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THE MORGENTALER CASE:
CRIMINAL PROCESS AND
ABORTION LAW

By BERNARD M. DICKENS**

A. INTRODUCTION

An investigation of the sequence of events that posterity will know collectively as The Morgentaler Case furnishes materials for a critical course of studies in the Canadian criminal process from initial charge, through denial of parole, to conduct of a re-trial, and perhaps even for a case-study in the dynamics of law-reform. Reaction to the Morgentaler episode is neither uniform nor complete, but when the social history of modern times comes to be written, the name of Dr. Henry Morgentaler may appear as the name not just of a person or of a judgment, but of a development in social attitude. It may identify the moment when a woman’s obligation to continue an unwanted pregnancy ceased to be merely her misfortune, and became recognized as an injustice.1 Judicial and legislative accommodation to this development is, however, still awaited; at present, it is expressed only by juries.

The continuing saga of Dr. Morgentaler has appeared regularly on Canadian newspaper front-pages, and we know it well; so well, indeed, that for the purposes of analysis in legal principle we need to defamiliarize ourselves and

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The author is indebted to Mr. D. A. Rhydwen, Chief Librarian of the Toronto Globe and Mail, for granting access to the newspaper’s files.

1 On the social effects of normative reclassification from misfortune to injustice, see, R. H. Turner, The Theme of Contemporary Social Movements (1969), 20 Brit. J. Sociol. 390.
return to the original legal materials. In particular, we must consult the language of the judgments given in the Supreme Court of Canada by the concurring Justices Pigeon and Dickson, and by the dissenting Chief Justice Laskin. The implications of these judgments, and of the several earlier decisions that were the procedural roots of the judicial plant that flowered in Ottawa in March of 1975, are, however, worthy of more than lawyers' attention, since they involve more than lawyers' interests. To set the scene, it is desirable to tabulate in sequence the elements of the case. This may defy attempts at objectivity, since the underlying abortion issues are those about which individuals nurture as many feelings as thoughts, and the presentation of elements must to a degree be subjective. Nevertheless, certain events appear on record, and a presentation of legally significant components of the Morgentaler story can be based upon them.

B. SEQUENCE

The commencement of the Morgentaler case will be taken here as the first jury trial; events leading up to this will be described as occurring at the pre-trial stage, even though involving numerous judicial proceedings. Similarly, events after the Supreme Court’s 1975 decision will be described as the aftermath, even though they include a subsequent jury trial and appeal, and re-trial of the original indictment.

1. **Pre-Trial**

   i) Dr. Henry Morgentaler, Vice-President of the Humanist Fellowship of Montreal, enters the public arena on the abortion issue by submitting a brief to the House of Commons Health and Welfare Committee, directed to elimination of “the illegal abortion racket.”

   ii) Dr. Morgentaler establishes a Montreal clinic to apply the vacuum aspiration technique of abortion, 1968.

   iii) Dr. Morgentaler, President of the Humanist Association of Canada, asks Parliament that the proposed amendment to the *Criminal Code* include total repeal of the abortion law.

   iv) Dr. Morgentaler seeks a meeting with the federal Minister of Justice on the abortion law.

   v) Decision to charge Dr. Morgentaler on counts of conspiracy to commit abortion and procuring abortion.

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2 This sequence aims to be in logical rather than strictly chronological order. When an event was reported the following day in the *Globe and Mail*, the date of the event will be given followed by an asterisk, e.g., August 15, 1973.*

3 *Globe and Mail*, October 20, 1967.


7 *Criminal Code* R.S.C. 1970, c. C-34, s. 423(1)(d). All references in this article will be to the current edition of the Code (hereafter referred to as Code), even though events at the time fell under the *Criminal Code*, 1943-54 (Can.) c. 51.

8 Code, s. 251(1): s. 251 is the abortion section of the *Criminal Code*, although it describes the offence as procuring miscarriage.
vi) Search warrant executed on Dr. Morgentaler’s premises, with seizure of documents and other effects, moneys, instruments and literature.

vii) Dr. Morgentaler arrested, June 4, 1970.9

viii) Arraignment and release on $2,000 bail, June 6, 1970.

ix) Counsel representing Dr. Morgentaler at arraignment called as witness for the prosecution, June 10, 1970.10

x) Preliminary inquiry before Fauteux, J., Sess., June 12, 1970:
   a) prosecution granted request for in camera hearing;11
   b) defence request for postponement on grounds of unavailability of alternative defence counsel12 denied, but defence allowed half-day adjournment, then extended over the week-end;
   c) subpoena served on defence counsel cancelled.


xii) Defence application to Quebec Court of Queen’s Bench for writs of prohibition and certiorari to quash the order June 16, 1970.14


xiv) Desaulniers, J., on July 20, 1970:
   a) transmits the application to the Superior Court for further investigation;
   b) grants certiorari since Fauteux, J., Sess., misconducted June 15, 1970 hearing (complaint of “continual interruptions” during testimony);
   c) orders Fauteux, J., Sess., to suspend further proceedings.

xv) Applications made before Shorteno, J., Quebec Court of Queen’s Bench, September 25, 1970:
   a) that the writ of certiorari be declared final and binding;
   b) that judgment be quashed and annulled;
   c) that nothing be done in furtherance of the said judgment, nor of the preliminary inquiry into the charges;
   d) That s. 465 (1) (j) of the Criminal Code be declared ultra vires null, void and inoperative inasmuch as it contravenes the British North America Act 1867;
   e) that s. 465(1) (j) be declared inoperative inasmuch as it abrogates,

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11 Under the Code, ss. 442, 465(1) (j); see, Id. at 196.

12 For circumstances, see, Id. at 194-95.

13 Id. at 189. The judge in these proceedings did not commit Dr. Morgentaler to stand trial.

14 Under the Ontario Criminal Appeal Rules, the procedure for certiorari is called a motion to quash; see Ontario Annual Practice 1975, 608-09.
abridges and infringes the right to a fair and public hearing as provided by the Canadian Bill of Rights.\textsuperscript{15}

xvi) Judgment, October 30, 1970:\textsuperscript{16}
   a) dismissing applications;\textsuperscript{17}
   b) discharging the writ of certiorari;
   c) finding apparent illegality by improper use of search warrant, enabling those executing it to go on a "fishing expedition", seizing everything they thought "was good for the case", without regard to relevance to the charge under which the search warrant was obtained;\textsuperscript{18}
   d) finding the postponement refused "should have been granted in fairness to the accused and to his counsel."\textsuperscript{19}

xvii) Appeal to Quebec Court of Appeal against dismissal and discharge dismissed, October 25, 1971.\textsuperscript{20}

xviii) Papers filed with Supreme Court of Canada for leave to appeal decision, November 25, 1971.

xix) Supreme Court refused leave, January 25, 1972.\textsuperscript{21}

xx) Dr. Morgentaler continues to practise abortion, claiming at later trial to have performed between 6,000 and 7,000 procedures "during the past few years."\textsuperscript{22}

2. \textit{Jury Trial}

i) Seventeen police\textsuperscript{23} enter Dr. Morgentaler's clinic during his sixth abortion operation of the morning of August 15, 1973*. Arrest of Dr. Morgentaler, eleven patients, three nurses and a receptionist, and removal of equipment (three vacuum suction apparatuses).\textsuperscript{24}

ii) Dr. Morgentaler arraigned and returned to jail pending bail hearing, August 16, 1973*.

iii) Cousineau, J., grants bail August 19, 1973*, on conditions that Dr. Morgentaler:

   a) respects the law;
   b) remains in Montreal;
   c) does not contact prosecution witnesses;

\begin{itemize}
\item \textsuperscript{16} R.S.C. 1970, Appendix III.
\item \textsuperscript{17} Supra, note 10.
\item \textsuperscript{18} Certiorari was held at best premature, since the judge had not yet decided whether or not to commit for trial; supra, note 13.
\item \textsuperscript{19} Id. at 195.
\item \textsuperscript{22} Globe and Mail, November 1, 1973.
\item \textsuperscript{23} Marq de Villiers, Globe and Mail Weekend Magazine, September 14, 1974.
\item \textsuperscript{24} Globe and Mail, June 11, 1975.
\end{itemize}
d) does not comment publicly on charges against him;
e) does not meet with newsmedia reporters; and
f) holds no news conferences.

iv) Indictment preferred by Quebec Attorney General, Jerome Choquette, in person, under s. 507(3), regarding twelve charges of performing an illegal abortion, August 29, 1973.25

v) Rothman, J., in the Quebec Court of Queen’s Bench rejects an application for certiorari to quash the indictment, September 21, 1973.26

vi) Supreme Court of Canada refuses leave to appeal against decision of Rothman, J., October 2, 1973.27

vii) Upon arraignment on six charges before Hugessen, A.C.J., Quebec Court of Queen’s Bench, October 3, 1973,28 accused moves to quash the indictment on the grounds that:

a) s. 251 is unconstitutional and ultra vires the Parliament of Canada since it concerns health matters, which are reserved to provincial legislation;29

b) s. 251 is inoperative under and repugnant to the Bill of Rights;

c) use of the preferred indictment procedure was improper, denying the accused the right to a preliminary inquiry.

Motions dismissed, jury trial to commence.

viii) First day of trial, October 18, 1973*:

a) All but one of the six charges dropped following Hugessen, A.C.J., granting earlier defence motion;

b) French-speaking jury sworn, eleven men and one woman.


x) Defence motion to reopen defence case at conclusion of prosecution rebuttal. Reopening not allowed, but defence permitted to call witness in counter-rebuttal, November 7, 1973.31

xi) Prosecution motions that evidence for defence based on s. 4532 be

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25 See, generally, 119 Can. H. of C. Debates (July 15, 1975) at 7614, per Paul Dick, M.P.
28 Supra, note 26.
32 Section 45 provides that “every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if:
(a) the operation is performed with reasonable care and skill, and
(b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.”
excluded (October 24, 1973), and that the s. 45 defence not be left with the jury (November 7, 1973) rejected, November 7, 1973.33

xii) Charge to the jury, including directions on:
   a) the defence of necessity (a common law defence, admissible under s. 7(3),34 and
   b) the defence under s. 45, November 12, 1973*.35

xiii) While considering their decision, the jury returned to ask a number of questions, principally regarding the s. 45 defence.36

xiv) After a total of almost ten hours’ deliberation, jury returned verdict acquittal, November 13, 1973*.

3. Pre-Appeal

i) Prosecutor notified intention to appeal on 15 points of law.37

ii) Dr. Morgentaler remained on bail on outstanding charges.

iii) Prosecutor sought:
   a) order to stop Dr. Morgentaler from performing abortions pending outcome of appeal, and
   b) order committing Dr. Morgentaler to jail for breach of bail conditions in addressing public meeting and news media.

Lamb, J., of the Quebec Superior Court, refused orders, November 28, 1973*.

iv) Dr. Morgentaler served with judgment signed in Quebec Superior Court ordering him to pay the provincial government $354,799 in additional tax for the years 1969-72, based on his claim at trial of performing up to 7,000 operations, at an assessed average of $200 each, February 13, 1974*.

v) Based on judgment, provincial tax inspectors seized Dr. Morgentaler’s professional and private documents, diaries and tapes, and closed his bank account.

4. Quebec Court of Appeal

i) Prosecutor appealed from acquittal on grounds of trial judge’s errors of law:38

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33 R. v. Morgentaler (No. 4) (1973), 42 D.L.R. (3d) 444.
34 Section 7(3) provides that “Every rule and principle of the common law that renders any circumstances a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.”
38 The prosecution may appeal against acquittal on indictment on “a question of law alone”; s. 605(1)(a).
a) in not restricting the defendant's means of defence to those set out in s. 251(4);\(^3^9\)

b) in deciding that the s. 45 defence could be invoked;

c) in submitting this means of defence to the jury.

ii) Court holds that:

a) where s. 251 procedure is unavailable, the necessity defence is allowed under s. 7(3), which defence seems co-extensive with the "reasonable surgical operation" defence under s. 45. The defendant must show actual, urgent danger to his patient (per Casey and Rinfret, J.J.A.);

b) s. 45 cannot be invoked to circumvent s. 251; a necessity defence must show impossibility of compliance with s. 251 (per Crête, Bélanger and Dubé, J.J.A.);

c) a properly directed jury would have concluded that Dr. Morgentaler's conduct, in not conforming to s. 251(4), did not meet the tests of necessity allowed by s. 7(3).

iii) Court allows appeal and enters conviction under s. 613(4)(b)(i) with direction to trial judge to pass sentence,\(^4^0\) April 25, 1974.\(^4^1\)

5. Post-Appeal and Sentence

i) Dr. Morgentaler appeals to the Supreme Court of Canada against Court of Appeal judgment,

ii) Trial judge Hugessen, A.C.J., refuses:

a) to pass sentence, doubting his jurisdiction since pending Supreme Court appeal may succeed;

b) to grant prosecution's petition to place Dr. Morgentaler in custody (with other charges pending), because he is eligible for bail pending disposal of Supreme Court appeal. May 2, 1974*.

iii) Quebec Court of Appeal orders:

a) that Hugessen, A.C.J., impose sentence;

b) that Dr. Morgentaler be taken into custody since, having been convicted, he no longer enjoys the presumption of innocence. May 14, 1974*.

iv) Dr. Morgentaler seeks leave to appeal to the Supreme Court against the order.\(^4^2\)

\(^3^9\) Section 251(4) exempts from criminal liability for abortion "a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person . . . if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee" has certified "that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health."

\(^4^0\) R. v. Ashcroft, Toth and King, [1966] 4 C.C.C. 27 held that an appeal court may remit a case to the trial court for sentence.

