ABORTION, LAW AND THE IDEOLOGY OF MOTHERHOOD: NEW PERSPECTIVES ON OLD PROBLEMS

by

EILEEN VERONICA FEGAN

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LAW

Department of ____________________________

The University of British Columbia
Vancouver, Canada

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ABSTRACT

Many feminist analyses of abortion law in Canada over the last two decades have been characterized by criticism of the failure of legislation and case law to appreciate adequately the interests of women in the matter. As a result they have advocated the pursuit of legislative reform and the demand for legal recognition and judicial protection of women's "right to choose". Despite the substantial fulfilment of these aims, problems of availability and access to abortion services continue to be experienced by Canadian women. This thesis purports to adopt a new, more critical perspective, incorporating an ideological analysis of both past restrictions and current conflicts over abortion regulation, in an attempt to develop fresh insights into the possibilities for feminist strategizing in this area. In highlighting the subtle ways in which law itself facilitates the continued denial of women's reproductive choice, it seeks to discourage the future reliance upon law alone to redress these current injustices.

The concept of a "dominant ideology of motherhood" is employed as the theoretical framework from which to examine the role of law in reflecting, and reinforcing dominant ideas about women and their relation to motherhood. An investigation of the ideas most influential in shaping the first nineteenth century prohibition on abortion and, of the understandings manifested in the legal developments secured since, discloses the constancy of certain, oppressive constructions of women in legal forums. Further analysis of how ideological anti-abortion messages have been imported into judicial discourse via the recent abortion injunction cases, suggests that law may not be the most appropriate forum in which to challenge and modify these dominant ideas.
Upon these findings, the scope for constructing alternative, revolutionary feminist discourse on abortion is examined. The thesis concludes that deconstruction of the particular and oppressive ideas informing the past and present legal treatment of abortion, and of the ideological nature of law itself, may provide a basis for developing oppositional, "woman-centred" ideas and understandings on the issue. Finally, it is suggested that feminists might make greater progress in the current debate through promoting these ideas in the extra-legal sphere.
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INTRODUCTION

In a feminist vision of a truly egalitarian society, women would be free to define their own sexuality, unwanted pregnancy would be viewed from the woman's perspective and the individual woman would be the only one empowered to make reproductive decisions permanently affecting her life.  

 Guarantees of timely access to medically safe and publicly funded abortion would be enshrined in law; and state policies would be aimed at ensuring all women deciding to carry their foetuses to term, of the ability to bear and raise healthy children whilst continuing to act as fully capacitated persons in society.  

 Such an image might appear alien to many women in Canada today despite the well-documented struggles of a women's movement active in reproductive politics, and of its celebrated successes in dismantling restrictive and oppressive laws on abortion.  

 Many decades of feminist mobilization around the issue culminated in 1988, when as a result of a Supreme Court of Canada decision the only remaining abortion prohibition was removed from the Criminal Code.  

 Although the historic and undoubtedly positive nature of this development cannot be denied, the fact that it has done little to guarantee adequate access

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2 Ibid.


to abortion services, or to put an end to such matters as enforced sterilization and judicial ambivalence towards women's autonomy in reproductive decision-making, suggests that we still have much further to go in this struggle. The succeeding events, which nullified the potentially empowering effects of the legalization of abortion in the lives of many women, carry with them in my estimation, the very telling sign that we live in a society still heavily imbued with oppressive role expectations, dictated by our gender, race and class. Through my interest with developing strategies aimed at the realization of the "feminist vision" articulated above, it has come to my attention that perhaps the most promise for our (some might say "utopian") future, lies in more critical structural analyses of our past than we have hitherto been concerned with. Building upon the optimism raised for the potential of such a project in recent feminist scholarship, I want to consider how abortion regulation past and present has been informed specifically by an "ideology of motherhood" defining women's relationship to child-bearing and, the very nature of their interest in abortion.

Drawn from a critical understanding of the most recent feminist literature in this field, my analysis will begin with an investigation of the various theories about abortion and law which have been developed by other scholars and, the strategies which have been employed by feminist

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5 I am referring here to recent fears that women of colour, native women and poor women continue to be subjected to subtle forms of coerced sterilization, which will be discussed, Chapter Five infra at 155-57.

6 Throughout the thesis I use the terms "we" and "our" to include my work within that of contemporary Canadian feminist work on reproductive rights, and to identify myself with Canadian feminists who share similar goals as to improving the reproductive choice of women within this country.

7 The work of Linda Gordon, Woman's Body, Woman's Right: A Social History of Birth Control In America (Middlesex: Penguin Books, 1977) is the only feminist literature I have found to employ the concept of an "ideology of motherhood" in the context of women's reproductive freedom. Yet Gordon's main focus is on it as it relates to female socialization, and does not involve a detailed analysis of how it informs the legal treatment of abortion.
organizations over the past two decades. I will focus in particular upon socialist feminist standpoints which highlight the importance of conducting ideological analysis of law, suggesting that an understanding of how ideologies inform law and how law in turn reinforces them, might offer new insights into the area of abortion regulation, where the legal developments already secured have proved inadequate in empowering all women with reproductive freedom. As the discussion progresses I will look more specifically at how ideological conceptions of women's role as mothers informed the first abortion prohibition in Canada during the nineteenth century, and how they succeeded in shaping the terms of the abortion debate in law well into the twentieth century. In this it will also be seen how, although the ideology of motherhood itself may have changed over the course of the last century, it has remained influential in the debate over when women should and should not be permitted to "reject" motherhood by choosing abortion. Several aspects of contemporary "foetal rights" ideology will then be critically examined in an attempt to illustrate how, though no longer explicitly endorsed in law, tenets of the ideology of motherhood are still echoed in legal forums through the acceptance of anti-choice terminology and representations of abortion. Further ideological analysis of the recent "father's rights" cases will illustrate how dominant and oppressive ideas about women are imported into and reinforced through judicial discourse, providing concrete evidence that law may not be the most appropriate forum in which to contest or modify the influence of the ideology of motherhood. In conclusion I will examine the scope for new, more effective feminist discourse on abortion, making some tentative suggestions as to how this might take shape once the ideological aspects of the current debate are exposed and critically deconstructed by feminists.
CHAPTER ONE

FEMINIST PERSPECTIVES AND THEORETICAL STANDPOINTS

There has been an abundance of feminist literature on abortion law and its relationship to the general subordination of women since the rise of the second-wave movement in the early 1970's. While it is difficult to compartmentalize different approaches into liberal, radical or socialist feminist boxes, these broad categories may be useful in identifying the theoretical understandings informing a body of work. Without aspiring to provide a comprehensive account of feminist perspectives on abortion law, in what follows I will give a somewhat condensed outline of those understandings which have both influenced my theoretical standpoint towards abortion and law, and inspired much of my own research into new feminist approaches to Canada’s ongoing abortion controversy.

Liberal Feminist Agenda

When the Canadian women's movement first began to mobilize against the illegality of abortion in the early 1970's, its primary focus was on the practical and social reasons why women should not be denied this medium of control over their reproductive capacities. Motivated by the concern that the possibility of unwanted pregnancy, and of consequently bearing and raising children left all fertile women constantly vulnerable to employment discrimination, access to abortion was soon considered essential to women’s enjoyment of equal
opportunity in public life.\(^1\) Taken at face value, the dominant liberal notion of law as "neutral arbiter among competing interests and the protector of the weak",\(^2\) appeared to second-wave feminists reason enough to trust in it to improve women’s precarious social position, through the endowment of rights equal to those of men.\(^3\) For the liberal-minded feminists who came to dominate abortion mobilization, the fact that law itself was implicated in depriving women of control over abortion, acted merely as a call to remove its coercive restrictions and to establish in their place the legal "right to choose".\(^4\) It did not seem to occur to them that, inherent in the criminal prohibition of abortion in all but medically approved circumstances, was the idea that women’s role as child-bearers was of such great social importance that the state was entitled to confirm that sufficient justification existed before allowing them to opt out of it. Indeed, they seemed unaware that a campaign for decriminalization alone, without adequate examination of the social context in which abortion restrictions were imposed, might render any "choice" it secured extremely abstract when exercised within a social climate where motherhood would still

\(^1\)The "public" sphere has been characterized in earlier feminist work, such as that of Juilet Mitchell "Women and Equality" in Anne Phillips ed., Women and Equality (Oxford: Blackwell, 1987) at 127, as the realm of employment, politics, and endless opportunity - the sphere traditionally regarded as that of men. Thus, for women to enter, they had to do so on male terms. Because pregnancy and motherhood were not accommodated in this sphere, these aspects of women’s lives effectively excluded women from the enjoyment of such opportunities.

\(^2\)Carol Smart, Feminism and the Power of Law (Routledge: London, 1989) at 1-3. The feminist tradition of strategizing for women’s "equality" through law and legal reform was an extension of classic liberal philosophy to the issue of women’s social subordination.

\(^3\)Central to this was the notion that women could be made equal to men in the reproductive sphere if they were empowered with the right to terminate unwanted pregnancies.

\(^4\)Smart, supra note 2 sees liberal feminists’ preoccupation with the pursuit of equal opportunities for women through the mechanism of law reform as a legacy of the nineteenth century feminist tradition in which law was held up as the neutral arbiter among competing interests and the protector of the weak. That the Canadian feminist and "pro-choice" campaigns of the 1970’s and 80’s had similar expectations of law is evident given their hope that the decriminalization of abortion would empower women with reproductive choice.
be prioritized over women's desire for self-determination. In this respect therefore, the liberal feminist agenda on abortion prevalent during the 1970's and 80's neither brought to light, nor fundamentally challenged, the ideas and beliefs manifested in the legal restrictions.

In more recent times it has become increasingly rare to find feminist literature on abortion which so isolates the issue from its social context and the attitudes surrounding it. Kristin Luker's much quoted work brings us a step closer to the realization that, "[p]ositions on abortion depend on broader commitments and in particular on contrasting views on the place of motherhood in women's lives." Analyzing current arguments made by the pro-choice and "pro-life" or "anti-choice organizations as to the respective rights of women and foetuses, she comes to the conclusion that they merely reflect the continuing conflict over the social construction of women as child-bearers. Whilst I can therefore identify with her fears of feminists thinking enough has been done through abortion legalization, I prefer to consider this as reason to develop more challenging feminist campaigns, than as reason to modify our claims in the hope of capturing some "middle-ground" in public opinion, as Luker advocates. For her the only way out of the current impasse is for feminists to demand and anti-abortionists to accept, rights of access to abortion in limited situations, such as rape, incest, and threats to life or health -

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5Although the liberal feminist demand to have women's right to reproductive choice respected by law did end in the decriminalization of abortion, as shall be seen below, the limited terms of the "right to choose" campaign might be said to have brought about the mere removal of an explicit form of women's legally mandated oppression in the reproductive sphere.


7Ibid., at 238.
termed by others as "woman as victim" scenarios - as opposed to those in which women are simply acting to take some essential control over their own destinies. Although I would agree that feminists now need to work at influencing public consciousness on abortion - especially on what its restriction means to women - I am unconvinced that this can be achieved by accepting the necessity of employing external observers to judge when our reasons for abortion are valid and when they are "selfish or petulant."

A more inspiring approach is that of Sheilah L. Martin, whose analysis is conducted within the specific context of Canadian law. For her the recognition that "the allegedly natural role of women as wives and mothers has been reinforced by numerous laws", is evidence that law alone cannot provide the whole solution to the denial of women's autonomy over abortion. Rather, she sees law as part of the problem to be addressed in feminist strategies. This is an especially pressing concern since, although other justifications (such as women's biological difference) are often asserted in support of the legal restrictions imposed, law demonstrates a consistent "preference for male interests" in this sphere. Yet, I find it extremely difficult to reconcile this point of view with her retained optimism for using law to ameliorate women's

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8Janine Brodie, "Choice and No Choice in the House" in J. Brodie, J. Jenson & S.A.M. Gavigan eds., The Politics of Abortion (Toronto: Oxford University Press, 1992) at 61. Brodie comments that on the evidence of recent opinion polls, the vast majority of Canadians think abortion should be allowed in the so-called "hard cases" of rape, incest, the woman's health and fetal deformity, but restricted in the "soft cases" relating to socio-economic or lifestyle factors.

9Luker, supra note 6 at 238.


11Ibid., in this she adheres to a more radical feminist view, that state control over abortion "has traditionally served to protect the appropriated interests that men have consistently asserted over women's bodies."
disadvantaged reproductive situation and to promote "social equality". Indeed, I consider her belief that the equality and liberty guarantees laid out in the Charter of Rights and Freedoms can benefit women "in real and symbolic ways", to be more representative of the ideal rather than the reality, given the post-Morgentaler experience of many Canadian women. As shall be seen below, the Supreme Court's endorsement of women's reproductive decisions as deserving of Charter protection, did not put an end to ideological characterizations of women and their demand for abortion rights, which seemingly continue to influence how legal institutions treat abortion. Thus, while Martin's work, in portraying law as "part of the problem and part of the solution", reflects some advancement in feminist understandings of the relationship between law and the denial of women's reproductive choice, her analysis falls short of specifying what else, apart from law-based strategies, might be necessary to transform the latter.

A more sophisticated "equality" approach is that of Frances Olsen who advocates that feminists develop an equal protection analysis to reveal the "gender dimensions" of the abortion debate. Her critique of the prevailing United States "privacy" approach to abortion reflects

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12Ibid.

13Ibid., at 36, Martin contends that S15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter] - a general interpretive statement that all Charter rights are to be enjoyed equally by men and women - might be applied by the courts in enhancing women's access to abortion currently enjoyed under the S7 guarantee, which protects "life, liberty and security of the person".


the concern that "issues of gender inequality and of the devaluation of women pervade the entire field in ways that have not been adequately examined." In her opinion, restrictive abortion laws "have something to do with women's relative lack of power" and also undermine women's aspirations to equality, since they impose upon women burdens that men do not have to bear. Therefore, she suggests that what might be described as a substantive equality analysis might be applied to require law to accommodate women's reality when faced with an unwanted pregnancy and to put an end to their devaluation, which abortion restrictions arguably facilitate. However, what I find more appealing about Olsen's thesis is her assertion that open acknowledgment of the gender politics necessarily involved in the legal treatment of abortion will make it much harder for an "ethical and humane" society to restrict women's access to it in any way. While such a strategy might indeed appear exploratory at first, I believe it gives feminists some important insights into the problems still faced after abortion legalization, and could be developed to provide us with some successful form of resistance toward further incursions upon women's abortion autonomy.

16Olsen regards the characterization of abortion rights as part of the constitutionally protected right to "privacy", as problematic for those concerned with improving the role and status of women. On the one hand, it leaves women poorly situated to demand public funds for the exercise of such rights, and on the other, it may "reinforce sexism by treating childbirth and abortion as central to women's identity as women". Ibid, at 112-13. It might be argued that the "liberty" approach favoured by the Supreme Court of Canada in Morgentaler is subject to the same criticism, as it did not make it incumbent upon the state to provide either the funds or the facilities for women's exercise of the right to choose.

17Ibid., at 108.

18Ibid., at 118-124.

19Ibid., at 135.
Radical feminists: Abortion Law As Male Control

The problems suffered by women under the legal restriction of abortion are a focal point for radical feminist analyses which see law as "inherently patriarchal and the paradigmatic representation of male values". Informed by the notion that laws regulating reproduction have traditionally served to protect men's interests in women's reproductive capacity, and to reinforce patriarchal control over female sexuality, their distrust in law to resolve such problems seems dictated from the outset. Indeed, while some would acknowledge that women's freedom to terminate an unwanted pregnancy has been increased as a result of legal developments, many still believe that law is still implicated in women's continued subordination in this sphere. For Catharine MacKinnon law is itself a form of male power which serves to maintain the subordination of women by institutionalizing, rather than redressing the inequality emanating from women's different reproductive potential. Though such a theory may seem quite tangible now in light of the legal backtracks suffered by women after abortion decriminalization, the "despair and powerlessness" it brings to feminist work is something we can ill afford at this stage. As Gavigan comments, "an approach which stresses the paramountcy of transhistorical

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21See for example, Catharine MacKinnon, "Reflections on Sex Equality Under Law" 100 Yale Law Journal 1280 at 1300-01, who contends that legal developments in the treatment of abortion in the United States have not proved wholly beneficial for women's exercise of true reproductive choice, and that the courts' reliance on the privacy doctrine has been a major factor in the continued denial of abortion freedom for poorer women.

22MacKinnon thus appears to view women's reproductive capacity as an occasion for their oppression.

male domination to explain both the form and content of law over the ages offers us very little to work with.\textsuperscript{24} If as radical feminists believe, "law sees and treats women the way that men see and treat women",\textsuperscript{25} little else is required to understand why dominant interests (in their opinion, those of men), become enshrined in the law and why, in being so, they cannot subsequently be removed. On the other hand, an understanding of law's historic denial of women's reproductive autonomy as something more complex than the simple exercise of male domination, gives feminists some lee-way with which to challenge and transform it.

**Socialist Feminist Developments**

A welcomed advance in recent socialist feminist literature, is the recognition that the substance of any abortion regulation is a reflection of those representations and understandings of the issue which have gained dominance.\textsuperscript{26} Most inspiring is the approach of Janine Brodie, Jane Jenson and Shelley Gavigan, who challenge the characterization by feminists over the past two decades of the abortion issue as a question of women's "rights". For them it is rather a question of the particular "social meanings" attached to the "objects of regulation", namely women, their social roles, their access to self-determination, and more recently their relationship


\textsuperscript{25}Catharine MacKinnon, "Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence" (1983) 8 Signs vol. 2 635 at 641.

toward the foetuses they carry. In thus analysing the "meanings systems" to that inform the
treatment of abortion in legal forums, they provide a more useful understanding of how some
meanings - those of most powerful social actors and institutions - dominate by silencing and
marginalizing other interpretations. It is because feminists and pro-choice activists have not
so far acquired the necessary political strength to challenge "the representations of earlier
organizers of the issue", that they have not yet succeeded in having the issue formulated in the
terms of their discourse in the legal arena. What I find most compelling about this approach is
that, unlike the others described above, it provides great scope for feminists to devise more
analytical critiques of abortion regulation, which their concentration upon legal reform and
"rights" to abortion has hitherto precluded. More importantly it urges us to question the role of
law in prioritizing certain representations of the issue over others, and to examine the
mechanisms through which it facilitates the dominance of particular ideas and beliefs about
abortion. It also encourages us to consider the possibility of other methods of struggle in and
around law apart from the pursuit of legal reform, and to see law as a site of political
struggle, in which we must begin to promote feminist discourse.

27 Brodie, Gavigan & Jenson eds., ibid., at 7. The concept "meaning systems" as used by Brodie et al.,
describes the analytic tools of discursive construction which help to define our social roles and the possibilities for
change. Whilst "characterized by some as 'discourse' and others as 'ideology' ... "meanings systems" weave
together everyday statements, linguistic terms, categories and beliefs - the ideas which play a crucial role in defining
how people come to understand their world."

28 The explanation of the power relations at work in defining the meanings attached to abortion given by Jane
Jenson, "Getting to Morgentaler" in Brodie, Gavigan & Jenson eds., supra note 8, at 19 deserves quotation:
While analysis of the social construction of meaning is necessary to understand policy outcomes,
meaning systems are never completely autonomous of the unequal social relations which inevitably
exist in a society in which the relations of production, in the family and between men and women
- among others - structure power... a power relationship is at the root of all political discourse.
All actors do not exercise the same power over the meaning systems which organize political
debate.
The understanding that law contributes to women’s oppression in reproductive matters in a subtle and indirect way, is prevalent in the work of Shelley Gavigan. She looks to the history of, and the specific changes in the legal prohibition of abortion in Canada in order to assess how law has been not simply outwardly coercive, but also "ideologically oppressive" to women. In her concern with articulating how law can be a more effective site of feminist struggle, Gavigan advocates an approach which recognizes that, just as the forms of law’s contribution to women’s oppression in the abortion context have changed over time, so have forms through which it can be challenged. Thus, whilst legal reform and the pursuit of rights claims may have benefitted women at one stage, such strategies cannot always be guaranteed to produce positive results. According to Gavigan then, we need to focus upon how law perpetuates the denial of women’s reproductive autonomy in the present context, so as to better illuminate whether and how feminists can use law to the opposite effect. While I am therefore drawn by her entire argument, I find her analysis of the post-Morgentaler era in Canadian abortion history particularly helpful in prescribing what is required of future feminist strategizing on abortion. Gavigan recounts the difficulties experienced by many women in exercising the "right to choose" they had supposedly been granted upon decriminalization, suggesting that they attest to the "fragility of legal victories". For her this is an indication that feminists must look beyond law


30Gavigan, "Abortion Law in Canada" supra note 24 at 265.

31Shelley A.M. Gavigan, "Beyond Morgentaler: The Legal Regulation of Reproduction" in Brodie, Gavigan & Jenson. eds., supra note 8, at 117 [hereinafter "Beyond Morgentaler"].

32Ibid., at 120.
to the extra-legal, cultural and political arena if we are to make any further progress in this struggle, or to have any success in contesting the negative ideological influence of anti-abortion campaigns, which threaten to further erode the limited legal gains we have already made.33

Another sophisticated socialist feminist approach to the current abortion debate is that of Rosalind Petchesky, who sees its persistence as a reflection of an ongoing conflict over broader social and ideological issues particularly, changes in family, gender, and sexual relations and their "cultural meanings".34 Writing in a context where women’s abortion choice has become more fragile than at any time since its legalization in the United States, (due to political inroads made upon the effects of Roe v. Wade35 and the ascendancy of "fetal politics"), Petchesky questions the extent to which this may be attributed to the resurgence of "patriarchal conceptions of women’s roles as child-bearers, wives and mothers."36 Taking this as evidence that but little progress has been made in the struggle for reproductive freedom, she undertakes an examination of the political ideas that have informed previous feminist mobilizations on the issue. In analyzing the implications of the earlier reliance on the "right to choose", she looks for an explanation of why, despite having secured legalization of abortion, women’s reproductive

33Ibid., at 121-22.
34Petchesky, supra note 25 "Preface" at (ix).
35Several United States Supreme Court cases have approved state legislation and policies to remove or restrict public funding of abortion services. See Harris v. McRae, 448 U.S. 297 (U.S.S.C., 1980); Webster v. Reproductive Health Services, 492 U.S. 490 (U.S.C.C., 1989). Petchesky, ibid., at (xvii) characterizes these and increased anti-abortion activism as "a response to certain real dimensions of women’s empowerment in the last twenty years that many people find threatening."
36Ibid., at (xxi).
control remains so vulnerable to such attacks. For Petchesky, because rights "are claims, by
definition, staked within a given order of things", they do not provide feminists with a very
effective means of redressing the historic denial of women’s reproductive control or, of
challenging the existing social relations which help sustain it. Rather, in isolating abortion
regulation from its broader social and cultural context, they do nothing to attack the dominant
patriarchal ideologies which she argues, continue to inform it. That many women still experience
problems in seeking to exercise their "right" to abortion, due to poverty as well as wide social
acceptance of ideological notions of their "maternal duty", is for her an indication that beyond
rights claims we now require a "critical deconstruction of the meanings that imbue current
abortion discourse. It is this aspect of Petchesky’s work that I find most inspiring, in that
it encourages us to probe deeper into the legal and the extra-legal discourse surrounding abortion
in order to identify those values and beliefs which presently threaten women’s exercise of
abortion choice. At the same time I believe it provides feminists with an incentive for continuing
the struggle for reproductive freedom by developing new and necessary challenges to those

37Ibid. at 7, the liberal right to choose merely says that women must decide on abortion because it is their bodies
that are involved, and because they have primary responsibility for the care of any children born.

