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# AN INFECTION OF NOBLE CAUSES: AN EXAMINATION OF THE EFFECTS OF NOBLE-CAUSE CORRUPTION ON THE CANADIAN JUSTICE SYSTEM

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## Introduction

Influenza does not usually pose a significant threat to one's overall health. Most people who contract the seasonal illness can easily overcome their flu-like symptoms with over-the-counter medication. In some cases, however, influenza can expose a person to more serious bacterial infections like pneumonia. Pre-existing conditions, respiratory illness for example, increase the likelihood that infections like pneumonia will enter the body successfully, spread through the bloodstream, and trigger a multi-system infection (Ducharme, 2018). While such instances are rare, the results can be deadly.

Noble-cause corruption is a form of corruption that occurs when individuals adhere to the problematic reasoning system of 'the ends justify the means' (Grometstein, 2005). Noble-cause corruption can be likened to influenza in the way that it affects the criminal justice system. We can think of it as an infection that causes the justice system to develop seemingly harmless 'symptoms' (or signs) of impaired function in the form of *unit failures* (Thompson, 2008). Pre-existing institutional conditions (Joy, 2006), like the tight coupling of crime-fighting *units* (Thompson, 2008), significantly increase the likelihood that more severe infections, such as socio-legal pressures, will successfully infiltrate the justice system and distort the conduct of individual agents. These factors work individually and together to produce consequences that are potentially lethal for due process and may result in wrongful convictions.

The purpose of this paper is two-fold. The first goal is to advance non-academic readers' understanding of noble-cause corruption by using more accessible language and focusing on its consequences within two specific *units* of the justice system: the prosecution and forensic laboratory units, respectively. For simplicity, this paper will only analyze the effects of noble-cause corruption in one *sub-system* of the justice system*:* the pre-trial investigation phase. The second aim is to explain how the public plays a key role in the potential success (or prevention) of noble-cause corruption. The analysis will begin at the agent level, identifying the symptoms of noble-cause corruption, before moving on to explain the *unit*-specific outcomes. Finally, a summary of macro-consequences for the justice system will precede a brief description of the remedies proposed in the literature.

## Explaining Noble-cause Corruption: The Infection

Noble-cause corruption (NCC) is a form of teleological reasoning that affects the conduct of agents in the justice system (Grometstein, 2005). Put simply, agents adopt a mentality of 'the end justifies the means,' which enables them to act in ways that undermine the integrity of their profession (Grometstein, 2005) and therefore compromise the function of their respective *unit*. This behavior is usually motivated by agents' desire to achieve a 'noble goal': 'getting the bad guys off the street' for prosecutors (Grometstein, 2005) and 'getting justice for the victim' for forensic analysts (Kramar, 2006). Grometstein (2005) helps us understand that agents are susceptible to NCC because it helps them reach their goal (justice) more effectively and efficiently. Thus, the agents' professional behaviour is ironically corrupted by their noble cause.

It is tempting to try and explain away NCC using an individualistic approach: asserting that the problem only resides with a few 'bad apples' in the justice system (Thompson, 2008). However, organizational theory teaches us that individual errors do not exist inside a vacuum. Indeed, occasional failures of independent *units* within any system should be expected and therefore present no real cause for concern (Thompson, 2008). The implications and severity of occasional failures, however, depend heavily on the structure of the *system* and how its various *sub-systems* operate with respect to each other.

## Understanding the Justice System as a *System*

According to organizational theory, a *system* is characterized by a unique collection of internal *sub-systems* which are comprised of even smaller elements known as *units* (Thompson, 2008). Categorization of the justice system's *units, parts,* and *sub-systems* directly corresponds to the various departments and offices that exist within the Canadian judicial setting. This paper examines the effects of NCC in one *sub-system:* the pre-trial investigation. This *sub-system* contains a plethora of smaller *units* filled with agents who share the responsibility of investigating alleged suspects of reported crime, gathering and examining potential evidence (Kramar, 2006), interviewing victims and witnesses, and deciding whether to proceed with legal action against accused persons (Joy, 2006). Among these *units* are police investigators, forensic labs and the prosecutor's office. Though the police investigators' *unit* performs a significant role, their conduct can be described as ubiquitous throughout the judicial system, extending far beyond the pre-trial investigation phase. Therefore, this unit will be largely excluded from later analysis to better isolate the effects of NCC on agents within this specific *sub-system*. Our chief

concern will be how NCC alters agents' conduct in the latter *units* to precipitate *incidents,* or undesirable events (Thompson, 2008).

When agents i.e. police officers or forensic analysts make an error while carrying out their *unit*-specific duties – whether intentionally or unintentionally – Thompson (2008) would characterize this as an *incident*. For example, a police officer might forget to read a suspect their rights upon arrest or a lab analyst may misinterpret the results of a minor test. Whereas these kinds of mistakes are usually detected and quickly rectified by *unit*-specific safeguards, NCC provokes agents to *intentionally* circumvent due diligence measures in order to accelerate the process of reaching their 'noble goal' (Grometstein, 2005). Indeed, the onset of NCC increases the probability that a *unit failure* will occur. A forensic laboratory *unit* could, as a result of intentionally inflating the results from a given testing procedure, advance findings that are misleading or entirely false in nature (Thompson, 2008).

Though *incidents* make *unit failures* more likely to transpire, the former is not a pre-requisite for the latter's existence. Thompson (2008) makes sure to clarify that the two events are mutually exclusive, noting that either one can occur in absence of the other. This is significant because NCC has the potential to trigger one or any number of *incidents* and *unit failures.* To be clear, a forensic lab *unit* could fulfill its role without *incident* by producing an accurate report only to be later withheld from evidence or exploited for overzealous prosecution by an NCC-infected prosecution *unit.* This is an example of how one *unit failure* can still occur in the absence of an initial *incident*. Alternatively, a forensic lab *unit* could produce misleading findings that the prosecution *unit* relies upon to maliciously prosecute and wrongly convict an innocent person, resulting in two *unit failures*. Alarmingly, *incidents* and *unit failures* caused by

NCC can easily be written off as localized events caused by individuals thought to carry no consequence for *units* in the same *sub-system* or the justice *system* at large (Grometstein, 2005).

Not only is it misguided to view agents' actions as isolated and unrelated, it also significantly inhibits policymakers' ability to create compelling and proactive solutions that address systemic problems (Thompson, 2008). Just as the flu cannot be cured with medicine that only treats one out of the three possible symptoms you are experiencing, NCC cannot be eradicated from the justice system by reprimanding individual actors on a case-by-case basis. Instead, NCC must be viewed as a *systemic* infection that has consequences beyond each individual agent. Like any other illness, effective treatment of NCC depends on the early detection and accurate diagnosis of its symptoms.

## Identifying the Symptoms of the NCC Infection

The flu does not affect all body parts in a uniform way. Signs of illness are unique to the function of each body part, i.e. congestion in the nose, nausea in the stomach, and pain in the head (Government of Canada, 2018). Importantly, the degree to which each symptom impairs overall bodily function will depend on what task the person is trying to accomplish. In the same way, NCC does not manifest in an identical set of behaviors across all *units*. Just as the nose and the throat carry out different functions for the body, prosecutors and forensic analysts play two distinct roles in the justice system. Thus, NCC will manifest in behaviors that are specific to each profession.

For prosecutors, symptoms of NCC include withholding exculpatory evidence from the defense and overzealous prosecution (Grometstein, 2005). Whereas signs of NCC affecting forensic analysts and experts appear when they overstate the probative value of scientific findings

or speak outside the boundaries of their expertise (Kaye, 2015). These actions amount to prosecutorial misconduct and ultracrepridarianism (Kaye, 2015), respectively. Each of these symptoms significantly increases the likelihood that a *system failure*, namely wrongful conviction, will occur. A *system failure* refers to a situation where the whole *system* suffers a breakdown, because of its failure to correct one or more *unit failures*, creating devastating results (Thompson, 2008). The consequences for due process are derived from the unique role that each *unit* plays in the justice system. This is not to say that one form of misconduct is 'worse' than others, but each *unit failure* certainly has different ramifications for the accused.

The role of forensic analysts in the justice system is akin to the function of the nose for the human body. The nose plays a crucial role in the respiratory system. While its "specialized cells" identify smells, its hairs are responsible for cleaning the air of foreign particles before it goes to the lungs (Healthline Medical Network, 2015). The most common symptom of a flu is nasal congestion which can result in "inflammation of the nasal passages" (Healthline Medical Network, 2015). In the same way, the forensic laboratory *unit* supposedly contains impartial examiners (Kramar, 2006) responsible for analyzing scientific evidence and interpreting 'objective' evidence before it is passed on to the police and prosecution. Thus, a common sign that NCC has infected this *unit* lies in the inflated claims these analysts make about their findings.

When faulty forensic evidence is used in the trial process without clearly established guidelines, this increases opportunities for invalid testimony and instances of overclaiming by analysts (Kaye, 2015). Moreover, when 'experts' fail to communicate the limitations of the scientific methods relied on to evaluate forensic evidence, they can unintentionally mislead juries into believing that evidence holds more objective significance than it does. In

the case of *Morin*, NCC emerged as overclaiming by forensic analysts. This was one of Canada's more recognized wrongful convictions – the 1986 murder conviction of twenty-five-year-old Guy Paul Morin for the murder of his nine-year-old neighbor, Christine Jessop. Identified as the main suspect early in the investigation, police narrowed their focus to Mr. Morin after a single dark hair was found on Christine's necklace and three hairs were found in his car (Morin, 1988).

Notwithstanding the validity of the science used by forensic analysts to assess hair follicles found in his car, the findings were undoubtedly limited by the lack of standardization in the methodology procedure used (Kaye, 2015). The forensic analyst who conducted a preliminary comparison of the infamous 'necklace hair' provided police with an overstated and premature opinion that went beyond the scope of the scientific method (Morin, 1988). According to the Inquiry (1998), "…the fibre similarities were not probative in demonstrating direct contact between Christine Jessop and Guy Paul Morin — instead, they were equally explainable by random occurrence or environmental contamination; the number and nature of the fibre similarities did not support the prosecution's position."

This overstep falsely implicated Mr. Morin in the highly publicized kidnapping and murder case, representing a *unit failure*. Furthermore, the analyst failed to effectively communicate the limits of her findings to the jury during Mr. Morin's trial which led them to believe that the hair evidence provided objective and conclusive evidence of Mr. Morin's guilt (Morin, 1988). At worst, faulty scientific evidence can falsely implicate an accused in a crime, as was the case in *Morin.* However, that evidence must still go through the prosecution *unit* before it is admitted into the trial. As previously mentioned, the human nose only partially cleans air by trapping dirt particles in its hairs (University of Florida Health, 2018). This is done

because air contains particles that must be removed before it is allowed to enter the lungs (University of Florida Health, 2018).

Since the prosecution represents a natural stopping point for the justice system and plays a critical role in the trial process, its function and importance in this *sub-system* are comparable to the lungs in the human body. After the nose partially cleans the air, the lungs engage in an ongoing process whereby they extract oxygen from the air and transport it to the rest of the body while simultaneously making a waste product called carbon dioxide (University of Florida Health, 2018). The carbon dioxide is then expelled from the body when we exhale (University of Florida Health, 2018). The office of the prosecutor acts as the 'lungs' to the trial process and the justice system because this is where results from the investigation enter and prosecutors decide what exculpatory evidence (oxygen of the case) will be admitted into the trial.