\(^4^1\) R. v. Morgentaler (No. 5) (1974), 47 D.L.R. (3d) 211.

v) Dr. Morgentaler detained in Montreal’s Parthenais maximum security prison, May 16, 1974*.

vi) Pre-sentence representations opened before Hugessen, A.C.J., May 22, 1974*.

vii) Montgomery, J., of Quebec Court of Appeal, hears bail application, May 22, 1974*.

viii) Bail granted at $25,000, May 26, 1974.43

ix) Dr. Morgentaler announces the end of his clinic’s operations, May 30, 1974*.

x) Supreme Court rejects appeal, orders Dr. Morgentaler return before trial judge for sentence, June 3, 1974*.

xi) Pre-sentence hearings continue, July 11, 1974*.

xii) Sentence announced July 25, 1974*44 that:

a) 18 months’ imprisonment be served;

b) three years’ probation follow release, during which Dr. Morgentaler be precluded from using any means to procure abortion except in an accredited hospital;

c) Dr. Morgentaler remain on $25,000 bail pending Supreme Court decision.

xiii) Dr. Morgentaler applies unsuccessfully to Hugessen, A.C.J., for order that revenue authorities return seized property, July 25, 1974*.45

6. Supreme Court of Canada

i) Dr. Morgentaler enters appeal on questions of law as of right under s. 618(2), challenging conviction.

ii) Laskin, C.J.C., allows argument on constitutional points to be submitted at trial by the Canadian Civil Liberties Association, the Foundation for Women in Crisis and the Alliance For Life, September 3, 1974*. Permission extended to L’Association des Médecins du Québec pour le Respect de la Vie, Le Front Commun pour le Respect de la Vie, and La Fondation pour la Vie, September 10, 1974*.46

iii) Dr. Morgentaler appeals on the grounds that:

a) s. 251 is invalid as an encroachment on provincial legislative power regarding hospitals and regulation of the profession and practice of medicine;

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43 Globe and Mail, July 12, 1974.
44 R. v. Morgentaler, Quebec Court of Queen’s Bench (Crown Side) (unreported) No. 01, 8039-73. For judicial observations at sentence, see, Globe and Mail, August 3, 1974.
46 For more details, see, supra, note 23.
b) sections 1(a) and (b) of the Canadian Bill of Rights, derived
from the United States Constitution, import into Canadian law
United States' decisional law giving effect to the United States
Constitution, notably the decisions in Roe v. Wade and Doe v.
Bolton;

c) under section 1(a) of the Bill of Rights, women have a right of
privacy including at least a qualified right to pregnancy termination,
especially in the first trimester;

d) s. 251 infringes section 1(a) of the Bill of Rights regarding pro-
tection of security of the person by due process of law because the
standard in s. 251(4) is so vague, so uncertain and so subjective
among different physicians and therapeutic abortion committees
as to deny due process of law;

e) there is further denial of due process in failure to provide adequate
procedural safeguards in s. 251 whereby an applicant may appear,
with counsel if she wishes, before a therapeutic abortion committee;

f) since there is a right to abortion under certain conditions without
risking criminal penalty, there is a right to a fair hearing thereon
in accordance with the principles of fundamental justice established
by section 2(e) of the Bill of Rights;

g) equality before the law and to the protection of the law under
section 1(b) are denied because s. 251(4), in permitting but not
compelling the establishment of therapeutic abortion committees,
operates unequally in respect of women in rural areas, women in
areas where no such committees have been established and women
whose economic status prevents them going to areas where such
committees exist, and creates inequality because the vague standard
set leads inevitably to varying interpretations and applications;

h) due process under section 1(a) is also denied for absence of review
of therapeutic abortion committees, having regard to grounds d)
and e) supra, and the absence of reasons for their decisions; the
failure to require reasons is itself a denial of due process of law;

i) prevention of a woman from having, and of a physician from per-
forming, a safe abortion by medically proven techniques constitutes
cruel and unusual treatment; and prevention of the physician from,
and his punishment for, performing a consensual operation which

47 Supra, note 15, recognizing "without discrimination by reason of race, national
origin, colour, religion or sex . . . (a) the right of the individual to life, liberty, security
of the person and enjoyment of property, and the right not to be deprived thereof except
by due process of law; (b) the right of the individual to equality before the law and the
protection of the law."

48 (1973), 410 U.S. 113 (U.S. Sup. Ct.).

49 (1973), 410 U.S. 179 (U.S. Sup. Ct.).

50 Supra, note 39: "would or would be likely to endanger her life or health".

51 For early and instructive evidence of how Canadian committees operate, see, K.
D. Smith and H. S. Wineberg, A Survey of Therapeutic Abortion Committees (1970),
12 Crim. L.Q. 279.
is, in his judgment, in the best interests of his patient, is cruel and unusual punishment;

j) even if the Bill of Rights is merely an aid to interpretation, it supports resort to s. 45 as a defence to a charge under s. 251 (submitted by counsel for the Foundation for Women in Crisis);

k) since the prosecution was initiated by a preferred indictment, the Attorney General of Quebec was under a duty to act judicially, and had not so acted;

l) s. 507(3), permitting preferred indictments, is in conflict with section 1(b) of the Bill of Rights as being a denial of equality before the law and of the protection of the law;

m) operations performed by Dr. Morgentaler fall outside the intendment of s. 251, which is confined to procuring miscarriage;

n) the Quebec Court of Appeal was incorrect in rejecting the reasoning of the trial judge to admit the s.45 defence;

o) the Quebec Court of Appeal was incorrect in finding no evidentiary basis for a necessity defence under s. 7(3);\(^52\)

p) it was for the jury to say whether the circumstances of the abortion constituted an emergency giving rise to a necessity such that s. 251(4) could not be employed;

q) the Quebec Court of Appeal cannot substitute a conviction for a jury's acquittal, or, if it can, it was not appropriate to do so in this case.

iv) Laskin, C.J.C., for the court, dismissed the appeal on the constitutional and constructional grounds, (a-m), March 26, 1975.\(^53\)

v) Laskin, C.J.C., Judson and Spence, JJ., concurring, dissented from the majority of the court, holding that the acquittal be restored, since:

   a) section 45 is not inapplicable under s. 251;
   b) in this case, there was evidence for the jury to consider which could satisfy the objective requirement of s. 45; the trial judge therefore properly left the matter with them;
   c) there was evidence fit to go to the jury upon the common law defence of necessity;\(^54\)
   d) it was for the jury to say whether the emergency made it impossible to observe s. 251(4).

vi) The majority of the court (Martland, Ritchie, Pigeon, Dickson, Beetz and de Grandpré, JJ.) dismissed the appeal and upheld conviction on the grounds that:

   a) s. 45 cannot in law apply so as to relieve criminal liability under s. 251;

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\(^52\) It may be questioned whether this is really a question of law, but see, the "no evidence" rule, infra, note 148.

\(^53\) (1975), 53 D.L.R. (3d) 161.

\(^54\) Notably evidence of the threat of the woman's self-induced or "backstreet" abortion, or suicide; see, infra, note 172.
b) while the necessity defence is preserved in principle, there was in this case a total absence of evidence of the urgent necessity which may, very exceptionally, justify a violation of the criminal law;

c) in the total absence of such evidence, the trial judge should have refrained from putting the necessity defence to the jury;

d) s. 613(4) (b) (i) specifically empowered the appeal court, upon allowing the prosecution’s appeal, to enter a verdict of guilty;

e) since the s. 251(4) defence was not advanced, the s. 45 defence was not available, and the s. 7(3) necessity defence was supported by no evidence, these defences to the evidence of guilt could not prevail; the only conclusion is that the accused is guilty.

7. **Imprisonment (and release)**

i) Dr. Morgentaler enters Bordeaux Jail, Quebec, March 27, 1975.\(^{56}\)

ii) Removal at own request to minimum security Waterloo Rehabilitation Centre.\(^{56}\)

iii) Dr. Morgentaler alleges instance of denial of medicine for his heart condition, in letter dated June 8, 1975, smuggled from prison.\(^{57}\)

iv) Dr. Morgentaler involved in altercation with guards, and placed in solitary confinement, June 12, 1975.\(^{58}\)

v) Removal to Shefford General Hospital intensive care ward following suspected heart attack, June 16, 1975.\(^{59}\).

vi) Removal to the University Medical Centre, Sherbrooke.\(^{59}\)

vii) Application for parole after third of sentence served, as of September, 1975.\(^{59}\)

viii) Removal to Town of Mount Royal prison convalescent home.

ix) National Parole Board of five members turns down parole, September 8, 1975,\(^{59}\), due to prisoner’s behaviour in prison, other charges pending, and “a whole series of factors”.

x) Request to Board to reconsider September 8, 1975 rejection of application, January 12, 1976.\(^{59}\).

xi) Release on unconditional bail pending re-trial, January 26, 1976.\(^{59}\).

xii) Quebec Court of Appeal finds Superior Court lacked bail jurisdiction and grants bail itself in the sum of $500, but on conditions that Dr. Morgentaler not perform abortions except in accredited hospitals, and not speak publicly about the re-trial or about Canadian abortion laws, February 17, 1976.\(^{60}\)

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\(^{55}\) *Globe and Mail*, March 31, 1975.

\(^{56}\) *Globe and Mail*, May 17, 1975.

\(^{57}\) *Globe and Mail*, June 18, 1975.

\(^{58}\) *Globe and Mail*, June 17, 1975.

\(^{59}\) *Globe and Mail*, June 19, 1975.

\(^{60}\) *Globe and Mail*, June 20, 1975.
8. **The Aftermath**

a) **Procedural**

i) Quebec Attorney General Jerome Choquette denies intent to prosecute further charges against Dr. Morgentaler, stating “I'll leave him alone for now. I have no intention of going after him. I don't want to humiliate him any more.” April 20, 1975*.

ii) Quebec Attorney General personally signs preferred indictment bringing Dr. Morgentaler to court to fix date for hearing of further charges, May 5, 1975*.

iii) Bisson, J., of the Quebec Superior Court, rejects prosecution request that five abortion charges be tried together, ordering one to be chosen to be pursued, May 26, 1975*.

iv) Dr. Morgentaler arraigned before Quebec Court of Queen's Bench upon the charge that on August 15, 1973 he performed an illegal abortion, May 29, 1975*.

a) French-speaking jury sworn, seven men, five women.

b) Defence argues only necessity under s. 7(3), alleging medical necessity, urgency, and that s. 251(4) operation exceptionally difficult to obtain in Montreal.61

v) Bisson, J., directs the jury that the “defence of necessity . . . is not available to the accused in this case,” June 9, 1975*.

vi) After 55 minutes’ deliberation, the jury returns a verdict of acquittal, June 9, 1975*.

vii) Prosecution

a) appeals to Quebec Court of Appeal against acquittal;

b) lays ten other charges (nine regarding August 15, 1973, one regarding an incident in 1970) by four preferred indictments signed in person by the Quebec Attorney General, June 10, 1975*.62

viii) Prosecution granted postponement of trial of the ten charges, pending Quebec Court of Appeal decision, January 5, 1976.63

ix) Prosecution appeals on grounds of the trial judge’s errors of law in:

a) not ordering a mistrial when the defence lawyer appeared on television and alleged persecution of his courageous client;

b) ordering the prosecution to proceed on only one charge instead of five;

c) not ordering the jury to find Dr. Morgentaler guilty because he had admitted his guilt;

d) allowing defence counsel twice to mention indirectly that his client faced life imprisonment on the charge;

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e) allowing the defendant to use the defence of necessity.\textsuperscript{64}

x) Quebec Court of Appeal dismisses appeal and upholds jury verdict, January 20, 1976\textsuperscript{*}, finding:
   a) evidence of necessity,
   b) error to detriment of the defence in Bisson, J., directing the jury that the necessity defence was unavailable,
   c) the discretion to order trial on one charge only was properly exercised.

xi) Federal Minister of Justice, Ronald Basford, sets aside conviction on the original indictment, and orders re-trial, January 22, 1976\textsuperscript{*}.\textsuperscript{65}

xii) Prosecution states intention to appeal to Supreme Court of Canada against Quebec Court of Appeal upholding jury acquittal, February 9, 1976\textsuperscript{*}.

xiii) Supreme Court of Canada refuses to allow prosecution leave to appeal, March 15, 1976\textsuperscript{*}.

xiv) On re-trial of original indictment, jury acquits, September 18, 1976.\textsuperscript{\textstar}

xv) Dr. Morgentaler ordered to appear on November 2, 1976 to face up to eight further charges, September 18, 1976.\textsuperscript{\textstar}

b) Legislative

i) Federal Minister of Justice, Otto Lang, proposes legislative amendment of s. 613(4)(b) to prevent jury acquittal again being reversed on appeal, July 3, 1975.\textsuperscript{66}

ii) Bill C-71, Omnibus bill to amend the \textit{Criminal Code}, introduced July 17, 1975. Clause 75 proposes to amend s. 613(4)(b) by allowing a Court of Appeal
   i) to order a new trial or
   ii) enter a verdict of guilty, except where the verdict successfully appealed is that of a judge and jury.

c) Administrative

i) Quebec Justice Department undertakes to have jury system reviewed by the civil law revision board in the light of trials going against the judges’ instructions.\textsuperscript{67}

ii) Federal Minister of Justice appoints three-member departmental committee, the Committee on the Operation of the Abortion Law, under Professor Robin Badgley\textsuperscript{68} to report, in June, 1976, on the operation and long-term implications of the abortion law as reconstituted in

\textsuperscript{64} \textit{Globe and Mail}, January 21, 1976.

\textsuperscript{65} \textit{Code}, s. 617(a). The date of re-trial was subsequently set for June 21, 1976, but then adjourned to September, 1976, due to the pregnancy of the principal prosecution witness, and judicial unwillingness to employ transcript of the trial, September 8, 1976.

\textsuperscript{66} 119 Can. H. of C. Debates (July 3, 1975) at 7232.

\textsuperscript{67} \textit{Globe and Mail}, June 11, 1975.

\textsuperscript{68} University of Toronto sociologist and behavioural scientist.
1969, to see if the law "is operating equitably across Canada," September 26, 1975.60


   d) Professional

   i) 116 doctors in Quebec sign statement that they performed abortions or helped females obtain abortions, outside s. 251(4), May, 1975.70

   ii) Total of signing doctors rises to over 200. Police in Quebec undertake to visit all the doctors, July 30, 1975*.

   iii) Quebec College of Medicine disciplinary committee takes proceedings against Dr. Morgentaler forlicence revocation for violating medical ethics, November 13, 1975*.

   iv) College orders licence suspension for 12 months and that Dr. Morgentaler be required to undergo a refresher course before resuming practice, because of his prior over-specialization.71

C. PROCEDURAL ISSUES

1. Generally

   The Morgentaler case reveals such a wealth of legally significant issues, great and small, that the isolation of only certain of them may fail to do justice to the case as an instrument for the observation of critical points throughout the operation of the criminal process. There is a sense, for instance, in which the initial decision to charge Dr. Morgentaler, reached by the Quebec Minister of Justice and Attorney General, was a political product of Dr. Morgentaler's own public challenge to the law. In contesting the apparent meaning of the terms of the law under conscientious compulsions, he adopted a political posture, and conditioned a political response. Indeed, had he remained uncharged, not just his doctrinal opponents would have considered the Quebec law-enforcement administration remiss or timorous in its duty. Had the dissenting opinion of Laskin, C.J.C., in the Supreme Court prevailed, the Minister would have incurred little adverse criticism for having taken up the gauntlet that Dr. Morgentaler consciously and constantly threw down.