38The "right to choose", conceived in terms of a privacy (or liberty) guarantee, is also vulnerable to political
manipulation as it does not place any obligation upon governments to provide the financial means necessary to
enable exercise of choice.

39Petchesky, supra note 25 at 377.

40Ibid.

41My account of Petchesky’s extensive work on abortion is necessarily brief, but it is to be noted that she
develops several complex ideas for enhancing women’s exercise of reproductive freedom in the United States. Of
particular interest is her reconceptualization of abortion as a positive "social need" to be provided for all women,
in contrast to the current United States and Canadian formulation of it as a negative, individual "privacy"/"liberty"
right. Petchesky’s re-definition of abortion as "a positive benefit that society has an obligation to provide to all who
seek it, just as it provides education and health benefits" would make it incumbent upon governments to provide
adequate abortion facilities and public funds to enable all women to partake of them. Ibid., at 391.
oppressive "meanings" or representations of women, which dominate the issue in legal and cultural spheres. It is my contention however, that such a project might benefit greatly from a specific ideological analysis of how women have been historically constructed both in laws restricting abortion and, in the justifications asserted in support of them. Despite the many legal and social developments which have characterized this debate since the inception of the initial criminal prohibition in nineteenth century, there is an all too frequent recurrence of certain issues for them to be discounted in the present context. It is in the quest for new approaches to present instances of the denial of women’s reproductive control that the concept of ideology may prove essential, since it demands that we adopt a more critical stance via the justifications advanced in support of them and, towards law itself. In particular, ideological analysis of abortion regulation past and present, requires us to investigate the role of law in reflecting, and thereby reinforcing dominant ideologies - those ideas about who women are and what abortion means, which make it difficult to achieve any substantive change in this area.
Much has been written on the nature of ideology and of law itself. My investigation here however, will be restricted to analyzing the complex relationship between the two, for the purposes of showing that an understanding of how ideologies inform law and how law in turn further legitimates them, might expose the ways in which law can be a more effective site of feminist struggle. Gavigan's work is most illuminating on this point. For her the fact that feminists have not achieved all we need or want through the strategy of identifying law as a major source of women's oppression, and subsequently engaging with it to reform its content, is a sign that we need to develop more complicated analyses of the processes through which law maintains relations of dominance over women. It is when feminists move beyond traditional characterizations of law as either "a neutral arbiter between competing interests" or as a "hammer of male authority", and begin to understand it as both "a product of and a reproducer of the existing social order" that our most important strategic discoveries might be made. In Gavigan's view then, there are two levels of inquiry required to expose law as a site of ideological struggle for feminists. First, we must question the extent to which law

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42The concept of ideology has been derived from Marxian thought, referring to a "legitimating mechanism" which distorts relationships of power and subordination, making them appear natural and inevitable, and unsusceptible to change. The term was originally used to describe the way in which the interests of the ruling class are represented, under capitalism, as the interests of all members of society, thereby hindering members of subordinate classes from seeing where their real interests lie. Yet, feminist theorists have adopted fresh insights into the concept, incorporating gender as a basis for the generation of ideology. In this thesis I adhere to the recent socialist feminist reconceptualizations of the concept which see ideology as more complex than distortion or "false consciousness", focussing rather upon how gender-based ideology in particular, presents "biology as destiny" for women, and how this operates to justify the continued subordination of women in various spheres.


44Smart, The Power of Law supra note 2 at 3.

45Gavigan, "Beyond Morgentaler" supra note 31 at 120.

46Ibid., at 121.
reflects and incorporates ideas and beliefs external to it, and secondly, we must seek to identify the ideological nature of law and legal doctrine itself.\(^47\)

An analysis at the first level gives way to the important discovery that ideas and beliefs about social relations, such as those on the appropriate role of women (gender-based ideologies) which have already been to some extent legitimated by appeals to the "natural",\(^48\) are often imported into law through various means. The courts have an especially important role in this. Not only are they actively involved in dispute resolution, but their judgements also implicitly shape and support ideas about social relations.\(^49\) For one, interpretation of legal rules and principles provides judges with tremendous scope for deciding cases according to whatever values they perceive as most worthy of protection in any particular case. Moreover, quite apart from the rules and principles they apply, judges' assessments of the general societal values and beliefs regarding the dispute at hand - what Gavigan terms "ideological thought" - act as a vehicle for the incorporation into law of other external, dominant ideas about social relations.\(^50\)

\(^47\)Gavigan, "Law, Gender" supra note 43 at 290.

\(^48\)Betsey Wearing, The Ideology of Motherhood: A Study of Sidney Suburban Mothers (Australia: Allen and Unwin, 1984) at 21 contends that applied to women ideology presents certain characteristics as biologically determined and therefore "inevitable". Michele Barrett & Mary McIntosh, The Anti-Social Family (London: Verso, 1982) at 27 note that ideas about women and their appropriate role in social life are most often justified by reference to their unique biological capacity to bear and suckle children. In being so based on "appeals to the natural", we are more easily seduced by them.

\(^49\)Gavigan, "Law, Gender" supra note 43 at 284. Dominant ideas about the women and their proper role are incorporated into law by those who hold law-making power in our society: by politicians in the Parliamentary arena and by judges in adjudication, who are predominantly white, middle class males.

\(^50\)Perhaps the best example of this in the Canadian abortion context is found in statements about "pregnancy as fundamental part of women's nature" echoed in the Quebec Court of Appeal in Tremblay v. Daigle (1989) 59 D.L.R. (4th) 609 at 613. For a discussion, see Chapter Four infra at 109-11.
Yet, despite all this the ideological content of judicial pronouncements is often overlooked by judges and the public alike which, as Katherine O'Donovan remarks, leaves the courts with even greater capacity to exert ideological influence. As shall be discovered below, it is perhaps above all the belief that law (and judicial decision-making in particular) is a mere reflection of "commonsense" notions of how things should be in society, that denies our own capacity to think of social relations in anything other than their dominant and legally sanctioned terms.52

This leads us to the second level of inquiry, where an "in-depth analysis of legal ideals, principles and doctrine" might prove essential in exposing the ways in which law itself exercises ideological power, and how it consequently operates to entrench dominant ideas further in public consciousness.53 Analyses of the ideological form of law conducted at this second level, might enable feminists to identify the means through which law is able to maintain the dominance of particular ideas and interests. Through an expressed commitment to concepts such as "equality" and individual "rights",54 the formal structure of law - those principles upon which its legitimacy rests - effectively empowers it to "shape and constrain the content of collective thinking about the social structure and the possibilities and necessity for change"(emphasis added).55 Because law purports to be the embodiment of the values of justice and fairness, it


52Martin, supra note 10 at 37.

53Gavigan, "Beyond Morgentaler" supra note 31 at 122.

54Faith in these principles has become particularly strong in Canada given the enactment of the Charter in 1982, the guarantees provided by which purport to apply equally to all persons.

55Gavigan, "Law, Gender" supra note 43 at 290.
serves an important ideological function. Indeed, it is our very faith in the neutrality of law and our beliefs about judicial impartiality in particular, which actually enables law to act as a "significant reinforcer of ideologies".\(^5\) Thus, when feminists begin to see law as more than just an outwardly coercive system which operates to oppress women (and which can therefore be used to improve women's situation), we might come to identify its ideological nature - the "internal aspect" of law, which O'Donovan contends, makes it appear fair and just in individual consciousness.\(^5\)

In her opinion, "[t]he internal aspect of law is its acceptance by individuals as natural and necessary in the form it takes and the values it expresses. It is internalized and most people are unaware of its contingency" (emphasis added).\(^5\) Whilst in conventional thought law is regarded as immanent and embedded in the seemingly "natural", feminists must seek to challenge and dismantle these mistaken assumptions, "mak[ing] explicit the implicit content and premises of law."\(^5\)

Drawing together the insights gained from both levels of analysis then, feminists may come to recognize the importance of both exposing the ideological content of law and of challenging its claim to objectivity and neutrality. The understanding that when dominant ideologies,\(^6\) having already some "legitimizing component"\(^6\) or "kernel of truth"\(^6\), are

\(^{56}\)Gavigan, "Law, Gender" supra note 41, at 295.

\(^{57}\)O'Donovan, supra note 51 at 200.

\(^{58}\)Ibid., at 19-20.

\(^{59}\)Ibid.

\(^{60}\)Roger Cotterell, The Sociology of Law: An Introduction (London: Butterworths, 1984) at 121, describes these ideologies as "systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, religion and politics and numerous other matters [which] provide certainty and security, the
incorporated into law they are thereby given a further "naturalness" and seeming inevitability which makes us more committed to them, demands that feminists address not only the ideological content of law, but also the ideological nature of law and legal doctrine itself. Abstract legal principles such as "equality" and "rights" which have been adhered to by feminists in their struggles of the past, have themselves contributed to the acceptance of law as neutral, objective and as somehow "fair" in the consciousness of most people. It is thus understandable how law, in incorporating society’s dominant ideologies, it makes them "virtually unassailable". Because many ideas about law - its inherent objectivity and fairness - appear self-evident even to feminists, we have neglected to examine its political role in incorporating and prioritizing certain ideas over others, or to recognize the ideological power it exercises in naturalizing us to particular ways of thinking about social relations. Thus, despite the apparently positive legal changes already secured by feminists, dominant ideas may still be written into law through legislation and judicial discourse, and reinforced in this way without sufficient reflection. It might be argued therefore that the implications of this for feminists’ engagement with law in the abortion context are immense, especially when it is considered that "law is a site for struggles over 'meanings'" which it will be seen, feminists still do not control.

65 Gavigan, "Beyond Morgentaler" supra note 31 at 123.

66 Cotterrell, supra note 60 at 121.


68 Gavigan, "Law, Gender" supra note 43 at 189.

69 Gavigan, "Law, Gender" supra note 43 at 290, adds that this "does not mean that people are duped but rather that something 'real' is at times gained or reflected in the ideology."
It is when we take this understanding of the complex relationship between law and ideology, and apply it to the context of abortion law that we might better appreciate the subtle ways in which law itself facilitates the continued dominance of particular ideas or meanings about women and their relation to motherhood. Betsey Wearing has done extensive research on the concept of the "ideology of motherhood" as it relates to women’s role in child-rearing. In her opinion it reflects a set of ideas and "mythical assumptions about women’s 'maternal instinct'", which operate to legitimate the sexual division of labour within the (heterosexual) family, and to restrict women’s ability to compete equally with men in the market and political arenas of society. In presenting child-bearing and the particular social practices associated with motherhood as women’s "natural" destiny, rather than a cultural construction, it serves to obfuscate the reality that these ideas actually represent dominant interests, and help "perpetuate gender relationships of power" generally unfavourable to women. Carol Smart’s contention that law, along with other disciplines, has historically operated to attribute certain identities to different women in the realm of motherhood, is in my opinion an indication that this ideology may have occupied a particularly privileged position in laws regulating abortion. It is upon such an understanding that I wish to conduct an analysis of the earliest prohibitions and the legal

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60Wearing, supra note 48.
61Ibid., at 11.
62Ibid., at 16.
63Carol Smart, "The Woman of Legal Discourse" (1992) 1 Social and Legal Studies 29 at 37.
developments in this field paying particular attention to the dominant "ideology of motherhood".\textsuperscript{70} Throughout this thesis therefore, I want to examine how an awareness of the dominant ideology of motherhood underlying laws and judicial discourse on abortion and, of the ideological power exercised by law itself, leads us to look at law in different ways and opens up new possibilities for feminist strategizing. In exposing us to other ways in which to focus upon law, apart from the traditional aim of legal reform or the pursuit of rights claims, it might furthermore help assert the power of feminism in promoting an "alternative version of reality to that manifested in law".\textsuperscript{71}

An examination of how Canada’s first abortion prohibitions were informed by the ideology of motherhood will help highlight the continuity of oppressive characterizations of women in legal forums and perhaps provide us with a better understanding of the problems we now face, having already secured the legalization of abortion. Charting the development of reproductive politics of the past might also assist us in revealing the socially constructed nature of present conditions, and uncover new possibilities of transforming them through conscious political strategy.\textsuperscript{72} Upon the premise therefore, that only through adopting a critical perspective towards our history can we begin to understand the nature and implications of the our current struggle, I want to first explore those ideological understandings or, "meanings",\textsuperscript{73}

\textsuperscript{70}Although other dominant ideologies, such as the those relating to the family, to children and to fatherhood, have undoubtedly influenced the legal treatment of abortion to some extent, I believe that the dominant ideology of motherhood may have had a particularly important impact upon both the differential treatment rendered to variously situated women and, upon the development of the "therapeutic" abortion law over the course of the last century.


\textsuperscript{72}Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 Journal of Law and Society 62 at 70.

\textsuperscript{73}Brodie, Gavigan & Jenson eds., \textit{supra} note 8 "Introduction" at 9.
manifested in the first legal regulation of abortion in late nineteenth century Canada. It is hoped that this might enable Canadian feminists to appreciate better the nature of law's historic intransigence to our demands for reproductive control, and perhaps illuminate the nature of the response required.
CHAPTER TWO

THE DOMINANT IDEOLOGY OF MOTHERHOOD:
AN HISTORICAL PERSPECTIVE

The nineteenth century is a significant starting point in an analysis of the origins of those ideas influencing abortion regulation, since it was then that the first instances of state control of fertility, are known to have occurred.¹ According to the several authors who focus upon the control of fertility in North America during this period, the assertion of motherhood as the paramount feature of women's lives arose contemporaneously with the industrialization and urbanization processes of the mid 1800s, a central feature of which was the demarcation of separate and clearly defined spheres of activity for men and women.² With the mass entry of men into the newly emerging sphere of industrialized economic production and paid employment, the private, domestic realm of household labour and child-rearing was left to the exclusive supervision of women. The fact that women were systematically denied access to the "public" world of work and politics, of course meant that they had little choice but to accept this imposed domesticity. But the further legal restrictions that went along with it, most significantly those denying women's control over the decision of if, when and how often they should reproduce, seem to some extent to have been encouraged by other forces. In this section it will be seen how the development of certain ideas and beliefs about women's proper role in social


²Constance B. Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada" (1983) 3 Windsor Yearbook of Access to Justice 61. Backhouse remarks upon the fact that abortion was not prohibited in pre-industrial society, when the production of food, clothing and tools was accomplished by both men and women working at home and raising children simultaneously.
life, and of the social practices augmented by them (particularly those associated with ideas about "proper motherhood") helped solidify the organization of the new industrialized society. It will also be seen how these ideas gained legitimacy in popular understanding through being reinforced by members of the newly emergent medical profession and influential Christian leaders, and how simultaneously laws prohibiting abortion were enacted for the first time in Canadian history. Particular attention will be given to the suggestion that the repressive nineteenth century abortion laws arose within the context of a pervasive "cult of motherhood" which both defined women's relation to motherhood and helped to restrain their reproductive decisions within the terms of that definition.³

**The Nineteenth Century Cult of Motherhood**

In their work on abortion and birth control in nineteenth century, Constance Backhouse and Linda Gordon provide insightful analyses into how the "cult of motherhood" was a product of the material conditions and the matrix of relations under which women in the newly industrialized North American society lived. Here it will be argued that the ideological notions about women represented in the cult of motherhood were not only the product of oppressive social conditions and unequal gender relations, but that widespread social acceptance of these ideas and their reinforcement in legal forums actually operated to maintain these conditions of women's inequality and subordination. It is through such a recognition that we might begin to understand the significance of the timing of the abortion prohibition and of its relationship to the

³Ibid., at 62 and 78.
promotion of ideas about women's role as mothers by the highly influential medical profession and Christian religious leaders.

It is difficult if not impossible to understand the emergence in the nineteenth century of particular ideas about women's maternal role without referring to the impact of the dominant Christian Churches upon social attitudes and beliefs. Of the various public lectures and sermons extolling motherhood as woman's highest function and emphasizing the need for women to embrace their domestic role, many echoed the long held Christian belief that reproduction was not only women's destiny, but the justification for their very existence. It is not surprising therefore that attempts by women to control their reproductive capacities were subject to the severest Christian condemnation which, as Frances Olsen remarks, contributed to the general historical devaluation of women and made it much easier for the state to outlaw abortion. The efforts of the exclusively male clergy were built upon by members of the equally male-dominated medical profession, who asserted that the rejection of maternal responsibility was tantamount to the destruction of healthy society and interpreted abortion as an affront to "the proper balance between the sexes". Yet, despite the exaltation of maternity as woman's highest calling by religious leaders and the medical profession alike, women's acceptance of the inferior social

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4See Gordon, supra note 1 at 9. Gordon attributes the "woman-hatred" of the Christian tradition, which mirrored its fear of sexuality, to the belief that it was women and men's desire for them, that made men weak. This view is thought to have its origins in the teachings of St. Augustine and St. Thomas Aquinas, who claimed that procreation was women's only means of redemption for engaging in sexual intercourse, and which helps explain the lasting Christian (and especially Catholic) emphasis on motherhood as women's destiny.


6Backhouse, supra note 2 at 81. As shall be seen below, those physicians who vehemently and publicly opposed abortion proved to be the most influential interest group in the evolution of progressively harsher abortion laws during the mid to late 1800's.
status that went along with this role seems to have required some amount of legislative intervention. The point made by Kristin Luker, that fears about the falling middle-class birth rate, the publication of religious and medical articles lauding the maternal role and laws prohibiting abortion all appeared around the same time is not merely coincidental, requires us to look for some "common denominator" which might help explain the connection between these ideas and the legislative prohibition of abortion. In examining the relationship between the dominant ideas and practices giving rise to and supporting the nineteenth century cult of motherhood, and the inception of the first abortion prohibition I find the concept of a "dominant ideology of motherhood" most illuminating. In uncovering the subtle messages contained within and the dominant interests served by the cult of motherhood, ideological analysis might enable us to understand better its impact upon the development of the abortion law. Although there has been some recent dispute over the use of the term "ideology" itself, my research has shown that descriptions and analyses of the role of women which developed during the nineteenth century, generally define the ideology of motherhood as a particular social construction and representation of the institution of motherhood and the nature of women’s relationship to it. It is essential at this stage to examine more closely what is actually meant by the term "ideology of motherhood".

According to Linda Gordon, three identifiable components might be argued to sustain the

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7Kristin Luker, Abortion and the Politics of Motherhood (Berkeley: University of California Press, 1984) at 32.

8According to Betsey Wearing, The Ideology of Motherhood: A Study of Sydney Suburban Mothers (Sydney: George Allen & Unwin, 1984) at 16, ideology in this view is "the presentation of a culturally constituted structure, institution or characteristic as 'natural' or inevitable."
ideology of motherhood which originated in the nineteenth century. The first is the *biological* element which relates to the physical processes of pregnancy, childbirth and lactation; the second is the *social*, child-rearing aspect; and the third is the *ideological* component which built upon, and yet contained notions external to the first two. A consideration of each of these elements and their relationship to one another enables us to better understand the ideological underpinnings of the nineteenth century cult of motherhood described above. As Gordon contends, the distinction between the biological and social aspects of motherhood has become blurred in most industrialized societies. Indeed, it was women’s original biological closeness to infants which physically confined them to the home for certain periods, that served as the "natural" justification for the sexual division of labour instituted in line with the industrialization of North American society during the nineteenth century. Under relations of male supremacy women were systematically assigned almost exclusive responsibility for child-rearing and domestic tasks, whilst simultaneously being *defined* according to this role. This left their possibilities for participation in the social, economic or political spheres extremely limited. At the same time, men’s responsibility for raising children which they had shared with women in pre-industrialized society, soon became overshadowed by the newly emergent possibilities allowing them to work outside the home for remuneration, and to thus provide the material means of the family’s subsistence. In the newly industrialized economy women’s procreative

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9 Gordon, *supra* note 1 at 11.


11 The implicit assumption was that men could not do this work and that women’s biology made it natural to them.

12 Backhouse, *supra* note 2 at 62.
potential was regarded as evidence of their special child-rearing ability, which was considered to be implanted at the level of instinct. Their biological difference to men was not only symbolic of the different social responsibility they acquired towards their offspring, but also more importantly for the purposes of my analysis, it came to be equated with women's supposedly higher level of desire for parenthood. It is in this that we may identify the ideological element of Gordon's definition - that which building upon the biological processes of female reproduction, operated to intensify the nineteenth century cult of motherhood so much so that women's choices as to whether or not to bear children in the first place were to be eventually constrained by law. In what follows I will attempt to isolate the dominant ideas about women and motherhood which I believe have had most impact in institutionalizing the cult of motherhood through laws prohibiting abortion. It will be seen that it was not so much the actual reproductive capacity of women that dictated the legislative denial of their reproductive freedom, but the socially ascribed and ideological incidents of it which were elevated in and by law to the status of a normative code of conduct to which all "proper" women were expected to conform.

Betsey Wearing's work provides some interesting insights into the ideological aspects of both traditional and contemporary definitions of motherhood. Quite apart from mythical assumptions about women's "maternal instinct" and their "natural" propensity for child care,

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13 The force of these "biological determinist" arguments emanates from the idea which appeared to be accepted by all those who voiced opinions on the matter, including doctors and even early feminists, that the capacities required for parenthood were not only instinctive, but sex-linked.

14 Wearing, supra note 8. Although her research is conducted within the particular context of child-rearing practices in modern day Australia, I find her general conclusions to be reflective of the norms of proper motherhood propagated by dominant social actors in nineteenth century Canada.
ideological conceptions of motherhood actively reinforce certain norms and ideals expected of all mothers and simultaneously hold out the promise of status and prestige for those women who conform to them.\textsuperscript{15} Central to the maintenance of the motherhood ideology is the socialization of females to anticipate and prepare for motherhood from an early age.\textsuperscript{16} The emphasis upon the need for young girls to develop so-called "maternal" characteristics of nurture and self-sacrifice are reinforced so much throughout daily life that the image of women as childbearers above and beyond all else becomes ingrained not only in the recipients of this indoctrination, but also in society's whole understanding and expectations of women.\textsuperscript{17} When we reconsider then the society's expectations of women in nineteenth century Canada, reflected in the cult of motherhood, we see that the socialization of females under conditions of industrial capitalism, operated in conjunction with religious and medical proclamations on women's proper sphere to produce a situation in which "motherhood was to be forced upon women regardless of any choice they might have wished to make to the contrary."\textsuperscript{18} Placed in such a social context, the ideological and subsequent legal condemnation of abortion might be argued to have been almost a matter of course. Because abortion both practically and symbolically allowed women to opt out of child-bearing, it was held out as an outright rejection of those basic feminine qualities and of mothering role to which all "proper" women "naturally" aspired.\textsuperscript{19} Thus, any woman who

\textsuperscript{15}Ibid., at 17.

\textsuperscript{16}Gordon, \textit{supra} note 1 at 406.

\textsuperscript{17}According to Wearing, \textit{supra} note 8 at 21, therefore, a "gender-based ideology of maternity forms the core of women's natural vocation and is a definition of "woman".

\textsuperscript{18}Ibid., at 62.

sought it was not believed to be in her proper frame of mind and was therefore liable to exploitation by profiteering abortionists who were willing to sacrifice women's physical and psychological well-being to their own gains. Indeed, as Gavigan comments, this was one of the main reasons given by members of the medical profession for abortion criminalization. Implicit in this belief, that the long-term dangers to women of such an occurrence were of such great a magnitude that the law must step in to protect them by outlawing abortion, is the powerful normative assertion that women must mother in order to realize their true feminine potential. When it is considered then that this was an explicit justification for the implementation of the earliest anti-abortion laws, we might begin to understand better their significance as one of the "techniques by which women as child-bearers [were] assigned their place" during the nineteenth century.

