

INVOLUNTARY MOTHERHOOD: ABORTION, BIRTH CONTROL AND THE LAW IN NINETEENTH CENTURY CANADA

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Professor Backhouse suggests that before the nineteenth century abortions and birth control were largely considered private matters. However, beginning in the early nineteenth century and continuing until the Criminal Code of 1892 there were several waves of legislation which Professor Backhouse traces and analyses that made abortions and birth control crimes. She also explores court cases dealing with abortions during that century and compares them with prosecutions for infanticide during the same period. Taking as her point of departure the burden that unwanted pregnancies could be for women, particularly the poor and unmarried or unhappily married, Professor Backhouse argues that much of the evidence suggests that the legislation was passed, not as a response to any upsurge of public opinion, but as a result of a determined group of male physicians who wished to assert monopoly control over a profession they were struggling to create.

La Maternité involontaire; l'avortement le contrôle des naissances et la loi au Canada au 19^e siècle

Le professeur Backhouse suggère qu'avant le 19^e siècle les avortements et le contrôle des naissances étaient considérés comme des questions plutôt privées. Depuis le début du 19^e siècle jusqu'au Code criminel de 1892, cependant, plusieurs vagues de législation se sont succédées — le professeur Backhouse les analyse — qui ont fait de ces actes des crimes. L'auteur explore également des procès pour avortement datant du siècle dernier, puis elle les compare à des poursuites pour infanticide pendant la même époque. Partant du fait qu'une grossesse non désirée pouvait être un lourd fardeau pour une femme, surtout si elle était pauvre, non mariée ou malheureuse dans son mariage, le professeur Backhouse avance qu'une grande partie des faits suggèrent que la législation a été votée, non par suite de quelque mouvement de l'opinion publique, mais parce qu'un groupe résolu de médecins (masculins) voulaient monopoliser le contrôle d'une profession qu'ils luttaient pour créer.

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From the first decade of the nineteenth century, when the first statutes prohibiting abortion were passed, to the last decade, when criminal sanctions were finally placed upon the advertisement and sale of contraceptives, Canadian legislators have moved to deny women all control over the decision to bear children. Various waves of legislation expanded the reach of the criminal law until virtually all aspects of fertility control had come under regulation. Motherhood was to be forced upon women, regardless of any choice they might have wished to make to the contrary.¹

¹ These repressive laws were enacted in the context of a pervasive cult of motherhood. Religious leaders commonly gave lectures which exhorted women to embrace their domestic role. Rev. Robert Sedgewick spoke to the Halifax YWCA in November, 1856, and claimed that "no love, not even the tenderest", could equal a mother's love: "The love of a mother is like the bounty of God. . . . Willingly does she watch [her helpless babe] by day in its cozy crib, and drink in purer, sweeter joy from her vigil, than ever she drank from any other source. Forgetful of herself, her sole care is centred on this little object, as she lives, and moves, and works and watch, and wrestles for its good." Ramsey Cook and Wendy Mitchinson, eds., *The Proper Sphere: Woman's Place in Canadian Society* (Toronto: Oxford Univ. Press, 1976), 30-32.

Women's groups embraced these sentiments, and based some of their claims about women's moral superiority upon their role as mothers. Mrs. Gordon Grant's address on the franchise, given to the Fifth Convention of the Woman's Christian Temperance Union in British Columbia in 1888, contained the following statements: "Our little ones come to us and by their very helplessness appeal to all that is pure and holy, all that is tender and loving in our natures . . . as we carefully watch over them, nourishing their bodies that they may become strong and vigorous, educating their minds that they may be intelligent and enterprising, inculcating right principles and pure thoughts in their hearts." *Id.*, 256-257.

Motherhood was elevated to the status of a "profession"; indeed, Helen Cameron Parker, writing in the *Canadian Magazine* in 1893, lamented the lack of professional training for mothers: "Society has seen and said — 'the hand that rocks the cradle rules the world, and it is therefore a moral necessity that woman should receive the best intellectual training which the State can give;' . . . Is it a small matter to the nation that each day scores of women become wives without one idea of the true duties of a wife, of the awful responsibility of a mother, . . . Would such ignorance be tolerated in any other profession?" Helen Cameron Parker, "Technical Schools for Women" (1893), 1 *Canadian Magazine* 634-637.

The clamour asserting maternity the paramount feature of women's lives arose contemporaneously with the industrialization and urbanization processes of the nineteenth century, which had served to reenforce the separation between the sexes. Men were expected to leave the home behind for the newly-emerging public sphere of industrialized economic production. Women were to remain in the home, supervising the private realm of child-rearing with nurture and motherly love.

Pre-industrial society did not entail such a marked separation of spheres between the sexes, since production of food, clothing and tools was accomplished by both men and women working at home and raising children simultaneously. See, for example, Nancy Cott, *The Bonds of Womanhood* (New Haven: Yale Univ. Press, 1977); Ramsey Cook and

For women in nineteenth century Canada, however, pregnancy was often an unmitigated disaster. The potential medical complications of childbirth must have been a source of fear and dread for all women.² Bloodletting and purges (the latter consisting of forced vomiting, or administration of large doses of laxatives or enemas) were the medical treatments most favoured for discomfort in pregnancy for much of the nineteenth century.³ Puerperal fever and infections spread by doctors and midwives who were ignorant of asepsis, and unskilled intervention during childbirth with forceps and other instruments often resulted in severe trauma and death. Although few married women would have expected, or perhaps wanted, to avoid childbearing completely, many would have wished to avoid repeated pregnancies.⁴ Some women may have had additional reasons for seeking to prevent reproduction. Dire poverty may have created circumstances in which individual women concluded that childbearing was economically untenable.⁵ Other women may have been anxious not to bring a child into a difficult home life, particularly if their husbands were violently abusive.

The legal records also indicate that some of the women who

Wendy Mitchinson, *supra*; and N.E.S. Griffiths, *Penelope's Web: Some Perceptions of Women in European and Canadian Society* (Toronto: Oxford Univ. Press, 1976). On the newly-emerging cult of motherhood in the nineteenth century, see generally, Ann Douglas, *The Feminization of American Culture* (New York: Alfred A. Knopf, 1977); Edward Shorter, *The Making of the Modern Family* (New York: Basic Books, 1977); and Barbara Ehrenreich and Deirdre English, *For Her Own Good: 150 Years of Experts' Advice to Women* (New York: Doubleday, 1978).

² See Barbara Ehrenreich and Deirdre English, *supra* note 1; Edward Shorter, *A History of Women's Bodies* (New York: Basic Books, 1982), and Wendy Mitchinson, "Historical Attitudes Toward Women and Childbirth" (1979), 4 *Atlantis* 13 for accounts of the prevailing medical technology used by midwives and male doctors in the nineteenth century.

³ Barbara Ehrenreich and Deirdre English, *supra* note 1, 41.

⁴ The following extract from a letter (dated 5 January 1841) written by Queen Victoria to her uncle, the King of Belgium, is particularly interesting in this respect: "I think, dearest Uncle, you cannot *really* wish me to be the 'Mamma d'une nombreuse famille', for I think you will see with me the great inconvenience a *large* family would be to us all, and particularly to the country, independent of the hardship and inconvenience to myself: men never think; at least seldom think, what a hard task it is for us women to go through this *very often*." From J.A. Banks and Olive Banks, *Feminism and Family Planning in Victorian England* (New York: Schocken Books, 1964), at 6.

⁵ See, for example, *The Queen v. Charlotte Saunders*, Archives of Ontario RG 22, Northumberland and Durham County Minute Books, 1897, where the accused was charged with infanticide, neglecting to obtain assistance in childbirth and concealing the birth of a child. The case file indicates that Charlotte Saunders, who was a widow and already had a nine year old son, was "absolutely without means" when she gave birth to the child whose death was the subject of the charges. For a similar English case, see *R. v. Douglas* (1836), 1 Mood. C.C. 480; 168 E.R. 1352 (K.B.).

sought to prevent reproduction were unmarried. The disgrace which attached to unwed pregnancy in Victorian times was intense and all-encompassing, particularly for women in the urban middle-class.⁶ Family and friends might cut off all relations and the poor woman would be forced to leave her home and neighbourhood to seek anonymity. The difficulties of trying to support herself and the child through her own employment would have been nearly insurmountable, for women's wages were not set high enough to support themselves, let alone dependent children. Unless she could find a charitable or religious organization to take her in, prostitution might be her only resort. Many unmarried pregnant women, often extremely young in age, were desperate to prevent, or to conceal and terminate a pregnancy before it disastrously transformed their lives.

This article examines the various statutes passed in Canada during the nineteenth century, and the patterns of prosecution and judicial analysis which faced women who rebelled against enforced pregnancy. The extent to which legal forces intervened to frustrate their efforts is one clear indication of the indifference with which these women's rights and lives were viewed.

I. The First Wave of Abortion Legislation: 1800-1840

Prior to the nineteenth century, there were no statutes in Canada or in England which prohibited the practice of abortion.⁷ Some commentators have argued that the common law also failed to deal with the issue of abortion. Cyril Means, for example, has asserted that women "enjoyed a common law liberty to terminate at will an unwanted pregnancy" at any

⁶ See W. Peter Ward, "Unwed Motherhood in Nineteenth-Century English Canada" in *Historical Papers* (Halifax: Canadian Historical Assoc. 1981), 34, 55.

⁷ The lack of legislation on abortion prior to this time may indicate that the practice was viewed with tolerance. In at least some early cultures, it appears that abortion was viewed as an acceptable method of birth control. See generally, Wendall W. Watters, *Compulsory Parenthood: The Truth About Abortion* (Toronto: McClelland and Stewart, 1976). Tom Campbell has noted that in Greece, both Plato and Aristotle endorsed abortion in order to prevent over-population, poverty and other societal ills. Campbell has noted that not all individuals agreed with this; Hippocrates cautioned physicians not to administer abortion-causing drugs, although his opinion has been described as a minority one. See Tom Campbell, "Abortion Law in Canada: A Need for Reform" (1977-78), 42 Sask. L.R. 221, 222. There was some movement in Roman law to repress abortion and it became seen as an offence against the father, whose property rights in his potential offspring had been interfered with. Glanville Williams, however, described this development as "ineffectual". Ecclesiastical law apparently came to be seen as the proper locus of control over abortion, with the development of Christianity and the Catholic Church. See Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), 148.

stage of gestation.⁸ In contradiction, Robert Byrn has argued that "at all times the common law disapproved by abortion as *malum in se* and sought to protect the child in the womb from the moment his [sic] living biological existence could be proved."⁹ Although this debate is still unresolved, all are agreed that the common law did not prohibit abortions done prior to "quickening", that is before the fetus had first stirred in the womb.¹⁰ The concept of quickening was thus a critical issue in the eyes of the law.

Quickening was clearly differentiated from viability, or the point at which the fetus could exist on its own outside the womb. Aristotle, for example, had attempted to calculate the exact date of quickening, and had decided that male fetuses quickened sooner than female fetuses. He settled upon a basic rule of forty days after conception for males and ninety days for females.¹¹ Hippocrates moved these dates up to thirty and forty-two days respectively; in Roman times the view was forty and eighty days.¹² St. Thomas Aquinas, using theological doctrines about the ensoulment of a fetus, concluded that life first began when the fetus stirred.¹³

The first wave of legislation in the nineteenth century also focused upon the issue of quickening. Lord Ellenborough's Act, passed in 1803 in England, was the model upon which the later Canadian statutes were passed. It specifically prohibited abortions upon women *who had already quickened*, something about which the common law had been unclear. However the major significance of the act was its criminalization of abortions on women who had not yet quickened. The latter had never previously been viewed as criminal. The penalties reflected this situation; those who procured abortions after quickening were subject to death as felons, while those who procured them before quickening faced a lesser sentence: "a fine, imprisonment, whipping or transportation beyond the seas for up to fourteen years." The preamble of the statute purported to outline its purpose:

. . . certain . . . heinous offences, committed with intent to destroy the lives of his Majesty's subjects by poison, or with

⁸ Cyril C. Means Jr., "The Phoenix of Abortional Freedom" (1971), 17 *N.Y.L. Forum* 335, 336-337.

⁹ Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion" (1973), 41 *Fordham L.R.* 807, 815.

¹⁰ See Cyril C. Means, *supra* note 7; Robert M. Byrn, *id.*; Bernard Dickens, *Abortion and the Law* (Bristol: Macgibbon & Kee, 1966), 20-23; Joseph W. Dellapenna, "The History of Abortion: Technology, Morality and Law" (1979), 40 *U. of Pitts. L.R.* 359, 359-428.

¹¹ Glanville Williams, *supra* note 7, 149.

¹² Linda Gordon, *Woman's Body, Woman's Right* (New York: Grossman Publishers, 1976), 52-53.

¹³ Tom Campbell, *supra* note 7, 222; see also Glanville Williams, *supra* note 7, 151-152.

intent to procure the miscarriage of women . . . have been of late . . . frequently committed; but no adequate means have been hitherto provided for the prevention and punishment of such offences. . . .¹⁴

James Mohr has noted that the new abortion law was motivated less by a direct concern for the protection of the fetus than by a desire to strengthen the criminal law in general:

[Lord] Ellenborough, who was an extreme conservative and upset at the steady liberalization of British criminal law, evidently cast about for as many new capital felonies as he thought he could reasonably create and lumped them together, ten in all, into an omnibus crime bill. . . . [He] made attempted murder by poisoning a hanging offense and, as a sort of rider to that section, he made attempts to produce abortion by the use of poisons after quickening another new capital felony as well. Almost as if to justify capital punishment for the latter crime, he declared attempts to produce abortion by any method *before* quickening transportable offences. . . .¹⁵

It is difficult to know whether the legislators truly believed it was important to criminalize abortions upon women who had not yet quickened, or whether this new provision slipped by them in the context of a larger omnibus criminal bill. The lesser penalty at least indicated their reluctance to sanction an entirely new offence with the death penalty.

Since the quickening distinction had now become a pivotal point with respect to penalty, one assumes that the legislators believed that quickening was a definitive event, an event that could be readily determined during legal proceedings. From the vantage point of the twentieth century, quickening seems a rather imprecise concept from which to draw such important legal distinctions. Modern scholars have set the time of quickening at approximately fourteen weeks after conception.¹⁶ However Joseph Dellapenna has cautioned that the test itself is a highly subjective one: "This time of quickening varies with the vigor of the child, the sensitivity of

¹⁴ *An act for the further prevention of malicious shooting, and attempting to discharge loaded fire-arms, . . . and the malicious using of means to procure the miscarriage of women*, 1803 (Eng.), 43 Geo. III, c. 53, ss. 1, 2. In 1828 this latter penalty, for abortion on women who had not yet quickened, was amended to provide for a maximum of three years imprisonment, and whipping if the offender was male, or the alternative of transportation for a maximum of fourteen years. *An Act for consolidating . . . Offences against the Person*, 1928 (Eng.), 9 Geo. IV, c. 31, s. 13. The passages which outlined the methods by which miscarriages should not be procured were also expanded.

¹⁵ James C. Mohr, *Abortion in America* (New York: Oxford Univ. Press, 1978), 23-24.

¹⁶ Bernard Dickens, *supra* note 10, 23.

the mother, and her awareness of the meaning of what she feels. Thus quickening occurs at different times for different pregnancies in different women. . . ."¹⁷ Furthermore, if the woman died of medical complications from the abortion, it would have been absolutely impossible to get evidence of quickening. Presumably the legislators did not expect the woman concerned, even if she lived, to be the sole arbiter of the issue. According to Bernard Dickens, the attempt to make a legal finding about quickening was assisted by the development of a rather unusual trial practice:

A Jury of Matrons was sworn in, composed of twelve married women then present in court, and these examined the woman to see if she was "quick with child". Medical aid could be sought to ensure a true verdict, but it appears that women were reluctant to sit; before the court announced that a Jury of Matrons was to be empanelled the doors of the court were locked, to prevent them from leaving.¹⁸

The reluctance of the matrons may have been due to their hesitance to make such life-determining decisions on the basis of what must have been such a subjective finding. Resorting to additional "medical aid" was probably of little assistance either, since Carl Degler has noted that medical knowledge was so unadvanced that throughout the nineteenth century there was no reliable test even for pregnancy in the early months of gestation, let alone for quickening.¹⁹

Canadian legislators apparently concluded that this legislation was a useful precedent, however, and a number of jurisdictions soon followed the English lead. New Brunswick, the province that passed the greatest number of statutes on abortion in Canada in the nineteenth century, was the first to do so. In 1810 it passed a statute that was a virtual duplicate of the 1803 English act.²⁰ The quickening distinction received prominence and the first part of the statute dealt solely with abortions on women "quick with child":

[I]f any person . . . shall wilfully, maliciously and unlawfully administer to, or cause to be administered to, or taken by any

¹⁷ Joseph W. Dellapenna, *supra* note 10, 377. See also *R. v. Philips* (1811), 3 Camp. 75, 77.

¹⁸ Bernard Dickens, *supra* note 10, 26.

¹⁹ Carl Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York: Oxford Univ. Press, 1980), 240. Degler stated: "For most of the century there was no reliable medical test of pregnancy for the first few months except the cessation of the menses, and that, of course, was not always reliable, either. The most obvious time when fertilization could be most confidently established was the point at which the mother perceived movement within her belly."

²⁰ *An Act . . . for the further prevention of the malicious using of means to procure the miscarriage of women*, 1810 (N.B.), 50 Geo. III, c. 2.

woman, then being quick with child, any deadly poison, or other noxious and destructive substance or thing, with intent such woman thereby to murder, or thereby to cause and procure the miscarriage of such woman . . . then . . . the persons so offending, his, her or their counsellors, aiders and abettors, knowing of and privy to such offence, shall . . . suffer death . . . [as] felon[s]. . . .²¹

If the abortion was intended for a woman whose fetus had not yet quickened, the penalty was lower. Persons who gave medicines or drugs to these women, or used instruments with the intent to procure their miscarriage, were "liable to be fined, imprisoned, set in and upon the pillory, publicly or privately whipped, or to suffer one or more of the said punishments at the discretion of the court. . . ." ²² In 1829 this lesser penalty was altered slightly. For abortions on women not yet quickened, the sentence was set at a maximum of two years. In addition, if the offender was male, the court could order him whipped once, twice, or thrice publicly or privately.²³ Prince Edward Island passed legislation almost identical to this in 1836. The only difference was that the provision spoke only of intent to procure a miscarriage and did not add the intent to murder the woman herself, as was seen in the New Brunswick statute.²⁴ None of the other Canadian jurisdictions enacted abortion statutes during this period.²⁵

It is difficult to know why these abortion statutes were first enacted in Canada. There is no evidence that they were inspired by any general feeling in the community that abortion was a morally reprehensible act. Certainly women, those most affected, had no voice in the passage of these laws, since they were neither permitted to vote nor to sit as members of the legislature. It is quite possible that the laws might never have been enacted, at least with respect to abortions in the early

²¹ S. 3.

²² S. 4.

²³ *An Act to amend the Statute Law, relative to offences against the Person*, 1829 (N.B.), 9 & 10 Geo. IV, c. 21, s. 8.

²⁴ *An Act to provide for the punishment of Offences against the Person*, 1836 (P.E.I.), Wm. IV, c. 22, s. 8. The New Brunswick reference to intent to murder the pregnant woman may have related to earlier common law rulings in England which were concerned with criminal and civil cases where the defendant had attacked a pregnant woman and her fetus had incurred injury as well.

²⁵ The province of Quebec had passed a statute receiving the English criminal law in 1763, and the province of Upper Canada did so in 1800. As a result they did not receive the English abortion statute subsequently passed in 1803. See *An act for the further introduction of the criminal law of England . . .*, 1800 (Upper Canada), 40 Geo. III, c. 1, s. 1. The Quebec reference is taken from The Hon. Mr. Justice Fred Kaufman, "Introduction" in George W. Burbidge, *Digest of the Criminal Law of Canada* (Toronto: Carswell, 1980) (originally published in 1890).

stages of pregnancy, if women had been permitted an equal role in law making. Angus McLaren has written that "women clung to the traditional view that life was not present until the foetus 'quickened'. They did not perceive themselves as pregnant, but as 'irregular'. They took pills not to abort, but to 'bring on their period'."²⁶ Commenting upon the situation in the United States, where similar laws were passed somewhat later in the nineteenth century,²⁷ Linda Gordon has also stated: "[M]any nineteenth century women and almost all women before that did not believe that abortion was a sin. Before the nineteenth century there were no laws against abortion done [prior to quickening]. The reversal of this tradition and the antiabortion legislation of the mid-nineteenth century did not immediately alter the customary belief that an early abortion was a woman's right."²⁸ There is certainly little evidence that the legal authorities tried to enforce the law. There were no reported cases of abortion trials in Canada between 1800 and 1840. Archival research would be necessary to determine whether the legislation was enforced at all.

II. The Abolition of the Quickening Distinction: The 1840s

Upper Canada was the first Canadian province to abolish the quickening distinction. *The Offences against the Person Act*, passed in 1841, described the new abortion offence as follows:

[W]hosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony.²⁹

There was no indication why the legislature decided to erase the quickening distinction. One might argue, although there is no evidence to support this view, that it illustrated an increase in concern over abortions done in the early stages of pregnancy. A stronger argument may be that the legislators were simply

²⁶ Angus McLaren, "Abortion in England, 1890-1914" (1977), 20 *Victorian Studies* 379, 396.

²⁷ See James C. Mohr, *supra* note 15.