   The case was not prosecuted, however, as a routine proceeding. Public comment by the Quebec Minister of Justice and Attorney General, Jerome Choquette, suggested that he considered the case a crusade, with no requirement that grace or magnanimity be offered, and adherents to Dr. Morgentaler's

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71 Globe and Mail, January 23, 1976. The proceedings were compelled by the requirement to investigate an instance of a physician being convicted in legal proceedings. In 1970, the Canadian Medical Association deleted reference to abortion from its Code of Ethics. The Code provides that "An Ethical Physician ... when his personal morality prevents him from recommending some form of therapy which might benefit his patient will so acquaint the patient."
cause responded by complaining of his persecution. The federal Minister of Justice and Attorney General, Otto Lang, through his parliamentary and media responses failed to remove the impression that his private convictions on the case coloured his public attitude. His initial refusal to see any threat to the historic jury system in the Court of Appeal’s power to impose conviction reversing jury acquittal, and his later concession that s. 613(4) (b) of the Criminal Code permitting such reversal should be amended, gave further weight to belief of his partiality.

In so far as his approach was personally adverse to Dr. Morgentaler’s conduct, however, he found support in the courts, and a constituency in the country at large, where the faction characterizing the Montreal physician as a martyr was countered by a faction seeing him as tantamount to a child-killer. Indeed, the entire sequence of trial events was acted out against a backdrop of factional lobbying, which took over the stage itself when the Supreme Court admitted non-parties’ representations on constitutional issues. The lobbying persists, and comment on the case and its implications is prone to be seen in partisan terms. There are certain elements contained within the events that can be isolated and considered in both principle and detail, however, notwithstanding that interpretation of their relation to the case as a whole depends on attitudes not objective in their nature.

More peripheral issues within the sequence of events in the Morgentaler case need not be relegated to a position of secondary legal significance. The defendant’s case sounded stirring and even heroic central themes, such as the Bill of Rights’ promise of equal and open justice, and the British North America Act’s safeguarding of provincial rights over health care. No less important, however, are constitutional considerations of free-speech first raised by the August 1973 bail conditions requiring that Dr. Morgentaler refrain from public comment on abortion law and decline to meet reporters from the mass media. This restraint was possibly justifiable in terms of preserving the integrity of jury trial against artificially stimulated publicity, although it may be doubted that contempt of court provisions require this reinforcement. Further, the conditions appear somewhat ironic in their presupposition that the jury’s verdict would be decisive, and oppressive in their obstruction of public access to information from Dr. Morgentaler, who held office as President of the Humanist Association of Canada. This gagging order’s potential for oppressive employment was advertised in the prosecution’s application of November 28, 1973 for Dr. Morgentaler’s imprisonment for its breach, pending the prosecutor’s appeal after the first jury acquittal; rejection of this application spared it the exposure that it was sufficiently objectionable to warrant. Outrage was more widely expressed against the Quebec Court of
Appeal's imposition of a similar restraint on freedom of speech in its bail conditions of February 17, 1976, pending re-trial on the initial charge.

Similarly, the case highlights the autocratic powers of the National Parole Board. The Board rejected Dr. Morgentaler's parole application upon loosely presented grounds, including his behaviour as a prisoner, when his treatment by prison officers, which would clearly interact with his behaviour and its official assessment, remained a matter of considerable controversy. Parliamentary calls for an inquiry into the circumstances of treatment and conduct, which would concern most publicly constituted bodies, evoked no apparent response of caution from the Board. Their determination to treat Dr. Morgentaler as any other prisoner was contradicted, however, by his case being considered not by two Board members, as is usual, but by five. Further, the contributory reason for refusing parole, that further charges were pending, raises in principle the question of whether this justifies the detention of an individual who was granted bail when the same charges were pending prior to a conviction, and shows the prosecutor's extra-judicial influence over a prisoner by merely formally commencing further proceedings.

An interesting procedural aspect of the Supreme Court appeal was the admission of non-parties to urge their contentions not on the merits of Dr. Morgentaler's conduct, but on constitutional points advanced at earlier proceedings. The Court's willingness to receive contentions by written brief and oral advocacy from non-parties was seen by some commentators as an innovation in criminal proceedings. In fact, the Supreme Court had allowed a non-party to intervene in 1963, but the initiative taken on a large scale

Footnotes:
78 Which they did not give to the applicant, nor to his lawyer; the Board let the applicant hear their decision on his future through the newsmedia following a press release, The Globe and Mail, January 7, 1976.
79 119 Can. H. of C. Debates (June 18, 1975) at 6871, per Robert Stanfield, M.P.
80 Laskin, C.J.C., in Mitchell v. The Queen, [1975] 24 C.C.C. (2d) 241 at 245, finding that "The plain fact is that the [National Parole] Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string." It seems indefensible to delay a remedy to this position, but the proposed Criminal Law Amendment Act (No. 1), 1976 is designed to provide that "Some procedural safeguards will be introduced . . . to ensure that the process by which the Board reaches its decisions will meet the expectations of natural justice. These will include assistance to the applicant, further information to the applicant and stated reasons for refusal of parole. These will be defined in regulations and will be phased in over a period of several years." (The Highlights of the Peace and Security Program, Dept. of Justice, Ottawa, 1976) at 7.
81 That is, other than a provincial or the federal Attorney General.
82 Submission was not confined to those permitted to address the court orally. Professor Cyril C. Means, Jr. of New York Law School submitted a lengthy brief for applicability of the s. 45 defence on historical grounds. This may have influenced Laskin, C.J.C., but Pigeon, J., found it "unnecessary to consider the elaborate material with which we were provided respecting the origins of s. 45"; 53 D.L.R. (3d) 195.
83 In civil proceedings, non-party representation before the Supreme Court of Canada was innovated in Attorney General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481, when a wide range of Indians' and women's organizations was permitted to intervene.
84 In Robertson and Rosetanni v. The Queen (1963), 41 D.L.R. (2d) 485, the Lord's Day Alliance of Canada was allowed to intervene.
in September 1974 may be welcomed for recognizing that the public at large has an interest in the outcome of particular criminal litigation.

Laskin, C.J.C., was first appointed to the Bench (the Ontario Court of Appeal) in 1965, the year in which the United States Supreme Court decided the seminal case of Griswold v. Connecticut with the assistance of arguments proposed by non-parties. He has noted that the United States Supreme Court is “dealing in the main with constitutional issues, which take it into the very heart of American political, social and economic organization,” and that “what influences the style is the greater hospitality that is shown by that Court to extrinsic materials than is the case in either the Supreme Court of Canada or the House of Lords.” The Chief Justice has expressed admiration of the United States Supreme Court’s willingness to recognize that “society may be brought into the court-room in the issues that are shaped for legal determination,” and has affirmed “I do not shrink from describing a court in the Anglo-American-Canadian tradition as a unit of government.” The Canadian Supreme Court’s discomfort with its quasi-legislative boldness in R. v. Drybones, and its subsequent refusal to build upon, or even to follow, this precedent on the Bill of Rights, suggests that a majority of its members does shrink from such description. A political scientist has recently observed that “Most of the judges [of the Supreme Court of Canada], to put it mildly, do not seem anxious to assume the strong political role entailed in enforcing the standards of a comprehensive Bill of Rights on the popular branch of government.” Chief Justice Laskin’s vision of the Supreme Court’s creative social role illuminates the potential of which the court fell short in the Morgentaler case by taking an excessively narrow view of the issues raised, the relevant law, and the role of the jury in determining the case.

2. The Post-conviction Charges

Viewing the Morgentaler affair in more detail and in retrospect, one may query the procedural aspects of its aftermath, notably the bringing of a post-conviction charge, and of ten additional charges after the second jury’s acquittal. It may be asked what purpose these were intended to serve in terms of law-enforcement and penal policy.

The Supreme Court dismissed Dr. Morgentaler’s appeal on March 26, 1975, and he entered prison the next day, but the Quebec Attorney General

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85 Although some fringe groups opposed the Supreme Court’s decision to admit non-parties to contest constitutional points. The Canadian School Trustees Association, for instance, urged the Justice Minister to impress upon the Court that it is not a policy-making body.

86 381 U.S. 479. The right of privacy recognized in Griswold was the basis of the U.S. Supreme Court’s landmark decisions in the 1973 abortion cases of Roe v. Wade and Doe v. Bolton, supra, notes 48 and 49.

87 Bora Laskin, The Institutional Character of the Judge, Lionel Cohen Lecture (Hebrew University of Jerusalem) 17th series (1972) 10.

88 Id. at 15.

89 Id. at 6.


apparently remained unsatisfied that the criminal justice system had exorcised the Morgentaler evil, and was not disposed to discontinue outstanding charges. At least in part, the sentence imposed on July 25, 1974 may have seemed insufficient, since the Crown Attorney had argued at sentencing that “jurisprudence weighed heavily in favour of a long sentence”; appealing for a longer sentence may have appeared incompatible, however, with bringing further charges. The prosecution was clearly aiming at punishment rather than public protection against Dr. Morgentaler's activities, which in any event had ceased almost a year earlier (on May 30, 1974) under other pressures, including those of revenue enquiries. The sentence of eighteen months' imprisonment was to be followed by a three year post-release period during which Dr. Morgentaler could perform abortions only within an approved institution; such a provision could have been attached to a probation order upon suspended sentence, and shows that restraint by incarceration was not necessary to protect the public. Indeed, the sentencing judge found that Dr. Morgentaler “represented virtually no risk to the life and health of his patients.”

Similarly, rehabilitation could not have been the foremost motive of further proceedings because the sentencing judge must have assessed the influence of this factor in determining sentence, since he could impose up to life imprisonment. A further concurrent sentence of up to eighteen months' imprisonment would add little to the point already made to the prisoner, and a longer sentence on the same type of charge arising from closely parallel circumstances would be unlikely. In assessing sentence, moreover, Hugesson, A.C.J., adverted unfavourably to Dr. Morgentaler's lack of good faith in evading the legal contest he had so publicly sought by recourse to procedural devices to frustrate the 1970 proceedings. This component of sentence could not be an element of a later sentence as well. A consecutive sentence of eighteen months or less may have been envisaged by the prosecution; such form of sentence would show the accused to be at the mercy of the Quebec law-enforcement personnel, who could progressively seek his cumulative punishment until public or other pressure brought an end to the pursuit.

The deterrence of other physician-offenders from following Dr. Morgentaler may initially have been a motive of the prosecution. Dr. Morgentaler was a highly qualified physician whose methods, published in the Canadian

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92 J. P. Maksymiuk, supra, note 29 at 284.
93 Code, ss. 663 and 664.
94 Supra, note 44 and supra, note 29 at 284.
95 Supra, note 44.
96 By chance, the initial sentence could have been genuinely rehabilitative, since pressure of work may have contributed to aggravation of Dr. Morgentaler's heart condition; his incentive to take rest and convalescence was greater when the alternative was routine imprisonment. It may be doubted that the Quebec Attorney General was so solicitous as to Dr. Morgentaler's health, although after his suspected heart attack in prison, commentators pointed to the consequences in public opinion of Dr. Morgentaler, a survivor of the Auschwitz and Dachau concentration camps, succumbing to the Quebec justice and prison systems.
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Medical Association Journal and featured in a CTV film, are now employed in hospitals across Canada. Many specialists visited his clinic, where the post-operative complication rate of 0.76 per cent showed the treatment and environment to be safer than those of a hospital, and to which two to three hundred physicians in Canada and the United States, including those at hospitals in Montreal, referred patients. Had such deterrence been the objective, however, it may appear not to have succeeded fully, since two hundred Quebec physicians came forward after Dr. Morgentaler's sentence and stated not only their support of his cause but also their association with him and abortions performed under the same inspiration, broadening the challenge to the existing law the Morgentaler prosecution might have been intended to resolve in favour of the status quo. In any event, deterrence of others would not justify further proceedings against Dr. Morgentaler after his conviction and imprisonment.

It may well be that the Quebec Attorney General was genuinely indifferent as to sentence in that the further proceedings were directed to other aspects of the affair. Having conducted a running battle with Dr. Morgentaler since about 1970 and having experienced considerable frustration from his procedural ploys and public provocation, the Attorney General's office may have acquired an institutional dynamic to pursue him as its special bête noire, and be loath to seem to yield to the preferences of his sympathisers at the point where the Law Officer's officials believed they could win. They may have been seeking institutional and personal vindication in obtaining a jury conviction, or, as the richest prize, Dr. Morgentaler's admission of guilt. In any event, they would grow more, rather than less, resolved in the face of jury repudiation, and would immediately hit back, tenfold.

Imputing less than worthy motives to the Quebec prosecuting authorities may seem poor criticism and itself discreditable, yet this is part of the dilemma unavoidably raised by the post-conviction conduct of this case. Indeed, those

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97 Supra, note 4.
98 In May, 1973; see J. P. Maksymiuk, supra, note 29 at 269.
99 See, generally, supra, note 29 at 279-81.
100 Globe and Mail, July 31, 1975.
102 For the capacity of institutions to develop a demonology, see, the $35,000 awarded by Solomon, J., of the Manitoba Court of Queen's Bench, against the Manitoba Vegetable Producers Marketing Board. After a producer unsuccessfully challenged the Board's constitutionality, the Board maliciously harrassed him by bringing three prosecutions (two dismissed, a guilty plea on the third) and two petitions in bankruptcy (one dismissed, one stayed), and by then coercing other companies not to employ members of his family. See, Gershman v. Manitoba Vegetable Producers' Marketing Board, [1976] 2 W.W.R. 432. For a better-known instance of institutional harassment, see, Roncarelli v. Duplessis (1959), 16 D.L.R. (2d) 689.
103 Indeed, the federal Attorney General, Otto Lang, observed in Parliament that, "if a conviction has been registered ... other charges ... are often pleaded guilty to by counsel on behalf of the defence. These are the sort of procedures that one would expect to find"; 119 Can. H. of C. Debates (July 15, 1975) at 7614.
opposing the Humanist philosophy advocated by Henry Morgentaler and expressed in his clinic's operation, would not necessarily regard persistence in pursuit of him as unworthy. Nevertheless, confidence in the Quebec prosecuting authority's detached, quasi-judicial approach\textsuperscript{106} to this case is hard to maintain. Zeal for aggressive pursuit of Dr. Morgentaler, evidenced in public statements by the provincial Justice Minister and Attorney General, and the prosecuting Crown attorney, ran beyond the prosecutor's normal conviction in the merit of his case. One may be driven from the immediate circumstances of this case, which threatened a sequence of ten jury trials after disposal of the second appeal against jury acquittal, and eight trials after a third jury acquittal at re-trial, to consider another important, more general question: the control of oppressive proceedings.

