THE ABORTION CONTROVERSY IN CANADA AND THE UNITED STATES

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The political dynamics and policy processes which have affected the abortion controversy in the United States and Canada offer a unique opportunity for cross-cultural research on how regimes of fundamentally unlike character cope with contentious disputes over morality.* While there are excellent case studies of abortion politics in the United States[1] and in Canada,[2] none offers a comparative perspective of both countries from common vantage points. The deficiency guides the analysis in this essay which draws upon substantive findings in a forthcoming book on abortion politics in North America.[3]

Though Canada is a constitutional monarchy and the United States a democratic republic, both were originally founded as English colonies. The Americans openly rebelled against British authority and created a Constitution in 1789 with great potential for a national government, but which later was coupled with

*A list of acronyms used in this article is provided on page 31.

a written Bill of Rights that circumscribed national authority to reflect strong libertarian values. Canada did not formally separate from the English Commonwealth until the mid-twentieth century and only recently--in 1982--did the northern nation establish a Charter of Rights and Freedoms as part of its fundamental law.

Both are federal systems, and the recent narrow defeat of a separatist referendum in Quebec recalls to mind the bloody Civil War which erupted when southern states seceded from the United States. Indeed, sovereignty issues about provincial self-government, notably a "special status" for Quebec relative to the rest of Canada, may be more volatile than racial animosities between whites and African-Americans in the U.S. But quite different political consequences have resulted. The end of the Civil War saw a sustained nationalization of American politics as the federal government gained at the expense of states' rights; moreover, the Supreme Court came to exercise a policymaking role over states through its "incorporation" of the Bill of Rights. In Canada, by contrast, the provinces have enjoyed substantial autonomy from the central government and today the Supreme Court of Canada may be especially reluctant to raise legal objections against Quebec legislation in order to avoid a constitutional confrontation. Prior to 1982 the Supreme Court of Canada held a restrained approach to "judicial review" but after the Charter of Rights and Freedoms was established, it has begun to imitate the U.S. Supreme Court by rendering decisions defending unpopular minorities and alternative lifestyles.[4]

On the other hand, Canada is a parliamentary government which allows for greater decision-making capacity than the U.S.

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system of "separated institutions sharing power," as the American arrangement is commonly characterized. And further bolstering the governing potential of Canada's parliamentary politics is its multi-party system, where the social democratic NDP, Liberal, Progressive-Conservative, Bloc Quebecois and Reform parties are more ideological and cohesive than their weak counterparts--Democrats and Republicans--in the United States.

While both nations are liberal polities, observers believe that Americans are more committed individualists, whereas Canadians are more respectful of community values.[5] Lipset succinctly portrays the differences this way: "America reflects the influence of its classically liberal, Whig, individualistic, antistatist, populist, ideological origins" whereas Canadians "can still be seen as Tory-mercantilist, group-oriented, statist, deferential to authority--a 'socialist monarchy,' to use Robertson Davies' phrase."[6]

I. COMPARING THE U.S. AND CANADA

Sociologist Mildred Schwartz notes that "[a] striking characteristic of American life is the ease with which moral causes are translated into political issues." She hypothesizes that "[i]n other countries, even when the same moral issues arise, they will be treated more cooly, with less emotional fervor. There will be less polarization among affected interests, and the issues will not play a prominent role in the political sphere."[7] Schwartz observed that Canadians, unlike Americans, were reluctant to exploit the medium of party politics. Moreover, the party discipline that results from a parliamentary system has a profound impact on how moral causes are treated. As she elaborated:

> These properties of government mean that there is less to fear in Canada from single-issue moral campaigns. This is not to suggest that some legislators may not suffer electoral defeat because of concerted efforts to overcome them, but it is probably less likely than in the United States, and in general, less disruptive. More to lose also means more to win: The attraction of individual legislators to single issues that will bring them attention is more of an American phenomenon.

Schwartz also subscribed to the then commonly held view that another "fundamental difference" was that the legislative branch was dominant in Canada, whereas the federal judicial supremacy

was a greater force in the United States. Therefore "[w]hen moral interests are successful in taking their case to the Constitution (as they were with prohibition and threaten to do again with abortion), they have the means of incorporating their view of conduct into the core of political values. The drama of this symbolism is absent from Canada."[8] That scenario may be less applicable today, following adoption of the Charter of Rights and Freedoms.[9] Are the policymaking dynamics in Canada similar to those in the United States and, if not, then where specifically do they differ?

II. BACKGROUND TO CONTROVERSY

A. 1960 Reform Agitation. What motivated the 1960s abortion reformers in the United States and Canada was medical need, not feminist theory or rights jurisprudence. In 1959 the American Law Institute recommended wholesale reforms in its Model Penal Code, including a call for therapeutic abortions under these conditions: (a) substantial risk that mother or child will suffer grave and irremediable impairment of physical or mental health and (b) the pregnancy resulted from forcible rape. The ALI Penal Code had no immediate impact until the issue was dramatized by the much-publicized story of Sherri Finkbine, host of a preschool television program in Arizona, and the thalidomide scare of 1962. The drug thalidomide had been obtained by Ms. Finkbine's husband while he was traveling in Europe and, upon his return, Ms. Finkbine took several pills to ease nervousness from her pregnancy, only to learn later from an article in *The Arizona Republic* that the drug was linked to thousands of deformed infants born in West Germany and Great Britain. After a storm of publicity a local hospital refused to perform an abortion, whereupon Ms. Finkbine travelled to Sweden where the aborted fetus was found to be grossly deformed.

In early 1965 an umbrella group, the National Association for Humane Abortion, held its organizational meeting in New York City, and in 1967 the American Medical Association formally endorsed the ALI recommendations. In a relatively short period of time both the medical community[10] and public opinion[11] rallied behind the call for therapeutic abortion reform. Given the fact that existing anti-abortion laws had forced a collision between changing medical practices and the legal *status quo*, one would think that organized medicine and the legal profession would have been in the forefront of change. While the AMA accommodated changing attitudes among

its membership, for the most part the pro-abortion activists were physicians and other health care professionals outside of organized medicine. The American Bar Association (ABA) took no action during the 1960s, though in 1972 its House of Delegates approved the Uniform Abortion Act that had been promulgated by the National Conference of Commissioners on Uniform State Laws in 1971.[12] Indeed not until August of 1992 did the ABA finally approve a resolution supporting "state and federal legislation which protects the right of a woman to choose to terminate a pregnancy (i)before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman."[13] The restrained advocacy of the medical and particularly the legal establishments in the United States stood in sharp contrast to what happened in Canada.

