

# Framing Reproductive Rights: The Politics of Abortion Access and Citizenship in a Post-Morgentaler Era

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Canadian Prime Minister Stephen Harper recently announced his administration's plans to take up the focus of past G8 summits, on issues of maternal health in developing countries, when Canada hosts the annual summit in 2010. Harper first disclosed his administration's plans to the House in early 2009, but exactly what was meant by a focus on maternal health care initiative for developing countries was not made clear, specifically, it was not evident whether or not abortion would be included in this definition. Pressure to clarify the nature of the policy increased in March when anti-choice Foreign Affairs Minister Lawrence Cannon claimed that the initiative did "not deal in any way, shape or form with family planning. Indeed," he claimed, "the purpose of this [initiative] is to be able to save lives"[11].

Cannon's comments sparked public outcry and extensive debate in the House. The Opposition took the controversy as an opportunity to pressure the government to formally include abortion in its maternal health plan or own up to its anti-choice stance. The government countered by attempting to quell debate, insisting that they had no desire to reopen the abortion debate, with Harper going so far as to state that the government "would not be closing doors against any options, including contraception"[2]. In the end, however, the government opted to adopt a definition of maternal health aimed at excluding contraception and abortion. They utilized the definition used by the World Health Organization and "many other countries in the G8 and around the world," which holds that "maternal health refers to the health of women during pregnancy, childbirth and the postpartum period"[1][22]. Interestingly, while this definition does not explicitly list birth control measures, they are by no means precluded by it. In fact, the World Health Organization lists "unsafe abortion" as one of the major direct causes of maternal morbidity and mortality, as well as death in childbirth[22]. Importantly, critics point to the fact that a lack of attention to abortion "would be at odds with the G8's established goals at previous summits"[2]. The rationale for the adoption of this view of maternal health was to avoid policies Harper feared would be divisive in Canadian society.

The Harper administration's decision to withhold funding for abortion from

its maternal health strategy at the annual G8 summit has reopened what, for many, is seen as a closed debate. Canada's abortion law was found unconstitutional in 1988 and no law has since been enacted to modify its legal status. Abortion's decriminalization has meant that it is now formally classified as a healthcare issue, though legal, social and political recognition of its impact on women's lives has made it central to calls for women's equality. Canada's strategy at the G8 has thusly exposed a serious problem in present framings of abortion in Canada. The Harper administration's decision to exempt abortion funding from a strategy aimed at maternal health challenges the obligations of the government to provide a procedure recognized as necessary to women's equality, both at home and abroad. The failure to recognize the gravity of the issue is further demonstrative of an understanding of abortion based more in ideological leanings than a clear understanding of the realities of a society in which abortion is illegal:

We had about one death a month, usually from septic shock associated with hemorrhage. I will never forget the 17-year-old girl lying on a stretcher with 6 feet of small bowel protruding from her vagina. She survived. I will never forget the jaundiced woman in liver and kidney failure, in septic shock, with very severe anemia, whose life we were unable to save. Today, in Canada and the U.S. septic shock from illegal abortions is virtually never seen – like Small Pox, it is a “disappeared disease”. [26, 56]

Enough time has elapsed that the gruesome deaths of women desperate for abortions have been largely forgotten, and anti-choice advocates feel secure in pushing for politicians to treat abortion as a moral question. While the pro-choice movement has made huge strides in securing abortion rights and access for Canadian women, a backlash has manifested against these victories which does not acknowledge the harsh realities of women's situation in Canada and abroad. This paper challenges present framings of abortion by de-legitimizing the anti-choice movement and drawing on historical and present data concerning abortion politics. It will begin by recounting the history of abortion regulation in Canada, both through the lens of legal and political change and through shifts in public opinion. Next it will take stock of the current climate of the abortion debate and its impact on women's lives through a framework of social reproduction. Social reproduction is useful because it takes into account the realities of the division of labor between the sexes and the impact of reproduction, both actual and potential, on women's lives. Ultimately, it will demonstrate how a citizenship framing would lend itself to a reframing of abortion in Canada which respects women's health and equality.

