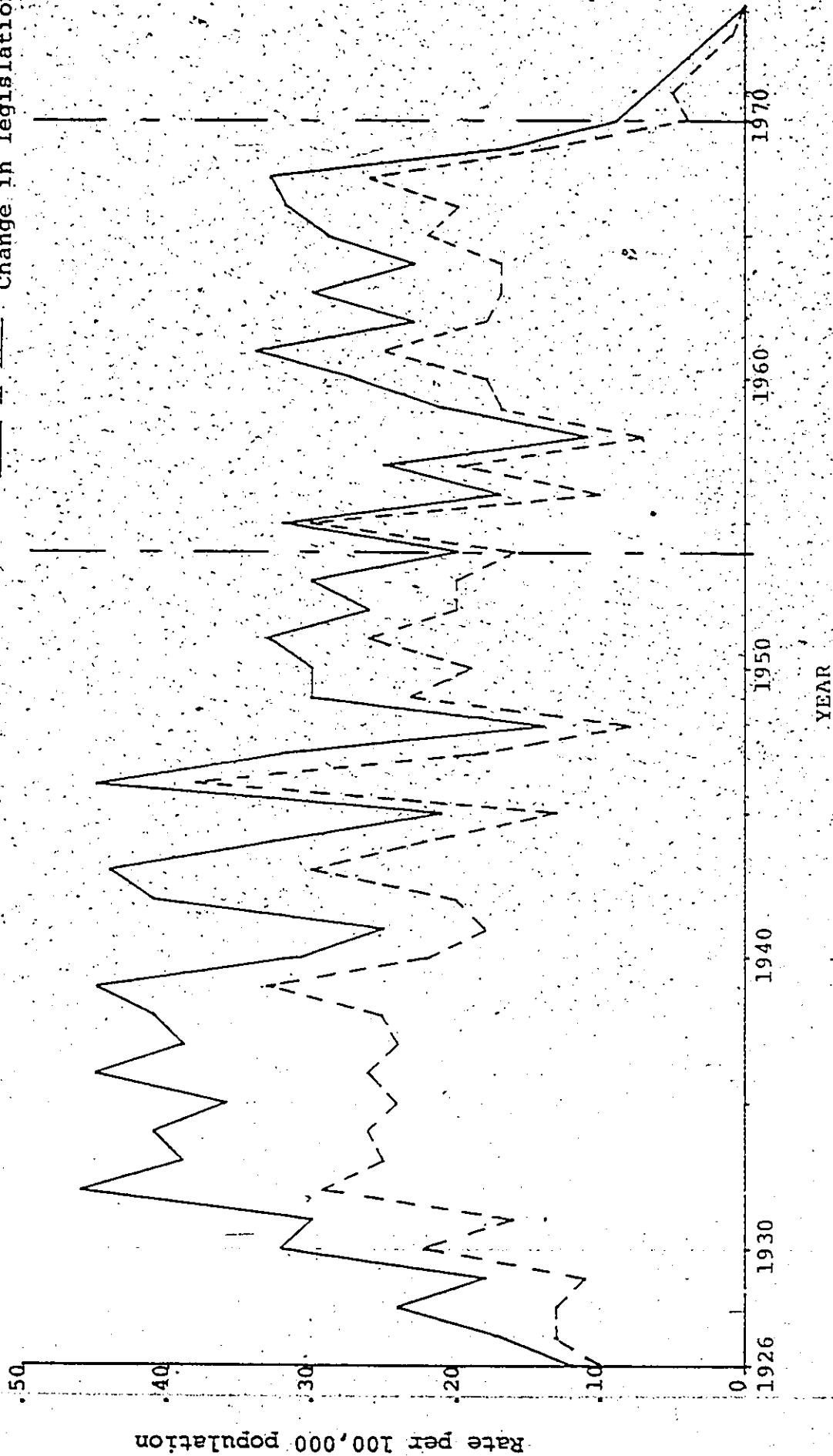
TABLE I (cont'd)

Year	Number of Abortion Charges	Charges Rate per 100,000 pop	Number of Abortion Convictions	Convictions Rate per 100,000 pop	G.N.P. per capita (dollars)	Unemployment Rate per 1,000 pop.
1950	41	.30	26	.19	1349	13.56
1951	46	.33	37	.26	1545	8.99
1952	37	.26	29	.20	1701	10.72
1953	45	.30	29	.20	1740	10.91
1954	30	.20	24	.16	1695	16.39
1955	51	.32	47	.30	1817	15.61
1956	28	.17	16	.10	1994	12.25
1957	42	.25	34	.20	2018	16.74
1958	19	.11	12	.07	2036	25.29
1959	37	.21	29	.17	2108	21.28
1960	48	.27	32	.18	2147	24.91
1961	62	.34	45	.25	2174	25.55
1962	43	.23	34	.18	2310	20.98
1963	57	.30	33	.17	2429	19.76
1964	45	.23	32	.17	2607	16.80
1965	57	.29	43	.22	2818	14.25
1966	64	.32	40	.20	3089	13.34
1967	68	.33	54	.26	3259	15.46
1968	36	.17	26	.13	3506	18.48
1969	16	.08	9	.04	3801	18.18
1970	13	.06	10	.05	4023	23.20
1971	8	.04	6	.03	4333	25.55
1972	4	.02	2	.01	4764	25.76
1973	1	.00	1	.00	5451	23.53