To suggest that the inception of the legal prohibition of abortion served to reinforce the paramountcy of motherhood to women's lives is not to say that the ideology of motherhood did not have some persuasive value in itself. On the contrary, although the prohibition of abortion undoubtedly inhibited women's sexual freedom more than men's, and the coercion of

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20Ibid., at 90.


23It was, and arguably still is, women and not men who bore the most severe consequences of unintended pregnancy, thus it is in women's interest to avoid this occurrence
maternity had numerous ill-effects upon women's opportunities for participation in social life, many women were nonetheless encouraged to accept motherhood as their ultimate goal. Indeed, as Gordon writes, the belief that motherhood was a woman's fulfilment, had a material basis during the nineteenth century when motherhood was often the only creative and challenging activity left open to women. Accordingly, many women were seen to demand respect for this role. The relegation of women to the private, domestic sphere ensured that there were very few alternative vocations or sources of worthiness available to them. As a further consequence of the reduced workplace opportunities which the motherhood ideology helped perpetuate, women were necessarily dependent upon marriage for economic survival and, men's responsibilities for the children they bore provided an important pressure in maintaining the marital stability required for their continued support. Thus it would appear that the dominant image of women as mothers was internalized by some women for both their economic protection and self-esteem. Yet the fact that some women were able to identify with the basic precepts of the motherhood ideology for even such reasons, seems to have reinforced it further, branding those who continued to resist it as "unaccepting, bitter and slightly crazy" for "rail[ing] against nature".

That the women's groups in existence at the time made little headway in countering the influence of the ideology of motherhood in social attitudes or in law is unsurprising given their relative lack of access to the existing mechanisms of social power, in particular the institutions

24 Gordon, supra note 1 at 112.

of professional medicine and religion. Their consequent inability to challenge the ideas of doctors and Christian leaders on the role of women led them to the other extreme of celebrating these views and of elevating motherhood to the status of a "profession", emphasizing the moral superiority which it conferred upon women. As Angus and Arlene Tigar McLaren suggest, since many early feminist groups assumed that their best hopes for improved social and political rights for women lay in the claims they could make as mothers or future mothers, to them the idea of socially and legally acceptable abortion actually devalued motherhood and the claims they based around it. Thus, any claims made at this time to the effect that women must have some measure of control over reproduction were not framed in terms of demands for access to birth control and abortion, but rather in terms of women’s right to insist upon sexual abstinence from their husbands. The failure of first wave feminists to identify the problem as that of the imposition of the mothering role upon women and their inability to directly attack the subtle forces at work in that process, did little to discourage the legislative denial of women’s reproductive autonomy. Despite the fact that under nineteenth century conditions, pregnancy carried high health risks for all women and led to certain social degradation and poverty for unmarried women, the desire to escape it through abortion was met by the Canadian state with the enactment of a series of statutes criminalizing, at first the abortionists whose assistance they sought and subsequently, women themselves. It is when we consider more specifically the

26Backhouse, supra note 2 at 62.


28Backhouse, supra note 2 at 127. It is to be noted that even this limited demand for reproductive freedom was denied with the passage of the Criminal Code’s marital exemption for rape, enacted in 1892. This was only recently repealed in 1982. For a discussion of this see Martin, supra note 25 at 28-30.
ideological grounding beneath the various statutes prohibiting abortion that we may begin to see more clearly how they incorporated and supported dominant ideas about women's role as mothers.

Abortion Criminalization and the Ideology of Motherhood

In examining the inception of Canada's abortion law it is instructive to have regard to the course of developments in other jurisdictions, notably those in Great Britain and the United States, both of which have been noted to have heavily influenced the Canadian position during the nineteenth century. Indeed it was only after abortion (before quickening) was prohibited in England in 1803, that it became a criminal offence in Canada. The province of New Brunswick was first to follow the English lead on criminalization of abortion in 1810, enacting a statute similar to the English model in terms of the quickening distinction. During the 1840's all variation in the penalties administered, depending on the stage of foetal development at which the abortion was performed, was abolished and thereafter each province adopted its own Offences Against the Person Act, (based upon the 1837 English statute of the same title).

For further details of this phenomenon see Gavigan, "On Bringing on the Menses" supra note 21 and Backhouse, supra note 2.

Derived from ecclesiastical law, "quickening" term used to describe the point at which the foetus became infused with a soul, was adopted under both English and Canadian common law to differentiate between the seriousness of the offence committed through abortion. The distinction was maintained under the early statutory prohibitions, delineating two categories of sentences for the abortion offence.

Lord Ellenborough's Act, 1803, 43 Geo. III, c. 58.

An Act for the Further Prevention of the Malicious Using of Means to Procure the Miscarriage of Women, 1810 (New Brunswick), 50 Geo. 111, c.2.
From then up until 1869 the exclusive focus of the prohibition was upon those procuring the miscarriage of a pregnant woman.\textsuperscript{33} Upon Confederation of Canada however, when criminal law became a power of the Federal government and when the various provincial laws were consolidated in one federal statute, the \textit{woman herself} became liable for prosecution for attempting to induce her own miscarriage.\textsuperscript{34} Moreover, when the consolidated Criminal Code was enacted in 1892, the law was extended beyond even this, criminalizing "[e]very woman \ldots whether with child or not [who] unlawfully administers to herself or allows to be administered to her any drug or other means or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with the intent to procure miscarriage." (emphasis added)\textsuperscript{35} When the ideological foundations of this harsh and arguably nonsensical amendment are examined several rationales for it might be found. Perhaps the most obvious explanation for the initial expansion of the criminal sanction is to be found in the growing concern expressed by the medical profession, that women themselves contributed as much to the problem of abortion, since it was their demand for it that led to the breach of the

\textsuperscript{33}Some provinces, namely New Brunswick and Nova Scotia did take the lead before then in 1849 and 1851 respectively, making it a crime for a woman to procure her own abortion. It is suggested by Backhouse, \textit{supra} note 2 at 74, that in this the provinces followed the practice of the New York state legislature.

\textsuperscript{34}\textit{Offences Against the Person Act}, 1869, 32-33 Vict., c.20, section 59 applied to "every woman, being with child, with the intent to procure her own miscarriage."

\textsuperscript{35}\textit{Criminal Code}, 1892, 55-56 Vict., c. 29, section 273. This provision remained intact until 1953 when section 273(2) of the revised \textit{Criminal Code}, R.S.C. 1953-54, c.51, set out the liability of a woman seeking to terminate her pregnancy herself by referring to "every female person who, \textit{being pregnant}, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention." (emphasis added)
prohibition by others. Whilst, as has been noted by several commentators, in campaigning for the prohibition of abortion in the first place, the socially superior "regular" physicians were acting to further their own professional interests through penalizing the practice of abortion by their "irregular" competitors, the upsurge in abortion activity during the mid to late nineteenth century in utter disregard of the new law seemingly symbolized to doctors that more drastic measures were necessary to forestall women's rejection of their "maternal destiny". It might be argued that the clear intention expressed in the later statute, for the criminal sanction to apply to those women who thought they were pregnant when they were not and those who wanted to remove the possibility of a pregnancy before its existence was confirmed, reflected dominant ideas about motherhood being women's most important role in life. In actively punishing those women who showed any signs of daring to depart from it and deterring others from adopting a similar course, the harsher statute was an exercise in reinforcing ideological aspects of the cult of motherhood. While we can therefore take this as some indication of the

36 As noted in (1875) 8 Canada Lancet, a prominent medical journal of the day:

Whilst, however, we would wish to see the severest punishment visited on the guilty abortionist, we cannot forget that the mother ... is the chief criminal, either herself soliciting the performance of the criminal act, or submitting willingly to the influences of the seducer, that it should be performed.

37 Backhouse, supra note 2 at 78. Those physicians of the period who refused to perform abortions became known as the "regulars". The label served to distinguish them from the mostly female members of the emerging profession known as the "irregulars", who were willing to carry out this and other procedures aimed at helping women to control their fertility.

38 Ibid., see also Gavigan, "On Bringing on the Menses" supra note 21; McLaren supra note 27 and John Known, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 (Cambridge University Press, 1988) who writes of a similar phenomenon in England. The "regular" physicians in Canada - predominantly white, middle class males, as the principal advocates of criminalizing abortion are argued to have exercised most influence upon Parliament in its decision to introduce anti-abortion laws.

39 As Gavigan, ibid., at 297, suggests, this profoundly challenges any notion that abortion was prohibited in order to protect the foetus.
extent to which the dominant ideology of motherhood was incorporated and reproduced in Canadian anti-abortion legislation, what remains to be examined at this point in my analysis are the interests or social functions served by this.

When the statutory measures are considered in relation to the previous discussion of the ideology of motherhood, the practical consequences of its manifestation in the legal prohibition of abortion is better illuminated. In the first place, since the beliefs and practices associated with proper motherhood represented in the cult of motherhood were used to explain women's reduced workplace opportunities, the coercion of motherhood resultant upon the legal prohibition of abortion may be argued to have further justified and perpetuated women's exclusion from the sphere of paid employment. When it is considered that the prohibition therefore helped to further weaken the social position of women relative to that of men, we can see how other values and ideologies might also have been articulated through the ideology of motherhood and strengthened by its incorporation into law. In particular, as Gordon suggests, since new relations of production in industrialized society had operated to undermine the fathers' authority by enabling family members to become economically independent, state imposition of the motherhood ideology via the abortion prohibition appears to have also facilitated the re-assertion of the patriarchal control of husbands over wives and of fathers over daughters. Thus, in many ways the criminalization of abortion might be said to have helped maintain the circular relationship described above, between the cult of motherhood and the matrix of material conditions and social relations both giving rise to and, supporting it.

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40 Gordon, supra note 1 at 19.
In addition to this, the "ideological convenience" of confusing the "natural" reproductive capacity of women with the conditioning imposed upon them in this particular social context, which Sheilah Martin believes was manifested in the earliest legal regulation of abortion, cannot be overestimated. To begin with, it served to mask the issues of gender conflict and power relations involved in the struggle for control over women's bodies, which lay at the heart of the nineteenth century abortion debate. Secondly, it operated to encourage women into viewing their disadvantaged social (and legal) position as inevitable, leaving them feeling powerless to change it. As to the first of these arguments, the legislative denial of abortion as an option for women burdened with unwanted pregnancy, signified the removal of an important means of empowerment and, perhaps the only form of "self-defence" available to them in male supremacist social system. Indeed, Brodie et al. suggest that the "meanings systems" at work in these earliest debates on the legality of abortion were both a product of and, an important contribution to maintaining, the unequal social relations existing between the sexes. Thus, the particular ideological construction of motherhood reflected and further entrenched in

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40 Martin, supra note 25 at 26-27.

41 Ibid.

42 Ibid., at 24. Martin states, "[t]he regulation of reproduction of women's sexuality and reproduction is best approached as a fundamental arena of gender conflict in which women and men have competed for control of women's bodies."

43 Ibid., at 23. The patriarchal social organization which had developed in response to the processes of industrialization, and in which men occupied all the positions of power, could not possibly have been sustained had women been able to escape those incidents of their biology which kept them in a subordinate social and politically weak position. For Martin this explains why "allowing" women to assert rights to physical inviolability through the availability of legal abortion, would "threaten a patriarchal structure". Ibid at 24.

44 Brodie, Gavigan & Jenson eds., supra note 19 at 8.
the series of statutes criminalizing abortion during this period, might well be argued to have helped "maintain relations of dominance over women in part by defining the very meaning of those relations, as well as by institutionalizing the practices which restrain women."\(^{46}\)

As to the second point made by Martin, the construction of women as always potential mothers above all else inherent in the absolute prohibition of abortion, is some evidence of the law's fortification of the ideological erosion of the distinction between women's biological capacity and their supposed innate capacity and desire for motherhood discussed above. Such a recognition enables us to understand the subtlety with which the ideology of motherhood was manifested in the earliest abortion laws. In giving implicit acquiescence to the oppressive ideological assumption that reproduction is the "natural" role of women because of their unique child-bearing and child-rearing capacities, the legal restriction of abortion itself becomes taken for granted as equally "natural", or inevitable in the consciousness of most people.\(^{47}\) Yet, the realization that women's reproductive situation under the law is "never the result of biology alone, but is mediated by the surrounding social and cultural organization",\(^{48}\) requires feminists currently facing the problems outlined above, to begin to challenge the legal reliance upon "nature" or "maternal instinct" in maintaining the denial of women's abortion autonomy. In addition, it encourages us to examine further the many and varied ways in which the dominant

\(^{46}\)Jane Jenson, "Getting to Morgentaler" in Brodie, Gavigan & Jenson eds. *ibid.*, at 18.

\(^{47}\)According to Michele Barrett, and Mary McIntosh, *The Anti-Social Family* (London: Verso, 1982) at 35, "appeals to the natural are commonly made in resistance to social change".

ideology of motherhood manifested in abortion regulation subtly operated to oppress differently situated women during the nineteenth and well into the twentieth century.

**The Dominant Ideology of Motherhood as Differentially Oppressive**

Although the generalized nature of the above discussion of the ideology of motherhood is useful in providing an initial understanding of the very complex issues and forces at work in the earliest regulation of abortion in Canada, I believe that to accept it as indicative of the treatment rendered to all women at that time, would be both over-simplistic and, detrimental to the development of effective feminist approaches to the many diverse concerns currently held by different women in this area. Without a more specific analysis of how various women living in their own particular and dramatically different contexts, have been affected by the dominant ideology of motherhood, we are at risk of universalizing the oppression of the women with whom we most easily identify, whilst negating that of others. Realization of this danger commands that we now undertake a more detailed investigation of how the ideology of motherhood, through its acceptance in the social institutions of power and its perpetuation in

49In the past I have found that as a white, middle-class, English-speaking, educated woman researching in an area which has traditionally been dominated by women of a similar background to myself, I had great difficulty in even imagining that women who did not share my experience might have other interests and concerns alien to my own. I am not claiming to have overcome this difficulty in my work, or suggesting that it is ever possible to have complete knowledge of all other perspectives, but rather that it should always be the aim of feminist work (my own included), to further "the search for excluded points of view" (Martha Minou "Feminist Reason: Getting it and Losing it" (1988) 38 Journal of Legal Education 47 at 60) I believe that we cannot let the fear that we might misrepresent the oppressions and concerns of other women inhibit us from doing the preliminary work which may facilitate and encourage the telling of their own stories. Without addressing the differential oppressions suffered by diverse groups of women, feminist work will continue to be of limited value and as shall be argued in Chapter Five, infra note 60 and accompanying text, ignoring the race and class oppressions which many women suffer in conjunction with gender oppressions, merely serves to perpetuate the conditions giving rise to the former.
law, served to differentially oppress women variously situated in relation to it.

Only more recently have feminists analyzing abortion law begun to recognize the significance of the state's concern with reproducing the dominant race and class relations (in addition to that of maintaining gender hierarchy), reflected in these earliest measures. The concept of the dominant ideology of motherhood is central to this development in that, as Rosalind Petchesky suggests, it might well have been an influential feature in the development of contradictory state policies which dealt differently with the issue of fertility control, depending upon the social status of the women targeted. Her account reveals that policies aimed at controlling the sexuality of white, middle-class women and of increasing their child-bearing, were pursued contemporaneously with those directed at reducing the fertility of less privileged women. Although Petchesky writes about the effect of populationist policies and abortion laws on the experience of lower class women and women of colour in the United States, it is helpful to consider what her analysis might add to recent suggestions as to the implementation

50Petchesky supra note 48 at 74. She suggests that it is because hierarchically organized state societies, such as that of the United States (and arguably also Canada) are divided into dominant and subordinate classes and races, that state policies on the control of sexuality and population have a distinct class and race dimension. Her historical analysis on the development of such policies is helpful since events there are claimed to have had subsequent reverberations in the Canadian context. Nancy Chater, "Unexamined History Repeats Itself: Race and Class in the Canadian Reproductive Rights Movement" (1991) 33 Fireweed 44, at 49, writes that it is a fact of general knowledge that people of colour, immigrants and First Nations peoples in Canada, have been historically marginalized in the colonial and post-colonial capitalist economy and, are often working class or living in poverty. Roxanna Ng, "Sexism, Racism and Canadian Nationalism" in J. Vorst et al. eds. Race, Class, Gender: Bonds and Barriers (Toronto: Garamond Press and Society for Socialist Studies, 1991) believes that the growth of Canada as a nation state designed for the "superior" British settlers, was a product of and served to reinforce, the institutionalization of strong racist assumptions.

51Petchesky, ibid.

of such policies in Canada during the period under discussion.\textsuperscript{53} The general consensus among the few authors who have dealt with the issue, is that the same historical trends are decipherable here even if they have not been statistically documented or officially acknowledged.\textsuperscript{54} That such speculation even exists, requires that we conduct a critical examination of these policies, asking how they might have been applied in our own context. It is hoped that this will help illuminate the conflicting values inherent in, and various oppressions suffered under the dominant ideology of motherhood in late nineteenth and early twentieth century Canada.

Before beginning the analysis it must be acknowledged that any reference to "state" policies may rightly be considered problematic unless the usage of the term is clarified in advance. Several academics with whom I would concur, point out that viewing the state as a monolithic structure actively dominating our lives, is over-simplistic and ultimately unhelpful in understanding state power and how it operates to oppress certain groups of subjects and not others.\textsuperscript{55} Petchesky suggests that a more meaningful description of the state, is that of "a complex weave of multiple centres of power" which exert control over the economy and law, with different forces having more impact in different historical periods.\textsuperscript{56} Indeed, my own

\textsuperscript{53}For an account of the suggestions of government-funded sterilization abuse of poor, black and immigrant women in Canada during the late nineteenth century and, of present day instances of the exertion of medical pressure upon such women to be sterilized in conjunction with a request for abortion, see Chater, \textit{supra} note 50 at 55-56.

\textsuperscript{54}\textit{Ibid.}, at 46, Chater suggests that there were important correlations between the political acceptance of eugenist fertility control policies in early twentieth century Canada, and the movement advancing sterilization of "the unfit" which emerged earlier in the United States.

\textsuperscript{55}Shelley A. M. Gavigan "Beyond Morgentaler" in Brodie, Gavigan & Jenson eds., \textit{supra} note 19, and Carol Smart, \textit{Feminism and the Power of Law} (London: Routledge, 1989).

\textsuperscript{56}Petchesky \textit{supra} note 48 at 70-72
foregoing discussion of the institutionalization of the cult of motherhood in the nineteenth century, shows how the prominence of the medical profession at the time facilitated the incorporation of their views into laws prohibiting abortion. In this section it will be seen how the continued influence of doctors was instrumental in the administration of class and race-biased fertility control policies to working class, black and immigrant women, and how this was prescribed by the dominant political philosophers and population controllers of the time.

Petchesky provides insight into the way in which the ideal of controlling white, middle class women's sexuality was brought about concurrently with that of "purifying" the composition of the population, through the vigorous agency of the medical profession. She notes that it was only when white, middle-class women began to ask their doctors to perform abortions that there was such a severe political attack against it.\textsuperscript{57} The availability of legal abortion symbolically alienated the act of sexual intercourse from women's innate desire to reproduce, and the very idea of these "respectable" women resorting to it, confounded the conservative medical observers of the time. Indeed, their fear of the "horrific" consequences that would flow from such activity, seems to have been the prime motivating factor in their push for criminalization. The whole notion of the sanctity of motherhood, and the "maternal virtues" for which such women were praised by the profession, both idealized the restriction of sex to within marriage and, justified the imposition of any means necessary to ensure the continuation of "white patriarchal control over their (supposed) sexual purity."\textsuperscript{58} Constance Backhouse remarks that the same patterns of

\textsuperscript{57}Ibid., at 80-81.

\textsuperscript{58}Ibid., "Preface" at (xviii).
medical control were repeated in Canada in the early twentieth century, when the "regular" doctors here became concerned about the increasing numbers of married middle-class women seeking abortions, in spite of the fact that it had already been made illegal. This, contrasted with their apparent acceptance of the widespread practice of infanticide as an understandable response by lower class, unmarried women and domestic servants to their unwanted pregnancies, was in Backhouse's opinion, indicative of the medical profession's concern about the barrenness of the influential classes compared with the "hyper-breeding" of the poor.\(^59\) The decline in the middle class English birth-rate in Canada had already begun to cause anxiety, and this had been further inflamed by fears about the influx of non-British immigrants\(^60\) and, of how the fertility of these "subordinate" classes would impact upon the dominance of the white British settlers. Thus, in nineteenth century Canada, whilst all women seeking abortions were characterized as "unnatural mothers", white, middle class women in particular were labelled "inhuman" for shirking the responsibility "naturally devolving upon them",\(^61\) of propagating the dominant race, and thereby entrenching its political power.

Christine Ball adds to the analysis in the Canadian context by pointing out that, fuelled by the belief that the social order was inextricably connected with the sexual order, the medical profession's concern for class survival and maintaining social balance became channelled into

\(^{59}\)Backhouse, supra note 2 at 78.

\(^{60}\)Ibid., at 80. Most of the concern surrounded the numbers of Catholic Irish and French immigrants, who were renowned for their large family sizes.

\(^{61}\)Ibid., Backhouse quotes a prominent medical journal of the day, (1889) 21 Canada Lancet 217-8.
a framework of morality. In the prevailing climate of preoccupation with the fertility of "inferior status" women, and with the "social chaos" that might result from their sexual activity, it was not surprising that moral considerations of "appropriate female behaviour" soon seeped into medical discussions of "proper motherhood". It is instructive at this point to consider how these sexual norms reflected in the dominant ideology worked to oppress these women in a way different to that documented above of the imposition of the mothering role upon white, middle class women. The characteristics of "true womanhood" endorsed by the medical profession which included, as Susan Boyd states, "four cardinal virtues: piety, purity, submissiveness and domesticity", were not thought to be universally held among women. Rather, they served to inform the belief that only the women who exhibited such qualities could be proper mothers, and thereby dictating which women should occupy this role. The important corollary of this was of course, the idea that some women were not "fit" or deserving enough to be mothers. The reality that many lower class (mainly single) women who experienced debilitating poverty often turned to prostitution, seems to have been equated by the prominent doctors and philosophers of the time, with the belief that sexual promiscuity was an inherent character trait of these subordinate classes. Indeed, as Gordon comments, the standards of sexual morality having become so rigid in this era, all sexual activity outside marriage became identified with and often in fact led to prostitution as, the "marriageability" of such women declined leaving few alternative means of

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62Christine Ball, "Female Sexual Ideologies in Mid to Late Nineteenth Century Canada" (1986) 1 Canadian Journal of Women and the Law 324 at 330.

This indeed appeared to confirm the opinion that all women of this particular social status were liable to fail miserably as mothers. In addition to poor, white women, black women also suffered from similar sexual stigmatization, due to the acceptance by dominant groups of the stereotypical image held over since the days of slavery in America, of their alleged promiscuity. The assumption formed in contrast to "privileged notions of white, middle class women as mothers", was that these groups of women made "bad" mothers and hence, they should be encouraged not to reproduce.