3. \textit{The Control of Oppressive Proceedings}\textsuperscript{106}

Oppression in prosecution may popularly be claimed to arise from two main sources: discrimination, and harassment by repetition. Canadian courts have yet to show their potential to control other than purely procedural impropriety in the instigation of criminal proceedings. This may be attributable to prosecutors' moderation and good sense, but also to the judicial reticence shown by the Supreme Court to take policy decisions open to political criticism.\textsuperscript{107} English courts have been more prepared to impose standards upon prosecutors, however, regarding the discretion both to prosecute and to decline to prosecute;\textsuperscript{108} and courts in the United States are beginning to tackle oppression by discrimination, of which, some allege, Dr. Morgentaler has been the victim.\textsuperscript{109}

While Dr. Morgentaler was clearly the central figure at his clinic, and had taken initiatives to publicize to the profession and to the public his methods and their availability,\textsuperscript{110} he was by no means acting alone in obtaining clients. Other physicians, in and out of hospitals, advised women seeking abortions to consult him, and collaborated in the ways two hundred Quebec doctors subsequently identified. Despite their counselling, aiding, and abetting, however, and the indictable offence against s. 251(2) each of the six or seven

\textsuperscript{106}The (Ouimet) Report of the Canadian Committee on Corrections; Toward Unity: Criminal Justice and Corrections, (Ottawa: Queen's Printer, 1969) at 44 observed, "That the attorney general and the law officers of the Crown have a discretion as to whether a prosecution should be initiated has never been doubted. This discretion must be exercised in a quasi-judicial way in accordance with the requirements of the public interest."

\textsuperscript{107}This treatment is confined to proceedings instigated by the same provincial Attorney General, and does not consider multiple proceedings by a provincial and federal authority, nor by two or more provincial authorities. On these matters, see, Martin L. Friedland, \textit{Double Jeopardy} (Oxford: Clarendon, 1969) and Jeffrey S. Raynes, \textit{Federalism v. Double Jeopardy: A Comparable Analysis of Successive Prosecutions in the U.S., Canada and Australia} (1975), 5 Calif. Western International L.J. 399.


\textsuperscript{109}For instance, 119 Can. H. of C. Debates (April 22, 1975) at 5100 and (May 29, 1975) at 6250, \textit{per} Stuart Leggatt, M.P.

\textsuperscript{110}\textit{Supra}, notes 97 and 98 and accompanying text.
thousand women Dr. Morgentaler claimed to have aborted were at risk of
committing, only he appeared to be charged. This selectivity seems to in-
dicate discrimination. It does not follow, however, that such discrimination
was necessarily unjust discrimination. The women were involved only in an
episode, but Dr. Morgentaler was engaged in a practice. Moreover, he was
also engaged in a “public challenging of the authorities to prosecute him,”
so that the claim that he was victimized by the first charge may not be easily
maintainable.

Nevertheless, the question remains in principle of whether unjust dis-


crimination is committed by a prosecutor against one defendant when many
others have been involved in the conduct for which he alone is charged. Courts
and the legal literature in the United States are coming to recognize that such
selectivity in prosecution, which awards an immunity to those not prosecuted,
can constitute an illegality against the one charged when the basis of selection
is, for instance, racial, political or religious. Acceptance of the argument
that charging one defendant is irregular because others equally liable to be
charged have not been bears the obvious potential of preventing anyone from
being the first to be charged, especially when a member of a majority group
may also complain of suffering relative disadvantage by the favour shown to
minorities to redress their suspected underprivilege. The joint or parallel
prosecution of suitably representative defendants, to forestall the charge of
unjust discrimination, raises problems too complex to consider here. Canadian
courts have no concept of equal justice in this regard, notwithstanding section
1(b) of the Bill of Rights; while they might, in separate proceedings, con-
sider the regularity of not prosecuting suspects not charged, they would
make no concession on grounds of unjust discrimination to the defendant
against whom proceedings have been commenced.

111 In fact, three doctors and a nurse associated with Dr. Morgentaler also faced
charges; see, Globe and Mail, April 30, 1974. His former chief nurse, Johanna Cornax,
was arraigned on a preferred indictment, and a plea of not guilty was entered at her trial
when she refused to plead; see, Globe and Mail, June 15, 1974. The prosecution’s request
for postponement of her trial, pending the Quebec Court of Appeal’s decision on Dr.
Morgentaler’s second jury acquittal, was granted on January 5, 1976; see, Globe and
Mail, January 7, 1976.

112 The English Inter-Departmental Committee on Abortion, 1939, observed that
“in practice, proceedings are rarely instituted against a woman who has had an illegal
abortion . . . the view taken by the police is, we gathered, that the prosecution of the
abortionist, who may have a widespread practice, should be their primary aim, and
since the woman’s evidence is required against him, proceedings against her are not
taken; para. 135, quoted in Bernard M. Dickens, Abortion and the Law (London: Mac-
Gibbon and Kee, 1966) at 86.


114 See, Andrew B. Weissman, The Discriminatory Application of Penal Laws by
State Judicial and Quasi-Judicial Officers (1974), 9 Northwestern Univ. L.R. 489; Mark
L. Amsterdam, The One-Sided Sword: Selective Prosecution in Federal Courts (1974),
6 Rutgers-Camden L.J. 1, and Michael P. Cox, Discretion — A Twentieth-Century
Mutation (1975), 28 Oklahoma L.R. 311.


116 Supra, note 47.

117 As did the English Court of Appeal in R. v. Commissioner of Police of the
Oppression by repetitious charging is more germane to the *Morgentaler* case, since if his seized clinical records are complete, his liability to an eighteen month consecutive sentence of imprisonment for each possible offence would amount to a total detention of well over ten millennia. The House of Lords in 1964 had to consider in principle a court's general discretionary power to quash or stay a second indictment when to try it would be oppressive to the accused. The facts in the case of *Connelly v. Director of Public Prosecutions* differed from those in *Morgentaler* in that the second indictment related to the same incident for his involvement in which the accused had already been convicted of murder; the conviction being quashed on appeal. The first trial judge had ordered an associated robbery charge to remain on the file; following the defendant's successful murder appeal, this charge was revived, the second trial judge then finding that he had no discretion to stay that indictment. Lords Devlin, Pearce and Reid concurred in the majority decision that a trial judge has a discretion to stop a prosecution, but Lords Hodson and Morris of Borth-y-Gest dissented on this point.

Lord Pearce opened his judgment with the proposition that “the court has an inherent power to protect its process from abuse,” but Lord Morris of Borth-y-Gest observed that, while this is so, it does not enable a court to order that a prosecution be dropped “merely because of some rather imprecise regret that an accused should have to face another charge.” The *Morgentaler* case involves the issue not just of “another charge”, but of another charge and another charge and another charge; a point might come when the public becomes outraged at the prosecution's unremitting and merciless pursuit of an individual.

Lord Devlin also noted “the courts’ duty to conduct their proceedings so as to command the respect and confidence of the public.” Lord Morris viewed each charge in isolation rather than as part of a continuing public process of law-enforcement, finding that “there is no abuse of process if to a charge which is properly brought before the court and which is framed in an indictment to which no objection can in any way be taken there is no plea such as that of *autrefois acquit* or *convict* which can successfully be made.” This narrow interpretation of “abuse of process”, relegating it to a legal term of art, was rejected by the majority of the court, who saw abuse as a matter

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119 He added that, if he had a discretion, he would not have exercised it against the prosecution on the particular facts: see, id. at 1339.

120 In *R. v. Riebold*, [1967] 1 W.L.R. 674 this power was invoked to stop a prosecution irrespective of the possibility of the defendant's guilt. In *R. v. Bros.* (1901), 66 J. P. 54 at 55, regarding commencement of proceedings, Lord Alverstone, C.J., stated that “I do not think it can be disputed that justices may, in the exercise of their discretion refuse to issue a summons, even if there was evidence of an offence before them if they considered that the issue of a summons would be a vexatious and improper proceeding.” The Quebec Attorney General overcame such monitoring of his discretion to prosecute, however, in proceeding by his preferred indictment.


122 Id. at 1302.

123 Id. at 1353.

124 Id. at 1304.
of social and judicial evaluation based on all of the surrounding circumstances. Lord Devlin expressed the opinion that “if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and of injustice to defendants.”\textsuperscript{126} It may be proposed that this danger can arise not only in charging different offences on the same facts, but also in charging the same offence on different facts. The countering argument that the judge can accommodate the defendant’s history of prosecution in his sentence, giving a concurrent or suspended sentence for later charges, disregards the defendant’s emotional and financial expenses of the trial process itself.

The House of Lords in \textit{Connelly} failed to draw a necessary distinction between a court’s power to prevent abuse, and the identification of abuse itself. It may appear in principle that a court need not passively submit to an abuse of its process, but it is difficult to discover whether a judge may find abuse when a procedurally regular prosecution is brought before him. The majority of the House of Lords, applying a social criterion, considered that a court can decline to proceed with a case regular in itself because of its oppressive context.\textsuperscript{126} The minority rejected this idea, however, limiting the identification of abuse to an esoteric procedural irregularity in the particular case, analogous to violation of the double jeopardy principle.

The Canadian disposition to the issue is not clear, but in a powerful passage of a judgment (that may have been \textit{obiter}), in the Supreme Court in 1971, Pigeon, J., aligned himself with the dissenting law lords in \textit{Connelly}. In \textit{R. v. Osborn}, he observed that he could “see no legal basis for holding that criminal remedies are subject to the rule that they are to be refused whenever in its discretion, a Court considers the prosecution oppressive.”\textsuperscript{127} This view, supported by Martland and Judson, JJ., was not accepted by Hall, Ritchie and Spence, JJ., who concurred in the result on the basis of a judgment narrowly confined to the facts of the case, where no irregularity was found, without addressing themselves to the issue in principle; Chief Justice Fauteux made the court unanimous, but gave no reasons at all.

Pigeon, J., was dealing with a case of further charging following acquittal or quashing of a conviction, and with the initial laying of incorrect charges or pursuit of other defective procedures. His comments do not directly apply to the bringing of a succession of further charges following a conviction, at trial or on appeal. Nevertheless, the spirit of his judgment suggests that a defendant cannot look to Canadian courts for protection against oppression by the instigation of proceedings valid in themselves.

This spirit is disappointingly consistent with the Supreme Court’s tolerance of unfairness in law-enforcement and prosecutorial procedure, re-

\textsuperscript{126} \textit{Id}. at 1353.
\textsuperscript{127} Finding support, perhaps, in the observation of Lord Alverstone, C.J., in \textit{R. v. Bros.}}, \textit{supra}, note 120.
\textsuperscript{127} \textit{[1971]} 1 C.C.C. (2d) 482 at 491.
revealed particularly in *R. v. Wray*.[128] The Court's restrictive approach to this issue, focussing on non-compliance with narrow legalities as the exclusive source of irregularity, and disregarding the oppression perceptible from only some little distance removed from the legal interstices of the case, risks discrediting the administration of justice. Members of the public are increasingly coming to see justice as a social concept which they can identify in operation and whose presence they can evaluate. They do not adopt the lawyer's vision of “justice according to law.” They turn to lawyers to distinguish legality from illegality, but know for themselves the distinction between justice and injustice, using their sense of justice to judge the law and its operation. The legal admissibility of illegally obtained evidence, permitted in *Wray*, gives licence to the police to ignore and violate the law on the accused’s rights, confident that their illegality will be of no account if the accused is shown guilty. A prosecuting authority may be equally confident that the accused's conviction in oppressively brought proceedings affords the authority public exoneration. The search for truth is, of course, important, but Arthur Maloney, Q.C., the Ontario Ombudsman, has recently pointed out, especially regarding the *Wray* case, that the search for truth may cost too much of the freedoms our society prizes.[129] A guilty suspect may have to go free, not that an innocent suspect shall not be convicted, but that society itself shall preserve its optimum freedom from unfairness and oppression.

An indication that the courts can and will resist oppressive prosecutions exists, however, in *R. v. Thorpe*. In that case, an Ontario County Court stayed proceedings the Crown had delayed for three years, on the ground that their dilatory presentation put both the complainant and the accused at disadvantage, for instance, in the defendant organizing his evidence. This principle may be relevant to the *Morgentaler* case, in that a parliamentary protest has already been made against the Quebec Attorney General taking up charges in June, 1975 regarding alleged offences committed in mid-August, 1973 and possibly earlier, when the evidence was available to the prosecution throughout the intervening time; in January, 1976 the prosecution obtained permission to postpone the trial further.[132]

The problem raised by the proposal that correct practice is to prosecute all charges in the same indictment (if none is for murder), faces the countervailing concept of oppression by multiple charging. It must be noted that Hugessen, A.C.J., granted the defence motion at first trial requiring the prosecution to select only one of six charges to pursue, and that Bisson, J., declined to allow five charges to be tried together at Dr. Morgentaler's second

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[128] See, [1970] 4 C.C.C. 1, and (1973), 10 C.C.C. (2d) 215. For a fascinating insight into the human dynamics of this case, see, Robert J. Carter (defence counsel) in *Criminal Trials: A series of talks given by criminal lawyers analysing their own cases* (Faculty of Law, University of Toronto, 1975) at 40-154.


[131] Supra, note 62.

[132] Supra, note 63.
The undesirability of unnecessarily long indictments has been judicially noted, not only because the jury may become confused in a welter of differentially relevant evidence, but also because the defendant may be harassed; the rock of his innocence on certain counts being eroded by the dripping of evidence of guilt from others. A pressure favouring a long indictment may be the scope this opens up to the Crown Attorney in plea bargaining, but a negative pressure is the fact that, once conviction is secured upon major counts, sentence will probably not be materially increased by additional counts of which the defendant is convicted at the same time. This may provide an answer to the dilemma of prosecuting the multiple offender; once his guilt is shown, each further joint charge adds a decreasing increment to punishment, until an optimum sentence is reached irrespective of guilt on additional charges.

Beyond judicial control of the Crown Attorney's discretion lie administrative and parliamentary or political controls. The Crown Attorney, as an Ontario statute expresses his position, "is the agent of the Minister of Justice and Attorney General for the purposes of the Criminal Code," and is therefore subject to ministerial administrative direction. The minister is answerable to his provincial legislature for the policy and quality of his direction, including use of his discretionary power under s. 508 to stay proceedings he considers should not have been brought or continued. Parliamentary control is likely to confine itself to general matters rather than extend to day-to-day decisions, but Parliament would not be precluded by the sub judice prohibition from questioning and even censuring the minister regarding a particular decided case or a potential case.