The role of the prosecution is to determine whether to prosecute an individual based on the evidence before them, which has been collected by other *units* in the system. They are effectively the filter of all pre-trial investigation findings and conduct: responsible for both extracting all the pertinent facts and expelling all evidence that may have been collected with questionable means or violated due process (waste products). When the lungs are compromised, so is their ability to send clean air to the rest of the body. In the same way, when the prosecutorial *unit* is compromised by NCC, their ability to assess the probative value of evidence is also compromised. With this in mind, one can begin to appreciate why a *unit failure* for the prosecution office represents the most egregious form of NCC.

The prosecution *unit* is meant to sift through and critically assess evidence to ensure they have a reasonable prospect to prosecute. A breakdown in this *unit* is more likely than any other *unit failure* to result in a wrongful conviction because it represents the last objective

checkpoint for evidence before it is admitted into a trial. Failure to efficiently screen and reject tainted or faulty evidence significantly reduces the accused's chances of receiving a fair trial. Thus, failure to adequately perform this role is closely linked with the occurrence of wrongful convictions. The consequences of this *unit failure* were particularly evident in the case of *R. v Henry*.

In *Henry*, the breakdown of prosecutors' filter role allowed multiple pieces of faulty evidence to enter the trial process while NCC compelled prosecutors to cover up police misconduct (Henry, 2015). During the investigation, Henry – accused of sexual assault – refused to participate in a line-up. Convinced of his guilt, police used force to secure a photograph of Henry – the initial *incident* – after relying on a conditional identification by one of the many complainants involved in the case (Henry, 2015). Police misconduct undermined the validity of the already questionable identification and violated Henry's due process rights, which could be seen as a *unit failure*. Because the prosecutors were complicit in this abuse of process, they withheld photographic evidence of police using force to secure Henry's photo and cited his refusal to participate in the line-up as proof of consciousness of guilt (Henry, 2015). The compounded errors of the police and prosecutors resulted in a *system failure,* namely the jury wrongfully convicting Henry.

Thus, we see that consequences of NCC are significantly worse for due process when they occur in this unit because it results in the concentration of multiple unit failures and errors that occurred prior to the start of the trial; leaving the accused at a considerable disadvantage. In such cases, the system does not develop a tolerance or immunity to the particular strain of NCC that results in a wrongful conviction because the infection infiltrates the 'last defence' of the pre-trial investigation process. Moreover, efforts to identify the exact factors that contributed to

wrongful convictions during a trial are complicated by pre-existing conditions such as the lack of transparency around prosecutors' methods (Bandes, 2005) and the confidentiality of jury deliberations.

**Identifying Institutional Vulnerabilities: Pre-existing Conditions**

As previously mentioned, influenza coupled with pre-existing conditions, such as respiratory illness, increase the likelihood that more serious bacterial infections will be able to successfully enter the bloodstream and trigger a multi-system infection (Ducharme, 2018). Likewise, the pre-existing institutional conditions *within* units help perpetuate the symptoms of NCC and increase agents' exposure to dangerous levels of external socio-legal pressure, such as the expectation during high-profile cases to secure a conviction(s) and make speedy arrests in response to increased media attention, scrutiny from advocacy groups, or general outrage from the public.

For prosecutors, institutional conditions that complicate their role as the 'lungs' of the justice system include low accountability, little transparency, and vague ethical codes (Joy, 2006). Loose ethical guidelines provide a large margin of error for behaviour and give prosecutors wide discretional authority when deciding what they will admit into evidence (Joy, 2006). Their discretion remains largely unchecked due to the lack of strictly enforced transparency regulations that govern prosecutors' conduct (Joy, 2006). Furthermore, prosecutors' shared goals and close interaction with police create strong bonds of loyalty which disincentivize the practice of reporting police misconduct (Bandes, 2005). Thus, structural factors within *units* perpetuate the effects of NCC by making it unattractive and costly for agents to address questionable behaviour (Bandes, 2005).

Prosecutors face a daily battle of balancing their two roles as arbiters of justice and advocates for the community (Bandes, 2005). In practice, however, ambiguous guidelines and the nature of the adversary system allow prosecutors to simplify their dual role by distancing themselves from their responsibility to justice in favor of remaining loyal to their institution (Bandes, 2005). When institutional shortcomings are allowed to co-exist with extra-legal pressures, Kramar (2006) explains how these conditions can lead to a similar clash between forensic scientists' professional interests and their advocacy role for the victim.

**The Impact of other External Social-legal factors on Legal Actors' Conduct**

Now that NCC has infected agents' reasoning and taken advantage of the pre-existing structural weaknesses within each *unit*, it is much easier for additional external pressures to successfully enter and further erode the *system's* overall functionality. These pressures insert *unit*-specific narratives and biases, which perpetuate the 'symptoms' of NCC and ultimately trigger a *system failure*, since at least two of the *units* have experienced failures (Thompson, 2008). Importantly, these pressures can successfully infiltrate the *system* because they latch on to the noble goals of the actors inside each *unit*.

Moral panics, like the early 1990 campaigns against child abuse-related death, caused forensic analysts to act more like "moral entrepreneurs" than impartial surveyors of evidence (Kramar, 2006). Similarly, the political climate following the 1983 amendments to the Criminal Code concerning sex offenses produced an analogous surge in prosecutors' desire to secure convictions under these new laws, evidenced by the overzealous prosecution in *R v. Henry*. Following the concerns raised by both advocacy groups and agents within the justice system (Department of Justice Canada, 1990), Bill C-127 created the offence of sexual assault in its

various forms in 1983. This new statutory framework made it possible for prosecutors to stack ten different counts of sexual offence against Mr. Henry and increase their odds of securing a successful conviction. When heightened socio-political climates give rise to high profile cases, legal actors seemingly diverge attention towards the advocacy role of their respective professions (Bandes, 2005). Whereas forensic scientists shift their focus to their duty to 'speak for the dead and protect the living' (Kramar, 2006), prosecutors doggedly pursue their role as 'ministers of justice'.

**Contagion: How the NCC Infection Spreads Across the Justice System**

Usually, when someone gets the flu, they are cautioned to *avoid* close contact with others and stay isolated until their cold subsides (Government of Canada, 2018). Organizational theory helps us to recognize the problematic design of the justice system which runs counter-intuitively to this advice; creating institutional vulnerabilities for actors. Under this lens, we can better understand how NCC spreads rapidly across *units* in the justice system. NCC persists because of the close ties, interaction, and overlap of duties that exist between *units* (Thompson, 2008). The infection quickly develops from a small virus at the individual actor level into a large, multi-*unit* 'disease' owing to the 'tight coupling' of *units* in the system (Thompson, 2008).

Both prosecutors and forensic analysts work closely with the police *unit* over the course of an investigation. Multiple interactions with police officers and exposure to victims and/or witnesses may, therefore, result in forensic analysts developing biases and becoming emotionally vested in the results of a pending investigation (Morin, 1988). Since the investigation process is not as independent as it should be, regular contact between agents across *units* increases the risk of instances of ultracrepidariansim (Thompson, 2008). The interdependent design also makes it

harder for individual errors to be detected and corrected early enough before they have snowballed into a *system failure* (Thompson, 2008). This was clearly displayed in *Morin.*

To be sure, NCC motivated a forensic analyst to ignore contaminated evidence and overstate her findings as conclusive to help police catch the 'bad guy' (Inquiry, 1998; Grometstein, 2007). However, overlap in duties created a situation whereby the forensic analyst was at the crime-scene at the same time as the police. The danger of forensic scientists analyzing evidence with a specific 'culprit' in mind is the increased risk of confirmation bias, as was the case in *Morin*. Though police relied on an overstated forensic opinion, their subsequent decision to exclusively pursue Mr. Morin as the prime suspect in their investigation was an example of tunnel vision (Morin, 1988). Officers' tunnel vision amplified the effect of the initial forensic error and was reinforced in the trial by forensic analysts' testimony. Thus, the tight coupling of these respective *units* allowed the bias to persist throughout the investigation and into the trial, ultimately resulting in Morin's wrongful conviction. Similarly, prosecutors' loyalty to the police (Joy, 2006) created mutually reinforcing biases (Thompson, 2008) in *Henry,* which permitted police misconduct and false statements to the jury, resulting in Henry's wrongful conviction (Henry, 2015).

These cases reinforce the notion that wrongful convictions are not the result of isolated mistakes by individual actors. Instead, they are an outcome of a *system* that is tightly coupled and suffers from more than one *unit failure* (Thompson, 2008). The factors that contribute to wrongful convictions are indeed structural in nature.

**Preventative Measures and Remedies to Combat NCC**

There are many factors that make it difficult to find 'the cure' to the persistent and potentially lethal infection of NCC. Structural, socio-legal, and ethical factors have already been discussed above. Another phenomenon however, is likely the most damaging obstacle to addressing these forms of wrongdoing: the concept of ambivalence. Grometstein (2005) argues that people have a difficult time condemning these specific forms of misconduct because the public conflates denouncing such actions with condemning the noble goals that are being pursued. Punishing agents who commit these acts while in pursuit of their noble goal yields mixed emotions, making it difficult to assign – and follow through with – appropriate forms of punishment.

Public sentiment plays a crucial role: either confirming or undermining the legitimacy of penalties for noble crime (Grometstein, 2005). In order for punishments to truly be effective, it is imperative that members of the public change their perception of and support for 'noble crime'. Citizens must replace their ambivalence with informed support for law-makers' efforts to hold noble offenders accountable. Doing this would not only reinforce the importance of preserving due diligence, but would also demonstrate to legal actors that there are *real* consequences for violating due process; regardless of their 'noble' intentions. Moreover, allowing NCC-infected actors to go unpunished has serious implications for the legitimacy of checks and balances embedded within the justice system.

Without the unequivocal sanction of actions taken in pursuit of noble goals, the public risks indirectly legitimizing legal actors' misconduct (Grometstein, 2005). This can lead to a slippery slope whereby officers, prosecutors, and analysts feel vindicated in relying on teleological reasoning that justifies fighting crime 'at any cost' (Grometstein, 2005). This

mentality sets a dangerous precedent for due process that is directly at odds with the protections set out under the Charter of Rights and Freedoms, specifically sections 7-14. It is imperative, therefore, for the average Canadian citizen to understand that their support, disapproval of, and/or ambivalence towards NCC-inspired crimes is not inconsequential. The more the public tolerates *incidents* where actors circumvent legal procedures, in *any* case, the easier it is for NCC to erode legal safeguards designed to prevent *unit failures* that set a *system failure* into motion (Thompson, 2008).

It is impractical and imprudent, however, to focus exclusively on devising the 'perfect' punishments for NCC-infected offenders alone; especially given the mixed (and often negative) reactions said punishments garner in the public sphere (Grometstein, 2005). When someone catches a cold, their symptoms cannot be reversed, only treated. Scholars therefore offer remedies that are holistic in nature and attempt to prescribe preventative measures to protect the *system* from being infected in the first place.

Joy (2006) proposes proactive measures such as providing prosecutors with more ethical training, a set of comprehensive ethical standards, as well as a prosecutor's handbook. These measures would collectively reduce the amount of discretionary authority prosecutors are able to deploy when assessing the probative value of evidence. This would therefore limit opportunities for symptoms of NCC to ever develop. Additionally, the establishment of an independent internal affairs *unit* may prove effective in the early detection and prevention of NCC before it contaminates other *units* (Joy, 2006). Increased transparency requirements that expose the limits of scientific methods and improve access to prosecutors' records would be equally effective in combating the power of NCC (Bandes, 2005).

As a general measure, the use of more deontological reasoning, which refers to 'the means determine what is considered a justifiable end' mindset (Grometstein, 2005), would prove useful in the battle against NCC. Deontological reasoning places greater emphasis on the *unit's* sense of duty and the obligation to uphold the principles of due process. In practice, this means actors can move forward with cases only when there is a reasonable prospect of conviction that does not rely on evidence collected using unethical and/or improper methods. Even when their case stands to benefit from the information collected, deontological reasoning would require prosecutors to reject such evidence because relying on it would represent a conscious contribution to unjust outcomes. This approach supports process-oriented reasoning and places a premium on professional integrity.