The Canadian political landscape was characterized by F.L. Morton this way: "Its professional groups, the Canadian Medical Association [CMA] and the Canadian Bar Association [CBA], spear-headed the effort. They received moral support from the United Church, the largest Protestant denomination in Canada, which began to endorse wider access to abortion in 1960. Surprisingly, women's groups played only a marginal role at this stage of the reform movement."[14] As early as 1966 the CMA and the CBA had passed resolutions favoring abortions where the health of the mother was endangered, and during parliamentary hearings in 1967 the CMA sent a delegation to testify. It favored legislation permitting abortion when the woman's life or health was endangered, when the fetus was defective, and when pregnancy resulted from a sex crime. In sum, Morton argues that the CMA was the leading reformist organization whose objective, with assistance from the CBA, "appears to have been neither sexual equality nor social engineering but professional self-interest: to protect doctors against the legal uncertainties of the current law."[15]

B. Therapeutic Abortion Laws. The first criminal abortion law in Canada was enacted in 1869 and provided a penalty of life imprisonment for the person who procures a miscarriage. As to why abortion was brought under the criminal code, as in the United States, there were societal and religious pressures to protect the fetus and concerns about the mother's health given that nineteenth century abortions were a dangerous medical procedure often performed by non-physicians.[16]

The Abortion Act of 1967 was approved in Great Britain and reform legislation, though more restrictive, was enacted in Canada two years later. Three private member's bills to legalize abortion were introduced in early 1966 and 1967 but none were enacted. Then on December 21, 1967, Bill C-195 was introduced to the House of Commons by Liberal justice minister Pierre Trudeau. It was an omnibus measure dealing with such moral questions as lotteries, passports, firearms, bail reform, homosexuality, and abortion. The standing committee on health and welfare proceeded with public testimony before rendering a final report on March 13, 1968, which criticized Bill C-195 and its expansive definition of "health" as justification for abortion. Bill C-195 died, national elections in 1968 kept the Liberals in power, and Pierre Trudeau, now prime minister, reintroduced identical legislation to Parliament as Omnibus Bill C-150. Rancorous debate followed a second reading on January 23, 1969, but Trudeau maintained that "morality is a matter of private conscience. Criminal law should reflect the public order only."[17]

While the packaging of abortion reform with so many other changes to the Criminal Code was a deliberate strategy by the Liberal Government, it was unlike what happened in the United States. The 1960s abortion reforms in the United States were not tied to any generalized liberal view of morality; instead the state-by-state actions focused strictly on the need to create abortion statutes that reflected prevailing medical practices. The "original" state anti-abortion laws, dating back to the 19th century, generally had proscribed abortion except to save the mother's life.[18]

In 1966 Mississippi added rape (to mother's life) as a therapeutic exception, and over the next seven years thirteen other states liberalized their criminal codes to allow a range of therapeutic abortions. Beyond that, Alaska, Hawaii, New York, and Washington State repealed their original anti-abortion laws in 1970, making the procedure elective within their jurisdictions. The fourteen reformed laws showed, according to George, "how substantial the influence of the (ALI) Model Penal Code has been, particularly in terms of the grounds stated to authorize abortions."[19] By the time the Supreme Court issued its landmark ruling on abortion in 1973, then, four states had decriminalized abortion entirely, fourteen had some form of therapeutic abortion law, and 32 states still retained their historic prohibitions on abortion.

III. PUBLIC OPINION AND ORGANIZED INTERESTS

A democratic government is supposed to be responsive to public opinion without disparaging the rights of minorities, but often public policy is shaped by organized interests without regard to the majority viewpoint. This political dilemma lies at the heart of the debate over abortion, even more so in the United States than in Canada. A situation exists where two "intense" minorities have polarized views of abortion policy that do not represent the feelings of most Americans or Canadians. In both countries the majority stands to the right of the unrestricted pro-choice position but to the left of the absolutist pro-life position.

A. Public Opinion. In the United States, long before *Roe v. Wade*, there was a virtual consensus favoring therapeutic abortions under specified medical conditions, but resistant to elective abortion. One review of Gallup polls during the 1960s found that "[a]bortion to preserve the mother's health or prevent child deformity may be said to be publicly well accepted, while abortion for discretionary ('selfish') reasons receives minimal but, nonetheless, rapidly growing support. Legal freedom of elective abortion, however, is rejected by the non-Catholic majority."[20] In Canada, a 1965 poll found that nearly three-fourths of respondents supported therapeutic abortions when the mother's health was endangered.[21]

A key to understanding the politics of abortion is the tremendous consistency and stability of public opinion over time. A standard question asked by the Gallup Poll is whether "abortions should be legal under any circumstances, legal only under certain circumstances, or legal in all circumstances?" In 1992 only 14 percent of Americans favored an absolute prohibition; 33 percent endorsed legalized abortion for any reason; and a majority of 51 percent favored abortions under certain (but unspecified) conditions. That same year slightly fewer Canadians agreed with the pro-life (10 percent) or pro-choice (31 percent) options, and 57 percent chose the middle position. Quite similar results for both the United States and Canada were reported by Gallup back to 1975, and their review of these data led Nevitte, Brandon and Davis to conclude that

> a substantial majority of both publics consistently fall into a very large middle ground; most Americans and Canadians are prepared to support the legalization of abortion "under certain circumstances." The precise nature of this

> middle ground...turns out to be a crucial source of variation in public opinions about abortion. When respondents are asked if abortion should be legalized when health concerns come into play...over three-quarters reply "yes." Support for legalizing abortion drops off dramatically when such "discretionary considerations" as low family income are at issue.[22]

The overwhelming support for "hard" or therapeutic abortion (mother's life, rape, deformed child) is corroborated by surveys of Americans by the National Opinion Research Center (NORC)[23] and of Canadians by Gallup.[24]

Recent cross-cultural research employs multivariate analysis to determine which factors undergird popular attitudes toward abortion. One study based on the World Values Survey of 1990 found three relationships. The importance of God and church attendance were the most important negative predictors in both the United States and Canada. Also postmaterialist values, feminism, and education correlated positively with abortion support. Finally, ethnic/racial attributes had mixed impact insofar as American blacks were opposed to abortions and Francophone Canadians supported abortions for health reasons, while gender had no decisive effect in either society.[25] The other comparative analysis affirmed the importance of religious variables insofar, as expected, Roman Catholicism was related to opposition to abortion in the United States and Canada and subjective interpretations of the Bible and saliency of religion were negative influences.[26] This research also revealed important regional variations. Quebec and the American South are unique, for different reasons, because "southerners are less supportive of access to legal abortion than are nonsoutherners in the United States" while "residents of Quebec are more supportive of abortion rights than are respondents residing in the English-speaking provinces."[27]

B. Organized Interests. When the abortion controversy first emerged in the United States, Peter Skerry alleged that it was "part of a larger cultural conflict between certain strata of the upper-middle class--the highly educated professionals, scientists, and intellectuals--and the mass of Americans who comprise the working and lower-middle classes.[28] In other words abortion provokes a "reverse" class conflict. Pretty much the same indictment of the Canadian political landscape is made by Morton and Knopff, who

more recently argued that issues like abortion represent the vanguard of a so-called "court party" in Canada. Leading the way is the unelected judiciary but "[s]ocio-economically, members of the Court Party are drawn almost exclusively from the service sector of the economy, and enjoy high levels of education, affluence, and mobility. As in most Western developed democracies, this social class has spearheaded a new kind of politics, known as the politics of postmaterialism. This class and its politics constitute the foundation of Canada's Court Party."[29]

Contrary to what popular commentators may say, abortion has not engulfed the organizational life of either the United States or Canada because, for most people, abortion is more an afterthought than a pressing policy concern. There are compelling reasons why organizations formed to promote economic interests, like trade associations and labor unions (especially so in the U.S.), have not taken sides in the abortion date.

