Constitutionalizing Abortion Rights in Canada

Joanna N. Erdman

THIS ARTICLE ENDEAVOURS TO understand the feminist activism from which constitutional abortion rights in Canada were born in the landmark Supreme Court case of *R v Morgentaler* 1988, and the influence of these rights on continued feminist activism for reproductive justice. Part I reviews abortion practice in the "back-alley" prior to and immediately after the 1969 criminal reform with attention to the direct service activism of liberation feminists in their campaign to repeal the abortion law as a matter of constitutional justice. Part II turns to adjudication in the courts to study how judicial reasoning channelled these constitutional claims, exploring the continuity of ideas between feminist liberation, the criminal defence of necessity, and Charter rights to liberty and security of the person. Part III reverses perspective to examine how *Morgentaler* 1988 shaped and ultimately de-radicalized abortion rights and a new wave of feminist activism through the constitutional logics and institutions of markets and medicine. The article concludes by reflecting on what constitutional abortion rights may yet become, informed by a vision of reproductive justice and rooted in a collective democratic spirit. This article is a study of the feminist ideas and practices that shaped abortion rights in Canada over the 150 years of its *Constitution*, not least the 35 years of its *Charter*, and that will continue to do so into the future.

CET ARTICLE EXPLORE LE parcours de l'activisme féministe à l'origine des droits constitutionnels à l'avortement au Canada que la Cour suprême a reconnus lors de sa décision historique dans l'affaire *R v Morgentaler* 1988. Il analyse en outre l'influence que ces droits ont exercée sur l'activisme féministe qui s'est poursuivi en faveur de la justice reproductive. La Partie I passe en revue la pratique de l'avortement clandestin avant et immédiatement après la réforme du droit criminel entreprise en 1969 en mettant l'accent sur l'activisme des féministes qui revendiquait des services directs dans le cadre de leur campagne visant à faire abroger la loi sur l'avortement à titre de question de justice constitutionnelle. La Partie II étudie, par le prisme de la jurisprudence, la manière dont le raisonnement judiciaire a mis à profit ces revendications constitutionnelles, en explorant la continuité des idées existant entre le mouvement de libération des femmes, le moyen de défense fondé sur la nécessité, et les droits à la liberté et la sécurité de la personne garantis par la Charte. La Partie III inverse le point de vue afin d'examiner la manière dont l'arrêt *Morgentaler* 1988 a façonné et finalement «dé-radicalisé» les droits à l'avortement et amené une nouvelle vague d'activisme féministe par le biais de la logique constitutionnelle et des institutions des marchés et de la médecine. L'article conclut par une réflexion sur ce que les droits constitutionnels à l'avortement

pourraient encore devenir, éclairés par une vision de la justice reproductive et ancrés dans un esprit démocratique collectif. Cet article présente une étude des pensées et pratiques féministes qui ont façonné les droits à l'avortement au Canada au cours des 150 années de sa *Constitution*, et non les moindres 35 années de sa *Charte*, et qui continueront sur cette voie à l'avenir.

CONTENTS

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INTRODUCTION

Ottawa figures as an important place on the 35th anniversary of the *Canadian Charter of Rights and Freedoms* (*Charter*),[1] and the 150th anniversary of the *Constitution Act* (*Constitution*).[2] Ottawa is also an important place for the constitutionalization of abortion rights in Canada, but not for the reasons one may first assume—namely that Ottawa is the seat of Parliament and home to the Supreme Court of Canada (the Court). Ottawa was a critical site for the women's liberation movement. In 1970, it marked the destination of the cross-country *Abortion Caravan*, which carried women's liberation activists to Parliament Hill to demand the repeal of the 1969 criminal abortion law.[3] The caravaners announced their arrival with a

* MacBain Chair in Health Law and Policy, Associate Professor, Schulich School of Law, Dalhousie University. I am much indebted to the scholars, biographers, archivists and memoirists who have preserved the inspiring efforts and achievements of Canadian reproductive justice activism on which we may build an equally inspiring future. Thank you as well to Adam Dodek and the organizers of the conference, *The Charter and Emerging Issues in Constitutional Rights and Freedoms: From 1982 to 2032*, for the opportunity to present my research, and to the editors of the *Ottawa Law Review* for their careful and dedicated assistance.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

3 *Criminal Code*, RSC 1970, c C-34, s 251. See Christabelle Sethna & Steve Hewitt, "Clandestine Operations: The Vancouver Women's Caucus, the Abortion Caravan, and the RCMP" (2009) 90:3 Can Historical Rev 463; Frances Jane Wasserlein, *"An Arrow Aimed at the Heart": The Vancouver Women's Caucus and the Abortion Campaign, 1969–1971* (MA Thesis, Simon Fraser University Department of History, 1990) [unpublished].

blistering letter to then Prime Minister Pierre Trudeau and his Ministers of Health and Justice, which read:

> We are FURIOUS WOMEN in a nation that does not recognize or respect our basic rights as human beings and citizens of Canada.
>
> We charge the Government of Canada with violation of its responsibility and trust to serve all of its citizens. We charge the Government of Canada with the following:
>
> 1. Of being responsible for the MURDER BY ABORTION of 2,000 CANADIAN WOMEN who die each year from illegal abortions.
> 2. Of being responsible for the hospitalization and possible mutilation of 20,000 WOMEN, who enter hospitals for treatment of complications arising from illegal abortions.
> 3. Of being responsible for the psychological, physiological and economic oppression and degradation of thousands of women who forced into unwanted motherhood…
>
> We, therefore, demand…[t]hat Abortion (Section 237) be removed from the Criminal Code of Canada…
>
> We are angry, furious women and we demand our right to human dignity.[4]

Twenty-five years later, local abortion rights activists issued a similar charge and demand in a quieter encounter in Charlottetown, Prince Edward Island (PEI). A veteran activist stepped onto the elevator of a government administration building, greeted by the PEI Premier who asked "[y]ou're coming up to see us this morning?"[5] Indeed she was to serve notice of an intention to challenge the province's restrictive abortion policy as a violation of women's *Charter* rights, and to bring local and safe abortion services back to the Island.[6] Months later, with no case won or even litigated,

4 Letter from Women's Caucus of Vancouver to Prime Minister P.E. Trudeau and the Ministers of Health and Justice, re: Women's Rights—Abortion (19 March 1970), online: <www.morgentaler25years.ca/wp-content/uploads/2013/01/womens-caucus-letter-1970.pdf> [emphasis in original]. The letter was reprinted in the April 1970 edition of *The Pedestal*, Canada's first feminist periodical, launched in September 1969 as the voice of the Vancouver Women's Caucus (see "Open Letter to the Prime Minister" (1970) 3:2 The Pedestal 8, online: <riseupfeministarchive.ca/publications/the-pedestal/pedestal_02_03>).

5 Personal communication from Colleen MacQuarrie, University of Prince Edward Island (5 January 2016) [on file with author].

6 Letter from Nasha Nijhawan, Nijhawan McMillan Barristers to Michele Dorsey, Deputy Attorney General, re: Abortion Access Now PEI Inc v Government of PEI (5 January 2016) [on file with author] (notice of intended proceedings under section 10(2) of the *Crown*

the Premier announced that his government would not contest the challenge. He agreed the provincial abortion policy was likely unconstitutional.[7] "The character of all places changes and evolves," he said, "[i]t's one of those things that comes at its time."[8]

The objective of this article is precisely to study how constitutional abortion rights in Canada change and evolve over time. Most would begin such an analysis with *R v Morgentaler* (*Morgentaler* 1988).[9] In this landmark 5:2 ruling, the Supreme Court of Canada struck down the 1969 criminal abortion law as unconstitutional, and with Parliament's failure, and later lack of desire, to enact a new law, abortion in Canada remains decriminalized today. Yet, in *Morgentaler* 1988, the Supreme Court was deeply divided as to how to frame the abortion right.[10] Three different opinions formed the majority, with none achieving more than two signatures.[11] This diversity in constitutional meaning, however, predates and postdates *Morgentaler* 1988. This feature of abortion rights reflects a more general phenomenon of constitutional rights: the ways in which rights carry multiple meanings, some dominant and others marginal, and how this mix of meaning changes over time. Sometimes this change happens in a paradigmatic shift—omnibus criminal law reform or a Supreme Court judgment. Sometimes it occurs outside formal lawmaking and unmarked by legal judgment: a caravan on Parliament Hill or a hand-delivered envelope. Thus, that *Morgentaler* 1988 remains the reference case for abortion rights today marks not stability in constitutional law, but rather the remarkable capacity for abortion rights both to accommodate and to shape normative change.

Proceedings Act, RSPEI 1988, c C-32). See also *Abortion Access Now PEI Inc v The Government of Prince Edward Island*, PEI Sup Ct (Draft Notice of Application), online: <www.leaf.ca/wp-content/uploads/2016/01/AAN-PEI-050116-Draft-Notice-of-Application.pdf> [AAN Application].

7 Sean Fine, "PEI Drops Opposition to Abortion, Plans to Provide Access by Year's End", *The Globe and Mail* (31 March 2016), online: <www.theglobeandmail.com>.

8 *Ibid*.

9 *R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281 [*Morgentaler* 1988 cited to SCR]. See e.g. Rachael Johnstone, *After Morgentaler: The Politics of Abortion in Canada* (Vancouver: UBC Press, 2017) [Johnstone, *After Morgentaler*] (examines the state of abortion rights and access in Canada today against historical developments since *Morgentaler* 1988).

10 The article acknowledges that the *Charter* does not expressly or directly guarantee a "right to abortion." The Court in *Morgentaler* 1988 variably constructed abortion-related rights from constitutional guarantees of the freedom of conscience, and the rights to life, liberty, security of the person, and equality under sections 2, 7 and 15 of the *Charter*.

11 This is not uncommon in constitutional abortion law. See discussion of a divided US Supreme Court in *Roe v Wade*, 10 US 113 (1973) in Nan D Hunter, "Justice Blackmun, Abortion, and the Myth of Medical Independence" (2006) 72:1 Brook L Rev 147 at 177–88.

The article therefore does not study constitutional abortion rights through legal doctrine alone, but situates *Morgentaler* 1988 in historical context. Structured as a retrospective and prospective case study, it endeavours to understand the feminist activism from which constitutional abortion rights were born, as well as the influences of these rights on continued feminist activism for reproductive justice. It is a socio-legal analysis based on the relationship between doctrine and discourse, law and politics, and the state and its members. The article takes seriously the idea that abortion rights are not forged in legal text or doctrine, but by those who claim and organize around them and the institutions of the state that give meaning and expression to them. Together, these claims and demands, and the ideas and practices that shape and express them, over time and in new political contexts, have fundamentally shifted the meaning of abortion rights in Canada over the 150 years of its *Constitution*, not least the 35 years of its *Charter*, and will continue to do so into the future.

Part I briefly reviews the state of abortion law and practice prior to and immediately after the 1969 criminal abortion law reform, with attention to feminist activism through direct service provision as part of a national campaign to repeal the criminal law as a matter of constitutional justice. Throughout this review, the article emphasizes abortion as a site of overlapping feminist discourse. The campaign for repeal was radical in its opposition to patriarchal culture, left in its critique of capitalist society, and liberal in its demands for legal rights and equality.[12] The capacity for abortion rights to carry multiple meanings was present in the very claim for them, which was critical to broad-based feminist support for them across different political commitments.