Law-enforcement is primarily a provincial matter, and the federal government may be very reluctant to seem to be overbearing in the context of any particular case. There is a general federal governmental responsibility for Criminal Code matters, however, and the Minister of Justice, in his capacity as federal Attorney General, may be prepared to address a provincial Law Officer on its enforcement. Discussing the second Morgentaler acquittal in Parliament, when the Justice Minister was asked by Edward Broadbent, M.P. "Will the minister approach the Quebec Minister of Justice and urge him not to appeal yesterday's decision . . .?" he replied, "I think it would be rather unusual for me to volunteer to give advice to the provincial Attorney General. It is really within his jurisdiction to institute and continue proceedings to the point where he feels it is satisfactory." When the issue was raised again, however, the day after the Quebec prosecutor appealed and laid ten further charges, the federal Justice Minister said:

The other day some honourable members wondered whether I am sometimes

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134 The Crown Attorneys Act, R.S.O. 1970, c. 101, s. 11.
136 For the concurrent or residual prosecuting powers of the federal Attorney General, see, R. v. Pelletier (1975), 28 C.R.N.S. 129, especially at 140.
137 119 Can. H. of C. Debates (June 10, 1975) at 6397.
reluctant to comment to the Attorneys General about the way in which they carry on their functions. I may very well wish to do so or feel obliged to do so, if I feel that in any way they are interfering with the application of the law or departing from the very important traditions of Attorneys General functioning as officers of the court to apply the law and apply their discretion in that context. I cannot see that kind of departure in this circumstance.\textsuperscript{188}

The federal minister does not have ultimate control, since he has no power to stay provincial Criminal Code proceedings under s. 508, and accordingly he is not answerable to the federal Parliament for failure to regulate the bringing of an oppressive case. Such control as exists can be exercised by a provincial Parliament through its regulation of the provincial Attorney General. This is compatible with the tenor of the judgment of Pigeon, J., in Osborne, placing control in the political rather than judicial arena; control in a particular case is exercisable, however, only by censure \textit{ex post facto}.\textsuperscript{139}

4. Justice, Truth and the Jury

The layperson’s sense of truth and justice, and the respect that should be paid to it, lie close to the centre of the Morgentaler affair. Jury members take an oath to do justice according to law, upon the details of which the judge instructs them, but this may not prevent them in practice from interpreting the facts to do justice, or injustice, despite the law. The jury's potential for injustice is moderated, however, by the judge's power to direct their verdict of acquittal, the prosecutor's discretion to seek judicial leave to offer no evidence or otherwise to discontinue a trial he fears may result in unjust conviction, and, of course, appellate jurisdiction to quash conviction. Unjust acquittal is no less a danger, but the perjured jury that acquits the oppressed defendant has an honourable history in the common law tradition.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{188} Id. at 6646-47 (June 11, 1975).
\item \textsuperscript{139} On the general reluctance of Parliament to intervene in an Attorney General's discretion regarding a potential case, see, Bernard M. Dickens, \textit{The Prosecuting Roles of the Attorney General and the Director of Public Prosecution}, [1974] Public Law 50, and supra, note 112; on the identity of Canadian and English practice, see, Locke, J., in \textit{Boucher v. The Queen} (1955), 110 C.C.C. 263 at 271 (Sup. Ct. Can.).
\item \textsuperscript{140} Blackstone referred to this as “pious perjury”. When statute provided the death penalty for a wide variety of property offences involving more than a small sum, “the common practice of the juries of . . . understating the value of stolen property was largely responsible for the virtual suspension of the operation of many capital statutes”: L. Radzinowiez, \textit{A History of English Criminal Law}, Vol. 1 (London: Stevens & Son, 1948) at 95. See, also, 329-30 for “remarkable instances of ‘pious perjury’ [which] indicated the futility of enacting laws whose severity would occasion the disapproval of public opinion.” Much reform of harsh law, especially involving severe punishment, has been inspired by juries’ refusal to convict; indeed, the call for more moderate maximum penalties often came from more reactionary interests desiring of the acquittal rate under existing harsh laws. Modern instances of greater leniency compelled by juries’ reluctance to convict for severe crimes include the creation of the crimes of infanticide, since juries would not convict the mother of murder or manslaughter, and in England, causing death by dangerous driving (introduced by the \textit{Road Traffic Act 1956}, s. 8), since juries would not find manslaughter. The range of special treatments for young offenders was of this origin, since juries would not condemn such offenders to the severity of adult punishments. The triple refusal of juries to convict Dr. Morgentaler when he faced life imprisonment, for aborting an unmarried student and a grade 12 schoolgirl who sought him out, speaks in historic tones as to the punishment, and perhaps the very existence, of the crime.
\end{itemize}
individual's greater democratic involvement in the legislative process, moreover, has not eliminated the juror's influence to inform government of popular sentiment. This is not to say, of course, that juries will necessarily record sentiment sympathetic to permissive, liberal or advanced thought. Those who praised the good sense of the Morgentaler juries may have been less impressed with the Boston, Massachusetts jury that convicted Dr. Kenneth Edelin of manslaughter following his legal abortion of an advanced fetus.\textsuperscript{141} The sound credentials of the jury's verdict lie not in its liberality or resistance to the state prosecutor's entreaties, but in its capacity publicly to express an authentic opinion of private persons; when the jury is socially representative, it may be the voice of 'the silent majority' of its community.

Even in the present iconoclastic age, juries are still prone to be idealized and analysed in somewhat simplistic terms. Results of such studies, as the 1954 University of Chicago Jury Project,\textsuperscript{142} published in 1966 by Kalven and Zeisel,\textsuperscript{143} have not shaken confidence in the jury system. The Morgentaler case may indeed be the exception that proves the rule, because on this first occasion of a jury acquittal being superseded on appeal by conviction since the possibility was legislated in 1930,\textsuperscript{144} an unsympathetic Minister of Justice was compelled to undertake, only fourteen weeks after the Supreme Court's confirmation, to have the provision amended. While "to authorize a Court of Appeal to enter a verdict of guilty on an appeal from an acquittal by jury verdict is a major departure from the traditional principles of English criminal law,"\textsuperscript{145} however, the sanctity attached to the jury's acquittal is completely absent from a conviction; appellate reversal of a jury conviction, without order of a new trial, is a common feature of the criminal justice system.

This favour shown to the defendant was explained (with a cultural restriction not really justified because of his audience), by Lord Devlin in giving the 1957 \textit{Sherrill Lectures at Yale Law School} when he said that:

[When a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted. Each is a deviation on one side of the other, but an injustice on the one side is spread over the whole of society and an injustice on the other is concentrated in the suffering of one man. The English-speaking peoples are so little vindictive that even those who have been most gravely injured by the criminal soon cease to resent his acquittal; but the burden on an undeserved conviction grows heavier rather than lighter as the years of punishment are prolonged. Since we know that the ascertainment of guilt cannot be made infallible

\textsuperscript{141} Excellent accounts of the Edelin trial were written by Barbara J. Culliton in 186 Science 327 (October 25, 1974); 187 Science 334 (January 31, 1975); 187 Science 814 (March 7, 1975).


\textsuperscript{144} \textit{Criminal Code Amendment Act}, S.C. 1930, c. 11, s. 28; see, Anglin, C.J.C., in \textit{Belyea v. The King} (1932), 57 C.C.C. 318 at 339-40. Pigeon, J., traced the evolution of the present s. 613 at 53 D.L.R. (3d) at 196-203.

\textsuperscript{145} Per Pigeon, J., 53 D.L.R. (3d) 202.
and that we must leave room for a margin of error, we should take care to see that as far as humanly possible the margin is all on the side of the defence.\textsuperscript{146}

The prosecution could appeal Dr. Morgentaler’s acquittal on indictment on “a question of law alone.”\textsuperscript{147} To overcome the jury’s finding of a necessity justification of the accused’s conduct, therefore, which in principle rests on factual assessment, the prosecution had to invoke the “no evidence” rule. This is comparable to the substantial evidence rule in the U.S., holding that “the absence of evidence constitutes a question of law,”\textsuperscript{148} as opposed to assessing the cogency of evidence presented, which is a matter of fact for the jury. An appeal court can clearly revise a jury’s verdict more easily on grounds of legal error than on error in factual determination.\textsuperscript{149} The Quebec Court of Appeal in \textit{Morgentaler} responded to the legal point and was emphatic as to the absence of evidence from which the fact of necessity could be found. Rinfret, J.A., for instance, observed that:

\begin{quote}
[There is a total want of evidence demonstrating that it was not possible for the respondent to avail himself of the provisions afforded him under the law; there is a total want of evidence that he communicated with one of the hospitals which have therapeutic abortion committees in order to obtain from them a certificate under s. 251(4)(d); there is a total lack of evidence that he even attempted to exhaust the legal means before deciding by himself, without consultation, to perform the abortion, and this in a clinic neither accredited nor approved.\textsuperscript{160}]
\end{quote}

In the Supreme Court, Pigeon and Dickson, JJ., similarly found no evidence of necessity in that Dr. Morgentaler did not demonstrate the impossibility of his compliance with s. 251(4).\textsuperscript{151} Chief Justice Laskin found such evidence, however, regarding the woman’s likelihood of attempting to abort herself or of having recourse to ‘back street’ procedures, or perhaps of suicide, and observed that “[t]he jury was entitled, if it so chose, to consider this evidence as raising an emergency situation.”\textsuperscript{152}

In granting the jury’s entitlement to find for itself, from the evidence

\textsuperscript{147} Code, s. 605(1)(a).
\textsuperscript{148} Per Crete, J. A., 47 D.L.R. (3d) 222. In \textit{R. v. Nat Bell Liquors Ltd.}, [1922] 2 A.C. 128 (J.C.P.C.) at 149, Lord Sumner, discussing quashing a conviction, said: “If, on some part of the case, which was material to the charge [in \textit{Morgentaler} read “defence”] and had to be legitimately established before the accused person could be convicted [“acquitted”], no evidence was forthcoming at all, this would be error of law, which being duly brought to the notice of the superior Court would oblige it to quash the conviction [“acquittal”].”
\textsuperscript{149} By s. 613(4)(b), a court of appeal could allow the appeal and “(i) enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law . . . or (ii) order a new trial.” This prevented an appeal court from entering its own verdict of guilty on grounds of the jury’s error of fact, which in any event would no doubt be difficult to show and might have to be in the order of perversity.
\textsuperscript{150} 47 D.L.R. (3d) at 221.
\textsuperscript{151} 53 D.L.R. (3d) 194 and 214 respectively.
\textsuperscript{152} See, 53 D.L.R. (3d) 190, where the Chief Justice identified “evidence of the accused that he feared that the pregnant woman would do something foolish unless she was given immediate professional medical attention to relieve her condition and her anxiety”; see, also, Dickson, J., at 214.
taken as a whole, the existence of emergency, the Chief Justice opened up a fundamental issue, namely the jury's use of its own understanding and beliefs as to dominant realities in society. He noted that "what the Quebec Court of Appeal saw in the defence of necessity was urgency of such a nature as to make it impossible to obtain lawful abortion under s. 251 (4)," but he declined to take the same stringent view on the question of urgency and impossibility, since "there is a danger here in usurping the function of the jury on that question according to the way in which it is defined." This may provide the key to the rational and common-sense grounds upon which the first jury, and probably the second jury, acquitted.

The Quebec Court of Appeal and the majority of Supreme Court judges may have fallen victim to the myopia of the trained lawyer, whose analytical mind distributes and confines submitted evidence to the point to which it is directly relevant. Ruling that s. 45 furnishes no defence in law, they did not sufficiently appreciate how evidence admitted in regard to it could properly indicate to the jury a pertinent issue of necessity, admissible under s. 7(3). The trial had shown that the aborted patient had an appointment at a Montreal hospital scheduled for shortly after she saw Dr. Morgentaler, which the judge described as a "circumstance which would very likely have permitted this girl to have herself aborted, in the most complete legality, two or three weeks later." The jury knew that a female's abortion is certifiable by a therapeutic abortion committee only when "the continuation of the pregnancy . . . would or would be likely to endanger her life or health," and that the patient had "consulted two physicians, one of whom was a gynecologist who did not perform abortions. She contacted a few hospitals, but what they offered her was too expensive or much too late. Someone in one of these hospitals recommended the accused."

The Quebec Court of Appeal and Supreme Court majority then required the accused himself (who held staff privileges at no hospital and to whose application for "approved hospital" status for his clinic the provincial Minister of Health had failed to reply), to contact accredited or approved hospitals with therapeutic abortion committees, presumably whose charges the girl student could afford, and try to persuade a committee to grant a certificate, within the period when the six to eight weeks pregnant girl could be aborted with maximum safety to preserve her health. Had such a requirement been

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154 Near the end of his charge to the jury, Hugessen, A.C.J., told them that "the defence of s. 45 is close to the defence of necessity" (42 D.L.R. (3d) 454), although not the same.


156 Code, s. 251 (4)(c).


158 47 D.L.R. (3d) 220.

159 "An abortion intervention performed before twelve weeks of pregnancy entails four times less risk of death or of serious consequences," id.
submitted to the jury, they would surely have rejected it as being utterly un-realistic. Dr. Morgentaler did not undertake, and therefore called no evidence of, such conduct, because it was self-evident that abortions were not so conveniently available in Montreal hospitals, and least of all in the French language hospitals with whose practices the jury might have been more familiar. That was why Dr. Morgentaler's clinic existed, and why the patient had been referred to him by someone at a Montreal hospital.\(^{160}\) This point may have been reinforced in that the trial judge had noted that the prosecution's medical expert witnesses “all admitted that they would not have performed an abortion on Miss P., under any circumstances.”\(^{161}\)

Jurors must reach a decision on the evidence called, and if one possesses special knowledge of the case, he should serve not as a juror but as a witness. Nevertheless, jurors' value to the administration of justice lies in their common-sense knowledge of ordinary affairs and relations. Any personal quality of worldly naivety would render them unsuited to the important public responsibilities of their office. This was the theory underlying the historical exclusion of women from the jury,\(^{162}\) and which still excludes the young. Jurors' familiarity with communal circumstances is the basis of the traditional venue and venire rules of jury trial, requiring a suspect to be tried by a local jury of an area having a nexus with the alleged crime. It was their members' knowledge of local events and circumstances that historically brought the institution of the jury into being; and when members first began to lack necessary information, they were given a short time to acquire it. The parties' introduction of evidence to assist the jury in finding the facts, related to population and urban expansion with no concomitant information expansion, began the jury's evolutionary transition from being witnesses to being judges of that evidence. Jurors have never been required to abandon their understanding of communal ways and circumstances, however, and may impartially resort to this understanding to find that a specific incident represents an emergency, whose solution comes within the social sense of necessity.