## When Abortion was Life and Death

Canada has demonstrated a vested interest in the regulation of abortion since Confederation. While the laws originally regulating abortion have undergone

dramatic shifts since 1867, the bulk of these changes occurred in the last 50 years. The rationale behind Canada's increasingly progressive policies on abortion evolved for a number of reasons, including the protection of doctors and the maintenance of codified Canadian values, but largely not for the now widely accepted belief that abortion is necessary for women's equality.

Canada's Criminal Code, enacted at confederation, was designed to largely mimic Britain's laws at the time, including its Offenses Against the Person Act, which prohibited abortions without exception [17, 63]. This law would remain unchanged for nearly a century until 1939, when it was modified to allow physicians to perform abortions with impunity, in the event that a woman's life was at risk[17, 63]. Thirty years later the Trudeau administration would once again broaden the scope of legal abortion access through the creation of therapeutic abortion committees. While the existence of these committees was sparse, and the criteria with which they ruled an abortion permissible were subjective, they nonetheless broadened the base of the existing law.

Dr. Henry Morgentaler emerged as a champion of the pro-choice movement in 1968 when he set began performing abortions, in spite of the law, at his Montreal clinic[24, 163]. His first arrest came in 1970 following a clinic raid[24, 48]. Morgentaler would be put on trial in Quebec a total of 3 times, in 1973, 1975 and 1976, for overtly breaking the law by performing abortions on demand, but would never be found guilty by a jury. Indeed, despite his first trial jury consisting of, "French Canadian, predominantly Roman Catholic jury," of working-class Quebecois, of which only one juror was female, on a case in which the law had been clearly broken, he was found innocent [23, 93-94, 116]. The jury's verdict in the 1973 case was overturned by a Quebec appeal court judge who cited "jury error," resulting in an eleven-month prison stay for Morgentaler, but he was released early due to public outcry in the civil rights community[5]. A federal law was also passed to prevent courts from overturning jury acquittals, a modification often referred to as the "Morgentaler Amendment"[5].

The 1976 case, *Morgentaler v. the Queen*, was the first instance in which Morgentaler challenged Canada's abortion law at the federal level. While he had long had plans to challenge the law, he and his lawyer, Claude-Armand Sheppard, were waiting for a shift in the social and political climates before pursuing a case[23, 75]. In the era before the Charter public support would be crucial to overturning a law within Parliament's purview to change. Morgentaler's views of abortion were based on his humanist philosophy of life, which is concerned with the quality of life and the rights of individuals to decide their fates[23, 27]. Still, while he never concealed his motivations for his attempts to challenge the existing law, he challenged the legislation based on the tools available to him at the time.

The Charter of Rights and Freedoms, implemented by the Trudeau administration in 1982, afforded Morgentaler the opportunity to reopen his case utilizing new legal tools. The extensive list of rights and freedoms guaranteed by the Charter, and enforced through the courts, allotted more power to individual interests. While more modern pushes for equality might have seemed like the logical approach to contest a restrictive abortion law, it did not fit with the

social conventions of the times. Most importantly, the United States' *Roe v. Wade* case, which liberalized abortion policies for the US in 1973, effectively utilized the provision for security of the person in their constitution; a provision echoed in Canada's Charter. The success of this strategy in the US made it a more reliable approach to pursuing changes in Canada[23, 81].

In 1988, reentering the Supreme Court to challenge Canada's abortion law for the second time, Morgentaler successfully utilized the Charter's provision for security of the person to strike down the law. Still, while the law, as it existed then, was deemed unconstitutional, the court left room for Parliament to create a new law to replace it. The Mulroney administration attempted to do just that in 1990 when it proposed a new law, which would have, "recriminalized abortion unless procedures were performed by a doctor and the life and/or health of the mother were threatened"[28, 383]. Bill C-43 was passed in the House but ultimately defeated by a tie vote in the Senate[8, 110].