Part II turns to the courts, including *Morgentaler* 1988 and the three opinions that formed the plurality judgment of the Supreme Court. The article draws attention, in particular, to differences in how each judge responded to and channelled feminist constitutional claims in their reasoning. This part begins by exploring the continuity of constitutional ideas between feminist liberation action and the defence of necessity in the physician civil disobedience trials that ultimately led to the constitutional challenge in *Morgentaler* 1988. The physicians' argument that their clandestine services were necessary to avoid the graver harm of obeying the law, and the Supreme Court's engagement with this argument, gave voice

12 See Linda Briskin, "Socialist Feminism: From the Standpoint of Practice" (1989) 30 Studies in Political Economy 87.

to liberation feminists' clandestine service provision as political action necessitated by the injustice of the criminal law. Dr. Morgentaler and his colleagues endeavoured to put the law on trial, and with the introduction of the *Charter*, they could do so directly. In turning to the landmark *Morgentaler* 1988 judgment, the article explores how the Court's section 7 security of person analysis both reaffirmed the feminist view of abortion rights as resistance against an unjust state, but also de-radicalized this resistance by reconstituting abortion rights as a right to access safe and timely therapeutic care. Abortion rights suffered the same fate in the lone opinion of Justice Wilson, who reconstituted abortion rights in a liberal feminist tradition as a private right of personal choice unencumbered by the state.

Part III reverses the direction of influence to examine how *Morgentaler* 1988 shaped popular understandings of abortion rights, and a new wave of activism within a new political climate. The article studies the ways in which liberal abortion rights exacerbated, rather than alleviated, social inequalities in access by cutting a constitutional path to the withdrawal of the state from and the privatization of abortion care. Against this outcome, feminist activists returned to the narrower security rights of *Morgentaler* 1988, and the promise of universal abortion access in the Canadian health care system. Yet, by channelling feminist activism through the logic and institutions of the health care system, the politics of abortion became the politics of health care. *Charter* litigation over abortion funding, for example, took on the same market rationality that dominated health care policy debates generally. Moreover, when feminist activism eventually succeeded, and abortion care was integrated into the health care system, it changed more than it changed the system; appropriating, if not reproducing, many of the institutional norms of state and medical authority that liberation feminists railed against. Collective rights in the service of political emancipatory ends became individual rights of free and informed consent in the receipt of medical services. Within the health care system, feminist action turned inward, toward the private, personal space that liberal abortion rights had carved for it, rather than outwards towards collective political action.

The article concludes with a reflection on what constitutional abortion rights may yet become by reference to the 2016 constitutional abortion challenge in PEI. It does so by following the constitutional "road not travelled" in the vision of reproductive justice: namely abortion rights as a demand for democratic inclusion and participation, rooted in the real and material

needs of women's reproductive lives, and the social and economic institutions that shape them.

I. FEMINIST ACTIVISM IN THE BACK-ALLEY

Before the constitutionalization of abortion, there was the commonplace of abortion. In 19th century Canada, abortion, like most health care, was left to family and community arrangements, and to self-care in a growing commercial market.[13] Trained midwives, often relatives or neighbours, presided over birth and its termination in the privacy of the home. A new market in abortifacients, patent medicines, and ladies' remedies, also gave literate women of the white middle class an alternative modern option. This market turned what had been a private domestic practice into an entrepreneurial enterprise for profit, leading some historians "to speak of an 'abortion epidemic'" among this social class.[14]

Against this commercialization of abortion, a professionalizing medical elite campaigned for the expanded criminalization of abortion in the mid-19th century.[15] The campaign formally centered on two objectives: first, to condemn and to prohibit the intentional destruction of fetal life; and second, to prevent harm to women.[16] State intervention was justified partly

13 See Hester Lessard, "The Construction of Health Care and the Ideology of the Private in Canadian Constitutional Law" (1993) 2 Ann Health L 121 at 123–31 [Lessard, "Construction of Health Care"] (for a discussion on the construction of health care in 19th century Canada).

14 See Angus McLaren, "Illegal Operations: Women, Doctors, and Abortion, 1886–1939" (1993) 26:4 J Social History 797 at 797 [McLaren, "Illegal Operations"]; Angus McLaren, "Birth Control and Abortion in Canada, 1870–1920" (1978) 59:3 Can Historical Rev 319 at 329–330 [McLaren, "Birth Control and Abortion"]. See also WA Dafoe, "The Types and Treatment of Abortions" (1930) 22:6 CMAJ 793; Shelley AM Gavigan, "On 'Bringing on the Menses': The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986) 1:2 CJWL 279 [Gavigan, "'Bringing on the Menses'"] ("[w]ell into the twentieth century, the belief persisted among…English [Canadian] women that self-induced abortion before the third month of pregnancy was legal" at 301).

15 With Confederation in 1867, Canada inherited England's *Offences Against the Person Act, 1861* (UK), 24 & 25 Vict, c C, but in 1869 would enact its own criminal law on abortion, drawing on pre-Confederation provincial statutes. When *The Criminal Code, 1892*, SC 1982, c 29 was consolidated in 1892, it incorporated this 1869 law on abortion. See Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion" (1984) 5:1 J Leg Hist 20 (for an extended study of the criminalization of abortion in Canada).

16 See Angus McLaren & Arlene Tigar McLaren, *The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada, 1880–1980* (Toronto: McClelland & Stewart, 1986) (for a fuller discussion of the 19th century criminalization of abortion and its many aims).

on an idealized vision of the medical profession saving women from the corruptions of the abortion market, which included the trade of irregular practitioners (so-called "quacks") but also the clandestine services of maverick physicians.[17] The moral and health aims of the law thus combined in the single figure of the physician. Abortionists practiced a trade for private profit. Physicians served the public interest in health and justice. Yet, the truth was that many abortionists were physicians.

Criminalization did not outlaw abortion practice so much as it revealed it, regulated it, and distributed its risks.[18] Criminalization shaped the abortion market. Poor and working-class women were largely confined to the vagaries of the back alley. Women with means turned to private spaces, the seclusion of a physician's office, or a maternity home.[19] Criminalization classed abortion on the terms and location of its practice, the status of its providers, and the women seeking their services. Shelley Gavigan also documented the rare but practiced provision of "therapeutic abortion" by physicians in hospitals, offered under tacit agreement to women of standing and concealed in clinical records by medical euphemism: emergency appendectomy, menstrual regulation, or dilation and curettage.[20] These physicians were not indifferent to the risk of criminal liability, aware perhaps of the common law defence of necessity. Yet, Gavigan notes their actions were likely guided more by the protections of professional autonomy, which both shielded their work from public scrutiny

17 McLaren, "Birth Control and Abortion", *supra* note 14 at 329. In her review of abortion cases in Ontario at the turn of the century, Constance Backhouse notes that state authorities tended to target the "abortionist" rather than the woman (see Constance B Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada" (1983) 3 Windsor YB Access Just 61 at 71, 83). In these trials, respectable physicians placed themselves with the state, often eliciting dying declarations from women to furnish evidence against the accused (see Susanne Klausen, "Doctors and Dying Declarations: The Role of the State in Abortion Regulation in British Columbia, 1917–37" (1996) 13:1 Can Bull Medical History 53). See Wendy Mitchinson, *The Nature of Their Bodies: Women and Their Doctors in Victorian Canada* (Toronto: University of Toronto Press, 1991) at 130–44 (for a study on the medical profession's role generally in the criminalization of abortion in Canada).

18 Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom*, revised ed (Boston: Northeastern University Press, 1990) at 67.

19 Ontario was the first province to pass legislation specifically regulating maternity homes, *An Act to regulate Maternity Boarding Houses and for the Protection of Infant Children*, SO 1897, c 52. Manitoba followed with a similar statute, *An Act respecting Maternity Boarding Houses and for the Protection of Infant Children*, SM 1899, c 21. See McLaren, "Birth Control and Abortion", *supra* note 14 ("[t]he medical journals carried numerous articles warning physicians to turn a deaf ear to the pleas of patients" at 332).

20 Gavigan, "'Bringing on the Menses'", *supra* note 14.

and distinguished their work from criminal abortionists.[21] By the 20th century, abortion within hospitals was increasingly carried out in the open, with physicians obtaining concurring opinions from fellow physicians and department heads, and formal consent of husbands and parents: the public authority of law deferring to the male authorities of medicine and family. By the 1960s, many hospitals formalized these practices in committees, which gave physicians an institutional level of protection.[22]

The 1969 criminal abortion law reform, challenged in *Morgentaler* 1988, decriminalized physician-provided hospital-based abortions if a committee approved the abortion as necessary to protect the life or health of the pregnant woman.[23] The reform left the criminal prohibitions on abortion otherwise intact. It, therefore, did not liberalize access to abortion care so much as it legally sanctioned the *status quo*.[24] This legal sanction, however, proved highly significant in the constitutionalizing of abortion.

By legislating limits on who may provide and access lawful abortion, and where they may do so, the reform was arguably designed to better achieve the two primary objectives of the criminal law: first, to condemn and prevent the intentional destruction of fetal life by ensuring the excuse of "therapeutic abortion" was not abused, and second, to prevent harm to women by ensuring that abortion was performed by skilled providers in safe conditions. What the 1969 reform achieved, in fact, was formal sanction of a class-based system of abortion access. The therapeutic-hospital committee system reflected all of the inequities of the pre-reform market in abortion access. Class and other social bias were overwhelming in committee authorizations of therapeutic need, which the law left to

21 *Ibid* at 298.

22 See Jane Jenson, "Getting to *Morgentaler*: From One Representation to Another" in Janine Brodie, Shelley AM Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 16 at 24–25.

23 *Criminal Code*, *supra* note 3, s 251.

24 The Canadian Medical Association and Canadian Bar Association jointly lobbied for the reform to clarify the law, and the federal government described the objective of the reform as such, that is, as doing nothing more "than recogniz[ing] what has actually been happening in a number of hospitals with respect to therapeutic abortions," (see House *of Commons Debates*, 28th Parl, 1st Sess, Vol 8 (28 April 1969) at 8058 (Hon John N Turner) [*House of Commons Debates*, 1969]). The effect of the amendment was thus largely confined to making expressly legal a number of abortions most of which would have been performed anyway (see Jenson, *supra* note 22; Melissa Haussman, "Of Rights and Power: Canada's Federal Abortion Policy, 1969–1991" in Dorothy McBride Stetson, ed, *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism* (New York: Oxford University Press, 2001) 63 at 66–67 [Haussman, "Of Rights and Power"]).

professional medical judgment without guidance or oversight.[25] Women had no right to appear before committees and no right of appeal from them. The committees rarely gave any reasons for denial.

Yet, certain systemic patterns in the administration of the law emerged. Married, white, middle class women, who could afford a family physician of good standing, fared better in approvals—especially if willing or able to bear the label of "mentally unstable" in their medical records.[26] For women of colour, Indigenous women, and women living with disabilities or in poverty, the cost of a rare approval was greater. Authorizations, for example, were granted on condition of consent to sterilization, with the committee system serving as an informal mechanism of coercive sterilization.[27] The 1969 reform also diminished access by creating an institutional means to stop what had otherwise been an informal, decentralized practice. By the mid-1970s, making it through the "bureaucratic hoop" became more difficult when anti-choice activists occupied hospital boards to set up rigid approval guidelines, quotas, consent and other eligibility requirements, leading to a near or complete withdrawal of services.[28] Qualifying hospitals were always free under the law to set up committees or not. Most declined, and the boards of other hospitals forced their committees into abeyance.[29]

For women who made it through the approval system, a shortage of operating room time, and a lack of equipment and training created a scarcity

25 *House of Commons Debates*, 1969, *supra* note 24 (John Turner) (the term health was left undefined because according to then Justice Minister Turner, "health is incapable of definition, and this will be left to the good professional judgment of medical practitioners to decide" at 8124).

26 See Canada, *Report of the Committee on the Operation of the Abortion Law*, Catalogue No J2-30/1977 (chair: Robin F Badgley) (Ottawa: Minister of Supply and Services Canada, 1977) at 211 [*Badgley Report*] (the vast majority of abortions reported under the criminal regime were authorized for reasons associated with mental health).