Despite how contrived and unbelievable such representations of the sexual activity and unfitness for motherhood of non-white non-middle class women might appear to observers in the present, it must be remembered that the context in which they were being formed was one of absolute paranoia about demographic changes which were feared to threaten the supremacy of the ruling classes. It was also one in which during the poverty of the 1920's depression affecting mostly non-dominant groups, and the lack of education and career opportunities for women, served to both reinforce the ideals of the ideology of motherhood and, to emphasize the distinctions between those women who were in a position to emulate it and those who were not. As Roxanna Ng notes, the nineteenth century cult of domesticity was a standard which only white, middle class women could aspire to, since black and other non-British immigrant women were often forced by economic considerations to work outside the home, either in the service of

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64Gordon, supra note 1 at 22.

65Davis, supra note 52 at 25.

66Boyd, supra note 63 at 90.
of the middle-class or in low-skilled menial jobs. Furthermore, the extremely irregular nature of the working hours they had to endure made it even more difficult for them to adopt the traditional mothering role open to more privileged women.

It may be seen from the above discussion therefore that although, according to the dominant ideology of motherhood all women are deemed to want children, those who do not wish to, or cannot conform to its often unrealistic ideals are expected to forego motherhood, supposedly in the interests of the unfortunate children they might create. While this altruistic concern for the well-being of future members of society appeared to some extent genuine, given that as Ng documents, many British middle class mothers worked hard to enforce their version of "proper motherhood" and child-care upon other immigrant women, it does not in my opinion explain the drastic measures now believed to have been taken to actually inhibit the child-bearing of such women. The ideals of the dominant ideology of motherhood which emerged in and were reinforced through the major medical, legal and political institutions of the late nineteenth and early twentieth century, seemed rather to justify the implementation of eugenic fertility control policies devised "to ensure the white character of the nation."

Much has been written about the history of the movement for birth control in the United

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67Ng, supra note 50 at 19.

68Michelle Stanworth ed., Reproductive Technologies: Gender, Motherhood and Medicine (Minneapolis: University of Minnesota, 1987) at 15.

69Ng, supra note 50 at 19.

70Ibid.
States which, despite having evolved out of the demands of women seeking "voluntary motherhood", soon became dominated by "race suicide" theorists, who feared that the white elite would be overwhelmed (numerically and politically) if measures were not taken to halt the population increase of blacks, immigrants and working class poor. There is a shortage of such corresponding literature in the Canadian context, but Nancy Chater's recent work suggests that, though it is not so widely recognized, birth controllers here were heavily influenced by the eugenist orientations of their American counterparts. She notes that whilst women's groups themselves in the early 1900's agreed with the notion of "sterilization of the unfit", the implementation of such policies seems to have been effected through the agency of influential businessmen, academics, clergymen and of course, the medical profession. A.R. Kaufman, a contraceptives manufacturer known to have financed the sterilization of a number of his seasonal employees, is but one example of those Canadian eugenists who were able to gain institutionalized acceptance for the idea that birth control and compulsory sterilization performed on lower class and immigrant women, was the solution to the poverty, unemployment, housing experienced in their communities during the 1930's depression. The administration of such policies was ensured by the co-operation of the exclusively middle class medical profession, who appeared to accept the notion of birth control purely for its potential of reducing the numbers

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72 Chater, supra note 50 at 46-47.

73 Ibid., at 48 and 54.

74 This has been documented in detail by Angus and Arlene Tigar McLaren, supra note 27.
of the "socially inadequate". Indeed it seems to have been the exertion of medical pressure, which encouraged some black, poor and immigrant women to abort desired pregnancies and which often made them agree to government-funded sterilization, in conjunction with a requested abortion or, in lieu of alternative means of birth control.

From even this brief incursion into a hidden part of our history, it has become apparent that the dominant ideology of motherhood, in drawing distinctions as to which kind of women are "good" mothers and which are unsuited to this role, undoubtedly facilitated the implementation of widespread race and class-biased fertility control policies, even if it was not the prime motivating factor in their development. What is significant about this for the purposes of my analysis is, that no matter what their class and race dimensions, the result of such policies was the same for all women in that they were denied the freedom to control their own reproductive capacities. Indeed, the idea that women were somehow not to be trusted with decisions concerning the use (or non-use) to which their bodies were put in reproduction, appears central to state regulation of fertility during the late nineteenth and early twentieth century. In

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75This was the view espoused by Dr. W. Hutton, an Ontario medical officer and chairman of the Eugenics Society of Canada, at the trial of Dorothea Palmer in 1936 for the illegal distribution of contraceptives, quoted in McLaren, ibid., at 118.

76Doctors' preference for sterilization of these women over the use of other reversible forms of birth control is according to Petchesky, supra note 48 at 69, informed by the medical assumption that poor, poorly educated or non-English speaking women are unable to "manage" non-permanent forms of contraception.

77Ibid., at 81.

78Apart from the use of the criminal sanction, state control over reproduction can be achieved in other, more subtle ways in particular through the medical profession, which is itself closely monitored and regulated by the state. This point will be more amply demonstrated throughout the next Chapter when the system of "therapeutic abortion" will be discussed.
contrast to the treatment rendered to non-privileged women, white, middle class women might be argued to have fared quite well under the dominant ideology of motherhood, since their mothering practices and their supposed sexual purity were exalted and held up as a code for all women to emulate. Yet, the fact that they too were denied the freedom of choice in the matter of their own child-bearing, given the enactment of laws prohibiting birth control and abortion,\(^79\) suggests that such laws and the ideology informing them, did not evolve from an appreciation of their perspectives. In the last section of this Chapter I want to consider what the views of women themselves were on the external regulation of their reproductive capacity. Of particular interest is the response of those group of women whom the dominant ideology upheld as "ideal" mothers. The problem with this is of course how we can discover such views, especially due to the lack of written accounts by women themselves in the nineteenth and early twentieth century. An important resource that we do have however, is evidence of women’s resistance to the abortion laws during this period and of the risks many women took in aborting themselves or seeking out the services of illegal abortionists.

Shelley Gavigan has done extensive research on how some women\(^80\) in this period continued to attempt to control their own fertility despite the criminal sanction and the intervention of medical profession who sought to enforce it. She remarks upon the lengths

\(^79\)Davis, \textit{supra} note 52 at 25, notes that "[w]hile women of colour are urged, at every turn to become permanently infertile, white women enjoying prosperous economic conditions are urged, \textit{by the same forces}, to reproduce themselves." (emphasis added)

\(^80\)Gavigan, "The Abortion Prohibition" \textit{supra} note 1 and, "On Bringing on the Menses" \textit{supra} note 21. Gavigan does not identify the race or social class of the women to whom she refers, perhaps due to the failure of the archival evidence upon which she relies to relate such information. However, given that she focuses on those who were concerned with resisting the abortion prohibition, and on their reactions to the doctors who moralized to them on the wrongness of their actions, I would presume that she means white, financially stable women.
women were prepared to go to resist the legal prohibition, often enduring excruciating pain and risking their lives or serious damage to their health.\(^{81}\) This, in addition to the fact, documented by Gordon, that it was women themselves who invented most forms of birth control and abortion during the period under examination, gives us some idea of just how important they viewed the planning of their pregnancies.\(^{82}\) Common to all feminist accounts on the subject, is the claim that the nineteenth century abortion laws were not developed from an appreciation of the wishes, perspectives or demands of women. As Backhouse and Gavigan both note, women generally viewed abortion as a private choice to be exercised according to their own conscience without external interference, and they continued to do so even after the first wave of legislation.\(^{83}\) Furthermore, the expansion of the prohibition during the 1840s, when the concept of "quickening" was abolished in law, shows that little regard was had for the opinion often espoused by women that, the foetus was not "alive" until they could feel it move.\(^{84}\) Any notion of morality women may have had regarding the decision to get an abortion must, if considered at all, have been deemed irrelevant by the lawmakers of the time. Although the accounts of Backhouse and Gavigan demonstrate that women's widespread disobedience of these earliest laws was not met by prosecution as might have been expected, the very fact that abortion was criminalized at all was oppressive to women, in that it inhibited valuable research into the

\(^{81}\)Ibid., "On Bringing on the Menses" at 283-4.

\(^{82}\)Gordon, supra note 1 at 23-27.

\(^{83}\)Backhouse, supra note 2 at 129; Gavigan "On Bringing on the Menses" supra note 21 at 300.

\(^{84}\)Ibid. It has often been noted by both authors that many women did not even consider themselves pregnant until they had experienced foetal movement. Before this point they were in their own opinion, merely "irregular".
It is this knowledge that women themselves had little input in the inception of the abortion laws which profoundly affected their lives, and the awareness of the extent to which such laws were resisted which enables present day feminists to call into question the validity of the particular construction of women - the dominant ideology of motherhood - which has been demonstrated to inform nineteenth century abortion regulation. Although it cannot be denied that some women did identify with and internalize the dominant ideology of motherhood, it has been shown that this was only in fact a possibility for more privileged women. Yet, it has been suggested that white, middle class women’s acceptance of it might have been due to their limited opportunities for any alternative lifestyle in the newly industrialized society. Indeed, it seems to have been their own resultant exaltation of it that motivated their assumed responsibility for importing ideological notions of "proper motherhood" to poor, working class and immigrant women. Inhibited by such factors as this and women’s relative lack of access to social and political power in nineteenth century Canada, it was not until well into the twentieth century that feminists were able to launch an organized challenge to the legislative denial of women’s reproductive choice. In the next chapter I will attempt to demonstrate that although feminist struggles in this area have wrought some hard-won victories for women’s reproductive self-determination, the legal regulation of abortion continues to be informed by antiquated, ideological conceptions of motherhood which do not reflect what unwanted pregnancy might mean to women. A review of the processes which led to the development of legally established

[^Gavigan, "On Bringing on the Menses" supra note 21 at 310.]
"therapeutic exceptions" to abortion in 1969, and to its eventual decriminalization in 1988, will show that the legally sanctioned medical dominance over the administration of abortion, has allowed (and arguably still does allow) these oppressive, ideological representations of women to continue into the twentieth century. It will be argued that both the "medicalization" of abortion discourse, and the legalization of abortion itself, have only served to obscure the pervasive influence of the ideology of motherhood which is still operative in the denial of many women's reproductive freedom.
CHAPTER THREE

MOTHERHOOD AND CHOICE:
TWENTIETH CENTURY DEVELOPMENTS

Recognition of the dramatic changes which have characterized the legal regulation of abortion in Canada during the course of this century, from the statutory recognition of certain "therapeutic" exceptions to the original prohibition, to the complete removal of the abortion offence from the Criminal Code, seems to assure us that far behind us are the days when motherhood was to be forced upon women regardless of their own wishes to the contrary. Despite the difficulty we might have in placing trust in a legal system which has so long denied our autonomy in the matter of our own reproduction, as women we cannot help but revel in the fact that this injustice has at last been redressed by the highest Court in the land. Yet, without discounting the necessity of our past struggles with the law or the importance of the legal victories they have secured, the frequent and forceful assertion of interests and values seemingly incompatible with our exercise of such self-determination since decriminalization, has explicitly demonstrated that this issue has by no means been completely resolved in our favour.

The insights provided in Chapter Two, on how women have been denied reproductive autonomy in the past partly due to the incorporation of the ideology of motherhood in laws restricting abortion, demand that we question the impact of such oppressive constructions of

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women in the current debate. Following Shelley Gavigan’s claim that we need to understand the
different forms of women’s oppression in different historical contexts and the nature of law’s
contribution to it before we can confront the problem of how to change it,\(^2\) I want to examine
how the ideas informing the reform of abortion regulation\(^3\) have in themselves facilitated the
continued denial of women’s agency over abortion decision-making. The abortion prohibition
may have finally been dismantled, and the ideology of motherhood originally giving rise to it
may no longer be explicitly embraced in law, but as Brodie, Gavigan and Jenson contend, the
abortion debate is perhaps now more than ever, a reflection of the social meanings ascribed to
women, their role in social life and more recently, their relationship to their foetuses.\(^4\)

**Mandatory Motherhood and the Medicalization of Abortion Discourse**

Women in Canada have witnessed many, mostly positive changes in abortion regulation
since the harsh days of the nineteenth century, when the criminal sanction prohibiting the

\(^2\)Shelley A.M. Gavigan, "Abortion in Canada: What’s Law Got To Do With It?" in Heather Jon Maroney &
Meg Luxton eds., *Feminism and Political Economy: Women’s Work, Women’s Struggles* (Toronto: Methuen
Publications, 1987) 263 at 264 [hereinafter "Abortion in Canada"].

\(^3\)By "regulation" I mean more than simply the implementation of legislation dealing with abortion. There has
been an absence of any specific abortion law in Canada since 1988, but women’s exercise of autonomy in abortion
decision-making has arguably still been affected, for example, by the policies of several provincial governments who
have since restricted medical insurance coverage to all but "medically necessary" abortions. Furthermore, as will
be seen later in Chapter Four, the judicial statements and the reasoning of the courts in the recent abortion injunction
cases are very significant indicators of the extent of reproductive freedom currently enjoyed by women and, of what
we can expect from future regulation.

termination of pregnancy in all circumstances attempted to constrain them within their allegedly "natural" roles as wives and mothers. Whilst the twentieth century gave rise to the recognition that women's mental and physical health needs might take precedence over their maternal destiny, the state continued throughout to exercise enormous influence over women's reproductive lives via the medical profession. In this section it will be seen how the history and the content of Canada's first permissive abortion legislation, left it inadequate to challenge those dominant representations of women as child-bearers, which provided important justification for the denial of their reproductive choice during the nineteenth century. It will be argued that both the ideas and the pragmatic factors from which legal recognition of the "therapeutic" abortion emerged, facilitated the continued dominance of medical opinion as to women's natural and proper role, serving not to increase women's control over their own reproduction, but rather, to "institutionaliz[e] the practices which restrain [them]".5

Despite the fact that liberalization of Canada's absolute abortion prohibition did not occur until the latter part of the twentieth century, it is now widely acknowledged that "therapeutic" abortions had been practiced in this country long before 1969.6 An awareness of the history of this practice, and the forces under which it became enshrined in law, may assist us in understanding the continued influence of ideological representations of women, which, despite

5Jane Jenson, "Getting to Morgentaler" in Brodie, Gavigan & Jenson eds., ibid., at 19.

legal recognition of the "therapeutic exception", persisted in law’s refusal to accept women’s own determinations as to the outcome of their pregnancies. According to Gavigan, doctors in Canada had begun using such criteria in administering abortions after 1939, following the acquittal of an English physician who claimed that the danger to a patient’s mental health (represented by the continuation of her pregnancy), necessitated his performance of an otherwise illegal abortion. While it is difficult to criticize the step taken by Dr. Bourne (and that of the Canadian medical profession in following his lead) in apparently prioritizing women’s health over their role as mothers, closer analysis highlights the limits of the exception it helped carve out in the criminal law. John Known recounts Bourne’s reasons for deciding to operate, as focusing primarily on the situation and status of the patient in question; namely, that she was a girl under the age of consent who had been raped. Gavigan’s account further adds that Bourne’s decision was based more on his assessment that this particular patient was "an ordinary

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4Gavigan, ibid., at 303, also states however, that the concept and criteria of therapeutic abortion had been discussed in Canadian medical and legal literature as early as the mid-nineteenth century. The fact that even the earliest prohibitions applied to abortions "unlawfully" performed, was taken by the medical profession to imply a recognition of lawful abortions in certain circumstances, namely those in which the mother’s life or health was endangered by the pregnancy.

5R. v. Bourne [1938] 3 All E.R. 619. The patient was a fourteen year old girl left pregnant after being "gang-raped".

6Ibid., at 619, MacNaghten J. stated that there might be some women who simply requested an abortion, but that a mere desire to be relieved of an unwanted pregnancy was, in his opinion no justification for an abortion to be performed by any doctor.

decent girl", than on a concern for the well-being of women in general.\textsuperscript{11} The distinction drawn between her situation and other possible scenarios giving rise to the request for an abortion - in particular, that of the "feeble-minded prostitute" wanting to be relieved of the consequences of her own "immorality" - leads her to suggest that there was much more than a medical judgement contemplated in Bourne's delineation of the categories of woman for whom he would be prepared to go to such lengths.\textsuperscript{12} Thus, as Gavigan contends, whilst his precedent might have facilitated the law's eventual recognition of the physical and psychological health reasons why abortion should be permitted, it also resisted any further liberalization which might allow any woman's request for an abortion, no matter how it was perceived by her doctor.\textsuperscript{13}

What is most significant about the Bourne legacy for our purposes, is the context in which his practice was emulated by the medical profession in this country. Gordon's work suggests that in the earlier part of the twentieth century, doctors all over North America were heavily engaged in an attempt to instil strictly defined norms of sexual morality in women.\textsuperscript{14} While they were prepared to perform abortions in some cases to safeguard the health of their female patients, they too made it clear that they would not provide an outlet for "promiscuous"

\textsuperscript{11}Gavigan, \textit{supra} note 6 at 309.

\textsuperscript{12}\textit{Ibid.}

\textsuperscript{13}\textit{Ibid.}, at 305.

\textsuperscript{14}Linda Gordon, \textit{Woman's Body, Woman's Right: A Social History of Birth Control In America} (Middlesex: Penguin Books, 1977) at 22, describes the medical profession in the late nineteenth and early twentieth century as "a new and powerful source of control over women's lives."
sexual behaviour, especially that of young, unmarried women. When examined within the general context of the cult of motherhood and the nineteenth century emphasis on purity and chastity as the highest of all "maternal virtues" (described in Chapter Two), twentieth century therapeutic abortion practice served less to empower women with some defence against compulsory motherhood, than to further enforce "an ideology which contemplated and regulated certain forms of sexual behaviour." In allowing doctors to judge the circumstances in which an abortion was merited, it proved extremely useful to the profession's effort at disciplining women to forego sexual activity outside the bounds of the patriarchal marriage institution. By refusing abortion to those women who indulged in such behaviour, they were able to actively compel "the goodness of 'good' girls ... whilst punish[ing] the deviance of 'bad' girls." Indeed, as Gavigan contends, recourse to the "therapeutic" exception enabled doctors to adopt the role of "moral intermediary", over-seeing all women's requests for abortion, whilst acting as a powerful tool with which to coerce or shame illicit women into changing their minds and mending their ways. Moreover, the general awareness of the high incidence of self-induced

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15 As Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom (Boston: North Eastern University Press, 1990) at 76 submits, nineteenth century physicians frequently proclaimed that the "maternal nature" of woman precluded the existence of female sexual instinct, thus reinforcing the idea that all "proper" women would adhere to strict norms of sexual abstinence. Even married women were warned to practice sexual moderation lest they bear "disordered" offspring.

16 Gavigan, "On Bringing on the Menses" supra note 6 at 295.

17 Frances Olsen, "Unravelling Compromise" (1990) 103 Harvard Law Review 105 at 110. This aspect of therapeutic abortion practice seems to have been informed by the idea that "good girls never need abortions, and bad girls do not deserve safe, legal abortions."

18 Gavigan, "On Bringing on the Menses" supra note 6 at 265.
miscarriages and "back-street" abortions performed by their "irregular" competitors in disregard of the criminal sanction, seems to have encouraged Canada's "regular" physicians into the practice of performing abortions in "deserving" cases. Their focus on the "health" justifications for their actions, and the consequent public acceptance of doctors' expertise in making such decisions, ensured that there would be few challenges to the profession's power to determine women's access to abortion according to whatever values they chose. In respect of its history then, legal endorsement of the "therapeutic" abortion in 1969, which formalized doctors' discretion in the administration of the service, might well be argued to have helped perpetuate the dominant nineteenth century idea that abortion as an expression of unmarried women's wish to avoid social disgrace, or of married women's desire to be relieved of their "natural" responsibilities, would not be tolerated by law.

Consideration of the forces giving rise to the reform help explain further its limited effectiveness in challenging the long dominant idea that women were not to be entrusted with

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19 As Backhouse, supra note 6 at 76 contends, in the early twentieth century these doctors began to realize that if they refused to entertain women's requests for abortion they could go to their "irregular" competitors (also referred to as "quacks") and probably have them performed anyway.

20 "Deserving" cases were typically those scenarios, such as rape, incest and poor health, in which women were cast as victims, as opposed to those in which they were considered blameworthy for the unwanted pregnancy.

21 Such acceptance was arguably exhibited by the jury in R. v. Bourne, supra note 8, in their reluctance to convict a respectable doctor performing an abortion openly and without a fee, in the belief that he was discharging his clinical duty. Kristin Luker, Abortion and the Politics of Motherhood (Berkeley: University of California Press, 1984) at 44-45 suggests that the unquestioned legitimacy enjoyed by the profession in making "therapeutic" abortion decisions permitted a considerable degree of arbitrariness and, a wide range of criteria to be used in judging the necessity of the procedure.
decisions regarding their own child-bearing. Several factors may be said to have mitigated against the potential of this legal development for empowering women with control over abortion. As Jane Jenson submits, pressure for 1969 reform came from a combination of lawyers, clergymen, and doctors, whose "socially powerful" position ensured that their views would carry great weight within Parliament.22 Yet, since doctors' medical training and history of involvement with the procedure gave them by far the most "expertise" in the matter, it was their concerns which came to dominate the reform effort. Doctors who had been relying on the Bourne precedent in performing abortions to protect the "life or health" of the pregnant woman, became concerned about the ambiguity of the concept of "health" relied on in that case. In particular, they feared that its lack of certainty put them at risk of prosecution under the Criminal Code, and demanded that Parliament act to clarify the issue in law.23 It is unsurprising therefore that the reform debate soon became immersed in a discourse of "medicalization", which stressed the claim of doctors for as much autonomy as possible in their clinical practice24 more than the needs of women whose actions would continue to be regulated and controlled under the new law. In this respect, the forces which emerged to reform the original outright prohibition of abortion did little to contest the injustice of the nineteenth century law which effectively forced motherhood upon women. They were rather, a reflection of doctors' desire to formalize a practice which allowed them to sit in judgement over women's abortion decisions.

22Jenson, supra note 5 at 24.

23Ibid.

24Gavigan, "On Bringing on the Menses" supra note 6 at 311.
The legal change which they eventually helped secure in S251 of the Criminal Code was not intended to empower women with some control over the circumstances in which they became mothers, but merely to establish some, if ill-defined, boundary between a legal and an illegal use of doctors' unquestionable expertise in judging the necessity of the procedure.

That women were not considered autonomous agents in the 1960's abortion debate, never mind possible determiners of their own reproductive careers, is clear from the way in which they were portrayed in the Parliamentary debates leading to reform. As Jenson has observed, women were consistently represented as mothers or potential mothers by the male doctors who claimed to speak on their behalf. In their respected opinion, "these mothers came in several varieties, being ones who already had too many children, or who were not healthy enough to be mothers, or who were too young to be mothers." It might be argued therefore that this was a major factor inhibiting Parliament from taking the opportunity presented by the climate of reform to redress the injustice of the old nineteenth century law which, as argued above, reflected and reinforced the notion of motherhood as the paramount feature of women’s lives. Any notion of "choice" for women in the decision of when and how often they should reproduce, was notably absent from the debates preceding the 1969 reform, since their position with respect to abortion was invariably mediated by the medical profession. Indeed, most of the concern demonstrated for women’s needs was translated by doctors and interested politicians into fears about the high

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24Jenson, supra note 5 at 28-29.