Source: Statistics Canada

FIGURE I: Abortion charge and conviction rate (Canada) 1926-1973

— Charges laid  
 - - - Convictions  
 — Change in legislation



During the 1940's there was a high degree of instability though with a slight tendency to decline, while the early 1950's saw a "levelling-off". There was an increase in charges and a relatively high level of convictions immediately after the 1953-1954 revision followed by decline in both until 1958. What is significant is this period, however, is the close correlation between charges and convictions. One could only speculate that this was due to a similarity of opinions between the police who laid the charge and the jury who returned the verdict. However, the change that resulted from 1953-1954 revision was only a reduction in sentence for those women guilty of their own abortion. This, of itself, is unlikely to have resulted in similarity between number of charges and convictions. From 1959 through to 1967 the charges laid remained at a high level, though fluctuating, while the proportion of convictions dropped considerably. After 1967, probably in anticipation of an easing of the law to allow therapeutic abortions, there was a rapid drop in charges, and a close correlation between charges and convictions. Following the 1969 law, abortion charges fell to zero over to the next four years.

GROSS NATIONAL PRODUCT PER CAPITA: 1926-1973 (Fig. 2)

The Gross National Product (Fig. 2) indicates a rela-

tively low level of per capita wealth during the 1930's, rising during the 1940's, a trend continuing steadily through the 1950's except for slight drops during 1946 and 1954. Following 1961, the level of wealth continued to grow, more rapidly than before.

UNEMPLOYMENT: 1926-1973 (Fig. 3)

In 1926 there was a drop in unemployment, this was followed by a sudden and significant increase in the early 1930's after which it continued to drop until the end of World War II, except for a rise in 1937. The unemployment level was unstable over the next fifteen years, but generally rising until 1961 from which time it dropped until 1966. After 1966, until the early 1970's the level rose. Nothing remarkable is noted about the 1953-1954 period nor 1969 except that the year from 1968 to 1969 saw no change in the level of unemployment. Both years of legislative change did, however, follow increases in the unemployment rate.

Considering charges and convictions for abortion, the gross national product and the unemployment rates during the period 1926 to 1973 we find that at the time when Canada was feeling the brunt of the recession with a reduction of