27 *Ibid* at 360. Reports also document that abortion committees incorporated economic need and other social considerations related to the perceived fitness to parent into health assessments under the criminal law (see Karen Stote, *An Act of Genocide: Colonialism and the Sterilization of Aboriginal Women* (Winnipeg: Fernwood Publishing, 2015) at 75–77 (describing the coercive sterilization of Aboriginal women through hospital-based abortion practices under the 1969 criminal law)).

28 See e.g. Katrina Ackerman, "In Defence of Reason: Religion, Science, and the Prince Edward Island Anti-Abortion Movement, 1969–1988" (2014) 31:2 Can Bull Medical History 117 at 123, 129 [Ackerman, "In Defence of Reason"] (prolife activists in PEI used this channel to effectively cease the provision of lawful services on the Island by the mid-1970s; a hospital committee last approved an abortion on the Island in 1982 and no hospital committee was operating in the province by 1986).

29 See *Badgley Report*, *supra* note 26 at 305.

driving further access inequality.[30] This scarcity, and the precariousness of access it created trickled down into the lives of women: the need to call and call again, hospital after hospital—regardless of work, child and family care, or the threat of violence—in order to secure an appointment.[31] Once inside the hospital, some women experienced abusive or degrading treatment, an experience sometimes more distressing and degrading than seeking services in the clandestine market outside it.[32]

The 1969 reform forced many women into the backstreets to seek abortion services outside the hospital and the law.[33] Yet, by the early 1970s, the backstreets looked different than their 19th century counterparts. A new wave of feminists had taken on abortion access as a political cause, understood as a basic precondition to women's liberation and a fundamental right of Canadian citizenship.[34] Common among the mainly young, white, middle-class university women who formed the women's liberation movement was a view of women as an oppressed class, and the need to reform

30 Katrina Ackerman, *A Region at Odds: Abortion Politics in the Maritime Provinces, 1969-1988* (PhD Thesis, University of Waterloo, 2015) [unpublished] [Ackerman, *A Region at Odds*] (Ackerman describes how "[t]he regulation strained hospital resources, created resentment amongst staff, and caused many hospitals to impose extra legal barriers to decrease the number of abortion procedures performed" at 18).

31 Ann Thomson, *Winning Choice on Abortion: How British Columbian and Canadian Feminists Won the Battles of the 1970s and 1980s* (Victoria: Trafford Publishing, 2004) (Thomson describes how "[o]n the one morning a week when The Toronto General Hospital scheduled abortions, only those who managed to get through to the switchboard by 10am had a chance…regardless of jobs, children [*etc*]…'you [had to] keep dialing and dialing. There [was] no other way. And by the time you [got] through, all the appointments [were] taken. So you start again' at another hospital" at 118–9).

32 Ackerman, *A Region at Odds*, *supra* note 30 (the waiting room in the Termination of Pregnancy Unit at the Halifax hospital was notorious for its seemingly intentional discomfort and humiliation. Women were crammed into a tiny room the size of a bathroom or closet, wearing nothing more than a hospital gown or "Johnny-shirt" at 148).

33 McLaren, "Birth Control and Abortion", *supra* 14 ("if…the recourse to quack potions, home remedies, and back street abortions teaches us anything, it is that there was at the turn of the century—as there is today—a demand for abortion and if that demand is not met by the medical profession it will be met by others" at 340).

34 Jenson, *supra* note 22 (the women's movement was not a primary actor in the 1960s abortion debates; Jenson explains that "women had not yet developed the powerful collective identity with which they could name themselves and act on a gender-based solidarity" at 21). See generally Thomson, *supra* note 31; Wasserlein, *supra* note 3; Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin, 2005); Beth Palmer, *Choices and Compromises: The Abortion Movement in Canada 1969–1988* (PhD Dissertation, York University, 2012) [unpublished] (for a rich study of liberation feminist activism on abortion).

the social and economic structures that disadvantaged women as a class.[35] The criminal abortion law, a state system of reproductive oppression, became a paradigmatic structure in need of reform. Liberation feminists mobilized around a single demand to repeal the law and found common cause in the fight for legal and publicly funded freestanding abortion clinics.[36] The activist discourse on repeal was popular in nature and captured multiple currents of feminist thought within the liberation movement. Among the most prominent was radical feminism, which located the primary cause of women's oppression in patriarchy, and Marxist or socialist feminism, which tied women's liberation to the end of capitalism.

Radical liberation feminists emphasized the female body as an object of liberation ("My Body, My Property") and control over it as a means to free women from sexual slavery and forced motherhood in a patriarchal order. They demanded the state "Keep its Laws off" women's bodies, and saw the injustice of the criminal abortion law as ceding control over women's sexuality and fertility to medical men. Socialist feminists, in contrast, focused on women's economic oppression. Allied with other new left movements critical of both state and capital, they did not frame abortion in terms of bodily control or property. Rather, they linked abortion, or more broadly, women's control over whether and when to reproduce, to a series of social goods—childcare, pay equity, parental leave, and affordable housing—in a radical restructuring of the economy to compensate women for their reproductive labour, and to allow women full control over their labour. Historical records show that the "typical" criminal abortion case in the 20th century involved married women, many already mothers, who turned

35 See generally Nancy Adamson, Linda Briskin & Margaret McPhail, *Feminist Organizing for Change: The Contemporary Women's Movement in Canada* (Toronto: Oxford University Press, 1988); Nancy Adamson, "Feminists, Libbers, Lefties and Radicals: The Emergence of the Women's Liberation Movement" in Joy Parr, ed, *A Diversity of Women: Ontario, 1945–1980* (Toronto: University of Toronto Press, 1995) 252 (for discussion of liberation feminism in Canada).

36 See generally Lorna Weir, "Left Popular Politics in Canadian Feminist Abortion Organizing, 1982–1991" (1994) 20:2 Feminist Studies 249 (it is important to note that many Quebec feminists supported, but did not take an active role in the national campaign to repeal the criminal law, refusing on principle to recognize the authority of Parliament on this or any other issue. Feminist liberation politics in Quebec were deeply connected to national liberation struggles in Canada. Their commitment to liberation demanded abortion rights as part of the rights of all oppressed québécois. Patriarchal oppression was understood as part of the colonial domination of English Canada). See also Louise Desmarais, *Mémoires d'une bataille inachevée : la lutte pour l'avortement au Québec 1970–1992* (Montréal: Trait D'union, 1999).

to abortion in economic need.[37] Socialist liberation feminists, therefore, saw the a primary injustice of the criminal law in its structuring of abortion access on the basis of class inequalities, and later, other social inequalities with growing alliances and greater representation among women of colour, immigrants, and lesbian women in the movement.[38]

Radical and socialist feminists disagreed on many issues, and many feminists within the liberation movement were not purist in thought, drawing on multiple feminisms in their campaign against the criminal abortion law. Whether the law forced women to beg men for control of their bodies, functioned as a eugenic tool to sterilize women of color, reflected a failure of the capitalist state to govern in the interests of the people, or denied women a right of personal autonomy in this most private of decisions, feminists collectively agreed that the criminal law must be repealed. The movement united in the belief that women's oppression could be overcome only through structural change. Abortion was never treated as a single issue, and access to services was never the only or ultimate goal. In 1971, the Executive Director of the Toronto Women's Liberation Caucus explained why feminists collectively focused on the abortion issue. Abortion, she said, touched all women, "even women who are only beginning to be affected by the radical ideas of our time can identify with this issue."[39] Abortion was a

37 Angus McLaren & Arlene Tigar McLaren, *The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada, 1880–1997*, 2nd ed (Toronto: Oxford University Press, 1997) at 32–35.

38 See e.g. Wasserlein, *supra* note 3 (describing how the Vancouver Women's Caucus, for example, engaged with the class structuring of abortion access and reproductive control in their work). Left politics continued to mark feminist abortion activism into the 1980s, embraced by organizations such as the Ontario Coalition for Abortion Clinics (OCAC) that "employed the language of reproductive freedom and crisis of access to signal the social stratification of abortion service delivery in terms of class, race, and region" and to form a politic bloc among women divided by racial, class, ethnic, and regional grounds (Weir, *supra* note 36 at 250, 260). OCAC was formed in 1982 by women health care workers from the Immigrant Women's Health Centre, Hassle Free Clinic, and the Birth Control and V.D. Information Centre in Toronto, who challenged the discriminatory application of the criminal law that effectively denied access to abortion for their clients: women of colour, Aboriginal women, and working class women. See Carolyn Egan & Linda Gardner, "Race, Class and Reproductive Freedom: Women Must Have Real Choices!" (1994) 14:2 Can Woman Studies 95 [Egan & Gardner, "Race, Class and Reproductive Freedom"]; Carolyn Egan & Linda Gardner, "Racism, Women's Health, and Reproductive Freedom," in Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian, Anti-racist Feminist Thought* (Toronto: Women's Press, 1999) 295, 300–06 [Egan & Gardner, "Race, Women's Health and Reproductive Freedom"].

39 Lis Angus, "Why Feminists Focus on Issue of Abortion" *Labor Challenge* (22 November 1971), online: <www.socialisthistory.ca>.

more radicalizing issue than the vote because "it [led] women to consider other issues, other ways in which their lives [were] limited."[40] Abortion could raise the consciousness of masses of Canadian women and bring them into united struggle. Abortion was a means to reach women, and build a movement for social and political change.

The participatory politics and direct-action tactics of liberation feminists led to their involvement in the provision of abortion services. They worked to remedy the immediate crisis of access and to meet women's existing needs. Through information and referral networks, feminist groups assisted women to find sympathetic and skilled clandestine providers or to access newly legalized services in the United States.[41] They searched for and inspected clandestine providers to whom they could refer women in trust. These networks were foundational to the later building of women's community health clinics across Canada.[42] Front-line activists assisted women in distrust of medical authority and in defiance of state authority. Feminist networks offered women an alternative to commercial for-profit brokerages, which exploited the crisis of access created by the criminal law to extract exorbitant fees from women.[43]

The goal of service delivery as feminist action, however, was ultimately to politicize the masses of women who came for help: to raise their consciousness about the structures of oppression in women's lives, and to thereby bring them into a movement for women's liberation. The service-provision work of liberation feminists, in other words, was building a

40 *Ibid*.

41 See e.g. Thomson, *supra* note 31 at 21 (discussion of Vancouver Women's Caucus' Abortion Information Service); Beth Palmer, "'Lonely, Tragic, but Legally Necessary Pilgrimages': Transnational Abortion Travel in the 1970s" (2011) 92:4 Can Historical Rev 637 at 638 (discussion of Vancouver Women's Caucus' *Abortion Information Service*). See also Christabelle Sethna & Marion Doull, "Accidental Tourists: Canadian Women, Abortion Tourism, and Travel" (2012) 41:4 Women's Studies 457 at 463–64; Christabelle Sethna et al, "Choice, Interrupted: Travel and Inequality of Access to Abortion Services Since the 1960s" (2013) 71 J Can Labour Studies 29 at 33–38 (discussion of women's domestic and international border crossings for abortion services after the 1969 reform including as documented in the 1977 *Badgley Report*).

42 See e.g. Aldean Stachiw, *Manitoba's Abortion Story: The Fight for Women's Reproductive Autonomy: 1969–2005* (MA Thesis, University of Manitoba Faculty of Graduate Studies, 2006) [unpublished] (discussion of Winnipeg's *Pregnancy Information Service,* which became the *Women's Health Clinic*, the first women's health clinic in the country at 76).

43 See *Badgley Report*, *supra* note 26 383–86 (the *Badgley Report* criticized the opportunistic nature of the commercial abortion referral agencies and argued that the referral agencies existed because "there was a demand for their services which was not otherwise being met" at 386).

constitutional culture of women's rights. These were the democratic beginnings of constitutional abortion rights. Liberation feminists argued that the government had responsibilities and obligations to women as citizens. They worked to make visible the ways in which the criminal law controlled women, and claimed their security, freedom, and equality against its oppression.