Deontological reasoning equips legal actors with the necessary ethical toolkit to overcome the shortcomings of teleological reasoning. Deontological reasoning is superior primarily because it is more robust. This reasoning can better withstand the socio-legal pressures associated with moral panics and sensationalized cases; it commands a higher level of accountability from each *unit's* actors; and it places greater emphasis on upholding due diligence by prioritizing the safeguards embedded in the process – not the results (Grometstein, 2005). Furthermore, agents who adopt this ethical stance should be better at resisting the temptation to produce an arrest, fabricate test results, or obtain a [wrongful] conviction in an effort to satisfy some elusive, ill-defined desire for 'justice'.

## Conclusion

By compromising the role of each *unit*, exploiting institutional weaknesses (Joy, 2006), and increasing actors' susceptibility to socio-legal pressures, NCC precipitates multiple *unit*

*failures*; resulting in the premature death of due process and ultimate miscarriage of justice for the accused. By drawing comparisons between NCC and infectious disease, this paper critically discussed how the problematic design of the justice system allows NCC to metastasize from the individual actor level, across *units*, and culminate in a *system failure*. Finally, this analogy makes analysis of NCC more accessible to non-academic readers and explains why it is incumbent for the general public to support initiatives aimed at eradicating NCC. Dispelling the public's ambivalence, along with a fundamental shift in ethical reasoning by legal actors, and a holistic approach to system reform are *all* necessary to rid the justice system of its (all-too-common) cold.

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# BEYOND CONVENTIONAL "WOMANHOOD": FEMINIST LEGAL SCHOLARSHIP AND GENDER IDENTITIES

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## Introduction

Feminism is a diverse discipline with political, legal, philosophical, sociological, and economic roots. In recent years, some of the conversations within this vast realm of discourse have extended beyond the binary categories of "male" and "female" which marked first- and second-wave feminist discourse. In addition to controversies within Canadian case law and legislation, feminists have been concerned with the following debate: Is there room for various forms of gender expression and identity within feminist legal scholarship beyond conventional conceptions of womanhood? The enactment of *Bill C-16* (enacted in June 2017) and the federal decision to amend the *Canada Human Rights Act* and *Criminal Code* so that these guiding legal principles will include gender identity and expression as a protected group has gained considerable media attention. Reactions have ranged from enthusiastic acceptance to intense disapproval. For instance, the viral denouncement from former University of Toronto professor Jordan Peterson, who refused to use gender-neutral pronouns and claimed *Bill C-16* would "criminalize pronoun misuse," an unfounded but popularized argument against the Bill (Cossman, 2018, 43-45).

If the scope of feminist theory is understood as a discourse concerned with exclusively feminine issues, then who is qualified to participate under that categorization? The human rights issues raised in the dispute between Kimberly Nixon and the Vancouver Rape Relief Society posed the problem of determining who can be classified as a "real" woman, as a legal subject, and as a participant in female-oriented spaces. In other words, being able to define womanhood

beyond the experiences of individuals who identify as female and were born with female sex organs (also known as cisgender women) could have legal ramifications. Feminist scholarship has demonstrated its potential to motivate and influence sociolegal discussions surrounding policy and social reform. Through the analysis of relevant case law and legislation, and by looking critically at the scholarly framework of existing feminist theory, the uncertain position of gender identities and their subjectivity can be placed within the context of feminist legal scholarship. This paper argues against the narrow interpretation of "womanhood" often adopted by Canadian law in favour of flexibility towards gender definitions.

**Historical and Theoretical Overview of the Gendered Legal Subject**

Feminist scholarship is an expansive field, and the current construction of the gendered legal subject can be approached from the perspectives of several different notable theorists. The following can be considered a foundation for the constitution of gender. Carol Gilligan criticized Kohlberg and Piaget's psychoanalytical theories about the moral development of children as she believed they privileged masculine forms of reasoning without contemplating feminine rationality, which was simply different, not necessarily less important (Gilligan, 1993, 18-20). In a study which analyzed gendered reactions to moral dilemmas, Gilligan revealed that most people give consideration to factors related to both care (the effect on relationships) and justice (conflict resolution through logic alone), though girls more frequently prioritized care while boys prioritized justice (Gilligan & Attanucci, 1988, 224-225, 232). Thus, there may be a distinctly female conception of justice or "reason." Concurrently, Judith Butler puts forth that "sex" is materialized through regulatory practices, and gender identity is a performative function which reiterates norms that have been socially determined based on body type (1993, 1-2). With regards to the law, masculinity prevails in the discourse and conventions that constitute legitimate

authority, subjugating the feminine (Butler, 1993, 107-108). The ideas and needs of women have been suppressed in the legal sphere.

Catharine MacKinnon champions the objective of achieving a feminist jurisprudence. In line with MacKinnon's research, capitalist and patriarchal systems have ensured the following: "Each sex has its role, but their stakes and power are not equal. If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective" (MacKinnon, 1983, 638). She argues that women have been sexually dominated by legal, social, and political organizations, and radical legal reform is essential to vocalizing the silenced experiences of all women (MacKinnon, 1983, 638, 644-645, 658). Her view of women is supported by Sylvia Federici, who details the systematic oppression of women throughout history in her work, *Caliban and the Witch: Women, the Body, and Primitive Accumulation.* The transition to capitalism enforced the devaluing of women's labour, which was largely restricted to domestic work, and reduced female bodies to "natural-breeding-machines" – all supported by the law (Federici, 2004, 91-92). It is important to note that MacKinnon's radical feminism has been criticized for portraying women as "determined, victimized, passive products of a seamless system of male sexual violence," which is a similar identity that has been assigned to women in developing countries within postcolonial scholarship (Lacey, 2004, 479-480). In all instances, the fundamental conversation deliberating the constitution of the gendered legal subject has been one of a binary nature.

## Contemplating Gender in Canadian Case Law and Legislation

### *Kimberly Nixon v. Vancouver Rape Relief*

Deciphering the subordination of the feminine under the jurisdiction of the law in terms of male and female categories may potentially exclude the experiences of transwomen who have

also been silenced and degraded by the prevailing socio-legal systems. Ohle (2004) disagrees with the legal treatment of transgender individuals, proposing that the presence of gender diverse people within the courts exposes them to inequality, as if they are merely a "footnote." Ohle (2004) claims that there are a number of reasons for this, including misconceptions that transgender individuals are diseased, the "othering" of transgender individuals by sometimes denying their desire to change their names, the regional legislature which dictates whether or not they will be unable to change the sex assigned on their birth certificate, fears related to marriage and parental rights, among others. Are these issues which should be addressed by feminist jurisprudence, or do the issues of gender diverse persons more appropriately fall under another realm of legal theory? There may be overlapping concerns, as in the case of *Kimberly Nixon v. Vancouver Rape Relief*.

Kimberly Nixon is a transwoman and survivor of sexual assault who was denied the opportunity to volunteer at a women-only crisis centre because they did not consider her to qualify as a "real woman" for the purposes of employment (Findlay, 2003, 57). The Vancouver Rape Relief Society asserted that "its work required that women have a lifelong experience of male oppression," which Nixon would not be privy to because she is transgender and began her life in a male body (Findlay, 2003, 58). By definition, a transgender person is "anyone who identifies, whether temporarily or permanently, as the other gender they were assigned at birth; and people who thought they identify as their assigned gender, are mistaken for members of the 'opposite' sex" – transcending the binary categories of societal gender norms (Findlay, 1999, 1). The Vancouver Rape Relief Society further argued that if Nixon was to be considered a "real woman," she would not be protected against discrimination on the basis of sex from a woman- oriented equality-seeking organization (Findlay, 2003, 58). Nixon's human rights complaint was

ultimately dismissed as the tribunal found that the Vancouver Rape Relief Society acted "in good faith" by excluding her from employment opportunities (Findlay, 2003, 72). The British Columbia Court of Appeal maintained that the Vancouver Rape Relief Society had the right "to prefer to train women who had never been treated as anything but female" in 2005, and the Supreme Court of Canada denied Nixon's further attempt to appeal this decision in 2007 (*Vancouver Rape Relief Society v. Nixon,* 2005; *Kimberly Nixon v. Vancouver Rape Relief Society,* 2007). Because Kimberly Nixon did not fit the conventional conceptions of womanhood, her gender identity was invalidated in a court of law.

The judgements of the case of *Kimberly Nixon* reinforces that to be seen as having a true claim to womanhood under the law, one must be born as a female. Scholarly arguments made in defense of the Vancouver Rape Relief Society's policies include an insistence that non-female-born individuals cannot relate to the experiences of growing up under the thumb of male dominance – the ancestral systems of oppression that MacKinnon and Federici describe in their work – and that consequently, vulnerable women will behave differently their presence (Lakeman, 2006, 129-130). Feminist philosophical perspectives on autonomy acknowledge that lifelong exposure to patriarchy may lead to internalizing misogynistic values, but supporting the importance of female relationships will assist in reclaiming agency (*Feminist perspectives on autonomy*, 2013).

Radical feminists, such as Patricia McFadden, argue that it is imperative to have spaces for women to escape the violation of male ideologies in all forms, and vehemently disagree with taking an "accommodative stance" with respect to gender as it will "stifle the political agency of women" (McFadden, 2004, 66-67). As such, this viewpoint subscribes to MacKinnon's theory that women are oppressed because of the bodies that they inhabit, subordination becomes inherited in this way,

and it is trauma which is universally experienced (MacKinnon, 1983, 639). Consequently, the inclusion of anyone who has been recognized as anything but distinctly female at any point in their existence would be an intrusion on female autonomy. Therefore, from the perspective of essentialist feminism, the courts have rightfully protected this gatekeeping with the judgement of *Kimberly Nixon v. Vancouver Rape Relief*. There were also fears that if the courts ruled in favour of Nixon and allowed transwomen into these types of safe spaces, it would be easier for male-identifying persons to successfully argue for their right to also be included, eradicating the sanctity of women-only environments all together (Lakeman, 2006, 131).

