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The Meaning and Implications of « Unlawfull » in Canada's Abortion Law

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Article abstract

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Pour soutenir son argument, il recourt à l'*Offences Against the Person Act* britannique de 1861 et à l'affaire célèbre de *Rex v. Bourne* (1938), et à la manière dont ceux-ci furent appliqués dans les pratiques légale et médicale canadienne.

Finalement, l'auteur concentre son attention sur la supériorité du langage éthique au langage socio-économique ou médical dans une législation sur l'avortement, et il souscrit à une législation sur l'avortement exprimée en termes éthiques.

The Meaning and Implications of « Unlawfull » in Canada's Abortion Law

Paul J. MICALLEF *

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Introduction

It is common practice that when a particular law has been drafted and accepted in one language and eventually translated into another, it is the text of the original language that prevails in the event that conflicts of understanding and interpretation arise even if provisions are specifically made, as in the *Canadian Charter of Rights and Freedoms* (1982), that « both language versions are equally authoritative »[1].

In this essay, I should like to concentrate on one term which in the English version of the *Criminal Code* of Canada is invariably used with one connotation but with quite a different one in the French version. The French version which is intended to provide an adequate, if not an accurate, translation of the original not only falls short of what may well appear to have been the intention of the legislator but in fact distorts that intention.

In the *Criminal Code*, no provision is made as to which version should prevail in the event that the versions concerned differ in meaning. In practice, however, this problem should not arise because the *Official Languages Act* (1969) takes care of it by stipulating that « in construing an enactment, both its versions in the official languages are equally authentic »[2]. In applying this general principle, the Act goes on to state that should some incompatibility arise, within the legal system of the country, as to the concept, matter or thing in its expression in one version of the enactment, « preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best assures the attainment of its objects »[3].

The term that I am mainly concerned with here is « unlawfully » and its various forms in which it is found in the *Criminal Code*. I shall first discuss the meaning and implications of the term and will then apply my analysis to a vital section of the *Criminal Code* in an attempt to show the significant role it can play not so much in the Code itself as in Section 251 which deals with abortion legislation in Canada.

1. The Meaning of « lawful » and « unlawful »

The English version of the *Criminal Code* almost consistently uses the term « unlawful » or « unlawfully » when a section or sections intend to establish that some action or actions are incompatible with accepted social behaviour. For « unlawful », the French version invariably uses « *illégal(e)* » and occasionally « *illégitime* » or « *illicite* », which in English find their

1. *Canadian Charter of Rights and Freedoms* (1982), s. 18(1).
2. *Official Languages Act*, S.R.C. 1970, c. O-2, s. 8(1).
3. *Ibid.*, s. 8(2)(d).

equivalent in « illegal », « illegitimate » and « illicit » respectively. All three terms are used to translate « unlawful » and yet none of them conveys the same meaning and implications that « unlawful » conveys. Their etymological roots are, of course, common but usage has given them different meanings and different connotations to the extent that they are by no means synonymous with one another. They are not necessarily antonyms either.

As a start, some dictionary definitions and explanations should be helpful.

Robert's *Dictionnaire alphabétique et analogique de la langue française* provides clear definitions and copious illustrations of the various nuances in the meaning of these terms[4]. For example:

> *Légal(e)*: qui a valeur de loi, résulte de la loi, est conforme à la loi: « Ce qui est légal est conforme à la loi. Ce qui est légitime est conforme à l'équité. Un acte qui viole la loi ne peut jamais être légal: mais il peut être légitime en raison des circonstances ».
>
> *Légitime*: qui est fondé en droit, en équité. *Légitime* n'est synonyme de légal que dans certaines expressions plus rares de nos jours qu'autrefois... *Légitime* évoque l'idée d'un droit fondé sur la justice et l'équité, droit supérieur que le droit positif peut contredire. Conforme... au droit naturel.
>
> *Licite*: qui n'est défendu par aucune loi, aucune autorité établie: (a) « Ce qui est licite n'est pas nécessairement juste, ni même légitime. Choses condamnables qui deviennent licites »; (b) « On est maître d'user ou de n'user pas des plaisirs *permis* ou *licites*; on n'est pas maître de faire ou de ne pas faire ce qui est *légitime* ou *légal*, on doit le faire, on doit s'y conformer ».

As far as « lawful » or « unlawful » is concerned, other than the terms listed by Robert, there seems to be no corresponding word in French.

The *Oxford English Dictionary* lists « justifiable » as one of the definitions of « lawful » (the others being « permissible » and « allowable »)[5]. Obviously, « justifiable » does not translate « légal(e) », « légitime » or « licite » and though in English « justifiable » and, perhaps, « allowable » come close to the English spirit, intent and meaning of « lawful », only indirectly, by a circuitous route, or by translating, adapting and interpreting « justifiable » can French approach the English meaning of « lawful ».