Their constitutional demands would eventually meet up with the *Charter* through a direct challenge to the therapeutic-hospital committee system, which the 1969 criminal law institutionalized. Feminist service provision networks worked in the shadows of this broken system, bearing witness to its injustices. Before referring women to clandestine providers, groups such as the Vancouver Women's Caucus first worked legal channels, seeking to persuade physicians to refer women to hospital committees and shepherding them through the process, but they were rarely successful.[44] A more common practice was physicians sending women to feminist networks for referrals. Activists used this outflow to show the dysfunction and hypocrisy of the system. Winnipeg groups, for example, picketed hospitals and demanded they make their abortion statistics available. They later used this information to pamphlet the city and publicize the inadequacy of public services.[45] Sometimes these pressure tactics worked, and provincial governments promised to improve access and many local hospitals did.[46]

It was, however, the Government of Canada's own commissioned study that would eventually bring change. The 1977 *Report of the Committee on the Operation of the Abortion Law* (the *Badgley Report*) "told the government what many Canadian women knew first-hand…[the] procedure provided in the Criminal Code for obtaining therapeutic abortion [was] illusory for many Canadian women."[47] The *Badgley Report* vindicated the feminist

44 Wasserlein, *supra* note 3 at 71–72 (the Vancouver Women's Caucus saw and used its abortion counseling and referral service as a means to pressure the Therapeutic Abortion Committee at the Vancouver General Hospital to speed up processing of abortion requests and ensure that women seeking abortions through the Committee system had the necessary support). Thomson, *supra* note 31 at 19 (during its first four months of operation, the Vancouver Women's Caucus' abortion information service assisted 300 women, only ten of whom successfully obtained an abortion in the hospital system).

45 Stachiw, *supra* note 42 at 79.

46 Wasserlein, *supra* note 3 at 107–08 (describing how members of the Vancouver's Women's Caucus and the women they were assisting occupied psychiatrist offices at the Vancouver General Hospital in demand for greater access to services, and the belief that the occupation was in some measure responsible for the increased availability of services).

47 Rebick, *supra* note 34 at 157. See generally *Badgley Report*, *supra* note 26 at 3 (in September 1975, the Federal Minister of Justice appointed a three-member committee to "conduct a

liberation claim: the 1969 criminal law sanctioned a class-based system of abortion access that had threatened the freedom, security and equality of Canadian women for over a century. The report recommended an answer to this injustice: repeal. The *Badgley Report* and its indictment of abortion access would ultimately prove persuasive to the Supreme Court of Canada, which struck down the criminal abortion law as a violation of women's constitutional rights under the *Charter* in the 1988 landmark case of *R v Morgentaler*.

II. ADJUDICATION IN THE COURTS

Morgentaler arose from a civil disobedience campaign waged by Dr. Henry Morgentaler and other physicians who provided abortion services without committee certification in facilities without government approval—the very services to which feminist networks often referred women.[48] Civil disobedience, in contrast to mere defiance of law, is a deliberate and public act aimed to provoke the state in order to challenge its law or policies.[49] It is a form of political action.

In the early 1970s, Dr. Morgentaler publicly announced that he had performed thousands of technically illegal abortions in his Montreal clinic, and invited the state to prosecute him, which it eventually did.[50] The state

study on whether the procedure provided in the Criminal Code for obtaining therapeutic abortions is operating equitably across Canada." The Committee conducted interviews and surveys in each province on the administration of abortion services. The *Badgley report* was tabled in the House of Commons on February 9, 1977).

48 HRS Ryan, "Abortion and Criminal Law" (1981) 6:2 Queen's LJ 362 at 363 (at the time of one of Dr. Morgentaler's early trials in Quebec, several hundred physicians practicing in the Province of Quebec, where there are few hospital committees, published a public statement to the effect that each had performed a considerable number of abortion without authorization).

49 Marshall Cohen, "Civil Disobedience in a Constitutional Democracy" (1969) 10:2 Mass L Rev 211 ("[c]ivil disobedience is, then, an appeal to the public to alter certain laws or policies that the minority takes to be incompatible with the fundamental principles of morality, principles that it believes the majority to accept" at 218). See also Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012) (discussing the legal merits and defensibility of civil disobedience).

50 See Henry Morgentaler, *Abortion and Contraception* (Don Mills, Ont: General Publishing, 1982); Bernard M Dickens, "The *Morgentaler* Case: Criminal Process and Abortion Law" (1976) 14:2 Osgoode Hall LJ 229 ("[t]here is a sense…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.…He adopted a political posture, and conditioned a political response…the Minister…[took up] the gauntlet that Dr. Morgentaler consciously and constantly threw down" at 242).

was otherwise reluctant to act, given that a clandestine market in which skilled physicians provided safe abortions at private expense worked well for the state. The 'physician-abortionist,' however, also deprived the state of one of its primary rationales for the criminal law: to protect women from harm. The civil disobedience campaign pressed the long-held truth that many abortionists were skilled physicians who provided safe and respectful care to women abandoned by the law. The maverick physician of the back alley, in other words, served the public interest. By inviting and then fighting criminal charges, physicians like Dr. Morgentaler endeavoured to put the law on trial, and in this respect, shared a common cause with liberation feminists. A national coalition for decriminalization was formed, which mobilized support for Dr. Morgentaler and other prosecuted physicians outside the courtroom.[51]

The continuity of constitutional ideas between feminist liberation direct action, and the physician civil disobedience campaign is evident in the legal argumentation of Dr. Morgentaler's defence. When Dr. Morgentaler first reached the Supreme Court in 1975 to defend against the charge of criminal conspiracy, it was not a rights-based argument that caught the Court's attention.[52] The issue, rather, that divided the Court was the defence of necessity, the taking of unlawful action to avoid greater harm, which Quebec juries would use repeatedly to acquit Dr. Morgentaler of his admittedly criminal acts. Defense counsel argued that the provision of abortion without committee authorization, outside of accredited or approved hospitals was necessary to avoid the graver harm of obeying the law. This defence not only echoed the radical, anti-statist spirit of

51 Canadians for Choice (CFC) and Fédération du Québec pour le planning des naissances (FQPN), *Focus on Abortion Services in Quebec* (2010), online: <www.fqpn.qc.ca/main/wp-content/uploads/2015/07/ResearchCFCFQPN2010.pdf> (the Canadian Association for the Repeal of the Abortion Law, later renamed the Canadian Abortion Rights Action League/Association Canadienne pour le Droit d'Avortement (CARAL/ACDA), organized and fronted the coalition. The mandate of CARAL was met in 1988, when the Supreme Court struck down the abortion law. Though CARAL would survive and continue to lobby for access to abortion, by 2004 it was replaced by two national organizations: Canadians for Choice, which focused on raising public awareness and promoting education, and the *Abortion Rights Coalition of* Canada/Coalition pour le Droit à l'Avortement au Canada (ARCC-CDAC), which focused on political activity. Some Quebec organizations were part of the national campaign, including Front commun pour l'abrogation des lois sur l'avortement (FCALA), the Comité de défense du Dr Morgentaler, and the Quebec section of Canadian Association for the Repeal of the Abortion Law (CARAL)).

52 *Morgentaler v The Queen*, [1976] 1 SCR 616, 56 DLR (3d) 161 [*Morgentaler* 1976 cited to SCR] (indeed the Court rejected arguments under the *Canadian Bill of Rights*, SC 1960, c 44 in parliamentary deference at 632–37, Dickson J).

liberation feminists, but also their concern for the social inequalities of the criminal law.[53]

In the 1976 case before the Supreme Court, Dr. Morgentaler was charged with performing an abortion for one Miss Parkinson, a 26-year-old unmarried woman in Canada on a student visa, ineligible for Medicare or employment benefits. Justice Pigeon, writing for the majority of the Court, found a total absence of evidence to support the claim that Dr. Morgentaler could not comply with the law.[54] Rather, he attributed a financial motive to the unlawful acts, finding that Dr. Morgentaler generally performed abortions not "as an act of charity without a fee, [but] in the course of a lucrative business."[55] Fees historically played a significant role in criminal abortion cases in deciding the *bona fides* of a therapeutic abortion and its provider.[56] Even upon his death, Dr. Morgentaler would not escape the charge of being a 'capitalist,' amassing an untaxed fortune in the abortion market.[57] By acknowledging the exploitation of women in criminal abortion markets, the Court channelled feminist liberation claims of injustice, yet it would not acknowledge the role of the criminal law itself in creating and sustaining these conditions of market exploitation.

By focusing on Dr. Morgentaler's political rather than financial interests, Justice Dickson, writing in concurrence, came even closer to the constitutional ideas of the liberation feminists. Observing that Dr. Morgentaler "made no attempt to bring himself within the bounds of legality,"[58] Justice Dickson warned that, "necessity can very easily become simply a mask for anarchy."[59] Consciously or not, the Court gave voice to the anarchist spirit of clandestine service provision as political action. Feminist activists and their physician comrades indeed struggled to save the lives of women in defiance of state power exercised with indifference to the health and lives of women. Their actions revealed the dysfunctions and hypocrisy of the law in its claims to protect women. By demanding access to safe and humane

53 See generally Steven M Bauer and Peter J Eckerstrom, "The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience"(1987) 39:5 Stan L Rev 1173.

54 *Morgentaler* 1976, *supra* note 52 at 659–61, Pigeon J.

55 *Ibid* at 661, Pigeon J.

56 Gavigan, "'Bringing on the Menses'", *supra* note 14 at 308, n 202 citing Smith & Hogan, *Criminal Law*, 4th ed (London: Buttersworth, 1978).

57 Jonathan Kay, "Jonathan Kay: For All His Renown on the Left, Morgentaler Was A Capitalist Who Saw An Untapped Market", *National Post* (29 May 2013), online: <www.news.nationalpost.com>.

58 *Morgentaler* 1976, *supra* note 52 at 685, Dickson J.

59 *Ibid* at 678, citing *Southwark London Borough Council v Williams* [1971] 1 Ch 734 at 746, 2 All ER 175, Edmund Davies LJ.

abortion care, they challenged the authority of the state, disentitling its law of any claim to legitimacy or obedience. While such action can be claimed anarchic when judged against the formal rules of law, when inspired and taken as an effort to enforce a rule of law that extends to the most basic values inherent in Canada as a free and democratic society, such action is perhaps better described as "constitutional."[60]

This is the view reflected in the dissenting opinion of Chief Justice Laskin, who called on these constitutional values to defend the necessity of Dr. Morgentaler's actions, taken to protect "a friendless young woman, a native of another country and a comparative stranger in Canada, who is alone, frightened by her pregnancy and without the means…to invoke the elaborate procedures of [the law], and who in desperation seeks the assistance of a qualified surgeon."[61] By rooting his reasoning in the social vulnerabilities of Miss Parkinson, Justice Laskin acknowledges the social inequalities of a criminal law that punishes those most in need. Abeyance of the criminal law becomes, if not a constitutional right, then a necessity of justice.

A majority of the Supreme Court, however, found the trial judge had erred in putting the defence of necessity before the jury, and so upheld the overturning of Dr. Morgentaler's acquittal. Dr. Morgentaler served prison time on this criminal charge, but returned to his Montreal practice, only to be charged and acquitted again as Quebec courts now allowed the defence of necessity, and juries used it.[62] In repeatedly finding no criminal guilt, juries affirmed not the necessity of any single abortion, but the generalized injustice of the law. Subsequent to a third acquittal, Quebec simply refused to prosecute further. In 1976, the Parti Québécois came to power and promised not to proceed with charges against Dr. Morgentaler, or any other physician providing abortions under safe clinical circumstances, effectively decriminalizing abortion in the province.[63]

Dr. Morgentaler continued his campaign of civil disobedience, opening free-standing clinics in Winnipeg and Toronto in 1983. Both clinics were

60 See David Dyzenhaus, "The Deep Structure of Roncarelli v. Duplessis" (2004) 53 UNBLJ 111 at 127–28.

61 *Morgentaler* 1976, *supra* note 52 at 650, Laskin CJ.