***Bill C-16***

Similar concerns were raised when *Bill C-16, An Act to Amend the Canadian Human Rights Act and the Criminal Code,* became law in June 2017. The enactment adds gender identity and expression to the list of prohibited grounds of discrimination and extends protections against hate propaganda for members of this identifiable group (*Bill C-16*). By extension, it offers codified securities for gender-diverse persons. At the second meeting to deliberate evidence for and against the proposed Bill prior to granting Royal Assent, Hilla Kerner was called as a witness on behalf of the Vancouver Rape Relief Society. She testified that to truly know and claim womanhood, one must be assigned female at birth:

> We are worried that well-intentioned legislation will be used to undermine the rights of women and the crucial work of women's groups to serve and organize with female-born women. From birth, through our girlhood and womanhood, we are treated differently.
> That treatment constitutes our oppression. Female-born women and people who were born male and self-identify as women have different life experiences. I don't know what it means to "feel like a woman" — I know what it is to be a girl and to be a woman, and the experiences and the feelings I have because I am a woman. My experience is reflected in the experiences of the women who call us. We know the embarrassment of having our clothes stained with blood from our period, the anxiety

> of facing an unwanted pregnancy and the fear of being raped. We know the horror of being raped and we know the comfort of grouping with other women. We connect the personal individual experience of how we are treated as girls and women to the collective political reality of women's oppression.
> To the specifics of *Bill C-16*, and the use of the terms "gender identity" and "gender expression," there is no social consensus on what these terms mean. We, like other feminists, use the term "gender" to mean the socially imposed division of the sexes. (*Transcript of Proceedings*, 2017)

Kerner establishes womanhood as a state that is accompanied by inherited fear and anxiety, which the broader concept of gender does not possess. Meghan Murphy, a freelance journalist known for her "opposition to transgender acceptance in both law and culture," also offered testimony at the 2017 proceedings for Bill C-16 (Brean 2019). Likewise, Murphy stressed the differences between birthright womanhood and social constructions of gender, which she views as less constraining:

> No one is born with a gender. We are born male or female and gender is then imposed on us through socialization. Women do not know they are women because they are born interested in high heels or the colour pink. They know they are women because they are female. Treating gender as though it is either internal or a personal choice is dangerous and completely misunderstands how and why women are oppressed under patriarchy as a class of people. Patriarchy was invented in order to control women's reproductive capacity and gender was created in order to naturalize and reinforce that hierarchical system. Women and girls around the world are killed, prostituted, raped and abused every single day not because they wear dresses, have long hair or behave passively but because they are female. And under patriarchy, females are said to be "less than," things that exist for male use, to be owned bought, sold and looked at. Women's rights exist on this basis because we, as a society, understand that women are discriminated against and subjected to male violence regardless of their clothing, body language or behaviour, which is now apparently being defined as "gender expression." The idea that women could simply express themselves or identify differently in order to escape oppression under patriarchy is insulting and provably untrue. Yet, this is what ideas like gender identity and gender expression communicate... The way men feel on the inside does not change that they hold power and privilege in this society, and the way women feel on the inside doesn't change their experience of sexism... The rights of women and girls are being pushed aside to accommodate a trend. (*Transcript of Proceedings*, 2017)

By invoking the language of fundamental rights and drawing attention to the adversities that possessing a certain type of body inevitably brings, Murphy and the representative of the

Vancouver Rape Relief Society emphasize that a woman's experience is rooted in oppression, and that her identity as a legal subject is consequently derived from that same shared pain. This logic implies that anything which is not purely and biologically feminine is tainted by masculinity and must be kept at a distance.

These distinctions are also at the core of the criticisms of Luce Irigaray, who agrees that female gender expression has been subordinated by its masculine counterpart – an effect of what she names the "phallic order" (Irigaray, 2004, 77). In order to escape the systemic oppression which has been engrained into linguistic communication, she calls for "jamming the theoretical machinery" and inventing a discourse which would allow for womanhood to finally achieve a substance of its own (Irigaray, 2004, 78). The linguistic site for this subordination within legal materials is within the law's rules and doctrines (Lacey, 2004, 476). For Irigaray, this translates into the need for enacting civil rights and freedoms which are specifically applicable to women and not any other sex, as the existing laws already reflect male needs (Lacey, 2004, 477).

Isolating the genuine experience of womanhood to individuals who possess female sex organs is unfairly limiting. Butler (2004) spends time deconstructing the idea of womanhood and associated gender identities. As part of the performativity of gender, Butler considers womanhood to be a historically conceived concept, not a natural fact (Butler, 2004, 902). She claims it is the cultural assignment of gender norms that contribute to society's understanding of what a "real" or "natural" woman should be, as well as how they should behave and how they should present themselves to the world (Butler, 2004, 904). The obsession with enforcing a gender binary leads to the excessive policing of womanhood. Caster Semenya, an Olympic athlete who was assigned female at birth, was instructed by a Court of Arbitration for Sport that in order to continue

competing as a track and field runner, she must take medication to lower her testosterone levels – a hormone her body produces naturally (Brewer 2019; Hesse 2019). Semenya's ability to qualify as a female athlete has been questioned under the premise of promoting fairness for "the 'normal' females racing against [her]" (Brewer 2019). While Semenya has been condemned because her biological advantages complicate the convenient gender categories, Michael Phelps has been praised for the genetic assets which boost his performance as a swimmer (Hesse 2019). No Olympic committee has ever moved for legal action to suppress Phelps' natural abilities, highlighting the pervasive pressure to conform to cultural expectations of gender performance or face career-stunting ramifications. Butler (2004) also argues that the sedimentation of binary genders solidifies ideologies such as the heterosexual system of marriage, which in turn subverts women by burdening them with the expectation of being a subservient means of reproduction (905). Are those not the same restrictions historically imposed by patriarchy which feminism seeks to liberate its constituents from? Does the concept of natural womanhood not serve more as a cumbersome imposition than a place of refuge from the thumb of masculinity?

A woman's inability to express her gender as a method of resisting patriarchy has been a critique of the Canadian legislation protecting gender identities. By this logic, is it not probable that gender-diverse individuals also experience systematic oppression as a result of male-dominated ideologies? Like misogyny, transphobic or "transantagonistic" attitudes are embedded into the social imaginary and have a profound impact on a targeted person's physical health, mental well-being, and ability to function in daily life (Ashley, 2018, 3-4). In Ontario, transgender persons must endure significant employment barriers, exclusion from their communities, and the degradation of often not having their true gender reflected on their legal documentation or

government-issued identification (Bauer & Scheim, 2015). In a recent attempt to reframe the conversation about gender differences, Gilligan offers a revised perspective on her earlier work:

> Care is a feminist, not a 'feminine' ethic, and feminism, guided by an ethic of care, is arguably the most radical, in the sense of going to the roots, liberation movement in human history. Released from the gender binary and hierarchy, feminism is neither a women's issue nor a battle between women and men. It is the movement to free democracy from patriarchy. (Gilligan, 2014, 101)

Even if the experiences of women are not universal, the suffocating effects of patriarchy might be, as is the common objective to be released from the political, economic, and legal constraints of a patriarchal society.

Proponents of *Bill C-16* would agree. As Ohle (2004) extensively details, trans persons have been omitted or supressed by legal authorities without proper recognition in the courts. The alarming rate of harassment, discrimination, and violence against transgender persons has been described as a "pandemic" (Ashley, 2018, 1-2). For example, recent "bathroom bills" proposed in the USA restrict access to public restrooms so that transgender persons must use facilities which correspond with the gender they were assigned at birth, less they risk being charged with disorderly conduct or fined (Kasperkevic, 2015; *H.B. 781*; *S.B. 1432*). These "emergency measures" are meant to protect "vulnerable" cisgender women without real concern for the outcomes of such legislation – forcing someone who identifies as male to use a female- designated restroom, which may already be occupied by women, is a dehumanizing experience (Kasperkevic, 2015; *H.B. 781*; *S.B. 1432*).

The enactment of *Bill C-16* represented long-awaited federal acknowledgement of the legal rights of gender-diverse persons which had been gradually adopted on a provincial level over the past decade (Cossman, 2018, 38-39). As Butler firmly asserts, transgender individuals may challenge the appearance as well as reality of gender performance, but a transwoman's

"gender is as fully real as anyone whose performance complies with social expectations" (Butler, 2004, 907). Even if the Canadian judicial system has failed to recognize such in the past, added protections to the *Canadian Human Rights Act* and *Criminal Code* could prevent the invalidation experienced by individuals like Kimberly Nixon from recurring in the future.

**Intersectionality and A Feminist Approach to Legal Reform**

As seen consistently throughout feminist legal studies, one of the primary interests of this branch of scholarship is advancing legal reform in promotion of equality and the reconstitution of the gendered legal subject. On the path towards this objective, two types of approaches emerge from feminist academia. Formal equality prioritizes the equal treatment of men and women, potentially overlooking and consequently aggravating the social structures which contributed to unequal treatment in the first place (Anagnostou, 2013, 135). Substantive equality, on the other hand, consists of the critical analysis of said social structures in the interest of addressing and eliminating underlying systems of discrimination with the intention of restructuring to produce equal opportunities (Anagnostou, 2013, 134). One of the criticisms of the individualized liberalism that serves as the foundation for certain strains of feminist theory, such as MacKinnon's radical feminism, is its preoccupation with formal over substantive equality (Lacey, 2004, 479). Conversely, methods which align with the goals of substantive equality have produced favourable results, such as with the feminist mobilization pushing for Greek constitutional reform to include more women in the political sphere in 2001 (Anagnostou, 2013, 148-149). At least in part, the favourableness of substantive equality is derived from its orientation towards intersectional values (Yip, 2009, 3).

Intersectionality first entered feminist discourse in 1989 when the concept was introduced by Kimberlé Crenshaw through her analysis of judicial processes and her conclusion that

encounters with discrimination as a woman and as a racialized person are not mutually exclusive (Crenshaw, 1989). Crenshaw asserted that the individualized experiences of Black women were not given enough emphasis in the courts nor in feminist or civil rights thought, and that denying their multidimensional nature was a disservice to their representation (Crenshaw, 1989, 150). As the theory and methodology of intersectional feminism evolved throughout Crenshaw's academic career, it has encompassed an assortment of analyses into overlapping features of identity and their relationship with legal subjectivity, including but not limited to gender, race, class, and sexuality (Cho et al., 2013, 788-790). The tendency towards allowing the experiences of white women to act as the standard for all women continues to be resisted for it ignores subdivisions of historical and contemporary forms oppression which have not been felt universally (Cho et. al, 2013, 801-802).

An adherence to intersectional values dispels the conception of a universally-shared female experience, even within the population of women whose gender identity aligns with their biological sex. Like sexism, racism has been legislated and enforced to promote hierarchal divisions (Federici, 2004, 108). The reduction of women to state-surveyed reproductive mechanisms was a plight endured by both West European women and racialized slaves in American colonial plantations as they became passive participants in the process of procreation for the purposes of population control (Federici, 2004, 88-89). However, Federici remarks that there are limitations to this comparison:

> European women were not openly delivered to sexual assaults – though proletarian women could be raped with impunity and punished for it. Nor had they suffered the agony of seeing their children taken away and sold on the auction block. The economic profit derived from the births imposed upon them was also far more concealed. (Federici, 2004, 89)

Today, Canadian women who belong to a visible minority group earn less employment income on average, are more likely to be low-income, experience discrimination, and self-report a poorer mental health state (Statistics Canada, 2016). This is in addition to greater risks to their physical safety. A national inquiry into the cases of thousands of missing women, girls, and 2SLGBTQQIA individuals has called the disproportionately high rate of violence and inadequate attention from government officials a "Canadian genocide" (Barrera, 2019). It makes it difficult to claim a universal experience of womanhood when these barriers exist for some members of the population and not others.

Recognizing uniqueness is an integral component of forming a cohesive and inclusive strategy towards legal reform. The feminine experience of oppression differs across the spectrum of womanhood. Although there are limitations to the compared struggles that possessing different features of identity entail, it is fair to say that there may be flaws in assuming a singular experience of being raised under patriarchy – contrary to the feminist jurisprudence ideals put forth by theorists like Catherine MacKinnon. An open-minded perspective of MacKinnon's feminist jurisprudence would admit that MacKinnon illuminates the struggles faced by transgender individuals in the Canadian judicial system, as the gendered distinctions of legal subjects is a source of discrimination against both cisgender and transgender women when compared to cisgender men (Ypi, 2009, 49-50). However, an anti-essentialist approach to legal reform would "challenge, transform and revolutionize gendered legal assumptions within the Canadian legal and human rights framework" (Ypi, 2009, 60). Thus, striving for substantive equality as an aspiration of reformative law would accommodate for forms of gender expression and identity alternative to male and female. Recognizing this "third category" which exists

outside of the long-held tradition of binary gender in Western legal scholarship is the most ethical approach to acknowledging the rights of gender diverse individuals (Ypi, 2009, 51-52). This has been realized by legislation such as *Bill C-16* and will hopefully continue to be incorporated into judicial decisions going forward.