Since that time no government has overtly attempted to create a law regulating abortion. Even Harper has attempted to avoid association with the abortion debate, asserting that the government does not "want a debate here or elsewhere on abortion"[29]. The absence of abortion legislation in Canada has thus afforded it many political protections, as well as the time to solidify its legitimacy in the court of public opinion, though these protections have not gone far enough.

## Public Perception

The increasing support for pro-choice policies is evident in public opinion polls in Canada over the past 35 years, since Gallup polls began to question whether individuals believed abortion should be legal, "under any circumstances, legal only under certain circumstances, or illegal in all circumstances"[14]. An overall rise was not only evident in those who felt that abortion was permissible, from 75% of respondents in 1975 to 82% in 2008, but a shift towards those deeming it permissible in all circumstances versus certain circumstances was also evident[14]. In 1975 21% of the 75% in favor of the procedure believed it should be legal under any circumstance, with the other 54% holding that it should only be legal under certain circumstance[14]. The percentage of those who believe abortion should be legal under any circumstances jumped to 28% of the 82% who found the procedure permissible in 2008[14]. It is evident, then, that in the decades that followed the Morgentaler decision the "court of public opinion" had forged a tentative social consensus on abortion"[8, 60].

Despite this shift the fear of an anti-choice movement influencing abortion policy and access still exists. The anti-choice movement may constitute only a "small proportion of the Canadian public, but their influence in the abortion debate far outweighs their relatively small numbers," due to their effective organization and vocal nature[8, 77-78]. The modern anti-choice movement, headed by Judeo-Christian fundamentalist groups in Canada and the US, justify their anti-abortion stance on a depiction of "abortion as murder"[8, 77]. This depic-

tion rests on the premise that a fetus constitutes a human life from conception to birth, an argument adopted by the Catholic Church in 1869 under Pope Pius IX[16, 243]. The arguments of this movement are not focused on a single issue, rather, abortion is a token issue tied to a deeply rooted commitment to social traditionalism[9, 42]. “The campaign [to end abortion],” Armstrong points out, “is no more [just about abortion] than the Scopes trial was just about evolution”[4, 360].

The values the anti-abortion movement seeks to protect have no place in the formal political sphere, based as they are in the necessity of unraveling Canadian values of equality and individual autonomy as laid out in the Charter. The assumption that traditionalism will resolve the perceived problems of modern society is rooted, according to McDonnell, in a misplaced nostalgia “for a time that never existed”[21, 91]. The legal and political footing for these regressive platforms has essentially disappeared, though that is not to say that they need not be guarded against. While the vocal nature of the anti-choice movement may distort their numbers, polls demonstrate that the pro-choice stance has long been dominate in Canada and is on the rise. Still, many anti-choice individuals hold positions of power in politics, the medical profession, and social movements, and continue to pose a threat.

## Shifting the Sphere of the Debate: Legality to Access

The legal status of abortion has not been effectively challenged in over two decades, but that is not to say the debate is over. With women no longer dying from botched back-alley abortions and rarely attempting to self-induce miscarriages, the grim realities of a society without abortion access have all but disappeared. Instead, the emotional, financial, and social struggles of women seeking abortions have entered the forefront of the debate. Since the *R. v. Morgentaler* decision that abortion debate has shifted from one of legality to one of access.