62 It was in fact not uncommon for juries to refuse to convict in criminal abortion cases, no matter how overwhelming the evidence. Angus McLaren describes the 1902 case of *Rex v Bella Howe*, in which the jury refused to convict a woman for self-induction, as blatantly ignoring the testimony of doctors, police, and even the accused herself (see McLaren, "Illegal Operations", *supra* note 14 at 808–09).

63 FQPN & CFC, *supra* note 51 at 15.

raided, and criminal charges were laid against clinic physicians and staff.[64] The Toronto arrest and trial eventually led to the Supreme Court's landmark *Charter* judgment, *R v Morgentaler* (1988). At trial, Dr. Morgentaler and his co-accused once again argued the defense of necessity: that conspiring to provide abortion services without committee approval and outside of hospitals was necessary to prevent greater harm.[65] Feminist social work activists were called as witnesses to testify to this need.[66] Described as "persons who work within, as best they can, the therapeutic abortion committee system," defense counsel Morris Manning called upon them to "show how that system works, or doesn't work."[67] Their testimony brought to life the truly oppressive nature of the legal regime.[68] On behalf of their clients, they would sit on the phone for hours, only to learn that all the available appointments were gone. The quotas filled. The witnesses knew of no other therapeutic intervention subject to quotas. They would begin again the next day, the next week. Yet, the rules were always changing. There were certain routes, certain negotiations to be made, about which the average citizen was utterly unaware. The counselors emphasized that the primary access measure of the system was wealth, not therapeutic need. Women who paid for the services of a private gynecologist with privileges at a hospital found greater success. Even family physicians were in on the racket, asking patients to pay referral fees for the name of such 'lucky' gynecologists. Indeed, it is difficult to argue that Dr. Morgentaler stood to benefit financially from breaking the law, when staying inside the law was more lucrative. By restricting supply and creating scarcity, the legal regime perfected the conditions for exploitation, better than any criminal

64 See FL Morton, *Morgentaler v Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland & Stewart, 1992) (in Manitoba, as recounted by FL Morton, "[i]n what is presumably the first time in the history of Canadian criminal law, a lawyer had actually gone to the police and explained that his client wanted to be arrested and charged with violating the Criminal Code" at 159).

65 *R v Morgentaler*, (1984) 47 OR (2d) 353 at 408, 12 DLR (4th) 502.

66 The complete record filed at the Supreme Court in the 1988 *Morgentaler* case, including pleadings filed at each level of court, the exhibits filed at trial, and the complete transcript from the trial, was made available by the David Asper Center for Constitutional Rights at the Faculty of Law, University of Toronto. The following documents are available on file with the author: Proceedings: 0105 Motion to Quash; Witness Examinations: 0130 Egan in Chief; 0171 Egan Cross; 0210 Egan Re-examination; 3287 to 3341 Witness Tripp, Janis Patricia; Final Submissions and Verdict: 3701 Charges and Submission; 3711 Charge to the Jury.

67 *P*roceedings: 0105 Motion to Quash, *supra* note 66 at 112.

68 See e.g. Witness Examinations: 0130 Egan in Chief, *supra* note 66; 0210 Egan Re-examination, *supra* note 66; 3287 to 3341 Witness Tripp, Janis Patricia, *supra* note 66.

market. The prosecution challenged this testimony by seeking to impugn the character of the witnesses, to reveal them as not health providers but as political activists.[69] Yet, this was precisely the point. They were both.

Morris Manning's closing statement to the jury suggested they too had the power to change law, where a law that is supposed to protect people in fact harms them and where politicians refuse to relieve the injustice. He called on the jurors to send a message to politicians by acquittal to stop prosecuting doctors for trying to help people. "That is the message that has to be delivered and there is only one body in our society that can deliver that message," he said. "You can bring freedom, because a jury is the lamp by which freedom is lit."[70] His statement led Associate Chief Justice William Parker to instruct the jurors that they were not legislators: "your duty is to decide the facts and then to apply the law. You are not here to judge the law and you have no right to do so."[71]

The civil disobedience campaign of clandestine clinic providers, however, endeavoured precisely to put the law on trial and with the introduction of the *Charter*, Mr. Manning could now do so directly. His pre-trial motion to quash the charges as unconstitutional, or as a violation of *Charter* rights, was denied, but the constitutional question reached the Supreme Court on appeal. Relying on a wealth of documented evidence showing the dysfunction of the hospital committee regime, including the *Badgley Report*, a plurality of the Court declared the 1969 criminal abortion law unconstitutional.[72] Five Supreme Court Justices agreed that the criminal law, which confined abortion to hospitals on committee authorization, endangered women's health by delaying or denying access to care in a manner disproportionate to any legitimate aim. The law, therefore, violated section 7 of the *Charter*, depriving women of their security of person contrary to the principles of fundamental justice, a deprivation that could not be saved by section 1.

Especially striking about this narrow reasoning was that it reflected the logic of the necessity defense. This was especially true of Justice Beetz's opinion, which affirmed that:

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69 Witness Examinations: 0171 Egan Cross, *supra* note 66 at 171–76; 3287 to 3341 Witness Tripp, Janis Patricia, *supra* note 66 at 3326–27 (emphasizing that the witnesses are involved with political organizations, namely OCAC and CARAL).

70 Final Submissions and Verdict: 3701 Charges and Submission, *supra* note 66 at 3746–47.

71 Final Submissions and Verdict: 3711 Charge to the Jury, at 3851.

72 *Morgentaler* 1988, *supra* note 9 at 56–63, 91–101.

> If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.[73]

By this logic, the right to security of the person gives a woman the right to access safe abortion services where her life or health is at risk. If an Act of Parliament denies her this right, and forces her to choose between crime and life, it is Parliament's act that is unlawful, not her own. The necessity defense, as argued in the criminal case law, was always aimed at this same end—the repeal of the law. It was never one act or one abortion for which the physician was forced to defy an otherwise legitimate law. Rather, because the defense was raised in the context of a civil disobedience campaign, it was intended as a systemic challenge. By reconstituting the necessity defense into constitutional analysis, the Supreme Court channelled and expressed a liberation feminist view by marking access to abortion as a symbol of resistance against the state and its unjust laws.

Yet the Supreme Court's judgment also shaped the constitutional future of abortion rights in a significant way. Political freedom was narrowed to a right of safe and timely access to a therapeutic service within a fair and rational health care system, and only as against direct state constraint. This is the ruling of *Morgentaler* (1988) read to its letter, and within its confines, the feminist liberationist spirit languished. This was especially true because the feminist strand of *Morgentaler* (1988) that survived was Justice Wilson's lone 'liberty' opinion, widely endorsed and often taken to represent the *Morgentaler* (1988) ruling as a whole.[74] Justice Wilson agreed that the dysfunction of the law endangered women's access to health care, but she also wrote of a more fundamental flaw. Working in perfect order, the criminal abortion law takes from a woman a fundamental personal decision of an intimate and private nature, depriving her of the right to develop her full potential, to plan her own life, and to make her own choices.[75] The criminal law decides for a woman something she has the right to decide for herself.

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73 *Ibid* at 90, Beetz J.

74 *Ibid* at 161–84, Wilson J. See Chris Kaposy & Jocelyn Downie, "Judicial Reasoning about Pregnancy and Choice" (2008) 16:1 Health LJ 281 at 290.

75 *Morgentaler* 1988, *supra* note 9 at 171–72, Wilson J.

Justice Wilson's reasoning is classically liberal, conceiving of women's reproductive freedom as the pursuit of self-interest unencumbered by state interference. The right to liberty, she wrote, "erect[s] around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."[76] In this liberal articulation, abortion rights are defended as a personal choice, rather than a choice structured by an oppressive capitalist and patriarchal public order. Though Justice Wilson wrote from the texts of liberal philosophy, many of the national feminist organizations that supported the civil disobedience campaign, chief among them the Canadian Abortion Rights Action League (CARAL), had long before shifted discourse to a liberal frame.[77] The rise of liberal feminism in the 1980s marked a significant departure from liberationist radicalism of the 1970s. This can be seen in the changing slogans of feminist activism, from "Free Abortion on Demand" to "Free Choice." Justice Wilson's opinion was widely celebrated in feminist circles, received media attention, and significantly influenced what abortion rights became in the next era of their constitutionalization.

III. INSTITUTIONALIZATION IN MARKETS AND MEDICINE

Morgentaler 1988 and the liberal abortion rights it fashioned were historically significant in two ways: first, in the campaign to stop re-criminalization,[78] and second, in provincial action to prevent decriminalization from becoming liberalization.[79] By restricting public funding to therapeutic

76 *Ibid* at 164, Wilson J.

77 Jenson, *supra* note 22 at 46–47; Rebick, *supra* note 34 at 157. See also Weir, *supra* note 36 (distinguishing the Left feminist politics of the national Pro-Choice Action Network/Réseau d'action pro-choix from the liberal politics of CARAL).

78 See *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537 (liberal abortion rights politically supported activists in defeating provincial prohibitions on abortion services outside of hospital settings, such as in Nova Scotia and New Brunswick, on the basis of their intentional criminal-like character).

79 See e.g. NS Reg 152/1989 (Nova Scotia prohibited clinic abortions with penal consequences); *Medical Act*, SNB 1981, c 87, s 56(a) (New Brunswick characterized abortions outside of hospital settings—criminal offences—as professional misconduct); *Medical Services Payment Act*, RSNB 1973, c M-7, s 2.01 (New Brunswick refused to fund non-therapeutic abortions performed in outlawed clinics); Man Reg 46/93, s 28 (Manitoba also regulated abortion funding, excluding all clinic abortions from the public plan); BC Reg 54/88 (British Columbia cut abortion funding except in life-threatening situations); PEI Reg EC453/96, s1(d)(iv) (PEI cut abortion funding except when medically necessary); Geoffrey York, "Saskatchewan Limits Abortion Financing," *The Globe and Mail* (18 February 1988), A1 (Saskatchewan also cut abortion funding except in life-threatening situations); Ian T

abortions performed in hospitals settings, for example, provincial governments repurposed the criminal law to explicitly ration access on the basis of wealth. Women with the social resources to navigate the system accessed abortion as therapeutic care under public health insurance schemes, while others were required to access services in a newly decriminalized market. The social inequalities of the system were so dire that the federal government argued for re-criminalization as an effort to guarantee universal access.[80]

The 'therapeutic reserve' in abortion funding regulation clearly reflected the logic of the 1969 criminal law, which created two categories of abortion: publicly supported therapeutic care and illegal private market transactions. The *Morgantaler* 1988 judgment did not disturb these categories, but rather re-inscribed them onto the logic of *Charter* rights. Women now enjoyed a security of the person right to access abortion as therapeutic care. Women also enjoyed the freedom to seek abortion as a private commodity in a newly decriminalized market, an effect of *Morgentaler* striking down and Parliament's failure to re-enact the criminal abortion law. Justice Wilson's opinion, moreover, turned this market-based freedom into a constitutional right by expressly articulating abortion as a private right of personal choice.

The constitutional abortion rights of *Morgentaler* proved a more powerful tool in the hands of government to deny or restrict public funding, than in the hands of activists to secure funding. Relying on the rhetorical power of *Morgentaler*, activists argued that abortion rights carried with them an implied right of funding, that any legal right was inseparable from the means necessary to exercise it.[81] Yet, the shift in activist discourse from 'free abortion' to 'free choice,' and the liberal framing of the abortion right

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Urquhart, "Federalism, Ideology, and Charter Review: Alberta's Response to Morgentaler" (1989) 4 Can JL & Soc 157 at 160–62 (Alberta originally conditioned funding on physician approval, but the government later softened the regulation, restricting coverage to abortions carried out by an approved physician, supported by a second opinion of therapeutic need, in an approved hospital).