Single-issue groups represented 69 percent of all pro-life groups which gave Congressional testimony and 53 percent of all pro-life *amici* before the Supreme Court.[30] Most active on the pro-life side were the National Right-to-Life Committee (RTL), Americans United for Life, Legal Defense Fund for Unborn Children, American Life Lobby, American Citizens Concerned for Life, and U.S. Coalition for Life. The National Abortion Rights Action League (NARAL) was the only single-issue organization on the pro-choice side. Founded in 1969 as the National Association for the Repeal of Abortion Laws, NARAL assumed its new name four years later.

The Canadian counterpart to NARAL is CARAL, or Canadian Abortion Rights Action League, although other pro-choice single-issue groups that gave parliamentary testimony in 1990 were the Pro-Choice Action Network, Tories for Choice, Men for Women's Choice, Coalition for Reproductive Choice, Physicians for Choice, and Canadians for Choice. This listing includes at least three umbrella organizations that represent other groups, most of which did not make formal presentations before the parliamentary committee. The Pro-Choice Action Network speaks for at least six like-minded groups across Canada, as for example, the British Columbia Coalition for Abortion Clinics, and among the eighteen affiliated groups of Canadians for Choice are the Canadian Unitarian Council, Canadian Federation of Business and Professional Women's Clubs, and the National Council of Jewish Women. CARAL is comprised of eighty-five mainly local

and provincial associations, but with some national groups as well (YWCA of Canada, National Association of Women and the Law). Many fewer pro-life groups are present but among the single-issue organizations are Campaign Life Coalition, Canadian Physicians for Life, Nurses for Life, and Campaign Quebec-Vie.[31]

In Canada single-issue groups are more important to the pro-choice coalition than in the United States, based upon those groups that gave testimony to Parliament on Bill C-43 in 1990. The mainstays of the American pro-choice coalition are women's groups, health care associations, organized religion, and family planning organizations. Those four categories accounted for 73 percent of the pro-choice organizations that gave testimony at various times to Congress, compared to 12 percent that were pro-choice single-issue groups. In 1990 Canadian women's organizations (at 40 percent) and single-issue groups (26 percent) together represented two-thirds of the pro-choice groups to testify against Bill C-43.[32]

A detailed examination of the pro-life and pro-choice groups which testified before Congress or co-authored *amicus curiae* briefs to the U.S. Supreme Court suggests that one ought to differentiate between the pro-life **lobby** and the pro-choice **coalition**.[33] The same logic would apply to Canada as well. In both countries the battle over abortion affects a relatively narrow band of interests. The pro-life lobbies are virtually a single-issue phenomenon while notable political alliances were forged within the pro-choice coalitions. Thus the pro-choice movement is larger, more diverse, and has prestigious national associations as affiliates, but still it is not an all-encompassing group network. The Canadian portrait is a microcosm--with some differences--of the American pattern.

Both in Canada and the United States mainstream Protestant and Jewish churches have joined the pro-choice coalition. Here they include the United Methodist Church, American Jewish Congress, United Church of Christ, The Presbyterian Church (USA), and United Presbyterian Church of USA. Only the United Church of Canada (the largest denomination) gave testimony to Parliament in 1990, though its sectarian allies would include the Presbyterian Church in Canada and the Anglican Church of Canada. A unique single-issue religious network is the U.S. Religious Coalition for Abortion Rights (RCAR), an umbrella organization of 28 religious groups representing fourteen denominations. RCAR was established in 1973 to prevent a pro-life constitutional amendment which, it believed, "would enact

into civil law one particular theology--a theology that is not shared by a majority of Western denominations."[34] There is nothing like RCAR in Canada because the abortion controversy in the United States has become embroiled in the ongoing debate over church-state separation and, more important perhaps, due to the forceful advocacy of the Roman Catholic Church. Where the U.S. Catholic hierarchy has undertaken a politically strident offensive against abortion,[35] the Canadian bishops have taken a decidedly restrained approach, so much so that "revivalist" lay Catholics have taken up the pro-life cause to rebel against both the secularism of Canadian society and the political accommodation of the Canadian Conference of Catholic Bishops.[36]

Abortion is singularly a women's issue, but in both Canada and the United States feminism was a late arrival in the struggle. Although data on lobbyists before Congress and the U.S. Supreme Court show that the largest category are groups dedicated to the social, economic, and political advancement of women, the overall statistics are slightly misleading.[37] It was not until 1967 that the National Organization of Women (NOW) endorsed liberalized abortion laws and, in fact, the outpouring of feminist sentiment was triggered by the pending *Webster v. Reproductive Health Services* (1989) decision before the U.S. Supreme Court. In the United States a transformation in the pro-choice coalition took place; "when *Roe* was decided, slightly more health and medical groups filed briefs than did women's organizations, and as late as 1983...health / medical groups were more prominently involved than were groups representing women....By the time *Webster* reached the Supreme Court docket in 1989, more than four times as many women's groups collaborated on *amicus* briefs as did health and medical organizations."[38]

In Canada most observers credit organized medicine with derailing Bill C-43, especially in the Senate debate. "The doctors, as [Minister of Justice Kim] Campbell recognized, were playing 'hardball politics' and, judging by the Senate committee's reactions to these exchanges, they were winning."[39] Bill C-43 was defeated by an essentially conservative political force (doctors), which is why Canadian feminists believe that Canada made no advance on incorporating abortion into a rhetoric of women's rights.

IV. JUDICIAL ACTIVISM AND RESTRAINT

A. American Activism. In 1968 Roy Lucas determined that "the constitutional issues implicit in the enactment and application of abortion laws have received scant judicial attention."[40] But things changed quickly when the Supreme Court overturned the "original" 1854 anti-abortion law in Texas in the landmark *Roe v. Wade* (1973) case and struck down the 1968 therapeutic "reform" law in Georgia in the companion case of *Doe v. Bolton* (1973). The logic of the Court's opinions was grounded in a birth control case, *Griswold v. Connecticut* (1965), where contraceptive use was declared to be a "privacy" right inferred from the Bill of Rights including the Ninth Amendment, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." By a 7-2 vote the justices reasoned that "privacy" in marital sex could be extended on similar legal grounds to abortion.

In his majority opinion Justice Blackmun distinguished among the three trimesters of pregnancy. During the first trimester he argued that the physician in consultation with the patient could determine whether his or her medical judgment indicated that the woman's pregnancy should be terminated. Upon making that decision, Blackmun said the pregnancy could be terminated "free of interference by the State." It was during the second trimester that the "important and legitimate interest in the health of the mother" allowed government to "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Finally, during the third trimester, government had an " important and legitimate interest in potential life" because, at the point of viability, the fetus could presumably survive outside the mother's womb. Thus government could even prohibit abortions during the third trimester except in cases to preserve the life or health of the mother.