FIGURE II: Gross National Product per capita (Canada) 1926-1973

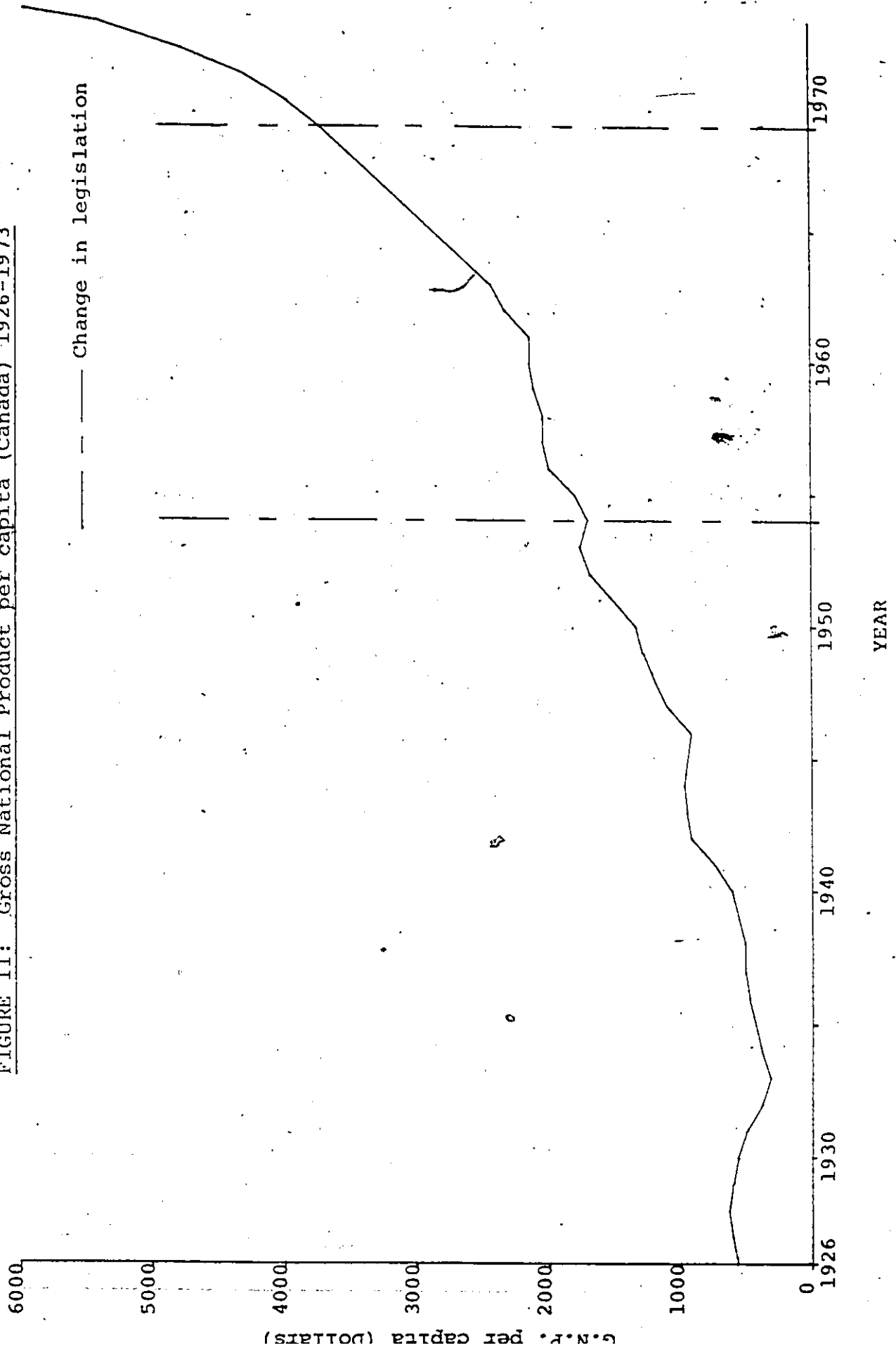
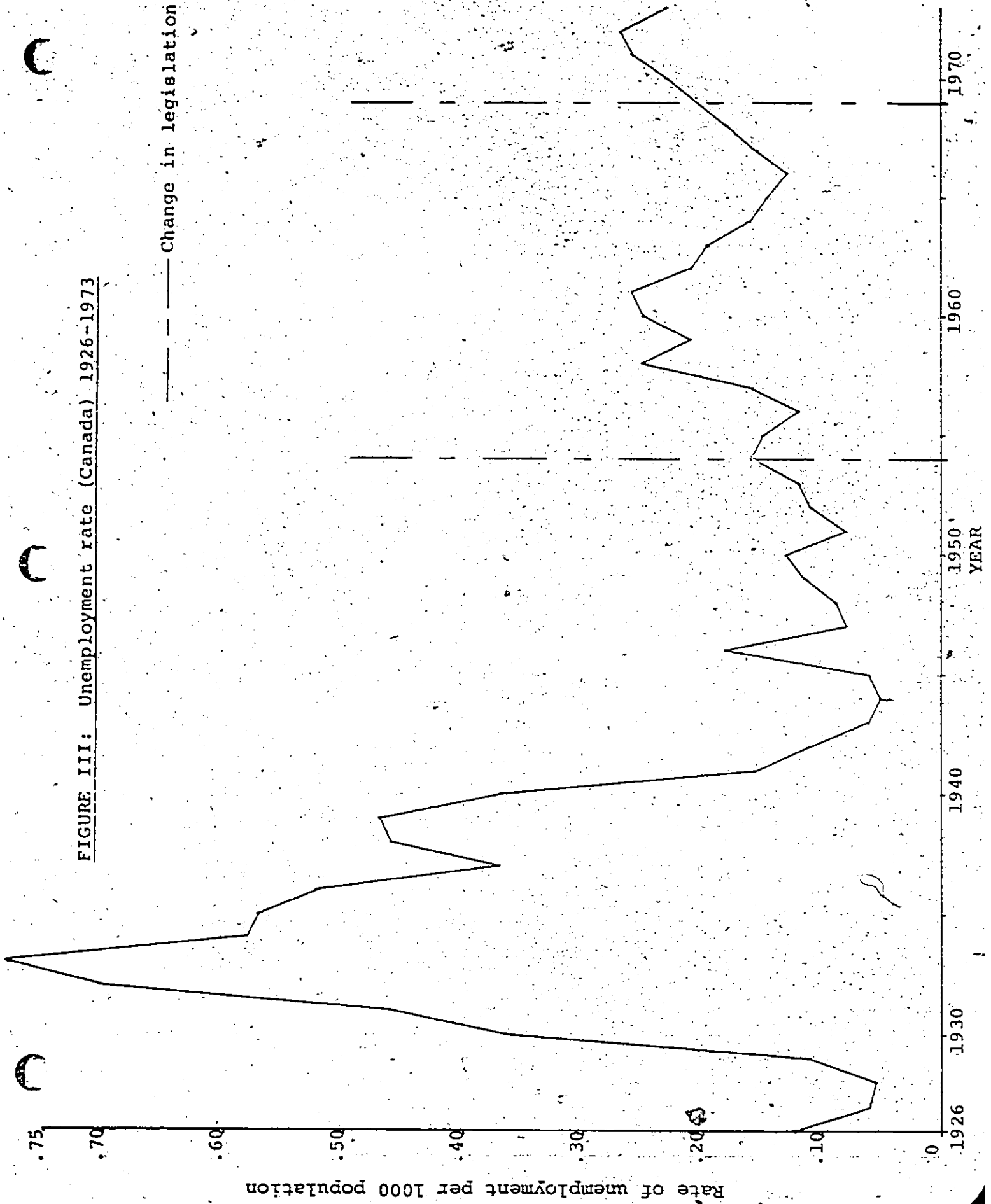