Black's Law Dictionary provides a clear explanation of « lawful » and « legal » and in the process brings out the sharp differences that exist between them. He puts it as follows:

> The principal distinction between the terms « lawful » and « legal » is that *the former contemplates the substance of law, the latter the form of law.* To say of an

4. Paul ROBERT, *Dictionnaire alphabétique et analogique de la langue française*, Paris, Société du Nouveau Littré, 1976, under *légal(e), illégal(e); légitime, illégitime; licite, illicite.*
5. *Oxford English Dictionary*, Oxford, Clarendon Press, 1961, vol. VI.

> act that it is « lawful » implies that it is authorized, sanctioned, or at any rate not forbidden, by law. To say that it is « legal » implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner. In this sense « illegal » approaches the meaning of « invalid ». For example, a contract or will, executed without the required formalities, might be said to be invalid or illegal, but could not be described as unlawful. Further, *the word « lawful » more clearly implies an ethical content than does « legal »*. The latter goes no further than to denote compliance, with positive, technical, or formal rules; while *the former usually imports a moral substance or ethical permissibility*. A further distinction is that the word « legal » is used as the synonym of « constructive », which « lawful » is not. Thus « legal fraud » is fraud implied or inferred by law, or made out by construction. « Lawful fraud » would be a contradiction of terms. Again, « legal » is used as the antithesis of « equitable »...[6]

Like Robert's, Black's analysis clearly shows that « lawful » and « legal » are substantially neither synonymous nor interchangeable. Furthermore, « lawful » has the added advantage provided by its suffix « full », hence « law-full », or « full of law », a connotation that is rich not so much in the letter as in the spirit and substance of the law : it provides a dimension which is absent in both the English and French versions of « legal », « legitimate » and « licit », namely, « an ethical content... a moral substance or ethical permissibility ». Aside from these considerations, the problem remains that « lawful » is not translatable by « *légal(e)* », « *légitime* » or « *licite* » ; however, in Robert's analysis « *légitime* » appears in effect to approach « lawful ».

According to Larousse, the juridical meaning of « lawful » is « *autorisé* »[7], which seems to translate the spirit and intent of « lawful », if not the term itself, and which could well mean in effect « lawfully authorized ». In fact, the *Criminal Code* is not unaware of this form in that in several sections it uses « without lawful authority » and translates it by « *sans autorisation légitime* », « *sans autorisation légale* » or « *sans excuse légitime* »[8]. If the different French versions carry different connotations, which in the context should not, the English version does not. The English version is consistent both in meaning as well as in usage.

Another meaningful phrase that the Code uses is « without lawful justification », « *sans justification légitime* ». In some places, the term that appears is « without lawful justification or excuse », « *sans justification ou*

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6. *Black's Law Dictionary*, St. Paul, Minnesota, West Publishing Co., 1979, 5th edition, p. 797. Emphasis is mine.
7. Larousse, *Dictionnaire moderne français-anglais*, Paris, Librairie Larousse, 1979.
8. Cf. *Criminal Code* of Canada, ss. 46(2)(b), 247(2), 249(1), 327, 332(a), 334(2), 363, 373(d), 377, 381(1), for « *sans autorisation légitime* » ; ss. 71(1)(a), 258(a), for « *sans autorisation légale* » ; s. 102(3) for « *sans excuse légitime* ». The references noted here are by no means exhaustive.

excuse légitime ». However, this phrase is broader in concept than « without lawful authority ». The latter carries with it the notion that the person concerned is duly authorized, either by the law itself or by the nature of his profession, the perform the action in question and is therefore answerable to a legal or professional code[9].

In brief, combining the juridical meaning of « lawful » provided by Larousse with Robert's explanations of « *légitime* », without losing sight of the ethical dimension of « lawful » that Black speaks of, it seems to me that « unlawfully » finds its synonym in « without lawful authorization ». In French, it could be translated by « *sans autorisation légitime* » or some such equivalent term or terms.

For the purposes of this study, it is the ethical dimension of the terms « lawful » and « unlawful » that is of interest and concern to us.

2. « Unlawful » in the context of the Abortion Law

The full thrust of the ethical content of « lawful » and its various forms can perhaps best be seen in its application to Section 251 of the *Criminal Code* which deals with abortion. Within the context of this section, I intend to explore the possibility whether an abortion law, expressed in ethical language, can safeguard society's concern for human life values and at the same time promote its respect for the freedom of choice of all those involved in abortion decisions.

How, it may be asked, can an abortion law, expressed in ethical or for that matter in any language, safeguard human life values when it will surely fail in one vital element? A simple answer to that question would be to say that the law should be cast not in sociological, economic or, as is the case with Canada's abortion legislation, in medical language[10].

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9. *Ibid.*, ss. 159(2), 262, 308, 408, 410, 416, 417. Other parallel terms, phrases, or expressions that the English version of the Code uses are the following: « without justification » (« *sans justification* »); « without authority of law » (« *sans l'autorité des lois* »); « without reasonable excuse » (« *sans excuse valable* »); « without reasonable justification » (« *sans justification raisonnable* »); « without lawful excuse » (« *sans une excuse légitime* » or « *sans excuse légitime* »). The sections where these variations appear are too numerous to list here. It might be of some interest to note that while in the Code, « without lawful excuse » and « *sans excuse légitime* » are always interchangeable, « *sans excuse légitime* » is occasionally used for the English version of « without lawful authority » (see note 8) which adds to the seemingly haphazard manner in which some key terms have been translated.