Abortion, now classified as a medical procedure, falls under provincial jurisdiction. Each province has opted to legislate abortion access differently, by dictating who can perform the procedure, where, and under what conditions. Most provinces had reacted negatively to legalized abortion. Indeed, “[i]mmediately after judicial decriminalization, all provinces, with the exception of Ontario and Quebec, restricted or withdrew public funding for abortion services”[13, 14]. Most of these provinces have been forced to change their policies since, though litigation is ongoing in many. Court cases across Canada have consistently found that, “the different treatment of abortion services under public health insurance schemes is unjustified”[13, 14]. Restrictions to abortion, according to provincial courts, were not implemented to ensure quality of care, rather, they were created “with a view to suppressing or punishing what the members of the government and of the Legislative Assembly perceived to be the socially undesirable conduct

of abortion”[12, para. 44]. A Manitoba court event went so far as to rule that the exclusion of clinic services from public health insurance is “a violation of the right to freedom of conscience as guaranteed by s. 2(a) of the Charter and of equality rights as guaranteed to women by virtue of s. 15 of the Charter”[15, para. 79].

The shift in framing, from criminal activity to healthcare concern, and the jurisdictional shift which accompanied it, meant that, “abortion could be legally integrated into health systems, and government by the laws, regulations, and medical standards that apply to all health services,” only it was not[13, 12]. The unique treatment of abortion by provincial governments created new barriers for women by restricting access. The failure to fully fund abortions, facility restrictions, gestational limits, and complex referral procedures represent some of the many barriers provinces have put in place to prevent women from accessing abortions[25, 26-27]. Still, while these barriers were created on a provincial level, the federal government is not without influence. The Canada Health Act, created to ensure a commitment to certain uniform standards of care across the country, allows the federal government to withhold federal transfers to any province that does not comply with the Act. While the federal government is required to penalize provinces for their conduct, federal governments have been “reluctant” to take action given the still largely taboo nature of the topic and concerns about infringing on provincial jurisdiction [18, 15].

In essence, the shift in jurisdiction over abortion has changed the nature of the abortion debate in Canada. Rather than a question of illegality, the new terrain of the abortion debate is access. While provincial court cases have established the status of abortion as medically necessary and critical to women’s equality, differing levels of access persist across the country in direct violation of the Canada Health Act. Moreover, restrictive policies are motivated by reactionary, moralistic viewpoints rather than informed political platforms reinforced by public opinion.

## Social Reproduction

While differing levels of provincial access to abortion have been partially remedied through progressive court rulings, progress on this front is incremental and continues to leave women vulnerable. While precedent works strongly in favor of pro-choice policies, equality can only be realized slowly without a formal and binding acknowledgement of the role abortion plays in women’s lives. Such an acknowledgment would be instrumental in ensuring that policies were put in place to guarantee all Canadian women access to the same level of care and are guaranteed freedom to control their lives, health, and dignity.

Pregnancy and birth are not stand-alone events in a woman’s life and cannot be conceptualized as such. The repercussions of deciding to proceed with a pregnancy can have huge implications for a woman’s physical and mental health, relationships, financial situation and social standing. Indeed, women bear the brunt of caring responsibilities for offspring. These responsibilities have been

relegated largely by social constructions of women and motherhood.

Social reproduction is a term used to conceptualize the processes involved in reproducing and sustaining individuals on a daily and generational basis[6, 3]. The process includes the physical acts of pregnancy and birthing as well as the daily maintenance of dependents including, “how food, clothing, and shelter are made available for immediate consumption”[7, 382]. It further entails emotional and mental labor including, “the ways in which the care and socialization of children are provided, the care of the infirm and elderly, and the social organization of sexuality”[7, 382]. The process of social reproduction thus refers to all of the labor associated with the maintenance of the domestic sphere, as well as the very maintenance of the separation between public and domestic spheres. As such, the activities surrounding social reproduction, though essential to human survival, are also markedly undervalued and considered distinct from public concerns[20, 32].