FIGURE III: Unemployment rate (Canada) 1926-1973



G.N.P. and an increase in unemployment, the number of charges laid were few, and the tendency was not to convict even in those cases.

The drop in the per capita G.N.P. bottomed out in 1933, though it was not until 1940 that a reasonably healthy economy was again observed. At the same time, the unemployment rate which had dropped to 6.61 per 100,000 population by 1928 rose rapidly thereafter to peak at 77.68 per 100,000 in 1933. The unemployment situation then began to improve and by 1940 was almost back to the 1930 figure. It was not until 1943, however, that the situation returned to approximate that of 1928. With the improvement in the economy the number of charges laid increased and the proportion of convictions obtained also increased.

From 1939 to 1944 the wealth of individual Canadian grew rapidly. It sank somewhat during 1945-46 picking up again the following year. Throughout this period an unstable employment picture is observed. As with wealth and employment, abortion charges fluctuated together with the convictions for that offence.

Throughout the latter half of the 1940's considerable instability existed in many areas. With the end of the war

in 1945 an increase in unemployment caused by the return of former soldiers was inevitable. The extent of personal wealth, however, continued to rise. Abortion charges slightly more than doubled in 1946 from the previous year while convictions almost tripled. Both the charge and conviction rate then dropped dramatically until, in 1948, only eighteen charges were laid across the country.

The turn of the decade saw a levelling-off in both abortion charges and convictions. In 1953, however, whereas the rate of charges rose, the conviction rate remained as it was in the previous year. This year also saw a continuation of the steady increase in the rate of unemployment and in personal wealth.

1954 saw several interesting events. The unemployment rate rose considerably from 10.9 to 16.3 per 100,000 population while the G.N.P. per capita declined from \$1740 in 1953 to \$1695, and this following a twenty year rise. A substantial reduction also occurred in both the rate of abortion charges and convictions.

With the exception of 1958, the rate of charges and convictions for offences against the abortion sections remained fairly constant until 1968. In 1958, while the level

of personal wealth continued to climb, but at a slowingpace, the increase in the rate of unemployment was around twice that of the previous year while the number of abortion charges laid dropped by more than half, and convictions by almost two thirds. One must consider the relationship in time here between the publication of the Wolfenden Report and the reported charges and convictions in the year following.

Probably in anticipation of changes in legislation concerning abortion, charges and convictions dropped rapidly from 1967, and by 1973 had fallen to only one charge laid in Canada for the whole year.

Changes which occurred in the legislation permit the use of a time-series experimental design to ascertain the effect of the legislation. There exist, however, certain problems of internal validity in the use of the time-series design. One must be particularly cognizant of history as a cause for invalidity-- in otherwords - was it the introduced element that caused the change we see; or was it some simultaneous occurrence? For credibility to rest with the conclusion it is necessary to eliminate the possibility of such external factors, or at least, control for them (10).

Campbell and Stanley suggest,

The plausibility of inferring an effect of X is greatest adjacent to X. The more gradual or delayed the supposed effect, the more serious the confound with history, because the possible extraneous causes become more numerous (11).

The exercise undertaken here, however, is not the determination of the effect of the changes in the legislation, but rather the effect of extant social and economic conditions on the changes in the enforcement of the law. Here it is necessary to recall that there were significant social changes - high unemployment, and low wealth during the period 1928 to 1940. The 1940's saw considerable fluctuation in the unemployment level, but a steady climb in the per capita G.N.P.. Consequently, in attempting to ascertain the relationship between these factors and the level of abortion charges laid, the time period has been divided into the years 1928 to 1940, 1941 to 1950, 1951 to 1960, and 1961 to 1973.