## Conclusion

By placing various orientations of feminist legal scholarship in conversation with one another, it is evident that the categorical binaries of gender within law has acted as a persistent source of discrimination and oppression for non-male identifying legal subjects. Feminist legal scholarship has traditionally concerned itself first and foremost with the methods by which persons born with female sex organs have existed under patriarchy, with a vested interest in advancing their needs for more equitable legal treatment. Some radical theorists and consequent judicial decisions subscribe to the belief that anatomy is destiny – that those who have not been classified as conventionally female throughout their entire life cannot and should not share in that identity if they transition. However, it is unfairly limiting to exclude gender-diverse persons from experiences of womanhood. Intersectional feminism advances the position that there cannot be a universal experience of womanhood even amongst cisgender women because each woman has unique encounters with discrimination based on their own personal features of identity, including race and class. Therefore, recognizing gender-diverse persons, including transwomen, in feminist legal scholarship is not only ethically appropriate, it is conducive to a more comprehensive and informed approach to a feminist understanding of the law.

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# WHERE AUTONOMY BELONGS: THE HISTORY OF ABORTION LAWS IN THE CANADIAN CONTEXT

ACE MILNER

## Introduction

From the time of approximately 3000 B.C., abortion, in some form has been a necessary tool of society, and used by many women within it for both personal and medical reasons (Lader, 1966). Despite this fact, after five millennia, abortion continues to be a much-debated issue in the modern era. This paper will use historical sources to sketch a timeline of Canada's history of abortion practices, which will focus on therapidly shifting legal status of abortion in Canada, and how it has come to be recognized the way it is today. The first era will be one that predates Dr. Henry Morgentaler and his efforts in abortions and abortion rights. The second era will surround his work, and what was accomplished during his time battling for abortion rights. The final era will be one of a modern Canada, and where abortion stands in the eyes of the law after the era of Morgentaler has passed. The goal of each section will be to identify where the law originally stood, how society, government, or the law may have influenced it, and finally, where abortion laws were at the end of the era, transitioning into the next. This paper will ideally function as a period at the end of the sentence that is the abortion debate, stating that restrictions to autonomy should cease, and encourage others to push for the same. Ultimately, this paper will argue that men have no place determining whether or not women are allowed access to an abortion, as it is ultimately a women's issue. Even other women should have no say in what others do with their own body and life – the debate on abortion is essentially questioning just how autonomously people can act regarding their own bodies.

**Pre-Morgentaler**

As mentioned in the introduction, abortion practices and the 'rules' surrounding them date as far back as 3000 B.C, but have also been mentioned as far back in time as 1550 B.C., as well as in the times of Plato and Aristotle supporting the practices of abortion in approximately 350 B.C. (Lader, 1966, 75-76). However, with the rising influence of the Christian faith, more people began to follow the words of Tertullian who stated that abortion was murder in advance, and allowing abortions is simply to allow an accelerated way to kill someone (Lader, 1966, 77). During this early era in human history, abortion rights were making leaps and bounds, with some regulations needing to be in place. Some of such included those offered by Aristotle, who stated that a fetus can only be aborted after 40 days if it is a male, and 80 days if female. It is worth noting however, that there was no mention of how to find out the gender of the fetus (77). This idea continued with the addition of the fetus being animated, or truly 'alive' inside the body, which was added to the odd set of guidelines by Pope Gregory IX (1227-1241) (78). Three hundred years later, in 1591, Pope Gregory XIV removed all blockades to abortion, except for the 40 and 80-day rules, effectively reinstating the old way of living (79). Another Pope reversed the course of abortion almost 300 years later again (1869), Pius IX removed all question of whether the fetus is animated or not, and decreed that all abortion would be punishable (Lader, 1966, 79; Valk, 1974, 174). Valk followed this stating that the "Christian faith has always held that it is a serious sin to destroy the fetus at any stage" (1974, 174), which echoes the sentiments of Lader, who calls Catholicism a hierarchy with violent opposition to any change in the system they have created over hundreds of years (1966, 79-80). The question should be asked, why does the Christian system, created after people, have any say towards what they do with their bodies? Why should a system of thought prevent an abortion?

While this historical review is not a complete overview of the centuries leading to Morgentaler, it is an introduction to Christianity as the global Hegemonic force, exerting power even over the law. In terms of abortion law, Wilson defines abortion until the 1970's as a predominantly Catholic issue (2003, 1). This paper also seeks to demonstrate the relations between churches and law, as they were very frequently one in the same in the years before Morgentaler, specifically through the influence of studies outlining certain church views on issues (homosexuality, for example) influencing legal proscriptions on the same issue (Elliott, 2004, 596). If the churches' view of homosexuality affected its legal standing, it would only make sense that the same applied for abortion.

However, the Catholic faith was not the only hegemonic superpower determining who could and could not have an abortion. Another important factor in reproductive rights for women was the social intricacies linked with abortion. In early Roman days (starting around 400 B.C.), there was the belief that abortion was not killing, since the fetus does not obtain its soul until the moment of birth (Lader, 1966, 76). Lader argues that the only person controlling women and their abortions was the husband, who had a say in the female's choices (which was promptly fought against by Roman females who wanted emancipation), but if all was in order, an abortion should carry with it no criminal charges or social stigma (1966, 76-77). A lack of criminal sanctions for abortion, as well as little-to-no social stigma was a trend in earlier days pre- dating Christian power, as it was seen to have some sort of purpose (1966, 77). Kumar, Hessini and Mitchell (2009), mention that stigma is contagious, and that the meaning of abortion can change, as well as the effects of unwanted pregnancies (627). This stigma is emphasized by Stettner (2016) when she speaks of the criminalization of not only of those who gave abortions, but also women seeking abortion, stating that women were being "drawn into the circle of guilt" (33). Concurrently, this

stigma was meant to affect women seeking an abortion by making them feel bad about needing one and worrying about social outcomes of a successful abortion. Kellough suggests that women seeking abortions were seen as double failures, both in refusing to act as a mature adult and failing to carry a pregnancy as a nurturing woman should (1996, 112). Thus started the infectious stigma around abortions, both internally and socially.

With both the social stigma and the pressure from Christianity in Britain at the time of Canadas formation of its Charter (1892), it carried over all of Britain's old abortion laws, making it illegal to perform an abortion unless the woman's life was in danger and the only way to save her was to abort the child (Brodie, Gavigan & Jenson, 1992, 24). This doctrine of double effect, in which an action that causes harm is deemed permissible because it promotes a positive outcome, lasted well into the Morgentaler Era (Stanford Encyclopedia of Philosophy, 2014).

## The Morgentaler Era: Abortion, Sexist Restrictions, and the Legal Challenge

The Morgentaler Era is considered to have begun around the mid-1960's, when his occupational work as an abortionist began, and ending in about 1990, after his final battle with the courts to legalize abortion. In this era, there was a definitive paradigm shift in the battle for women's reproductive rights. Many of these reforms centred around legalizing or placing low restrictions both for bodily autonomy, and abortion, with a focus to make it safer, but not to encourage it.

In the 1960's, many doctors were performing backroom abortions, but not universally. Doctors still relied on the reasoning of necessity – that aborting the fetus would save the woman's life – as well as speaking to colleagues for a second opinion, to solidify this justification of

necessity (Brodie et al., 1992, 24-25). Both professionals and the public supported wider reaching allowances on abortions (including 90% of gynecologists and obstetricians, and 60% of the general population) to reduce the growing number or illegal backstreet abortions leading to the bill (estimated to be between 100,000 – 300,000 in 1967) (Valk, 1974, 20-42). Valk describes this as a two-step process. Firstly, these campaigns reached out to the public in an attempt to gather the above information. Secondly, this information was used as a driving force to legalize abortion, and codify practices that were already occurring in hospitals (1974, 20-42). However, this was not the only driving force at the time. At the same time, there was an increasingly normalized idea of backroom abortions which were assumed to be performed by "wicked old crones in filthy conditions with bent sewing needles" (Greer, 1987, 177).

This lead to the instatement of the 1969 omnibus, which legalized abortion with some caveats: a woman could only receive an abortion if a committee of three doctors agreed that the pregnancy endangered the woman mentally or physically (CBC Archives, 1967). Brodie et al. argue that the omnibus was an important step towards the thinking of rights towards accessing safe abortions (1992, 37). While the omnibus continued to drive the ideals of the pro-choice movement, there were still restrictions to abortion. These restrictions allowed doctors to make moral judgements about a woman and the state of her pregnancy, and as such, her legal rights weren't hers to utilize, but hers to be given by a doctor and, by extension, hospitals (Brodie et al., 1992, 37). These were deemed therapeutic abortion committees (TAC) (Government of Canada, 2019).

During this era, Morgentaler opened a clinic from which he would later report to having performed over 5000 abortions to challenge the provisions of the 1969 amendment. Morgentaler

provided public abortions without consulting other doctors or being in a hospital to prove that these restrictions were overly gratuitous (Kellough, 1996, 178).

The restrictions in the 1969 omnibus were not only sexist, but also restrictive and vague. Women were required to consult with three doctors, who would explore the option of an abortion for the individual in question. The first issue that arises is that these doctors must also not be performing abortions, in an attempt to create unbiased committees. However, the number of doctors in Canada was approximately 1.4 per 1000 people in 1969 (Worldbank, 2019). The odds of finding three doctors willing to sit on a committee like this was very low, and it made it even harder when considering that the doctors could not be performing abortions as well, taking the real rate below the stated 1.4/1000 people national average. This, as well as the government of Canada's concern "as to whether legal abortions were equally available to women in various parts of the country" (Government of Canada, 2019, Section C) should begin to highlight the issues of even attempting to find doctors to compose a TAC. If an individual could find a TAC, they then ran into the, if not sexist, extremely gendered regulations in place. In 1969, only around 9% of physicians in Canada were females (Ciolfe, 2017). Odds are, most of a TAC would be made up of three men, with the odd chance of at least one female appearing in it. These men would then debate about an issue they have never had to experience – abortion – to decide if it was a risk to this woman's health. This is where the vagueness comes in: the doctors were to debate if:

> … the continuation of the pregnancy would or would be likely to endanger the life or health of the female. No further definition of 'health' was given, and there was even some uncertainty as to whether or not the word included mental or psychological health (Government of Canada, 2019, Section C, Paragraph 2).

The doctors on this committee would not only be telling a woman what she could do with her body, but in the process could also be telling her that being afraid of the pregnancy or having mental health outcomes from being pregnant may not be relevant to the situation at hand. Men

who have never experienced this issue, were now the sole people who both could define the health of the woman in question, and approve or deny an abortion. It is clear that whatever attempt at a non-biased committee had been put forward, was far from the truth. With this one should see why Morgentaler was fighting as he did, and why he performed as many abortions as he could. It was not up to him to decided who got one, it was simply his job to ensure it was done safely.

However, three years prior to this reveal, Morgentaler was arrested in Montréal for performing illegal abortions, mainly due to his rejection of the aforementioned guidelines. In 1973, after his testimony of public abortions, Morgentaler was acquitted for the first of several legal challenges in his history (CBC News, 2009). In his actions, Morgentaler has subscribed to what Jukier and Woehrling define as a rigid secularism, where the public sphere should be free of religious influences, with particular focus on morality related issues (2010, 185-186).

Rich mentions that whether abortions are legal or not, women are frequently told what they should be feeling after it (relief of not having a child, guilt of refusing life into the world, and the like, all varying by circumstance), but are never told to feel the way they genuinely do, and explore why they feel this way (1986, 268-269). This leads to women potentially feeling like passive participants in their own abortions, as they do not have the liberty to express and explore their true feelings about the procedure. She later elaborates that male doctors tend to minimize the experience leading to the moment they are at, in lieu of emphasizing the consequences of a circumstance they care little for (1986, 270), as men can never experience the phenomenon of pregnancy, and will therefore never truly understand it. Due to TAC and multiple doctors telling a woman how to feel about the circumstances and procedure, Morgentaler fought to provide abortions where women didn’t feel compelled to act or feel any specific way, or explain their

actions: He simply wanted women to get safe abortions (as shown by his 5000 abortions) and to feel however they feel about it (Kellough, 1996, 178).