80 Haussman, "Of Rights and Power", *supra* note 24 at 78–79, 81–82 citing Bill C-43, *An Act respecting abortion*, 2nd Sess, 34th Parl, Elizabeth II, 1989–91, 38–39–40 [Bill C-43] (Bill C-43 passed the House of Commons on 29 May 1990, but was defeated by the Canadian Senate in a tie vote on 31 January 1991. Bill C-43 would have recriminalized abortion unless a medical practitioner was of the opinion that the health or life of the pregnant woman was threatened at 2233).

81 Egan & Gardner, "Race, Women's Health and Reproductive Freedom", *supra* note 38 at 305. See also Gail Kellough, *Aborting Law: An Exploration of the Politics of Motherhood and Medicine* (Toronto: University of Toronto Press, 1996) at 244–45 (see e.g. argument that

unhinged or slackened this pairing. Sheila Shaver describes this outcome as the contradiction of liberalism in reproductive rights: the identification of reproductive freedom with the free market rather than state intervention, with the private rather than the public sphere.[82] In the most basic terms, a 'right to choose' guarantees a woman exercise of her will, control over her body, and free pursuit of her interests. Her rights rest with her as an individual, secure from state interference. As an individual, however, she is also equal to all others, and so also vulnerable to the competing rights of others. This includes the taxpayer as a generalized other, Shaver explains, who may refuse to share in collective support of abortion access.[83]

This is precisely what happened at the provincial level. In the 1990s, clinic picketers in New Brunswick carried signs reading, 'Not with my tax dollars.'[84] In Ontario, investigative journalists warned "unsuspecting" taxpayers of the "millions of dollars" they have been "forking-out" to support the Toronto-based Morgentaler clinic.[85] In Manitoba, an activist group, "Defund Abortion," assembled before the Manitoba Legislative Building to demand an end to public funding.[86] Political responses have been a little more measured, voiced in the sustainability of Medicare and the need to ration public health care dollars. In *Charter* litigation in Manitoba, for example, the government fought a constitutional obligation to fund clinic services on the claim that otherwise abortion rights allowed individual choice to trump social policy, entitling "everyone…to healthcare service based upon the time of their choosing."[87] Some feminist groups shared this concern, questioning whether *Charter* litigation on abortion funding

'choice' is not an individual right, but an 'enabling term,' which often requires collective support for its implementation).

82 Sheila Shaver, "Body Rights, Social Rights and the Liberal Welfare State" (1993) 13:3 Critical Social Policy 66, 69–70.

83 *Ibid* at 71.

84 Lianne McTavish, "The Cultural Production of Pregnancy: Bodies and Embodiment at a New Brunswick Abortion Clinic" (2008) 20 TOPIA 23 at 29. See also Ackerman, *A Region at Odds*, *supra* note 30 ("[w]hile Canadians were divided over whether tax funding should cover abortions, residents of the Maritime region strongly opposed using their tax dollars for the procedure" at 192).

85 Judi McLeod, "$5-Million Man", *Canada Free Press* (14 September 1999), online: <www.canadafreepress.com>.

86 "Abortion Debate Reignites on Steps of Manitoba Legislature", *CBC News* (03 October 2013), online: <www.cbc.ca>.

87 Terence Moore, "The Right to Health", *The Winnipeg Free Press* (28 January 2005), A10; Thomson, *supra* note 31 at 110 (Manitoba defended its long-standing refusal to fund clinic services on the argument that it would not support health care privatization). See also Stachiw, *supra* note 42 at 202.

was a good idea, or whether it would lead to greater privatization in the system.[88] Their concern proved warranted.

In 2005, the Supreme Court decided *Chaoulli v Quebec*, striking down a legislative restriction on private health insurance as a violation of *Charter* rights.[89] The case became a flashpoint for market-modeled liberty in Canadian constitutional health care analysis.[90] The rhetoric of the majority judgment in *Chaoulli* is one of saving, not dismantling, Medicare, albeit through the enforcement of *Charter* rights as consumer choice.[91] Chief Justice McLachlin and Justice Major, writing in concurrence, grounded their analysis on the *Charter* right to security of the person, and the precedent set in *Morgentaler* 1988. They reasoned that the state had created "a virtual monopoly for the public health scheme…[and] effectively limited access to private health care except for the very rich."[92] This state monopoly resulted in delays and denials of care, except for the wealthy few who could pay for private care, typically outside the country. The reasoning tracks *Morgentaler* 1988, especially in the access crisis under legal constraint, but its conclusion for the relative roles of governments and markets is more direct. The fact that the state holds a monopoly on services the market can better provide commends itself to an opening of competitive markets in health care.

This is the contradiction of liberal rights. Not only do they fail to ensure social equality in access, they undermine its guarantee by cutting a constitutional path to privatization. In this liberal tradition, the constitutionalizing of abortion not only decriminalized the market in abortion services, it affirmed a competitive private market as the means of rights fulfillment, and thereby acceded to its rationalities and inequalities.[93] The liberal abortion right of *Morgentaler* 1988, carried forward by a liberal feminist

88 Johnstone, *After Morgentaler*, *supra* note 9 at 99.

89 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

90 See Joan M Gilmour, "Fallout from *Chaoulli*: Is It Time to Find Cover" (2006) 44:2 Osgoode Hall LJ 327 (examines *Chaoulli* as an example of the increasing prevalence of normalizing privatization and individual responsibility in Canadian health policy). See also Colleen M Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

91 *Chaoulli*, *supra* note 89 at para 97, Deschamps J.

92 *Ibid* at para 106 McLachlin CJ and Major J.

93 Richard Robison, "Neo-Liberalism and the Market State: What is the Ideal Shell?" in Richard Robison, ed, *The Neo-Liberal Revolution: Forging the Market State* (Hampshire: Palgrave Macmillan, 2006) 3 (describing how citizenship is redefined in terms of the "right to participate in the market" and equality as "access to the market"). See also Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015).

movement, legitimized the withdrawal of the state, the privatization of abortion care, and all the social inequalities of access that followed.[94]

Within this new political context, feminist activists shifted discursive strategy and sought to rework the abortion right to secure access and equality. They claimed, and provincial governments contested, that abortion services are not market commodities. Rather, all abortions are therapeutic care, or in Canadian health care discourse, a 'medically necessary' service. The appeal of this claim is obvious. On reclassification as therapeutic care, abortion is fully absorbed into the public health care system, to be treated and funded like every other health care service. The material achievement of the claim was comprehensive funding, but its constitutional consequences were more tenuous. The politics of abortion became the politics of health care.[95] The label "medical necessity" replaced the slogan of "choice." Abortion rights, Melissa Haussman argues, were "de-gendered and de-politicized."[96]

National women's organizations, for example, began working in and through mainstream political discourse and institutions. In the 1990s, activists enlisted a Liberal federal government to politically coerce provincial funding reform under the *Canada Health Act* (*CHA*).[97] As a federal spending statute, the *CHA* establishes national criteria that provincial health insurance plans must satisfy to qualify for federal contributions.[98] In this sense, Medicare is neither a legal obligation of governments nor a legal right of individuals.[99] Nonetheless, its commitment to a universal needs-based system strongly reflects the social democratic values of the

94 See Lessard, "The Construction of Health Care", *supra* note 13 at 141–42.

95 Shaver, *supra* note 82 at 83. See also Clare Bambra, Debbie Fox & Alex Scott-Samuel, "Towards a Politics of Health" (2005) 20:2 Health Promotion Intl 187.

96 Melissa Haussman, "'What Does Gender Have to Do with Abortion Law?' Canadian Women's Movement-Parliamentary Interactions on Reform Attempts, 1969-91" (2000) 21 Intl J Can Studies 127 at 130.

97 *Canada Health Act*, RSC 1985, c C-6.

98 *Ibid*, ss 2, 7.

99 For discussion of positive health rights under the *Charter*, see Colleen M Flood & YY Brandon Chen, "Charter Rights & Health Care Funding: A Typology of Canadian Health Rights Litigation" (2010) 19:3 Ann Health L 479; Matthew Rottier Voell, "*PHS Community Services Society v Canada* (*Attorney General*): Positive Health Rights, Health Care Policy, and Section 7 of the Charter" (2012) 31 Windsor Rev Legal Soc Issues 41; Mel Cousins, "Health Care and Human Rights After *Auton* and *Chaoulli*" (2009) 54:4 McGill LJ 717; Martha Jackman, "*Charter* Review of Health Care Access," in Joanna Erdman, Vanessa Gruben & Erin Nelson, *Health Law and Policy in Canada*, 5th ed (Toronto: LexisNexis, 2017) 71).

Charter.[100] In many ways, feminist activists advocated for abortion funding reform less on the formal entitlements of the *CHA* than on its constitutional spirit and values. Materially, however, the activists found little success. The status of abortion under the *CHA* is controversial, namely whether abortion is a medically necessary service and therefore subject to the terms of the *Act*. Even when provincial governments have reformed funding policies, many denied any legal obligation to do so, claiming the designation of a health service, as an insured service, is solely within provincial discretion.[101] In the 1990s, Federal Health Minister, Diane Marleau, wrote to all provinces explaining that their failure to cover private clinic fees for medically necessary services, including abortion, contravened the *CHA* and that provinces would face financial penalty unless they fully funded the services.[102] This intervention was in part an effort to address the larger issue of privatization in the Canadian health care system. Some provinces complied with the terms of the Minister's letter, while others simply took the financial hit. Federal Health Ministers since have warned, threatened, and even initiated administrative action against provinces, but little was gained.[103] The channelling of feminist activism through the

100 Antonia Maioni, "Citizenship and Health Care in Canada" (2010) 42 Intl J Can Studies 225. See also Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, Cat No CP32-85/2002E-IN (Commissioner: Roy J Romanow) (Ottawa: Government of Canada, 2002).

101 See Fine, *supra* note 7 (in the recent PEI abortion challenge, for example, the provincial government made repeated claims of legal compliance with the *CHA*. Even on yielding to the constitutional challenge, Premier MacLauchlan denied the Canada Health Act any legal force, repeating that "government has the right to decide what health-care services are available under the Canada Health Act").

102 Letter from Diane Marleau, Minister of National Health and Welfare to provincial and territorial Ministers of Health (6 January 1995), online: Abortion Rights Coalition of Canada <www.arcc-cdac.ca/backrounders/HC-letter-Jan1995.pdf >. See also Canada, Minister of National Health and Welfare, "Statement by the Honourable Diane Marleau" (16 October 1995), online: Abortion Rights Coalition of Canada <www.arcc-cdac.ca/backrounders/HC-letter-Oct1995.pdf>.