During the period 1928 to 1940, a positive correlation ( $r = .49$ ) is observed between rates of unemployment and abortion charges, whilst a negative correlation exists between charges and per capita G.N.P. ( $r = -.73$ ). These correlations are consistent with the consensus theory applying to abortion.

legislation. A similar situation exists during the next period (1941-1950).

A positive correlation is found between unemployment and charges ( $r = .04$ ) and a negative one between per capita G.N.P. and charges, ( $r = -.29$ ). The situation changes thereafter.

During the period 1951 to 1960 a negative relationship is observed between unemployment and charges ( $r = -.52$ ). A negative correlation also exists between per capita G.N.P. and charges ( $r = -.51$ ). Combined, these are supportive of neither the consensus nor conflict position.

During the period 1961 to 1973, a negative correlation is also found between unemployment and charges ( $r = -.59$ ), as well as per capita G.N.P. and charges ( $r = -.88$ ), once again failing to support either theory.

Doubtless, elements other than the wealth of the nation or its unemployment level affected the abortion rate over the period under consideration. Over time there has been a general relaxation of some aspects of morality. This may have been responsible for a greater demand for the services of the abortionist whilst diminishing fear of searching one out. Methods

of effecting an abortion have changed making the operation safer - even under illegal circumstances. In recent years, in fact, several medical practitioners have admitted to performing abortions under illegal, though surgically safe conditions. With the 1960's came the contraceptive pill - an event that would increase substantially the opportunities for sexual relations whilst reducing drastically the former consequences. All of these events took place during a period of both rising costs and rising family benefits. These two elements may work in opposition on the abortion question - with rising costs resulting in the demand for smaller families and increased benefits as an incentive to larger ones.

However, the fact is that, overall, the enforcement data related to prevailing social and economic conditions do not lend support to either the consensus or the conflict hypotheses.

CHAPTER VDISCUSSION AND CONCLUSIONS

In differentiating between the offence of procuring the miscarriage of a woman who was 'quick with child' which carried a death sentence, and one who could not be proved to be 'quick', which made the procurer liable to be "...fined, imprisoned, set in and upon the pillary, publickly or privately whipped, or to suffer one or more of the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years" (Ch. III p. 64 supra), the 1803 Act - Lord Ellenborough's Act - clearly emphasized the importance of the foetus in the legislation. This may be interpreted to mean that in so legislating it was the purpose of the government to ensure sufficient births to maintain the labour force at a time when human labour was of great importance throughout the Commonwealth.

It could also be interpreted as a reaffirmation of the value of human life and its extension to include the foetus. The former interpretation would perhaps support the value conflict situation. It would be in the interest of the dominant class to ensure the existence of a labour class sufficiently large to provide cheap labour for economic activity, while it would be in the interests of the subordinate classes

to limit the number of children to ensure a family small enough to permit them the quiet enjoyment of their lives. The latter interpretation would perhaps support the value consensus position unless it was assumed that human life had value only to a segment of the population.

The changes wrought in the abortion laws in Canada over the years have been few and far between. Like changes in any other type of law these can be seen as changes in criminalization or changes in penalization. Criminalization changes involve alteration in the range of behaviour outlawed resulting in either behaviour that was until then legally permitted being considered illegal or behaviour that was until then illegal considered legal. The first change occurred in 1837.

This year saw a decrease in penalization; the maximum sentence of life imprisonment replaced the earlier maximum sentence of death. The second change occurred in 1861. An amendment made it an offence for a pregnant woman to attempt to procure her own miscarriage with penal servitude for life as the sentence. This law was directed at pregnant women and towards the protection of the foetus. This amendment came thirty years after Lord Landsdowne's Act declared that a woman could become an accessory before the fact to an

abortion performed upon her.

The Criminal Code of 1892 saw the third change. There was a reduction in sentence for a pregnant woman attempting to procure her own miscarriage, or permitting another to attempt it. The sentence was reduced from penal servitude for life to seven years' imprisonment.

From 1892 until 1953-54, apart from changes to section numbers, there was no change in the law or penalties respecting abortion. The revision of the Criminal Code in 1953-54 saw a change but that was only reduction in the sentence for a woman attempting to procure her own miscarriage. In this revision the term "unlawfully" was omitted from section 251.

Prior to this it had been an offence to "unlawfully" administer any drug or other noxious thing, or to "unlawfully" use any instrument with intent to procure a miscarriage. The omission of this term caused much concern to the medical profession since their defence to a charge of abortion was assured where the Crown failed to show that it was performed unlawfully. Hansard reveals that the government was removing what appeared to be a fairly broad defence for the medical profession and replacing it with the legal principle of "mens rea" whereby the burden upon the Crown was limited to

show that an abortion was performed by one with guilty intent - be it a medical practitioner or otherwise. The elimination of that one word from the revised law put an immediate flame to the abortion law revision movements that grew to be so vocal in the following years.