25Ibid.
incidence of illegal and dangerous abortions. Yet, the concern generated by the threat to law’s
legitimacy posed by the unenforceable law, and "society’s" interest in maintaining "healthy
mothers", seems to have been most influential upon legislators when this aspect of the debate
was played out. It was upon the advice of members of the Canadian Bar Association (C.B.A.)
as to the first point, and that of the Canadian Medical Association (C.M.A.) as to the second,
that Parliament set about reforming the antiquated nineteenth century prohibition to take account
of the "therapeutic" reasons why abortion should be permitted under law. In the end of the
day therefore, the revised Criminal Code was a reflection of the idea that there were situations
in which abortion was a medically necessary procedure, and that doctors were best qualified to
determine when they existed. It was not, by any stretch of the imagination, an acknowledgement
that for some women motherhood may not be the most urgent desire, for whatever reason. In
this respect then, although the 1969 law acted as an official recognition that health preservation
might occasionally require women to forego child-bearing, it did little to disrupt the time

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27 Ibid., at 30 and 35.

R.S.C. 1985, c-46) provided exceptions from the general criminal liability in circumstances where

(4) (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any
hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out
his intention to procure the miscarriage of the female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited
or approved hospital any means for the purpose of carrying out her intention to procure her own miscarriage, if,
before the use of those means, the therapeutic abortion committee for that ... hospital, by a majority of the members
of the committee at which the case of the female person has been reviewed,

(c) has by certificate in writing stated that in its opinion that the continuation of the pregnancy would, or
would be likely to endanger her life or health, and

(d) has caused a copy of that certificate to be given to the qualified medical practitioner.
honoured notion of maternity as their ultimate destiny.

Of the various ill-effects of the 1960's "medicalization" of abortion discourse, the representation of the issue as one in which women had little interest and fewer rights, was perhaps the most destructive of the potential for more positive changes in the years to come. As Janine Brodie argues, the dominance of the medical profession and of its characterization of the women needing abortions, for a time discouraged the growth of a collective women's consciousness on the matter.\(^{29}\) Though some women's groups did attempt to get involved in the reform debate, their impact was limited.\(^{30}\) Even the largest and most accepted representative of Canadian women at the time - the National Council of Women - felt unable to frame its claims in terms of women's need to be free from forced motherhood.\(^{31}\) Rather, it confined itself to speaking out against the injustice of the current situation, where women's access to necessary abortions was dependent upon finding doctors willing to perform them.\(^{32}\) In restricting themselves to calling for a more equitable distribution of therapeutic abortion services, they did

\(^{29}\)Janine Brodie, "Choice and No Choice in the House" in Brodie, Gavigan & Jenson eds., supra note 4 at 71.

\(^{30}\)Although such groups did present briefs to the government on the proposed reform, their relative political powerlessness and lack of resources compared to those of the other actors involved, namely the C.M.A., the C.B.A. and the Christian Churches, ensured that their concerns would be marginalized in the debate.

\(^{31}\)Since the National Council of Women was established in 1893 with terms of reference committing it to serving "the highest good of the family and the State", (see Jenson, supra note 5 at 31) it is not surprising that it would find it difficult to pursue any notion of the right to abortion on demand.

\(^{32}\)As Jenson, ibid., at 31, suggests, the chance of finding such a doctor was higher in some places than others, resulting in some women, such as those living in rural areas, having to travel to obtain a "legal" abortion, or risk having an illegal one.
little to challenge social constructions of motherhood as women's destiny, nor the medical opinion adhered to in Parliament that only *unhealthy mothers* should be permitted to terminate their pregnancies.

It was not long after the passage of the 1969 law however, until some new and more distinctively feminist voices on the abortion issue were raised. The accelerating trend of women entering higher education and the sphere of professional employment, brought home more acutely than ever the hazards of unplanned pregnancy to career opportunities. From among the ranks of those women in a position to pursue such aims, arose the "second-wave" feminist movement, claiming greater control over reproduction as a prerequisite for women's achievement of their full potential. Whilst the demand for greater access to abortion as a means of enhancing women's equality and social position was at first powerfully stated, subsequent disagreement as to the best way of pursuing the necessary legal changes, soon weakened the import of this

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33 Luker, supra note 21 at 111 refers to the 1970's as a period of changing social mores and "sexual revolution", in which married women began to combine motherhood with careers, whilst unmarried working women began to postpone marriage and to expect sexual activity before it. However, it was in the sphere of paid employment that both found themselves discriminated against "because they were mothers or potential mothers", *ibid.*, at 117-18. Once women had choices about life roles, they came to feel that they had a right to abortion in order to control their lives. Speaking of the motivation behind the emergence of the "pro-choice" movement in the United States, Luker, *ibid.* adds, "for men, or the state, or physicians to have control over whether pregnancy would take place - and for women to suffer alone the consequences that decision would have for their careers, or education, or social status - came to be seen as eminently wrong and cruelly oppressive." *Ibid.*

34 Rarely were such opportunities available to non-white, non-middle class women. Lower income women, including immigrant women and women of colour, were too preoccupied with overcoming the immediate problems of unemployment, inadequate housing and forced sterilization to be concerned about expanding their career opportunities.

35 In the earlier stages the demand was most forcefully made by groups constituting the "Abortion Caravan", who travelled to Ottawa in 1970 to emphasize the need for "abortion on demand" within the House of Commons.
apparently radical demand.\textsuperscript{36}

Although the liberal feminists who came to dominate the field\textsuperscript{37} framed their claim for greater access to abortion in terms of the need for all women to have the "right to choose", they seemed more reluctant to justify this demand with reference to women's self-determination, emphasizing instead the importance of their role within the family. During the early 1970's they relied heavily upon the idea that, since women are ultimately responsible for the birth and care of children, they alone must make the decision whether or not to bear a child, based on factors such as their own health, the quality of life for the potential child and, that of their existing family.\textsuperscript{38} As Brodie suggests, this reasoning was more reflective of the sociological and pragmatic arguments for the legality of abortion, than of a revolutionary feminist critique of social constructions of motherhood and child-rearing as women's primary role.\textsuperscript{39} In this respect therefore, feminists' initial "pro-choice" campaign did little to disrupt those medical representations of women as always potentially maternal, which had been effective in shaping

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\item Jenson, supra note 5 at 45. All feminists of this period did not however share the same ideas on the demands central to pursuing women's liberation. As Jenson describes, the abortion issue was a highly contentious one in debates among radical, socialist and liberal feminists, in terms of the priority to be given to it in the hierarchy of demands. With deepening divisions among radical and socialist feminists on more general issues (the former focusing on manifestations of violence against women, and the latter on theories of class and patriarchal relations), it was left to liberal feminists to take the lead on the abortion issue. Yet even they were reluctant to put it high on their agenda of reforms, attributing women's inequality more to the perpetuation of discriminatory practices in the public sphere, than to their lack of control over reproduction per s.

\item See ibid.

\item Brodie, supra note 29 at 72.

\item Ibid.
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the 1969 law. It was only later, when feminists came to state the demand for reproductive choice in terms of classical liberal "rights" discourse, claiming legal respect for women’s right to "bodily integrity", that any permanent inroads upon the long accepted medicalized definition of the issue might have been made.\(^40\) However, by that stage the oppressive impact of the 1969 law was beginning to be felt by Canadian women and, the movement’s attention soon became captured by the practical problem of uneven and inadequate access to legal abortion services.

Although the new S251 of the Criminal Code purported to be exhaustive as to the manner in which legal abortions in Canada were to be performed, it had imposed no legal requirement upon any hospital to establish a Therapeutic Abortion Committee [hereinafter T. A. C.] making their existence subject to local public opinion on the morality of abortion.\(^41\) The availability of therapeutic abortion was further limited by the restriction that T.A.C.s be established only within hospitals which were "accredited" or "approved" within the meaning of the section.\(^42\) The

\(^{40}\)Ibid.

\(^{41}\)Gavigan, "Abortion Law in Canada" *supra* note 2 at 276-77 states that hospitals in some areas even appointed members to their T.A.C.s in such a manner as to deliberately ensure their pro-natalist slant, whilst others came under extreme anti-abortionist pressure to dismantle T.A.C.s. which were regarded as allowing "too many" abortions.

\(^{42}\)S251 (6) defined such terms as follows:

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purpose of this section by the Minister of Health of that province;

"therapeutic abortion committee" for any hospital means a committee comprised of not less three members of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.
inordinate amount of discretion S251 placed in hands of local hospital boards, along with the often disputed "health" concept, according to which all requests for termination were to be judged, left even the limited option of abortion for therapeutic reasons genuinely unavailable for many women who might have fulfilled the criteria. Under these circumstances it was perhaps inevitable that during the late 1970's and 1980's, feminists would be too concerned with the more immediate problem of facilitating women's access to abortion services, to examine the ideological conditions under which such an unfair system had developed in the first place.

Pro-choice organizations turned their energy to the practical strategy of providing abortion services outside the bureaucratic structure of the T.A.C.s and "approved hospitals". The Ontario Coalition for the establishment of Abortion Clinics [hereinafter O.C.A.C.], one of the most prominent groups at the time, invited Dr. Henry Morgentaler to extend to Toronto his experiment of performing abortions in free-standing clinics, in outward breach of the 1969 law. Yet, in undertaking to finance and publicly support Morgentaler's legal defence, the 1977 publication of the government-commissioned Report of the Committee to Investigate the Abortion Law (Ottawa: Supply and Services, 1977) [also known as the Badgley Report] the many inadequacies in the operation of S251 were officially acknowledged. The Committee found sharp regional disparities in the availability of abortion services due to the non-existence of T.A.C.s in hospitals in some areas, making access to therapeutic abortion "largely illusory", ibid., at 139-41. It was also discovered that hospitals providing the service interpreted the law in dramatically different ways, the variable definition of "health" leading to "considerable inequity in the distribution ...of the procedure", ibid., at 20. Additionally, many unnecessary delays were found to be attributable to the very requirement of T.A.C. certification, ibid., 29-30.

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This strategy had already been tried with some success by Dr. Morgentaler in Quebec where he was acquitted of the criminal charge brought against him for providing abortion services outside the terms of the Criminal Code. See Morgentaler v. The Queen (1975) 30 C.R.N.G. 209 (S.C.C.); R. v. Morgentaler (1976), 33 C.R.N.S. 244 (Quebec Court of Appeal). Similar charges were subsequently brought against Morgentaler and his colleagues with respect to the establishment of the Toronto clinic, see R. v. Morgentaler, Smoling and Scott (1986), 52 O.R. 353 (Ontario Court of Appeal).
feminists committed themselves to an agenda which did not fundamentally challenge the concept of abortion as a "therapeutic" procedure of last resort. Whilst the costs of Morgentaler's defences were often raised by pro-choice groups, his legal arguments paid a relative lack of attention to pro-choice themes. Indeed, Dr. Morgentaler defended his earliest charges by pointing to the injustice of the procedural apparatus established by S251 which, he contended, operated to prevent women from obtaining the medical care they required. He went on to claim that the provision of abortion services in freestanding clinics was therefore a response to their need for such care, which he alone as a doctor had the capacity to judge. In this respect then, as Jenson concludes,

Morgentaler's struggle did not, nor could it ever alone, transform the situation of Canadian women who remained confined by an abortion law that required them to demonstrate that their pregnancies made them "unhealthy" and subjected them to the decisions of doctors.

In aligning themselves with the Morgentaler free-standing clinic experiment therefore, feminists appear to have been unaware of the more subtle messages contained within the medical definition of abortion. It might be argued that, in order for any meaningful or lasting changes to have resulted from the pro-choice mobilization of the 1970's and 80's, it would need to have

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45Gavigan, "Abortion Law in Canada" supra note 2 at 279.

46Jenson, supra note 5 at 40. She also notes that during the early 1980's Morgentaler and his allies stressed the threat to the state's legitimacy caused by the unenforceability of the 1969 law more than the needs of the women who suffered under it.

47Brodie, supra note 29 at 71, in the traditional medicalized definition, abortion is seen as "necessitated [only] by unpredictable and uncommon medical indications."
proceeded upon the recognition that far from being a simply medical matter, the regulation of abortion is a matter of debate over the role and status of women in society. As demonstrated in Chapter Two, the legal treatment of abortion has historically been a reflection of the importance assigned to motherhood in women's lives. Abortion was first outlawed during the nineteenth century because at a particular historical moment child-bearing and women's maternal role was held out by religious leaders, social reformers and medical professionals, as having such great social value that the State was entitled to compel women's acceptance of it. The practice of performing "therapeutic" abortion only evolved afterwards, when the medical profession realized that physically or mentally "unhealthy" women did not make ideal mothers, and that many were prepared to risk illegal or self-induced abortion in order to fulfil their own wishes as to child-bearing. However, when this exception to the original prohibition was given legal sanction in the 1969 reform, it was accompanied with a statement to the effect that women were not to be permitted to reject their maternal duty without good reason, the only acceptable one being that they are unable to fulfil it appropriately due to physical or mental weakness. The bureaucratic requirements laid down in S251 further made it clear that this was a matter of such importance that, not only was a trained physician needed to establish proper cause for an abortion, but a whole team of such "experts"! Yet, even when unfairness and inequity were seen to result from this deference to medical opinion and from the T.A.C. system itself, feminists still had difficulty in associating the denial of abortion rights with the way in which women were represented in the surrounding medicalized discourse. Had it been understood that the dominance of doctors in abortion decision-making facilitated the continued dominance of oppressive representations of women and their role in social life, feminists of the 1970's and 80's might
have better understood the necessity of promoting a "woman-centred" critique of the abortion law. Yet, since the new and fragmented movement had not yet succeeded in constructing its own specifically feminist discourse on abortion, the campaign for reform continued without adequate appreciation of what abortion restrictions meant to women. In any event the actions of Dr. Morgentaler, which had drawn public attention to the injustices of the T.A.C. system and provided a practical alternative for women suffering under it, might have seemed like a more effective method to challenging the immediate problems occasioned by the 1969 law. Though it was indeed the eventual success of the Morgentaler appeal which helped secure the decriminalization of abortion, as shall be demonstrated below, it was much less effective in challenging long dominant ideas on "what abortion is and who women are".

Legalization and Beyond: The Legacy of R. v. Morgentaler

It was only after two decades of intense struggle by feminists, doctors and family planning associations supporting Dr. Morgentaler that the bureaucratic system governing women's access to abortion was eventually dismantled by the Supreme Court of Canada in 1988. Pro-choice supporters all over the country, interpreting the Morgentaler decision as a

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48 It was the very existence of the Morgentaler clinics that forced the abortion issue into the courts, after the federal government's consistent refusal to consider changes to the 1969 legislation.

49 Brodie, supra note 29 at 71.

50 R. v. Morgentaler, supra note 1.
reinforcement of women's right to reproductive control, rejoiced in the belief that at long last abortion services would be freely available to all women who needed them. Whilst it would be difficult to characterize the landmark case as anything other than a feminist victory, an appreciation of the instances of almost immediate "counter-attack" against any freedom it might have meant for Canadian women, suggests that far from being over, the struggle for legal recognition of our need for complete reproductive control, may merely have reached another stage. In the remaining sections of this Chapter therefore, I want to examine the inadequacies of the Supreme Court's reasoning in Morgentaler in failing to avert subsequent incursions upon women's exercise of self-determination in this sphere. It is hoped that such an analysis will reveal that despite the formal legality of the present context, abortion is still, as Petchesky suggests, "the fulcrum of a broader ideological struggle in which the very meanings of the family, the state and motherhood are contested" (emphasis added).

In evaluating the wider implications of the Morgentaler decision for women's exercise of reproductive choice, I find it essential to analyze the main ideas informing the majority's reasoning. All five of the majority judges agreed on the basis of evidence presented in the

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51 Brodie, supra note 29 at 59, suggests that the decision was immediately interpreted as a feminist victory because it represented a significant shift in legal discourse concerning women’s rights and reproductive control: the Court seemed to have accepted the pro-choice movement’s assertion of women’s right to bodily integrity. Yet, as Shelley A. M. Gavigan, "Beyond Morgentaler: The Legal Regulation of Reproduction" in Brodie, Gavigan & Jenson eds., supra note 4 at 126 states, in light of the events which followed, the Morgentaler decision proved to be a "fragile, incomplete and contradictory" victory for feminists.

52 Petchesky, supra note 15 "Preface" at (xi).
Badgeley Report\textsuperscript{53} that the procedures laid down in S251 had resulted in the restriction of the number of hospitals legally entitled to perform therapeutic abortions and had caused serious and unnecessary delays for women in obtaining such treatment. The increased exposure to health risks and to psychological trauma which resulted from those procedural requirements, were in their opinion a violation of women's right to security of the person which the Court had a duty to protect under S7 of the \textit{Canadian Charter of Rights and Freedoms}, 1982.\textsuperscript{54} Yet, what is more significant about the decision for feminists, is the fact that all but one of the majority justices (Madame Justice Wilson) failed to acknowledge that they were dealing with an issue fundamental to women's equality and self-determination.\textsuperscript{55} Although Dickson C.J.C. (Lamer J. concurring) did concede that women have a right not to be compelled, under threat of criminal sanction, to carry a foetus to term,\textsuperscript{56} he did not reject the fact of criminalization per s. In his decision to strike the abortion offence from the \textit{Criminal Code}, based upon the fact that the procedural unfairness of S251 made any defence intended by it almost illusory, he implied that had they been otherwise he would have upheld the contested law. Beetz J. (Estey J. concurring)

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\item \textsuperscript{53}The Badgeley Commission constituted by the Minister of Health was restricted by its limited terms of reference, to investigating only the operation of 1969 law - a supposedly medical matter- concerned with more the equity of the universal health care system established in the late 1960’s, than with the plight of women.
\item \textsuperscript{54} S7 of the \textit{Charter} reads:
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
\item \textsuperscript{55}This is how Shelagh Day's "Comment" in \textit{The Supreme Court of Canada Decision on Abortion} Shelagh Day and Stan Persky eds., (Vancouver: New Star Books, 1988) characterizes the main issue of the case.
\item \textsuperscript{56}Morgentaler, supra note 1 at 402.
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went much further in endorsing the traditional model of medical control over abortion decision-making. Although he agreed that most of the procedures laid down in S251 were invalid, he found the establishment of some standard indicating when abortions are permissible, the requirement of an independent medical opinion to assure this standard is met in each case and, some delay in obtaining that opinion, to be all legally acceptable. If, as Luker contends, "the structural necessity of having someone else make the decision about abortion, mean[s] that both symbolically and practically, traditional women’s roles [can] be upheld," then the support rendered in both judgements for some form of state supervision over women’s access to abortion, would seem to indicate that the legal change effected in Morgentaler was not the result of any significant change in dominant attitudes towards the place of child-bearing in women’s lives.

Of the judgements responsible for removing abortion from the Criminal Code, only that of Madame Justice Wilson contemplated in any great depth the effect of abortion restrictions upon women’s exercise of self-determination. Apart from the question of procedural unfairness, she found it essential to ask whether the content of the contested law infringed women’s liberty,

57 Medical expertise would be needed to ensure that an abortion is only performed when the "mother’s" life or health is endangered by continuation of the pregnancy.

58 Morgentaler, supra note 1 at 465.

59 Luker, supra note 21 at 121.

60 As Shelagh Day, supra note 55 at 206 suggests, rather than endorsing women’s right to choose, the Supreme Court might be said to have "backed into decriminalization" by finding fault with the procedures laid down in S251.
also protected under S7 of the Charter, in a substantive way. Considering that the right to liberty guaranteed every individual a "sphere of personal autonomy over important decisions intimately affecting their private lives", and that the "right to reproduce or not" arguably fell within that sphere, she felt that the S251 restrictions on abortion access represented unconstitutional state interference with that right. Moreover, since the requirement of external ratification of a woman’s abortion decision, by a T.A.C. or otherwise, effectively made her "the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life," her security of the person was also violated by the very existence of such conditions. Madame Justice Wilson took the opportunity presented in the Morgentaler appeal, to confirm what the actions of many Canadian women had long demonstrated: that the circumstances giving rise to their demand for safe, legal abortions are not just medical but, complex and varied. Indeed, as Shelagh Day remarks, she is the only one of the Supreme Court justices (perhaps understandably so since she was the only female member of the bench at the time) who talks about the issue as if she fully appreciates what it could mean to women. What is therefore discouraging about her judgement from a feminist perspective, is her recommendation that women’s access to abortion might be subject to "reasonable limits", in fulfilment of the valid

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61Morgentaler, supra note 1 at 491.

62Ibid., at 492.

63Day, supra note 55 at 197 suggests that the demand for abortion reflects rather, "how women think about themselves, their relationship to others and to society at large."

64Ibid., at 199.
legislative objective of preserving pre-natal life. Wilson J. suggested that legislation reflecting
a developmental approach to abortion decision-making, similar to that laid down by United
States Supreme Court in Roe v. Wade, might help strike an appropriate "balance" between
women's rights and the state's "compelling" interest in the protection of viable foetuses.
While it might have been expected that at least one member of the Court would be influenced
by the position of the American judiciary, it is surprising that Wilson J. paid so little attention
to contemporary problems experienced by women in the United States, where the parameters for
their exercise of reproductive choice have begun to be narrowed due to technological
developments rendering the foetus viable at increasingly earlier points in pregnancy. What
is even more startling in this respect, is Wilson J.'s failure to consider the implications of her
earlier stated proposition in Morgentaler, namely that the assertion of state control over a
woman's reproductive capacity allows her to be "treated as a means - a means to an end which
she does not desire but over which she has no control." It is not at all clear how this would
be prevented if Parliament took up her invitation to impose new restrictions upon women's

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65Morgentaler, supra note 1 at 489. Her opinion was shared by Dickson J. ibid., at 417, who contemplated that
state protection of "foetal interests" might well be deserving of the Court's recognition under S1 of the Charter,
which "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as
can be demonstrably justified in a free and democratic society". Beetz J. ibid., at 471, went even further, holding
that protection of the foetus was the primary purpose of the abortion legislation.


67See Janet Gallagher, "Fetus as Patient" in Sherill Cohen & Nadine Taub eds., Reproductive Laws for the 1990s
(Clifton, N.J.: Humana Press, 1989) at 195, who claims that in the United States this approach has led to "open
season" having been declared on the rights of pregnant women after the first trimester.

68Morgentaler, supra note 1 at 492.
decision-making autonomy after the first trimester of pregnancy. Though she and the other majority justices claimed no authority to rule on the issue of "foetal interests", neither did they enter any philosophical discussion (as might be considered necessary) on the actual reasons why it should be dealt with in new abortion legislation. Moreover, they all declined to elaborate on the nature of the "state interest" in the foetus, which might justify women’s loss of "liberty" or "security of the person". As will be discussed at greater length below, it may be difficult for women to imagine any such state interest different from that which has traditionally sought to confine them within their "natural" roles, via an oppressive regime of abortion regulation. This is especially true when whatever the justification asserted in restricting abortion, the bottom-line for women remains unchanged - they are still relegated to a "slave class of child-bearers". Thus, whilst Wilson J. might have gone a step further than her colleagues in recognizing that the legal debate on abortion is primarily one about the role and status of women, she failed to complete her analysis by identifying women’s need for unencumbered reproductive control with their ability to function as free and equal citizens in society. In this respect, she too might be seen to have given implicit acceptance to traditional ideological notions

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69 It is submitted that another more positive way for the state to protect its interest in foetal life, is to provide all women deciding to carry their pregnancies to term with the means necessary to bear and raise healthy children. For example, extra financial support, adequate pre and post-natal care and better housing for lone mothers might be provided from public funds.