A division between the public and private spheres has traditionally been essential to divisions of rights, assets, and obligations in Canadian society. Historically men have been relegated to the public sphere and women to the private, though these spheres are by no means static. While a particular ordering of gender roles may last decades, it is by no means permanent[10, 47]. Indeed, the divisions between the public and private spheres in Canada have blurred significantly. According to Vosko, “[t]he male breadwinner-female caregiver model no longer dominates even at a normative level, and multiple-earner households, where several household members are engaged in precarious employment, are gaining ascendance”[30, 147]. In essence, women have increasingly gained control over their reproduction and have a strong presence in the public sphere in the form of employment, while men are seen as having a place in the domestic sphere. Brodie argues that a number of social changes have become apparent in Canada which could indicate shifts in social reproduction:

[F]ertility rates are declining, the population is ageing, income gaps between rich and poor are growing, intergenerational mobility has ground to a halt, numbers of lone-parent families are growing while two incomes are increasingly necessary to support a family, the demand for child care and elder care is not being met... [8, 183]

Social reproduction is a useful concept insofar as it embodies the problems associated with a rigid division of the public and private spheres; it allows for a conceptualization bridging both spheres, for which abortion is a central issue. Politicizing the issue of abortion presents a challenge for the public/private dichotomy. If birth is a private matter, how can past and present interventions by the state be justified? Yet, if it is a public matter, how can it be justified as such if women are equal citizens? It is evident that abortion is an issue of utmost importance to governments and societies, a failure to acknowledge it as a political concern would challenge the capacity of the state and society to play a role in the cycle of social reproduction.

While abortion has historically been caught in a nexus between public and private spheres, in which sphere, ideally, should abortion be located? The pri-

vate sphere may seem appealing at first, as it points to the illegitimacy of state's involvement in regulating women's bodies, however, abortion already has a place in the public sphere. Women's lives are already structured by their ability to reproduce. The social roles women are allotted and the institutions they operate within are structured around the possibility that they will reproduce. Indeed, the ability to reproduce impacts women's daily lives regardless of their age, location, or status[19].

The lines between the spheres appear blurred because they have never truly been separate. This breakdown is necessary for a more complete conceptualization of the role of abortion in increasing women's autonomy. In order to operate as autonomous individuals in Canadian society women require control over their reproduction which, at present, requires state regulation to ensure. Positioning abortion as a private issue denies the public implications of reproduction on women's lives.

It is useful to conceptualize social reproduction as a cycle, rather than a constant, in women's lives. This cycle is fundamentally impacted by reproduction. The roles women are allotted in social reproduction depend on their perceived responsibilities, be they the responsibilities of a daughter, wife, grandmother, or any number of other designations. When a woman gives birth she is given the designation of mother and the law, as well as social rhetoric, allots her specific responsibilities and demands monetary sacrifice (if the father of the child is not willing or able to provide it) as well as time and emotional dedication. Kershaw observes that:

Research consistently confirms that the birth of a child sets in motion a series of normative expectations and economic incentives that propel many heterosexual couples to approximate patriarchal patterns in the division of labour. Spouses become more traditional in their care, housework, and employment decisions upon the onset of parenthood, with the most significant changes occurring in women's routines. In particular, the total amount of work that new mothers perform increases disproportionately compared to new fathers, although relatively little of this extra work is in paid employment. [19, 130]

Offspring thus solidify a particular role for women in the domestic, or private, sphere. The power to influence this cycle thus affords women more independence. In this way it is apparent that women's control over their own reproduction grants them agency in the cycle of social reproduction, though it does not fundamentally end it. Reproductive control is necessary, but not sufficient, to women's autonomy. A rethinking of citizenship lends itself well to a reframing of abortion as an aspect of social reproduction.



## Citizenship

Traditionally citizenship has been conceptualized as a linear process by T.H. Marshall, divided into civil, political, and social components, all of which must exist in harmony for citizenship to occur. The problem inherent with this view of citizenship, regarding reproductive health, is that it does not challenge the biased construction of citizenship towards specific groups. Bakan and Stasiulis' present an alternative vision of citizenship, which effectively addresses these issues.