²⁸ Linda Gordon, *supra* note 12, 52-53. See also Horatio Storer, "The Abetment of Criminal Abortion by Medical Men" (1867), 3 *Canada Medical Journal* 225, 231. Storer, a Boston M.D. and Assistant in Obstetrics and Medical Jurisprudence at Harvard University, complains of "a widespread popular ignorance of the true characteristic of the crime — a belief, even among the mothers themselves, that the foetus is not alive till after the period of quickening."

²⁹ *An Act for consolidating . . . Offences against the person*, 1841 (Upper Can.), 4 & 5 Vict., c. 27, s. 13. This legislation was later extended to Lower Canada as well: *An Act respecting Offences against the Person*, 1859 C.S.C. (Can.), 22 Vict., c. 91, s. 24.

attempting to eliminate the obvious evidentiary difficulties inherent in establishing when a woman had quickened. Nevertheless they must have believed that the newly-combined offence did not warrant the full death penalty seen earlier for abortions after quickening. Therefore they modified this by setting a maximum penalty of life imprisonment. While this may have seemed a step in the direction of lenience, it also involved harsher treatment for those convicted of procuring abortion prior to quickening. Compared with the penalties seen earlier in Canada for these abortions, set at a maximum of two years, this represented a significantly more severe sentence.

New Brunswick also amended its law in 1842, eliminating the quickening distinction and setting a maximum sentence of life imprisonment in all cases. The unusual feature of this legislation was that it also set a *minimum* penalty of three years imprisonment.³⁰ After only one year, the New Brunswick legislature felt compelled to reduce this harsh penalty. Passing a statute which claimed that "it [was] deemed expedient to mitigate the [earlier] punishment prescribed," the legislature dropped the sentence for abortion to a maximum of fourteen years imprisonment.³¹ This seems remarkably milder than the penalty prescribed in Upper Canada, but in comparison with existing English law, it too was a harsh sentence.

The English Parliament had abolished the quickening distinction in 1837.³² In contrast with the Canadian legislators, however, Parliament had set a maximum penalty for the new offence at three years imprisonment, a dramatic reduction from the earlier capital punishment. The English amendment had been part of a much wider move to reduce the number of capital punishment offences. Lord John Russell stated that the intent was to relax the severity of the law in accordance with public feeling. He referred to "a strong feeling among almost all classes, that the number of capital punishments should be diminished." Indeed, he noted that there was a suspicion among judges and jurors "that while the punishment of death [did] not deter many from committing crimes, it prevent[ed] prosecutions from being successful."³³ This would explain why Parliament undertook to remove the capital penalty, but there

³⁰ *An Act further to amend the Law relating to Offences against the Person*, 1842 (N.B.), 5 Vict., c. 33, s. 2.

³¹ *An Act to amend "An Act further to amend the Law relating to Offences against the Person"*, 1843 (N.B.), 6 Vict., c. 29, ss. 1, 2.

³² *An Act to amend the Laws relating to Offences against the Person*, 1837 (Eng.), 1 Vict., c. 83, s. 6. The penalty also included the alternative of transportation beyond the seas for life.

³³ (1837), 37 *Hansards Parliamentary Debates*, House of Commons, 717-8. The debates also indicated that capital punishment had largely fallen into disuse. In 1835, of the 523 persons condemned, only 34 had been executed. In 1836, 494 persons had been condemned, but only 17 had been executed. *Id.*, 711.

is nothing further in the debates which would explain why it dropped the penalty so substantially.

Newfoundland picked up the English amendment, with its more lenient sentence, when the General Assembly voted to extend the criminal laws of England to the colony in 1837.³⁴ Prince Edward Island, however, stubbornly clung to its first abortion law, with the capital penalty and the quickening distinction, for as long as the province retained jurisdiction over the criminal law.³⁵ With a few exceptions, then, Canadian legislators exhibited a harsher attitude toward the crime of abortion than that found in England during this time.

Another interesting feature of the abortion statutes passed up to this point was their exclusive focus upon the abortionist, rather than on the woman herself. From the actual wording, the legislation seemed to attack only those who attempted to procure a miscarriage upon some other woman. No specific reference prohibited the woman herself from attempting to procure her own abortion. Commenting upon United States' statutes which were similar in wording, James Mohr has concluded that this furnishes strong evidence about the genesis of abortion legislation:

The first wave of abortion legislation in American history emerged from the struggles of both legislators and physicians to control medical practice rather than from public pressures to deal with abortion *per se*. Every one of the laws passed between 1821 and 1841 punished only the "person" who administered the abortifacient or performed the operation; none punished the woman herself in any way.³⁶

Bernard Dickens, however, has argued that the legislation may well have permitted the prosecution of women themselves: "There was no specific reference to a woman procuring her own abortion, but the words of the section probably included such a case, and the statute was directed to the punishment of

³⁴ *An Act to extend the Criminal Laws of England to this Colony*, 1837 (Nfld.), 1 Vict., c. 4, s. 2. Since the English act was passed on 17 July 1837, Newfoundland did not receive it until 17 July 1838. See s. 2, which required a twelve month waiting period for laws passed after 20 June 1837.

³⁵ Federal criminal law was first extended to Prince Edward Island in 1877: *An Act to extend to the Province of Prince Edward Island certain Criminal Laws*, 1877 (Can.), 40 Vict., c. 4.

³⁶ James C. Mohr, *supra* note 15, 43.

such an offence. . . ."³⁷ Failing this, Dickens has stated that "where a woman procured her own abortion by another, she would be charged as an aider and abettor to that other's offence, or still be liable for the common law misdemeanour."³⁸

Unfortunately for the resolution of this issue, there are no reported Canadian cases which considered the question. However, one English case did touch on the matter as it related to the counterpart English statute. In *R. v. Russell* in 1832, the defence counsel argued that the felony was the act of administering medicine to a pregnant woman, but that it "did not apply to a woman administering it to herself; and that, assuming her to have taken arsenic knowingly, and with the intention of procuring a miscarriage . . . , she was not guilty of any offence."³⁹ The prosecuting attorney contradicted this, stating that the wording of the statute was general and applied to all persons — "to the woman herself as to another person administering to her." In the alternative, he argued that even if the act would not make the pregnant woman a principal in taking the poison, "she was clearly consenting to it, and by so assisting in and accessory to the felony." The actual judgment was based on another ground, and so no conclusion was ever reached on this point.

This case ought to have alerted at least some legislators to the possible difficulties in convicting women seeking abortions. Either they did not disagree with the outcome, or they were unaware of the possible loophole. Despite all of the legislative

³⁷ Bernard Dickens, *supra* note 10, 24. This statement was made in reference to the English statute of 1803. In reference to the 1828 Act, he stated that it was "no more explicit than the 1803 Act on the question of whether an unaided woman procuring, or attempting to procure her own abortion, is covered . . . but the same presumption of inclusion may be made, although the uncertainty must be recognized. No authority has suggested her exclusion. . . ." *Id.*, 25. With respect to the 1837 English statute, he added: "There was still no express reference to a woman who procured her own abortion, but there was no doubt that the Act was intended and understood to include her within its ambit. An early draft of the section had distinguished the position of such a woman from that of another person charged with procuring her abortion, in whose case there was a requirement of proof of pregnancy. Lord Lyndhurst's criticisms of this requirement prevailed to omit this from the final draft." *Id.*, 27-28.

³⁸ *Id.*, 24. Of course the "aiding and abetting" analysis would not be of assistance unless the woman was acting in concert with some other person, and the common law would apply only to women who had already quickened, if then.

³⁹ *R. v. Russell* (1832), 1 Mood. C.C. 356, 360-361, 365; 168 E.R. 1302, 1304, 1305. The case was considering *An Act for consolidating and amending . . . offences against the Person*, 1828 (Eng.), 9 Geo. IV, c. 31, s. 13, but the wording of the statutes was not dissimilar with respect to who could be charged with the offence.

amendments made to the abortion law in England and Canada during this period, the wording was not altered. At the very least, the failure to specify that the crime could be committed by the woman herself signifies that the major thrust of the legislation was to attack the abortionists who prescribed drugs for or operated upon pregnant women. Mohr's argument that this emphasis shows the laws were passed in an attempt to control the practice of medicine is an interesting one, which may well be applicable to the Canadian situation. As will be seen below, the medical profession in Canada was certainly one of the driving forces behind the expansion of abortion legislation later in the century.

III. Major Legislative Expansion: 1849-1891

From the end of the 1840s up to the enactment of the Criminal Code, abortion law underwent significant expansion in a number of directions. In 1849 New Brunswick specifically made it a crime for a woman to procure her own abortion, which was a major departure from earlier laws.⁴⁰ Shifting away from an exclusive focus on abortionists, the new statute purported to give women who attempted to procure their own abortions the same fourteen year sentence. Nova Scotia duplicated this legislation in 1851.⁴¹ This was an amendment of substantial importance, which made clear for the first time that one of the legislators' primary goals was to prosecute the actual women concerned. By this action, New Brunswick and Nova Scotia exhibited surprising legislative leadership, since it took

⁴⁰ *An Act to consolidate . . . the Criminal Law*, 1849 (N.B.), 12 Vict., c. 29, art. 7, "Other Offences against the Person". It stated: "Every woman being with child, who, with intent to procure her own miscarriage, shall maliciously administer to herself any poison or other noxious thing, or use any instrument of other means whatever; and every person who, with intent to procure the miscarriage of any woman, shall maliciously administer to or cause to be taken by her, any poison or other noxious thing, or using any instrument or other means whatsoever, shall be guilty of felony, and shall be liable to be imprisoned for any term not exceeding fourteen years."

⁴¹ *Of Offences Against The Person*, R.S.N.S. 1851, c. 162, s. 11. This legislation was substantively an exact duplicate of the 1849 New Brunswick statute, and provided for the punishment of pregnant women and others who attempted to procure a miscarriage, setting a maximum term of fourteen years. The legislation was not altered; see *Of Offences Against The Person*, R.S.N.S. 1864, c. 164, s. 11.

England until 1861 before the same change was effected.⁴² The state of New York, which passed similar legislation in 1845, may have set the precedent for the New Brunswick and Nova Scotia legislation.⁴³

Why did the legislators come down so harshly against the women seeking abortion? Glanville Williams has described the English legislation as inexplicable, and as "theoretically one of the most ferocious in the world" in its treatment of the unwilling mother. The professional abortionist, he has argued, is "the real source of the mischief", and in any event criminal prosecution is unlikely to deter women who are "fixed" upon ending an unwanted pregnancy.⁴⁴ The legislators, in contrast, presumably had come to believe that the women involved were equally the source of the problem and that the full force of the criminal law ought to be brought to bear on them as well. The latter opinion came to be much in vogue, at least within medical circles in Canada, as can be seen in the following extract from an 1875 issue of the *Canada Lancet*, a prominent nineteenth century medical journal:

Whilst, however, we would wish to see the severest punishment visited on the guilty abortionist, we cannot forget that the mother — with very rare exceptions, where it is committed without her will — is the chief criminal, either herself soliciting the performance of the criminal act, or submitting willingly to the influences of the seducer, that it should be performed. In the "eternal fitness of things", we submit therefore that both mother and seducer or instigator should be held equally amenable to the law with the abortionist, and imprisonment for life should be inflicted or even death punishment, if that should

⁴² *An Act to consolidate . . . Offences against the Person*, 1861 (Eng.), 24 & 25 Vict., c. 100, ss. 58, 59. Section 58 clarified that the woman herself could be charged with the offence as well as others, and stipulated that where persons other than the woman herself were charged, it was irrelevant whether the woman was actually pregnant or not. Section 49, which prohibited the supply of poison, noxious things or instruments to accomplish the abortion, had a maximum term of three years, which was one year more than the New Brunswick counterpart. The surprising thing about the English act was that it dramatically raised the penalty for abortion from three years to life imprisonment (s. 58). The Parliamentary Debates gave no clue why the English legislators believed the penalty should be increased at this time. Indeed, there was no debate at all on any substantive issue of this statute, except on the penalty for conspiracy to murder. The Right Honourable Lord Campbell, Lord Chancellor, had cautioned the House of Lords that there was no point in debating this vast consolidation clause by clause. "If they wished to have a digest," concluded Campbell, "they must entrust it to men [sic] in whom they could confide." (1861), 163 *Hansards Parliamentary Debates*, House of Lords, 1376-1378.

⁴³ James C. Mohr, *supra* note 15, 123-124.

⁴⁴ Glanville Williams, *supra* note 7, 153-155.

be considered more likely to prevent a violation of both Divine and human law.⁴⁵

The doctors, at least, were prepared to describe the women as "the chief criminal[s]", and recommend consideration even of the death penalty in order to deter them. The views of the legislators and the doctors, however, seem not to have been entirely shared by those whose duties involved the actual enforcement of the new law, as shall be seen below.

The legislators were not content to let matters rest, and continued to expand the scope of the abortion law. In 1864 New Brunswick created an entirely new offence: it was prohibited for anyone to supply the poisons, noxious things or instruments used for an abortion, at the risk of a maximum penalty of two years.⁴⁶ The net was widening, not only to include pregnant women but also to include anyone who assisted her or her abortionist by providing the means of carrying out the procedure. The 1864 amendment also stated that offenders who attempted to procure abortions upon women could be prosecuted whether the woman was pregnant or not.⁴⁷ Lifting the requirement for proof of pregnancy may have been even more significant than eliminating the quickening distinction in the 1840s. James Mohr has argued that medical knowledge was still so limited in the nineteenth century that quickening was really the only way to tell whether a woman was pregnant.⁴⁸ As long as proof of pregnancy was critical, the quickening doctrine continued to operate in practice. With the elimination of this precondition, however, it was finally possible to enforce the law against women who were in the early stages of pregnancy. Obviously this amendment also permitted prosecution in cases where the woman had been mistaken about her need for abortion, and in fact was not pregnant at all.

When the federal government obtained jurisdiction over the criminal law in 1867, it adopted the most expansive provisions seen anywhere in Canada at the time. The first federal consolidation of criminal law in 1869 borrowed substantially from New Brunswick, the provincial leader on abortion legislation. All of the features seen in the New Brunswick law of 1864 were duplicated. The only change involved the penalties. The federal government chose to follow the lead of the English Parliament, which had increased the penalty for

⁴⁵ (1875), 8 *The Canada Lancet*. See also (1868), 4 *Canada Medical Journal* 524, published in Montreal: "It is the regret we feel that the law of our country does not give us the power to prosecute mothers who in the crime of abortion attempt to hide their shame. We trust that we shall not much longer have to complain of such a strange omission."

⁴⁶ *An Act further to amend the Law relating to offences against the person*, 1864 (N.B.), 27 Vict., c. 4, ss. 4, 5.

⁴⁷ Ss. 4, 5.

⁴⁸ James C. Mohr, *supra* note 15, 124, 133.

abortion to a maximum life term in 1861.⁴⁹ As the Dominion of Canada continued to expand, the legislation was extended to Manitoba in 1871, to British Columbia in 1874, and to Prince Edward Island in 1877.⁵⁰

Describing a similar burst of anti-abortion legislation in the United States between 1840 and 1880, James Mohr has attributed these developments to a number of key changes. He has claimed that the overall incidence of abortion appeared to be increasing sharply during this period, at least with respect to its public visibility. Furthermore, attention was being directed toward the kind of women who were seeking abortion. Doctors increasingly described them as married, white, Protestant, native-born women of middle and upper class background. Fears were expressed of "race suicide" in the face of declining birth rates from these groups compared with that of the immigrant lower class. This was catapulted into public attention by one sect of medical practitioners, the "regulars", and used as a tool through which to argue for monopoly control over the newly-emerging medical profession.⁵¹

The regulars were almost exclusively male doctors, whose medical treatments during a good portion of the century consisted of "heroic" measures such as bleeding, blistering and

⁴⁹ *An Act respecting Offences against the Person*, 1869 (Can.), 32 & 33 Vict., c. 20, ss. 59, 60. Interestingly, although the federal government followed the English lead with respect to a sentence for procuring abortion, it followed the New Brunswick lead with respect to the sentence for supplying the poisons or instruments. A term of two years was specified in the latter case, rather than the English three year term. This legislation continued in force until the Criminal Code was enacted. See *An Act respecting Offences against the Person*, R.S.C. 1886, c. 162, ss. 47, 48. The only distinction was that the provisions dealing with a woman procuring her own abortion were made to apply in more passive situations. In 1869 the woman herself had to administer the poison or use the instrument. In 1886, it was sufficient if the woman permitted the poison to be administered or an instrument to be used with intent to procure an abortion.

⁵⁰ *An Act respecting Offences against the Person*, R.S.C. 1886, c. 162, s. 20, 49; *An Act to extend to the Province of Manitoba certain of the Criminal Laws*, 1871 (Can.), 34 Vict., c. 14; *An Act to extend to the Province of British Columbia certain of the Criminal Laws*, 1874 (Can.), 37 Vict., c. 42; *An Act to extend to the Province of Prince Edward Island certain Criminal Laws*, 1877 (Can.), 40 Vict., c. 4.

⁵¹ James C. Mohr, *supra* note 15, 46, 86-118. "The greatest champions of the anti-abortion crusade were also in the forefront of the drive for professionalization generally," he has stated. See also Ben Barker-Benfield, "Sexual Surgery in Late Nineteenth Century America," in (1975), 5 *International J. of Health Services* 279, 286: "Social leaders and molders — doctors, clergymen [sic], popular novelists, and politicians — saw America as a beleaguered island of WASP righteousness, surrounded by an encroaching flood of dirty, prolific immigrants, and sapped from within by the subversive practices of women. Their masturbation, contraception and abortion were exhausting society's procreative power."

leeching.⁵² They were almost single-minded in their drive to rout "irregulars" from the practice of medicine. The latter group, which contained proportionately more women, was comprised of a number of sects, and espoused such treatment as herbal remedies, hydropathy and nutrition. One other major distinction between the groups had to do with their policy on abortion. The regular doctors refused to perform abortions because they adhered to the Hippocratic oath which forbade the practice; the irregulars, who maintained no such traditions, had far less concern about the procedure. Mohr has concluded that competition was the major motivation behind the opposition of the regulars:

Practically, the regular physicians saw in abortion a medical procedure that not only gave the competition an edge but also undermined the solidarity of their own ranks. If a regular doctor refused to perform an abortion, he [sic] knew the woman could go to one of several types of irregulars and probably receive one. And, as the regulars themselves pointed out, it was not so much the short-term loss of a fee for the abortion that upset them, but the prospects of a long-term loss of patients. Anti-abortion laws would weaken the appeal of the competition and take the pressure off the more marginal members of the regulars' own sect.⁵³

Mohr has also noted that the regulars camouflaged this motivation with rhetoric about professional ethics and developing notions about when life began. It is quite likely that they deceived even themselves into believing that their only goals were to encourage the protection of life.⁵⁴ In addition, they bolstered their anti-abortion campaign by insisting that reproduction was the highest goal of womanhood: "[T]he chief purpose of women was to produce children; anything that interfered with that purpose, or allowed women to 'indulge'

⁵² See Barbara Ehrenreich and Deirdre English, *supra* note 1, 33. Of the training of male "regulars", they report: "Medical theories were often grounded more in logic than in observation. Medical students spent years studying Plato, Aristotle, and Christian theology. Their medical theory was largely restricted to the works of Galen, the ancient Roman physician who stressed the theory of 'complexions' or 'temperaments' of men, 'wherefore the choleric are wrathful, the sanquine are kindly, the melancholy envious,' and so on. Bleeding was common practice, even in the case of wounds. Leeches were applied according to the time, the hour, the air, and other similar considerations. Incantations and quasi-religious rituals mingled with the more 'scientific' treatments. . . ." *Id.*, 33.

⁵³ James C. Mohr, *supra* note 15, 37. The gender-based nature of the campaign was also apparent: "In 1874 Detroit physicians . . . urged a crackdown against 'the inhuman wretches' who produced abortion; 'almost every neighbourhood or small village,' they claimed, "has its old woman, of one sex or the other, who is known for her ability and willingness for a pecuniary consideration, to break the state's abortion statutes.' They wanted 'her' driven from the field." *Id.*, 161.

⁵⁴ *Id.*, 162-163.

themselves in less important activities, threatened marriage, the family, and the future of society itself."⁵⁵ Proclaiming the importance of professional ethics and the sanctity of motherhood, it was the regular physicians who worked to bring about a shift in public opinion which eventually led to the passage of strict and unprecedented abortion laws in the United States.⁵⁶

Further historical research into the professionalization of medicine in Canada would be necessary before one could draw such unequivocal conclusions about the genesis of our stricter abortion laws. However preliminary findings indicate that the United States patterns may have been repeated in Canada. R.D. Gidney and W.P.J. Millar, Judi Coburn and Veronica Strong-Boag have all documented the nineteenth century campaign waged by the male regular physicians to obtain monopoly control over the provision of medical services in Ontario.⁵⁷ It was these doctors who made the strongest argument against the practice of abortion. One example of this was published in 1871 in the *Canada Lancet*. Describing abortion as "the crime of the period", the author decried its prevalence:

[Abortion] is fearfully on the increase; both here and in the United States . . .; nor is it confined to that unfortunate class whose only fault is that they have "loved too well", but [it] prevails to an alarming extent even among otherwise respectable married women. The various modes . . . of destroying the offspring of their womb are subject of common conversation, and no more is thought of it than if it were a duty imposed upon them which they felt bound to perform. In reference to this crime there is a moral obliquity pervading all ranks of society that is truly appalling.⁵⁸

The article concluded by characterizing professional

⁵⁵ *Id.*, 169.