More than one observer has laid the blame on the U.S. Supreme Court for rupturing the political consensus that was developing during the 1960s around "therapeutic" abortion[41] and, beyond that, for polarizing the abortion debate by disregarding any legal protections for the fetus in favor of a woman's right of privacy. For that reason Glendon argues that *Roe v. Wade* created the most one- sided abortion policy of any Western democracy.[42]

In the more than two decades since the high court constitutionalized a right of abortion, pro-choice activists have looked

to the judiciary to protect their new-found liberty. With the exception of three rulings which upheld state or local bans on public funding or the use of public facilities for abortions, *Beal v. Doe* (1977), *Maher v. Roe* (1977), *Poelker v. Doe* (1977) as well as the 1980 decision in *Harris v. McRae* (which supported the Hyde Amendment by which Congress refused to fund most abortions under Medicaid), the Supreme Court yielded little ground to the prolifers. The judiciary has not reneged on abortion as a woman's constitutional right, has refused to acknowledge that the unborn is a "person" in any legal sense, and fairly regularly has struck down obstacles designed to prevent women from obtaining abortions. A detailed examination of the seventeen major Supreme Court abortion rulings during the years 1974-1992 shows that 19 of 36 (53 percent) restrictions by states and localities on the abortion procedure had been struck down, but there has been a dramatic change since in 1989. For the period 1974-1988, 18 of 27 regulations (67 percent) were invalidated, but from 1989 to 1992 the Court has ruled against only 1 of 9 (11 percent),[43] thus highlighting the consequences of the conservative jurisprudence in *Webster v. Reproductive Health Services* (1989).

Webster resulted because there has been turnover on the Supreme Court since 1973, since Republicans have owned the White House for all but four years during the interim. With a new partisan lineup on the Court, pro-choice advocates feared that *Roe* would be overturned and pro-lifers relished the thought. The 5-4 vote in *Webster* did neither. While the constitutional precedent for a women's right to an abortion was not directly repudiated, its practical effect was narrowed considerably because a majority of the justices applied a less restrictive standard for reviewing state anti-abortion restrictions. Indeed, these chilling prospects led pro-choice litigants to informally resolve their suit against Illinois' using its medical practice laws to impose regulations on abortion clinics rather than appeal to the high court.[44] Because the 1973 ruling had established a "fundamental" right to abortion and thus required "strict scrutiny" of any state or local regulations that prevented or deterred women from obtaining abortions, few laws could withstand that legal hurdle. So *Webster* is a turning point in abortion jurisprudence and paved the way for the Court to approve state anti-abortion restrictions (parental consent, waiting periods), that previously had been struck down, in the latest series of decisions ending with *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).

B. Canadian Restraint. By comparison, the Canadian Supreme Court has been a model of judicial restraint, notwithstanding its ruling in 1988 nullifying the 1969 Criminal Code on abortion. That was a dramatic about-face from its refusal twelve years earlier to intervene affirmatively in the abortion controversy. Two years following the *Roe* decision the West German Constitutional Court ruled that abortion to preserve the mother was not subject to criminal penalty, but the Canadian Supreme Court in *Morgentaler v. The Queen* (1975) declined to overturn the 1969 therapeutic abortion statute. A comparison with the German case led Susan Mezey to conclude that by its "rejecting the constitutional arguments and declining to question the constitutionality of the legislative enactment, the Canadian Supreme Court showed a degree of judicial restraint which is not typical of a modern common law court."[45]

The 1975 ruling involved Dr. Henry Morgentaler, the prominent abortionist. He has been the most outspoken advocate, a *cause celebre*,[46] in the modern era of Canadian abortion politics, and his personal crusade culminated in the 1988 victory. This time, voting 5-2, in a 200-page judgment, the Supreme Court of Canada removed abortion from the Criminal Code. Section 251 of the 1969 statute had restricted abortions to accredited or approved hospitals and only where pregnancy terminations were certified by the majority of a hospital therapeutic abortion committee. While the immediate effect of its ruling was to make abortion a medical issue between the woman and her doctor, three justices in the majority indicated that they would accept some federal restrictions on abortion. The provinces, while they could not make abortion a criminal offense, could try (and did) to regulate abortion as they did any health service.

The difference between 1975 and 1988 was the 1982 Canadian Charter of Rights and Freedoms, and Dr. Morgentaler mounted his legal challenge pursuant to Section 7, which states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." But this ruling, unlike *Roe v. Wade*, was not grounded on privacy rights and did not preclude parliamentary restrictions on abortions. According to Glendon:

> [i]n both *Roe* and *Doe* [*v. Bolton*, a companion case] the United States Supreme Court went far beyond the exigencies of the cases at hand to invalidate the abortion laws of all fifty states, and then proceeded (in quasi-legislative

fashion) to lay down its own guidelines for abortion regulation in such a way as practically to foreclose further development by the state legislatures.[47]

Instead the reasoning of the Canadian Supreme Court hinged on the unworkable nature of the existing abortion law which posed a threat to the "security" of women, unlike the U.S. Supreme Court opinion that made virtually no mention of abortion services. "Much of [plaintiff's lawyer Morris] Manning's case centered on his argument that the law created unequal access to abortion--coupled with distressing, often dangerous delays."[48] Of the five-person majority, only Madam Justice Wilson was receptive to the appellant-doctors' argument that, following the U.S. example, a constitutional right to abortion should be established. Thus Canadian women "won a symbolic right to access but without the corresponding right to choose" while American women won "the symbolic right to choice without the corresponding right of access."[49]

The 1988 *Morgentaler* case was the first of a trilogy of important abortion decisions issued by the Canadian Supreme Court. The *Daigle v. Tremblay* (1989) case began when Jean-Guy Tremblay won a temporary injunction preventing Chantal Daigle, his former girlfriend, from aborting her pregnancy, a request upheld by the Quebec Superior Court and the Quebec Court of Appeal, whereupon Daigle appealed to the high court. By the time the Supreme Court ruled, Daigle's attorney informed the Justices that she, now 24-weeks pregnant, had aborted the pregnancy. Even though the case was moot, the Supreme Court invalidated Tremblay's injunction on various grounds, one being that "[t]he Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood." Furthermore: "[a]scribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties--a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature." In other words, the high court would not ascribe personhood to the fetus and, once again, deferred to the legislative branch in resolving that issue.

The third case involved a direct attempt to force the Canadian Supreme Court to grant legal protection to the unborn. *Borowski v.*

Canada (1989) was litigated by Morgentaler's nemesis, Joe Borowski, ex-trade union activist and former Manitoba NDP cabinet member who became Canada's foremost pro-life crusader. Though his legal efforts preceded the Charter of Rights and Freedoms of 1982, his final appeals argued that Section 7, granting "everyone" the "right to life, liberty and security," should be extended to the unborn.

The Saskatchewan Court of Queen's Bench in 1983 ruled that the fetus was not a legal person, and its judgment was upheld by the Saskatchewan Court of Appeal in 1987, setting the stage for a high court review. On March 9, 1989, the Canadian Supreme Court sidestepped the constitutional issue of whether the fetus has a right to life under the Charter, arguing instead that Borowski's appeal was moot since Section 251 of the Criminal Code already had been nullified by its *Morgentaler* decision. That the controversy was "moot" hinged on three constitutional doctrines, the third of which was based on "the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention." That is, "[w]hat the appellant seeks is to turn this appeal into a private reference....To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court." Of course Borowski was devastated, complaining that "it would be a waste of my time to ever go back before those gutless...judges who wasted ten years of our time."[50] But an option remained insofar as all three rulings in the trilogy of abortion cases of 1989 encouraged the legislative branch to write a new law on abortion and specify the legal status of the fetus.