In the United States, many of the same issues were occurring. An important takeaway was how the US handled the issue of abortion and defended it, in majority, using privacy laws (Fried, 1990, 30-33). A case where this is especially visible is the *Roe v. Wade* case, which gave women accessibility to abortions, and many challenges to the bill were met with intense scrutiny, due to the sensitive and private matter of a person's own body (Fried, 1990, 30-33). This decision was made to protect those seeking abortion from influences of the public, as well as allowing autonomy and protecting women from husbands who did not want an abortion (Fried, 1990, 33). The federal government even began to accept and state that they had no place in the bedrooms of the nation. (Trudeau, video by CBC, 1967). This statement seemed to be the one that Morgentaler sided with, by denying the hospital, or any group or individual the right to make a moral judgement about a circumstance surrounding an abortion (Kellough, 1996, 15). This moral implication is one that at the time, was still driven by a Christian faith which was decidedly anti-abortion. Christian views were that the life of the unborn fetus was more important than that of its carrier (Kellough, 1996, 232). If the government has no place in the bedrooms of its people, why then should *anything* have a place there? There is, feasibly, no reason to regulate things that do not affect society as a whole, and only affect the individual in question.

In the middle of the chaos of the Morgentaler era, the Canadian Charter of Rights and Freedoms was founded (1982), and as such, anything in violation of the Charter was found to be invalid and was removed from legislation. Between 1983 and 1986, Morgentaler faced four more court cases, two out of Toronto, and two out of Winnipeg for giving illegal abortion services (CBC, 2009; Kellough, 1996, 233). Both Morgentaler and his colleagues were acquitted in each

case and no charges were ever laid. After this, Morgentaler challenged the abortion laws that were still in place by raising a Charter challenge against S. 251 of the Criminal Code of Canada (R v. Morgentaler, 1988). This case had two significant parts to it. First, it upheld the acquittal of Morgentaler and his colleagues in their final set of charges from a Toronto raid. Secondly, more importantly for the history of abortion, the court upheld that section 251 of the Criminal Code was unconstitutional because being denied medical care due to restrictions under the 1969 omnibus (Bill C-150) was a violation of a woman's right to safety (Section 7 of the Charter) (Brodie et al., 1992, 16). As Brodie et al. continue, however, this decision itself was slightly problematic as there were no amendments suggested to the section struck down, so it was not in the hands of the legal system, the medical system, or even the people; the issue was back in the hands of the parliament and the lawmakers to decide what to do with abortion rights once again (1992, 17). The only feedback on the law that was given was that the administrative processes of the original 1969 abortion law were difficult to work with and interfered with women's rights to make their own choices (R v. Morgentaler, 1988), but never gave any suggestion as to whether or not women actually had reproductive rights, nor did it try to clarify the rights of the woman against those of the fetus she carried (Brodie et al. 1992, 16).

This signaled the end of the Morgentaler era, as he had essentially achieved all he could have given the circumstances. He was acquitted of all charges against him, and had successfully decriminalized abortion by having it stuck down by the recently formed Canadian Constitution of Rights and Freedoms. His lawsuits and Charter challenges, at the time, allowed for abortions to be provided legally, as the court had not spoken on women's reproductive rights, nor the rights of the fetus (though this is eventually shut down, as the Supreme Court claims in 1989 that fetus rights are irrelevant in the now voided abortion legislation) (Brodie et al. 1992, 16; CBC, 2009).

In this, the activities of pro-choice and pro-life activists were restricted; pro-life attempted to continue their moral crusade, because of the Supreme Courts lack of comment regarding the importance of carrier vs. fetus, but pro-choice choice could no longer argue abortion being a matter of doctors and hospitals, as that was outlined in the now void S. 251 (Brodie et al., 1992, 16). This era, concerned with the reproductive rights of the woman had won and lost some battles in this regard – abortions were now decriminalized and easily performed, but much of the stigma seemed to remain (to be touched on in the post-Morgentaler era) as well as females continuing to be passive agents in their medical needs, being told how to feel, instead of being allowed to feel how they wanted or truly did.

## Post-Morgentaler: Governmental Offloading and Public Attempts of Abortion Prevention

Following Morgentaler's legal victory in 1988, to attacks on abortion clinics until approximately 1997, there have been several issues surrounding abortion, even in its decriminalized state. Without the law being used to argue for or against abortion rights, other issues have been raised in its absence, such as their taboo and secret nature, as well as funding for abortions. While these have always been issues, they were strengthened with the emergence of decriminalized abortions.

In the early years after decriminalization, there were many intermittent incidents of extremism regarding abortions and those involved in them, ranging from attacks on those seeking abortion, to attempted murder of the doctors providing them. One of the earliest cases was one surrounding Ms. Daigle (1989), where she wished for an abortion, but her ex-boyfriend was given an injunction to stop her from receiving an abortion, and the appeal was upheld; a great joy for

the pro-life community (Brodie et al., 1992, 94-96). Within this, the pro-life community had once again built traction and contested the right of a fetus being more important than that of the carrier, and were convinced that pro-life agenda was back on track (1992, 95). The injunction was reversed 24 weeks into the woman's pregnancy, because the Supreme Court had decided that according to the Charter's wording and Canadian law precedent, a fetus was not a person, but also that no man of relation to the pregnant woman had the right to veto an abortion regardless of their interest in the child (1992, 96). If this had been accepted as a universal fact, issues like the one recorded by Stacey (1990), wherein a woman had to threaten to leave her husband to get him so sign his approval on an abortion, would never have needed to be addressed (211). Even in an era post-Morgentaler, we see other people's feelings (boyfriends, husbands, close family) challenging or even taking precedence over the feelings of the women who want abortions. Here, we have seen examples where the law works in conjunction with men of the relationships to disallow abortions, regardless of what the woman who is pregnant wants. While the hospitals no longer have a say (and as such, an attempt to end a misogynistic system), it seems that the men of the relationships could still have the power in some circumstances to remove a woman's autonomy, or act above it.

The proposition of Bill C-43 shortly followed these events. The Bill was proposed by the Conservatives to put more regulations on abortion in an attempt to make the process of obtaining one both more neutral and more standardized. This was difficult, however, as the pro- life and pro-medicalization factions went toe-to-toe on which standards were the best to uphold, and came up with a definition based on the health and life of the female carrying (full rule in appendix, Brodie et al., 1992, 98). This Bill was passed to the Senate for approval, and defeated in Senate by a tie vote, resulting in abortion being treated the same as any other procedure would be (CBC, 2009; Brodie et al., 1992, 99-116). One of the more damning realizations that came from this

proposal was the fact that the government simply wanted something in place in a medical related area so that the provinces, which governed their own health care systems, have to deal with the burden of enforcing or changing this legislation. The courts quickly ruled against this downloading of responsibility by stating that criminal law ad all its sanctions fall to the federal government exclusively, which led to the status quo of decriminalization of abortion (Brodie et al., 106-113). However, as has been shown in this paper, the status quo has never been enough. All the court functionally did was tell the government that abortion cannot be passed onto another system and must be kept within the federal government. While it is no longer in the Criminal Code, it is only decriminalized, and not legal. The result: no progress for abortion rights, and the federal government and its legislature once again had to decide how and if they were to proceed in regards to abortion laws.

Following the lack of change on the status of abortion in 1991, there were a series of attacks on clinics and doctors who performed abortions between 1992 and 1997. These attacks were attempting to dissuade abortion through whichever means necessary, ranging from clinics being fire bombed to doctors being shot. Doctors were both personally and professionally targeted, and nowhere was safe (CBC,2009). Only one of the attacks was lethal, but the tone was set: abortion services wouldn't be tolerated by the pro-life groups. It is quite ironic that the pro-life camp demands that abortions not be legal, because of arguments surrounding the right to life, however they are willing to attempt to take someone's life to prove their point. Fortunately, despite the violence, women who needed abortions were not deterred, and many stories came forward about why women were obtaining their abortions. Many pro-lifers assumed women were getting abortions because of promiscuousness or selfishness, not caring about the unborn potential human being. Many stories from women who received abortions suggested quite the opposite. Stettner,

who collected many stories of women who received abortions and told their stories, states; “The kind of woman who has an abortion is one who can get pregnant” (2016, 247).

From millennia before Morgentaler until the day of this reading (and subsequently), women will need abortions. Circumstances happen that require them, not always medically, not always because of a threat to the woman, but even to her way of life. Less general, there are also many stories about woman who consider abortions to save their future children, from foster care, not being well provided for, or in the case of many people in the stories recorded in *Brave New Families,* to save her child from the future abuse that may be cyclically passed on from her father to her, and thus to her child (Stacey, 1990, 194). As such, many follow the pro-choice status of, it is a woman’s body, so it is her choice to continue the pregnancy or commit to an abortion. Regardless of the reason, and regardless of if there is a reason, an abortion should always be an option.

## **Present Day: Federal Accountability, Legislation, and the lack Thereof**

The decriminalized status of abortion has remained unchanged. When asked in 2004 while running for Prime Minister, Stephen Harper refused to table the subject of abortion if elected, and when he was elected, for all eight years, there was never an attempt to change abortion laws (Wherry, 2014). In fact, while Prime Minister Harper made it his duty to ensure that abortion was never brought to parliament, Prime Minister Trudeau has explicitly told his party to vote no against any restrictions or criminalization of abortion (Wherry, 2014). Since the last attempted Bill in 1991, 25 years ago, there has been no governmental or legal shift in the status of abortion. This would suggest that the courts, and the government are at the very least content with the current status of abortion, and will only rule on issues surrounding it when they are brought up. A recent

example of this was Ontario's decision to make it illegal to protest around abortion clinics (Canadian Press, 2017). The Ontario Legislative Assembly passed Bill 163, as a way of protecting not only women who are attempting to get access to abortions, but also the workers who aid at any step in the process. Under this Bill, it is illegal to give advice or information about abortions, persuade a person to avoid abortions, or perform acts of disapproval surrounding abortions at a minimum of 50 metres, not surpassing a maximum of 150 metres around a clinic (while the people working for the clinic are exempt from this). These access areas include the residential areas of individuals who work in clinics and provide abortions, to avoid harassment of both caretakers or providers of abortions, and people who wish to seek them out (Ontario Legislative Assembly, 2017). This will help to avoid circumstances of women being pressured out of abortions, or an individual forcing them into an abortion – as *Tremblay v. Daigle* (1989) ruled that no male partner or any individual other than the woman who is pregnant has a choice or say in a woman's attempt to get an abortion.

In Canada, almost all parties seem content to leave abortion law alone, however, there was an election in 2019, where a leading party member, Andrew Scheer, at this time of writing, is outwardly pro-life. He claims that abortion will continue to not be tabled if he is elected. While perhaps not touching the issue has worked, it also has allowed for some places to not require to give any sort of abortion aid or services. An example of which is Prince Edward Island. Even though abortions were technically legal as far back as 1969, in 2017, PEI opened its first abortion clinic and performed the first legal abortion in 35 years (Kingston, 2017). While it may seem like a great leap forward that even with abortion in a decriminalized state, that clinics can be opening up in remote areas such as PEI, it reveals one of the very issues with the 1969 omnibus: restrictive

abortions. Since 1980, there has not been a single abortion performed (by a doctor) on the entire island.