⁵⁶ See also Linda Gordon, *supra* note 12, 59, 60; and Carl Degler, *supra* note 19, 239-42. Dr. Horatio Storer, M.D., an Assistant in Obstetrics and Medical Jurisprudence at Harvard University, indeed went further and alluded to "many cases of insanity in women, based as to causation upon the induction of criminal abortion and the systematic prevention of pregnancy." (1867), 3 *Canada Medical Journal* 225, 228.

⁵⁷ R.D. Gidney and W.P.J. Millar, "The Origins of Organized Medicine in Ontario, 1850-1869," in Charles Roland, ed., *Perspectives in the History of Canadian Medicine* (Toronto: forthcoming, 1983). Judi Coburn, "I See and Am Silent: A Short History of Nursing in Ontario," in Janice Acton, et al., eds., *Women at Work, 1850-1930* (Toronto: Women's Press, 1974) 128; Veronica Strong-Boag, ed., *Elizabeth Smith: 'A Woman with a Purpose'* (Toronto: U. of T. Press, 1980). See also Jean Donnison, *Midwives and Medical Men: A History of Inter-Professional Rivalries* (London, Heinerman, 1977).

⁵⁸ (1871), 4 *Canada Lancet* 185-186.

abortionists as “traffickers in human life,” who “live and flourish on the blood they spill.”⁵⁹

Nowhere in the nineteenth century medical journals did the doctors express any similar horror and consternation over the practice of infanticide. Yet infanticide was a common means employed by nineteenth century Canadian women to prevent unwanted motherhood, and if anything it seems to have been far more predominant than abortion.⁶⁰ All evidence points to the conclusion that Canadians did not regard infanticide as a particularly heinous crime, but saw it as a rather understandable response to the problem of unwanted pregnancy, especially on the part of unwed mothers.⁶¹ The public, then, seemed equally unconcerned about either crime — infanticide or abortion. However the doctors failed to rail against the “moral obliquity” of the infanticide situation, in spite of the fact that in these cases it was uncontested that a live child was involved. Instead, they addressed all of their energy to campaigning against abortion. The economic rationale for the abortion campaign was largely irrelevant in infanticide cases, since the trials reveal that most of these women gave birth alone, medically unassisted by anyone.⁶² Furthermore, the women who were caught committing infanticide were overwhelmingly lower class, unmarried domestic servants, and this would not have fueled the doctors’ fears about the declining fertility rate of the “better classes.”

Fear of competition from “irregular” practitioners played an important role in motivating this campaign. Several indications of this can be found in the medical journals themselves. One *Canada Lancet* column in 1875 referred to abortionists as drawn from those classes of practitioners “who were unlicensed and unqualified to practice medicine.” Referring to their efforts to oust these quacks, the article continued: “The Medical Council true to its duty, has come forward to prevent such occurrences by driving from the country that class from which abortionists are recruited.”⁶³ An 1889 article specifically referred to the severe competition faced by young regular practitioners: “It is to the credit of the profession,” it stated, “that so few have fallen victim to so alluring a temptation, especially the younger members, to whom these applications [for abortion] are more frequently

⁵⁹ *Id.*

⁶⁰ The records in the Ontario Archives between 1840 and 1900 reveal over fifty charges relating to infanticide and only sixteen charges of abortion.

⁶¹ See Constance B. Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada” (forthcoming in *U. of T. L.J.*).

⁶² It is not until the enactment of *The Criminal Code* in 1892 that the first legislation required women to obtain reasonable assistance during childbirth. *Id.*

made when patients and fees are often extremely rare."⁶⁴ Underlying this statement is a fear that the more marginal members of the regular sect might break ranks and perform abortions under financial pressure from competitors.

When it came time to lobby for stricter legislation against abortion, however, the doctors, like their United States counterparts, framed their appeal around arguments that might be more convincing to the general public than their own monopoly interests. A sharp fall in the middle class English birthrate had already begun to generate anxiety, especially when inflamed by fear about the fertility of the Irish, the Quebec French, and the influx of non-British immigrants.⁶⁵ The doctors fuelled these worries about race suicide, emphasizing that married women were shirking their responsibility. The number of abortions procured upon married women was publicized with anger. Doctors characterized all women seeking abortions as "unnatural mothers," but married women were further described as "degraded" and "inhuman" for wishing "to be relieved . . . from the care and trouble naturally devolving on [them]."⁶⁶ Greater sympathy was expressed at the plight of unmarried pregnant women, but the typical medical advice, given by one Windsor, Ontario doctor, was still to deflect their entreaties as well:

When we consider the terrible penalties inflicted by society on the female sex for incontinence, we need not wonder at the desperate efforts young girls make to escape them. When you are solicited to interfere for the relief of these poor wretches, pity them, pity them with your whole hearts; . . . meet their entreaties with prompt, decided refusal, [In one of my cases] the

⁶³ (1875), 8 *Canada Lance* 24. Although the doctors made no specific outcry against midwives in this respect, they also may have been a source of concern. Edward Shorter has noted that anti-abortion oaths were required as some of the first regulatory controls on midwives, a factor that indicates their role in providing abortion services. See Edward Shorter, *supra* note 2, 42. Although the Ontario medical legislation permitted female midwives to practice medicine through much of the nineteenth century, by 1865 the doctors succeeded in their quest to have midwives prohibited entirely from the field. See *An Act to amend the Laws . . . physic, surgery, midwifery*, 1827 (Upper Can.), 8 Geo. IV, c. 3, s. 6. and *An Act respecting the Medical Board and Medical Practitioners*, C.S.U.C. 1859, c. 40, which permitted midwives to practice without a licence, and *An Act to regulate Qualification in Medicine*, 1865 (Can.), 29 Vict., c. 34 which removed the exemption. See also (1874), 6 *Canada Lancet* 268.

⁶⁴ (1889), 21 *Canada Lancet* 217.

⁶⁵ Angus McLaren, "Birth Control and Abortion in Canada, 1870-1920," (1978), 59 *Canadian Historical Review* 319, 320-322. McLaren notes that the most dramatic decline took place in Ontario, where the birthrate fell 44% between 1871 and 1901.

⁶⁶ (1889), 21 *Canada Lancet* 217-218.

poor child (for she was scarcely more than a child) protested that if not relieved, rather than disgrace her recently-married sister and kill her mother, she would conceal her fault and avert exposure by suicide. Thank God, I have no confession to make in this case; I did not yield, but my heart bled when I refused her.⁶⁷

Claiming that the "crime of foeticide" was fearfully prevalent and rapidly increasing, Canadian doctors insisted that steps be taken before it could "corrupt . . . and debase . . . the country both morally and physically."⁶⁸ Views about the paramountcy of motherhood in the lives of women were also enlisted in the campaign. One *Canada Lancet* article demanded that the "severest punishment" be "meted out to those degraded specimens of humanity whose sole occupation is to pervert the highest function of woman's nature, and to turn blessings into cursings."⁶⁹ Wendy Mitchinson has noted that reproduction was commonly extolled as woman's "highest function" in the nineteenth century, and that the rejection of maternal responsibility was considered to be tantamount to the destruction of healthy society. The medical profession took up this premise, and interpreted abortion as a direct affront to the proper balance between the sexes. According to Mitchinson, "physicians felt threatened by abortions. Certainly they were an attempt on the part of women to control their own bodies and thus a challenge to the medical profession."⁷⁰

In summary, the vehemence and frequency with which the regular doctors expressed themselves on the topic of abortion indicates that they were a very formidable interest group in the evolution of stricter abortion laws during the middle and later decades of the nineteenth century. Their purpose seems, at best, to have been a mixed one. Along with rhetoric about "foeticide" and "traffickers in human life," they also seemed to be particularly concerned about the declining birthrate of the respectable classes. They decried the prevalence of abortion in wealthier circles, claiming that the main cause of this was that it was not "fashionable to have a large family."⁷¹ Their distorted notions about women's proper role in society also contributed to a campaign that was largely motivated by selfish desires to curb the medical practices of competitors. The regulars have been described by Coburn as a medical elite; the prominence of these men assured that their arguments would have been heard

⁶⁷ Alfred A. Andrews, "On Abortion" (1875), 7 *Canada Lancet* 289-90. Andrews was a Windsor, Ontario M.D.

⁶⁸ *Id.*, 290.

⁶⁹ (1871), 4 *Canada Lancet* 186.

⁷⁰ Wendy Mitchinson, *supra* note 2, 23. See also Patricia Knight, "Women and Abortion in Victorian & Edwardian England" (1977), 4 *History Workshop* 57-69.

⁷¹ (1871), 4 *Canda Lancet* 185-186.

and given considerable weight by the legislature.⁷² Further research may disclose the existence of other groups or forces that also helped to account for the broad expansion of abortion law during this period, but it seems that the lobbying of the regular physicians provides at least one plausible explanation for the strong new laws.⁷³

IV. Canadian Cases: Patterns in Prosecution and Judgment

The courts did not try many abortion cases in the nineteenth century and the reported decisions number less than half a dozen.⁷⁴ Further investigation into the surviving court records

⁷² Judi Coburn, *supra* note 57, 133. She stated: "The leaders were men trained in medicine in British Universities, many of whom were adopting a second career following military and legal positions, most of them were aligned through family ties, church activities, and political sympathies to the Family Compact." R.D. Gidney has criticized this statement as too sweeping: "The regulars could have been trained in British and American universities (a very few) or hospitals; most went through apprenticeships and by the mid-nineteenth century, a year or two of medical school. One could hardly describe them as mainly 'aligned . . . to the Family Compact.'" Personal correspondence between the author and R.D. Gidney, 17 March 1983.

Further research would be necessary to unearth *direct evidence* that legislators were indeed responding to the expressed opinions of the doctors in enacting expanded abortion provisions. The motivations of nineteenth century Canadian legislators and the direct relationship of statutory amendments to various lobbies constitute complex matters, and appear initially to be more difficult to uncover than in the United States.

⁷³ Angus McLaren has commented on the English situation, and indicated that the English doctors were active in the campaign to prohibit abortion as well. He has referred to medical journals and testimony from doctors in front of the 1892 Select Committee on Midwives Registration in which doctors insisted that midwives, chemists and herbalists fostered a high criminal abortion level. "Doctors were, in short, falling victim to the irresistible urge of turning to their own purposes the public concern over abortion in order to eliminate the competition of semi-professional medical personnel," he concluded. Angus McLaren, *supra* note 6, 390.

E.A. Hart, the editor of the *British Medical Journal* in the 1860s, directed a systematic campaign against professional abortionists, whom he described as "those hideous excrescences of civilization." (1861) *British Medical Journal* (26 Jan. 1861) 97 and (8 Feb. 1868) 126-7.

⁷⁴ The following cases were discovered: *The Queen v. Sparham and Greaves* (1875), 25 U.C.C.P. 143 (C.P.); *R. v. Stitt* (1879), 30 U.C.C.P. 30 (C.P.); *R. v. Andrews* (1886), 12 O.R. 184 (C.P.); *The Queen v. Garrow and Creech* (1896), 1 C.C.C. 246 (B.C.S.C.); *The Queen v. Hamilton* (1897), 4 C.C.C. 251 (Ont. H.C.J.). There may be a few additional cases uncovered in the future, since some trials may have proceeded on other charges.

at the Ontario Archives revealed an additional sixteen cases in Ontario between 1840 and 1900.⁷⁵ One of the most surprising features of the abortion trials was the complete absence of prosecutions against the women concerned. There was not one instance of a woman being charged with procuring an abortion for herself; the authorities chose only to prosecute the other individuals involved in procuring the abortion.⁷⁶ Describing a similar phenomenon in the United States, Michael Grossberg has argued that American legal authorities viewed women as

⁷⁵ Archives of Ontario R.G. 22, County Court Judges' Criminal Court Minute Books and Courts of Criminal Assize Minute Books, 1840-1900. The statistics are available from 1792 to the present, although this paper has focused upon the records from 1840. The files are not complete, some having been destroyed by fire or simply lost. The case files used are from Criminal Indictment records, also located at the Archives of Ontario. Like the Minute Books, they have survived only intermittently. The case files which are available contain some of the testimonies of the accused and various other witnesses. These records have also been supplemented by further information from the Toronto Gaol Register and the *Canada Lancet*.

⁷⁶ An examination of the reported abortion decisions in England reveals that, with one exception, women seeking abortions for themselves were not charged with these offences there either. (A full examination of the non-reported cases would be necessary, of course, before a complete comparison could be made.) The one exception occurred in *R. v. Whitchurch* (1890), 16 Cox C.C. 743; [1886-1890] All E.R. Rep. 1001 (C.C.R.). Elizabeth Cross was charged with *conspiring* with her lover and a third man to procure her own miscarriage. The evidence established that although all three believed Elizabeth Cross was pregnant, she was not. At trial, Cross's lawyer, Hammond Chambers, argued that she could not be convicted because it was not an offence at common law or by statute for a woman who was not pregnant to attempt to procure her own abortion.

Wills, J. rejected this line of reasoning, although he was not prepared to contradict the assertion completely. Instead he held that the statute made it a crime for the men to attempt to procure an abortion on Elizabeth Cross, whether she was pregnant or not, and in this event, she could be charged for conspiring with them to commit a crime.

The English statute of 1861 provided that women could be charged for procuring their own miscarriage only if they were "with child." For others who committed the offence, however, the act stated that they were subject to penalty "whether she be or be not with Child." *An Act to consolidate and amend . . . the statutes relating to Offences against the person*, 1861 (Eng.), 24 & 25 Vict., c. 100, ss. 58, 59. This legislation was not altered throughout the nineteenth century. In Canada, *The Criminal Code* of 1892 finally made the issue of the woman's actual pregnancy irrelevant for all would-be abortionists — the woman herself and all others.

The jury convicted all three and Cross appealed her case. The Court of Criminal Appeal concluded that although Cross could not have been convicted if indicted alone, her act of combining with the two other prisoners constituted a conspiracy; the conviction was affirmed. Canadian lawyers and judges would likely have known about this case, since it was reported in "Comments on Current English Decisions" (1890), 26 *Canada Law Journal* 229.

“victim[s], not accomplices,” despite the “obvious voluntary nature of the act”:

The aura of motherhood, a shibboleth which garnered unwavering judicial allegiance, reinforced that tendency, as did the middle class origins of most abortion seekers. Instead of co-conspirators, the bench characterized women as the easy prey of abortionists who lured them from the virtuous path of motherhood against their better instincts by appealing to their weaknesses. [. . .] This stance served as a boon to women seeking abortions. They had only to weigh the physical risks involved, considerable though they may have been, since criminal penalties fell on the abortionists.⁷⁷

The policy of enforcement also provides further evidence about the actual purpose of the abortion laws. The cases reveal that prosecutions were only brought against certain individuals. Doctors and other medically-knowledgeable individuals who performed the abortion were charged in the majority of cases.⁷⁸ In a number of others, the woman's male partner was also charged, along with the doctor, for his role in getting the doctor to agree to perform the desired services. In most cases in which the male lover was charged, however, it was because he had provided the abortifacient or employed mechanical means in an attempt to end the unwanted pregnancy himself.⁷⁹ The primary

⁷⁷ Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (unpublished manuscript), 211-212.

⁷⁸ The medical background of these individuals was not disclosed so it is difficult to know whether they actually belonged to the “irregular” sects so often accused of providing most of the abortions. Angus McLaren has uncovered at least one case of an abortion-murder in Halifax in 1883, where the doctor involved must have been a “regular.” McLaren described Dr. Archibald Lawson as a “prominent physician” and “lecturer on the principles and practices of medicine.” Angus McLaren, *supra* note 65, 328. See also (1883-1884), 12 *Canada Medical and Surgical Journal* 252. Presumably this case was an anomaly.

⁷⁹ Some of the men involved in procuring abortions for their women-friends seem to have been genuinely anxious to help them. Others did so only with reluctance, and with a great deal of ambivalence. The case of *The Queen v. Thomas Goffatt*, Archives of Ontario, Simcoe County Minute Books, 1898, provided a good illustration of the latter situation. Fanny Young, a seventeen year old woman still living at home, had been impregnated by Thomas Goffatt. When she informed him of her condition, he wrote accusing her of being a slut, a prostitute, and a “thoroughly bad woman.” He accused her of deceiving him and claimed she had got pregnant by some other man in Muskoka. Finally he warned her that her tears would not work on him. Nevertheless, he seems to have had a change of heart, because he tried to find a doctor to perform an abortion on Fanny, but failed. He next purchased a “male catheter,” which he told Fanny to insert into her womb. She did so, and gave birth to a four-and-a-half month old dead fetus. Fanny became very ill and Thomas Goffatt apparently sent a cot, blankets and wood to her parents' home for her use. However she died of septic inflammation a few days later. Goffatt was later found guilty of procuring an abortion.

enforcement focus, therefore, was upon the provision of medical services. If the abortion laws were primarily considered to be a method of regulating the practice of medicine, it should not be surprising that they were predominantly enforced against the individuals who were providing the medical services, rather than against the patient, who was merely the recipient of the treatment. It must be admitted, of course, that the doctors who were lobbying for stricter abortion laws had called for criminal prosecutions against the mothers, but this was largely an example of their rhetoric against abortion. The medical journals of the day certainly indicated that although doctors were often confronted with women seeking abortions, they virtually never turned them over to the authorities.⁸⁰ Their real concern lay with the class of medical practitioners, trained or untrained, who were competing with the regular doctors by providing the service of abortion.

A number of different methods were used to bring about an abortion in the nineteenth century.⁸¹ The cases reveal that Canadian women ingested a variety of drugs such as pennyroyal, black draught, oil of cedar, tansy tea, oil of savron, ergot of rye, myrrh, hellebore and cantharides in the hope that these would produce a miscarriage. The effectiveness of these "abortifacients" is still an issue of some debate. Linda Gordon has noted that these recipes, which evolved over the centuries, were highly unsuccessful in accomplishing their goal:

Most doctors, in fact, believe that folk recipes for abortifacients are never effective and attribute the reported successes to the coincidence of women having miscarriages from other causes.

The basic principle of the working of these various brews is that to the degree they are effective at all they are indirectly

⁸⁰ See, for example, (1889), 21 *Canada Lancet* 217-218, in which the author decries the numerous applications doctors received from desperate women and recognizes that the doctors involved were not taking the trouble to turn them over to "some competent executor of the law."

⁸¹ Quite apart from the use of drugs and instruments, both of which were proscribed specifically in the criminal law, women would try violent physical stimulus in an effort to bring on a miscarriage. Linda Gordon has stated: "Many societies practised destroying the fetus by external means, instructing women to engage in severe exercise: lifting heavy objects, climbing trees, taking hot baths, jumping from high places. . . ." Linda Gordon, *supra* note 12, 38. G. Greaves, a member of the Manchester Statistical Society of England, outlined in 1863 "the stories floating in society, of married ladies, whenever they find themselves pregnant, habitually beginning to take exercise, on foot or on horseback, to an extent unusual at other times, and thus making themselves abort." G. Greaves, *Transactions of the Manchester Statistical Society*, Session 1862-3, 14. Angus McLaren has reported that these physical means were also used in Canada in the nineteenth century: ". . . a woman might try bleedings, hot baths, violent exercises, and consumption of large quantities of gin." Angus McLaren, *supra* note 65, 330.

effective. None of them specifically attacks the fetus. Rather they so irritate or poison the body or the digestive system that they cause rejection of the fetus as a side effect.⁸²

Angus McLaren, who has done pioneering research on abortion in England and Canada in the nineteenth century, has provided some evidence to the contrary. He has concluded that some of these drugs were indeed effective in at least some instances:

Several of these 'home remedies' were eventually to be taken over by professional obstetricians. Ergot is a substance that causes smooth muscle — such as that found in the uterus — to contract and today in the form of ergotmetrine is used both to induce labor and help with the expulsion of the placenta.⁸³ Pennyroyal and tansy are irritant drugs with a toxic action.⁸⁴

If these drugs failed to accomplish their purpose, a number of women apparently gave up their attempt and went ahead to give birth to a child they later raised. In at least one of the cases, however, an unsuccessful abortion attempt which led to a healthy birth later resulted in infanticide.⁸⁵ Other women were determined not to carry to term, and they resorted to another desperate measure: the insertion of some instrument into the uterus to disrupt the ovum and cause its expulsion. The cases are filled with references to the use of instruments described as soft rubber catheters, male catheters and female syringes.⁸⁶ The Ontario Archives have retained the original instruments, when these were produced in evidence during the trial; they have removed the rather gruesome specimens from the actual case files.

⁸² Linda Gordon, *supra* note 12, 36-37.

⁸³ Angus McLaren, *supra* note 26, 391.

⁸⁴ Angus McLaren, *supra* note 65, 330, note 336. On the discovery of the effectiveness of such drugs, McLaren provided a marvellous illustration of how this knowledge was initiated and passed along in several communities in England in the mid 1890s: "[A]n outbreak of lead poisoning [occurred in Sheffield] due to contamination of the town's water supply. The local women were quick to note that those who had been pregnant aborted, and so the idea was stuck on that a small degree of lead could be used to induce miscarriage. Diachylon was readily at hand in every working class home for use on cuts and sores, as a plaster, and for drawing milk away after parturition. [Its] use spread to Leicester, Nottingham, Birmingham, and later to Burnley and Doncaster." Angus McLaren, *supra* note 26, 391-392.

⁸⁵ *The Queen v. McKeown*, Archives of Ontario, Northumberland and Durham County Minute Books, 1860. Eliza Jope Bownsall, the woman involved, was later tried for concealing the birth of her child, resulting in its death; see *The Queen v. Eliza Jope Bownsall*, Archives of Ontario, Northumberland and Durham County Minute Books, 1860. She was found not guilty.