10. Under Canada's abortion law, viz. s. 251(4)(c), a therapeutic abortion may be performed in any accredited Canadian hospital after a minimum of a three-doctor therapeutic abortion committee has certified that a woman's continued pregnancy « would or would be likely to endanger her life or health ».

Abortion laws cast in sociological, economic or medical language are those laws that specify the grounds for which abortions may be performed. Such laws could well be found to be morally objectionable because, among other things, they decide in advance, thereby establishing the principle, that those fetal lives which are in conflict with some aspect of the mother's life or health have next to no protection from the law. And since it is far safer today to terminate a pregnancy, in the first trimester, than to carry it to term, theoretically every pregnancy constitutes a danger to the mother's life or health and hence theoretically every pregnancy passes the medical test, and consequently the legal one, for termination.

Within the broad framework of current abortion legislation, including Canada's, Dr. W.H. Allemang of Toronto, argues that, once any abortion is approved and performed, subsequent refusals to terminate unwanted pregnancies are discriminatory and contravene the rights of the individual [11]. One may or may not, of course, agree with his contention but it is typical of the kind of opinion that necessarily emerges from a law that makes *a priori* judgments on the basis of which fetal lives may be destroyed.

On the other hand, the superiority of ethical language over sociological, economic or medical language in abortion is underscored by the fact that abortion is an act highly charged with moral overtones. Though no law need express moral concerns, it should nonetheless reflect the general feelings of society as a whole while not brushing aside the concerns of those who need access to it, particularly when the matter we are dealing with cuts across all denominational and moral considerations and does not and cannot receive universal approval.

To suggest, therefore, an abortion law expressed in ethical rather than in other terms, one would have to go back to what is now known as « the old abortion law ».

2.1. Britain's Offences Against the Person Act, 1861

In essence, the old abortion law is Britain's *Offences Against the Person Act, 1861*, which up to 1953 had substantially corresponded to Canada's law and which until the sixties had also inspired abortion legislation across the U.S. The 1861 Act reads, in part, as follows:

> Every woman, being with child, who, with intent to procure her own miscarriage, shall *unlawfully* administer to herself any poison or other noxious thing, or shall *unlawfully* use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any

11. W.H. ALLEMANG, « Therapeutic Abortion : Some Considerations of the Current Problem », *National Conference on Abortion*, Toronto, 1972.

> woman, whether she be or not with child, 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, and being convicted thereof, shall be liable... to be kept in penal servitude for life.[12]

It should be noted that it is not clear whether or not abortion was a crime at common law [13]. Perhaps this doubt explains, at least in part, Black's comment on « unlawfully » : « It was formerly necessary », he writes, « when the crime did not exist at common law (...) but was unnecessary whenever the crime existed at common law and was manifestly illegal. »[14]

At any rate, the frequent use of the term « unlawfully » is, in the context, very significant in that the 1861 Act had quite clearly protected fetal life. But on its face it had not protected fetal life exclusively. By its appropriate insertion of « unlawfully » — or its use would have been redundant and would have served no purpose at all — it had also respected the freedoms and choices of doctors and women. This dual respect for life and for the freedom of choice of individuals was assured by two facts : (a) that the 1861 Act had specified no grounds for which abortions may be performed ; and (b) that the Act contained the all-important term « unlawfully ». Though it did not elaborate upon the term, the medical and legal professions took it to imply that, under certain conditions, the Act envisaged that some abortions were lawful after all, and therefore legally permissible, provided they were performed in good faith and in compliance with the conditions specified in the Act. The Act was obviously silent regarding which abortions were lawful. Eventually and painfully, it became evident that there might be instances which medically as well as legally justified termination of pregnancies. It was left to the good faith of the individuals most intimately concerned with abortion decisions to assess at the moment, and not in advance, whether or not any particular abortion was indeed « law-full ».

2.2. Section 251 of Canada's *Criminal Code*

Until 1953, the present Section 251 (then Section 303 ; subsequently Section 237) of the *Criminal Code* had also contained the term « unlawfully ». At the time, the section concerned read as follows :

> 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

12. *Offences Against the Person Act, 1861,* 24 and 25 Vict. c. 100, s. 58. Emphasis is mine.
13. Cf. *Regina v. Whitchurch,* (1890), 24 Q.B.D. 420, cited in *Martin's Criminal Code of Canada,* Toronto, Cartwright & Sons, Ltd, 1955, p. 446.
14. *Black's Law Dictionary, supra,* note 6, p. 1377.

> not with child, *unlawfully* administers to her or causes to be taken by her any drug or other noxious thing, or *unlawfully* uses on her any instrument or other means whatsoever with the like intent.[15]

However, when in 1953 the Code was revised, the sections dealing with abortion were not discussed or debated at all but, for no clear reason other than that a drafting error had been made, the term « unlawfully » was removed in the 1953 edition of the Code [16]. Nonetheless, again for no known reason, it was retained in Section 252 which specifies quite clearly that it is unlawful for any one to supply a drug or any instrument or noxious thing for the purposes of procuring abortion [17].