Just because something won't be actively fought against doesn't stop it from being restrictive or dangerous. Even to claim that simple decriminalization is enough to empower women to use their autonomy is just plain wrong; their autonomy would need to include making multiple trips out of province (and off an island) to receive consultations and the abortion itself. Simply being passive is unacceptable. Just as women shouldn't have to be passive participants in their own abortions, being told how to feel or what their actions should be, neither should the government play a passive role in them, and allow others to dictate what is right or wrong in these matters. Every person should have the right to do with their body as they wish. The government stepping back and allowing too much leeway on abortion and its rules is not enough. However, if governments begin to push in the wrong direction, Canada may be railroaded onto the same route as the United States has been set upon.

In the United States, there are some situations that stretch beyond and have implications much more extreme than the government simply not taking a side. Four states have passed bills known in some degree as Fetal Heartbeat Bills, some otherwise known as abortion bans (LegiScan, 2019). Some bills an abortion after the dedicated timeline, except for some incredibly extreme circumstances, others outlaw abortion altogether. These states, Alabama, Georgia, Missouri, and Ohio, each have incredibly high bars to allow abortions. To begin, Missouri allows abortion up to 8 weeks, and after that, the only reason for an abortion is to avoid the pregnant woman's death or serious and irreversible bodily harm (LegiScan, 2019a). Ohio and Georgia allow abortion until 6 weeks. Ohio allows for the same exemptions as Missouri, whereas Georgia includes allowing abortions if the child will be born with a severe anomaly which will not allow

it to survive after birth, or if it is the result of rape or incest in which a police report has been filed prior to 20 weeks into the pregnancy (Georgia General Assembly, 2019; Ohio Legislature, 2019). Finally, Alabama has completely outlawed abortion all together, unless it is to avert the death of the mother or irreversible bodily harm, which does not include emotional or mental damage (LegiScan, 2019b).

As of 2017, four states have effectively banned abortions, some not even considering the circumstances in which the pregnancies happened, forcing individuals to carry to term a baby conceived or rape or incest, or go underground or out of state to obtain legal abortions. Many of these bills contravene the Supreme Court ruling in Roe v. Wade, which states that abortions cannot be regulated before the end of the first trimester, approximately 12 weeks into a pregnancy (1973). These rules are actively working against the autonomy of women, and rarely allow for the possibility of an abortion. For many women, pregnancy does not become known about until a missed period, which is already 4 weeks into this six (or eight) week timeline (Lanquist, 2016). This then means, at maximum, 4 weeks to allow for necessary testing, consulting with a physician, and booking an appointment in time. This does not consider the mental stress that a woman may be put under in this sort of extreme circumstance. Some bills even state that mental and emotional harm are not considered to be real harm under abortion laws (LegiScan, 2019b).

This is an example of how in the modern day, 5000 years after the first proof of abortion practices, that some are still arguing the practice and attempting not to regulate, but to ban it. Women's autonomy over their body (especially in case of rape or incest) are breeched, and they are disallowed from doing what is best for their life. They must risk criminal charges or the heightened cost of travelling out of state to where abortions are legal, simply to do what they want with their bodies.

## Conclusion: An Overview and Final Remarks

A final overview of the history of abortion shows an oscillating cycle. It begins in ancient times where abortions were performed with no social response, and either out of necessity or want (Lader, 1966, 75-76). This lasted for millennia until the formation of the Christian faith, which opposed any killing for any reason, and over the next millennia built up a following against abortion culminating in Pope Pius IX deciding abortion was never okay under any circumstance and would be punished (Lader, 1966, 79; Valk, 1974, 174). Religion had vast influence over law, and had taken control of abortion, causing it to be deemed illegal under early Canadian law (Elliot, 2004, 596; Wilson, 2013, 1). The Morgentaler era showed laws decriminalizing and recriminalizing abortion in a cyclical nature with many legal battles, most around Morgentaler himself. The basis of which was his performance of many abortions knowing full well it was illegal for him to do so. The legal battles ultimately ended nearly 20 years after he was first charged when the Supreme Court of Canada decided abortion restrictions were contrary to the Charter and struck them down, leaving a void where the abortion legislation used to be (Brodie et al., 1992, 17). Even after Morgentaler, there were debates between the public about whether or not abortion should be allowed, but after the final attempt at abortion regulation with Bill C-43, abortion laws remained untouched, and areas surrounding it are only clarified when they need to be (The Canadian Press, 2017). The only fact about abortion that has not changed in over five thousand years of its history is that women get abortions because they want them, or they need them; simply because they have the ability to get pregnant means abortion will be a considered option, legal or not (Stettner, 2016, 247).

The purpose of this historical review has been to emphasize the importance and glaring lack of female autonomy surrounding abortion and its rights. While being descriptive is an

inevitable prerequisite to progress, this paper also attempted to show that since the rise of the Christian Era, abortion law has been contentious. This is especially true in both Canada and the United States, where it seems everyone except the woman seeking an abortion has had a say in the regulation of abortion. In Canada, the group and legislation preventing autonomy was Therapeutic Abortion Committees, then some revisions, multiple legal challenges, and now a decriminalized hole where any legislation once was. Even some political leaders have very outspoken opinion about being pro-life, yet claim they refuse to table abortion.

Simply ignoring the problem and hoping for it to go away will not be enough. If the wrong person gets to the problem first, it may result in catastrophic changes to abortion law, similarly to the United States. In the United States, modern day, multiple bills have been passed disallowing abortions completely in Alabama, Missouri, Georgia, and Ohio. Where they are not banned, the prerequisite to obtain one is not whether the woman wants one, but if she is in danger. In some of the more forgiving states, circumstances such as rape and incest allow for abortion. In states like Alabama, unless the woman will die, it is illegal for her to have an abortion. While there has been backlash, and many parties from around the world have been quite outspoken, there is one issue that must still be resolved. Regardless of what governing bodies, laws, or public opinion wants women to feel, they will eventually obtain an abortion. It has been shown through history that if a woman wants an abortion, she will get one however she can, safe or not. When are we going to put abortion regulation and female autonomy where it belongs, in the hands of women?

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**Appendix 1**: Taken from Brodie et al., 1992, 98. The exact wording of the proposed new abortion law by the Conservative government in 1989:

"Every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would likely be threatened."

# CONSIDERING DOMESTIC VIOLENCE IN THE CONTEXT OF REFUGEE CLAIMANTS IN CANADA

KALEIGH CAMPBELL

## Introduction

In *Liberalism and the Limits of Inclusion: Race and Immigration Law in the Americas*, Cook-Martin, and FitzGerald (2010) acknowledge and refute the dominant perspective that the adoption of international human rights-based immigration law has eradicated exclusionary immigration policies in liberal states such as Canada (9). In fact, Cook-Martin and FitzGerald (2010) establish that exclusionary immigration policies are proposed and implemented more in liberal states than in illiberal states (7). In considering this discussion of immigration policies in liberal states, it can be asserted that despite the purported attempts of liberal states to eradicate exclusion in immigration policies, liberal states continue to participate in forms of positive discrimination which occur during the processes of evaluating the claims of individuals who are pursuing refugee status (Cook-Martin & FitzGerald 2010, 14). In the process of evaluating refugee claims, Sherene Razack (1998) further advances this discussion of liberal immigration policies through arguing that adjudicators on immigration boards categorize individuals seeking asylum on the grounds of domestic violence in diametric positions (88-89). Razack (1998) thus purports that adjudicators categorize claimants as either disreputable claimants or those in essential need of emancipation from the violence endured on valid grounds of persecution (88-89). Drawing on the perspectives of Cook-Martin and FitzGerald (2010) and Razack (1998), this article will demonstrate that immigration rights in liberal states are not granted equally.

The aforementioned disparities address the fundamental immigration debate as to whether refugee status should be granted to women who claim human rights violations and persecution

on the grounds of domestic violence. In recognizing that domestic violence is not categorized by international law as an enumerated ground for persecution, victims of domestic violence are further subjected to the categorizations of the diametrical positions in consequence of the increased discretion of governing institutions and refugee claim adjudicators. This is demonstrated through considering successful asylum claims in liberal states in which Razack (1995) argues require that claimants be depicted as victims of a culture or state, as opposed to their spouses (46). In considering the role of ideologies and perceptions of human rights, this article will examine the significant discrepancies between the conceptualization of domestic violence as a human right violation from an international perspective, and the institutional legitimization of these rights through refugee claims under the jurisdiction of individual states.

This examination will be considered in the Canadian context and will emphasize the institutional power structure of the Immigration and Refugee Board of Canada, and the associated guidelines on *Women Refugees Claimants Fearing Gender-Related Persecution*, as well as their engagements with the United Nations *Convention Relating to the Status of Refugees* (Razack 1998, 99). In examining domestic violence and refugee claims, this article will adopt the perspective that domestic violence is an inherent violation of foundational human rights granted through international agreements and, therefore, should be considered a basis for refugee claims. This article will also argue that as a consequence of the ideological struggles and conflicts amongst hierarchical power structures, and individual consciousnesses operating amongst those power structures, the perception of domestic violence as a rights violation is a product of ideological construction. Furthermore, the perception of domestic violence as a human rights violation can be considered the result of an ideological process and is therefore, in a constant state of flux and negotiation, whereby it continues to be "challenged, reproduced, and transformed" based upon

interactions with structures of power (Ewick 2008, 80).

**Ideological Contestations of International Institutions and Domestic Law in Canada**

In 1951, following the conception of the *Charter of the United Nations* and the *Universal Declaration of Human Rights*, the United Nations introduced the *Convention Relating to the Status of Refugees* (Ramos 2011, 501-504). The *Convention Relating to the Status of Refugees* continues to define the grounds through which individuals can claim refugee status within the states of the signatories. The aforementioned grounds stipulated by the Convention include fear of persecution on the enumerated grounds of "race, religion, nationality, membership of a particular social group or political opinion" (Efrat 2013, 731). In considering the context of domestic violence, it is evident that "gender" is not amongst the enumerated grounds under the international governing structure. In response to this, as a liberalized state, Canada advanced these grounds for claiming refugee status through the Immigration and Refugee Board's introduction of the guidelines for *Women Refugees Claimants Fearing Gender-Related Persecution* (Efrat 2013, 731).

The most significant component introduced by the *Guidelines* was the determination that domestic violence was to be considered a distinctive ground for persecution and the basis for a refugee claim in Canada (Efrat 2013, 731). It was proposed that the functional objectives for implementing the *Guidelines* in Canada were thus to "heighten the sensitivity of the Immigration and Refugee Board decision–makers to the unique problems women face when seeking international protection, and to provide a method of analysis within which to evaluate a women's claim to refugee status" (Oosterveld 1996, 570). In further examining the jurisdiction of the *Guidelines*, it is fundamental to assert that the *Guidelines* are not codified in law, and therefore their enforcement is dependent upon the adjudicators on the Immigration and Refugee Board (Efrat 2013, 731). It is also fundamental to recognize that in consequence of the geographical distance

between Canada and the East, Kelley (2001) states that Canada is not susceptible to mass migration, which thus ensures that the determination of refugee status is confined to the restrictive and prolonged procedures of the Immigration and Refugee Board (560-561). Thus, the determination of which women are to be granted refugee status on these grounds is precarious. In considering the interaction of international agreements with the spheres of domestic legislation it can be stated that despite the beneficial nature of the introduction of the *Guidelines*, the contents of these agreements, as well as the claims of individuals, undergo an ideological transformation through their engagement with institutional structures of power and individuals within these institutions. This is exemplified in the modifications made to the existing *Guidelines* in Canada through the introduction of the guidelines for *Women Refugees Claimants Fearing Gender-Related Persecution* (Efrat 2013, 731).