V. THE LEGISLATIVE RESPONSE

A. In Parliament. No concerted effort was made to repeal the "therapeutic" abortion language of the Criminal Code until the issue was joined by the Canadian Supreme Court. Since the high court literally had invited Parliament to rewrite the law, the Progressive-Conservative government of Brian Mulroney made unsuccessful efforts to fashion new legislation. Following the court ruling, the government moved to get the "sense of the House" (of Commons) by proposing three resolutions on abortion (pro-life and pro-choice alternatives and a centrist option) in May of 1988. But the maneuver failed because the government planned to limit debate

and prohibit any amendments, and the opposition parties, Liberals and New Democrats, denounced the procedures as anti-democratic and illegal, whereupon the government "sheepishly withdrew its proposal."[51]

Two months later the government submitted a solitary abortion proposal, but now permitting amendments that would require the opinion of one doctor for therapeutic abortions "during the early stages of pregnancy" and agreement from two physicians and more strict criteria "during the subsequent stages of pregnancy."[52] Though "free voting" was allowed, all twenty-one amendments were defeated, and then the House of Commons rejected the government plan on a 147-76 vote. While "the voting crossed all party lines, female MPs from all parties voted consistently for the pro-choice positions."[53]

One last try by the Mulroney government to resolve the legal tangle over abortion policy came in late 1989. The Prime Minister formed a caucus committee of pro-life and pro-choice MPs to forge a compromise, and what they agreed upon eventually became Bill C-43. It was introduced to Parliament on November 28, 1989, when Mulroney made a speech imploring both sides to yield some ground. He indicated that only PC backbenchers would be allowed a "free vote," whereas "Cabinet Ministers and those aspiring to Cabinet were sent a clear message to hold their noses and pass the bill."[54] Then testimony was received from organizations and individuals by a parliamentary committee from January through March of 1990. Pro-life opponents believed the legislation was too liberal; pro-choice advocates were opposed to recriminalization of abortion; and organized medicine was generally hostile.

According to informed observers "passage of the bill seemed to be a foregone conclusion. The government had exerted strong pressure on its caucus to toe the party line and the debate itself was not well attended."[55] Outside Parliament pro-choice activists organized rallies in Toronto and fifteen other Canadian cities while, for their part, pro-lifers were "inactive in the face of this eleventh-hour campaign," suggesting that "[t]heir confidence had been visibly shaken both because their committed proponents proved unable to change the legislation in committee and because many self-proclaimed pro-life MPs now appeared willing to support the bill."[56] Says F.L. Morton, "the pro-life and pro-abortion extremes, which had dominated the earlier stage of courtroom politics, continued to play a

leading role in the legislative arena." Thus Bill C-43 barely passed, said Morton, because "both pro-life and pro-abortion MPs voted against it. This alliance of extremes against the middle failed largely because the 'free vote' did not apply to the cabinet, which maintained its solidarity and voted *en masse* in favour of the bill."[57]

There were ten motions from pro-life MPs to strengthen the prohibitions against abortion and one pro-choice motion to decriminalize abortion entirely. Bill C-43 had proposed to legalize abortions where "the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened." And the key term "health" was given an expansive definition to mean "physical, mental and psychological health," which explains why many of the pro-life amendments were designed to limit the definition of "health" for abortion purposes.

On the pro-life amendments, the prevailing pattern was for a majority of Progressive- Conservatives and upwards of two-thirds of New Democrats to oppose them, whereas the Liberal Party was divided (most Liberals chose to abstain). On final enactment there was a marked increase in the number of MPs who voted, with 83 percent of Progressive-Conservatives voting in favor while 88 percent of Liberals and 98 percent of New Democrats were opposed. A multivariate analysis indicated that, overall, two cleavages dominated the voting patterns: party affiliation and cabinet membership. Progressive-Conservatives and particularly the "frontbenchers" supported Bill C-43, and the cabinet remained unified against the pro-life motions (less so for the backbenchers), but on the key procedural votes the rank-and-file members rallied behind the government. So Overby, Tatalovich, and Studlar concluded that partisanship was the strongest predictor of this "free vote" on abortion in the Canadian parliament.[58]

What ended this attempt to recodify an abortion policy was the defeat of Bill C-43 on an unprecedented tie (43-43) vote in the 104-member Canadian Senate. Senators are not elected and thus are relatively immune from electoral politics, though not from government pressures, but on Bill C-43 the Mulroney government also allowed a "free vote" and "[t]here had been very little pressure exerted on Conservative Senators to toe the party line" by the government.[59] Morton contends that the absence of cabinet members in the Senate meant that, unlike the situation in the House of Com-

mons, a "similar critical mass supporting the legislation did not exist in the Senate" to salvage a victory.[60]

B. In Congress. In Congress there was a legislative backlash to legalized abortion which continues to this day. From 1973 to 1988 a total of 571 abortion bills were introduced, of which 94 percent advanced the pro-life agenda in some way.[61] Slightly more than half were attempts to amend the Constitution, but none were passed since two-thirds of the House and Senate would have to concur. Congress banned the use of family planning grants for abortion, curbed data-collecting by the U.S. Commission on Civil Rights, protected the "right of conscience" for health care personnel opposed to doing abortions, and restricted the use of foreign aid programs to promote abortions.[62] The most famous anti-abortion restriction is the Hyde Amendment, named for Congressman Henry J. Hyde (R-IL), which imposes strict limits on the use of medicaid monies for abortions under this federal-state partnership to provide the indigent with health care. The first Hyde Amendment in 1976 banned using medicaid funds for abortions "except where the life of the mother would be endangered if the fetus were carried to term." After enactment, Public Law 94-439 was delayed by legal challenges and did not take effect until August 4, 1977. Three years later the Supreme Court upheld the constitutionality of the Hyde Amendment and, ever since, a more-or-less restrictive version of this prohibition has been enacted. The House routinely passes a restrictive version of the Hyde Amendment while pro-choice forces in the Senate have tried to soften its prohibition on medicaid- funded abortions. Despite hard bargaining by the conferees they quite often failed in their efforts, meaning that Congress was unable to enact its regular spending bill for the Department of Health and Human Services (HHS). The House was decidedly more pro-life in voting on abortion bills as compared to the Senate.[63]

For nearly three years the abortion controversy sidelined congressional efforts to pass the Civil Rights Restoration Act of 1988 and threatened to derail efforts (which ultimately failed anyway) by the Clinton Administration to reorganize America's medical care and establish universal health insurance. Both episodes involved heavy lobbying from the National Conference of Catholic Bishops (NCCB), which originally had been sympathetic to both goals. The civil rights bill was designed to "restore" expansive anti-discrimination guide-

lines against women for educational institutions receiving federal aid (which were nullified by the Supreme Court), but then the NCCB demanded (and got) an "abortion neutral" amendment to prevent the application of anti-discrimination laws for not providing abortion-related services.[64]

For the most part pro-choice forces in Congress have fought a rear-guard battle, trying to prevent or modify the most restrictive anti-abortion bills, though recently the pro-choice cause was victorious when Democratic majorities in the 103rd Congress and President Clinton agreed to enact the Freedom of Access to Clinic Entrances Act (FACE), designed to impose penalties on groups like Operation Rescue that use direct-action tactics against women seeking abortions at clinic facilities. Yet in 1996 the 104th Congress, with Republican majorities in both chambers, enacted (and Clinton signed) legislation to foster major structural changes in the communications industry that included another proviso by Congressman Hyde banning abortion data from the electronic information networks. Civil libertarians and information technology companies immediately promised to challenge that provision on free speech grounds.