Major changes in the law on abortion were made in 1969. In that year abortion law was liberalized considerably by permitting abortions under certain conditions and at certain locations. Subsection (4) of section 251 of the Criminal Code allowed that a qualified medical practitioner who was not a member of what was to be a 'therapeutic abortion committee' could perform an abortion in cases where such a committee for an accredited or approved hospital "...by a majority of the members of the committee and at a meeting of the committee at which the case of (a pregnant) female person (had) been reviewed, (and had) by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health...". The new section also introduced a fresh burden upon the Provincial authorities. To them came the task of 'policing' the therapeutic abortion committees whereby "The Minister of Health of a province may by order (a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a

copy of any certificate described in paragraph (4) (c) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or (b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4) (c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require." (s.251 (5)). The 'therapeutic abortion committee', according to section 6 was to comprise not less than three qualified medical practitioners appointed by the board of the hospital for whom the decisions would be made. The law did not require the presence of a gynaecologist on the committee - in fact, since committee members were excluded from performing abortions, according to subsection 4, few gynaecologist were likely to be found on those committees.

Prior to the 1969 amendment, considerable debate, both in the House of Commons and outside took place and a number of divergent opinions were expressed. By the mid '60's three focal positions had developed. There were some whose opinions reflected the position of the medical profession, that abortions should be available in limited circumstances and under controlled conditions; others who agreed with the thrust of

the women's movements arguments - that the issue was not so much a question of the rights of the unborn as it was to do with the rights of the born - the pregnant woman, and a third group representing principally the position of the Roman Catholic church that an induced abortion was wrong under any circumstances.

These positions were reflected by various members of the House of Commons. Generally, the three private members' bills into which hearings began in 1967 presented the position of the medical profession. Grace MacInnis (N.D.P.) followed the C.M.A. recommendation that grounds for abortion should include health, deformity of the foetus, and pregnancy resulting from sexual assault. Ian Wahn (Lib.) wanted an act to clarify the 1953-54 legislation which had caused so much concern to medical practitioners, and H.W. Herridge (N.D.P.) hoped to make abortion easier to obtain, but was against abortion on request.

The Minister of Justice, John Turner also supported the position of the C.M.A. when he informed the House that one of the overriding purposes of the proposed (1969) legislation was to clarify the earlier law - to permit abortion "...under the restricted circumstances where the mother's life or health might be in danger." (1)

Three months later, however, in April 1969 Turner went beyond support for women's health and saw abortion as a question of morality related to freedom of will: "Who is to decide when moral responsibility exists in terms of freedom of will, and when it has to be diluted in human terms because of environmental or physical causes?...In a pluralistic society there may be different standards, differing attitudes and the law cannot reflect them all." (2) Several spoke to the rights of women as being paramount to this issue. Gordon Fairweather (Con.) claimed abortion to be a matter "...which concerns something womanhood should decide..." (3) Robert McCleave (Con.) maintained that "...if a Roman Catholic woman feels strongly enough about her religion, presumably she would not consent to an abortion in any case." (4) David Lewis (N.D.P.) urged "...that we do not term public crimes those actions which are matters for an individual's conscience." (5) Stanley Knowles claimed that "...this is a human and social problem to be dealt with in a humanitarian manner." (6) It was two years after the 1969 amendment that Prime Minister Pierre Trudeau expressed his position on abortion succinctly, indicating support for the stand of the women's movements: "I don't feel I can speak with great authority on this because I am not a woman." (7)

The third group of M.P.'s maintained, as John Diefenbaker

did, that abortion should never be legalized. Most who held that position rooted it in religious doctrine. The teachings of the Roman Catholic church were the basis of argument of the Ralliement Creditiste members, all of whom spoke against the proposed amendment.

A few, such as Mark MacGuigan (Lib.) expressed personal compromise. Personally opposing the Bill since he believed "...the foetus is an actual human being from the beginning...", he proposed that the new legislation was necessary to ensure that "...abortions now taking place in the hospitals...according to the best canons of medical practice..." were clearly within the law - a position ultimately supporting the medical profession (8).

Examination of cases heard in or appealed to higher courts reveals three general divisions. The first includes cases heard prior to the 1953-54 revision. Up to that point courts were generally engaged in interpretive and definitional issues. The early cases set out what was included or excluded by the terms 'substance' and 'means', and what was meant by the term 'noxious thing'. In one 1914 case it was decided that corroboration was not required in a charge of procuring an abortion. In a 1909 case a physician, charged with the principal offence relied upon the presence of the

word 'unlawfully' in the procurement section. It was held that since the Crown failed to prove that the abortion was not necessary to save the woman's life, the defendant, McCready, should be discharged.