In *Immigration*, Sterett (2008) admonishes the power of states and their capabilities to control their adherence to international obligations (356). In the context of the *Convention Relating to the Status of Refugees*, it is evident that there is a continuous struggle amongst ideologies, specifically ideologies pertaining to the assertion of human rights. This is an associated consequence of the objectives of the contesting parties and institutional structure to govern the cultural conditions through which the world operates (Silbey 1998, 285). In considering the conditions of refugee claimants, the ideological struggle is further complexified as the *Guidelines* established in Canadian undergo an additional transformation from the initial international conceptualization. This is the result of the involvement of the Immigration and Refugee Board, as individual adjudicators are granted the power within the institution to interpret the circumstances of the claims and the concrete applications of the *Guidelines* (Efrat 2013, 731).

It can thus be asserted that the process through which refugee claims are considered is an

ideological process, in which ideological content interacts with hierarchical power structures amongst institutions and engages in a transformative process. In the context of rights-based refugee claims, the process of determining the success of claims is therefore representative of the evolution from the conceptual notion of utopian human rights (Hajjar 2008, 593) to the realm of the real whereby rights are legitimized or delegitimized through the structural restraints of institutions and power structures. Furthermore, in consequence of asserting that the process of adjudicating refugee claims is an ideological process, the decisions of the adjudicators are, therefore, ideological effects. The subsequent sections will examine this process, beginning with the conceptual construction of the rights of refugee claimants in the context of the United Nations *Convention Relating to the Status of Refugees* under the jurisdiction of international law.

**The Utopianism of Human Rights in the UN *Convention Relating to the Status of Refugees***

In *Rights Protection in Canadian Refugee Law*, Ezrat (2013) identifies that the UN *Convention Relating to the Status of Refugees* stipulates that refugee status should be granted by signatory states to all individuals who are capable of demonstrating a reasonable fear of persecution, and the unwillingness of their state to ensure adequate protection against violence (731). This statement demonstrates the profound rhetoric embedded in this international agreement, which suggests that the right of refugee status is the equal entitlement of all individuals who endure persecution under one of the enumerated grounds. This exemplifies the notion of assuming a broad definition of rights perpetuates the problematic consequences of the utopianism of human rights (Hajjar 2008, 593). In perpetuating this utopian perspective of rights, where rights are an equal entitlement to all, a specific conception of rights is infliction upon those who attempt to assert them through the processes of legitimization and universalization (Hajjar 2009,

595).

In acknowledging the purported universalism of rights and the idealism of the equal assertion of rights, it is apparent that albeit appearing as neutral constructions, the inherent development of rights is an ideological process. In consequence of the ideological nature of rights, international agreements in terms of rights, often do not consider international complexities and, therefore, impose the standards of states with the most powerful institutions (Hajjar 2008, 595). Furthermore, in accordance with the theorizations of Nielsen (2008), the legal codification of equal human rights through international agreements is an ideological process through which rights obtain falsified empowerment (74). The falsified empowerment of rights occurs because of the perceptual connection of international law to institutions of power, but in the realm of the real, international law holds minimal power compared to the states and institutions in which it was established to govern.

In considering the conceptual foundation of rights from the perspective of international governing bodies, the following section will further refute the notion of equal human rights proposed by the *Convention Relating to the Status of Refugees*. This will be discussed in the context of refugee claimants on the grounds of domestic violence, whereby their rights are either legitimized through the result of a successful refugee claim or are delegitimized through being neglected and subjected to the consequence of positive discrimination in domestic laws (Ewick 2008, 86).

**Legitimizing Rights in Refugee Claims: The Immigration and Refugee Board of Canada**

In examining the process of how specific refugee claims on the grounds of domestic violence are either legitimized or delegitimized through the Immigration and Refugee Board, this

section will adhere to and challenge the previous claims pertaining to ideologies and universal conceptions of human rights. The following examinations also function to establish and reinforce that rights as an ideological phenomenon are polysemantic and subject to interpretation dependent upon the process that individuals or collectives consider and interpret contextual factors. In considering the acceptance of refugee claims by the Immigration and Refugee Board of Canada, Razack (1998) and Efrat (2013) assert that in consequence of the cultural perceptions of Western liberalized countries such as Canada, the refugee claim determinations in Canada are premised upon securing a hierarchical positioning through the establishment of an us and them dichotomy (89, 749).

Furthering this postulation, Razack (1998) argues that despite the implementation of the *Guidelines* in Canada, in cases where domestic violence exists amongst a series of diverse issues within a particular claim, adjudicators often do not recognize the significance of domestic violence and engage in the process of erasure (124). In engaging in the process of erasure of the individual experiences of these women, the adjudicators often emphasize the cultural foundations of the violence endured, whereby the experiences of the applicants engage in a further process of transformation based on the individual perceptions of the adjudicators. This notion demonstrates that rights are non-determinative social constructions, which are a unique ideological product of those who are granted the power to assert them.

In considering the transformative process of the claims of these women, it is fundamental to recognize that this ideological process functions to further categorize refugee claimants into the diametric positions of those who are disreputable claimants and those who are in essential need of emancipation from the violence endured on valid grounds of persecution (Razack 1998, 88-89). According to Wikström and Johansson (2013), claimants who are viewed as disreputable are

women who do not align with the "normative standards" of refugee women and who aspire to immigrate because of patriarchal societies and cultural norms that permit prosecution (93). In addition to the abovementioned function of categorizing claimants, the process of adjudicating claims provides substantial evidence to indicate that the adjudicators engage in positive discrimination when determining the success or failure of rights claims, which as Cook-Martin and Fitzgerald (2010) argue, is common in liberal states (1). Positive discrimination has the consequential impact of adjudicators preferring a particular group or individual for admittance under immigration laws (Cook-Martin & Fitzgerald 2010, 14). In the circumstances of refugee claims on the grounds of domestic violence, it is evident that the cultural conditions of the violence endured are imperative to the decision as to whether their rights are to be legitimized or delegitimized.

In recognition of the emphasis on the cultural circumstance of these claims, a statistical investigation regarding the success of the claims under the jurisdiction of the Immigration and Refugee Board was conducted by Efrat (2013) to determine the foundations of a successful refugee claim on the grounds of domestic violence (716). His examination suggests that when claims containing practices that are considered to be in cultural opposition to Western culture are presented to the adjudicators, claimants have an increased potential of being granted refugee status (Efrat 2013, 761). The cultural practices that result in the granting of refugee status for women who are pursuing claims under the grounds of domestic violence include forced sterilization and genital cutting. The collected evidence of Efrat (2013) demonstrates that claims of acts of domestic violence that are not often experienced by non-Western women are accepted (761), and that this is a consequence of the ideological perception of Western states as saviours and protectors of those suffering from the cultural practices of the East.

In addition to Efrat's (2013) work, it is fundamental to also consider the qualitative research conducted by Razack (1998) which examines the specific details of refugee claims, as well as the responses of the adjudicators. In *Looking White People in the Eye* (1998) Razack investigates the case of Dularie Boodlal, who was a victim of brutal domestic violence in Trinidad, upon her husband following her migration to Canada, Boodlal submitted a claim for refugee status (99). As a consequence of the circumstances and the Westernized domestic violence experienced by Boodlal, her claim for refugee status was declined as the adjudicators determined that she was inadmissible under humanitarian grounds (99). When the Canadian public determined that the dismissal of Boodlal's claim was unjust, numerous individuals contacted government agencies questioning the decision of the Board (Razack 1998, 99). As a consequence of the public disapproval of the rejection of her claim, the Board reconsidered Boodlal's claim, and she was granted refugee status (Razack 1998, 99). The case of Boodlal exemplifies the ideological nature of rights, as well as the significance of institutions in their assertion. The circumstances of Boodlal's case is also representative of the various operational forms of rights, as it is evident that as stated by Nielsen (2008) the operation of rights in the form of social movements present an increased potential to disseminate the ideological effects of institutions (6). Furthermore, the case of Boodlal further exemplifies the hierarchical structures and power differentials that are existent in the circumstance of refugee claims.

In examining the corresponding findings of Efrat (2013) and Razack (1998), it is evident that the potential for individuals to assert their rights granted by the UN *Convention Relating to the Status of Refugees* is precarious dependent upon the ideological foundations of institutions and structures of power that rights must endure to obtain legitimization. In acknowledging that the refugee claims of women who are subjected to violence premised in cultural beliefs have an

increased potential for approval from adjudicator, it is evident that those within the power institution of the Immigration and Refugee Board are engaged in a process through which the objective is to govern the cultural conditions, as opposed to the individual conditions of the applicant. It can therefore be asserted that a constant ideological struggle is occurring in these instances. However, it is crucial to recognize that this ideological struggle is not occurring between the applicant and the adjudicator. Instead, it is occurring between the cultural ideologies of the West and the East.

In recognizing that the ideological struggle does not occur between the applicant and the adjudicator, it is fundamental to consider if the rights of applicants are ideological in nature or are representative of their consciousness through their engagement in challenging the ideologies of cultural conditions. In considering the classification of the claims of individuals as representative of their consciousness, as opposed to their ideologies, it can be postulated that consciousness has the potential to challenge ideologies, but in the context of refugee claims, the consciousness of refugees often challenge and operate in opposition to the ideologies of institutions. In recognizing this, the assumption made by Ewick (2008) that consciousness and ideologies are no longer considered to be operating in opposition can be modified to assert that consciousness and ideologies are not in consistent opposition, but can operate in consistent opposition of one another (80).

In asserting that the potential for the opposition between consciousness and ideologies continues to exist, as mentioned, the Marxist conception of ideologies and consciousness must be emphasized. It was stated by Ewick (2008) and Silbey (2008) that from the perspective of Marxism, ideologies are controlled by the powerful and a method through which hierarchical structures of power that perpetuate inequalities are concealed (80-81; 284). In application to the

circumstance of the Immigration and Refugee Board, it is evident that the inequalities between those who endure cultural violence and Westernized domestic violence are perpetuated by the ideologies of those within the power structure and are in pursuit of controlling the cultural conditions of the world. The application of the Marxist perspective also identifies that hierarchies exist amongst the claims of applications which are determined in an attempt to secure an international hierarchical structure beyond the institution, whereby the cultural conditions of the West are superior to those of the East. In subscribing to this perspective, the notion that rights have no inherent power, and are granted legitimization through their interactions with power structures are exemplified in the circumstances of women who attempt to obtain refugee status on the grounds of domestic violence in Canada.

**Conclusion: Human Rights as Paradoxical**

In summation of this examination of the disparities between the conceptualization of domestic violence as a human right violation and the institutional legitimization of these rights through refugee claims, it is evident that determining the success or failure of refugee claims is an ideological process resulting in an ideological effect. By recognizing the unequal distribution of refugee status, this article rejects the theoretical utopianism of human rights promised to individuals through international agreements. This article also identified that the fundamental issue with international agreements such as the *Convention Relating to the Status of Refugees* is the neglect of the agreements to consider the significance of institutional ideologies and their power to reject the assertion of individual rights.

In recognizing the ideological nature of rights, as well as the institutional structures of power that determine the assertion of rights, it is apparent that an ideological struggle occurs. It

has also been established that the objective of the ideological struggle is to control the cultural conditions of the world. The struggle occurs through the process of granting refugee status, and therefore, it is important to recognize that the ideological struggle does not occur between the adjudicators and the refugee applicant. In contrast, it is an ideological struggle between the institutional structures of powerof the West and the East.

In conclusion, despite domestic violence being a legitimized ground for persecution and a basis for refugee claims in Canada, the assertion of these rights remains at the fundamental discretion of the institutions of power in which these rights interact.

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