Enacting the Hyde Amendment also reflected the strategy used by pro-lifers in overcoming Democratic Party resistance to their curbs on abortion rights. Most pro-life activists in the House were Republicans at a time when the majority party was persistently Democratic, so the use of floor amendments was designed to force Catholic Democrats to confront the abortion issue publicly, and when they did they usually voted pro-life with the Republicans. Research on House voting on abortion bills has found that ideology was most important, that party affiliation had no effect, but that the religious affiliation of representatives was second-ranked in importance. These were the findings of Vinovskis, who studied three votes taken on the 1976 Hyde Amendment, and the systematic analysis by Tatalovich and Schier of abortion voting in eight Congresses during the 1970s and 1980s.[65]

Analysis of the 70 roll calls in the Senate across the period 1973-1988 revealed to Wattier and Tatalovich that substituting a "partisanship variable" (which combines party affiliation with ideology) is a stronger predictor of voting behavior than simply party affiliation. More partisan (liberal) Democrats vote more pro-choice and more partisan (conservative) Republicans vote more pro-life.[66] The only Senate roll call taken on a proposed constitutional amend-

ment occurred on June 28, 1983, when the Hatch-Eagleton Amendment was handily defeated. It read: "A right to abortion is not secured by this Constitution." The division on that vote was examined in three studies, but only Chressanthis, Gilbert, and Grimes directly assessed the importance of party versus ideology. They concluded that party was not a significant predictor of voting behavior but that ideology may be more important than constituency interests in voting on abortion legislation.[67]

VI. NO MANDATE ON ABORTION

Politicians, certainly American politicians, are afraid of the abortion issue because its zero-sum nature and highly symbolic overtones mean that they cannot easily defend a centrist position and, moreover, will be subjected to intense pressures from activists on both sides. One of the political dilemmas surrounding the abortion controversy in the United States is that it has traumatized the system for so long even though the majority of Americans consistently support a middle-of-the-road policy on abortion. The political fallout from the abortion controversy has not rocked the Canadian regime nearly as much, so there may be important lessons from a comparative look at how the abortion issue impinges upon elections, parties, and political campaigns in a parliamentary system as opposed to a separation-of-powers system.

In the 1972 presidential campaign, Richard Nixon sided with the Roman Catholic Church in its effort to repeal New York's elective abortion law, but abortion was not mentioned in either party platform. Four years later abortion was mentioned in both the Republican and Democratic platforms, though their presidential candidates--Gerald Ford and Jimmy Carter--tried to equivocate on the issue. All this changed beginning in 1980 when both parties' platforms and candidates adopted polar opposite views on abortion (Republicans became stridently pro-life and Democrats became ardently pro-choice[68]) and that dichotomy persisted into the 1992 presidential election. Such conditions are conducive to "responsible party" doctrine, where voters are offered a clear-cut choice on policy issues, except for the fact that public and partisan opinion is not polarized on abortion and, more importantly, voters do not choose between the Republican and Democratic presidential candidates based on their abortion views.

The 1988 American National Election Studies "show that primary election voters are no more extreme on the abortion issue than other partisans. There were more pro-choice Republican primary election voters...than pro-life voters....Indeed, what is striking is the similarity between Democratic and Republican primary voters."[69] While "there is evidence that the public has gradually aligned its partisanship with the positions of the presidential parties on abortion"[70]--pro-lifers becoming more Republican and pro-choice advocates more Democratic--abortion attitudes are a decidedly minor influence on how the majority of people cast their votes for president.

A multivariate analysis of voting in every presidential election since 1972 found, as expected, that incumbent popularity, voters' party affiliation, and candidate images were highly significant in every contest, whereas abortion attitudes were significant in 1972 but not again until 1992. For the 1972 and 1992 elections, people with restrictive views on abortion tended to vote Republican while those with liberal abortion opinions generally voted Democratic. However, abortion attitudes had "a decidedly minor impact" on the electorate, even in 1992, and thus these findings "are quite conclusive that the electorate has not been choosing between the presidential candidates from a single-issue perspective on abortion."[71] The fact that the American electorate is not unduly influenced by abortion in its choice between Republicans and Democrats does not mean that abortion is not salient for particular issue publics. For voters who were "aware and concerned" about the abortion issue in the 1992 election, abortion attitudes ranked second to party preference in determining their vote.[72]

In Canadian politics, abortion seems to be almost irrelevant. The 1988 national elections returned the Progressive- Conservatives to power under Prime Minister Brian Mulroney, who eventually had to cope with abortion policy following the *Morgentaler* ruling that same year. But abortion was not a salient consideration in why the voters rejected the Liberal Party or endorsed the Progressive-Conservatives. The "dominant issue in the 1988 campaign" was free trade, specifically the Free Trade Agreement (FTA) with the United States. A listing of the "most important" election issues in Canada since the 1974 elections does not even mention abortion policy. As Harold D. Clarke and his associates explain: "substantial numbers [of respondents] moved from the choice of an

economic issue (e.g., inflation) as most important in 1974, to a confederation issue (e.g., national unity) in 1979, and back to an economic issue (e.g., the Tory budget) in 1980." Moreover "[i]n 1984 as well, the electorate's attention suddenly shifted to the problem of unemployment, mirroring this economic evil's new status as the nation's number one problem in public opinion polls. Finally, the public's shift in attention to free trade in 1988 was so total as to leave all other election issues far behind."[73]

A pre-election national survey in 1988 showed that 89.4 percent of respondents mentioned free trade as the "most important" election issue that year, whereas only 0.8 percent cited abortion. Of that tiny minority, 28 percent chose the position of the Progressive-Conservatives as closest to their view on abortion; 18 percent preferred the New Democratic Party; and 12 percent aligned themselves with the Liberals (10 percent chose another party and 31 percent expressed no opinion).[74] Campaign Life made the attempt to politicize abortion during the 1988 elections by supporting PC and Liberal candidates for parliament based upon their pro-life inclinations. A study comparing those parliamentary candidates who were endorsed by Campaign Life (74 Conservatives, 50 Liberals, one New Democrat) against those who were not endorsed concluded that "Campaign Life's endorsement during the 1988 federal election campaign did not provide a significant benefit to the group of 125 major party candidates that were identified."[75] Nor did candidates endorsed by the Canadian Abortion Rights Action League fare much better, although CARAL limited its endorsements to the province of Ontario where 65 of its 77 endorsements went to New Democrats.