103 In 2001, Federal Health Minister Allan Rock specifically warned the PEI government that failure to fund clinic abortion services constituted a violation of the *CHA*, and threatened to withhold transfer payments unless abortion was treated like all other medically insured services, regardless of where they were performed (see Laura Eggerston, "Abortion Services in Canada: a Patchwork Quilt with Many Holes" (2001) 164:6 CMAJ 847). In 2004, former Federal Minister of Health Ujjal Dosanjh sent a letter to New Brunswick's provincial Department of Health and Wellness, initiating an official dispute avoidance resolution process to address the funding restriction on clinic abortion services. The New Brunswick Minister of Health and Wellness, Elvy Robichaud, declared that the province would not "bow to pressure" from the federal Liberals and refused to engage in talks. The matter ended with a change in government, and the new Minister, Tony Clement, chose

CHA did, however, result in a discursive shift in abortion rights. Public litigation over abortion funding in the 1990s and into the 2000s took on qualities of a management disagreement—the same market rationality that dominated constitutional health care analysis generally. Although *Charter* arguments were raised in these cases, they were either dismissed on technical grounds or avoided on narrow administrative grounds.[104] The British Columbia Civil Liberties Association challenged provincial funding restrictions as "180 degrees opposed to the spirit of the decision of the Canadian Supreme Court [in *Morgentaler* 1988]."[105] Yet, the provincial Supreme Court invalidated the regulation on a technical point, offering the government an alternative way to achieve its policy end.[106]

All provincial governments eventually reformed or repealed funding restrictions enacted immediately before or after *Morgentaler* 1988 and abortion care was slowly absorbed into Medicare to be treated and funded

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not to pursue the matter (see Johnstone, *After Morgentaler*, *supra* note 9 at 116; Health Canada, *Canada Health Act: Annual Report 2005-2006*, Cat No HI-2/2006E (Ottawa: Minister of Health, 2006) at 10–11). In 2016, Federal Health Minister Jane Philpott affirmed that women "should have access to reproductive health services, no matter where they live in our country," but refrained from taking any enforcement action under the *CHA* to make this a reality (see Anna Mehler Paperny, "Health Minister 'Will be Checking' on Provinces' Abortion Access Plans", *Global News* (23 February 2016), online: <www.globalnews.ca>).

104 In 2004, the Manitoba Court of Queen's Bench ruled on summary judgment that the government's funding restriction on clinic services violated women's *Charter* rights, using *Morgentaler* 1988, *supra* note 9 as precedent. The Court of Appeal, however, set aside the judgment, concluding that the significant policy implications of the case required a more complete evidentiary record (see *Jane Doe 1 v Manitoba*, 2004 MBQB 285, 189 Man R (2d) 284). In 2006, Dr. Morgentaler challenged the New Brunswick *Medical Services Payment Act*, *supra* note 79, regulation, which excludes abortions performed in non-hospital settings from government funding as a violation of *Charter* rights; however, the case languished in the courts after a long, but successful, battle over public interest standing (see *Morgentaler v New Brunswick*, 2009 NBCA 26, 344 NBR (2d) 39). For a full description of the case, see Rachael Johnstone, "The Politics of Abortion in New Brunswick" (2014) 36:2 Atlantis 73 [Johnstone, "Politics of Abortion"]). The only successful judgment during this time was a Quebec class action that concerned government reimbursement for failure to cover full clinic fees over a ten-year period. Although *Charter* violations were argued, the case was again decided on narrow statutory terms of the provincial health insurance act (see *Association pour l'accès à l'avortement c Québec* (*Procureur général*), 2006 QCCS 4694, [2006] RJQ 1938). For a discussion of cases see generally, Joanna N Erdman, "In the Back Alleys of Health Care: Abortion, Equality and Community in Canada" (2007) 56 Emory LJ 1093; Rachael Johnstone & Emmett Macfarlane, "Public Policy, Rights, and Abortion Access in Canada" (2015) 51 IJCS 97.

105 Thomson, *supra* note 31 at 170.

106 See *British Columbia Civil Liberties Assn v British Columbia* (*Attorney General*) (1998), 24 BCLR (2d) 189, 49 DLR (4th) 493.

like any health care service. Yet, as abortion care integrated into the health system, its political aspirations changed more than they changed the system. The direct service provision of feminist activism under the criminal law was an alternative to the hospital committee system, both in securing access to services, but also in the experience of care. This was part of the feminist liberation agenda to assist women in defiance of state authority, and especially for radical feminists, in defiance of patriarchal medical authority. After decriminalization, several feminist groups opened clinics modeled on a feminist ethic of care, but these revolutionary aims were generally quieted in activism for public funding in an effort to have abortion treated like any other health care service.

Linda Briskin describes this trajectory as "mainstreaming," feminist alternative organizations coming to reproduce the very norms they set out to reject, just to survive.[107] To secure public funding, for example, abortion rights appropriated the therapeutic designation of the former criminal law as a "medically necessary" service. Counselling also remains a core part of feminist abortion care, but it looks different today. Whereas counselling once served political emancipatory ends through critical consciousness-raising and movement-building, it now serves individual dignity and autonomy through a generic health care right of free and informed consent. To respect abortion as an empowered decision of a woman can be deeply respectful and affirming of women's worth, equality, and even liberation. Yet the individualizing of abortion risks universalizing it: the act comes to mean one thing for all women, a caricature which keeps its complex and contradictory realities out of sight. As such a woman with the freedom to choose, marked by full and equal access to abortion care, carries all the power to choose the life she wishes to lead, but also all the responsibility for the burdens of her life.[108] Though women use abortion to survive and even thrive in lives marked by poverty and violence, the ways in which they would ascribe meaning to this choice may compete with or collapse under its assumptive freedom. By asking women to take responsibility, even pride, in the decision, no matter how severe the constraints or unjust the conditions under which they act, the individualizing of

107 Briskin, *supra* note 12 at 94.

108 Kate Gleeson, "The Limits of 'Choice': Abortion and Entrepreneurialism" in Meredith Nash, ed, *Reframing Reproduction: Conceiving Gendered Experiences* (New York: Palgrave MacMillan, 2014) 69.

abortion disappears oppressive social and economic structures.[109] This is another instance of the privatizing impulse in Canadian health and social policy.

Feminist action turned inward, toward the private, personal space that liberal abortion rights carved for it, rather than outwards towards public and political action.[110] Constitutional abortion rights, in other words, failed to institutionalize into the Canadian health care system a vision of abortion care in the tradition of feminist liberation. That vision was never simply to provide free and safe abortion care to meet immediate need, although of course, this was always a part of direct service activism. Rather, the vision was to use the moment of meeting peoples' needs to raise critical consciousness about the underlying causes of those needs. The goal was to improve the lives of women by enlisting them in a movement to change the conditions of their lives: health care as political action.

Rarely does the "constitutional road not taken" present itself for comparison. Yet, the history of abortion rights in Canada affords such an opportunity in the divergent path of Quebec liberation feminists, who supported but did not take an active role in the national campaign to repeal the criminal law. In the late 1970s, with the provincial promise not to prosecute, activists who organized under the *Coordination nationale pour l'avortement libre et gratuit* established and expanded abortion services in community health centers, which the Quebec government funded as part of its welfare program.[111] Like clandestine direct action service provisions in other parts of Canada, community-based abortion care was a political act to recognize that "[p]roviding free abortions on demand…is not just one more service to the rest of our programs or interventions in family planning. Rather, it is taking a stand in a long and heated legal and political debate."[112] Today, Quebec is an exception in abortion access—46 of 94 abortion facilities in

109 Barbara Cruikshank, *The Will to Empower: Democratic Citizens and Other Subjects* (Ithaca, NY: Cornell University Press, 1999); Bob Pease, "Rethinking Empowerment: A Postmodern Reappraisal for Emancipatory Practice" (2002) 32:2 Brit J Soc Work 135.

110 See Adamson, Briskin & McPhail, *supra* note 35 at 198 (for a discussion of the contradictory contribution of the 'personal is political').

111 FQPN & CFC, *supra* note 51 at 17–18. See also: Nora Milne, *Creating Change to Maintaining Change: The Fédération du Québec pour le planning des naissances and the Pro-choice Movement* (MA Thesis, McGill University, 2011).

112 FQPN & CFC, *supra* note 51 at 18 (citing CLSC practitioners).

Canada are located in the province, with social equality in access credited largely to the provincial health policy of the 1970s.[113]

The community-based health centers in Quebec afforded an alternative strategy, which feminist activists soon began to replicate in the rest of Canada: working with, rather than against, provincial governments to secure social equality in abortion access.[114] In the early 1980s, activists began to lobby provincial governments to accredit or approve free-standing clinics as hospital facilities for the lawful provision of services.[115] The Ontario Coalition for Abortion Clinics (OCAC), a leading proponent of the strategy, explained as follows: "[Clandestine] clinics have been indispensable in providing desperately needed services to thousands of women, in dramatizing daily how unfair and unworkable the existing law is….At the same time, clinics can be posed as a model for the future: centres providing care for the full spectrum of women's reproductive lives."[116] OCAC campaigned to *repeal* the federal law, but also petitioned the province of Ontario to *legalize* and *fund* community-based clinics. Abortion provision through these clinics represented not only political resistance against an unjust law, but a political future for a just health care system:

> We live in a world where inadequate wages make women the largest percentage of the poor, where racism is systemic, where women are subject to rape and violence, sexual and racial harassment, and still bear the major responsibility for domestic work and childcare. It is in this context…for all women regardless of class, race, ability or sexuality to truly have choices in our society, we require: safe and effective birth control with information and services in our own languages and in our own communities, decent jobs, paid parental leave, free childcare, the right to live freely and openly as lesbians, an end to forces or coerced sterilization, employment equity, an end to sexual and racial harassment, the right to have the children we

113 See Wendy V Norman et al, "Abortion Health Services in Canada: Results of a 2012 National Survey" (2016) 62:4 Can Fam Physician e209.

114 See generally Achsah Turnbull, *Abortion Access Restricted: The Effect of the Division of Powers on Abortion Services in Canada* (MA Thesis, University of Ottawa, 2014).

115 Carolyn Egan, "Twenty-Five Years On: How We Won Abortion Rights", *Rabble* (23 January 2013), online: <www.rabble.ca>. See also Patricia Antonyshyn, B Lee & Alex Merrill, "Marching for Women's Lives: The Campaign for Free-Standing Abortion Clinics in Ontario" in Frank Cunningham et al, eds, *Social Movements/Social Change: The Politics and Practice of Organizing* (Toronto: Between the Lines, Society for Socialist Studies, 1988) 129 at 130.

116 Antonyshyn, Lee & Merrill, *supra* note 115 at 149.

> choose to have, and the right to full access to free abortion. All of these must be achieved if we are truly to have reproductive freedom.[117]

OCAC worked in a tradition of reproductive justice, which endeavours to reveal a political space beyond access to services, a space in which to build social institutions in the public interest that speak to a community's diverse needs and values: "abortion rights can never be put forward as a single issue separated from other struggles."[118] Community-based abortion care ultimately seeks to return democratic power to communities.[119]

Many feminist activists outside of Quebec were successful in establishing community women's health clinics. The Women's Health Clinic in Winnipeg, Manitoba, was among the first, providing a mixed program of services, advocacy, and community action. As explained in their model of care, "[t]he woman, in the context of her community, is the centre of…service planning and delivery…[on the] understanding that…women's health status is influenced by a variety of social and structural factors, including social status, income and employment, education, and social supports."[120] Even more interesting, Canadian feminists appear to be returning to the model in more recent activism. After the Morgentaler clinic in Fredericton, New Brunswick closed in the Spring of 2014, feminist activists mobilized through a crowd sourcing campaign to "Save the Clinic," re-opening Clinic 554 as a community-based reproductive health centre.[121] Moreover, the activists campaigned in a distinctly reproductive justice discourse. Their stated goal was "evidence-based policy about abortion care, and that includes services that are located within the community and are

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117 Egan & Gardner, "Race, Class and Reproductive Freedom," *supra* note 38 at 96, citing Carolyn Egan, "The Right to Choose" (1985) 4:4 Our Times 30 at 30.

118 *Ibid* at 97; see also Luna Zakiya & Kristin Luker, "Reproductive Justice" (2013) 9 Annual Rev L & Social Science 327; Loretta J Ross & Rickie Solinger, *Reproductive Justice: A Primer* (Oakland, CA: University of California Press, 2017).

119 On the political goals of community-based health centers see H Jack Geiger, "The First Community Health Centers: A Model of Enduring Value" (2005) 28:4 J Ambulatory Care Management 313; D Brad Wright, "Social Justice and Community Health Centers: Commitment to One Gave Rise to the Other" (2005) 16:4 J Health Care for Poor & Underserved 607.

120 Women's Health Clinic, "Models of Care" (1998) at 2, 4, online: <womenshealthclinic.org/wp-content/uploads/2013/10/WHC-Model-Of-Care.pdf>.