⁸⁶ Edward Shorter has argued that abortion obtained by the use of instruments was becoming much safer in the nineteenth century because of the development of uterine syringes and the discovery in 1839 of the vulcanization of rubber, which permitted the use of flexible rubber catheters. Edward Shorter, *supra* note 2.

In some cases it was a doctor who inserted the instrument into the womb, but in many situations the woman operated on herself or had her male lover do it for her.⁸⁷ This lack of medical expertise created serious problems, and many of the women involved later died from complications.⁸⁸ However it should be stressed that relying upon court records to determine the degree of risk associated with abortions is extremely dangerous. Many successful abortions must have been performed, only to escape notice from the legal authorities. Linda Gordon has made this point with respect to United States statistics: "[Most] abortions were safe and successful. Today more women die in childbirth than from abortions. That was undoubtedly true in mid-nineteenth century America also."⁸⁹ Edward Shorter has noted that professional abortionists, in particular, were most likely to be able to perform an abortion with competence and safety. In large part this was due to the experience they developed over time. Compared to these, physicians who performed the procedure only rarely were often "rushed, guilt-ridden, and unpracticed. . . ." According to Shorter, they were the "real butchers."⁹⁰ Unfortunately for Canadian women, however, very few of them had access to a full-scale professional whose expertise might have assured them a modicum of safety. Professionals who conducted a volume business seem to have been in short supply, at least according to the number prosecuted. Only two of the cases seem to fit this description in any respect.

One such case involved the most sensational abortion trial of the century, *The Queen v. Ransom J. Andrews*,⁹¹ conducted in

⁸⁷ See *The Queen v. Thomas Goffatt*, Archives of Ontario, Simcoe County Minute Books, 1898, for an example of a case where the pregnant woman inserted the instrument into her own uterus; and the case of *The Queen v. Sam McKay*, Archives of Ontario, Middlesex County Minute Books, 1861, where the woman's lover inserted the instrument for her.

⁸⁸ The pregnant woman died in both cases cited in note 85. The presence of a doctor did not always ensure that the aborted woman would live; see, for example, *R. v. Sparham and Greaves* (1875), 25 U.C.C.P. 143 (C.P.), and *R. v. Garrow and Creech* (1896), 1 C.C.C. 246 (B.C.S.C.). In fact, Linda Gordon has concluded that "abortion technique was apparently not much safer among upper-class doctors than among working-class midwives." Linda Gordon, *supra* note 12, 70.

⁸⁹ Linda Gordon, *supra* note 12, 52. Gordon's conclusion has been contradicted by Cyril Means, *supra* note 8, who has argued that it was precisely because abortions were so dangerous that the laws were enacted to prohibit them. A great deal more research into the history of medical practices would be necessary before one could know for certain how dangerous nineteenth century abortions proved to be.

⁹⁰ Edward Shorter, *supra* note 2, 207.

⁹¹ Archives of Ontario, York County Minute Books, 29 Jan. 1886, John Edward Rose, J. presiding; McMahan, Q.C. for the Crown, Osler, Q.C. and James Reeve for prisoner; *R. v. Andrews* (1886), 12 O.R. 184 (C.P.), Matthew Crooks Cameron presiding, Osler Q.C. for the prisoner, McMahan, Q.C. for the Crown.

Toronto in 1886. The accused, Ransom J. Andrews, was a medical practitioner who had been born in the United States; the court records do not specify which medical sect Andrews belonged to, but he was described as having had a "superior education." At the time of the criminal prosecution, he was an elderly married man of seventy-two years old, still actively running a lucrative abortion practice. The Toronto police caught on to the nature of Andrews' business, and without warning they broke into the house from which he operated. There they discovered a woman named Jennie Leslie, who was still recuperating from the abortion Dr. Andrews had performed on her several days earlier. Jennie Leslie was dragged out of bed for questioning and the police arrested everyone else in the house. Dr. Andrews was promptly gaoled, as were his housekeeper (a thirty year old spinster named Harriett Armstrong) and his domestic servant (a twenty-one year old immigrant from England).⁹² The latter two were released on bail a week later and it seems that they were never prosecuted. Dr. Andrews, however, was charged with "using two instruments and a syringe, through the labia and vagina and into the womb of Jennie Leslie, with the intent to procure a miscarriage."

The Toronto newspapers were filled with information about the subsequent police investigation. Describing the case as "sensational," the *Telegram* reported that Inspector Stark had taken possession of all the correspondence in the house, consisting of hundreds of letters referring to "a number of criminal operations, performed both on married and single females all over the country." Emphasizing that women of all classes were involved, the paper continued:

Some of these letters are couched in the plainest language by educated as well as ignorant women, written confidentially, but confessing to the greatest acts of shame and seduction, and offering to pay large sums of money for advice and successful treatment. Altogether, they form a revelation which will form the darkest blot on society at large and shock the community from end to end of the land.⁹³

Despite the number of women involved, only Jennie Leslie was asked to testify at the trial. She told the court that she normally resided in Whitby, but had learned about Dr. Andrews and

⁹² Harriett Armstrong was also described in the Gaol records as Canadian-born, semi-educated and a Methodist. Harriett Roberts, the domestic servant, was listed as single, a Methodist, and having only elementary education. Maggie Smith was the other person arrested, and she was described as seventeen years old, single, Canadian-born, a Protestant, and possessing only elementary education. Her relationship with the doctor was not specified, and she registered as having no occupation. Toronto Gaol Register records.

⁹³ Toronto *Telegram*, undisclosed date, as reported by C.S. Clarke, *Of Toronto the Good* (Montreal: The Toronto Publishing Co., 1898), 124.

travelled to Toronto seeking his services. The records do not give any indication why she decided to seek an abortion, and her marital status remains unknown. Jennie Leslie also testified that the fee she paid was \$50, an amount that Dr. Andrews had told her was "not much for such a risky job." Presumably his comment was made in response to her reluctance to part with such a large sum. In 1886, \$50 was an extremely large amount, especially for women whose peak yearly salaries generally ranged from \$200 to \$600.⁹⁴ No further information was revealed about Jennie Leslie, so we do not know how she raised the money; she may have received assistance from the man involved or she may have had independent financial means.⁹⁵

Confronted with this rather damning evidence, Dr. Andrews' lawyer, Mr. Osler, Q.C., tried to argue that another doctor, Dr. Bogart, had operated on Jennie Leslie before the accused had seen her. It was Dr. Bogart, he argued, who had attempted to procure the miscarriage; Dr. Andrews was merely operating to expell a dead fetus. Since leaving a dead fetus in the womb would be very dangerous, Osler argued that Dr. Andrews was totally blameless, and was merely operating to protect the woman's life and health. The prosecution then countered by calling Dr. Bogart to the stand; he denied having any involvement with Jennie Leslie. On the basis of this evidence, the jury rendered a verdict of guilty and the judge, John Edward Rose, J., sentenced Dr. Andrews to five years in the Kingston Penitentiary.

Osler Q.C. appealed the conviction to the Court of Common Pleas on two grounds. First he argued that Dr. Bogart ought not to have been allowed to testify, since his evidence was merely collateral to the subject matter of the indictment. Chief Justice Matthew Crooks Cameron ruled against Osler on this point, concluding that the evidence was relevant "though remotely so." Furthermore he added that whether or not Dr. Bogart had really operated on Jennie Leslie, Dr. Andrews could still be found guilty if he was under the impression, even mistakenly, that he was performing an abortion:

The crime charged against the prisoner is not that he caused a

⁹⁴ Elizabeth Graham, "Schoolmarms and Early Teaching in Ontario," in Janice Acton, ed., *supra* note 57, 165, 192-194. These figures are based on school teacher and charwoman salaries between 1858 and 1900.

⁹⁵ That a man involved might have helped pay for the abortion seems a logical possibility. In *My Secret Life*, (New York: Grove Press, 1966), 393, originally written as an anonymous sexual autobiography of a wealthy Victorian man, the author revealed that it was not unusual for a man of means to provide financial assistance in such cases. Recounting one situation in which he had seduced a servant girl who later became pregnant, he stated: "Lucy and I both agreed that she should get an abortion. I told her to spare no money and put her in the way of getting the thing done." Since the author was normally notoriously insensitive to most of his female lovers, one can conclude that this practice may have been a reasonably common one in the general community.

miscarriage, but that he used an instrument upon Jennie Leslie with intent to do so, and if so used, the offence was completed whether Jennie Leslie was pregnant or not, . . . It is only upon the supposition that the foetus was dead, and that the prisoner knew this, that his use of the instrument could be held to have been innocent.⁹⁶

The second ground of appeal concerned the matter of corroboration. The major Crown witness had been Jennie Leslie, who although not charged herself, was at least an accomplice to the alleged offence. Osler Q.C. pointed out that the trial judge had failed to warn the jury that the evidence of an accomplice should be corroborated. Although Osler admitted that corroboration was not absolutely essential in law, he argued that "at the same time it is laid down that it is the safer course . . . and the judge should never omit to tell the jury that it is not safe to convict in the absence of corroborative evidence." The appeal court seemed to have no qualms about the omission, however, labelling the customary caution as "a mere practice." Cameron, C.J. affirmed the conviction, noting that "in the present case there was . . . an abundance of corroborative evidence, and so there was no necessity for the caution."⁹⁷ Dr. Andrews apparently served only a portion of

⁹⁶ *R. v. Andrews* (1886), 12 O.R. 184, 188 (C.P.).

⁹⁷ Several United States courts had ruled on this issue earlier in the century, and the conclusions they reached were significantly different from this. Their reluctance to convict without corroborative evidence, and their insistence that the jury receive a caution, illustrate the type of judicial lenience that Mohr has argued was characteristic of United States courts ruling on abortion prior to 1880. In *Frazer v. People*, 54 Barb. 306 (1863), a New York court was considering the case of an accused who had been charged with administering medicine and drugs to a pregnant woman with intent to procure a miscarriage. The principal witness was the defendant's lover, the pregnant woman who had sought the abortion. The defence lawyer argued that without corroboration her testimony was not entitled to full credit. The trial judge charged the jury that he believed her evidence had been corroborated by the testimony of a medical witness, and instructed them to "give her evidence such weight and credibility as they thought best." The defendant was convicted and appealed his case.

The appeal court concluded that the judge's charge was in error, and that the medical witness's testimony had not amounted to corroboration. For this mistake, they were prepared to reverse the conviction. Their statements regarding the importance of proper corroboration were instructive: "The witness Daly [the pregnant woman] was, upon her own statement, guilty of a criminal offence of the same grade as that charged upon the defendant, and was liable upon conviction to the same punishment. The submission to an operation, or the taking of drugs, with an intent to procure a miscarriage, is a moral as well as a legal offense; and that, with the confessed want of chastity, was an impeachment of the witness, and rendered a corroboration proper, even if not indispensable. 54 Barb. 308.

The New York Court of Appeal, in the case of *Dunn v. People*, (1864), 29 N.Y. 523, 86 Am. Dec. 319 also concluded that it might be proper for a jury to convict in the absence of corroboration, but that "a jury should be cautioned against giving credit hastily to the uncorroborated evidence of an accomplice." 29 N.Y. 532.

his term, spending 203 days in all at the penitentiary.⁹⁸ Whether he was released early or died in gaol is not known.

The only other case that seems to have involved a professional abortionist was *The Queen v. Laura Johnston*,⁹⁹ heard in Toronto in 1896. Jane McConkey, the key witness for the Crown, testified that she had been a woman "in trouble," and had confided this to the prisoner, who was an acquaintance of hers. The prisoner had told her that she had been "in trouble" herself in the past, but had managed to procure an abortion without injury; she offered to help Jane McConkey out of her dilemma. Whether the prisoner was a full-fledged professional abortionist is not entirely clear, but she did admit that she had helped at least one other woman obtain an abortion in the past, and demanded \$90 in payment for her services.

The accused first took Jane McConkey to see Dr. Garrett, who later testified in court that he had refused the accused's offer of \$100 for performing the required abortion. Next the accused wrote to McLaren's drug shop and ordered an instrument described as a 25¢ catheter made of soft rubber, along with pennyroyal and black draught. The druggist also testified against Laura Johnston in the subsequent trial. The accused allegedly used both methods, the instrument and the pills, in an effort to obtain the desired result for Jane McConkey; the records do not disclose whether the attempt was successful. It is not clear how the two women were discovered, but perhaps the doctor or the druggist was responsible for alerting the police. Jane McConkey was not charged; in fact she was confident enough of her situation to demand, in front of the court, that the prisoner return her \$90. Laura Johnston was charged with using an instrument and drugs "with intent to procure miscarriage," but the jury rendered a verdict of not guilty. The basis for their reasoning was not disclosed.

Angus McLaren has uncovered at least one other professional abortionist who managed to remain free from criminal prosecution, at least in Canada. Dr. Thomas Neill Cream appears to have been quite different from the two individuals described above, for he was a pathological murderer who used his abortion practice to lure in his victims.¹⁰⁰ Cream practised from an office on Dundas Street in London, Ontario, and suspicion settled upon him in 1879 when the body of a chambermaid was found in a privy behind his

⁹⁸ Toronto Gaol Register records reveal only 203 days served in the Kingston Penitentiary.

⁹⁹ Archives of Ontario, York County Minute Books, October and November 1896, William Purvis Rochfort Street, J. presiding; Robinette and Williams for the prisoner.

¹⁰⁰ Angus McLaren, "Discipline and Punish: Pathological Responses to Abortion in the Nineteenth Century," unpublished manuscript, 1981.

premises, a bottle of chloroform by her side.¹⁰¹ At the subsequent inquest it was revealed that she had gone to see Dr. Cream to obtain an abortion. Although many suspected that Cream had murdered the woman, no charges were laid. His practice, however, was ruined and he left for Chicago shortly afterwards.¹⁰² He seems to have continued to receive Canadian patients at his new office in the United States, and in August 1880 he was arrested by United States authorities and charged with the murder of another Canadian woman who had come to him seeking an abortion. Since the evidence was not conclusive, he was discharged. It was not until 1891 that he was finally caught; he was executed in London, England for the murder of several young women there.¹⁰³ Whether Cream ever provided abortions to the women who consulted him, or merely operated his practice as a ruse to entrap murder victims, is unclear. He certainly exemplified the additional dangers to which women could expose themselves when they turned to someone who specialized in flouting the law.

The famous women's rights activist, Dr. Emily Stowe, was also tried on abortion charges in Toronto in 1879.¹⁰⁴ Dr. Stowe, a well-known advocate of women's suffrage, had been one of the first women to challenge the sex barriers that male physicians had placed upon entrance to the "regular" practice of medicine. Both in her own career and in her efforts to open up medical schools to women, she was a life-time advocate of women's rights. Refused admission to Canadian medical schools because of her gender, she obtained her first degree in New York. Although she was then qualified to practice, the Ontario College of Physicians and Surgeons denied her a licence for thirteen years. Emily Stowe, however, refused to be deterred and set up her practice in Toronto without a licence.¹⁰⁵ She truly can be characterized as one of the most marginal members of the regular sect of physicians.

Dr. Stowe became the subject of criminal prosecution because of evidence revealed at an inquest in Toronto in 1879. The dead woman, Sarah Ann Lovell, had been employed as a domestic servant, when she died suddenly in August 1879 of congestion of the lungs. The ensuing investigation disclosed that she was pregnant and had been taking a drug prescribed by Dr. Stowe — tincture of myrrh, tincture of hellebore and tincture of cantharides. Since these drugs were believed to be

¹⁰¹ W. Teignmouth Shore, *Trial of Thomas Neill Cream* (London: Wilham Hodge Comp. Ltd., 1923).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The Ontario Archives do not contain records of this case, and the information was thus drawn from an account of the proceedings found in (1879), 12 *Canada Lancet* 61-62.

¹⁰⁵ On Emily Stowe's life and career, see Janet Ray, *Emily Stowe* (Don Mills, Ont.: Fitzhenry and Whiteside, 1978).

possible abortifacients, Dr. Stowe was charged with having administered "poisons and noxious things with the intent of providing a miscarriage." Emily Stowe testified that Sarah Ann Lovell had consulted with her to obtain medicines "to bring on her periods." Dr. Stowe initially refused to comply with her request, but when the woman threatened to drown herself unless supplied with the medicine, she had yielded. In her defence, however, she claimed that the dosage she prescribed, thirty drops three times a day, was harmless and would not have produced an abortion. Other doctors testified at the trial that the medicine was "injurious and likely to produce abortion in a pregnant woman," but that the dosage prescribed "would, in all probability, be perfectly harmless."

One longs to know what Emily Stowe had really intended. If she had decided to prescribe a drug that would be ineffective, why did she choose a combination of medicines that were commonly regarded as abortifacients? It is possible that she had fully intended to help the pregnant woman, had prescribed a drug and dosage that she thought would be sufficient, and then had pleaded a low dosage as a matter of defence. Little is known about the attitudes of nineteenth century Canadian feminists toward abortion, and it is not yet known what Emily Stowe thought about the practice. Linda Gordon, who has examined the response of nineteenth century United States feminists to abortion, has concluded that while they condemned the practice in public, they also decried the procedure as "undeserved punishment" and the women who had them as "helpless victims."¹⁰⁶ While United States feminists did not lobby against the abortion laws or argue publicly for legalized abortion open to all, they also took issue with the denunciations made against women who sought to terminate unwanted pregnancies. *The Woman's Advocate* of Dayton, Ohio retorted as follows:

Till men learn to check their sensualism and leave their wives free to choose their periods of maternity, let us hear no more invectives against women for the destruction of prospective unwelcome children, whose dispositions, made miserable by unhappy ante-natal conditions, would only make their lives a curse to themselves and others.¹⁰⁷

Indeed, Elizabeth Cady Stanton, another famous United States woman's suffrage advocate, stated that she sympathized with women who had abortions, and used the problem of abortion as an example of women victimized by laws without their consent.¹⁰⁸

Dr. Stowe must have been well-acquainted with the views of these women, since she maintained close friendships with

¹⁰⁶ Linda Gordon, *supra* note 12, 108.

¹⁰⁷ (1896), 1 *The Woman's Advocate* 16.

¹⁰⁸ Linda Gordon, *supra* note 12, 108.

feminists in the United States, often having them up to her home in Toronto to visit and give public lectures.¹⁰⁹ Her behavior in this case should be compared with that of a similarly situated United States doctor, Clemence S. Lozier. Dr. Lozier was a leading female physician in New York City, a founder of the New York Medical School for Women and a long-time president of the New York Suffrage Association. Yet in December 1869 she called the police and laid charges against a couple who had approached her for an abortion.¹¹⁰ Both Dr. Lozier and Dr. Stowe were in the forefront of the drive to open up the regular practice of medicine to women. The pressures to adopt the professional ethics of the dominant male group, including those against abortion, must have been strong. While Lozier succumbed to the male ethic, however, Dr. Stowe's actions indicate that she was uncertain about whether to accept the much-touted medical position, or whether to act out the sympathies expressed by some of the feminist thinkers of the time. Her initial refusal to help her patient indicates that she was not by any means a proponent of widespread access to abortion. That she changed her mind and then possibly reneged by prescribing what may have been too low a dosage shows great ambivalence and confusion. Whatever her private views may have been, however, Emily Stowe did not deem it appropriate to discuss them in public on the occasion of her trial.

Having heard the evidence against Emily Stowe, Mr. Justice McKenzie directed a verdict of not guilty. He seemed swayed by Dr. Stowe's sworn testimony that the drug she had prescribed was harmless, and emphasized that there had been no attempt at concealment. "Dr. Stowe handed the girl a prescription which she regarded as harmless, to make any use of she thought proper — a thing most unlikely if she had any criminal intent."¹¹¹ Dr. Stowe was discharged and there seems to have been no further discussion of the matter except in the medical journals of the day. The *Canada Lancet* contained a full

¹⁰⁹ Janet Ray, *supra* note 105, 37, describes Dr. Stowe as a relatively good friend of Susan B. Anthony, a close colleague of Elizabeth Cady Stanton.

¹¹⁰ James C. Mohr, *supra* note 15, 113.

¹¹¹ Report of the trial, *Canada Lancet*, *supra* note 102, 10. The *Canada Lancet* also noted that the defence had made an additional argument in the case: "The counsel for the defence contended that the giving of a prescription containing poisons to a person who applied for it, and afterwards purchasing the medicine from a druggist (though it might be an offence in one way) was not an offence under this indictment. The Judge briefly reviewed the case, holding that there could be no offence in writing a prescription and handing it to a person, and there was no evidence to show that Dr. Stowe had told the girl to procure the medicine or to take it. . . ." While this report is somewhat confusing, the defence counsel was probably arguing that Dr. Stowe could not be convicted upon this evidence with "administering" an abortifacient, but merely with "supplying" it, the latter being an offence with which she had not been charged.

description of the trial, which it stated had excited "some considerable interest." The male editors of the journal did not appear to be entirely convinced of Dr. Stowe's innocence, as

A number of English cases had dealt with the same issue as to what conduct was required before one could be convicted of "administering" noxious substances, or "causing [them] to be taken" with the intent to procure a miscarriage. The broad approach taken to the concept of "administering" in England would seem to contrast with the narrow ruling seen in the Stowe verdict. In *R. v. Wilson* (1856), Dears & B. 127; 169 E.R. 945 (Q.B.), a pregnant woman had begged the prisoner to provide her with something to procure a miscarriage. For two pence the prisoner had given her a preparation of mercury, which she directed should be taken with one-half of its quantity in gin. The potion caused the miscarriage, and almost caused the woman's death in addition. The defence argued that the actual administration of the potion was entirely carried out by the pregnant woman. The prisoner had not even been present, and her only act was to give the woman the means of taking the potion. Despite this the trial judge directed a verdict of guilty, and this was affirmed by the appeal court.