The New Democratic Party was officially pro-choice in the 1988 elections, but the only party to embrace pro-life was the new Christian Heritage Party (CHP). The newly formed Reform Party, though conservative, chose not to take a formal position on abortion but rather allowed its parliamentary candidates to be guided by constituency opinion. Neither the PC nor the Liberals adopted abortion planks, and Brian Mulroney stated that Progressive-Conservative MPs could vote on abortion according to their own conscience. This posturing led Vancouver Campaign Life activist Paul Formby to call both Mulroney and John Turner (leader of the Liberals) "gutless wonders" for not making abortion a party policy insofar as both gentlemen were Catholics.[76]

The 1993 national elections transformed the Canadian party system. Both the Reform Party and the Bloc Quebecois showed tremendous strength at the polls while the PC and NDP suffered precipitous declines. Yet again, the outcome hinged on economic considerations, the NAFTA trade accord with the U.S. and Mexico for example, coupled with Mulroney's reputation as the most unpopular prime minister in recent Canadian history. Abortion played little if any role in that major partisan shakeup.

Meanwhile a familiar scenario is unfolding for the 1996 presidential elections in the United States. In the crowded Republican field of contenders, only Senator Arlen Spector (R-PA) was avowedly pro-choice (but he dropped out of the race in December, 1995). Senator Robert Dole (R-KA), the frontrunner, has signalled his sympathies with the anti-abortion agenda as a gesture to solidify his support among conservatives and the religious right, and other challengers--Senator Phil Gramm (R-TX) and Pat Buchanan--have been stridently pro-life. The main question is whether Dole, assuming his nomination is secure, will downplay abortion in order to mollify GOP women or publicize the issue to galvanize the Christian right. Thus abortion continues to polarize American politics as we approach the 21st century even while it has been effectively depoliticized in Canada.

VII. ABORTION POLICY IMPLEMENTATION

Because Canada and the United States are federal systems, substantial authority is given to subnational political authorities to implement abortion policy, as well as to private sector decision-makers in the United States. Yet despite (or, in the American case, because of) the existence of a uniform legal abortion law, there persists in both countries wide variations in access to abortion services. Whether the uniform law on abortion was promulgated by an unelected judicary or by a popularly elected legislature, the implementation story in Canada and the United States may be characterized as one of massive non-compliance with the law of the land.

In Canada, the 1969 criminal code, which authorized abortions where "the continuation of the pregnancy of the female person would or would be likely to endanger her life or health," further stipulated that "accredited or "approved" hospitals seeking to provide abortion services must create a therapeutic abortion committee (TAC). A therapeutic abortion committee composed of at least

three members who were qualified medical practitioners was to be appointed by the board of each hospital to consider requests for terminations of pregnancy. Each hospital with a TAC had to be accredited by the Canadian Council on Hospital Accreditation to assure the presence of diagnostic services as well as medical, surgical and obstetrical facilities, otherwise a hospital could get the approval to establish a TAC from a provincial minister of health.[77] While the Criminal Code restricted abortions to "hard" or medical reasons, "hard grounds can be, and in Canada apparently were, converted to soft [socio-economic] grounds through expansive interpretations of 'health.'"[78] This medical regime lasted until 1988, when the *Morgentaler* ruling was handed down, and ever since there has been no statutory policy on abortion at the national level.

Trends in abortion rates and abortion providers once diverged but now show convergence between Canada and the United States. Two years after *Roe v. Wade* the number of U.S. abortions reached the one million mark and has stabilized at around 1.5 million since 1980. Canada, with roughly one-tenth the U.S. population, first reached 1/15th of the total for U.S. abortions in 1992. In 1988, the U.S. abortion rate of 27.3 (per 1,000 females aged 15-44) was more than double the Canadian rate of 12.6, but a substantial jump in the Canadian rate beginning in 1990 reflected the opening by Dr. Morgentaler of abortion clinics across Canada. Although the 1969 law mandated that abortions be done only in hospitals, the refusal of Quebec juries to convict Morgentaler for his clinic services in that province has allowed him to operate freely there since 1976. Thus by 1992 the Canadian hospital abortion rate remained substantially (14.9) less than the U.S. rate (25.9) mainly because of the increased number of clinic abortions. Abortions done in private Canadian clinics accounted for 6.4 percent in 1988 but rose to 29.4 percent in 1992, whereas the U.S. proportion of clinic abortions hit 60 percent as early as 1975 and rose steadily to 93 percent in 1992. So if these Canadian trends continue, the demand for abortions and the supply of (clinic) services may approximate the situation in the United States.[79]

Another parallel development has been the failure of the established health care system to provide abortion services coupled with the grossly uneven availability of abortion providers across the American states and the Canadian provinces. The charge made by abortion advocates in 1981 that "responsible response has not been forthcoming from the mainstream of American medicine in the years

since the Court's [*Roe*] ruling"[80] is even more valid today for the United States, and applies equally to Canada despite the urgings of the CMA to safeguard legal abortions. The 855 "known" hospital abortion providers in the United States would represent 16.2 percent of 5292 "community hospitals" in 1992, whereas the most recent data for Canada showed that 22.9 percent of its 835 hospitals had performed abortions in 1990.[81] Since differing measures of hospital "capacity" to perform abortions are used in Canada and the United States, these statistics are not exactly comparable. Using as a baseline for "capacity" the number of U.S. hospitals with obstetrics and gynecology services (since abortions are performed through that service), one study revealed that in 1986 only 34.5 percent of hospitals with "capacity" offered abortion services.[82] In Canada, TACs could be established by hospitals with obstetrics and gynecology **or** medical and surgical units. Using only the former measure of hospital "capacity" to perform abortions, a replication analysis of Canadian hospitals for the same year (1986) showed that only 35 percent bothered to establish therapeutic abortion committees.[83] What this comparison means is that the 1969 parliamentary decision to legalize therapeutic abortions in Canada did not induce any more compliance by the health care sector than was the case for the United States, where a Supreme Court promulgated an elective abortion policy in 1973.

The comparative data for 1986 also reveal similar regional variations in Canada and the United States in the availability of hospital-based abortion services. In both countries abortion services are most accessible in the area lying along the West Coast, and the most restrictive patterns are found in the Alberta, Saskatchewan, and Manitoba provinces or among the thirteen states between California and the midwest. The rate of abortion policy implementation in the U.S. midwest is virtually identical to the mountain states whereas, in Canada, Ontario is decidedly more supportive of abortion services than the midwestern grouping of states-- Michigan, Wisconsin, Illinois, Indiana, Iowa, Minnesota, and Ohio. What are considered to be outliers, Quebec and the South, roughly fall in the middle of the distribution of abortion service availability.[84]

An unexpected finding contradicts the view of some scholars--at least with respect to abortion--that Canadians have a more communal ethos and are more deferential to political authority than Americans. Although hospitals controlled by public authorities represent

29.6 percent of U.S. hospitals but 48.2 percent of Canadian hospitals, it was determined that only 22.3 percent of government-managed hospitals in Canada, compared to **27.4 percent** in the United States, had provided abortion services in 1986. On the other hand, more (57 percent) non-governmental and non-religiously affiliated hospitals in Canada had established TACs in 1986 as compared to the 45 percent of U.S. private sector hospitals with abortion "capacity" which offered abortion services that year.[85] One would think that a higher proportion of Canadian public **and** private hospitals would offer abortion services compared to the United States **if** its collective political ethos were to extend to the provision of abortion services. But that assumption is called into question by these findings.