The necessity for abortion, assessed in terms of general social experience, as opposed to the artificial and conservatively contrived terms adopted by the Quebec Court of Appeal and Supreme Court majority, is identified by reference to the patient's circumstances, not to the physician's circumstances. The physician can act outside s. 251 when he finds not himself but his patient in necessity; the patient's necessity is the attending physician's necessity. Whether Dr. Morgentaler's patient would have succeeded in obtaining (and affording)

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\(^{160}\) At Montreal Royal Victoria Hospital; see, 47 D.L.R. (3d) 216.

\(^{161}\) 42 D.L.R. (3d) 451. Most were shown to come from hospitals with extremely limited, if any, facilities for therapeutic abortion, and the prosecution's calling of an expert from New York may have brought out the unwillingness of local physicians to testify against Dr. Morgentaler, whose own expert witnesses tended to be from Quebec. The prosecution was not aided by calling a medical expert witness against Dr. Morgentaler who was shown before 1969 to have referred a number of patients, including his own secretary, to Dr. Morgentaler's clinic. At the September, 1976 re-trial, the prosecution called no medical expert witnesses, though claiming it could have called 200 to 1,000 doctors to testify against Dr. Morgentaler; see, Globe & Mail, September 16, 1976.

\(^{162}\) The ostensible ground was their inability to meet tests of property ownership, but this legal inability was also based on belief in female worldly innocence.
a hospital abortion, which the trial judge found her circumstances “would very likely have permitted,” had she kept her later appointment, is speculative. There was, however, ample evidence before the jury of her failure, up to August 15, 1973, to find a sufficiently early and inexpensive facility, not because she did not qualify for therapeutic abortion, but because of pressure of demand on scarce local facilities. This evidence would have indicated to the jury the inadequacy of abortion services in Montreal without submission of further details. The jury would realize that a female’s entitlement to a safe, early abortion to preserve her health does not keep well; there must be a limit to how many committees have to be consulted. In finding no criminal guilt in Dr. Morgentaler’s treatment of the patient, the jury was finding the necessity not just of this operation, but of the existence of Dr. Morgentaler’s clinic. The second jury, of June, 1975, receiving similar evidence, was apparently of the same view, as was the jury at the subsequent re-trial.

It cannot be contended, of course, that a defendant claiming only necessity, who is acquitted when he adduces no evidence of necessity, is to be immune from the prosecutor’s successful appeal for a new trial. An appeal court should be aware that jury members import into their decision on the evidence an interpretation of its social setting, and should seek grounds to make sense (as well as to make nonsense) of the jury’s findings. That the Quebec Court of Appeal did not consider the sense of the verdict is evident in its members’ several observations made in disregard of the evidence to which the trial judge had referred the jury.

Rinfret, J.A., for instance, claimed that “[t]he abortion for which the respondent is prosecuted took place in Montreal, within reach of the services enumerated in s. 251(4). The respondent thus cannot claim remoteness, nor non-access to the facilities furnished by the therapeutic abortion committees established in several metropolitan hospitals.” The trial court found evidence, however, that the patient had “contacted a few hospitals, but what they offered her was too expensive or much too late.” Similarly, Dubé, J.A., found the defendant had not “furnished any evidence that it was necessary to proceed immediately with this abortion,” but the trial judge adverted to evidence of circumstances that “would very likely have permitted this girl to have herself aborted, in the most complete legality, two or three weeks later.” The jury would have realized that urgency in therapeutic abortion

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163 Supra, note 155 and text.
165 In fact, a physician from Montreal General Hospital told the court that the hospital’s therapeutic abortion committee had to deal with sixty cases an hour, and Dr. Morgentaler’s patient, serving as a prosecution witness, said that when she applied to Montreal General Hospital she was told that facilities would not be available until after her first trimester had passed: see, J. P. Maksymiuk, supra, note 29 at 268-69, and references in his notes 44 and 45.
166 Globe and Mail, June 5, 1975.
167 47 D.L.R. (3d) 220.
168 Supra, note 157.
170 Supra, note 155.
increases with delay, but so does risk; moreover, a therapeutic abortion
committee's grant of an operation is not certain, since the committee must take
account not only of the applicant's need, but also of availability of its hospital
staff and facilities.

Evidence of the patient's needs making her eligible for a s. 251 abortion,
and evidence of hospitals offering a too expensive or too dilatory service, show
that evidence of necessity did exist. Its credibility was a matter for the jury.
Chief Justice Laskin observed that:

[It must be an unusual case, indeed, in which an appellate Court, which has not
seen the witnesses, has not observed their demeanour and has not heard their
evidence adduced before a jury, should essay to pass on its sufficiency . . . and
thereupon to substitute its opinion for that of the jury and to enter a conviction
(rather than ordering a new trial) where the jury has acquitted.171

Respect for the jury system demanded that action be taken, as it has been, to
ensure that this should never occur again in Canada.

The Quebec Court of Appeal and Supreme Court of Canada majority
ccontrived to find no evidence of necessity by defining necessity very narrowly
on the facts of the case, and discounted the generality of evidence presented,
part of which was introduced on the legally unavailable s. 45 defence. That
made it no less evidence adduced before the jury, however, and, while not
directed to the necessity defence, such evidence was pertinent to it. In ex-
cluding the s. 45 defence, as they were entitled to do, and in dismissing the
necessity defence, as, it is respectfully submitted, they were not entitled to do,
the judges in effect required a directed verdict of conviction. The Court of
Common Pleas in Bushel's case172 terminated the common law courts' practice,
acquired from Star Chamber, of punishing jurymembers for finding "against
the manifest evidence" and compelling the nature of their verdict. This does
not regularize a finding against the evidence, of course, and a new trial may
be ordered, but it leaves jurymembers free to make their own decision on the
facts; their right is protected to disbelieve the prosecution's case and witnesses
and to refuse to convict. Dickson, J., adverted to the danger of the necessity
defence becoming "a mask for anarchy,"173 but, in debasing the jury's capacity
to determine a case against the state prosecutor, the judges shaped a mask
for tyranny.

5. The Penalty of Due Process

In imposing sentence, Hugessen, A.C.J., observed that:

[the accused says he is seeking justice . . . The records of this court, of the Court
of Appeal and of the Supreme Court over the past four years are replete with
procedures taken by or on behalf of the accused with a view to frustrate and delay
his being brought to trial . . . These are not the actions of a man seeking justice.

171 53 D.L.R. (3d) 181. Even allowing that the time the jury spent considering the
s. 45 defence, and questioning the judge with regard to it, was considerable, the fact
that jury members took almost ten hours to reach a verdict may suggest that they found
at least some evidence of necessity to consider.


Borough Council v. Williams, [1971] 1 Ch. 734 at 746.
They are those of one striving at all costs to avoid the evil day when the music must be faced. . . . No one suggests, of course, that the accused should be penalized for having acted as he did, but his delaying tactics go far to negate his much-vaunted good faith.\textsuperscript{174}

The propositions that a defendant who persistently required the prosecution to observe due process of law thereby destroyed his personal good faith, and that, though claiming a legal justification his trial jury found convincing, he was nevertheless consciously acting “to avoid the evil day when the music must be faced,” are novel, and corrupting of the entire process of lawful trial. It is the claim of a modern legal system that the individual, and especially the criminal defendant, has access to the full range of its procedures without legal obstruction or penalty; neither penalty upon conviction, as Hugessen, A.C.J., recognized, nor the penalty of having recourse to procedural defence seen as acknowledgement of guilt and evasion of its consequence. Even a defendant deliberately challenging the law’s interpretation and contending that his conduct falls within its licence is entitled to preserve personal credibility without having passively to suffer impropriety by prosecutor or judge.

That such impropriety occurred to Dr. Morgentaler’s prejudice is apparent on the record. From the beginning of legal action against him, Dr. Morgentaler experienced a series of prosecutorial excesses and procedural irregularities, any one of which should be a matter of concern to a society expecting observance of the law in the course of its penal enforcement. If the judge at sentence felt bound to note the lack of good faith the defendant showed by his use of due process, he might in justice have similarly reflected upon the conduct of the Quebec law-enforcement agents in their recourse to both due and undue process to impose arbitrary extra-judicial penalties upon the defendant, and to place him at tactical disadvantage. The judge’s observation on the number of the defendant’s arguments with which court records are replete, leading to an adverse finding on his good faith, was inequitable without reference to how many of such arguments proved to be justifiably raised.

Dr. Morgentaler’s first encounter with legal process occurred in mid-1970 when a search warrant was executed on his premises, and documents, instruments and literature were seized. At the June, 1970 preliminary inquiry, his counsel objected to the indiscriminate production \textit{en bloc} of all documents taken, irrespective of whether or not they were relevant to the charges then under consideration; the judge, Fauteux, J., Sess., overruled the objection.\textsuperscript{175} In his judgment on the application for \textit{certiorari} to quash the preliminary inquiry, however, Shorteno, J., noted:

\begin{quote}
. . . the apparent illegality which was committed by those executing the search warrant, on what appear(s) to have been a ‘fishing expedition’, by seizing every-thing which they thought was ‘good for the case’ . . . . Not only were most of the objects seized from petitioner’s office done so without consideration as to their relevance to the present case contrary to [s. 443(1) (information for search warrant)] but it was also thought, contrary to [s. 446(1) (detention of items seized)].\textsuperscript{176}
\end{quote}

\textsuperscript{174} Supra, note 44.
\textsuperscript{175} 3 C.C.C. (2d) 192.
\textsuperscript{176} Id. at 193.
The same design to impose the law-enforcement officers' opinion in anticipation of judicial decision appears in the seizure in the August 15, 1973 raid on his clinic of three vacuum suction apparatuses;\(^{177}\) for evidentiary purposes at trial, it would seem that seizure of one would have been sufficient, but the seizure was apparently intended to serve more than that purpose. Following Dr. Morgentaler being found not guilty of illegal abortion, the prosecutor sought orders both to stop him from performing any abortions pending outcome of the appeal, and to commit him to prison for breach of bail conditions in addressing a public meeting and the news-media. Lamb, J., refused both orders.

The initial preliminary inquiry, of June, 1970, was also affected by other improprieties. On considering the first challenge to its regularity, Desaulniers, J., was satisfied of the judge's misconduct, but in the Superior Court, Shorteno, J., considered Dr. Morgentaler's complaint by \textit{certiorari} premature, and repeated that "[t]he question here is whether the proper remedy is sought and not whether there is no remedy."\(^{178}\) He offered the assurance that "I am quite certain that had the learned Judge allowed the petitioner's attorney to make representations to him beforehand about these most serious 'irregularities', some of which may have gone to his jurisdiction, he would have undoubtedly corrected them."\(^{179}\)

Fauteux, J., Sess., did attempt to cure one irregularity at the June 12, 1970 inquiry by quashing the subpoena served on Dr. Morgentaler's defending lawyer. Shorteno, J., later stated that:

\begin{quote}
[i]t is difficult for me to understand why a subpoena should have been sent to [the defence lawyer] a day or two before the preliminary which had been fixed for the 12th and after the authorities knew . . . that he was then petitioner's attorney. It is also difficult to comprehend that the prosecution should have insisted on proceeding on the 12th, without consideration of petitioner's rights in the matter.\(^{180}\)
\end{quote}

Fauteux, J., Sess., refused the defendant an adjournment in these circumstances, apparently considering his cancellation of the subpoena adequate to afford the accused proper and immediate representation, but Shorteno, J., was satisfied that the adjournment should have been granted in fairness to the accused and to his counsel.\(^{181}\)

Dr. Morgentaler, a self-proclaimed publicist of the cause of widely available abortion, and public opponent of the restrictive policies pursued particularly in the province of Quebec, objected in addition to grant of the prosecution's request for an \textit{in camera} hearing at the preliminary inquiry. Shorteno, J., upheld the inquiry ruling, however, finding that, since in abortion cases the prosecution's witnesses might be embarrassed to relate in medical detail the abortion techniques practised upon them, and the typical physician

\footnotesize{\begin{itemize}
\item[177]\textit{Globe and Mail}, June 11, 1975.
\item[179]\textit{Supra}, note 175.
\item[180]\textit{Id.} at 195.
\item[181]\textit{Id.}
\end{itemize}}
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would be ashamed of being so charged, the discretion contained in s. 465(1)(j) was properly exercised in favour of closed hearings. Indeed, he considered it somewhat perverse and suspicious that Dr. Morgentaler wanted the public to know the circumstances of his alleged crime, observing that “he appeared to be most anxious, for some ulterior and undisclosed motive to be judged in open Court.” The issue did not arise before the jury trials of October, 1973 and May, 1975, of course, because they were on indictments preferred directly before the trial court, which obviated the need for preliminary inquiries. The resulting trials were held openly, however, the prosecution apparently not requesting trials in camera permissible under s. 442. Nevertheless, Hugessen, A.C.J., at sentence found in Dr. Morgentaler’s active pursuit of his procedural rights contributory evidence of his bad faith.

It seems likely that Dr. Morgentaler’s vigorous contesting of the 1970 proceedings, concluded in January, 1972 with the federal Supreme Court’s refusal of leave to appeal the dismissal of his challenge to the preliminary inquiry, was a significant factor both in their lapse into abeyance and in the Quebec authorities’ determination to bring further proceedings. They acted on two fronts, their judicial initiative leading to the acquittals of November, 1973 and June 1975. While appeal was pending against the first of these, the Quebec authorities opened the second front by signing ex parte judgment against Dr. Morgentaler in the Quebec Superior Court for $354,799 for taxes he was alleged to have failed to pay. The bona fides of this proceeding are open to some question, not least because in closing Dr. Morgentaler’s bank account, the tax authorities obstructed his means to pay for legal representation compelled by subsequent criminal trials, and impoverished his challenge to the taxation proceedings themselves. This penal employment of due process bears an ominous potential for oppression, and is worthy of separate attention.