121 See Choix NB Choice, Press Release, "RJNB Crowdfunding Information" (4 July 2014), online: <choixnbchoice.org>; Government of New Brunswick, Press Release, "Provincial Government Removes Barriers to a Woman's Right to Choose" (26 November 2014), online: <www.gnb.ca>, citing *New Brunswick Regulation 2014-160*, OC 2014-44, (2015) NB Gaz, 56 (*Medical Services Payment Act*) (despite regulatory change in January 2015, public funding for abortion in New Brunswick remains restricted to hospital-based services).

delivered within a broader holistic and more preventive model of reproductive health care....Access to safe abortion services is critical to health, but it is only one component of a full reproductive justice agenda that has been ignored for too long in [New Brunswick]."[122] Even if constitutional abortion rights today appear divorced from the real and material needs of women's lives, and the social and economic institutions that shape them, the New Brunswick activism shows the imprint of feminist liberation struggles to be drawn upon in the forging of new constitutional claims for the future.

CONCLUSION: A COLLECTIVE DEMOCRATIC FUTURE

What is the constitutional future for abortion rights in Canada? The lesson of constitutional abortion rights in Canada is in their capacity to be reimagined again and again.

Shortly after *Morgentaler* 1988, Hester Lessard imagined a possible future for abortion rights focused on the political capacity of their holders to make a claim against the state for more than access to a single health-care service.[123] She imagined abortion rights as democratic rights—to fully and equally participate in and benefit from the social institutions of the state, the health care system among them. Lessard saw this future in Justice Wilson's liberty opinion in *Morgentaler* 1988, when she focused on women's reproductive liberty as a collective struggle for inclusion in society, rather than exclusion from the state. Justice Wilson wrote that the decision to terminate a pregnancy "is one that will have profound psychological, economic and social consequences for the pregnant woman....It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large."[124] Seldom emphasized in the opinion of Justice Wilson is the way in which she linked the private right of reproductive freedom to the heart of the democratic political tradition, a prerequisite of legitimate government no less than the traditional

122 Reproductive Justice New Brunswick/Justice Reproductive Nouveau Brunswick, Press Release, "Re: Clinic 554/ Communiqué de Presse" (16 January 2015), online: <rjnb.org>. See also Joanne H Wright, "What the New Liberal Government Should Know About 'Reproductive Freedom and Justice in New Brunswick'" (2014) 5 JNB Studies 15; Johnstone, "The Politics of Abortion", *supra* note 104.

123 See Hester Lessard, "Relationship, Particularity, and Change: Reflections on *R v Morgentaler* and Feminist Approaches to Liberty" (1991) 36:2 McGill LJ 263 [Lessard, "Relationship, Particularity, and Change"].

124 *Morgentaler* 1988, *supra* note 9 at 171.

civil and political rights of man: "the right [of individuals] to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue."[125] Lessard saw great potential in the conception of abortion rights as a claim for democratic inclusion and participation, namely in the different view of the state it entails, "one in which state power is the mediator and facilitator of rights rather than antithetical to freedom.... The language of rights becomes the language of democratic interrelationships rather than the language of separation and boundaries."[126]

In this construction of abortion rights, women's rights to reproductive liberty, security and equality are extricable from empowerment within political and public life. Abortion rights mediate the relationship between women and the state, and thereby shape the use of its power for women's security, equality, and freedom in the public interest. Other scholars have written of a democratic vision for *Charter* rights in health care, but reproductive justice activists are giving legal form to this future.[127] In 2016, a group of PEI activists persuaded their government to adopt a new understanding of constitutional abortion rights, conferring upon it the authority to act and to reform a decades old restrictive policy.[128]

This policy threatened reproductive freedom not by state interference, but rather state indifference. The province's abortion policy required women to seek and access services over the Confederation Bridge, in neighbouring provinces, with minimal state resources or support.[129] It was this state indifference to the health and lives of PEI women that the activists challenged as a violation of the *Charter*. Rather than disavow the liberal legacy of *Morgentaler* 1988 and the abortion rights it affirmed, they grafted onto it the historical weight of feminist thinking and activism in this country. They added new ideas to old paradigms, or rather old ideas to

125 *Ibid* at 166.

126 Lessard, "Relationship, Particularity, and Change", *supra* note 123 at 306.

127 See Alana Klein, "So Long as You Have Your Health: Health Care Distribution in Canada" (2012) 30:2 Windsor YB Access Just 247; Jackman, *supra* note 99. See also Johnstone, *After Morgentaler*, *supra* note 9 at 156–66 (advancing an argument for the recognition of reproductive rights as essential to women's equal citizenship).

128 The following analysis draws upon Joanna N Erdman, "A Constitutional Future for Abortion Rights in Canada" (2017) 54:3 Alta L Rev 727 [Erdman, "Constitutional Future"]. See also Kate McKenna, *No Choice: The 30-Year Fight for Abortion on Prince Edward Island* (Blackpoint, NS: Fernwood Publishing, 2018).

129 See Erdman, "Constitutional Future", *supra* note 128 at 732–37 (description of the former policy).

contemporary paradigms, in the reshaping and reclaiming of constitutional abortion rights as a renewed source of democratic power. They argued that the abortion policy was constitutionally unjust, not only because of its impact on women's individual rights to liberty, security, and equality, but more fundamentally, because of its democratic effects on the status of Island women as full and equal members of public and political life.

When claiming *Charter* rights of liberty, the activists claimed not only for the right to make personal decisions of an intimate and private nature. On the contrary, this was a liberty the state too willingly gave women in its withdrawal of public support and in the privatization of abortion care. Thus, one of the first tasks the activists undertook in their challenge was to highlight the elaborate state administration of abortion in order to demonstrate how the government was deeply implicated in the withdrawal of local hospital services, the obstruction of new clinic-based services, and the funding and referral of out-of-province services to quell criticism and avoid reform on the Island.[130] The activists challenged the government's simple claim that market forces explained the lack of local services. They refused to alleviate the government of responsibility for the privatization of care and resulting social inequalities in access.

When claiming section 7 *Charter* right of security of person, the activists again claimed abortion rights, not as an entitlement to a discrete health service in the protection of health, but against a government policy that endangered the health and lives of women and the government's seeming indifference to that fact.[131] In other words, the activists put the law on trial. The narratives of the ways in which the abortion policy worked in practice—that women without family physicians had little hope of navigating the province's abortion rules and regulations, and that many as a consequence were pushed outside the system, some into safe private care, others toward unsafe clandestine practice—recalled all of the dysfunctions and hypocrisy of the hospital committee system under the former criminal law.[132] The activists bore witness to this injustice against a govern-

130 *Ibid* at 733.

131 *Ibid* at 745–47.

132 See Colleen MacQuarrie, Jo-Ann MacDonald & Cathrine Chambers, "Trials and Trails of Accessing Abortion in PEI: Reporting on the Impact of PEI's Abortion Policies" (Charlottetown: University of Prince Edward Island, 2014), online: <projects.upei.ca/cmacquarrie/files/2014/01/trials_and_trails_final.pdf> (this evidence was largely based on a 2014 study of women's first-person accounts in seeking and accessing abortion services under the policy. Other testimonial accounts of women's experiences followed the release of the study). See also: *The Sovereign Uterus*, (blog), online: <www.thesovereignuterus.wordpress.com>

ment refusal to carry out any investigation of abortion practice under its policy, affirming only that, by its knowledge, there are no illegal 'back-alley' abortions in PEI.[133]

In homage to the necessity defence of the civil disobedience trials of *Morgentaler*, the activists argued that it was not clandestine abortion that endangered women's health and lives, but the law itself, the abortion policy. Women survived this policy without harm to the extent they did because an army of local activists worked the shadows of the broken system, took its outflow, and assisted women to find safe services, precisely as they had under the criminal regime.[134] Against these facts, the activists argued government malfeasance in the maintaining and enforcing of a policy that caused harm. This was not a novel claim, but tracked the argument of defense counsel and ultimately the reasoning of the Supreme Court in *Morgentaler* 1988.[135] To provide abortion services, or any other health care service in ways that deny or delay safe access, or otherwise breeds conditions for unsafe access, infringes on the right to security of person. The activists raised the constitutional argument beyond mere bodily harm by emphasizing the democratic effects of this harm: that as a principle of fundamental justice, and as full and equal members of Canadian society, the lives and health of women have worth and must be accounted for in the design and delivery of health care under a public system.[136]

Partly in answer to these criticisms of its policy, the provincial government took efforts to improve access through information, travel support, and expanding out-of-province eligible services. The assumption was that if the policy could be made to work, it would present no constitutional affront. The activists disagreed. A policy that required its residents to leave PEI to access abortion care, no matter how comfortable the journey, is

(contains anonymous narrative accounts of women's experiences in navigating the regulatory system); Teresa Wright, "P.E.I. Women Share Harrowing Abortion Stories", *The Guardian* (30 May 2015), online: <www.theguardian.pe.ca>; Anna Mehler Paperny, "Your Stories: Navigating Canada's Abortion Provider Patchwork", *Global News* (5 January 2016), online: <www.globalnews.ca>.

133 "Lack of Abortion Access Fuels Risks to Women, Says Report", *CBC News* (28 January 2014), online: <www.cbc.ca>.

134 Alison Auld, "P.E.I. Women Continue to Face Barriers to Abortion Despite Easing of Restrictions", *The Toronto Star* (27 December 2015), online: <www.thestar.com>.

135 The same argument has since found favour with the Supreme Court in *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134; *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

136 AAN Application, *supra* note 6 at paras 143–45.

constitutionally offensive because of the normative view it communicates about women as members of the democratic order.[137] The activists invoked equality rights under section 15 of the *Charter,* enlivened by the spirit and values of Medicare and the *CHA,* to argue for the legislative entitlement of all Islanders to a single, integrated health care system, grounded in evidence-based decision-making, and focused on improving health, enhancing access, and local delivery.[138] The abortion policy was none of these things. By relying on the universal promise of health care in provincial legislation, the activists claimed abortion rights not against state intervention, but as a means to enforce that intervention, a claim on the state and its protections.[139] The activists endeavoured to enforce the democratic promise of legislation for the benefit of all those subject to it, women included. This is why the identity of "Island Women" became vital to the *Charter* challenge. The women reclaimed their status as Islanders and their constitutional rights as public interests.[140]

In their public campaign and formal legal challenge, the PEI activists claimed abortion rights as democratic rights, that is, as claims on the state to build its institutions in the collective interest. They claimed abortion rights for more than access to a single health care service. They claimed abortion rights as democratic rights: the right to fully and equally participate in, and to benefit from, the institutions of the state, the health care system among them. They claimed reproductive justice as constitutional justice.

This case on a small Island portends of a big constitutional future for abortion rights, namely the capacity to carry forward the visions of democratic movements for a socially just world. In this case, the PEI government reformed its abortion policy not because of judicial review, but because of women's collective demands for justice. Constitutional rights come into being by no one paradigm, in no one place, and at no one time. That is the lesson of 35 years of the *Charter* and 150 years of the *Constitution*.

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137 See Erdman, "Constitutional Future", *supra* note 128 at 748–51. See also Joanna N Erdman "The Law of Stigma, Travel, and the Abortion-Free Island" (2016) 33:1 Colum J Gender & L 29 [Erdman, "The Law of Stigma"].

138 Erdman, "Constitutional Future", *supra* note 128 at 737–42.

139 The activists made a claim of entitlement to health care only in this respect: once the state provides a benefit, namely, local and safe access to health care, it is obligated to do so in a non-discriminatory manner, which may require extending the scope of benefits to include local abortion services (see e.g. *Eldridge v British Columbia* (*Attorney General*), [1997] 3 SCR 624, 38 BCLR (3d) 1).

140 Erdman, "The Law of Stigma", *supra* note 137 at 34–36.