The period from 1954 until 1969 saw, generally, a firmer tone in judicial interpretations. Although it was stated in a 1957 case that there was no material difference in s.307 of the 1927 Code and s.237 of the 1953-54 Code, a change in interpretation of the law by the Quebec Court of Appeal is observed. In the case of Lariviere v.R., at variance with earlier cases when it was necessary to prove the 'means' by which a miscarriage was procured when a particular means was alleged, the Court ruled the Crown was not required to specify the means used. During the next few years several cases were heard by the higher courts addressing the issue of 'means'. It was consistently held that it was not only unnecessary to specify the means, but also not required to prove that the instrument or means concerned would, in fact, successfully induce a miscarriage.

1968 was a year when abortion was being hotly debated both in and out of Parliament. In that year a drug store employee was convicted of supplying miscarriage-inducing pills to a policeman posing as the boyfriend of a woman (a

police woman) whom he claimed to be pregnant. There have been few cases of the use of 'agents provocateurs' in abortion cases, and this case came at a crucial time in the history of abortion legislation.

The third - post 1969 - stage saw popular interest rise with the defiant activities of Dr. Henry Morgentaler. As Maclean's magazine's Mary Janigan has said "The history of abortion law prosecution since 1969 is essentially a history of Morgentaler himself." (9) Following his acquittal in 1973 of a charge of performing an illegal abortion the Supreme Court of Canada upheld an Appeal Court decision finding him guilty - this contrary to the original jury finding. While in jail for that offence he was again charged and acquitted by a jury. Once more the case was appealed and a new trial ordered at which time a not guilty verdict was again returned.

#### CONCLUSION

The first indication of support for either the consensus or conflict theory occurred in 1837 when Parliament reduced the sentence for procuring a miscarriage from death to life imprisonment. This reduction in sentence may be suggested to weakly support the consensus position since there is no indication of private interests affecting the decision.

A similar occurrence in 1892 may be interpreted the same way. No private interests were apparent in 1892 when the maximum penalty for a woman attempting or permitting another to attempt to procure her own miscarriage was reduced from life to seven years' imprisonment, again indicating weak support for consensus theory.

The examination of case law from the introduction of abortion laws in Canada until the Criminal Code revision of 1953-54 indicates a judicial interest in legal interpretation and definition and nothing can be gleaned to support either theory from that.

Analysis of variables related to the two theories in the previous chapter indicates support for the consensus theory position during the period 1928 to 1950.

Based upon these various approaches to this inquiry it may be suggested that prior to the Criminal Code revision of 1953-54, Canadian abortion law both in the books and in the courts supported the consensus theory of legislation.

A further reduction in sentence for a woman attempting to procure her own miscarriage occurred in the 1953/4 Criminal

Code revision. As before there is no indication of private interests associated with this change and once more it may be suggested that the consensus theory position is weakly supported by the change.

Between 1954 and 1969 the courts are, generally, seen to develop a consistently firmer application of the law, but there is no evidence associated with this to offer support for either of the popular theories.

The statistical analysis also fails to support consensus or conflict theories from 1951 until 1973.

Both the consensus and conflict theories posit the existence of value differences. These differences are resolved, from the consensus viewpoint, by the differing groups coming "...to deliberative agreement to live together in a society, each giving up something to gain something else" (10). The differences are resolved from the conflict point of view by one group imposing its will on the others. Both these approaches look upon the law as performing a peace-keeping and social harmonizing function - establishing in one way or another certain simple fundamental rules of living together. But the law performs two other functions as well. It performs a conflict resolution function, providing the principles and

procedures for conflict resolution between individuals and groups. It also performs a resource allocation function guaranteeing and protecting existing production relationships and ways of distributing resources at various degrees, at various times and various places (11).

Focusing on this last function, Turk (12) points out that "...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." From this point of view legislative changes must be seen involving not a value crisis but a hegemonic crisis challenging not cherished values but the existing power structure, with the value crisis appearing as the surface manifestation of the deeper hegemonic one (13).

As has been pointed out earlier, real changes in abortion laws began to occur only with the 1953-54 revision of the Criminal Code. That revision deleted the word 'unlawfully' which had prefaced the offence of using or administering anything for the purpose of procuring a miscarriage. The revision apparently caused considerable concern to members of the medical profession resulting in the growth of the

powerful medical lobby group. The organization of the group saw the development of other well financed and organized lobby groups.

Women's groups jumped into the debate with both feet following the publication of Finigan's pro-abortion article in Chatelaine in August 1959. It seemed, however, that for every such group in favour of easier abortions one would sprout up against it. The largest group of all was the National Council for Women which advocated the legalization of abortions. Other groups supporting that position included Planned Parenthood and a variety of Women's Institutes. Lobbying against abortion were the numerous Catholic Women's Leagues, Action Life and the Coalition for the Protection of Human Life.

The United Church vocalized its position - that abortions should be allowed for physical and mental reasons - in 1960. Throughout, however, the Roman Catholic church maintained that abortion was contrary to the will of God and should not occur.