70 As demonstrated in Chapter Two, abortion was originally prohibited in the nineteenth century to ensure women’s fulfilment of their maternal destiny, rather than to preserve the life of the foetus. Indeed, the prevailing idea in most western societies up until 1803 (with the enactment in England of Lord Ellenborough’s Act) was that no "life" was present at all until "quickening" had occurred.

of "maternal duty" and self-sacrifice which, it is now argued, pregnant women owe their foetuses.\textsuperscript{72}

Thus, when the opinions aired in the majority judgements are considered as a whole, it becomes apparent that the Court’s decision to decriminalize abortion was by no means a reflection of some new commitment to redressing the historic disadvantage of women in abortion regulation. Whilst all majority justices stressed the undesirability of a law which allowed women to be denied control over their bodies via \textit{arbitrary procedures}, none of them seemed sufficiently concerned with exposing and attacking the ideological foundations of the 1969 law. Even the justices who saw the demand for reproductive choice as part of "modern woman’s struggle to assert her dignity and worth as a human being"\textsuperscript{73} and that her own "priorities and aspirations"\textsuperscript{74} might take precedence over child-bearing, themselves ultimately failed to address the question of whether women had abortion \textit{rights}, or to attempt to reconcile them with those which had recently been claimed for the foetus.\textsuperscript{75} In the end therefore, the only clear result of

\textsuperscript{72}It was only after the 1969 liberalization of Canada’s abortion law that anti-abortionists began to organize around the aim of preserving foetal life. As will be seen in the next Chapter, this has provided the major focus of their efforts since then to prohibit abortion or effectively block women’s access to it, in both legal and political forums.

\textsuperscript{73}\textit{Morgentaler, supra} note 1 at 491 per Wilson J.

\textsuperscript{74}\textit{Ibid.}, per Dickson C.J.C. at 408-9.

\textsuperscript{75}In \textit{Borowski v. Attorney General of Canada} (1984), 8 C.C.C. (3d) 392, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15 (Sask. Q.B.); (1987), 39 D.L.R.(4th) 731 (Sask. C.A.), anti-abortion activist Joseph Borowski had argued that the therapeutic abortion legislation was unconstitutional under sections 7 and 15 of the \textit{Charter}, since it violated a foetus’ right to life and equality. The claim was dismissed and his appeal to the Supreme Court of Canada had not yet been heard when the Court ruled on \textit{Morgentaler}. However once the contested legislation had been struck down Borowski’s appeal was rendered moot. See \textit{Borowski v. Canada (Attorney General)}, [1989] 1 S.C.R. 342 (S.C.C.).
Morgentaler was the removal of all legal restrictions from doctors performing abortions. Soon to become painfully clear however, was the fact that the decision offered no resolution of the critical issue of access to abortion, nor any guarantee that women's reproductive decisions would remain free from state regulation.

Very little time was lost in interpreting the effects of the Morgentaler decision when several Provincial governments took it upon themselves to erect their own local barriers to women seeking abortions. Initiatives taken by Alberta, British Columbia, New Brunswick and Nova Scotia, to remove health insurance coverage from all but "medically necessary" abortions, effectively operated to preserve the situation existing prior to decriminalization. Of particular interest is the first reaction, that of the British Columbia premier who announced that his province would only provide public funding for abortions in "life threatening" situations. His further contention that rape and incest were therefore not to receive coverage, was an indication that far from enjoying new freedom through the celebrated legal reform, some Canadian women might suffer a return to the harsh days of nineteenth century regulation, when few possibilities of avoiding one's "maternal destiny" existed. Yet, when the BC Civil Liberties Association brought these actions under the scrutiny of the provincial Supreme Court, the ruling - that the provincial government did not have the authority to determine what constituted such a "medically

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76 Due to the increasingly sophisticated medical knowledge and treatment methods of recent years, there are now very few situations in which pregnancy and birth are considered "life threatening".
required" service\textsuperscript{77} - offered little assurance that other provinces would not succeed in their own attempts to restrict abortion access. Indeed, the decision taken soon afterwards by hospital boards in Prince Edward Island and Newfoundland not to provide any abortion services whatsoever, was concrete evidence that something more than a technical disapproval of such provincial "clawbacks"\textsuperscript{78} would be necessary to prevent further incursions upon women's exercise of reproductive choice.

Yet, it is when we consider the possible relationship between these provincial measures and Morgentaler, that we may better understand its shortcomings in dismantling the ideological premises of the old therapeutic abortion regime. When the Supreme Court struck out S251 on the grounds of its unconstitutionality, it did not empower women with a new, positive right of access to abortion services. In confining itself to dealing with the legislation's procedural violation of S7, the Court merely affirmed that women had a liberty, or a negative right to control their reproductive capacities. Its failure to articulate a clear and substantive right to abortion for all women, might even be argued to have facilitated the continued representation of abortion as something which "healthy" women do not need (or deserve), implicit in the provincial counter-measures. Moreover, given the majority justices' unanimous agreement on the need for Parliament to intervene on the issue of "foetal interests", their failure to request federal legislation ensuring universal provision of abortion facilities and medicare funding nationwide, seems almost inexcusable. The subsequent insistent refusal of some provinces to


\textsuperscript{78}Gavigan, "Beyond Morgentaler" supra note 52 at 140.
fund abortions in certain circumstances, even though none were now illegal, was testament to the fact that any "right to choose" established in *Morgentaler* would therefore be "an empty and bitter one" for many women, particularly those without the resources to exercise it.80

Yet, what was perhaps more distressing about the legacy of *Morgentaler* for feminists, was the federal government's reaction to these problems. In attributing the provincial variations in access to the absence of a distinctive federal legal position on the matter, it sought to recriminalize abortion in the name of ensuring a "national approach to the issue of entitlement".81 It was indeed difficult to imagine how this might have been achieved by the proposed new law since, though it did not suffer from the same bureaucratic requirements and "procedural unfairness" of the old 1969 system, it placed complete control over abortion administration in the hands of individual doctors.82 That the opinion of only one doctor was required did not detract from the fact that women were not recognized as moral agents with the

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80Clark & McConnell, supra note 71 at 81.

81In this respect, the *Morgentaler* decision and the provincial measures removing medicare funding from abortions had more negative consequences for poor women who, in North American society now as in the nineteenth century, are disproportionately women of colour, first nations women and immigrant women. For further details on this point, see Nancy Chater, "Unexamined History Repeats Itself: Race and Class in the Canadian Reproductive Rights Movement" (1991) 33 Fireweed 44; Dorothy Roberts, "The Future of Reproductive Choice for Poor Women and Women of Colour" (1990) 12 Women's Rights Law Reporter 59; also Chapter Four, infra at 99-100.

82Both the Attorney General and the Minister for Justice justified the decision with reference to the federal government's exclusive jurisdiction in criminal law matters, which they assured Parliament, would help establish a clear national position on abortion access; House of Commons Debates, (7 November 1989) at 5640.

83 Under Bill C-43, *An Act Respecting Abortion*, 2d Sess., 38 Parl., 1989, each doctor was given the authority to form an opinion in good faith (without a second medical opinion or certification from any hospital committee) that the continuation of a pregnancy constituted a threat to the health or life of the woman. The doctor's opinion had only to be formed in accordance with the "generally accepted standards of the medical profession".
capacity to make their own decisions, but must still have them approved or vetoed by someone else. That the definition of "health" itself was quite broad-based did not obviate the fact that a male-dominated profession - not women - would define it. As Clark and McConnell further contend, despite the advantages claimed for it, Bill C-43 did nothing to cure the real problems of complete unavailability of abortion services in some areas and inequality in their provision in others. On the contrary, in stigmatizing a woman's abortion decision as criminal and thus inherently wrong unless she could find a doctor who believed that it was justified, the proposed legislation was "retrogressive and insupportable". Indeed, while the federal government continued to "de-politicize" its efforts at recriminalization, as Donna Greshner contends, the paternalistic nature of the new abortion Bill was not so easily concealed. It served as implicit reinforcement of the traditional idea that women should not be free to make reproductive choices without the permission of a more reliable agent and, that their demand for abortion would as before, be mediated and judged by the medical profession. Yet, whilst the Bill's provisions re-established "an alleged 'medical' standard in which [the demand] must reflect a medically acceptable reason", no satisfactory justification was offered as to why doctors should be

83Clark & McConnell, supra note 71 at 82.

84Ibid. On the use of the criminal law power in the area of abortion, Clark & McConnell add 
[where there is an admitted division of opinion on the wrongfulness of the behaviour, it is totally 
incorrect to describe the practice as "criminal" merely for the sake of constitutional convenience 
or compromise much less administrative efficiency...Labelling a practice as criminal...determines 
the framework for the debate and prejudges exactly what is at issue. It adopts the assumptions of 
one of the positions in the debate...Ibid.

Law Journal 633 at 638-40, states that de-politicization redefines abortion decisions as mere "health" issues - 
technical matters which require the judgement of medical doctors as experts in that field.

86Clark & McConnell, supra note 71 at 83.
regarded as more legitimate arbiters of the decision to terminate a pregnancy than women themselves. When we consider the content of Bill C-43 in the historical context of abortion regulation in Canada however, it becomes strikingly apparent that despite the various reforms which have been achieved in this field, women are still regarded in law as irresponsible agents with respect to their own pregnancies. When it is considered that had this legislation been enacted, "healthy" women in Canada would have been compelled once again under threat of criminal sanction to bear children against their will, we should be extremely concerned that Bill C-43 was only defeated at the Senate stage of its reading because of the adverse reaction it had provoked from the medical profession! After its passage in the House of Commons doctors all over the country, fearing that the new law would put them at risk of prosecution, third-party interference or anti-abortion harassment, began refusing to perform any abortions until the government moved to clarify their position under the Bill before it was passed. The confusion and anxiety generated by their actions led to a tied vote on the Bill and its ultimate failure in the Senate, indicating as Brodie argues, that control over women's reproductive decisions might still be up for grabs under new legislation less displeasing to the medical profession. This concern is an especially pressing one given the objection of some Senators, that Bill C-43 did not go far enough in establishing a state interest in protection of the foetus,

87Ibid., at 89.

88Brodie, supra note 29 at 115, noting that Bill C-43 was the first piece of legislation to fail at the Senate stage of the Parliamentary process in thirty years.

89Ibid.
the ground upon which the judges in *Morgentaler* had suggested Parliament might intervene.90 What this era of the abortion debate in particular demonstrates, is that decriminalization was brought about in isolation from any transformation in how women and their demand for reproductive control are characterized in legal forums. The Supreme Court’s failure as Shelagh Day suggests, to clearly endorse the concept of women’s need for complete autonomy in this field, and its anticipation of further legal supervision over abortion decisions, left it virtually incapable of preventing by itself such a legislative backtrack upon any empowerment it had for women.91 Under such circumstances therefore, the possibility of a more successful attempt at recriminalization in the future, is not at all unlikely.

**Assessment**

From the findings of the above discussion it becomes apparent that when the developments made in the regulation of abortion are evaluated from a critical feminist perspective, we may begin to understand how legal reforms themselves might play some part in perpetuating ideological beliefs about women and their relation to motherhood. Indeed, once we review the meaning of the "therapeutic" abortion legislation and the actual effects of decriminalization in the lives of women, we are compelled to consider the broader social and political context in which the debate has occurred this century - that of the social construction of women. It has been seen how the dominance of a "medicalized" definition of abortion

90See *Morgentaler*, *supra* note 1 at 499, where Wilson J. said "the precise point in the development of the foetus at which the state’s interest becomes 'compelling' I leave to the informed judgement of the legislature..."

91Day, *supra* note 55 at 204.
implicated the very role and status of women in society. In placing complete control in the hands of doctors it treated women as if their only possible interest in abortion might be one of preserving their health. The legal deference to medical expertise in this area and official recognition of the therapeutic exception in legislation, might even be said to have precluded social acceptance of the idea that for many women, other reasons for terminating a pregnancy may be considered equally as valid as threats to their life or health. It has furthermore been seen how the removal of all criminal restrictions on women’s access to the procedure has done little to dislodge the time-honoured notion that motherhood is, and should always be, the first priority of all women who are "fit" to carry a pregnancy to term. Whilst in legislative and judicial chambers "shared understandings of what abortion is and who women are [have gone] a long way toward informing the content of abortion [regulation]," what has been notably absent is the harsh realization that when law prohibits abortion in any circumstances, or when governments make its availability conditional upon any externally defined criteria, some women will effectively be coerced into motherhood against their wishes.

While we must question the extent to which this can be attributed to the inadequacies of the feminist discourse developed during the 1970’s and 80’s in exposing the ideological premises of the therapeutic abortion law, we might do better to first consider the intransigence of law and legal institutions to feminist demands for reproductive freedom. In the following Chapter it will be seen further how the courts have not only demonstrated negative restraint in response to feminists’ demands for women’s enhanced reproductive control, but how they are actively

\[\text{\textsuperscript{92}Ibid., at 71.}\]
implicated in reinforcing ideological anti-abortion messages. It is hoped that a more specific exploration of the role of law and of legal institutions in prioritizing certain ideas and beliefs about women and abortion over others, might enable feminists to better appreciate the nature of the response required to counter-act the continued influence of dominant ideological notions of motherhood and, the intractability of law to our demands. This is now perhaps a more pressing concern than ever before in recent history, due to the increasing infiltration of pro-natalist ideology into legal forums and to the acceptance of its message in the social, cultural and political spheres.
CHAPTER FOUR

FOETAL RIGHTS AND ANTI-ABORTION ACTIVISM:
THE IDEOLOGICAL MESSAGE

No analysis of the current abortion debate in Canada would be complete without a discussion of the part played by anti-abortion forces, who currently seek to restrict, if not deny completely women's access to abortion. Liberalization of the abortion law in 1969 fuelled the organization of an anti-choice movement, contesting the concept of "therapeutic" abortion, and dedicating itself to re-criminalizing abortion in all circumstances. Although anti-abortion campaigns did exist before 1969, these took more the form of the condemnation of the immorality of irresponsible sexual behaviour, than of efforts to preserve foetal life.\(^1\) The anti-abortion crusade to preserve pre-natal "life" after 1969 was marked first by its strategic attempts to prevent the "Therapeutic Abortion Committee" structure from functioning at all. With tactics ranging from harassing hospital boards into dismantling their T.A.C.s, to electing its own members to sit on these boards and committees, anti-abortion activists succeeded in effectively removing the possibility of therapeutic abortion from women in many areas.\(^2\) With the support of the Catholic Church and certain anti-feminist groups,\(^3\) the organization also turned to the arena of electoral politics, hoping to pressure politicians into re-introducing a total ban on

\(^1\)For a brief historical account of the anti-choice rhetoric employed in Canada over the course of the last century, see Janine Brodie "Choice and No Choice in the House" in Janine Brodie, Shelley A.M. Gavigan & Jane Jenson eds., The Politics of Abortion (Toronto: Oxford University Press, 1992).

\(^2\)This strategy was extremely successful in Prince Edward Island, New Brunswick and Newfoundland and other rural communities throughout Canada.

\(^3\)In particular the conservative group, REAL (Real, Equal and Active for Life) Women of Canada.
abortion, and to fulfil its long-term goal of electing a new government more sympathetic to its cause. While such tactics might be expected of any group committed to securing legal change, the anti-choice movement has not relied solely upon these to infiltrate legal institutions with its claims and convictions. Rather, in its aim of re-instating as far as possible the old, nineteenth century legal position on abortion, it has had more success through its ideological efforts.4

Since 1969 anti-abortionists have consistently and publicly asserted that the foetus is a "person" with a right to life just like any other and thus abortion, under almost any circumstances, is the unjustified taking of that life, equivalent to "murder".5 Whilst they have not so far achieved any explicit legal protection for this claim, it has not been without some success in shaping how the abortion issue is now perceived by politicians, legislators, judges and the public at large. Indeed, whilst public opinion polls suggest that only a small proportion of Canadians agree with anti-choice aims,6 their influence upon the abortion debate - how foetus is imagined and how abortion is perceived by public in general - is much greater. It has already been demonstrated in Chapter Three, that despite their apparent legal successes, feminist and


5For a detailed academic account of the some of the basic aspects of anti-choice thought in Canada, see Alphonse de Valk, "Abortion Politics, Canadian Style" in Paul Sachdev ed., Abortion (Toronto: Butterworths, 1981) at 3.

6In a 1988 survey it was shown that 69% of the population agreed that the abortion decision was one for the woman in consultation with her doctor, while only 26% disagreed. Gallup Poll, Canadian Abortion Rights Action League, Press Release (19 April 1988).
pro-choice representations of the abortion issue as one of women's absolute right to control their bodies, has not had such a positive impact in shaping legal discourse or public attitudes after decriminalization. In this Chapter I want to examine how far the arguments and strategies employed by anti-choice advocates are founded upon ideas similar to those which informed the original abortion prohibition in the nineteenth century. I will examine first the ideological premises underlying anti-abortion campaigns and secondly, the extent to which they have succeeded in employing traditional, oppressive images of women to dominate the abortion debate both within and outside of the legal sphere. It will be argued that although anti-abortion extra-legal campaigns and assertions of foetal rights look like they are concerned only with protecting the "innocent life of the unborn", closer critical examination reveals that they do indeed have some important correlations to the dominant ideology of motherhood which, as described above, has historically informed and justified legal restrictions upon abortion.

**Foetal Personhood: Resurrecting the Ideology of Motherhood**

When we re-consider the findings of Chapter Two, on the nature of the earliest claims made in favour of prohibiting abortion,\(^7\) it becomes apparent that arguments about the need for legal protection of the foetus are a relatively recent phenomenon in the abortion debate. As has been noted by several authors, the focus of anti-abortion groups only changed from that of their

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\(^7\)Such claims were based on the need to protect women from the dangerous practices of irregular or "quack" physicians; the desirability of increasing the white, middle class birth rate; and, "the enforcement of sharply differentiated concepts of [gender roles]", Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* 2d ed. (Boston: North Eastern University Press, 1990) [hereinafter *Woman's Choice*].
traditional condemnation of the immorality of irresponsible sexual behaviour, toward a positive
campaign aimed at protecting "life", in the aftermath of the first liberalized abortion laws two
decades ago. Writing in the context of similar developments in the United States, Rosalind
Petchesky attributes this shift to the movement's awareness of cultural trends which indicate that
the Christian norms of sexual morality which originally formed the basis of its activism, may
no longer offer the best avenue for gaining widespread support.  

Petchesky's analysis of the "foetal personhood" campaign and the tactics used to promote
it, in this respect helps illuminate what I consider to be the main issue of anti-abortionist activity
for feminists - what it actually seeks to achieve in terms of women's lives. Focussing upon the
visual imagery employed by anti-choice advocates to "prove" that the foetus is alive and
functioning in a way similar to that of a newborn infant, she suggests that despite the many
inadequacies of this method of proof, society's collective understanding of the foetus has been
largely constructed by these images. Photographic portrayals, ultrasound techniques and video
recordings have been implemented not only to make the foetus "a public presence" within a
"visually oriented culture", but also more significantly, to construct it as existing independently
of the woman who carries it and to arouse public identification with it as such. The pregnant

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8Petchesky, "Foetal Images" supra note 4 at 58.

9Petchesky, Woman's Choice supra note 7 "Preface" at (xiv) claims that such visual images have a tendency
to distort reality, by presenting the foetus "out of history and social context".

10Petchesky, "Foetal Images" supra note 4 at 57-58, claims that the strategy of anti-abortionists is to make foetal
personhood "a self-fulfilling prophecy" by bombarding us with images of foetus as a fully fledged member of
society. Meanwhile such "positive" images and symbols of abortion are hard to construct.

11Ibid.
woman's body, along with her emotional needs and concerns with respect to the pregnancy, are obscured within the "fetocentrism" of anti-abortion imagery and discourse. Discussion of her physical contribution to foetal development is now almost as a matter of course, confined to fears about whether she will provide a favourable "maternal environment". As Brodie thus contends, she is effectively regarded as a "mechanical incubator who, so long as she is functional, is irrelevant to the outcome of the pregnancy." That most people in any event, accept without question this imagery as an accurate representation of what a foetus actually is and thus, what the abortion debate is about, tells us something about the subtly anti-abortionists have used in getting across their ideological messages about women and their relation to childbearing.

In light of these insights into how foetal imagery implicates the position of women vis-à-vis reproduction, I believe feminists must adopt a more critical standpoint from which to evaluate and expose the ideological messages or "meanings" underlying foetal personhood campaigns. As Donna Greshner contends, the representation of the foetus as an independent entity, in decontextualizing its existence from that of the pregnant woman, her experiences and wishes, reinforces a very traditional viewpoint of women as child-bearers. It has been seen

12Petchesky, Woman's Choice supra note 7 "Preface" at (iv).

13Brodie, supra note 1 at 82.

14Petchesky, "Foetal Images" supra note 4 at 63 argues that these visual images never show the foetus' necessary connection to the pregnant woman. Yet, "the foetus could not possibly experience itself as if dangling in space without a woman's uterus, body and bloodstream to support it".

15Donna Greshner, "Abortion and Democracy for Women: A Critique of Tremblay v. Daigle" (1990) 35 McGill Law Journal 633 at 650-54. This image of women and their relation to child-bearing corresponds closely with that advanced by religious and medical leaders during those nineteenth century campaigns which, as I have argued
in Chapter Two, how the idea of motherhood as women's "highest calling" legitimizing the prohibition of abortion, was bolstered during the nineteenth century through a particular and idealized construction of "maternal characteristics". In that era "absolute dedication, marital chastity, selflessness and total sacrifice"\(^{16}\) were held out as the qualities expected of all "proper mothers". Viewed in this historical context the anti-abortion claim that pregnant women owe "the most serious and extensive duties and obligations toward the unborn",\(^{17}\) appears to be little more than an extension of this "motherhood" ideology. Indeed, when we examine the current anti-choice focus on the "mother/foetus" conflict within the context of abortion legalization, we may begin to understand why and how traditional, ideological constructions of motherhood are propagated today by foetal personhood campaigns.

As Kristin Luker points out, greater control over reproduction was only demanded in the latter part of the twentieth century, when women began to recognize that their new aspirations for participation in the public sphere were threatened by the possibility of unplanned pregnancy.\(^{18}\) With increased opportunities for education, employment outside the home and economic independence, women began to view themselves and their roles differently - in particular, motherhood no longer beckoned as the only, or even the most fulfilling role they could enjoy. Given that legalized abortion was an important aspect of women's empowerment,

\(^{16}\)Brodie, *supra* note 1 at 84.

\(^{17}\)Edward W. Keyserlingk, "The Unborn Child's Right to Prenatal Care" (1983) 3 Health Law in Canada 10 at 12.

it was not surprising that an anti-abortion movement might emerge from among the ranks of those committed to maintaining traditional gender relations. For Luker, those who currently oppose abortion and seek to make it unavailable, are therefore declaring both practically and symbolically that women’s reproductive role should be given social primacy over any other they might wish to pursue. While motherhood may indeed be chosen by some women as their primary role, and the promotion of social policies to support them in this choice are not therefore inherently bad, my point is that anti-abortionists have gone much further than this, resurrecting not only the nineteenth century idealization of motherhood, but also the idea that women who reject it are somehow incomplete. Underlying the anti-abortion rhetoric that women are "special" and privileged because of their ability to nourish life is the notion that pregnancy is their defining characteristic. In thus upholding motherhood as the "natural" course for women they are also implicitly suggesting that child-bearing can never be recognized as discretionary choice for women. When it is considered then that all heterosexually active women of child-bearing age must be receptive to the possibility of motherhood, it might be argued that the ideological dimensions of twentieth century anti-choice campaigns are not so vastly different from the ideas which helped facilitate the restriction of women’s reproductive choices during the 1800’s. In the days before women had begun to publicly demand some control over their own destinies, abortion restrictions were overtly "legitimated by references to 'true womanhood'" and

19Ibid., at 134, Luker states that many anti-abortion activists and supporters in the United States are married women, with children who are not employed outside the home and who thus regard the legality of abortion as threatening the value of their own lives as full time wives and mothers.