Moral conflicts are polarizing and, even though Canada has avoided the debilitating political turmoil that surrounds the abortion controversy in the United States, abortion seems to be a unique kind of issue that tests the underlying normative cohesion of any society. The debate over abortion brought forth the same counter-arguments in Canada as were experienced in the United States--abortion is killing the unborn--and they were expressed in both societies by Catholics and fundamentalist Protestants. When Lipset and others took note of the communal nature of Canadian society, as opposed to the libertarian strain of American society, undoubtedly they were thinking more about collective economic goods--the welfare state--rather than moral conflicts. In Canada there is widespread support for universal access to health care, including among medical practitioners. On the other hand, for most citizens a moral conflict may provoke nothing more than an expression of belief, whereas abortion is a deliberate act that requires physicians to reconcile the necessity for abortion against a competing value--the protection of life. And rather than face that situation, what seems to be happening in Canada as well as in the United States is that most physicians, despite their supportive views on abortion, have chosen to avoid the moral dilemma by simply not getting involved in the delivery of abortion services.

VIII. CONCLUSION

This comparative analysis offers mixed findings about whether the similarities or the differences are greater between the United States and Canada. The similarities seem to be rooted in cultural and

socio-economic forces, whereas the differences are linked to institutional arrangements.

Four conclusions can be drawn regarding the role of cultural and socio-economic forces. First, the events of the 1960s that dramatized the need for therapeutic abortion reforms had an impact on both nations, and mainly on elites insofar as the agitation to change laws to reflect medical practices was not the result of a mass movement. Canadian and American public opinion initially galvanized around the medicalized rationale used to justify therapeutic abortions. Second, the contours of public opinion on abortion have been relatively stable and consistent in both nations during the past few decades. Abortions for so-called "hard" conditions elicit high levels of support; those for socio-economic conditions generally fall below majority support. Canadian opinion, in all probability, is marginally more liberal than American opinion. Third, the "scope of conflict" over abortion has been confined to the same organized interests. Both in Canada and the United States, the pro-life "lobby" is represented by single-issue groups and principally by the Roman Catholic Church, whereas the pro-choice "coalition" is comprised of mainstream Protestant churches, the medical and legal establishment, and women's organizations. Organized medicine was certainly a more decisive factor in Canada. Fourth, despite the status of abortion as a constitutional right in the United States and its availability as a medical service under the Canadian health care system (though legally health care is not an entitlement in Canada[86] as are Social Security pensions in the United States), in both nations there is tremendous variation in abortion services. The fact that most established health care providers (hospitals) do not provide abortion services suggests that, beneath the legal niceties, abortions are deemed a marginalized area of "health care" which should be avoided. The cultural stigma attached to abortions must be even greater in Canada, otherwise how else can we explain the lack of services despite the publicized role of organized medicine to gain a liberalized statute in 1969 and to prevent recriminalization in 1990? In the United States, the growth of specialized abortion clinics offers an alternative delivery system and a similar development has been taking place in Canada since 1988.

Three conclusions also can be drawn about how institutional differences have affected abortion policymaking. First, while the establishment in 1982 of the Charter of Rights and Freedoms has

encouraged the Canadian Supreme Court to move closer to the American model, its decision in the 1988 *Morgentaler* case does not embrace the kind of judicial activism represented by the 1973 *Roe v.Wade* case. The U.S. Supreme Court promulgated a new "right" of abortion and thus polarized the controversy; the Supreme Court of Canada challenged the workability of existing law and invited the parliament to amend it. Second, clearly the popularly elected legislative and executive branches in the United States have responded to limit the impact of judicial policymaking, mainly by denying public funds for abortions, whereas the failed parliamentary efforts in 1988 and 1990 to fashion a new abortion code have not been repeated since. Abortion is a dead issue in Canada, but in America it is alive and well. Third, the abortion controversy persists in the United States because it has been sustained by American political leadership (through not by the American electorate), whereas Canadian political elites effectively neutralized the issue. Abortion is a partisan issue that divides the Democratic and Republican party platforms, the views of their presidential candidates, and the partisan rhetoric of election campaigns. In Canada, neither the Progressive-Conservatives nor the Liberals have adopted a formal stand on abortion and, much more so than the United States, their elections have been dominated by economic conflicts. The weakness of American political parties makes them subject to infiltration by pro-choice and especially pro-life single-issue activists. The widespread use of primaries to choose presidential nominees, where today party conventions simply ratify the collective result of the primary contests, makes the parties vulnerable to policy activists who volunteer their efforts on behalf of the candidate with the purest views on abortion, who control disproportionate numbers of votes in the primaries and party caucuses, and who organize political action committees to channel campaign funds directly to that candidate without going through the party organizations. So thoroughly have primaries democratized the process by which Americans recruit their presidential candidates that the Democratic and Republican leadership no long monopolize the nomination process and, consequently, cannot "screen out" policy zealots or political mavericks who are beholden to single-issue causes. The fact that pro-lifer Patrick Buchanan, a columnist who never held elective office, could win an upset victory over Senator Robert Dole, a seasoned politician and the favorite of the GOP political establishment, in the 1996 New Hampshire GOP primary

illustrates once again that a trade-off exists between weak political parties and their "capture" by strongly organized single-issue groups.

In Canada there are powerful disincentives (e.g., appointment to the cabinet) for a backbencher to betray the party organization and seek the backing of single-issue activists. The fate of longtime Liberal MP John Nunciata of Ontario is illustrative. Despite his considerable seniority and probably because of his strong pro-life views, he was not included by Prime Minister Chretien in his cabinet or given any other significant party leadership position. Indeed during the 1993 federal election campaign in Ontario, Liberal party officials (presumably with Chretien's tacit approval) intervened in several ridings to prevent pro-life candidates from securing the nomination away from party regulars. This kind of intervention by the party establishment to guarantee that their partisans are nominated is rare in American politics; even presidents avoid getting involved in intra-party fights for the nomination of congressional candidates.

So formal institutions matter, as Mildred Schwartz rightly observed in the opening pages of this essay.[87] At base, what magnifies the force of institutional divergence are the fundamental differences between the party systems which underlie these two regimes. The Canadian parliamentary system with its strongly disciplined parties has restrained the abortion controversy, whereas the American separation-of-powers system with its loosely organized parties gives expression to its explosive qualities.

ACRONYMS

ABA	American Bar Association
ALI	American Law Institute
AMA	American Medical Association
CARAL	Canadian Abortion Rights Action League
CBA	Canadian Bar Association
CHP	Christian Heritage party (Cda)
CMA	Canadian Medical Association
FACE	U.S. Freedom of Access to Clinic Entrances Act
FTA	Free Trade Agreement
GOP	Grand Old Party (i.e., U.S. Republican Party)
HHS	U.S. Dept. of Health and Human Services
MPs	members of Parliament
NAFTA	North American Free Trade Agreement
NARAL	National Abortion Rights Action League (U.S.)
NCCB	National Conference of Catholic Bishops (U.S.)
NDP	New Democratic Party (Cda)
NORC	National Opinion Research Center
NOW	National Organization of Women (U.S.)
PC	Progressive-Conservative Party (Cda)
RCAR	Religious Coalition for Abortion Rights (U.S.)
RTL	National Right-to-Life Committee (U.S.)
TAC	therapeutic abortion committee

NOTES

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ISSN 1-1047-1073