Governmental revenue authorities are not averse to receiving their due proportion of even illegal income and financial gains, so that the Quebec Department of Revenue could prepare its revenue claim upon Dr. Morgentaler without regard to the outcome of criminal proceedings, including appeals. In fact, they based their claim upon selected evidence presented at the October, 1973 trial, not seizing the doctor’s papers and tapes until after the revenue judgment was signed; in particular, they accepted Dr. Morgentaler’s own claim as to the total of abortions he had performed since opening his clinic in 1968, and applied an assessed free-income from each. Throughout the operation of his clinic, he paid taxes in a routine way, but the revenue authorities apparently came to consider that their entitlement was greater. Hugessen, A.C.J., found regarding Dr. Morgentaler’s fees that “the price [$200] is hardly exorbitant and all the evidence confirms that he will reduce

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182 In fact, there was no need for the prosecution to detail Dr. Morgentaler’s abortion technique, since he admitted that the procedure he performed was designed and intended to achieve abortion. The prosecution’s purpose was to show the extent of Dr. Morgentaler’s preparation for the clients he anticipated, and how speedily he aborted them.

183 Supra, note 175 at 203.

184 The Quebec Taxation Act, Stats. Que. 1972, c. 23, s. 758(2).

185 Dr. Morgentaler’s legal expenses are estimated to exceed $300,000.00.
his fees, sometimes to nothing, in cases of hardship or inability to pay."\textsuperscript{8}

The revenue authorities based their claim upon more uniform payment, however, and signed judgment for an optimum amount, so that the party liable to pay could then take the initiative to challenge. The Quebec Department of Revenue made no defence of its claim in contested proceedings.

The practice of revenue authorities putting their claims at a theoretical optimum and leaving to the suspect taxpayer the burden of showing evidence as to his lower liability offers the authorities obvious administrative advantages. Their conduct \textit{in terrorem} may be justifiable, however, only when it does not impair the individual's means of contesting the assessment. The Morgentaler claim smacks of overreaching, since upon signing \textit{ex parte} judgment the tax inspectors closed the bank account through which challenge could be financed, and seized the documents the taxpayer needed for his accountant's researches. Beyond that, however, the inspectors also took personal documents and intimate tapes and diaries in a comprehensive seizure reminiscent of the search undertaken of Dr. Morgentaler's premises by the police in mid-1970, later condemned by Shorteno, J. The later seizure was in a sense more oppressive; the police in 1970 sought evidence for charges, whereas in the February, 1974 revenue seizure, judgment had already been entered, and the revenue inspectors' conduct was aimed at self-vindication.

Revenue authorities may be justified in retaining evidence of undisclosed income and in preserving sufficient taxpayer's assets to meet their properly presented claims, but their revenue interests must be set against the interests of the administration of justice, notably in an individual's capacity to defend criminal charges and have them pursued in accordance with due process of law, and his capacity to contest the revenue claim itself. In the \textit{Morgentaler} case it may be hard to resist the conclusion that the revenue authorities were motivated by more than their duty to gather revenue, and that they were employing due process of revenue collection penally, to achieve political or philosophical objectives. For contradictory evidence, we need only to look to see whether others shown to have engaged upon different means of achieving financial gain through crime in the province of Quebec are similarly pursued by the revenue authorities.\textsuperscript{8}

D. EFFECTS UPON ABORTION LAW

In the Supreme Court, Dickson, J., opened his majority judgment by denying that the court took any position of its own on the abortion controversy. He stated that the court:

\textsuperscript{8} Supra, note 41.

\textsuperscript{8} Their record is not good. The Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Quebec, in its report \textit{Crime, Justice and Society} (Quebec Government, 1969), noted that "In the opinion of various police forces, the investigators of the Minister of Revenue . . . even avoid dealing with those cases which would require them to confront individuals known for their illegal activities, or who are known to have contacts with the underworld." On the other hand, however, it was noted that "The Minister of Revenue has extensive powers . . . and he has succeeded on many occasions . . . in convicting criminals when the Minister of Justice has previously failed to do so": vol. 3, tome II para. 143. at 130.
Has not been called upon to decide, or even to enter, the loud and continuous
public debate on abortion which has been going on in this country between, at
the two extremes, (i) those who would have abortion regarded in law as an act
purely personal and private, of concern only to the woman and her physician, in
which the state has no legitimate right to interfere, and (ii) those who speak in
terms of moral absolutes and, for religious or other reasons, regard an induced
abortion and destruction of a fetus, viable or not, as destruction of a human life
and tantamount to murder. The values we must accept for the purposes of this
appeal are those expressed by Parliament.\textsuperscript{188}

In identifying Parliament's values, however, Dickson, J., chose to equate
them with the latter of these two extremes, since he found that "Parliament
regards procuring abortion as a grave crime which carries with it the same
maximum penalty as non-capital murder."\textsuperscript{189} This statement was a significant
misrepresentation of the law, since by s. 218(4) life imprisonment for non-
capital murder was the minimum sentence imposable, rather than the maxi-
mum, as is the case for abortion.

This construction by reference to murder expressly indicates a judicial
evaluation. The judge might equally pertinently have equated the life sentence
for abortion with the identical sentence for many lesser offences than murder,
including breaking and entering a dwelling-house,\textsuperscript{190} robbery and stopping a
mail conveyance with intent either to rob or to search,\textsuperscript{191} and failing to dis-
perse within thirty minutes of the riot proclamation being made.\textsuperscript{192} The
sentence of only eighteen months' imprisonment, which Hugessen, A.C.J.,
based upon the defendant's lack of good faith and "his massive and public
flouting of the law," which "forced the authorities to prosecute with more
vigor and the courts to punish him with more severity,"\textsuperscript{193} seems in itself a
rejection of the murder analogy, as may the prosecution's decision not to
seek leave to appeal against sentence.\textsuperscript{194}

The murder analogy, urged by most groups hostile to liberal legal
abortion, may be a significant obstacle facing a prosecutor seeking a jury's
conviction of an abortionist, since jurors' realization of the grave im-
lications of conviction may dispose them to be more demanding in requiring
the prosecutor to show not only that the accused's conduct was worthy of
conviction, but also that he is unworthy of sympathy. The jury's humane
instinct for "pious perjury" cannot be ignored;\textsuperscript{195} indeed, in his charge to the
original trial jury, Hugessen, A.C.J., expressly instructed them to disregard
the theoretically imposable sentence, since in practice it could be much less
than the maximum set by the \textit{Criminal Code}.\textsuperscript{196} In appealing against the

\textsuperscript{188} 53 D.L.R. (3d) 203.
\textsuperscript{189} Id. at 206.
\textsuperscript{190} Code, s. 306.
\textsuperscript{191} Code, ss. 303 and 304.
\textsuperscript{192} Code, s. 69(b).
\textsuperscript{193} Supra, note 41.
\textsuperscript{194} Under s. 605(1)(b); this decision is explicable, of course, on many other
grounds.
\textsuperscript{195} Supra, note 140.
\textsuperscript{196} Globe and Mail, November 13, 1973; Bisson, J., gave the second trial jury a
second jury's acquittal, moreover, the prosecution cited the defendant's reference at trial to his liability, upon conviction, to life imprisonment. Were the maximum punishment very severely reduced, it might even justify denial of jury trial, excluding the elements of uncertainty, "pious perjury" and the new bar on substituting conviction for acquittal at first instance that the jury system introduces. There would be rich historical precedent for those preferring juries to be more strict in abortion cases to urge reduction of the maximum punishment, though this practical reason for distinguishing abortion from murder might be incompatible with their doctrinal basis.

Whatever legal defences may have been available to an abortion charge before enactment of s. 251(4) of the Criminal Code, there can be no doubt that this sub-section is now of primary relevance not just to a physician's defence, but also to his protection against being charged. It is clear that he cannot invoke as an alternative the defence under s. 45, but the common law defence of necessity remains available to a physician, and indeed to anyone else. This defence to abortion, would seem to be wider than the defence under s. 45, since the latter provision is limited to "a surgical operation." Abortion may be achieved, of course, by both surgical and non-surgical means. Surgical abortion would be performed when the pregnancy was more advanced, with a greater health risk to the mother and the chance of damaging a resulting viable fetus. It would be incongruous to protect this surgery by s. 45, but to leave early, safer non-surgical abortion of an embryo or a non-viable fetus defensible only by the more rigorous defence of necessity. The position clarified by the Supreme Court more consistently shows abortion defensible only by s. 251(4) and by necessity admissible under s. 7(3), however performed. Further, necessity will uniformly protect both the practitioner from s. 251(1) liability, and the patient from s. 251(2) liability, whereas s. 45 would protect only the person "performing a surgical operation."

The problem raised by the decision of the Supreme Court majority arises from the traditionally restrictive approach taken to the necessity defence. Indeed, Dickson, J., seemed not fully convinced of even its theoretical availability; he dismissed the historic English abortion case of R. v. Bourne as "exceptional", and noted that the defence has never otherwise been raised successfully, as far as he could ascertain, in England or Canada. It may be pointed out, however, that failure of the defence on its facts does not show its unavailability in law, and that appeal courts upholding convictions have

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197 Supra, note 140.
198 By the Criminal Law Amendment Act, 1968-69, c. 38, s. 18.
199 Supra, note 32.
200 Recognition of the necessity justification for abortion in Canada runs deeper than the Morgentaler case. In 1909 when Lamont, J., of the Saskatchewan Supreme Court, was hearing an extradition application regarding an abortion performed on a female in the United States, he said that "From the evidence before me I cannot say that the operation . . . might not have been necessary to preserve her life, in which case it is not unlawful": Re McCready (1909), 14 C.C.C. 481 at 485, quoted by Laskin, C.J.C., at 53 D.L.R. (3d) 185.
201 [1939] K.B. 687; see, generally, Bernard M. Dickens, supra, note 112, ch. 2 B.
not found trial judges in legal error in admitting argument and evidence of
necessity. Further, cases of jury acquittal upon a necessity defence may have
failed to find their way into the law reports, especially in England where,
until 1972, there was no prosecution appeal against acquittal.\footnote{203} It must also
be remembered that those who break the criminal law in circumstances of
necessity may justifiably not be prosecuted,\footnote{204} and that in the Morgentaler
case the prosecution recognized the common law defence of necessity pre-
erved by s. 7(3).

Nevertheless, Dickson, J., felt able to concede only that “[i]f [the neces-
sity defence] does exist it can go no further than to justify non-compliance
in urgent situations of clear and imminent peril when compliance with the
law is demonstrably impossible.”\footnote{205} He added that “[t]he defence of necessity,
whatever that vague phrase may import, does not entitle a medical practi-
tioner, in circumstance of time and place such as those under consideration,
to procure an abortion on his own opinion of the danger to life and health,”\footnote{206}suggesting that in different circumstances a medical practitioner may be so
entitled, and may act without the concurrence of a therapeutic abortion com-
mittee of at least three members. Accordingly, a defendant abortionist will
be called upon to show urgency to act to preserve the female’s life or physical
or mental health, and that it was impossible for the female to comply with
s. 251(4) by approaching a hospital therapeutic abortion committee; this
may require the defendant to show that, as a physician, he could not approach
a committee on her behalf.

Dickson, J., referred to section 1(4) of the British Abortion Act 1967,\footnote{207}
which relieves a physician from having to obtain a concurring professional
opinion before terminating a pregnancy, and from having to conduct the pro-
cedure in approved premises, “in a case where he is of the opinion, formed
in good faith, that the termination is immediately necessary to save the life
or to prevent grave permanent injury to the physical or mental health of the
pregnant woman.” This sub-section imports the necessity justification judicially
approved in the Bourne case. The judge noted that the Canadian Parliament
has not chosen to legislate a dispensing provision similar to section 1(4), and
he declined to read such a term into s. 251. There is reason to believe, how-
ever, that the Canadian legislature does not intend to require the isolated
physician to stand by and let his patient, or another female he could assist,
die or suffer grave permanent injury to her physical or mental health. The
British Act also provides in section 5(2) that “For the purposes of the law
relating to abortion, anything done with intent to procure the miscarriage of
a woman is unlawfully done unless authorised by section 1 of this Act.” The
1967 Act contains the entire abortion law, because section 1(4) introduces
the necessity justification. Section 251 contains no comparable section to

\footnote{203} See, now, the Criminal Justice Act 1972, c. 71, s. 36, giving the Attorney General
a right of academic appeal on a point of law.

760 at 765.

\footnote{205} Supra, note 202 at 209.

\footnote{206} Id. at 211.

\footnote{207} U.K. Stats. 1967 c. 87.
section 5(2), and presumably Dickson, J., would not read in this provision either. Section 251 is accordingly not an entire provision as is the British Act; the necessity defence remains applicable to s. 251, and the British section 1(4) may well provide relevant words to express its silent presence in s. 7(3).

An obvious ground of impossibility of compliance with s. 251(4) is that no hospital therapeutic abortion committee exists, or can be assembled, in the area to whose medical services the patient reasonably has recourse, and no hospital with such a committee is reasonably accessible. In these circumstances of risk to life or health, non-compliance with s. 251(4) is clearly more easily justifiable than where a local committee operates. This legal point stands in contrast to conventional belief that the absence of a therapeutic abortion committee makes it impossible for a hospital lawfully to terminate a pregnancy, and that a physician cannot operate when such a committee is unavailable to give certification. It may conceivably be the case, indeed, that the same legal justification can be made out before a jury where an accessible committee pursues a restrictive policy for doctrinal reasons, or where its facilities are too expensive or over-extended, causing delay in committee consideration or in performing an operation.208 The Criminal Code provides no appeal system against a committee's refusal of an operation, but equally it does not give any committee a veto power. A woman whose application has been rejected by one committee may submit it to another, whose members may in good faith find sufficient evidence of necessity to warrant an operation under s. 251(4). Similarly, since a woman is entitled to seek more than one committee's approval, she may argue, when refused certification by the only committee she had time to approach, that her case was not properly considered,209 and that termination of her pregnancy was necessary to preserve her health despite the committee's refusal, which can be explained on grounds consistent with the presence of necessity as defined in s. 251(4).

Clearly, when a therapeutic abortion committee is accessible, non-resort to it, or abortion following its refusal of certification, becomes far more difficult to justify. Unavailability of s. 251 facilities, however, for whatever reason, is to be established by the defendant as a matter of fact, and a jury will assess the evidence he adduces; it is not a matter of law to be determined by the judge. The defendant's task of explaining that a committee would not, or did not, make a necessary therapeutic facility available when a female's life or health was at risk may appear formidable. It can be successfully undertaken, however, as Dr. Morgentaler showed at his two jury trials; verdicts in his favour were a finding of inadequate local s. 251 facilities. Committees are not required to give reasons for refusing to certify an operation,210 and it has

208 And also, perhaps, where a therapeutic abortion committee will certify an operation as necessary, but adds unacceptable conditions, such as that the woman must agree to be sterilized at the same time; see, Bernard M. Dickens, Eugenic Recognition in Canadian Law (1975), 13 Osgoode Hall L.J. 547.