20Ibid., at 200.
the importance of women's roles as mothers.\(^{21}\) Since economic, social and cultural changes may be argued to have "delegitimated that ideology"\(^{22}\) for many women, the anti-choice movement has resorted to a new language in its attempt to recreate the conditions of mandatory motherhood -that of foetal life and the "rights of the unborn".

The Meaning of "Foetal Rights"

In addition to their visually oriented campaigns, anti-choice advocates have turned to classical liberal rights discourse in an attempt to win legal legitimacy for the claim that the foetus is a person with rights deserving of protection. With the help of the device of "foetal rights", anti-abortionists have been able to characterize pregnancy as an inescapable conflict not only between the foetus and the woman, but also between her and the biological "father" acting as the protector of those rights. In this section I hope to demonstrate that the idea of "fathers rights" in abortion decision-making is both problematic and ideologically oppressive to women in a number of respects. The idea of a "father's" inherent right or interest in a pregnancy to which he has contributed, has origins preceding the legal regulation of abortion itself. As J.L. Caldwell remarks, under Roman ecclesiastical law abortion was not seen as an offence against

\(^{21}\)American Association of University Women, A Note: "Rethinking (M)otherhood: Feminist Theory and the State Regulation of Pregnancy" (1990) 103 Harvard Law Review 1325 at 1333.

\(^{22}\)Ibid.
the foetus, but against the father for deprivation of his "child". Yet this notion of a father's "property interest" in the foetus has also been argued to have extended to the "mother" also. As Barbara Katz Rothman asserts, under ancient systems of patriarchal kinship where paternity was regarded as the most important of all relationships, the idea that women bear men's offspring allowed men to exercise control over women as the mothers of their children. The "father's rights" cases are some indication that society has not outgrown this patriarchal obsession with the "male seed". Selma Sevenhuijsen's analysis of the "natural rights" often successfully claimed now by fathers in child custody cases, suggests that law has been fairly constant in its treatment of fatherhood as "an institution which guarantees men rights based on their biological capacity to inseminate women". In her opinion the success of these rights claims is a reflection and a continuation of the patriarchal power men have traditionally held over women and children as the head of the family. When it is considered then that abortion is therefore a powerful symbol of the loss of male authority over women, the assertion of fathers' control over the "fate" of their foetuses (and their mothers) might well be seen as an


24 According to Janet Rifkin, "Toward a Theory of Law and Patriarchy" in Piers Beirne & Richard Quinney eds., *Marxism and Law* (New York: John Wiley and Sons, 1982) at 295, the origins of patriarchal culture lies in the very conception of women as the property of men.


27 Ibid., at 336.

28 As Brenda Cossman, "The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion" (1986) 44 University of Toronto Faculty of Law Review 85 at 87 argues, men may feel threatened by abortion simply because it allows women to "undo what men have done to them".
extension of this traditional "definition of fatherhood as a set of rights ... over women and children". 29

Of even greater ideological significance is the anti-choice conceptualization of the foetus/"mother" relationship as one of conflicting rights. In order to ensure the primacy of foetal rights, anti-choice advocates have represented the essential conflict presented by abortion, as that of the competing "right to life" of the "unborn" versus the right of the woman to reproductive self-determination. Thus, a society that allows women the right to choose abortion is effectively sanctioning the denial of "another [member's] ... right to exist." 30 According to this formulation, "the mother has all the rights and the foetus has none". 31 Yet, nowhere in pro-life literature is it acknowledged that the representation of the abortion issue as simply one of the weight to be given to competing rights effectively isolates it from the broader context within which it necessarily exists: that of conflicting expectations as to women's proper role. When it is considered that the foetus' right to life did not become a central focus of anti-abortion campaigns until after women had begun to demand the right to abortion, this new rhetorical claim might be seen for what it actually is: a more subtle attempt to tie women to their "procreative duty". 32 Foetal rights protection, as it is asserted to justify the restriction of women's reproductive choices, thus appears to be little more than a restatement of the old,

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29 Sevenhuijsen, supra note 26 at 336.


31 Ibid.

32 Luker, supra note 18 at 107.
dominant ideological assumption that child-bearing is women's most important role.

This is also demonstrated to some extent in anti-abortionists' promotion of adoption as a viable alternative to abortion. Inherent in the expectation that women should carry unplanned pregnancies to term in order to give the child to some other woman who might want it, is the ideological notion of women as self-sacrificing child-bearers first and foremost. This might indeed be seen as a reflection of the dominant nineteenth century idea that women must fulfil their "natural" biological capacity for child-bearing, as well as early social constructions of motherhood, which dictated that all other desires and wishes must be sacrificed to this "superior function". As Brodie suggests, the desire to so "recruit" the bodies of "selfish" pregnant women often exhibited in anti-choice rhetoric, reflects a certain sympathy toward childless women who are trying to follow the "natural and selfless course of motherhood". Moreover, as Petchesky notes, the anti-abortion focus on adoption (in the United States at least) arguably targets only white women who feel ambivalent about their pregnancies, since there are already many black children in need of homes. In this respect the concern with protecting life is reduced to a "racist and class-biased fantasy".

In other respects too, the pro-natalism of recent anti-abortion campaigns echoes traditional expectations and stereotypes about women, as they have been propagated since the  

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30 Brodie, supra note 1 at 85.

31 Petchesky, Woman's Choice supra note 7 "Preface" at (xxi).

32 Ibid.
nineteenth century. In particular anti-choice opposition to abortion is often based upon a desire to preserve "family values", reflecting a deeper concern that if women can control their pregnancies "there is no built-in sanction to prevent them having sex whenever and with whom they please". Because legalized and freely available abortion creates a situation where the fear of pregnancy and the threat of involuntary motherhood or marriage no longer deter women from promiscuity, the anti-choice movement has gone about restricting its availability in various ways. Far beyond the goal of preserving foetal life, anti-abortion efforts at withdrawing public funding from abortions (and their success in the United States) begin to look suspiciously like an attempt to restore involuntary motherhood as a sanction against women's freedom of sexual expression, which was regarded as unacceptable under the dominant nineteenth century norms of motherhood. When it is considered that such measures as de-insuring abortion as a health care need, have the harshest impact upon poorer and lower class women - those traditionally regarded as the most sexually promiscuous according to dominant ideological constructions of "proper womanhood" - they might be understood as merely the latest weapon with which to punish "immoral" women. As Petchesky contends, it seems to be the idea that these women are "get[ting] something (sex) for nothing, ... far more then the "killing" of foetuses" that fuels anti-

36Ibid., at 264.

37Milton Diamond, "Abortion and Sexual Behaviour" in Sachdev ed., supra note 3 at 192, notes that after ten years of the 1969 liberalized abortion law tested the anti-abortion assumption that legal abortion encourages such "socially disapproved" behaviour, and found little evidence to support it. Rather, he uncovered "a shift from patterns that were illegal and dangerous to those that are safe and legal." Ibid., at 206.

38See Harris v. McRae, 448 U.S. 297 (U.S.S.C., 1980); Webster v. Reproductive Health Services, 492 U.S. 490 (U.S.S.C., 1989). Provincial governments in Canada have already demonstrated a similar willingness to "privatize" abortion costs. As noted in Chapter Three, supra at 83-86, in the immediate aftermath of decriminalization, several provincial governments took initiatives to remove health care insurance coverage from all but "medically necessary" abortions.
abortion anger. Thus, far from demonstrating an exclusive concern with foetal rights, in this respect pro-natalist ideology reflects a deeper traditional concern with controlling women's choices, not only as to child-bearing but also, as to sexual behaviour.

On another more practical level, the anti-abortion focus on abstract foetal rights tends to mask the actual implications for women of state or third party intervention, which might eventually be considered necessary to protect these rights. In the United States, governments and courts have responded to the assertion of foetal rights not merely by creating new obstacles to abortion, but by policing every stage of pregnancy to eradicate "maternal misconduct". Already several courts there have forced women to undergo blood transfusions and caesarian sections in order to preserve the life and health of foetus. While in Canada, a few orders have been sought requiring submission to caesarian section and pre-natal medical care, as well as apprehension of the foetus, the courts here have been more reluctant to rule against these "negligent and disobedient mothers" in the absence of specific legislative provisions enabling them to do so. In Re "Baby R.", MacDonnell J. acknowledged that a policy of foetal apprehension might enable a pregnant woman to be "detained whilst awaiting her delivery of the

39Petchesky, Woman's Choice supra note 7 at 250.

40American Association of University Women, supra note 21 at 1326. Research findings on the effects of drug use and alcohol consumption on the foetus which have led to discussions among various government and medical agencies about the means to regulate the everyday conduct of pregnant women - disproportionately poor women, black, on welfare - has not been matched with a concern for providing adequate pre-natal care and advice for these women. Instead focus is on forced medical treatment, preventive detention, criminal prosecution and civil penalties.

41See, e.g., In re A.C., 533 A.2d 611 (D.C. 1987), 539 A.2d 203 (D.C. 1988) where an order was granted permitting doctors to perform a cesarean section on a terminally ill women without her consent; and Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, 377 U.S. 985 (1964) where an order was granted permitting doctors to administer a blood transfusion over the objections of the mother.
child being apprehended." Yet, he failed to see this as requiring further analysis of the broader issue of women’s self-determination, concluding merely that "such powers to interfere with the rights of women, *if granted* and if lawful, must be done by specific legislation and anything less will not do." In the more recent case of *Re A (in utero)*, an order for interim protection of the foetus was sought on the grounds (among others) of the mother’s refusal to accept professional pre-natal care and obstetrical treatment. Steinberg U.F.C.J. "reluctantly" found that the statute under which the relief was sought was not "broad *enough*" (emphasis added) to justify forcing "the mother ... to undergo, under restraint if necessary, medical treatment and other processes against her will." In distinguishing the case from the abortion injunction cases (discussed below, *infra* at 109-15), he left no doubt as to how he might have decided the case if not restrained by the existing child welfare law:

> the mother, having opted to give life to the foetus, and having raised it to full term, has a duty to ensure that the balance of pre-natal care and the child’s birth be effected in a proper manner...This is simply a reflection of the mother’s *natural duty* in such circumstances. (emphasis added)

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42 53 D.L.R. (4th) 69, 30 B.C.L.R (2d) 237, (British Columbia Supreme Court) at 80. Here an apprehension order was granted before the birth under the Family and Child Service Act, S.B.C. 1980, c.11, on the grounds that the child was being deprived of necessary medical attention, the mother having refused to consent to a caesarian section deemed necessary to prevent its death or injury. It was only when the order was enforced after the birth, in removing the child from the custody of the mother, that it was appealed and struck out.

43 *Ibid.*, at 80. The facts of this case might also have been relied upon to resolve the issue of whether a pregnant woman could be forced to submit to a caesarian section in order to preserve the health or life of the foetus. Yet, since the woman had given her consent to the surgical operation at the last moment, the court refused to deal with this question.


With such judicial concern for the well-being of the foetus and persistence in recognizing the "state's interest in protecting the foetus" (re-iterated in Re A), it might not be long before women here are forcibly detained, or required to submit to invasive medical procedures in the name of defending this interest. New studies conducted in Canada about the dangers of "foetal alcohol syndrome", and the effects of cigarette smoking and poor diet upon foetal development also forewarn of the possibility of legislative intervention to control women's everyday conduct during pregnancy, extending ideological notions of "maternal duty" far beyond what has ever been known.

Thus, there seems to be a very real danger that should foetal rights receive express legal recognition, not only might women be coerced into motherhood against their wishes but also, into a new and more expansive "culturally defined maternal role of nurturance and self-sacrifice". Meanwhile as Petchesky points out, anti-abortionists' commitment to "[s]aving foetuses from their mothers, distracts conveniently from society's failure to feed, house, educate, and provide health care for millions of children." Their concurrent lack of commitment to improving the well-being of already existing children, does indeed make their concern for foetuses appear somewhat less than genuine.

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41Ibid., at 732, "[t]here is no doubt that the state has an interest in protecting those foetuses that mothers have decided to bring to full term, but the means and criteria for their protection had been best left to the legislature or Parliament and not to the discretion of the judiciary."

42See Royal Commission Report and Recommendations on Foetal Alcohol Syndrome 1992 where it is stated that "enough is known about [F.A.S] for governments at all levels to take positive actions to attempt to prevent [its] occurrence" (emphasis added), ibid., at 1.

43American Association of University Women, supra note 21 at 1337.

44Petchesky, Woman's Choice supra note 7 "Preface" at (xiii).
When we undertake a feminist deconstruction of the "meanings" of abortion currently reinforced by anti-choice campaigns, it becomes apparent that beneath all the rhetoric the real objects are not "innocent foetuses", but women seeking to exercise some control over their lives. Reflecting upon the subtle ideological messages contained within, and the practical implications of foetal rights claims allows us to understand that it is women’s lives and women’s rights which are under attack from anti-abortionists. The paternalistic attitude of those who would gladly make (other) women’s choices for them is often not very well hidden. Indeed, according to one anti-choice academic "[w]hen a woman asks for an abortion, she is really saying that she has a problem and that she needs help." As Shelley Gavigan aptly puts it, those who assert foetal rights as a means of "speak[ing] for the foetus", are really asserting their authority to speak for and about women, and more significantly, about "society’s" right to control our reproductive capacities. What is most discouraging about this for feminists is the success foetal rights advocates have had in isolating abortion from the issue of women’s self-determination, and presenting it as one of the state’s interest in protecting pre-natal life.

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51 Gavigan, "Beyond Morgentaler" supra note 4 at 131.

52 Marnie de Varent, "Feminism and Abortion: A Few Hidden Grounds" in Fairweather & Gentles eds., supra note 30 at 65. Although de Varent does acknowledge the difficulties raised by the "motherhood question" in the enforcement of foetal rights, but she does not regard women’s unique position in child-bearing (or indeed child-rearing) as giving them a legitimate claim to make independent abortion decisions. While she concedes that the abortion issue is complicated by the problem of "sexism in the distribution of roles and functions according to sexual difference" under which identifying women with motherhood perpetuates their social subordination, she still fails to see the necessity of empowering women with abortion rights, preferring only to deride the sexist assumptions which make motherhood appear like such an oppressive and unrewarding role. Ibid., at 61.

53 Gavigan, "Beyond Morgentaler" supra note 4 at 130, suggests that the conflict presented by abortion is not one between maternal and foetal rights, but rather between women and the "self-appointed curators of the foetus".

It is when feminists begin to understand the pro-natalism of anti-abortion rhetoric and legal claims as merely a more subtle way of re-imposing traditional roles upon women, that we are required to inquire into the impact they have had in legal forums and the prospects of this for future abortion regulation. There is perhaps no better place to begin such an inquiry than the "father's rights" cases documented below, in which several men (in their capacities as "fathers of the unborn") supported by anti-abortion intervenors sought court injunctions to restrain their ex-girlfriends from having abortions. All these claims were eventually defeated, but they were met with initial acceptance and accorded some legitimacy in judicial chambers, suggesting that the anti-choice idea - that society (and men) must intervene to control the "harmful" actions of selfish women - is more influential than feminists would like to believe.

**Fathers, Foetuses and Judicial Discourse**

In the almost immediate aftermath of abortion decriminalization several Canadian women who attempted to exercise their newly established "right to choose" found themselves hauled through the courts and harassed by media attention at the instigation of ex-partners seeking to override their abortion decisions. In removing all prior restrictions from abortion decision-making, the momentous *Morgentaler* decision created new possibilities for anti-abortion forces to extend their ideas on the rights of the foetus into the legal arena. Indeed, to some extent of this aspect of the *Daigle* case, see below *infra* at 119-20.

55In *Daigle*, ibid., the only case to go before the Supreme Court of Canada, the applicant ex-boyfriend was assisted by anti-abortion groups, namely, Campaign Life Coalition and Canadian Physicians for Life.

56*Morgentaler*, supra note 54.
an opening for paternal claims asserting the protection of foetal interests, had been created in
Morgentaler itself. Given that each of the majority justices had conceded the "state’s interest in
the preservation of pre-natal life", it was not entirely surprising that anti-choice advocates
might see the intervention of "fathers" as a way for them to make a legal breakthrough in getting
the courts to recognize that abortion is not simply a woman or her doctor’s decision. As shall
be seen below, this avenue was to prove somewhat useful in contesting the traditional, legally
accepted delineation of abortion as a medical procedure, since at least one of the applicants
succeeded in getting a court to give explicit acknowledgement to the long-standing anti-abortion
claim, that "pregnancy is not a disease."

Neither was it totally unexpected that some men would turn to law in the hope of re­
asserting their "patriarchal authority", given that abortion legalization meant that "pregnancy no
longer forced women to stay in dead, difficult or dangerous relationships." Considered in this
light, the abortion injunction actions, all of which attempted to force ex-girlfriends into

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57Ibid., at 499 per Wilson J.

58This basic premise of anti-choice ideology was re-iterated by Bernier J.A. of the Quebec Court of Appeal in
the medicalized definition of abortion is deceptive since, though it is a surgical procedure abortion is not always
sought in response to an illness. While feminists are now also beginning to challenge the dominance of doctors in
abortion decision-making, the courts have not been as easily persuaded by the grounds of their argument -that
women must be free to make their own abortion decisions for reasons unrelated to the preservation of their health.

59Shelley A.M. Gavigan, "No Man’s Land?: Men’s Interventions in Pregnancy and Abortion" (Paper presented
at the Annual Meeting of the Canadian Law and Society Association, University of Victoria, B.C., June 1990)
[unpublished] at 17 [hereinafter "No Man’s Land"].
motherhood (and at least one into marriage) look suspiciously like a "backlash" against women’s independence in reproductive decision-making, which had just recently received official (if, only tentative) legal recognition. Far from representing some supposed "paternal instinct" desire to protect the foetus, such claims might be argued to be more indicative of a patriarchal desire to restore women to their traditionally dependent roles. What feminists might therefore find discouraging about the judgements in these cases, is that the litigants were to some extent empowered in this aim by having their discourse aired and heeded in certain judicial forums. In some respects therefore, the post-Morgentaler abortion injunction cases might provide us with an accurate measure of how far anti-abortion ideology has actually been able to penetrate current legal discourse on abortion. In testing this premise, I want to examine the nature of the various courts’ responses to the paternal legal claims. My particular concern will be with analyzing the implicit receptivity of the various courts towards these requests for law to intervene on men’s behalf to get "selfish and unaccepting" women to submit to traditional ideological notions of their "natural" roles.

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60 After his success in the Quebec Court of Appeal Jean Guy Tremblay, when asked by the Press about his future intentions toward the foetus, stated "I'm going to raise the baby, and I'm going to raise it with her, with my wife", in "Tremblay Proclaims Work Successful in Abortion Case" The [Saskatoon] Star Phoenix (19 July 1989) 16.

61 According to Caldwell, supra note 23 at 169, new evidence of men's ability to "forge a relationship with a foetus strikingly similar to that of the mother", demonstrates the "directness of the interest which a father has in his foetus." But see Gavigan, supra note 4 at 28, who contends "[t]he foetus is intimately connected to and constructed within the woman's body; it can only be intimately connected to and constructed within the imagination of the man."

62 Whilst recent analyses of these cases by other authors - in particular Greshner, supra note 15 and Gavigan, "No Man’s Land" supra note 59 and "Beyond Morgentaler" supra note 4, have focussed to a large extent upon the reinforcement of typically anti-abortion language and ideas in the various courts’ judgements, I want to look more specifically at how aspects of the ideology of motherhood, discussed in the preceding Chapters, are subtly reproduced in the court’s reasoning.
The assertion of men’s interests in abortion decision-making was by no means a completely new phenomenon in Canadian courts after decriminalization. Several such applications had been brought before 1988, but the prevailing medicalized definition of abortion acted to protect women from third party interference or vetoes, because medical treatment was seen to be the decision of the woman alone. Yet, even then the applicants were usually granted standing to apply to the court to ensure that the letter of the therapeutic abortion law was observed. Indeed, despite the fact that a paternal right of consultation or veto has never been recognized in law, Canadian judges have consistently demonstrated an ambivalent attitude towards the claims of "fathers" in abortion decision-making. As Gavigan notes, the men in these cases are almost always characterized as "sincere and genuine" by the male judiciary, who often made no secret of the fact that they felt constrained (by law) to strike out these actions against their own "personal convictions". Indeed, the empathy shown in earlier cases such

63See Medhurst v. Medhurst [1984] 38 R.F.L. 225; 9 D.L.R. (4th) 252, Ontario High Court and the Supreme Court of Canada decision in Minister of Justice v. Borowski, (1982) 130 D.L.R. (3d) 588, where anti-abortion activist Joseph Borowski was granted standing to argue that the therapeutic abortion provisions of the Criminal Code contravened S1 of the then Canadian Bill of Rights, in depriving the foetus of its "right to life".

64Medhurst v. Medhurst, ibid., at 233, on granting standing to the husband to review the T.A.C.’s decision in the matter of his wife’s application for a therapeutic abortion, Reid J. remarked

The husband has a direct interest in the issue of compliance with the law which entitles him to bring this application...and his lack of any right to withhold consent or to be consulted does not deprive him of that right... I cannot think of anyone more entitled to the court's protection ... It is difficult to think of anyone who could have an interest equal to that of a husband in the pregnancy of his wife.

His view is shared by J.L. Caldwell, supra note 23 at 167, who attributes the defeat of these actions to the "evidential problems involved in challenging the medical opinion".

65In Re Unborn Child "H" (1979) 38 N.R.S (2d) 432, 69 A.P.R. 432 (Nova Scotia Family Court) the "father" was granted an application to speak on behalf of the "unborn child" at the hearing of the injunction proceedings.

66Gavigan, "No Man’s Land" supra note 59 at 21.

67Medhurst v. Medhurst, supra note 63 at 235 per Reid J.
as Medhurst toward "the interest of a husband in the pregnancy of his wife" (despite their marital separation) seems to have been enough to encourage the resurgence of such actions by ex-boyfriends after decriminalization. Had the Canadian courts adopted a similar position to that taken by courts in other jurisdictions however, these latest applications might even have been avoided.

In Paton v. British Pregnancy Advisory Service Trustees, a British court ruled that a husband’s claim for injunctive relief to prevent his wife proceeding with an abortion was "completely misconceived" as he had no right of consultation whatsoever in the matter. In the later case of C v. S it was further held that an unmarried father did not even have standing to restrain the mother from terminating a pregnancy in circumstances alleged to constitute a criminal offence under U.K. law. The United States Supreme Court in Planned Parenthood of Central Missouri v. Danforth, went even further, suggesting that the father’s interest in the foetus would always be subordinate to the woman’s right to abortion since, as she is more directly affected by the pregnancy, the balance necessarily lies in her favour. Yet, even in light of such foregoing decisions, and the recent decriminalization of abortion, some lower Canadian courts still felt compelled to legitimate the claims of ex-boyfriends who sought their

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assistance in invalidating abortion decisions taken against their wishes.\textsuperscript{71}

Perhaps the best illustration of judicial compassion towards these men and, towards strains of anti-abortion discourse, is found in the Quebec Court of Appeal decision in the much publicized \textit{Tremblay v. Daigle} case. Showing "almost immediate identification with the foetus and Tremblay (the applicant)",\textsuperscript{72} the court upheld the injunction restraining the respondent (Daigle) from proceeding with an abortion, on the grounds that the foetus was a "distinct human entity with a right to life and protection by those who conceive it" under the Quebec Charter.\textsuperscript{73} All three majority justices took it upon themselves to assess Chantal Daigle’s reasons for seeking an abortion, and despite her own statement of reasons,\textsuperscript{74} found that the decision to break off her living arrangements with her abusive boyfriend (the alleged "father") was the most influential. Holding that this was not sufficiently serious to warrant the drastic action she proposed, and that her excellent state of health meant that she would not be physically endangered by birth, Daigle was considered to have \textit{no} reasonable grounds for terminating the pregnancy against the wishes of the "father".\textsuperscript{75} As Frances Olsen suggests, the very exercise of examining women’s reasons for seeking abortion reflects the assumption that women naturally

\textsuperscript{71}The "liberal approach" of Canadian courts compared to those of other jurisdictions (namely, U.S.A, England, New Zealand and Australia) to granting locus standi to prospective fathers in the context of abortion decisions is remarked upon by Caldwell, \textit{supra} note 23 at 167, who sees this as a positive reflection upon the Canadian judiciary’s understanding of "the directness of interest a father has in his foetus". \textit{Ibid.}, at 169.