There was a similar result in *R. v. Farrow* (1857), Dears & B. 164; 169 E.R. 961 (Q.B.). Louisa Chuter, the pregnant woman concerned, gave the following evidence: "I was in my shop standing behind the counter when Mary Ann Farrow came in . . . and I asked her to have some tea. We were talking about having children, when Farrow said she had had a large family and did not intend to have any more, and she told me she knew of something she could give me that would get rid of my child. I asked her what it was and she said "savin", or something of that kind. We had several times previously talked together about my being in the family way, and she, Farrow, said she would bring me some savin to destroy my child." 169 E.R. 961. The defendant Farrow brought Louisa Chuter some savin, which she told her to take with gin. This had no effect except to make Chuter ill. Next Farrow suggested Chuter send to a chemist in Barking for some medicine which Farrow then made up into blue pills. After taking twenty or thirty of these, Chuter became even more ill, although the pregnancy continued to term. "Since my confinement it has preyed on my mind very much," she told the court. "I make this statement thinking that I am in great danger and shall not get better. . . ." The trial judge was concerned about whether this amounted to evidence that Farrow had administered the medicine, or caused it to be taken, and reserved the question for the Court of Criminal Appeal. Cresswell, J. stated that there was no real distinction between this case and *Wilson*, and affirmed the conviction.

An alternate decision was given in *R. v. Fretwell* (1862), 9 Cox C.C. 152; 169 E.R. 1345 (Q.B.). Elizabeth Bradley, a domestic servant who was living apart from her husband, had become pregnant by the prisoner. She had endeavoured to purchase corrosive sublimate, but the druggists to whom she applied had all refused her requests. She begged the prisoner to obtain it for her, and when she began to threaten to take her own life if he did not, he complied. She died from the effects of the drug and the prisoner was charged with murder. The jury found him guilty, but the Court of Criminal Appeal reversed the conviction, stating: "In the present case the prisoner was unwilling that the deceased should take the poison; it was at her instigation and under the threat of self-destruction that he

the following comment indicated: "It was a most unfortunate prescription, as Dr. Stowe admitted, taking the most charitable view of the case. . . ." ¹¹²

Due to the paucity of abortion trials, it is difficult to develop much quantitative analysis about patterns from the actual verdicts. ¹¹³ Table 1 summarizes the frequency of abortion-related charges and their outcomes for the period 1860 through 1899. During those decades, twenty charges were laid. Those twenty charges resulted in ten guilty verdicts and nine not guilty verdicts, with one verdict unknown. Although these numbers seem fairly balanced, the earlier decades resulted in proportionately more findings of not guilty than the later years. Four out of the five trials in the 1860s resulted in a discharge;

procured it and supplied it to her; but it was found that he did not administer it to her or cause her to take it. It would be consistent with the facts of the case that the prisoner hoped and expected that she would not resort to it. In my opinion the prisoner was not guilty of murder. . . ." 9 Cox C.C. 152, 154-155. This case dealt with a murder charge and the narrow interpretation may be differentiated from the earlier cases by this reason. See also *R. v. Hillman* (1863), Le. & Ca. 343; 9 Cox C.C. 386; 169 E.R. 1424 C.C.R.; *R. v. Titley* (1880), 14 Cox C.C. 502 for broad interpretations of the offence of "supplying noxious substances."

¹¹² (1879), 12 *Canada Lancet*, *supra* note 104, 61-62.

¹¹³ The few cases where the sentence was recorded do not permit much analysis either. There is little evidence of any systematic sentencing, as shown below:

- 1) 1873, Roberta Ellis, charged with attempting to procure an abortion, County of York, released on her own recognizance from the Toronto Gaol.
- 2) 1879, Robert Stitt, convicted of procuring an abortion, County of York, three months.
- 3) 1883, Arthur Barber, convicted of supplying an instrument to procure an abortion, Ontario County, six months.
- 4) 1883, Joseph H. Roy, convicted of administering a drug with intent to procure an abortion, Carleton County, one month.
- 5) 1886, Ransom J. Andrews, convicted of procuring an abortion, York County, five years.
- 6) 1896, Herbert McMullen, convicted of procuring noxious drugs with intent to procure an abortion, York County, suspended sentence.
- 7) 1896, Walter Hamilton, William Bustard, convicted of attempting to procure an abortion, York County, 2½ years and 3 years respectively.

four out of six of the trials in the 1890s resulted in a conviction.¹¹⁴

Table 1
Abortion-Related Charges and Verdicts, Archives of Ontario
1840-1900*

	Guilty	Not Guilty	Verdict Unknown	Total Charges
1860s	0	4 (80%)	1 (20%)	5
1870s	3 (75%)	1 (25%)	0	4
1880s	3 (60%)	2 (40%)	0	5
1890s	4 (66.7%)	2 (33.3%)	0	6
Total	10 (50%)	9 (45%)	1 (5%)	20

*There were no reported cases in the earlier decades. These statistics have also been supplemented with information from the Toronto Gaol Register, reported cases and the *Canada Lancet*, where these revealed additional cases not disclosed in the archival records.

¹¹⁴This situation was somewhat similar to the patterns seen in the United States. James Mohr has claimed that there were few prosecutions prior to the 1860s, and that throughout the 1860s and 1870s, "continuing tolerance of American state and local courts in abortion cases" impeded the chances of successful prosecution: "While prosecutors could point to a limited number of anti-abortion rulings that dated from the 1850s, judges continued to decide many technical points of law and virtually all of the crucial medical questions that arose in abortion cases in favour of the accused. In Boston, for example, where the physicians' crusade [against abortion] had first been launched, local coroners failed to convict a single person of criminal abortion between the end of the Civil War and 1877." James C. Mohr, *supra* note 15, 230. See also Carl Degler, *supra* note 19, 238, and Linda Gordon, *supra* note 12, 47. Mohr has concluded that after this point, the cases illustrated a significant new direction in abortion jurisprudence; the sorts of arguments which had saved United States abortionists before 1870 were regularly being denied by the courts after 1880: "[a]n official consensus against abortion solidified in the United States only during the last quarter of the nineteenth century. Not until then did state courts all around the country begin systematically to put the burdens of evidence, proof, and interpretation on the accused in abortion

It is useful to compare these verdicts with the results obtained in the murder trials for infanticide cases during a similar period. Table 2 sets out the frequency of murder charges that were laid for infanticide during the period 1840 through 1899.

Table 2
Murder Charges and Verdicts in Infanticide Trials,
Archives of Ontario
1840-1900

	Guilty	Not Guilty	Substitute (lesser) Verdict of Concealment	Verdict Unknown	Total
1840s	0	0	1 (50%)	1 (50%)	2
1850s	0	0	0	0	0
1860s	2 (20%)	6 (60%)	2 (20%)	0	10
1870s	0	0	1 (100%)	0	1
1880s	0	8 (88.9%)	1 (11.1%)	0	9
1890s	0	4 (80%)	1 (20%)	0	5
Total	2 (7.4%)	18 (66.7%)	6 (22.2%)	1 (3.7%)	27

Out of twenty-seven murder trials in Ontario between 1840 and 1900, only two resulted in a conviction for the full offence, with six convictions for the lesser and included offence of concealing the birth of an infant. The overwhelming majority, eighteen cases, resulted in a verdict of not guilty. Similarly when a mother was charged with manslaughter in the death of her infant, there were twice as many not guilty findings as guilty: four to two. Table 3 analyzes six manslaughter charges that were laid for manslaughter for the 1880s and the 1890s.

cases." James C. Mohr, *supra* note 15, 230-231. While the Canadian patterns are similar in comparison with the United States rulings, Canadian courts seemed to have been harsher on abortionists from an earlier period — at least from the beginning of the 1870s. The new direction in abortion jurisprudence seems to have begun in Canada at least one decade earlier than it took hold in the United States.

Although this is a fairly small sample, the results are consistent with the verdicts in the murder charges; out of four charges, only two resulted in guilty verdicts. In the other two trials, the defendants were found not guilty. The courts were obviously far more willing to convict for abortion than for infanticide.

Table 3
Manslaughter Charges and Verdicts in Infanticide Trials,
Archives of Ontario
1840-1900*

	Guilty	Not Guilty	Verdict Unknown	Total Charges
1880s	0	2 (100%)	0	2
1890s	2 (50%)	2 (50%)	0	4
Total	2 (33.3%)	4 (66.7%)	0	4

An examination of some of the actual decisions reveals that the courts hearing abortion cases were using much looser standards of factual proof and legal analysis than were applied in infanticide cases. In a number of the abortion cases, defence lawyers presented factual evidence and legal arguments that would have permitted the courts to acquit, had they been so inclined. However the actual decisions indicate that the courts were not anxious to make use of these arguments, and convicted the prisoners in spite of them. The case of *The Queen v. Sparham and Greaves*¹¹⁵ provides an excellent illustration. The prisoners had been indicted in Brockville, Ontario for the murder of Sophia Elizabeth Burnham, who had died after Dr. Sparham used an instrument to perform an abortion upon her. William Greaves, the man who had impregnated the deceased woman, was charged for his role in procuring the abortion. The evidence revealed that on the day of the operation, Sophia had returned home and taken to bed. Apparently her sister, Lilly Burnham, was altered to the cause of Sophia's illness, and when she realized how sick her sister was, she called in a magistrate and a practising barrister to take Sophia's statement. Sophia gave them the following sworn declaration:

* There were no charges of manslaughter laid in infanticide cases in the earlier decades.

¹¹⁵ (1875), 25 U.C.C.P. 143.

I had a miscarriage on Tuesday. It was the result of the medicines given to me and the operations performed on me by Dr. Sparham. *If I die in this sickness*, I believe it will have been caused by the operations performed on me by Dr. Sparham, at the instigation of William Greaves. I make these statements in all truth, with the fear of God before my eyes, for I firmly believe I am dying.¹¹⁶

The magistrate and the lawyer wanted to be able to introduce Sophia's statement into court in the event that she died before proceedings could be taken. However they must have been worried about whether it would qualify as a "dying declaration," in that Sophia had used the phrase, "if I die in this sickness . . ." As a result, they returned two days later for a second declaration. By this time Sophia was even worse, and was giving instructions to her sister about how she wanted her property divided, mentioning her jewellery and books in particular. She reportedly confessed to her sister: "I don't want to live, because I believe my sins are forgiven." A second statement was taken, in which Sophia declared:

I have no hope of recovery whatever. I expect to die. I firmly believe that I shall die. I feel that I am dying. When I gave my information or evidence before . . ., I said what was perfectly true in every respect. . . . I had no hope of recovery of any kind at the time I gave this information or evidence.¹¹⁷

She finally died two days later.

The whole case turned upon whether these statements were admissible in evidence. The Crown prosecutor, Mr. Britton, admitted that without them his case was lost, because there was no other evidence to connect the prisoners with Sophia's death. The defence lawyer, J.H. Cameron Q.C., argued that it would be a great error of law to admit the statements. The standard for admissibility, Cameron noted, was that "upon the face of the whole declaration it must appear that there is no hope of life; but if it affords the slightest ground for thinking that all hope of life is not given up, then the declaration is inadmissible." The first statement was tainted, he argued, because Sophia had expressed a hope of life in her phrase, "if I should die." Even the parties who took the statement had acknowledged this when they decided to take a second statement. Cameron argued further that the second statement was no better than the first, since Sophia had stated at the time that she did not want to live, because she believed her sins were forgiven. This too "indicate[d] a hope of life," he cautioned. If the court should disagree with his interpretation of this second statement, he continued, even permitting it to be used in evidence would not prove sufficient. This was because the

¹¹⁶*The Queen v. Sparham and Greaves* (1875), 25 U.C.C.P. 143, 144 (emphasis added).

¹¹⁷*Id.*, 144.

second statement was not complete in itself, and made no sense unless it was read with the first statement. Finally, he noted that the declarations had not been taken down in the actual words of the deceased, but constructed in the form of a narrative by the two legally-trained men who had conversed with her.

In addition, the defence lawyer made several other points. Sophia had allegedly died from injuries caused by the intrusion of an instrument into her womb. Yet in her declaration she had attributed her death to the medicines prescribed by the doctor as well as to the operation. This mistake, he argued, fundamentally weakened her statement. Most importantly, it was noted that while Sophia was confined to bed with her illness, her brother had been convalescing from smallpox in an adjoining room. Since both patients were attended by the same doctor, Cameron argued that the deceased might have been infected with smallpox and died of blood poisoning from this, rather than from the abortion. A witness, Dr. Church, took the stand and testified that, in his opinion, Sophia's death was really caused by the communication of the smallpox virus. The attending doctor ought to have taken precautions, Dr. Church claimed, to prevent the spread of the smallpox contagion. At this point the Crown attorney asked to call the doctor who had attended Sophia and her brother, so that he could testify as to the precautions he had actually used. Cameron objected that this testimony was inadmissible as collateral, but the trial judge permitted it to go in. Dr. Moore was called to the stand and testified that while treating the two patients he had carried camphor in his pocket, washed his hands in carbolic acid and ventilated both rooms. Cameron refused to cross-examine Dr. Moore, claiming that his testimony was inadmissible and that it would invalidate the entire proceeding.

The prisoners were convicted at trial and Cameron immediately brought the case forward on appeal. Chief Justice John Hawkins Hagarty was no more inclined to find for the prisoners than the trial court had been. Commenting upon the admissibility of Sophia's dying declaration, he stated:

The cardinal point is that the Court must be satisfied that whatever statement is admitted in evidence must be shewn by credible testimony to have been made in full belief of approaching death, with an abandonment of all hope of life. [. . .] We . . . fully agree with the learned Judge at the trial that he was bound to admit the statements.¹¹⁸

As for the argument about Sophia's error in pinpointing her cause of death, Hagarty, C.J. proclaimed: "We think it quite unimportant that the deceased may have attributed her death to both medicines and mechanical means, when in truth it may have been only the latter means that produced the fatal result."

¹¹⁸ *Id.*, 154-155.

The argument that smallpox might have caused Sophia's death was likewise dismissed, since the court concluded that it was proper for the Crown to call rebuttal evidence to the effect that the doctor concerned had taken steps to avoid contagion.

The ease with which the court dismissed these factual and legal arguments is quite surprising. If the court had wished to do so, it could have seized upon the legal arguments regarding the admissibility of the statements and Sophia's mistake regarding the cause of her death.¹¹⁹ Although both arguments were rather technical ones, they contained enough merit that they could legitimately have been used to prevent the reception of this evidence. Even more startling, however, was the court's seeming dismissal of the factual evidence that Sophia's death

¹¹⁹ A number of United States decisions should be compared with this ruling, in order to highlight just how lax this decision appears to be in comparison with some of the more careful evidentiary rulings in the United States. *People v. Davis* (1874), 56 N.Y. 95 (N.Y.S.C.) involved a charge of procuring a miscarriage in which some of the key testimony came from a dying declaration made by Clara Penry, the woman concerned. Clara Penry had sought to obtain an abortion from the accused and his wife, and had left her home with them one afternoon, failing to return until one o'clock in the morning. Upon her return she confessed to her stepmother, Phoebe Penry. Since Clara died before the trial, the verdict turned upon whether this confession was admissible as a dying declaration. Mr. Justice Grover determined that it was legally inadmissible: In this case the thing done, or *res gestae*, was at the doctor's office in another town; and it is clear that its narration by the deceased was no part of that thing. But when the declarations offered are merely narratives of past occurrences, they are incompetent. That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office and not any part of what was then done, and therefore no part of the *res gestae*." 56 N.Y. 101-102.

An 1885 Pennsylvania case, *Railing v. Commonwealth* (1885), 110 Pa. St. 100, 1 Atl. 314 provided an excellent analysis of the reasons behind this rule limiting the admissibility of dying declarations. Mr. Justice Green cited a number of concerns about the validity of the testimony: "It is hearsay, it is not under the sanction of an oath, and there is no opportunity for cross-examination. It is also subject to the special objection that it generally comes from persons in the last stages of physical exhaustion, with mental powers necessarily impaired to a greater or less extent, and, at the best, represents the declarant's perceptions, conclusions, inferences and opinions, which may be, and often are, based upon imperfect and inadequate grounds." 110 Pa. St. 316-317. The major reason for permitting such evidence, he added, was often attributed to the increased chance that the declarant, "conscious of the great responsibility awaiting him [sic] in the near future if he utters falsehood," would tell only the truth. This analysis, however, he also recorded as somewhat fallacious: "It leaves entirely out of account the influence of the passion of hatred and revenge, which almost all human beings naturally feel against their murderers, and it ignores the well-known fact that persons guilty of murder beyond all question very frequently deny their guilt up to the last moment upon the scaffold." 110 Pa. St. 317.

had resulted from blood poisoning brought on by smallpox, and not from the abortion. Dr. Church was the only medical witness to give evidence about the cause of death and his conclusion was that smallpox had been the real culprit. This was not contradicted by any other expert witness, and must at least have generated some reasonable doubt as to the true cause of death. Yet the court seemed unconcerned about this, and dismissed the argument in the face of testimony that at least some precautions had been taken against contagion.

The case of *The Queen v. Robert Stitt*¹²⁰ provides yet another example of this type of reasoning. Stitt was tried in Toronto in 1878 for supplying abortifacients to Mary Collins with an intent to procure her abortion. Mary Collins testified that she had had "criminal intercourse" with Robert Stitt on many occasions and that she had written to notify him once she became pregnant. Stitt provided her with two bottles of "Sir J. Clarke's Female Periodical Pills"; these were apparently available in drug stores and sold without any restriction to all who asked for them.¹²¹ The instructions on the wrapper of the bottle suggested one pill night and morning, increasing to four pills a day, if necessary. They reassured the buyer that the pills were "perfectly harmless," and "peculiarly suited to married women, . . . unailing in the cure of all the painful and dangerous disorders to which the female constitution was subject."¹²² It is not clear whether the marketers of the drug were actually touting its efficacy as an abortifacient, but at the very least the vague wording and reference to "married" women's disorders left open this interpretation. Stitt must have believed the pills to be ineffective except in large doses, however, for he advised Mary Collins to disregard the instructions and take twenty-five pills at a dose to produce a miscarriage.

Mary Collins must have had her doubts about the drug, for she threw the first bottle away, and turned the second over to a William Jamieson (who was unidentified in the records), who in turn gave them to a University of Toronto professor, Henry Croft, for analysis. Professor Croft, an analytical chemist, found that the pills contained oil of savin, a substance which was "well known as a popular abortive." He later testified in court that a large dose of oil of savin might "possibly procure abortion," although with some women "it would be almost impossible to bring about such a result."

Stitt's defence at trial was that there was no proof that the pills were "a noxious thing" under the terms of the statute. Mr. McMichael Q.C., put the argument as follows:

¹²⁰ Archives of Ontario, York County Minute Books, 21 Oct. 1878, Featherstone Osler, J., presiding; *R. v. Stitt* (1879), 30 U.C.C.P. 30.

¹²¹ The Ontario Archives case file contains three original bottles of these pills, along with the instructions that accompanied them.

¹²² *R. v. Stitt* (1879), 30 U.C.C.P. 30.

The indictment is based on the supplying of a noxious thing within the meaning of the statute. There is no evidence of the thing supplied being noxious. Sir James Clarke's Female Pills are not included amongst poisons, but are publicly sold as a medicine. The thing must be noxious itself, and not merely when taken in excess, even although it may have been administered with intent. . . .¹²³

Neither the trial court nor the appeal court accepted this argument. At the appeal level, Chief Justice Adam Wilson responded that he believed "that a thing may be or become noxious by the quantity of it taken or administered, as well as by the quality of the article itself." While he admitted that the evidence was not entirely free from doubt, he confirmed the conviction:

I do not think the evidence is quite as plain and direct as it might have been that the twenty-five pills the woman was directed to take . . . would from the condition of this woman be a noxious thing to her; but I think there is sufficient evidence to shew that [this] was a supplying of a noxious thing within the meaning and contrary to the provisions of the statute. . . .¹²⁴

Had the judge really wished to acquit Stitt, he could have focused upon the absence of "plain and direct" evidence, and concluded that the prosecution had failed to prove the case.

¹²³ *Id.*, 32-33.

¹²⁴ *Id.*, 33, 35. An English court ruled similarly in the case of *R. v. Cramp* (1880), 5 Q.B.D. 307, two years later. Cramp had given Ellen Elizabeth Verrall, a woman he had impregnated, a bottle containing 500 to 600 drops of oil of juniper. She took half of the contents which caused violent sickness, but no miscarriage; she had already delivered the child at the time of trial. The medical evidence indicated that oil of juniper in small quantities of 5 to 20 drops was commonly used as a diuretic without any negative effects. In large doses, however, the court was told that the following could occur: "[I]t acts as a powerful stimulant and irritant, and produces violent purging and vomiting which would have a tendency to produce miscarriage, by reason of the shock to the system, and the straining of the parts, consequent upon the purging or vomiting, . . . [it] would be a very dangerous dose to administer to a pregnant woman; but the danger would consist in the high probability of its causing miscarriage, which is always more or less dangerous to woman, and not in the probability of any mischief of any other kind." 5 Q.B.D. 308. Cramp was found guilty both at trial and on appeal. Lord Coleridge, C.J., speaking for the appeal court, stated: "Some things administered in small quantities are useful, which, when administered in large quantities are noxious."