The omission produced within the medical and legal professions two schools of thought: one that abortion had suddenly become illegal, literally by the stroke of the pen; the other, that since no debate was held on the subject and no legislation had been adopted in any way, it was simply, to put it crudely, « business as usual ». The latter position was reinforced by what was known as the « Bourne Principle ». The fact remained, however, that the omission had created an ambivalent and anomalous situation and no small hardship. One medical commentator (who also had legal training) had put it this way: « The omission of *unlawfully* in 1953 kicked the props from the legal defence established by Bourne. »[18] In spite of this unclear situation, therapeutic abortions were continued to be performed mainly on the strength of the Bourne Principle [19].

2.3. *Rex v. Bourne* (1938)

The Bourne Principle which gave renewed force and effect to « unlawfully » and which was respected on both sides of the Atlantic without question arose, albeit obliquely, out of the following incident.

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15. Cf. *Tremeear's Annotated Criminal Code*, Toronto, The Carswell Co., Ltd, 1944, 5th edition, s. 303. Emphasis is mine.
16. Cf. *Minutes of the Standing Committee on Justice and Legal Affairs*, March 13, 1969, p. 345-346; *House of Commons (Canada) Debates*, March 5, 1971, p. 4015.
17. The retention of « unlawfully » in s. 252 raises a host of questions. For instance, might it not be taken to imply that there may well be instances when supplying « a drug or other noxious thing or an instrument or thing » for the purpose of procuring an abortion could be lawful? Might it not be argued that it anticipates the abortifacient drugs or injections when these become available and that supplying them may well be, like abortion in the past, lawful after all?
18. Cf. J. LEDERMAN, « The Doctor, Abortion and the Law: A Medico-Legal Dilemma », *Canadian Medical Association Journal*, 87 (1962) 216. Emphasis is author's; Graham E. PARKER, « Bill C-150: Abortion Reform », (1969) 11 *Criminal Law Quarterly*, 267.
19. Dr. G.B. MAUGHAN of McGill University and Montreal's Royal Victoria Hospital, as cited in a *Canadian Press Report*, « Cross-Canada Survey on Therapeutic Abortions », March 19, 1970.

In 1938, Dr. Aleck Bourne, an eminent British gynecologist, was charged with performing an abortion on a fourteen-year old girl who had been gang-raped by a number of horse-guardsmen. The rape occurred on April 27, 1938, and the abortion was performed seven weeks later on June 14.

Until its sweeping revisions in 1967, Britain's legal provisions concerning abortion were contained in the *Offences Against the Person Act, 1861*. The 1861 Act was very carefully worded in that its framers had inserted the word « unlawfully » in some very appropriate places. But by design or necessity, the Act in general and « unlawfully » in particular lacked definition. Consequently, what before very long became the accepted medical practice — particularly when the procedure was considered necessary to save the mother's life — was to destroy the child *in utero* shortly before birth or even at the onset of labour. This form of child destruction was not strictly abortion because at this stage the fetus is quite viable and it had gone beyond the stage to which the term « abortion » normally applies. Nor was it infanticide/homicide because these terms were, as they still are, applicable to the human being and the unborn child is not, in law, a human being[20].

The period between viability and birth was a sort of a « no-man's land » and since this medical and legal gap was covered by no Act, Bill or Statute, a step forward towards bringing that no-man's land under legal control was taken in 1929 when the English Statute created a special offence of child destruction, known as the *Infant Life Preservation Act, 1929*. Originally proposed in England by various bills, dated as far back as 1867 and 1874 and by the Royal Commission's *Report of the Criminal Code, 1879*, it was never enacted into law until 1929. Canada, however, filled the legal gap between viability and birth soon after this Report became available to the Parliament of Canada, which in 1892 it adopted with some changes and modifications as its *Criminal Code*.

The *Infant Life Preservation Act*, which corresponds to Canada's Section 221 of the *Criminal Code*, was primarily intended to prevent children from being destroyed at birth, once they had been spared abortion. However, the Act provided a very important limitation : « No person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother ».

The 1861 and 1929 Acts were patently unrelated because they covered two quite distinct and different periods in fetal development. Nonetheless,

20. Cf. s. 206.

so-called therapeutic abortions were performed, no doubt in fear and trembling, on the strength of the term « unlawfully » of 1861 and possibly on the basis of a somewhat convoluted interpretation of the saving clause of 1929.

Dr. Bourne had been performing therapeutic abortions for some years without fear of legal reprisals but when the rape case occurred in 1938 he was determined to obtain a judicial declaration of the law's provisions so much so that he publicly announced his intentions of performing the abortion for reasons other than that the life of the mother was in danger. With the consent of the girl's parents and without fee, he performed the operation in the open wards of St. Mary's Hospital, London. He put his head on the block, as it were, and no sooner had he terminated the pregnancy of the fourteen-year old girl than he was arrested and charged with committing a felony.