In 1963 the Canadian Bar Association spoke of the need for amendment of abortion law. Disputes within that Association, however, led the B.C. Catholic Lawyers' Guild to voice

its opposition to further liberalization. To the present day the powerful legal lobby group is widely split on this controversial issue.

That same year, 1963, saw a deepening in the involvement of the Canadian Medical Association. That group adopted the proposal of the Ontario membership that the subject should be studied by the medical professionals. The appointed committee developed a position fundamentally the same as that which was later written into law.

The Church of England's report was issued at the end of 1965 rejecting abortion on demand, for the victims of crime or where there is deformity of the foetus, the reasons proposed by the Canadian Bar Association as grounds for an abortion.

In recent years, however, those with the greatest interest in this debate have clearly been women - whether for or against abortion. There is no denying that, whatever one's religious or philosophical beliefs, it is women who are at the centre of the issue, and we have witnessed a transfer of emphasis from the foetus to the rights of women in general, pregnant ones in particular.

When the New Democratic Party revised its manifesto it clearly stated its position that people should have "...the right of choice in reproductive matters," and that it "... unequivocally supports the fight of women for freedom of choice on (abortion)." (14) Dr. Morgentaler has claimed that his struggle is not one concerning pregnancy or a foetus, but a fight for "...women's struggle for reproductive dignity." (15)

Even the anti-abortion movement has shifted its direction slightly claiming it a "...political fact of life... that pro-life advocacy is really a form of selling, and as distasteful as it may seem, should be treated as such. We are selling a philosophy of life which involves not only being "anti-abortion", but speaking out on issues such as infanticide and euthanasia, and working towards a truly caring society." (16)

The effect of all these developments as revealed in the debate on the 1969 revision had been to pull parliamentarians in three conflicting directions. As this study has indicated, a number of members of parliament expressed support for the position of the Canadian Medical Association - abortion under certain circumstances. Others argues for the stand of the "pro-choice" women's groups-abortion to depend on the desire

of the woman. A third group who were against abortion stood behind what was essentially the position of the Roman Catholic church - no abortion at all.

Collectively, the enactment of the law, the activities in the courts and the interpretation of statistical data associated with this period suggest that there is no firm support for either the consensus or conflict theories leading one, once more, to consider the existence of an alternative interpretation of these events.

Little can be said of the post - 1969 period. The debates continue - Morgentaler continues to challenge the law and Borowski continues to challenge Morgentaler, without any resolution in sight.

The issue of rights has been directed to the Supreme Court of Canada with Morgentaler's case, and both sides in the debate claim the Charter supports their position. The pro-abortion lobby claims that the s.7 Charter guarantee of 'life, liberty and security of the person' supports the rights of women to control their bodies, the anti-abortion group maintain that for such an argument to succeed there would need to have been an earlier finding along those lines, or such a right needs to be "...deeply rooted in the traditions

or conscience of this country" which, they claim, is not so (17).

It was recognized by Vold that there will not always be unilateral success in the quest to design legislation - he identified the outcome of group conflict as either "... utter defeat and destruction or subjugation for the other side," on the one hand, or "...something less conclusive and decisive, a stalemate of compromise and withdrawal to terminate the conflict with no final settlement of the issues involved" on the other (18).

Turk, however, maintained that power must not exist as either "...an excessively coercive, power relationship or an excessively consensual egalitarian relationship," (19) suggesting the existence of a third possible situation.

Herbert Spencer, at the beginning of this century professed that "Maybe we should speak less of consensus and more of compromise" (20). He, of course, looked upon compromise as a part of the process by which consensus is reached. Compromise, however, need not end in consensus nor need it lead to a "termination of the conflict without a final settlement of the issues" as Vold claims it does. The compromise could result in movement of the debate from one set of values to

another by considering the behaviour involved in terms of a set of values more pertinent to the emergent hegemonic crisis and far removed from the implied value crisis. This is what is occurring in the case of abortion laws in Canada. The behaviour under scrutiny - abortion - no longer involves the questioning of the values that it once did - the life of an unborn child, and the problem is no longer one of pro or anti abortion. The value involved is becoming more and more one of a woman's right to do with her body what she would, and the problem is becoming one of pro or anti choice.

The focus of the debate is shifting from the unborn child to the pregnant woman, from human life to human rights. The hegemonic transformation converts the problem of abortion into one of women's rights and obscures its connection with the value of human life which continues as a cherished value.

The socio-legal compromise witnessed by these events did, albeit temporarily, and to a limited degree, resolve the conflict. Abortion is an issue which will, probably, never be resolved to the permanent satisfaction of all.

We are, after all, politicians, not philosophers, and while we may look for the best of all possible worlds, we may have to take second-best. Compromise is possible if it looks in the right direction.

Pierre Elliott Trudeau  
10th January, 1969.

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