In two earlier cases, *The Queen v. Perry* (1847), 2 Cox C.C. 223; 169 E.R. 808 and *R. v. Isaacs* (1862), Le. & Ca. 220; [1861-73] All E.R. Rep. 986; 9 Cox C.C. 228 (C.C.R.), the English courts took a more cautious approach and refused to convict on the basis of evidence that the drug involved had not been proven dangerous. See also *R. v. Hollis and Blakeman* (1873), 28 L.T. 455; 12 Cox C.C. 463 (C.C.R.), in which the defendant was convicted because the woman did miscarry after taking the medicine, although the actual drug could not be located for analysis and there was therefore no evidence of its noxious character.

The medicine which implicated Stitt was widely available without prescription or restrictions, and the medical evidence was far from conclusive that even the dosage Stitt prescribed would have prompted a miscarriage. Had the court wished to rule otherwise, it certainly could have avoided convicting Stitt on these grounds.

The court's failure to do so is even more surprising in light of the community response to the verdict. Robert Stitt must have been an individual of some standing in the community, although he was described only as a "carriage maker" living in Spencerville, Ontario. A number of petitions were sent on his behalf to the judge who had to sentence Stitt. One petition read as follows:

Your petitioners have known for a long time Robert W. Stitt who has as your petitioners are informed been convicted of an attempt to procure an abortion. The said Stitt always during the time he lived in the city of London which was for a period of about five years bore an excellent character and your petitioners believe him to have always conducted himself in an honest, upright and moral manner and that he is a fit and proper person to have the clemency of the court extended to.¹²⁵

This was signed by over one hundred people from London, Ontario, including the mayor, the ex-mayor, the M.P. and the sheriff. Another petition for mercy came from over ninety individuals from the village of Spencerville, as well as several mayors, a senator, several M.P.'s, constables and even some doctors. Perhaps the most astonishing petition came from Herbert Macdonald, a County Court Justice from Leeds and

The case of *R. v. Brown* (1899), 63 J.P. 790, is also of interest on this point. Five people had been charged with inciting women to administer noxious substances with intent to procure miscarriage. Apparently these five had been in business for over three years, circulating pamphlets and other advertisements under the name of Madame Frain, in an attempt to market drugs that would cause abortions. The prisoners raised the defence that they could not be found guilty because the whole scheme had been a hoax; the drugs they had distributed were harmless and totally incapable of causing abortions. Darling J. accepted this argument in part: "[I]f a person, himself [sic] believing the drug to be a noxious drug, incites a woman to take it, he is guilty, although the commission of the crime in the manner proposed is impossible. But if the thing supplied is to his knowledge not capable of procuring abortion, such person is not guilty of inciting her to commit an offence under the statute, although he knows that she will take it in the belief that it was a noxious thing in order to procure abortion." 63 J.P. 791. Determined that the law should provide a remedy in this case, however, Darling J. concluded that there was at least some evidence that the drugs were capable of being held noxious drugs within the statute, and put the case to the jury. They promptly convicted the accused, and Darling J. handed out stiff sentences of twelve months to one offender, nine months to two others and fine of fifty pounds to the remaining two.

¹²⁵ *The Queen v. Robert M. Stitt*, *supra* note 120.

Grenville, who stated that he felt "a great delicacy in signing any writing in the nature of a petition to a judge in a court in such a case, yet I desire to state that R.M. Stitt is a member of a very respectable family."¹²⁶ This considerable outpouring of community support worked in part. Although Stitt was not given a suspended sentence, he was only assessed three months in gaol for the crime which carried a maximum two year sentence.¹²⁷

The 1896 British Columbia case of *The Queen v. Garrow and Creech*¹²⁸ provides another excellent example of a rather startling decision. The case involved manslaughter charges against Dr. Garrow, who had allegedly performed an abortion upon twenty-four year old Mary Ellen James, and Mr. Creech, who had been her fiancé. Creech and Mary Ellen James had been engaged for five years, although Mary Ellen was still living with her mother and brothers. Mary Ellen was described as having "a delicate constitution," with "a tendency towards tuberculosis and anaemia." She was almost two months pregnant and suffering "intractable vomiting" when Creech took her to see Dr. Garrow. Garrow first prescribed ergotone, which was believed to be a drug which acted upon the uterine muscles. When this failed to work, he operated upon Mary Ellen, passing "an instrument called a 'sound' into her uterus." The operation was not completely successful, but Creech took Mary Ellen home to recuperate. When he discovered that she had a "piece of flesh protruding from the womb," he finally called in her family physician, Dr. Frank Hall, and confessed everything.

At first Dr. Hall refused to have anything to do with the situation, but after repeated urgings, he came to see the patient.

¹²⁶ *Id.*

¹²⁷ Another abortion trial, which took place in Winnipeg in 1864, apparently incited similar community support, although it was expressed differently in the rougher frontier climate. James H. Gray has recounted how the Reverend Griffith Owen Corbett, an Anglican priest, was tried for attempting to procure an abortion upon a housemaid he had seduced. While he was being held for trial, his friends stormed the Fort Garry gaol and threatened violence unless he was granted bail. Bail was granted, but Corbett was convicted of the charge and sentenced to six months. He wrote numerous letters to the *Nor'Wester* from gaol, protesting his innocence and condemning his accusers. Gray described the ultimate result as follows: "After some days a local schoolteacher named James Stewart organized a posse, knocked the jailer unconscious, and released Corbett, who returned to the bosom of his family at Headingly. The authorities then arrested Stewart, who was promptly rescued from jail by another mob. No attempt was ever made to re-arrest either man. Corbett eventually deserted his family and returned to England, the seduced housemaid died a few years later, and the schoolteacher went on to achieve a large measure of local fame as the leader of the "Canadian Party." James H. Gray, *Red Lights on the Prairies* (Toronto: MacMillan, 1971), 28; J.J. Hargrave, *Red River* (Montreal: John Lovell, 1871), 260-274.

¹²⁸ (1896), 1 C.C.C. 246 (B.C.S.C.).

He made a digital examination of Mary Ellen's vagina, "finding a piece of something protruding, 'not as big as a hen's egg'." He removed this, but did not trouble to examine it carefully, and later testified that he was unsure whether it was ovum, placenta, mucus membrane of the uterus or an organized blood clot. Two days later Creech again summoned Dr. Hall because Mary Ellen had not improved. At this point Dr. Hall, together with Dr. Fraser, proceeded to do an operation by dilating the uterus and scraping it of all foreign substances. The court records indicated that "something was scraped out during the latter operation; but whether mucous membrane of the uterus or the membrane of pregnancy the surgeons could not say, as they had not examined it, and the difference between these substances could only be determined under the microscope, which was not used." Mary Ellen continued to worsen, and died of septicaemia or blood poisoning the next day. Dr. John Lang conducted the post-mortem examination. Although he examined the womb, ovaries and fallopian tubes, he told the court that he was "unable to form any safe conclusion from the post-mortem examination." All of the doctors examined at trial said they could not swear positively to the cause of death, and that it was possible that death might have been occasioned by some undiscovered disease," which a proper post-mortem might have disclosed. Indeed Dr. Hall stated that he could not positively say that it was even a case of miscarriage, or that there was blood poisoning, or that Mary Ellen had even been pregnant. Despite this the jury convicted both prisoners of manslaughter, Dr. Garrow for administering the medicines and operation, and Creech for counselling, procuring or assisting in the abortion.

Both men appealed to the British Columbia Supreme Court, arguing that the prisoners had not been sufficiently linked with the cause of the woman's death. Although Mr. Justice John Foster McCreight admitted that none of the medical witnesses had positively stated "that it was a case of miscarriage, or that there was blood poisoning, or that the girl had even been pregnant," he affirmed the conviction:

The only question which is left to the Court in this case is whether the case should have been withdrawn from the jury or not, and I do not think it would have been right to withdraw it from them. I may add that I am far from suggesting that they were not warranted in arriving at their verdict, and I think the conviction should be affirmed.¹²⁹

This type of legal decision making did not occur in infanticide trials during the nineteenth century, in which judges and juries exhibited a pronounced reluctance to convict the prisoners accused. In another article I have provided a detailed analysis

¹²⁹ 1 C.C.C. 252.

of the infanticide trials which took place in nineteenth century Canada, but a few examples will serve to highlight the contrast between the offences.¹³⁰ *The Queen v. Catherine McDonald* involved a case in Peterborough, Ontario in 1861, where the accused was charged with having "feloniously, wilfully and of her malice aforethought kill[ed] and murder[ed] a certain infant child then lately born of her own body."¹³¹ The accused, who was employed as a servant on a farm near Peterborough, had managed to conceal her pregnancy from nearly everyone who knew her. She was not married, and therefore tried to disguise her condition by wearing skirts with full hoops, hoping to keep her pregnancy entirely secret. During the last week of her pregnancy, she complained of headaches and finally took to bed. The night of her delivery she crawled out of bed, left the house and gave birth alone outside. A child's body was later discovered by another farmer in the area; only part of its arm, leg and trunk remained as it had been torn apart by dogs. Suspicion soon fell upon the accused, for her mistress had suspected she might be pregnant, and someone else had heard her get up and leave the house on the night in question.

The grand jury, which had to decide if the case should go forward to trial, heard this evidence and concluded that the accused had indeed given birth to the infant concerned. They stated that they could not positively determine "whether the said infant was stillborn or not," but added that it was their opinion "that it was born alive from the appearances of the portions found; and . . . that the said girl is guilty of wilfully causing its death." In spite of this finding, the grand jury decided that the case should not go forward to trial; no further legal proceedings were taken against Catherine McDonald. It is most difficult to reconcile this decision with the evidence, but the case is typical of a pervasive pattern of acquittals in infanticide cases.

The Queen v. Lizzie Smith involved another murder trial in the County of York in 1884.¹³² The evidence indicated that the accused was a single woman, living as a boarder with a family in Toronto. She managed to conceal her pregnancy and gave birth to a female infant in secret, in the middle of the night. The child's body was recovered from the privy nearby. Its body was covered with scratches which appeared to have been made by a stick with a nail in it. Lizzie Smith was accused of murdering her child and throwing its body into the privy. In this case as well, the court concluded that the accused was not guilty, and the case was dismissed without further reasons.

In the face of strong and shocking factual evidence in infanticide cases, Canadian courts repeatedly rendered verdicts of not guilty. Ruling upon abortion cases in which the factual

¹³⁰ See Constance B. Backhouse, *supra* note 61.

¹³¹ Archives of Ontario, Peterborough County Minute Books, 1861.

¹³² Archives of Ontario, York County Minute Books, 1884.

evidence was highly contradictory and confusing, they regularly returned convictions. The pattern of acquittals in infanticide cases has been attributed to social attitudes which viewed children as relatively insignificant, and infant death by natural or criminal causes as an unavoidable feature of life in the nineteenth century.¹³³ That abortion was viewed as "foeticide" and strict legal sanctions enforced against its perpetrators indicates the successfulness of the medical lobby against it, rather than any greater sensitivity to the right of unborn infants.

The other reason for the distinction may relate to the women involved. In infanticide, the women accused were predominantly poor, unmarried women of the lower class who had been seduced and abandoned.¹³⁴ They were undeniably powerless forces in society at large. No one appeared to be concerned about their reproductive role in the community. In contrast, women seeking abortions came from all classes of the community.¹³⁵ Some were from the working classes — one worked in a tailor shop, for example, and another was listed as a domestic servant.¹³⁶ But others seem to have been relatively well-to-do. Several of the cases refer to women paying fees of between \$50 and \$100 for the procedure, and one can also surmise that a number came from the middle and upper classes by the descriptions given of their property and the social circles in which they travelled.¹³⁷ When women from the "respectable classes" sought to regulate their reproductive abilities, it generated a concern of much greater magnitude.

Furthermore, when doctors campaigned against abortion they stressed that a great number of the individuals seeking the procedure were married women. While the court records do not

¹³³ Constance B. Backhouse, *supra* note 61.

¹³⁴ *Id.*

¹³⁵ This would seem to be similar to the pattern revealed in the United States, where Linda Gordon has reported that abortions were common among all classes. See Linda Gordon, *supra* note 12, 54, 58.

¹³⁶ See *The Queen v. Herbert McMullen*, Archives of Ontario, York County Minute Books, 1896; and the report of the trial of Emily Stowe, M.D., in (1879), 12/2 *Canada Lancet* 61-62.

¹³⁷ In the case of *Sparham and Greaves*, *supra* note 113, the pregnant woman died from the abortion, and the court listened to testimony about how she had decided to dispose of her valuables, including books and jewellery after her death. In the case of *Stitt*, *supra* note 120, it is clear that the woman involved had friends who maintained a relationship with a university professor, an indication that she travelled in well-educated circles. Furthermore it should be noted that upper-class women may have escaped detection more frequently because greater financial resources would have enabled them to ensure more privacy surrounding the procedure.

reflect this,¹³⁸ this may be attributed to the fact that young, single women were the most likely to get caught. Married women may have been equally represented among the clientele seeking abortion, but greater resources and more freedom assisted them in carrying out their goal without detection.¹³⁹ The need to deter married women from seeking the procedure may have been another of the underlying reasons for the severe legal treatment visited upon abortionists. Infanticide, by contrast, was thought to involve only single women. It was commonly accepted in Victorian society that a woman would be desperate to avoid unwed motherhood, but once she was married her maternal capacity was not to be denied.

V. The Criminal Code, 1892: Legislative Refinement and the Prohibition of Birth Control

The enactment of the Criminal Code in 1892 signified the culmination of the nineteenth century legislative drive against fertility control. All of the existing statutory prohibitions were reenacted together with a few refinements and several major

¹³⁸ In some cases it was impossible to tell what the pregnant woman's marital status was, but in the majority of the cases where it was disclosed, the women were described as single. One exception involved a case in 1897 where a thirty-four year old widow with two children attempted to procure an abortion for herself and died of puerperal septicaemia in the process. See *The Queen v. William E. Bessey*, Archives of Ontario, York County Minute Books, 10 November 1897. Another possible exception is the case of *The Queen v. James King and Julia Anne King*, Archives of Ontario, Grey County Minute Books, 1881. Both individuals cited were charged with procuring an abortion upon, and the murder of, Mary King, but the relationship between the three persons was not disclosed. It is at least possible that Mary King was married to James.

¹³⁹ Although Linda Gordon did not touch on the greater ability of married women to escape detection, she has noted that in the United States, "[a]bortions . . . were most common among the married. . . ." Linda Gordon, *supra* note 12, 54. Angus McLaren has outlined some of the reasons married women were less likely to be caught: "[M]arried women who already had borne children recognized the signs of pregnancy earlier than the single [women] and could thus take more effective action. Moreover, a married woman who miscarried raised few suspicions; with a single woman there was the chance of the doctor, neighbours, or even police investigating." Angus McLaren, *supra* note 65, 336.

additions.¹⁴⁰ One of the most important refinements involved the penalty for women who procured their own abortions, which was reduced from a maximum of life to a maximum of seven years. The sentence of life was retained for all other offenders.¹⁴¹ Although the debates do not indicate the reasoning behind this reduction, the legislators must have wished to surmount the reluctance of prosecutors to try these women by providing a lesser penalty. This was merely the last in a series of enactments from the 1840s on in which the legislators passed amendments to ensure that the women seeking abortions would be subject to criminal sanction. None of the legislative initiatives seemed to make any difference, for there was no marked change in the prosecution pattern throughout the century.

The new offence of "killing an unborn child" was also enacted, and it was framed in the following, rather confusing manner:

Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he [sic] would have been guilty of murder if such child had been born.¹⁴²

This amendment was probably intended to bridge the gap between earlier abortion provisions and the homicide laws which applied to infanticide. Infanticide trials would now proceed under homicide charges when the child had already "become a human being." The Code described this state of affairs:

¹⁴⁰ *The Criminal Code*, 1892, (Can.), 55 & 56 Vict., c. 29, ss. 272-274. S. 272 provided that: "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 used any instrument or other means whatsoever with the like intent."

S. 273 provided that: "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." [Emphasis added.] Permitting the prosecution of women who procured their own miscarriage whether pregnant or not, was another substantive change; previously prosecutions where the woman was not pregnant had been confined to other individuals.

S. 274 provided that: "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."

¹⁴¹ *Id.*, s. 273.

¹⁴² *Id.*, s. 271(1).

A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not. The killing such child is homicide, when it dies in consequence of injuries received before, during or after birth.¹⁴³

This latter section merely codified the existing jurisprudence on infanticide,¹⁴⁴ but the new law against killing an unborn child made it clear that criminal sanctions could be taken against abortions conducted even late in the pregnancy. It was probably intended to eliminate any confusion that might have existed about where the cross-over fell between infanticide and abortion.

Few charges were laid under this new provision in the remaining decade of the nineteenth century. The one trial which has been uncovered, *The Queen v. Walter Hamilton and William Bustard*¹⁴⁵ in 1897 in Toronto, involved a case in which charges were laid under the old abortion provisions as well as the new. The prisoners were indicted with "using a uterine instrument to cause a miscarriage" as well as "killing an unborn child". The court found them guilty of the former offence, but not the latter, although there is nothing in the court records which helps to explain the legal analysis behind this divided verdict. That the authorities charged the men with both offences indicates that, at least in their minds the offences were largely overlapping. The facts of the case were most interesting, and deserve some discussion on that account.

Mary Jane McNally, a young woman who lived with her mother in Toronto, had become pregnant after having sexual relations with William Bustard. Bustard, a police officer, was already married, and he decided to help Mary Jane obtain an abortion. He took her first to a doctor named MacMaster, who apparently examined Mary Jane and did "something" while she was in the "operating chair." She was unable to describe the procedure more fully, but she suspected him of duplicity from the start. When she returned to see him a week later for additional treatment, Dr. MacMaster apparently made certain he was alone with his patient, and then made a sexual advance, asking her to "sit on his knee." Dismayed that her suspicions were correct, Mary Jane left and reported what had happened to Bustard.

Bustard next took her to see a second doctor, named Hamilton, who performed an operation which she described as very "painful." Dr. Hamilton also requested that she return for additional treatment, and on the third visit he held Mary

¹⁴³ *Id.*, s. 219.

¹⁴⁴ C.B. Backhouse, *supra* note 61.

¹⁴⁵ Archives of Ontario, York County Minute Books, 1897; W.P.R. Street, J. presiding, but trial completed under Hugh MacMahon, J.

Jane's hand and let Bustard, her lover, have a try at performing the surgery. (As well as holding down a job as a police officer, Bustard also professed to be a medical student.) After this very unconventional treatment, Mary Jane became sick and was soon confined to bed. At this point both Hamilton and Bustard came to her home and conducted further surgery. This was finally successful, a dead fetus was delivered, which Bustard apparently wrapped in paper and put in his pocket to dispose of later. Mary Jane recovered and resumed her sexual relationship with Bustard once again, but several months later they fought and broke it off. She then reported the whole story to another police officer. When Hamilton and Bustard learned of this they quickly confronted her; they demanded that she sign a letter stating that she had lied about the abortion, and when she did so they paid her \$30. Her brother soon discovered what had happened and beat her until she turned the money over to him. Meanwhile Bustard and Hamilton had been charged, and after hearing Mary Jane's testimony the court found them guilty of abortion. Hamilton was sentenced to two and half years, and Bustard got three years for the offence.¹⁴⁶ One wonders whether Mary Jane's dangerous and lengthy ordeal was representative of the experiences of many women who sought to terminate an unwanted pregnancy in the nineteenth century. Forced to seek abortions from unsavory characters, they may often have been confronted with callous treatment and appalling breaches of proper medical procedure. Mary Jane's further abuse at the hands of her own family may also have been a typical experience for women who were discovered to have had abortions.

As the *Hamilton and Bustard* case illustrates, the case law unfortunately has provided little in the way of interpretation

¹⁴⁶ The case of *The Queen v. Hamilton* (1897), 4 C.C.C. 251 (Ont. H.C.J.) may be the report of the appeal launched by these two individuals. Without further resort to the court records for this appeal, it is impossible to determine whether the two cases arise from the same facts, but the similarity between the name, date and location would seem to suggest that they do.

The *Hamilton* decision involved an application for leave to appeal from a trial where the defendants were reportedly charged with attempting to procure an abortion and procuring an abortion. They had been acquitted of the full charge, but convicted of the attempt. The grounds for appeal were that "there was no evidence to support a conviction for the lesser offence, apart from the evidence shewing the greater offence." Since the jury had disbelieved the evidence on the full charge, the defence lawyers argued that there was no other evidence upon which to convict the accused for the attempt. The Ontario High Court concluded that the verdict should stand: "[T]he jury might believe a portion of [the evidence] and disbelieve a portion of it, and . . . the discrediting of testimony in so far as it went beyond the lesser offence did not affect the validity of the jury's finding of guilt in respect of the lesser offence from the testimony of the same witnesses."

concerning the offence of "killing an unborn child." The most interesting feature of the new offence, however, is found in another aspect — the statutory defence included in the provision. The legislation stated: "No one is guilty of any offence who, by means which he [sic] in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth."¹⁴⁷ It is difficult to understand why the legislators decided to permit such a defence for the offence of "killing an unborn child" and not for the other abortion provisions. There was certainly a fair degree of overlap between the general abortion provisions and the new offence, since the latter was not specifically restricted to late term abortions. The availability of the defence in most cases, therefore, would rest entirely upon the discretion of the prosecuting authorities who determined which charge to lay in the first instance.