Dr. Bourne was charged under the provisions of Section 58 of the *Offences Against the Person Act, 1861*, the abortion Act. To strengthen his and the medical profession's understanding of « unlawfully », his line of defence proceeded in part on the saving clause of the 1929 Act (where the exception is limited to the preservation of the mother's life), and read into « unlawfully » of the 1861 Act the same exception covered by the 1929 Act, even though the 1929 Act was not related to abortion as such. Once he did that, his defence interpreted the preservation-of-life clause in a more extended sense to include as well the safeguarding of the mother's health, physical or mental. He argued that no clear-cut distinction could be drawn between the purpose of saving the mother's physical life and the preservation of her mental health, which was the indication in the present case. It was Dr. Bourne's intention « to establish in the eyes of the law that mental health was just as important as physical health, and in certain cases perhaps even more so »[21]. He contended that there are many vague and almost indefinable conditions which, as serious dangers to health though not to life, are much more important than many straight cases of heart or chest disease. The latter often suffer little or no real depreciation of health and they carry the label of a named disease which is readily accepted by laymen ; the former class, by reason of the lack of concise clinical definition, may not be readily convincing cases in any subsequent investigation. It is these patients who represented the real problem[22].

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21. Aleck BOURNE, « Rex v. Bourne », *Lancet*, II (1938) 280.

22. For a full account of the Bourne case, see « Comment : Artificial Abortion Following Rape », *Lancet*, II (1938) 99 ; Lilian WYLES, *A Woman at Scotland Yard*, London, Gollanzc, 1952, p. 221 et seq. For the socio-legal aspects : Aleck W. BOURNE, « Social Aspects of

In his summing-up on the *Bourne* case, Mr. Justice MacNaghten told the jury: « If the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, in those circumstances, and in the honest belief, operates, is operating for the purpose of preserving the life of the woman ». They were further instructed to take a prudent view of the significance of the preservation-of-life clause. In his words: « The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death.... Nobody suggests that the operation only becomes legal when a patient is dead »[23].

Dr. Bourne's line of defence, coupled with the Court's interpretation of his argument, became the celebrated « Bourne Principle », a major landmark in the history of abortion law reform. In brief, the principle established beyond reasonable doubt that it is sufficient to operate in the honest belief in cases where the woman, in no immediate danger of losing her life, might otherwise be left impaired, physically, mentally or psychologically; or, to paraphrase Canada's abortion language, where continuation of the pregnancy would proximately or remotely threaten or somehow or other would appear to be capable of threatening the existential totality of the woman herself and in relation to her family, her total environment and the community in which she lives and brings forth her child. Another way of looking at *Bourne* is to say that there might be circumstances, as in fact there are, justifying a termination of pregnancy which cannot be cast in the mould of law, but which provide society with an opportunity to catch a glimpse of what Daniel Callahan calls « the inner world of a woman — her goals in life, her perception of the world, her own felt needs »[24]. Furthermore, all proof to the contrary, that an abortion was not performed to preserve the life or health (physical or mental) of the mother or that the doctor did not in good faith believe the abortion was necessary, lay with the state. In the circumstances, this was quite a heavy burden of proof[25].

Abortion », *British Medical Journal*, I (1939) 408; Glanville WILLIAMS, *The Sanctity of Life and the Criminal Law*, London, Faber & Faber, 1958, p. 152-176. For a critical comment on the legal and medical case: *The Tablet*, 172 (1938) 103.

23. *Rex v. Bourne*, (1938) 3 All E.R. 615.

24. Daniel CALLAHAN, *Abortion: Law, Choice and Morality*, New York, MacMillan, 1970, p. 479.

25. Besides becoming the operative principle in Britain, Canada and the U.S., the Bourne Principle was subsequently upheld in other cases. See in particular: *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (Dist. Ct. App. 1959), which appeared to reinforce Bourne

3. The Ethical Implications of the old Abortion Law

The legal, medical and not least ethical ramifications that surrounded « unlawfully » of the 1861 Act and which *Bourne* brought out with the assistance of the saving clause of the 1929 Act were far-reaching. It became abundantly clear that besides recognizing those facts that every abortion law recognizes — namely, that abortion is a fact of life and is likely to remain so for as many generations in the future as there have been in the past; that with or without a liberalized law, possibly even with a greatly permissive one, the illegal rate of abortions will not necessarily be reduced; that if a doctor wants to perform an abortion he will perform it, as much as any woman seeking an abortion will obtain it, legally or illegally — the 1861 Act or the old law recognized at the same time other factors in a way no other law does.

First of all, it was based on a fundamental common law principle: society's commitment to the protection of human life from deliberate or negligent attack. By not establishing a hierarchy of values involving the mother and her unborn child, it inserted no *a priori* principle in our legal system justifying the elimination of life. Thus while the old law protected unborn children, it provided at the same time enough freedom to those intimately involved in abortion decisions to take such decisions responsibly and judiciously. By so providing, it preserved the dignity of women and doctors and sought as rational a control of abortion as possible, without at the same time creating an abortion charter: while the old law demanded women and doctors to pause and think if the abortion in question was indeed « law-full », the reformed legislation anticipates their judgment in practically all particular cases of abortion.