Citizenship, they argue, is not a linear relationship, rather, it exists on a spectrum, "involving a pool of rights that are variously offered, denied, or challenged, as well as a set of obligations that are unequally demanded"[27, 2]. The existence of such a spectrum challenges simplistic legal categories that do not acknowledge the multifaceted relationships experienced by individuals to, "territories, nation-states, labour markets, communities and households"[27, 11]. In this way Canadian citizenship fails to live up to standards of "freedom, democracy and equality of treatment"[27, 11]. Citizenship must not only include a legal definition of membership, but notions of societal and political perceptions of community membership as well[27, 11]. Joanna Erdman echoes this sentiment in *The Back Alleys of Abortion Care: Abortion, Equality and Community in Canada*:

Access to reproductive and sexual health services is [...] inseparable from the larger project of women's political, economic and social equality. If women are to be equal members of Canadian society, the Charter must be interpreted and applied in fulfillment of a broader commitment to transform social and political institutions – including our health care system – in an egalitarian direction wherein women are not only perceived as full members of Canadian society, but believe themselves to be.[?, 1155]

This broader conception of citizenship and its acknowledgment of the problematic and unequal nature of the legal category alone would include questions of reproductive autonomy as fundamental to women's full community membership. Such a shift in citizenship, as Paul Kershaw accurately suggests, "signals a recoding of the shared ideas and criteria by which issues are recognized as appropriate subject matters for politics, and, thus, a reorganization of the boundaries of political debate"[19, 4]. By challenging the taboo nature of abortion, much the same way its prolonged deregulation has, the social acceptance of the procedure and related birth control methods and information would be given the room to further increase. More importantly, it would offer solid grounding to challenge the regulation of abortion through restrictions to access.

## Conclusion

Canada has made huge strides towards recognition of the important role reproductive health and choice has in the lives of women. Deaths resulting from illegal, back-alley abortions have, for many, become a distant memory. In many ways, we have moved beyond a framing of abortion as a matter of life and death, but women are not yet guaranteed the agency to control their own lives. If women are to be full citizens, their autonomy needs to be guaranteed through positive protections, which account for their unique ability to reproduce and the social responsibilities reproduction entails. A model of citizenship, which acknowledges the realities women face and the known consequences of labeling abortion as anything but an equality issue, is necessary to move forward.

The forces generating a backlash against abortion are small but organized and vocal. While they possess no political or legal grounding to further their perspectives (they rely on idealistic notions of traditionalism to justify their protests) they continue to pose a threat to the achievements of the women's rights movement today. The legalization of abortion does not guarantee abortion access in Canada, nor does it ensure unbiased treatment of the issue in its international policies. Many Canadians have become complacent about the status of abortion, assuming that accounts of its inaccessibility will self-correct over time. Unfortunately, complacency does not further rights and, if women are to be full citizens in Canada, they require access to reproductive choice.

The Harper administration's treatment of women in developing countries is demonstrative of the problems with present framings of abortion in Canada. Not only is a reframing of the procedure necessary to guarantee women's health and equality within Canada, but it is evident that without it the status of women in other countries is under threat as well. While questions of abortion in the political sphere are largely avoided by parties in power, for fear of igniting controversy, the necessity of addressing the issue, or in the case of the G8, justifying its absence, has made this tactic increasingly difficult.

Since its decriminalization avoidance of the abortion debate in politics has increased its perceived legitimacy by the public while simultaneously allowing antichoice groups and individuals the opportunity to challenge reproductive choice through the backdoor. Restricting access to abortion has been the focus of antichoice groups as a non-confrontational way to influence women's rights without reigniting a debate that the public perceives as largely closed. Reframing abortion as a citizenship right for women would protect them from direct and indirect challenges to their equality. Perhaps most topically, it would pressure the government to pursue policies abroad designed to ensure women living outside Canadian borders are granted equality of treatment with Canadian women "based on sound scientific evidence and not prejudice"[3].

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