The origin of the decision to include a statutory defence was not revealed in the debates, but the provision was quite similar to a defence which had been formulated in England in 1846 by the Criminal Law Commissioners, who recommended it for inclusion in the English abortion law.¹⁴⁸ The recommendation was not acted upon in England until the twentieth century, but the province of New Brunswick had adopted it in its legislation of 1849, where the following proviso was added to the general abortion offence: "Provided that no person . . . shall be punishable when such act is done in good faith, with the intention of saving the life of the woman whose miscarriage is intended to be procured."¹⁴⁹ The proviso remained only temporarily and it was removed in 1864,¹⁵⁰ but the early New Brunswick initiative could have provided the model upon which the 1892 codification rested its first statutory defence. Why the decision was taken to restrict its operation solely to one of the abortion provisions and not the others seems inexplicable.

The common law defence of necessity would presumably always have been available, both before the 1892 amendment and after with respect to the general abortion provisions which did not contain specific statutory defences. George Burbidge, one of the leading commentators on Canadian criminal law in the nineteenth century, described the common law defence as follows:

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in

¹⁴⁷ *The Criminal Code*, 1892 (Can.), 55 & Vict., c. 29, s. 271(2).

¹⁴⁸ British Parliamentary Papers, Reports, Commissioners, 1846, 24, 42 (Art. 16).

¹⁴⁹ *An Act to consolidate . . . the Criminal Law*, 1849 (N.B.), 12 Vict., c. 29, art. 8.

¹⁵⁰ *An Act further to amend the Law relating to offences against the person*, 1864 (N.B.), 27 Vict., c. 4.

order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him [sic] or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.¹⁵¹

The common law defence would appear to have been even wider than the statutory one, and would seem to include cases in which the mother's life was at risk as well as other situations in which there may at least have been grave danger to her health. Since no Canadian or English case ever considered the common law defence in the context of an abortion trial throughout the nineteenth century, it is difficult to determine exactly how it might have differed from the statutory proviso.¹⁵²

That the defence, common law or statutory, was never called upon in court does not mean that its significance went unfelt. The medical journals were filled with references to "therapeutic abortions" and it appears that the doctors themselves were not only performing these procedures, but also felt fully justified in deciding when they were permissible. The medical journals often provided examples of cases for which therapeutic abortion was advised; sometimes it was made clear that the operation should not be undertaken except when the mother's life was in peril, but in other cases this precondition went unstated. One article recommended abortion in case of "obstinate vomiting in pregnancy when a fatal result is anticipated if relief cannot be afforded." Although this made reference to the potential death of the mother, the dangerousness of vomiting was presumably open to a great deal of interpretation. Other examples, where reference to the mother's life was made explicitly, included "pelvic deformity so great as to preclude the birth of a viable child," and "narrowing of the genital canal by tumors, so as to prevent the

¹⁵¹ George W. Burbidge, *supra* note 25, 36-37.

¹⁵² The first case to consider the common law defence of necessity in the context of an abortion trial was *Rex v. Bourne*, [1939] 1 K.B. 687; [1938] 3 All E.R. 615 (C.C.C.).

The only nineteenth century exception to this statement may have been *The Queen v. Ransom Andrews*, *supra* note 89, where Dr. Andrews argued in his defence that Jennie Leslie's womb held a dead fetus, and that his operation was done merely to protect her life and health. However there is no indication that the defence lawyer or the court characterized this argument as based upon the common law defence of necessity. Furthermore, the facts of the case seemed to be substantially different from the scenario pictured by the doctors who assumed they had a right to conduct therapeutic abortions; Dr. Andrews was clearly operating a full-scale abortion practice, and his defence counsel asserted that another doctor had tried to perform the abortion first, and that he was merely finishing up the procedure.

passage of a viable child."¹⁵³ In these latter examples, the major test seems to have been whether the *child* was likely to survive delivery. Another 1881 edition of the *Canada Lancet* provided detailed medical instructions about how to induce abortion. The safety of the procedure was stated to be well established: "It will be very rarely indeed that convalescence will not be prompt and perfect."¹⁵⁴

Some physicians even became alarmed about the number of doctors performing therapeutic abortions. One such individual was Dr. Horatio Storer, a prominent professor of medicine at Harvard who considered himself to be an authority on criminal abortion. Writing in the *Canada Medical Journal* in 1867, he cautioned that the induction of labour prior to the full gestation should only be used "to save the life of the mother or that of her child." He lambasted his readers for resorting to therapeutic abortions for other reasons: "I do not believe that abortion is often induced by regular physicians with evil intent; but I do believe that it is not infrequently accidentally occasioned by them, and too often intentionally under a sincere but mistaken idea of its necessity."¹⁵⁵ Fourteen years later the same concern was again expressed in the *Canada Lancet*; the writer urged doctors to consult with "two or more medical men" before inducing a therapeutic abortion, as a safeguard against making mistakes.¹⁵⁶

Nevertheless there seems to have been widespread medical acceptance that physicians had every right to perform therapeutic abortions when they diagnosed them as necessary. Moreover, there seems to have been little discussion in the medical journals of the legal basis for the criminal immunity that was assumed to operate.¹⁵⁷ That none of these doctors was forced to raise the defence in court, and indeed that none of them was ever charged in a situation in which the defence might have been argued, indicates that the legal authorities showed a

¹⁵³ (1881), 13 *Canada Lancet* 343.

¹⁵⁴ (1881), 13 *Canada Lancet* 277-278. See also (1875), 7 *Canada Lancet* 289; (1899), 32 *Canada Lancet* 113; (1900), 25 *Canadian Practitioners and Review* 331, 334-336, 401. Angus McLaren, commenting upon a similar phenomenon in England, has concluded that "the law punished not so much the act of abortion, as the poverty of the woman unable to afford a discreet physician." Angus McLaren, *supra* note 26, 392.

¹⁵⁵ Horatio R. Storer, "The Abetment of Criminal Abortion by Medical Men" (1867), 3 *Canada Medical Journal*, 225, 233-234.

¹⁵⁶ (1881), 13 *Canada Lancet* 343.

¹⁵⁷ The only reference to concern about legal prosecution was found in (1881), 13 *Canada Lancet* 343, where it was suggested that "a legal declaration be made to the public prosecutor."

great deal of tolerance in permitting the medical community a wide berth to make its own rules.¹⁵⁸

By far the most important of the new Criminal Code provisions was the section on obscenity. Section 179 created a new indictable offence, with a maximum of two years imprisonment, for selling or exposing obscene material to public view. For our purposes, section 179(c) included the key phrases which prohibited anyone from "offer[ing] to sell, advertise, publish an advertisement of or have for sale or disposal any medicine, drug or article intended or represented as a means of preventing contraception or causing abortion."¹⁵⁹ For the first time, Canadian statutory law contained a specific prohibition against the sale, distribution and advertisement of contraceptives, labelling this along with abortifacients as obscene material. Laws against obscenity had existed in Canada since the early nineteenth century; some of them were based upon English statutes and common law, and others appear to have been indigenous.¹⁶⁰ There had been little enforcement of these laws, and apart from several cases in

¹⁵⁸ Grossberg has noted that a similar situation existed in the United States, where most statutes contained therapeutic abortion exemptions. This legislation "testified to the increasing stature of regular doctors," he concluded, "and the legislative tendency to delegate to them greater and greater decision-making authority in reproductive policy." Michael Grossberg, *supra* note 77, 239.

¹⁵⁹ *Criminal Code*, *supra* note 136, s. 179. The other substantive sections made it an offence for anyone knowingly, without lawful justification or excuse, to: (a) publicly sell, or expose for public sale or to public view, any obscene books, or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals; or (b) publicly exhibit any disgusting object or any indecent show. Section 179(2) of the Code also provided a statutory defence, if the offender could prove that "the public good was served" by her/his acts. The statute added that it was to be a question of law whether there was evidence that the offender had exceeded what the public good required. Section 179(3) provided that the question of whether there was excess in fact, however, rested with the jury. In any event, section 179(4) stipulated that "the motives of the seller, publisher or exhibitor shall in all cases be irrelevant."

¹⁶⁰ The earliest statutes prohibiting indecency were found under vagrancy legislation. See *An Act for the Punishment of disorderly Persons*, 1824 (Eng.), 5 Geo. IV, c. 83; *An Act to amend an Act for punishing . . . disorderly persons . . .*, 1838 (Eng.) 1 & 2 Vict., c. 38; *An Act to extend the Criminal Laws of England to this Colony . . .*, 1837 (Nfld.), 1 Vict., c. 4, s. 1; *An Ordinance for establishing an efficient system of Police in the Cities of Quebec and Montreal*, 1867 (Lower Can.), 2 Vict., c. 2, s. 9; *Acte relatif aux Vagabonds*, 1869 (Can.), 32 & 33 Vict., c. 28, s. 1; *The Criminal Code*, 1892 (Can.), 55 & 56 Vict., c. 29, s. 207(c). Numerous statutes also authorized municipalities to enact bylaws to prohibit such materials. See *An Act respecting the Municipal Institutions of Upper Canada*, 1866 (Can.), 29 & 30 Vict., c. 51, s. 284(2); *An Act respecting Municipal Institutions in . . . Ontario*, 1873 (Ont.), 36 Vict., c. 48; *An Act respecting Municipal Institutions*, R.S.O. 1877, c. 174; *An Act to consolidate Acts*

respecting . . . , 1882-3 (Ont.), 46 Vict. c. 18, s. 490; *An Act respecting Municipal Institutions*, R.S.O. 1887, c. 184; *An Act to consolidate the Acts respecting . . .*, 1892 (Ont.), 55 Vict., c. 42, s. 489; *An Act respecting Municipal Institutions*, R.S.O. 1897, c. 223, s. 549; *Municipal Code of the Province of Ontario*, 1870 (Que.), 34 Vict., c. 68, s. XII, s. 604 (Quebec); *Town Corporations' General Clauses Act*, 1879 (Man.), 42 Vict., c. 3, s. 289; *The Manitoba town corporations act*, C.S.M. 1880, c. 10; *Manitoba Municipal Act*, 1886 (Man.), 49 Vict., c. 52; *An Act Respecting Municipal Insts.*, 1890 (Man.), 53 Vict., c. 51; *An Act Respecting Municipal Institutions*, R.S.M. 1891, c. 100; *An Act to amend "The Municipal Act"*, 1898 (Man.), 61 Vict., c. 31.

England passed one of its most important obscenity statutes in 1857. *An Act for more effectually preventing the Sale of Obscene Books, Pictures, Prints and other Articles*, 1857 (Eng.), 20 & 21 Vict., c. 83, provided special police powers of search and seizure for all obscene books, papers, writings, prints, pictures, drawings and other representations. In 1889 another statute was passed in an attempt to suppress indecent advertisements. This legislation was specifically intended to attack the circulation of information about venereal disease. The legislation defined the following as "indecent": "Any advertisements relating to syphilis, gonorrhoea, nervous disability, or other complaint or infirmity arising from or related to sexual intercourse, shall be deemed to be printed or written matter of an indecent nature. . . ." It was forbidden to put these advertisements on any building or structure visible to persons travelling on public streets, to inscribe them on any public urinal, or to deliver them to persons passing along public streets. *An Act to suppress Indecent Advertisements*, 1889 (Eng.), 52 & 53 Vict., c. 18, ss. 3, 4, 5.

The first Canadian statute to deal specifically with obscenity was passed in Prince Edward Island in 1863. *An Act for raising a Revenue*, 1863 (P.E.I.), 26 Vict., c. 2, s. 30. The legislators in P.E.I. clearly considered the problem to be one of importing obscenity, rather than producing or distributing it. The act stated: "It shall be unlawful for any person . . . to import into this Island any indecent or obscene paintings, books, cards, lithographic or other engravings, or any other indecent or obscene articles; and if imported, the same shall be seized and destroyed by any Collector of Import and Excise, or preventive officer." In 1875 the federal government enacted provisions to prohibit the posting of indecent material through the mails. The statute read as follows: "[It shall be a misdemeanour] to post for transmission or delivery by or through the post any obscene or immoral book, pamphlet, picture, print, engraving, lithograph, photograph, or other publication, matter or thing of an indecent [or] immoral . . . character. . . ." *An Act to amend and consolidate the Statute Law for the regulation of the Postal Service*, R.S.C. 1886, c. 35, s. 103; *An Act respecting the Postal Service*, 1867 (Can.), 31 Vict., c. 10, s. 72(27); reenacted 1883 (Can.), 46 Vict., c. 18, s. 1. This provision was later enacted into The Criminal Code of 1892, where the punishment was set at a maximum of two years imprisonment. The earlier statute had left the penalty to the discretion of the court. *The Criminal Code*, 1892 (Can.), 55 & 56 Vict., c. 29, s. 180.

Some of the pressure to enact federal obscenity legislation may have come from community concerns. In 1879 a Grand Jury in the County of York recommended that the legislators import some of the English provisions regarding obscenity: "[T]he youth of our land are tempted to visit [immoral theatrical representations] by advertisements and placards which disgrace our public streets, the windows of apparently respectable shops are disgraced by photographs of actresses in almost every attitude of

England, no one had tried to use them to attack the distribution of birth control information.¹⁶¹ By defining contraceptives and abortifacients as obscene, the Canadian statute went far beyond anything yet seen in English legislation. In fact the model upon which the new section was based was a United States federal statute, passed in 1873 and popularly known as

nudity, the counters and shelves of news stores are loaded with books and papers whose vile pictures and viler tales have obviously no other object than to tempt the virtue and deprave the morality of the community. The Grand Jury had their attention directed to the absence of any law in Canada to search for, seize and destroy obscene and improper books, prints and literature and they respectfully refer the authorities to the admirable and comprehensive *Imperial Act*, 1857, (Eng.), 20 & 21 Vict., c. 83 which furnish such a complete remedy for the evil in England and hope that the legislature may be induced at an early date to introduce a similar measure in Canada. The Grand Jury are gratified to think these noxious publications are foreign to the soil of Canada, the whole of them emanating from social corruptions of the United States, and they hope that proper vigilance in the postal and customs services and due efforts on the police will banish from this country." 1879, Presentment of the Grand Jury, County of York, end of Autumn session, York Criminal Assize Minute Book, 1878-1887, 126-128. Their concerns did not seem to touch on the topic of information regarding contraception and abortifacients, but rather to focus upon nudity and explicit sexual depictions.

¹⁶¹ The most important of these English cases was the *Bradlaugh-Besant* trial of 1877, in which Charles Bradlaugh and Annie Besant were charged with publishing an obscene book, *The Fruits of Philosophy* by an American, Charles Knowlton. The tract was only in part a guide to contraception. In fact, one of the major birth control methods advanced on rhythm fact was incorrectly described; the book stated that "although conception may occur at other times, it is much more likely to happen from intercourse a few days before or after the menstrual periods." Elaine Showalter and English Showalter, "Victorian Women and Menstruation" in Martha Vicinus, ed., *Suffer and Be Still: Women in the Victorian Age* (Bloomington, Indiana: Indiana U. Press, 1972), 38, 39. Both Bradlaugh and Besant pleaded their own defence. Mrs. Besant's argument was described as an "eloquent plea for family limitation as a means of relief to the working class woman." Constance Rover, *Love, Morals and the Feminists* (London: Routledge and Kegan Paul Ltd., 1970), 104. The two were convicted by the jury, despite a favourable charge from the judge, Lord Chief Justice Cockburn, who indicated that he did not believe the defendants had operated from any corrupt motive. See *The Queen v. Bradlaugh and Besant*, [1876-77] 2 Q.B.D. 569, rev'd [1878] 3 Q.B.D. 607. Annie Besant later attributed the jury's verdict to their dislike of the defendants' atheism, rather than to their views about birth control. The case was later reversed on appeal, on the technical ground that the words alleged to have been obscene were not set forth in the indictment. Charles Bradlaugh later went on to become a respected member of Parliament for Northampton in 1880, but Annie Besant was faced with "public abuse and insinuations of the grossest kind of immorality." J.A. Banks, and Olive Banks, *Feminism and Family Planning in Victorian England* (New York: Schocken Books, 1964), 88-89. Besant and her husband had separated a few years earlier, and the courts granted custody of their daughter to her

the Comstock law after Anthony Comstock, a United States mail clerk who became a notorious anti-obscenity crusader.¹⁶²

It was probably the medical profession, once again, that was responsible for the passage of this legislation. For some time doctors had been lobbying for criminal sanctions against those who marketed abortifacients. Their journals published numerous diatribes against the druggists who dispensed these drugs and the newspapers which carried the advertisements for the products.¹⁶³ The following extract from the *Canada Lancet* in 1871 contains merely one example of the demands for legislation:

The sale of these drugs is immense . . . and the matter-of-business way with which even respectable druggists sell violent

husband, the Rev. Frank Besant, because of the mother's involvement with the obscenity trial. See Constance Rover, *supra*, 103; J.A. Banks and Olive Banks, *supra*, 89. The most important feature of the trial was the great public interest it generated and the impetus it gave to the availability of birth control in the future: "It was made clear to all that many important respected personages did not regard family limitation necessarily as a set of 'indecent, obscene, unnatural and immoral practices.' The spell was broken above all by the spectacle of a woman willing to risk ostracism and imprisonment in her outspoken defence of birth control, pleading before the chief magistrate of the land, who did not hide his interest." *Population Policy in Great Britain* (London: Political and Economic Planning, 1948), 67. See also Glanville Williams, *supra* note 7, 39-40.

¹⁶² Angus McLaren, *supra* note 65, 323. See also Mary Ware Dennett, *Birth Control Laws: Shall We Keep Them, Change Them, or Abolish Them* (New York: Da Capo Press, 1970), 28-9, (originally published in 1926). Dennett was apparently unaware that Canada had followed the United States lead and enacted laws similar to the Comstock statute; she stated: "American laws in this regard stand unique among those of the nations of the world. In various countries there are obscenity statutes and regulations, but in none save the United States is contraceptive information *per se*, classed with penalized indecency. In no other country is science reduced to the level of obscenity in the law." *Id.*, 28-29.

¹⁶³ Respecting druggists, (1874), 12 *Canada Lancet* 59, stated: "In our opinion every druggist should be sworn to keep the medicines we allude to [abortifacients] under lock and key, and to suffer none but himself [sic] or a sworn assistant to dispense them, upon a proper recipe. Knowledge is power." Similarly, (1875), 8 *Canada Lancet* 23 demanded the prohibition of the sale by druggists of any drug, secret preparation or instruments which might be used for the promotion of abortion or premature labour.

The doctors also demanded a law prohibiting advertisements for these products in the newspapers: "We cannot . . . refrain from remarking that by the constant insertion of advertisements of an unmistakable character in their columns, . . . editors [of city and country newspapers] are not very remotely answerable for the spread of a crime that we have too good reason to believe has long been disgracing our land, seduction, unfortunately not being the only incentive to it, but poverty, ill-health, and love of fashionable life being also occasionally found among the influences impelling to it." *Id.*, 23.

and noxious drugs to women far advanced in pregnancy is one of the most alarming features of this trade. And what are the authorities doing to prevent it? Literally nothing. The press and pulpit feel a delicacy in handling the matter, and a feeling of false modesty prevents them from doing their duty. These matters should be fully discussed and brought prominently before the legislature, in order that measures may be taken to lessen an evil of such magnitude. Nothing short of the most stringent enactment, prohibiting the sale of all drugs calculated to produce abortion — under a severe penalty — will be of any avail in arresting the progress of this widespread evil.¹⁶⁴

It is not surprising that doctors advocated criminal penalties for selling and advertising abortifacients in view of their longstanding campaign against abortion. Their attack on contraception, however, require further attention. In the latter half of the nineteenth century, Canadian doctors had begun to argue that “contraception made marriage a form of prostitution, cheapened sex and dulled sexual enjoyment and so led to unfaithfulness.”¹⁶⁵ They also “discovered” a number of medical repercussions which they attributed to contraception: nervous disease, insomnia, insanity and impotence.¹⁶⁶ Others based their analysis upon their own notions of morality. One doctor claimed that it was “morally a crime to avoid conception by resorting to any of the many means in vogue for preventing the fertilizing fluid from reaching the ovum, and no Christian medical man [sic] can advise such proceedings.”¹⁶⁷

In their efforts to stop the practice of birth control, the doctors had to overcome customs of contraception that had been accepted for generations. Linda Gordon has reminded us that birth control was not invented by doctors or scientists, but by women who handed down their knowledge as part of the folklore of society. The use of pessaries, douching, coitus

¹⁶⁴ (1871), 4 *Canada Lancet* 185-186.

¹⁶⁵ Wendy Mitchinson, *supra* note 2, 22. See also Angus McLaren, *supra* note 65, 327, in which he recounted that Canadian doctors described coitus interruptus or withdrawal as “mutual masturbation” or “conjugal onanims.”

¹⁶⁶ (1867), 3 *Canada Medical Journal and Monthly Record* 226, 228; [1883] *Canadian Practitioner* 296; (1898) 3/1 *Kingston Medical Quarterly* 163.