Its wisdom and virtue lay precisely in the fact that it was expressed not in socio-economic or medical language but in ethical language. All that it

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by implying that the mother's life must be considered in relation to its quality as well as its duration, was based solely on the statutory law which then provided only the exception « when necessary to preserve the mother's life »: « There is a presumption of necessity when an abortion is performed by a licensed physician, which presumption cannot be overturned merely by showing prior good health... Surely the abortion statute... does not mean that the peril of life be imminent. It ought to be enough that the dangerous condition be potentially present, even though its full development might be delayed to a greater or less extent »; in *U.S. v. Vuitch*, 305 F. Supp. 1032 (D.C.D.C. Nov. 1969), the Court stated: « We are unable to believe that Congress intended that a physician be required to prove his innocence. We therefore hold that, under 22 D.C. Code 201, the burden in on the prosecution to plead and prove that an abortion was not "necessary for the preservation of the mother's life or health" »; see also, *People v. Gallardo*, 41 Cal. 2d, 57, 257 P.2d (1953); *Commonwealth v. Brunelle*, 341 Mass. 675, 171 N.E. 2d 850 (1961).

demanded was good faith on the part of those who perform or seek abortion. Designed to serve a specific class of people in very disturbing and perplexing circumstances, it, consequently, demanded that it be put to work. Furthermore, by placing its trust in the good faith of professional people, it made the conscience clause irrelevant and it could also take care of the day, which no other type of law does, when the abortifacient pill becomes available. Since the pill would presumably require a doctor's prescription — *and a lot of good faith* — the cumbersome mechanism erected to have an abortion approved and performed would become unnecessary.

By not putting all these concerns and all these needs in so many words, the old law avoided serious conflicts over the grounds for abortion and the terminology to be used and, in fact, rendered all discussion of specific indications superfluous.

I am not suggesting that all these permutations and combinations in abortion laws were necessarily in the legislator's mind when the law was first enacted. In fact, they were not. I dare say, however, that they could be subsumed under such a meaningful term as « unlawfully », even if a law expressed in such terms does not in any way resolve the problem of the morality of abortion as such. But it could well make abortion laws ethically acceptable. What I am, therefore, suggesting is that the answer to the question — what indications should an abortion law contain, if it should contain any indications at all — may perhaps be found in history, by reviewing how the combined efforts of the legislature, the medical profession and the judiciary, tacitly, even if at times belligerently, working together towards a better understanding and practice of the law, have over the past one hundred years sought to bring out the implications of the law. Another way of putting it is to say that an abortion law had better say nothing, other than what the old law had said, and had better be left to the good faith of those most intimately affected by the law, even if in some cases there might be a *de facto* honouring of the law in the breach rather than in the observance.

Certain abuses in the applications of any abortion law are unavoidable, but abuses are probably preferable to a wholesale social system of legalized abortion. « The criminal law is not futile », writes John Finnis referring to abortion legislation, « if it succeeds in doing little more than manifesting society's continuing commitment to its preferred values »[26]. A participant at the 1967 *Washington Conference on Abortion* put it as follows: « The abortion laws use the didactive power of the law to uphold this negative

26. John M. FINNIS, « Three Schemes of Regulation », in John T. NOONAN, Jr., *The Morality of Abortion*, Cambridge, Mass., Harvard University Press, 1970, p. 179.

judgment upon abortion while still providing a means of grace, an outlet for people who are in embarassing circumstances. »[27]

Given the climate in which abortion legislation has been adopted — in Canada, the debate had the « nation bleeding »[28] — it is difficult to conceive of any abortion law, other than the old law, that would have so responsibly manifested society's commitment to its preferred values and that at the same time is so concerned with all or most of the rights claimed in abortion. In its own way, the old law had a didactive value about it which is absent in the current abortion laws. Since « unlawfully » gave it « a moral substance, an ethical permissibility », practical concessions made through it were not compromises of principle : society's preferred values were built into the law. One might note in passing that, as opposed to this approach, Canada's law considers abortion illegal (not unlawful) in Section 251 (1), (2) and (3) and then goes on to explain that, nonetheless, it may be done legally if certain conditions are adhered to.

Other than saying that the old law appears to have been a good law from the ethical standpoint, the considerations I have put forward should by no means suggest that the old law was a perfect law, that it was immune from abuses, or that it was even remotely an attempt to make, as it were, everyone happy. Callahan repeatedly points out that there is hardly an abortion law that is exempt from problems. One law may nullify some problems and reduce the impact of others, but in the process the same law may create its own particular set of problems.