209 Supra, note 165, showing that the committee at Montreal General Hospital dealt with sixty applications for abortion in an hour.

210 By s. 251(5)(a), a provincial Minister of Health may order a committee or any member thereof to give him a copy of any certificate issued, with "such other information relating to the circumstances surrounding the issue of that certificate as he may require," but there is no power under the section to obtain grounds of certificate refusal.
been seen that a defendant will be free to adduce evidence to explain refusal compatibly with the presence of necessity to act to preserve life or physical or mental health. As in any case of abortion outside s. 251, however, the defendant will have to introduce some evidence of necessity for the jury to assess, in order to avoid the effects of the no evidence rule.\textsuperscript{211} If the prosecution were to subpoena a committee and its records to show that the refusal of certification was because it found no risk to life or health, the defendant would still be able to call evidence to show that another committee might have found otherwise.

A hospital is under no legal duty to establish a therapeutic abortion committee,\textsuperscript{212} although, since the \textit{Criminal Code} makes the assembly of such a committee a pre-condition to a hospital anticipating and routinely discharging its responsibility to a female in its community when continuation of pregnancy “would or would be likely to endanger her life or health,”\textsuperscript{213} a public hospital failing or declining so to equip itself might be considered in breach of its social obligation to the public. In legal terms, however, a hospital board has an option as to whether it wants to commit its resources to supplying an abortion service for its patients; its negative decision would not preclude it, of course, from meeting an emergency with which it was suddenly presented. The matter concerns not its legal powers, but its decision upon the distribution of the health-care facilities at its command. Indeed, a remarkable feature of the post-1969 public debate on abortion has been the relatively low profile maintained by the federal and provincial Ministers of Health, and the prominence of the Law Officers.

When it was reported that in 1974 in Quebec only 27 of 281 hospitals had the necessary committees to certify performance of this form of therapy when female life or health was at risk, the federal Minister of Health, Marc Lalonde, noted that “[t]hey are public institutions and, in my view, should be providing services demanded by the public.”\textsuperscript{214} No official suggestion has appeared, however, of federal or provincial authorities imposing any legal duty upon hospitals to make such provision.\textsuperscript{215} In Quebec, patients’ rights are expressly confined to institutional facilities. The \textit{Health Services and Social Services Act} provides that “[e]very person has the right to receive adequate, continuous and personal health services . . . taking into account the organization and resources of the establishments providing such services.”\textsuperscript{216}

Moreover, when such a committee operates, no guidance as to how it is to discharge the duty it assumes to reach an opinion upon the danger of continued pregnancy to life or health exists in law, and none was offered by

\begin{itemize}
  \item \textsuperscript{211} Supra, note 148.
  \item \textsuperscript{212} For a valuable study of the early operation of committees, see, K. D. Smith and H. S. Wineberg, \textit{supra}, note 51.
  \item \textsuperscript{213} Code, s. 251 (4)(c).
  \item \textsuperscript{214} \textit{Globe and Mail}, March 31, 1975.
  \item \textsuperscript{215} In the United States, by contrast, it was held in \textit{Doe v. Hale Hospital}, 369 F. Supp. 970 (1974), that a publicly funded hospital with abortion facilities could not refuse to make them available.
  \item \textsuperscript{216} Stats. Que. 1971, v. 48, s. 4.
\end{itemize}
the Supreme Court. In August, 1970, the then federal Justice Minister, John Turner, approved a broad definition of “health”, covering psychological and social health as well as the purely physical condition. This is consistent with the concept of health applied by the World Health Organization, which includes “complete, physical, mental and social well-being and not merely the absence of disease or infirmity.”

The subsequent Minister of Justice, Otto Lang, preferred a more narrow interpretation, however, and suggested that hospital committees would be acting unlawfully in certifying operations upon other than a strict basis. Even a strict basis may be more accommodating than it at first appears, however, since Gilles Marceau, Parliamentary Secretary to the Minister of Justice, has observed that:

> [The] danger for the pregnant woman's life or health is the only criterion in this matter. If it is proven medically that financial, social or other circumstances endangered or would probably endanger the mother's life or health, a certificate may be given; but the decision must be based on reasons of real danger to life or health, and not on social or financial factors as such.

This seems to put emphasis upon the form and expression of certification rather than upon the substance of the female's condition and circumstances.

Uncertainty in this area is clearly undesirable for hospitals and patients, and contributes to uneven availability of abortion services. It may be a factor in hospitals deciding not to establish therapeutic abortion committees, in committees fearing to certify particular cases or to have too high a proportion of successful applications, and in physicians in hospitals without committees failing to respond as they think in their patients' best interests in medical emergencies. Lack of definition somewhat eases the burden of the defendant prosecuted for proceeding outside s. 251(4), however, in that he may offer the jury evidence to support his personal interpretation of danger to physical or mental health justifying his action on grounds of urgency. The degree of urgency affects the test of reasonable availability of a hospital committee, since if life or health is in immediate danger from pregnancy the female may be aborted without prior committee approval even in a hospital equipped with a committee. It may be believed that the legal need for obtaining approval is not intended to obstruct treatment in a life-threatening or health-threatening emergency, which fortunately is rarely experienced, but applies to pregnancy termination that is elective to the extent that a woman's health would not be chronically impaired by childbirth. In a sense, the lack of a hospital committee may make abortion upon grounds of necessity more, rather than less, easily justifiable in law.

It must be asked, in relation to this point, what legal difference exists between procedures under s. 251(4) certification and by common law necessity. It may, for instance, be proposed that where s. 251(4) is applied, no offence has been committed, whereas the procedure without certification is illegal.

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217 Quoted in 119 Can. H. of C. Debates (May 29, 1975) at 625, per Stuart Leggatt, M.P.
but the offence may be excused because of the necessity of the circumstances. This distinction may affect decisions relevant to prosecution, but in principle both propositions are over-simplifications. A physician acting in emergency to save life or health is entitled to be regarded at least as a non-offender, rather than as an offender who need not be reported to or investigated by the police, or not referred to a Crown Attorney, or not prosecuted, or not convicted, or not punished, or not condemned by the discipline committee of his provincial College of Physicians and Surgeons; he may be entitled to claim that on the facts of the incident "the law of necessity" supersedes or overrides s. 251, furnishing an alternative source of legality.

On the other hand, not every certificate purported to be granted under s. 251(4) may lead to an unimpeachable operation. The requirements for compliance with the sub-section are technical, and unless an irregularity falls under the de minimis rule, its effect will need to be considered. If, for instance, a certificate has been granted and given to the applicant physician, but for some reason he cannot perform the operation, which under pressure of time has to be performed by another available physician who is "a member of a therapeutic abortion committee for any hospital," this would have to be defended under s. 7(3), since s. 251(4) does not exclude from criminal liability a member of such a committee "for any hospital". Similarly, a certificate granted in terms of likely danger to health may be open to some question when founded on a liberal interpretation of "health", for instance accommodating the consideration that a woman in poor socio-economic circumstances, over-burdened with care of existing children, is likely to experience reduced health levels in pregnancy and infant-care, and that a pregnant woman's mental health may be impaired by anxiety about the inimical social and emotional environment her child would enter; indeed, the adverse effect upon the mother's mental health of learning of the committee's unfavourable response to her application might weigh heavily in the committee's consideration.

The effect of an arbitrary "health" definition is that it subverts the basis of s. 251(4) certification, and may make the statutory scheme purely formalistic and unworkable in practice with any avoidance of capriciousness. If a strict view is taken of when abortion may be certified by a committee, the test may coincide with the urgent circumstances in which abortion may be performed under the necessity defence without committee approval. If, on the other hand, certification may be given on any other basis, it may seem hard to consider the circumstances falling within the s. 251(4) statutory formula of danger to life or health; that is, if s. 251(4) certification is co-terminous with the necessity justification, there is no need for s. 251(4), and if s. 251(4)

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220 Per Dickson, J., supra, note 202 at 209.
221 Code, s. 251(4)(a).
222 See, generally, Bernard M. Dickens, supra, note 208, part 4.
223 The basis of certification may be sought by a provincial Minister of Health, see, supra, note 210, but it may be doubted that he would undertake to second-guess a hospital committee expressing itself in correct form, according to the proposition of Gilles Marceau, see, supra, note 219.
standards are lower, there may be no need for an operation in the terms in which it may alone be certifiable.

The view that certification is an essential pre-condition when the danger to life or health is prospective, but not immediate, seems more likely to represent the legal position. It gives sense to Parliament's studied enactment, and is consistent with medical distinctions between necessary and elective abortion. A physician may respond to necessity on his independent initiative and judgment, but an abortion at an elective stage is legal only upon the concurring opinion of a majority of members of the therapeutic abortion committee of the accredited or approved hospital where the procedure is to be performed.

In emphasizing that Dr. Morgentaler's acquittal was irregular because he introduced no relevant evidence of necessity, the Quebec Court of Appeal and the Supreme Court of Canada established that, had he introduced any such evidence, the jury's decision would have prevailed. With termination of an appellate court's power to replace jury acquittal with its own entry of conviction, moreover, a jury verdict will always prevail in the future, subject to an appellate court setting aside a jury's conviction. Demanding legal tests may have been set by the courts to satisfy the requirement of showing necessity, and the trial judge will have to inform the jury of these, but necessity itself remains a matter of fact, to be decided by the jury. Provided that the defendant adduces some evidence of necessity for his action, meaning evidence to show that it was taken in good faith in some degree of urgency when s. 251(4) facilities were practicably unavailable, he may hope for the jury's sympathy. His attempts to comply with s. 251(4) requirements in the circumstances of the case may well influence the jury's views on the accused's good faith. Indeed, a defendant who is not persuasive of actual urgency nor of the unavailability of s. 251(4) facilities may be acquitted when he convinces the jury only of his good faith. Abortion is not a crime of strict liability. Acquittal would be in accord with the deeply traditional moral basis of the criminal law, condemning an individual not simply because he did wrong, but because he also intended wrong.

This consideration of effects of the Morgentaler case upon Canadian law has ignored a political factor that may well prove to be the most powerfully influential of all in shaping the future course of abortion law in Canada. Common law jurisdiction is primarily exercised upon the basis of territoriality, rather than upon the nationality basis that has provided the jurisdictional nexus of civil criminal jurisprudence since the French Revolution. Accordingly, Canadians will not in principle incur criminal liability in Canada for what they lawfully do in other jurisdictions. The most relevant foreign jurisdiction to Canada is, of course, that of the United States, where since the January,

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224 This was the basis upon which the Quebec Court of Appeal upheld the second jury's acquittal; see, Owen, J.A., 27 C.C.C. (2d) 81 at 96.

225 See, generally, the Harvard Research on International Law (1935), Jurisdiction with Respect to Crime.

226 Nor will it necessarily be unlawful in Canada to arrange to go to another jurisdiction to do acts lawful there but unlawful here; travel agents, for instance, may lawfully arrange gambling visits to Las Vegas.
1973 Supreme Court decisions in Roe v. Wade and Doe v. Bolton, abortion has been available upon an accommodating legal basis.\(^{227}\) Major population centres in Canada, such as Montreal, Toronto and Vancouver, are within relatively easy access of the border, and many women with the financial means cross it for the purpose of termination of pregnancy. Statistics Canada abortion figures realistically include operations performed in New York State,\(^{228}\) where incomplete figures for 1973 showed that 6,200 Canadian residents, one in eight of the total of Canadian women having legal abortions, obtained their operation. The legality of these procedures is confirmed by the fact that such provincial health schemes as exist in Ontario and Quebec help to meet expenses of these procedures when incurred by residents of the province eligible for coverage of therapeutic treatments received out of the province. At the September, 1976 re-trial, moreover, the crown prosecutor actually asked Dr. Morgentaler why he had not suggested that the woman go to an accredited hospital in the United States for a legal abortion,\(^{229}\) a question that does considerable violence to the moral pretence of Canadian abortion law.

Constitutional and criminal law circumstances in Canada and the United States are, of course, quite different, but social circumstances may not be so different as to preclude a significant degree of cultural osmosis fashioning comparable if not common social evaluations. Even if an accused charged with illegal abortion does not reinforce his necessity argument by pointing out to the jury that the female concerned might have gone to the United States for a lawful elective procedure, the jury may from its own knowledge be aware of the more permissive legal situation prevailing there. The jury need not be aware that public hospitals in the United States are under a legal duty to use the facilities they possess to undertake abortion services\(^{230}\) to find unconvincing the view, whether urged by prosecutor, prosecution witness or judge, that abortion is a crime tantamount to murder. Indeed, a feeling that the prosecution at the Morgentaler trials was over-stating the heinousness of the offences in the circumstances of the females involved may have underlain the jury acquittals; a jury's capacity to react more strictly when it considers a potential life has been insufficiently respected, as perhaps in the Edelin case,\(^{231}\) gives greater credibility to the Morgentaler verdicts.

The trials of Dr. Henry Morgentaler may prove to mark a turning point in Canadian abortion law and practice. He set out to force the issue of

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\(^{227}\) Although a recent study has shown abortion services to be inadequately available in the United States, especially in public hospitals which traditionally serve the poor; see, The Alan Guttmacher Institute, The Unmet Need for Legal Abortion Services in the U.S., 7 Family Planning Perspectives 224 (September-October 1975).

\(^{228}\) Globe and Mail, November 18, 1974. They exclude figures for other states, however, such as Washington State, where many western Canadian women go for abortion.

\(^{229}\) See, Globe and Mail, September 14, 1976.


\(^{231}\) Supra, note 141.
abortion law reform, and will have paid dearly for any success he may eventually achieve with his liberty, his financial security and, some believe, his health. His campaign leaves the social controversy on abortion with no improved prospect of resolving itself in consensus, and has served debate on the moral issues only by assisting to illuminate its extremities. The jury system and the values it symbolises will be the more secure for removal of appellate power to replace acquittal with conviction. In both abortion law and criminal procedure, his trials have caused the Canadian public to enquire about basic issues in criminal law and its enforcement. One need not admire the man himself, nor hold him in any special respect, to be indebted to him for forcing to public attention important principles by which the administration of justice is achieved. The Morgentaler case, involving issues of substantive law, the quality of its enforcement and the interaction of legal process and society has given cause to contemplate the different dimensions of justice.