¹⁶⁷ A. Laphorn Smith, (1889), 17 *Canada Medical Record* 194. Dr. Smith B.A., M.D., Lecturer in Gynecology, Bishop's College, Montreal, went on to suggest there was no moral fault in practising abstinence, but mistakenly described a woman's fertile period as just before menstruation: “Menstruation has been defined as the funeral ceremony of a dead ovum. Is the definition a correct one? If it is then we may consider a woman who has just menstruated as being safe from conception until the next menstrual period. In other words, does conception take place just before or during or just after a menstrual period? I think that all the evidence points to its taking place just before the period. If the spermatozoa live less than ten days, and if menstruation is the funeral of a dead ovum, then conception will not take place if there is no intercourse during the ten days previous to the rupture of the graafian follicle.” *Id.*, 194.

interruptus or withdrawal, the rhythm method and suppositories made from spermicidal concoctions, have all been discovered in the nineteenth century and earlier.¹⁶⁸ The evidence suggests that the upper classes had greater access to more effective contraceptives,¹⁶⁹ but homemade remedies appear to have been passed along from generation to generation and between communities.¹⁷⁰ Dianne Harkin has determined, for example, that Allen McIntosh, a lay preacher and Ontario appleseed cultivator, travelled through eastern Ontario in the late nineteenth century, selling abortifacients

¹⁶⁸ See Linda Gordon, *supra* note 12, 42-45, 62-64, 67-68, 101. Gordon also states that there is some evidence of surgical sterilizations being performed on women in preindustrial society. *Id.*, 45. The ordinary condom was rarely used in the nineteenth century as a form of contraception; it was viewed instead as a precaution against venereal disease and was associated mainly with prostitution. *Id.*, 44. On the connection between condoms and prostitution, see James H. Gray, *supra* note 127, 28, where he describes how condoms were sold to men in the nineteenth century in Winnipeg and other western cities for their protection when they had sex with prostitutes. The revenue that railroad news agents apparently made from these sales exceeded their profit from selling fruit and magazines. See also C.S. Clarke, *Of Toronto the Good* (Montreal: The Toronto Publishing Co., 1898), 127. Prostitutes, however, were extremely knowledgeable about the methodology of birth control; see Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore: Johns Hopkins U. Press, 1982), 99.

The rhythm method was somewhat unreliable, since many observers had incorrectly targeted the fertile phase of the female cycle. See Angus McLaren, *supra* note 65, 325, for a description of the erroneous information circulating in Canada. Gordon notes that it was not until the 1920s that the ovulation cycle was correctly plotted, and the 1930s before it was generally understood by United States doctors. See Linda Gordon, *supra* note 12, 101. Rugoff, however, has stated that a London professor named Oldham discovered the correct formula in 1849. See Milton Rugoff, *Prudery and Passion: Sexuality in Victorian America* (New York: G.P. Putnam's Sons, 1971), 164-165. Presumably many women had identified the correct cycle prior to this as well.

Gordon has also made the point that the technology of birth control was "passed on by an underground of midwives and wisewomen." *Id.*, 26. By the nineteenth century, the role that these women had traditionally played was diminishing as male doctors took over the business of health care; Gordon notes that this had a direct impact on the knowledge about birth control; "Many women had lost much of [their] ability and self-confidence [with respect to birth control] by the early nineteenth century." *Id.*, 67. See also Angus McLaren, *supra* note 64, for a description of the published materials available in Canada purporting to provide information about birth control.

¹⁶⁹ Linda Gordon, *supra* note 12, 70.

¹⁷⁰ Angus McLaren, *supra* note 65, 326, has discovered a recipe for a homemade contraceptive concocted of cocoa butter, boric acid and tannic acid in the papers of the feminist Violet McNaughton, which he suggests indicates that "Canadian women were not slow in producing their own protective devices."

and pessaries he described as "Dinosaur Turds" along with the apple seeds he was marketing.¹⁷¹ While few of these methods were entirely reliable, by nineteenth century standards they were considered highly effective. Women using them managed to limit their offspring to a manageable three or four children, rather than face repeated pregnancies throughout their fertile years.¹⁷²

Why were Canadian doctors so anxious to eliminate the knowledge about and use of contraceptives? Wendy Mitchinson has argued that Canadian doctors wanted to control contraception because they believed that women should be required to devote themselves entirely to motherhood:

The answer lies in the wider control of society. [. . .] Industrialization had brought with it the separation of place of work and place of residence. As a result, woman's place was the private sphere, the home; man's the public sphere, the workplace. It was felt that each balanced the other in a healthy society. Contraception was a denial of woman's highest function and a denial of that balance. If women rejected their maternal role and as a consequence their focus on the home, society was deemed the sufferer.¹⁷³

Norman Hines has argued that one reason for the medical antipathy to birth control was economic. "[P]hysicians . . . opposed birth control because of the feeling that a declining birth rate would reduce their incomes."¹⁷⁴ Linda Gordon has made a similar argument, but has put it in more subtle terms. She has claimed that the fight to prohibit birth control, like the campaign against abortion, was part of the medical struggle to obtain professional status; in the course of that struggle, physicians frequently identified promotion of contraception with quackery and immorality.

¹⁷¹ Interview with Dianne Harkin, 6 December 1982. Harkin received this information from an interview in 1977 with Olive Baldwin McIntosh, a daughter-in-law of Allen McIntosh. Olive McIntosh had inherited Allen's trunk, a box made of applewood, in which she found recipes for abortifacients and envelopes, marked with the handwritten words "Dinosaur Turds," inside the family Bible. Allen McIntosh was the son of John McIntosh, whose wife first invented the "McIntosh apple" seed. John had come from New York to eastern Ontario as a United Empire Loyalist, and made his new home in Williamsburg, Ontario. Harkin was researching the history of the McIntosh apple for an article on "Johnny Applesseed" which was later printed in the *Ottawa Citizen*. Harkin also mentioned that she learned from her discussions with elderly farm people in eastern Ontario that it was common knowledge that slippery elm could act as an abortifacient.

¹⁷² James Read, *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (New York: Basic Books, 1978), 6.

¹⁷³ Wendy Mitchinson, *supra* note 2, 22.

¹⁷⁴ Norman E. Hines, *Medical History of Contraception* (New York: Gamut Press, 1963), 286 (originally published in 1936).

Most doctors in the nineteenth century [were] opposed to birth control of any sort. *** Physicians . . . gained a monopoly on the treatment of upper- and middle-class women's diseases and pregnancies, forcing out midwives and popular healers, who had been the social repository of birth control knowledge. *** The nineteenth century saw the establishment of male hegemony in medicine, and simultaneously of medicine as a prestigious profession. *** In the course of this campaign, [doctors] attempted to discredit the older, folk tradition by identifying it with quackery. . . .¹⁷⁵

One Canadian doctor, who was demanding an end to the widespread availability of contraceptive information, put it succinctly: "knowledge is power", he wrote.¹⁷⁶ His short dictum indicates that monopoly control over medical knowledge was also one of the key goals of the Canadian physicians' lobby.

Most women, then, were to be denied the opportunity to practice birth control, even if this resulted in unnecessary deaths from unwanted pregnancies. When exceptions had to be made and individual women were permitted access to contraception, doctors believed that they should be the ones to make the decision. According to Gordon, many doctors were willing to give birth control information to a few of their patients, despite their public attack on the practice of contraception. The important thing was to keep the right to make these decisions inside the profession. This attitude, Gordon notes, involved a newly-evolving perception about the proper place of the physician in society. Doctors were developing "a sense of responsibility and privilege as the guardians of sexual morality . . . and [wanted to be] the arbiters of situations in which exceptions might need to be made."¹⁷⁷

The court records indicate that there were few prosecutions under the new law prohibiting birth control. Angus McLaren has discovered that there was certainly room for a number of charges under the provision; he has noted that advertisements for popular drugs touted as abortifacients continued to appear despite the new law, in papers as far apart as the Vancouver *Semi-Weekly World* and the Halifax *Herald*.¹⁷⁸ Yet the only trial which took place during this period occurred in 1901 in Toronto, under the name of *The King v. Karn*.¹⁷⁹ The authorities had decided to prosecute F.F. Karn, a

¹⁷⁵ Linda Gordon, *supra* note 12, at 160-162.

¹⁷⁶ (1874), 13 *Canada Lancet* 59.

¹⁷⁷ Linda Gordon, *supra* note 12, 170.

¹⁷⁸ Angus McLaren, *supra* note 65, 329.

¹⁷⁹ (1901), 5 C.C.C. 543 (York Co. Ct.). A number of similar trials in England have been nicely analyzed by Angus McLaren in his article, *supra* note 25. Since there was no law specifically prohibiting the advertisement and sale of abortifacients and contraceptives in England, the charges were laid under "inciting women to attempt to procure miscarriage" and "extortion."

manufacturer-distributor of medicines, who was accused of holding them out as abortifacients. The drug in question, advertised as "Friar's French Female Regulator" contained the following directions:

They will speedily restore the menstrual secretions when all other remedies fail. Should this function become deranged from any cause whatever, relief can always be obtained by using the tablets. The only certain and effectual emmenagogue known. These tablets surpass all such compounds as pennyroyal, ergot, tansy, etc. Thousands of married ladies are using these tablets monthly. No name is ever divulged, and your private affairs, your health, are sacred to us.¹⁸⁰

The directions and a warning on the back of the box added: "Caution — ladies are warned against using these tablets during pregnancy."

No medical analysis was taken of the drug, and so its chemical composition was unknown. Edward Shorter, however, has concluded that these nineteenth century proprietary "female pills" were not generally of much use. "They consisted mainly of alcohol, iron salts, and laxatives and contained minimal amounts of such drugs as savin or apiol which might have been effective."¹⁸¹ However the authorities did not undertake to prove that the drug actually constituted an abortifacient; their case was based upon the argument that the accused was marketing the drug as such, and therefore had run afoul of the advertising prohibition in section 179(c) of the Code. Mr. Justice Joseph E. McDougall, the trial judge, directed the jury to return a verdict of not guilty, holding that "the words used must be taken in their natural and primary sense." Because the directions did not specifically hold the drug out as an abortifacient, and indeed warned women against using the tablets when pregnant, he concluded that the accused had not committed an offence. The case was then reserved for the opinion of the court of appeal.

Featherstone Osler, J.A., noted that the statutory prohibition in question was a new one and that there was "no corresponding section . . . in any Imperial Act." He was thus left to his own decision concerning its proper interpretation. He articulated what he took to be the basis for the trial judgment: "In the absence of evidence that the warning on the outside of the box was intended to be read as an invitation to do the very thing warned against, in other words, that it was not an honest warning, I should have thought that the learned [trial judge] was right. . . ." Nevertheless he continued to state that at least one portion of the instructions for the drug worried him:

There is, however, a paragraph in the "directions" which is of a more doubtful character, viz.: "Thousands of married ladies are

¹⁸⁰ *R. v. Karn* (1903), 5 O.L.R. 704, 708; 6 C.C.C. 479, 484-485 (CA).

¹⁸¹ Edward Shorter, *supra* note 2, 210.

using these tablets monthly." [. . .] I think the learned [trial judge] should have held that this language, read of course with the rest of the printed matter, was capable of the obnoxious meaning. . . . Their object and operation in promoting and ensuring the regularity of the menstrual flow, which is, popularly at all events, supposed to be interrupted by conception, is so clearly and explicitly stated that it might well be asked for what other purposes married ladies . . . would be likely to be using them monthly.¹⁸²

He concluded that the case ought properly to have gone to the jury, but decided that it would not be proper at this point to direct a new trial. "The cases ought to be extremely rare in which the Court would think it right to place the accused a second time in jeopardy for the same offence, contrary to what has hitherto been one of the fundamental principles of English law," he pronounced, adding that "this expression of opinion will probably be sufficient as a guide in future cases of a similar kind. . . ." Had the case actually gone to the jury it is difficult to know whether the verdict might have been different. C.S. Clarke, writing in *Of Toronto the Good* in 1898, insinuated that advertisements like the one in question were commonly understood to be inducements to women seeking to terminate unwanted pregnancies.¹⁸³ The jury might well have agreed and convicted the proprietary drug entrepreneur. Nevertheless the judicial decision did serve as a warning for the future. The ultimate effect of the prosecution upon the many manufacturers of medicines and devices touted as abortifacients and contraceptives would be a subject for further twentieth century research in this area.

How did women respond to the criminalization of the sale and advertisement of contraceptive information in the nineteenth century? Those that spoke publicly on the issue focused their energy on a campaign for "voluntary motherhood." Eliza B. Duffey, one of the most outspoken United States women on the subject of a woman's right to her own body, wrote in 1876: "An unwilling motherhood is a terrible, a cruel, and unjust thing. This enforced motherhood is the cruelest wrong which women sustain at the hands of men. It embitters their lives and turns into a curse that which should have been a blessing."¹⁸⁴ Linda Gordon has noted that the campaign title, "voluntary motherhood" was carefully chosen: "[it] incorporat[ed] a political statement about the nature of *involuntary* motherhood and child-rearing in women's lives."¹⁸⁵ The label itself was a response to the doctors who accused women who practised birth control of "selfishness"

¹⁸² *R. v. Karn* (1903), *supra* note 180, 707, 483.

¹⁸³ C.S. Clarke, *supra* note 168, 125.

¹⁸⁴ Eliza B. Duffey, *The Relation of the Sexes* (New York: 1889) (originally published in 1876), 242-284, cited in Carl Degler, *supra* note 18, 204-205.

¹⁸⁵ Linda Gordon, *supra* note 12, 95.

but failed at the same time to articulate the medical dangers of childbirth and the arduousness of child-rearing.

It is interesting that those who took up the cry for voluntary motherhood in the nineteenth century failed to challenge the criminal prohibition of contraception and abortion directly. In their defence, it must have been extremely difficult to embark on such explicitly sexual discussions during the Victorian era. Gordon has also concluded that behind this strategy lay a pervasive fear of the promiscuity that might result from public advocacy of the separation of sexuality and reproduction.¹⁸⁶

The ideal . . . — responsible, open sexual encounters between equal partners — was impossible in the [nineteenth century] because men and women were not equal. A man was a man whether faithful to his wife or not. But women's sexual activities divided them into two categories — wife or prostitute. These categories were not mere ideas, but were enforced in reality by severe social and economic sanctions. [V]oluntary motherhood propaganda . . . was [thus] associated with a push toward a more restrictive . . . sexual morality.¹⁸⁷

Instead, in conjunction with their campaign against the sexual double standard and their struggles to eliminate the exploitation of prostitutes,¹⁸⁸ these women emphasized the need for self regulation. They disparaged the common belief that male lust was an uncontrollable urge, an attitude that they argued served to legitimize prostitution, rape and seduction.

Instead of demanding full access to birth control and abortion, nineteenth century feminists thus retreated to a demand for women's right to insist upon sexual abstinence as a means of preventing unwanted pregnancy. The right of women unilaterally to refuse their husbands' sexual advances became a key substantive demand.¹⁸⁹ They managed to convince many of the authors of popular marriage manuals, who often recommended that women should be the ones to control when sexual relations took place, and cautioned against "marital excess."¹⁹⁰ Dr. Emma F. Angell Drake, whose *What a Young Wife Ought to Know* was a bestseller in late nineteenth century Canada, warned that "far too many marriages were little more

¹⁸⁶ *Id.*, 97.

¹⁸⁷ *Id.*, 111.

¹⁸⁸ Constance B. Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (unpublished manuscript, 1983). See also Nancy Cott, "Passionlessness: An Interpretation of Victoria Sexual Ideology 1790-1850," in Nancy Cott and Elizabeth Pleck, *A Heritage of Her Own* (New York: Simon and Schuster, 1979), 162-181.

¹⁸⁹ Linda Gordon, *supra* note 12, 102.

¹⁹⁰ See Daniel Scott Smith, "Family Limitation, Sexual Control and Domestic Feminism in Victorian America," in Nancy Cott and Elizabeth Pleck, *supra* note 188, 222, 233.

than legalized prostitution or arrangements by which the husbands turned the right to enjoy sexual intercourse into a form of legalized rape."¹⁹¹ Dr. Drake admonished husbands: "Be guarded, O husband! It is woman's nature to forgive, . . . but there comes a time when love and forgiveness have reached their limit, and love struggles vainly to rise above disgust and loathing."¹⁹²

In establishing a wife's legal right to refuse her husband, however, the nineteenth century "voluntary motherhood" advocates failed abjectly. The pivotal court case came in 1889, when an English court was asked to determine whether a woman whose husband had knowingly infected her with venereal disease should be permitted to file charges against him for assault. In *The Queen v. Clarence*¹⁹³ Charles James Clarence argued that he could not be convicted because "consent to coition on the part of the wife is a matrimonial obligation."¹⁹⁴ Four out of the six judges that heard the case decided that Clarence could not be convicted of the offence.¹⁹⁵ Pollock, B. summed up his analysis:

The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent.¹⁹⁶

The editors of the *Canada Law Journal* found the English decision to be so interesting that they reported on it later that year. They made the following fascinating comment about the case:

The reasons for quashing the conviction appear to turn more on the supposed evil consequences which might flow from a contrary decision, by the possible extension to other cases of a like principle; but in the coming years, when the ladies have

¹⁹¹ Michael Bliss, "Pure Books on Avoided Subjects: Pre-Freudian Sexual Ideas in Canada," *Historical Papers* (Halifax: Canadian Historical Association, 1970), 87, 93.

¹⁹² *Id.*

¹⁹³ [1889] 2 Q.B. 23.

¹⁹⁴ *The Queen v. Clarence* was somewhat more complicated than described in that the woman involved had not known that her husband was suffering from gonorrhoea at the time she consented to sexual intercourse. She was thus faced with her own consent as a defence, and was forced to argue that she had consented under fraud, which vitiated the consent.

¹⁹⁵ The dissenting opinions, and the *obiter* nature of the judgments, are described in Constance B. Backhouse and Lorna Schoenroth, "A Comparative Study of Canadian and American Rape Law" (1983), 6 *Canada-United States L.J.* 48.

¹⁹⁶ *The Queen v. Clarence*, [1889] 2 Q.B. 23, 63.

ascended the bench of justice, they will probably see the matter in a very different light, if indeed they do not sooner get the legislature to mete out punishment to husbands who have so little regard for their marital obligations.¹⁹⁷

There is every reason to believe that these editors were right, given the prevailing views of women about their right to insist upon sexual abstinence as a method of birth control. Women, however, were not permitted to vote, to run for office or to serve as judicial officials throughout the nineteenth century. Their absence must surely have been at least partly responsible for the provision enacted three years later into the Criminal Code, which statutorily confirmed that husbands could not be convicted for raping their wives.¹⁹⁸ By this enactment, Canadian women were denied even the rather inferior option of sexual abstinence as a method of birth control. The law had swallowed up even the last shred of women's control over their reproductive capacities.

VI. Conclusion

The nineteenth century witnessed an explosion of legislation directed against abortion and the practice of birth control in Canada. The first wave of legislation, between 1800 and 1840, followed the lead of the British Parliament and made the procurement of abortion a crime, although abortions upon women who had not yet quickened were treated relatively leniently. There was no evidence that these early laws were ever enforced or that their passage was based upon any widespread community condemnation of abortion. Indeed all the evidence points to the conclusion that women had generally viewed the practice of abortion with tolerance and continued to do so even after the enactment of this first wave of legislation.

The second set of statutes, passed in the 1840s, began to expand the scope of the abortion laws; the quickening distinction was abolished and generally harsher penalties were attached to the crime. The number of statutes swelled most significantly, however, after 1849, when the law branched out in a series of new directions. The number of potential offenders was increased as the statutory focus began to shift away from the abortionist, to emphasize the criminal responsibility of the woman who sought to procure her own miscarriage. New and subsidiary offences were created, such as killing an unborn child, supplying noxious substances or instruments to be used in an abortion and advertising and selling abortifacients and contraceptives. In order to eliminate the difficulties of

¹⁹⁷ (1889), 25 *Canada Law J.* 144.

¹⁹⁸ See Constance B. Backhouse, "Nineteenth-Century Canadian Rape Law, 1800-1892," in David H. Flaherty, *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, forthcoming 1983).

providing conclusive medical evidence of pregnancy, new laws also made it irrelevant whether the woman concerned was pregnant or not.

This massive expansion of legislation represented an intrusive encroachment into what had previously been considered a private sphere of activity. A great deal of evidence points to the fact that the legislation was not prompted by any great upsurge in public opinion against abortion and birth control, but that the major lobby force behind its passage was a determined group of male physicians who wished to assert monopoly control over a profession they were struggling to create.

When the prosecutorial wing of the criminal justice system came to deal with the new laws, there was a marked reluctance to bring charges against the women who sought to obtain abortions. Instead the authorities focused their attack upon the abortionists who dared to flout the "medical ethics" of the predominant sect of "regular" physicians. Judges ruled against these women and men rather harshly, often failing to give much credence to many of the substantive and procedural arguments constructed by defence counsel. The predominance of convictions in abortion cases contrasts vividly with the high percentage of acquittals in infanticide trials during the same period. The distinction can be attributed to several causes. Doctors had not been similarly motivated to attack the practice of infanticide, and thus the significant lobby force that was demanding enforcement of the abortion laws did not exist with respect to infanticide. Secondly, the women who were practising infanticide — largely lower class, poor and single — were considered far less a cause for concern than the women perceived to be practising birth control and abortion — native born married women from the "respectable" classes.

Feminists of the nineteenth century expressed some sympathy for the women involved in abortion cases, but seemed unable to mount a direct attack upon the waves of legislation preventing women from regulating their own fertility. Instead they concentrated their energies upon insisting that women had a right to demand sexual abstinence to prevent unwanted conception. Even this last remnant of reproductive choice was denied, however, with the passage of the Criminal Code's marital exemption for rape in 1892. The close of the nineteenth century thus ushered in a legal system in which women were denied any vestige of fertility control. Not until well into the twentieth century were those who opposed a regime of involuntary motherhood able to muster the strength and support necessary to fight against these injustices.