Ironically, the old law's greatest virtue turned out to be its greatest weakness, namely, the vagueness of its key-term « unlawfully ». It has been stated to this effect that « a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process »[29], a principle that was increasingly upheld in abortion debates and decisions to invalidate the old abortion statutes. Closer to home, Claude Armand-Sheppard, Q.C., also expressed the same concern, referring

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27. Robert E. COOKE *et al., The Terrible Choice : The Abortion Dilemma*, New York, Bantam Books, 1968, p. 63. A psychologist, also present at the *Washington Conference on Abortion*, stated : « We have to be concerned with the entire ethical fabric of what's happening to this society — drugs, sexual behaviour, homosexuality. People need rules badly ; what they want is a set of rules where at least they believe most people share that set of values », *ibid.*, p. 62.
28. Cf. *Debates*, May 8, 1969, p. 8503-8505, for Eldon Woolliams' eloquent speech on the antagonism created in Parliament by the abortion debate.
29. *Connelly v. Gen. Const. Co.*, 269 U.S., 385, 391, cited in *Commonwealth v. Brunelle*, see note 25; *Lanzetta v. New Jersey*, 306 U.S. 451.

to « unlawfully » as a term which provides « fodder for Supreme Court decisions and not very helpful in practice »[30].

But on the other side of the ledger, there are several declarations upholding the old law. In one case, for instance, the dissenting judges of the Supreme Court of California (3 against 4) registered a strong protest : « One would think », they wrote, « that the English language which has been the sensitive instrument of our system of law for over 500 years has lost, by the mere passage of time, all capacity for clarity of expression »[31]. Regarding this particular decision, Louisell and Noonan make the following comment :

> The statute which was invalidated in 1969 had been in substantially the same form for over a century... It is usual for a statute to be somewhat indefinite and to be progressively clarified by judicial decisions. The majority of the court in this case seemed to have thought that judicial decisions had made the statute progressively unclear so that finally there was nothing left but to say that it was unintelligible.
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> ...
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> About the same time that California invalidated its law, the Supreme Court of Massachusetts and the Supreme Court of New Jersey found parallel phrases in their statutes on abortion to be clearly understandable by ordinary persons. It is difficult to believe that what is comprehensible to ordinary men in Massachusetts and New Jersey is not comprehensible to ordinary men in California.[32]

Indeed, the old law was no more vague than the new legislation's terminology — health, a difficult social situation, any threat to a woman's total well-being, etc. — terms which, vague, undefined and undefinable though they be, are being used to justify abortions and the setting-up of abortion clinics. After all, the Criminal Code abounds in what Jerome Frank calls « weasel words, loose words with vague meanings »[33]. Consequently, it is not an irregular practice to retain rules or laws formulated in such language while providing them with a different interpretation than hitherto given. Indeed, if legislators were to bind their own laws and the Courts by precise, inflexible terminology, they would be defeating themselves. Ambiguities in legal terminology do not usually result from careless draftsmanship but rather from the fact that it is impossible for the legislator to anticipate or envisage with any sense of accuracy the numerous circumstances which can come within the scope of any particular law. Legislators have, therefore, no

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30. *Minutes*, March 27, 1969, p. 759, 766.
31. *People v. Belous*, 458 P.2d 210, 80 Cal., 1969, p. 370.
32. David W. LOUISELL and John T. NOONAN, Jr., « Constitutional Balance », in NOONAN, *supra*, note 26, p. 238, 240. In support of their opinion, they cite *State v. Moretti*, 52 N.J. 182, 244 A.2d 499 (1968): « Without lawful justification »; and *Kudish v. Board of Registration in Medicine*, 248 N.E. 2d 264 (1969): « Unlawfully ». See notes 8 and 9.
33. Jerome FRANK, *Courts on Trial*, New York, Atheneum Publishers, 1969, p. 277.

choice but to draft their laws in general terms and allow the courts to interpret and implement them by judicial decisions on the strength of a right principle drawn from the law or which somehow emerges from the law. For instance, when does « shall unlawfully », in the present context, mean « may lawfully »? Or when does « unlawfully » mean « without legitimate authorization », « without being lawfully authorized », or « without lawful justification »? Glib answers defeat the whole purpose of legislative procedures and intentions [34].

It is a matter of regret that a phrase like « without legitimate authorization » and similar expressions found their way into the Criminal Code involving actions ranging from spying to altering a weapon's serial number and did not find their way into the sections dealing with such a vital matter as abortion.

The charge that the old law had given no directions as to which abortions were said to be legal and which illegal (as the new legislation is supposed to do and to have done) might have been valid in 1861 when the law was first enacted. But then the terminology used was « unlawful » and not « illegal » and after a 100-year old experience, after *Bourne*, after the long arduous political debate and the publicity that accompanied and followed it, by medical practice, by court rulings and interpretations, « unlawfully » can hardly be said to lack definition, to provide no guidelines, to be unintelligible to men of common intelligence. By having the implications of « unlawfully » brought out in several ways, the old law had been given a specific content amply demonstrating that a qualified physician operating within the terms of the law could quite « law-fully » perform an abortion if he in good faith believed that the abortion was necessary [35].

In a special report prepared *prior* to the enactment of Britain's Abortion Act of 1967, the Council of the Royal College of Gynecologists and Physicians stated that « the present situation commends itself to most gynecologists in that it leaves them free to act in what they consider to be the best interests of each individual patient... » [36]. After the enactment of the 1967 Act, it was in fact observed that if the abortion situation had improved in

34. In his *Treatise on Law*, I-II, q. 96, a. 6, Aquinas made very much the same point which is worth recalling here : « No man is so wise as to be able to take account of every single case ; wherefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion, but should frame the law according to that which is of most common occurrence ». Cf. also ARISTOTLE, *Nicomachean Ethics*, 1137a31-b27.

35. Cf. *Commonwealth v. Wheeler*, 315 Mass. 394; *v. Nason*, 252 Mass. 545; *v. Brunelle*, 341 Mass. 675.

36. « Legalized Abortion », *British Medical Journal*, I (1966) 850.

England, this improvement was due not so much to the effect of the law itself as to the debate which preceded it and to the deliberations and explanations that had been made. At the *Arden House Conference on Abortion*, it was also generally agreed that it was « virtually unknown » that a licensed physician who had performed an abortion under hospital jurisdiction had ever been prosecuted [37]. Or as Dr. Milton Helpern put it : « Law enforcement agencies, as a rule, have not questioned the propriety and judgment of reputable physicians who decide to perform an abortion for therapeutic reasons in a reputable hospital... even though there may not have been uniform medical agreement as to the indications for the abortion. »[38] Dr. Helpern is here referring to the New York experience. Dr. Alan Guttmacher, a staunch supporter of abortion on demand, had made similar observations about Maryland [39].

Conclusion

Underlying my analysis is the fundamental difference that we must recognize between, on the one hand, the moral worth of abortion as such and, on the other, the moral worth of an abortion law. A discussion of this problem is obviously beyond the scope of this essay. It should be noted, however, that it is at this point that we must begin to distinguish, wisely and honestly, what is immoral and what, notwithstanding, may be lawful or legally permissible. The morality of abortion may indeed rest on the value of fetal life and in this respect society's fundamental concern should forever remain the protection of human life wherever and however it is found. But in the context of contemporary demands and life-styles one must make a sincere decision as to how the law can best safeguard and promote this value as the central issue in abortion or as one of the major issues without creating an abortion-oriented society.

Perhaps the law can best safeguard this value by reinserting the ethical dimension into the law. During the parliamentary debate on abortion in 1969, Mr. Eldon Woolliams attempted to do just that by proposing the following version as a working formula :

> Every one who, with intent to procure the miscarriage of a female person whether or not she is pregnant, unlawfully uses any means for the purpose of carrying out his intention is guilty of an indictable offence...[40]

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37. Mary S. CALDERONE (ed.), *Abortion in the United States*, New York, Hoeber-Harper, 1958, p. 40.
38. Milton HELPERN, « The Problem of Criminal Abortion », *Quarterly Review of Surgery, Obstetrics and Gynecology*, 16 (1959) 232.
39. Cited in A.E. HELLEGERS, « Law and the Common Good », *Commonweal*, 86 (1967) 421.
40. *Minutes*, March 27, 1969, p. 796. Woolliams' proposal may be translated as follows : « Est coupable d'un acte criminel... quiconque, avec l'intention de procurer l'avortement d'une

Professor Alan W. Mewett of Osgoode Hall considered abortion legislation through the same perspective as Woolliams, as did many legal minds of the country[41]. Called before the Standing Committee on Justice and Legal Affairs, Mewett said : « If instead of these amendments you merely inserted the word "unlawfully", you would then make it quite clear that the principles adopted in *Rex v. Bourne* would also apply to Canada. »[42]

The insertion of « unlawfully » would, in fact, have done no more than readopt the law as it was prior to 1953 and in effect codify the Bourne Principle which would have allowed reasonable latitude when termination of pregnancy is indicated[43]. Furthermore, it would have left the matter both within the medical profession — to decide on medical and ethical grounds whether in the profession's good faith an abortion is therapeutically necessary or otherwise justifiable in the best interests of the patient — as well as within the legal profession and the judiciary in the event that some particular case of abortion might be considered « unlaw-full ». Each case of abortion would thus be evaluated, therapeutically on its own merits, legally on the basis of « unlawfully ».

Had that law been allowed its proverbial day in court to which it was entitled, it probably would have withstood the test that it would have been subjected to. Regrettably, it was thrown out of court. *Bourne*, however, was not and that was at a time when the Court had hardly any jurisprudence on abortion to rely on other than the term « unlawfully ».

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personne du sexe féminin, qu'elle soit enceinte ou non, emploie sans autorisation légitime quelque moyen pour réaliser son intention ».

41. Cf. *Debates*, April 28, 1969, p. 8089, where Woolliams stated that the abortion provisions in Bill C-150 are « not only beyond my comprehension but also beyond the comprehension of many professors teaching criminal law in Universities in Canada ».
42. *Minutes*, March 13, 1969, p. 350-351, 370, 374-375.
43. Cf. Norman ST. JOHN-STEVAS, « The English Experience », *America*, 117 (1967) 707; Alan W. MEWETT, « Notes and Comments : Bill C-195 », (1967-68) 10 *Crim. L.Q.*, 385 (Bill C-195 was the original number of Bill C-150, popularly known as the « Omnibus Bill »); *Debates*, April 25, 1969, p. 7968; April 28, 1969, p. 8089.