\textsuperscript{72}Greshner, \textit{supra} note 15 at 658.

\textsuperscript{73}\textit{Tremblay v. Daigle}, (Que. C.A.) \textit{supra} note 58 at 611.

\textsuperscript{74}Daigle’s affidavit evidence set out her reasons for the abortion: \textit{Daigle, supra} note 54 at 537.

\textsuperscript{75}\textit{Daigle, supra} note 58 at 614.
want to have babies and that their choice not to procreate requires explanation. Indeed, Bernier J.A. made no secret of the fact that he was relying upon such an assumption in the comment;

[pregnancy is not in itself an infringement of the physical integrity of a woman ... but a function which is a fundamental part of her nature. The rule of nature is that a pregnancy must be carried to term.](emphasis added), where he explicitly echoed the ideological notions of motherhood as women's "natural" role which, as demonstrated above, inform anti-abortion campaigns. In other respects too, the court's reasons were seen to reflect central themes of anti-choice discourse. In particular, as Brodie notes, typically pro-natalist language was used by the judges when referring to the foetus and the applicant boyfriend. Despite the fact that terms such as "infant plaintiff" and "father" imply that an important social and emotional bond already exists, these were accepted without question as appropriate to describe Tremblay's interest in the foetus.

The response of the Quebec courts to Tremblay's claim was a clear demonstration of the vulnerability of women's reproductive freedom to the prejudices of certain judges towards both male and foetal interests. Yet, even in the other lower level post-Morgentaler decisions, in which

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76 Frances Olsen, "Unravelling Compromise" (1990) 103 Harvard Law Review 105 at 110 at 123, and footnote 82.

77 Daigle, supra note 58 at 613.

78 Brodie, supra note 1 at 93.

79 Sevenhuisjen, supra note 26 at 336 notes that law has been responsible for the "fortification of fatherhood as an institution which guarantees men rights" based on their biological connection to children, "regardless of the social tie between them." See also, Barbara Katz Rothman Recreating Motherhood: Ideology and Technology in a Patriarchal Society (New York: W.W. Norton & Co., 1989), who suggests that if greater attention were paid to men's input into child-rearing - "social fathering" - than to biological paternity, there would be a lesser tendency to describe a genetically connected man as the "father" of a foetus.
the injunctions were either refused or struck out on appeal, there was no unequivocal rejection of the possibility of "fathers' rights" in the matter of abortion. In *Murphy v Dodd* the decision to rescind the initial restraining order was based upon the technical grounds that the respondent had been given inadequate notice of the proceedings and, that the injunction had been obtained on the basis of inaccurate facts presented in the applicant's evidence. The substantive issue arising from his argument: whether a woman could be compelled by a court order initiated by an ex-partner to carry a pregnancy to term against her wishes, was for all intents and purposes, ignored.

In *Mock v. Brandanburg* the ex-boyfriend applied for an interlocutory injunction on the basis that he had a "contract for child-bearing" with the respondent (she having had previously agreed to have a child), which would be unlawfully broken if she proceeded with an abortion. The application was denied on the grounds that the "balance of convenience" favoured the interests of the pregnant woman, given the intimacy of the relationship between her and the foetus, the length of the gestational period and the potential physical and psychological effects upon her of the pregnancy and birth. In confining herself to a methodical step-by-step

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81Ibid., at 525. The ex parte order restraining Dodd from proceeding with the abortion had thus been obtained by a fraud upon the court, since the applicant had presented unreliable evidence as to the dangers of the abortion to the respondent's health and to paternity, both of which were considered to be "material issues".


83Ibid., at 240.
inquiry, Madame Justice Veit failed to perform a more substantive analysis of the legal merits of the applicant's claim. While her approach was a characteristic response to any claim for injunctive relief, she might have done more to clarify the momentous issues of women's reproductive freedom involved here, and perhaps lay a stronger precedent for courts deciding similar cases in the future. Thus, as Sheilah Martin contends, the judgement did little to help prevent further such distressing actions being taken against women.  

In only one of the lower court judgements in the "father's rights" cases was the claim for an injunction against the abortion struck down at first instance. Hirschfield J.'s decision in *Diamond v. Hirsch* was based upon the "medical" observation that "an eight-week old foetus is [not] in fact a distinct human being" as the ex-boyfriend had alleged. Whilst recognizing that in deciding to terminate the pregnancy, the woman was "exercising a freedom of choice which she has the right to exercise", even he did not discount the possibility of "fathers" being granted a right of intervention under a new law regulating abortion.

It is within the context of these prior rulings and of the implicit support rendered in them

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85Diamond v. Hirsch, decision of Hirschfield J., (6 July 1989), (Manitoba Court of Queen's Bench) [unreported].

86Hirschfield J. went on to say
"the Respondent has an absolute right, subject to criminal sanctions, to the control of her body. There is no criminal sanction against her exercising that right ... as the law stands today and until changed, she is entitled to do so." (emphasis added) *ibid*. 
for the idea of "fathers' rights" in abortion decision-making, that the only Supreme Court of Canada pronouncement on the issue must be interpreted. By the time she appealed to the Supreme Court, Chantal Daigle had not only been physically abused by her ex-partner, but she had also suffered at the hands of the Quebec judiciary who, as Greshner describes, were "disrespectful of her personhood, disdainful of her reasons... and willing to endorse and enforce Tremblay's exercise of power against her". It is little wonder that she did not wait for the Court's ruling before travelling to the United States in the advanced stages of her pregnancy to have a legal abortion there. When the Court finally spoke on the (by then moot) issue of Daigle's freedom to make her own abortion decision, its end result did not disappoint Canadian feminists. Yet, what might be as important in the long run, is what it left unspoken. Although the injunction against Daigle was discharged by absolute majority and more substantive reasons were given than those in the lower level cases, the Supreme Court has come under criticism for not going further in endorsing women's right to abortion unencumbered by the interference of men or anti-choice advocates.

Tremblay had argued that the Quebec Charter of Rights and Freedoms gave the foetus a "right to life", and the father a right of veto over a woman's abortion decision, both of which would be infringed if Daigle had an abortion. Upon a review of the specific provisions to which

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87Greshner, supra note 15 at 656.

88Ibid., at 636.
he had referred,\textsuperscript{89} it was held that neither right existed, leaving no substantive basis for the relief sought. In confining itself to the narrow question of the existence of the particular legal rights alleged in support of the injunction, the Court failed to lend its much needed support to involuntarily pregnant women who feel threatened against making their own abortion decisions in the face of resistance from ex-partners (and increasingly so, anti-abortion intimidation). Much more empathy for Daigle's position might have been demonstrated by the Court, and as Greshner contends, was indeed required to offset the support rendered for Tremblay by the Quebec judiciary.\textsuperscript{90} Its formalistic and abstract reasoning did not compensate for the prior lack of understanding shown for the consequences of the injunction upon the person most affected by it. The Court did however, make some progress in acknowledging that Tremblay's relationship to the foetus would be more accurately described as that of "potential father".\textsuperscript{91} This was the only way in which it made any explicit attempt to rebut anti-choice discourse. Yet, one might say that it is too little, too late for women, given that already "ideologically and culturally, the hearts and minds of Canadians seem to be with the men, the 'fathers' who are losing to selfish women and their feminist allies."\textsuperscript{92}


\textsuperscript{90}Greshner, \textit{supra} note 15 at 656.

\textsuperscript{91}Daigle, \textit{supra} note 54 at 665.

\textsuperscript{92}Gavigan, "No Man's Land" \textit{supra} note 59 at 28.
Apart from this gesture, no other serious effort was made to relate the "foetal rights" alleged to the context in which they would operate if legally recognized - that of forced motherhood. The Supreme Court's failure to consider the practical implications for women of enforcing a concept of foetal rights, seems all the more inexcusable in light of Daigle's conviction that Tremblay's only reason for seeking the injunction was "to maintain his hold over [her]".† Had the insights uncovered at the outset of this discussion been considered, namely that the assertion of foetal rights is merely another attempt to deny women reproductive control, the concept of "foetal rights" may have been revealed for what it is - "a purely political device designed to allow other people, mostly men and usually legislators, doctors or husbands, to exercise power over women."‡ By consequently refusing to give any legitimacy whatsoever to this "device", the country's highest judicial body might have delivered a powerful message to disgruntled men and anti-abortionists alike, that no further incursions upon women's reproductive autonomy would be entertained in the name of "foetal rights". On the contrary however, as in Morgentaler the Court went to great lengths to stress that the issue evoked normative questions for Parliament, not the courts to resolve. Yet, in deliberately avoiding the broader social controversy about foetal personhood, it did little to weaken the cultural impact of the extra-legal anti-abortion campaigns described above, or to discourage anti-choice advocates from initiating further litigation aimed at securing constitutional protection of the

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†This is how Daigle's affidavit characterized the ex-boyfriend's attempt to prevent her abortion in her affidavit evidence to the court: Daigle, supra note 54 at 537.

‡Greshner, supra note 15 at 661. The English Court of Appeal had little difficulty in recognizing this purpose In re F. (in utero), [1988] 2 W.L.R. 1288, at 1306, where Balcombe J. concluded that "[t]he only purpose of extending the [wardship] jurisdiction to include a foetus is to enable the mother's actions to be controlled."
More significantly, in failing to consider what the "state's interest in pre-natal life" would mean for women such as Daigle, the Court might even be argued to have widened the opening created in *Morgentaler* for the introduction of legislation to fulfil this aim. Furthermore, in light of Canadian courts' generosity in allowing "fathers" standing to challenge women's abortion decisions, the possibility of men being granted a right to intervene in protection of such interests, is not wholly inconceivable. In the final analysis, it might be said therefore that *none* of the courts deciding upon the fathers' rights claims did much to thwart the eventual fulfilment of the anti-choice movement's oppressive, "anti-woman" aims.

**Assessment: Ideology at Work**

In assessing the impact of anti-choice arguments upon legal discourse on abortion and, the implications of this upon feminists' continued struggle for women's unencumbered abortion autonomy, the use of ideological analysis may prove essential. It has been noted above that judicial decision-making provides an important forum for the incorporation into law of dominant, 

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95The question of the constitutional status of the foetus was raised in *Borowski v. Canada (Att. Gen.)* [1989] 1 S.C.R. 342. The Supreme Court ruled that the striking down in *Morgentaler*, of the law the applicant (an ardent anti-abortion activist) had alleged to infringe the constitutional rights claimed for the foetus, rendered his reliance upon the *Charter* moot. In *Daigle*, the applicant could point to no law infringing the S7 rights also alleged. Because the action therefore amounted to a "private" dispute between the parties, no analysis of foetal rights under the *Charter* was undertaken.

96The Court's decision was confined to the narrow issue of the existence of the rights alleged under Quebec law, making its relevant only in terms of the existing law of that province.

97Demonstrated in *Medhurst v. Medhurst*, supra note 63 and the other post-*Morgentaler* abortion injunction cases discussed in this section.
external ideologies.\(^9\) Despite the courts' proclaimed commitment to the ideals of "justice" and neutrality, factors other than the dispute at hand or the "law" to be applied are often seen to enter the judicial arena in this context. Because, in addition, we often overlook the particular prejudices expressed through, and subtle messages contained within judicial decisions, we fail to recognize the great scope of the courts for influencing how a particular issue is perceived. Upon an understanding that law, especially through the courts, incorporates culturally and politically dominant ideas about the social order and the nature of the social relations embedded within it, feminists might begin to see the necessity of identifying these ideas in order to modify their influence. Certain, particularly oppressive ideas about women and motherhood as their appropriate role in social life have been shown to dominate the legal regulation of abortion since the nineteenth century.\(^9\) Despite, (or indeed perhaps because of) the legal reforms feminist have been able to grasp in this area, ideas such as these are still brought forward in the courts, even if they are now ushered in through the back door of "foetal rights". What I have attempted to demonstrate here, is that while some courts (notably the Quebec courts) have explicitly lent their support to anti-abortion demands, all those deciding the fathers' rights cases have to some extent facilitated the continued dominance of anti-choice ideas about what abortion means and consequently, about who women are. In what follows it will be demonstrated that judicial acceptance of this construction is not only a result of the subtle and politically acceptable terms anti-abortionists have used, but is also more significantly, a product of the legal form itself, in particular, the device of "rights".

\(^9\)See Chapter One, supra at 18-20.

\(^9\)See Chapter Two, supra at 28-37.
According to their traditional formulation in liberal legal theory, rights, as "trumps attaching to separate individuals", provide a means through which conflict can be resolved. The application of rights in any given context therefore implicitly assumes that conflict exists and as such, it is an inappropriate description of the relationship between a woman and her foetus during pregnancy. Yet, in representing the abortion issue as a question of the relative weight to be given to the competing rights of the woman and the foetus, anti-abortionists have succeeded in polarizing current abortion discourse into these abstract and inaccurate terms of reference. In the first place, far from being an autonomous and independent rights-bearer, the foetus has but little opportunity for existence outside of the body of the woman who is creating it. As nonsensical as it may therefore appear, this characterization of the foetus as a separate individual with legal rights has some important ideological dimensions which, as demonstrated above, are at best overlooked and, at worst reinforced by the courts when they attempt to resolve foetal rights claims in isolation from the context of women’s self-determination. Like society’s acceptance of the foetal imagery used in anti-abortionists’ extra-legal campaigns, the courts’ acceptance of the concept of foetal rights too obscures the pregnant woman’s very existence, and devalues the contribution she makes throughout the pregnancy and during parturition. If pregnancy and motherhood were not regarded as women’s "natural" functions, as Frances Olsen contends, most people, judges included, simply would not be receptive to the idea that a foetus

100Greshner, supra note 15 at 652. "A person is separate from and independent of all others, possessing rights as a means of stopping others from infringing upon his space, his autonomy."

101In light of recent medico-technical developments, it must be acknowledged that at increasingly early stages in development the foetus can be maintained outside of the woman.
is just the same as a baby or any other person with rights separate from, and potentially hostile to those of its mother. On the contrary, if society and the courts were to acknowledge the physical contribution and emotional commitment maternity requires of women, their absolute control over pregnancy would seem natural and inevitable.

It is thus when we unravel the ideological implications of the characterization of abortion as a contest between the women's rights and those of the foetus, we recognize that it is about much more - namely, the importance to be attached to women's role as mothers. The cultural success of these campaigns therefore contributes to the continued dominance of an ideology of motherhood in social attitudes to abortion. My point is that when anti-choice arguments are accepted by the courts and reflected in their reasoning (as I believe they have been in the fathers' rights cases), culturally dominant ideas about women's role as mothers are reinforced in law, if now more implicitly than before because they are presented in less blatantly oppressive terms.

When we critically evaluate the cases we see that even though none of the abortion injunctions stood on appeal, the fact that all but one initially succeeded despite the lack of a jurisprudential or statutory basis, is some evidence that the judiciary is not wholly convinced by the idea of women as independent decision-makers in abortion. The acceptance in most courts of rhetorical anti-choice language to describe the parties involved, for example, "mother", "father", unborn child" and, of typically anti-abortion concepts such as "foetal rights" to describe the issue to be resolved, is some indication that judges might be more swayed by the

102Olsen, supra note 76 at 126. As such, the widespread cultural acceptance of the legitimacy of "foetal rights" claims is "another example of society's tendency to devalue the work that women do."
terms of their argument - that abortion represents the taking of a life at the "whim" of selfish and unaccepting women. Indeed, the Supreme Court of Canada’s observation in Daigle, that the state has an (as yet undefined) interest in protecting pre-natal life, implicitly reinforces this very idea.

Considering then, as Shelley Gavigan does, that the entire post-Morgentaler feminist experience\textsuperscript{103} shows that "legal victories are clearly not to be taken for real victories";\textsuperscript{104} the judicial response to the fathers’ rights claims thus appears to lend further support to the thesis that the courts are primarily ideological institutions. Taking these cases as an illustration of how dominant ideas and ideologies pervade legal institutions and legal discourse, they would seem to destroy our faith in the courts to address the problems still suffered by women in this area. When it is recognized that these dominant ideas are currently not those of feminists, but rather of anti-abortionists, feminists appear to be facing an insurmountable hurdle as far as using law to improve women’s situation is concerned. Whilst it seems that legal defeats seem only to strengthen anti-abortionists’ resolve to conduct a more long-term, cultural and ideological struggle along the battle lines of foetal rights, feminists can no longer afford to ignore the possibilities of pursuing our own aims beyond the legislatures and the courtrooms.

**Feminists in the Extra-legal Terrain**

\textsuperscript{103}Detailed in Chapter Three, supra at 80-85.

\textsuperscript{104}Gavigan, "Beyond Morgentaler" supra note 4 at 136. Moreover, "each feminist [legal] victory contains the kernel, the possibility of a new defeat." Ibid., at 132.
The anti-abortion movement's reliance upon tactics (described at the outset of this Chapter), vigorously pursued in the extra-legal, cultural terrain has augmented the success of its campaigns, without significant support in law. Despite the defeats suffered by the anti-abortion movement in the "fathers' rights" and other legal challenges, its efforts to restrict women's access to abortion continue outside of law. Indeed, as Gavigan aptly puts it, given that the strongest weapon in the anti-choice "arsenal" has not so far been a legal one, "the extra-legal, cultural struggle currently being waged may prove to be the decisive one". In the midst of all this the question remains as to what feminists must do in response to renewed challenges to women's right to choose, established in Morgentaler, but as yet met with opposition and disdain in the courts, the legislatures and the streets.

There is of course the possibility of claiming new rights for women in the reproductive sphere, or demanding greater legal protection for already existing rights. It has been suggested by some for instance, that feminists should now rely upon the equality guarantee laid down in S15 of the Charter, in claiming the right to abortion as essential to women's equality.

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105 Neither the cases on the rights of fathers or that specifically on the rights of the foetus - Borowski, supra note 95 - have succeeded at the higher court levels.

106 Anti-abortion violence could spread to Canada, pro-choice groups fear" Vancouver Sun, (12 March 1993). After the shooting of an American doctor outside his Florida abortion clinic, pro-choice groups in British Columbia spoke out against the increased level of anti-abortion harassment recently experienced by doctors performing abortions here. Joy Thompson of the B.C Coalition for Abortion Clinics remarked "[t]he anti-choice movement has not been able to win legislation and is now resorting to terrorism."

107 Gavigan, "Beyond Morgentaler" supra note 4 at 122.

this may eventually provide a practical solution to problems of uneven access, in re-defining abortion choice as a positive right to be enjoyed by all women rather than a negative "liberty" right (as it currently is under S7 of the Charter), it may not be the most appropriate place for feminists to start deconstructing oppressive, ideological images of women which, as we have seen, continue to influence how abortion is perceived in the legal sphere. In light of Carol Smart's claim that feminists have already ceded too much to law (and in particular, legal rights) at the expense of more important extra-legal strategies, it would seem that the assertion of more rights is not the most effective means of undoing the damage done to women's current exercise of abortion choice by ideological anti-abortion campaigns. Moreover, because, "[e]xcept in rare instances, our language does not become the courts' language, nor our visions the courts' visions", a continued reliance upon rights claims seems to make us "complicit with an oppressive system - a system which should be challenged, not relied upon". The weakness of the legal victories we have already secured, and the extra-legal successes of anti-abortionists are sufficient confirmation of the recent claim that "[f]eminist ideas must find a stronger voice in popular culture and consciousness before they can have a lasting impact on

Charter, which mandates that women's Charter rights cannot be burdened in a way that men's are not.


*Ibid.*, at 144 "legal rights do not resolve problems. Rather they transpose the problem into one that is defined as having a legal solution." The granting of more rights in the abortion context may therefore even be considered counter-productive, since this might give the impression that the problem no longer exists, thereby distracting attention from more important issues such as creating the conditions necessary to enable true enjoyment of the rights, and changing the social attitudes which hinder free exercise of them.


The anti-choice campaigns on the rights of the foetus have shown us the fragility of our court-granted rights, but they have also, more importantly, exposed the "fragility of public consciousness," leaving feminists in the position of having to consider strategizing outside the legal realm.

Indeed, Canadian feminists can no longer afford to ignore the powerful material dimensions of anti-abortion ideological successes which, as Marlene Gerber Fried comments, in the United States have already attributed to a growing popular notion that abortion is morally problematic, making it easier for governments and courts there to place restrictions upon access to it. In this country already provincial governments and legislatures have demonstrated a similar willingness to impose financial obstacles to the free exercise of abortion choice. Legislative initiatives taken by several provincial governments attempted to remove health insurance coverage from all but "medically necessary" abortions. Tell-tale signs such as these, and the incidence of similarly harmful post-Morgentaler backlashes against legalized and accessible abortion even after the relative successes of feminists compared to anti-choice

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113Petchesky, Woman's Choice supra note 7 at 321.
114Gerber Fried, supra note 112 at 2.
115Ibid., at 5. In decisions such as that in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), whereby the performance of abortions in all public facilities and in private hospitals which receive public funds was effectively prohibited, the United States Supreme Court might be argued to have give more weight to anti-abortion views than those of feminists.
116See Chapter Three, supra at 85-87.
117Almost immediately after the decriminalization abortion in Canada the federal government attempted for two years to recriminalize abortion under Bill C-43, (An Act Respecting Abortion 2d Sess., 38 Parl., 1989), and in the "fathers' rights" cases the judiciary exhibited a reluctance to endorse women's unconditional exercise of reproductive freedom. See Chapter Three, supra at 87-90.
advocates in Canadian law, suggests that the abortion issue in the future, is indeed "more likely to be settled by political struggle than by legal right."\textsuperscript{118}

In this Chapter I have been concerned with exposing the ideological messages or "meanings" about women which are contained within anti-choice campaigns and discourse, though often overlooked or forgotten when we are presented with visual images of "living foetuses" and verbal rhetoric of "protecting innocent life". It has been seen here how the construct of foetal personhood and rights entered abortion discourse only after women began to achieve some measure of control over their reproductive lives, and how new restrictions upon women's abortion autonomy have since been demanded as necessary to protect the foetus. It has also been seen how, in the face of feminist and pro-choice legal challenges, obstacles to abortion are rarely explicitly justified in the name of ensuring that women fulfil their supposedly "natural" roles as mothers. Yet, this does not mean that these ideas have disappeared from abortion discourse. Without suggesting that current anti-choice ideology is \textit{exactly the same} as the ideology of motherhood which (in conjunction with other ideas about the authority of fathers over women and children\textsuperscript{119}) informed the original prohibition of abortion in the nineteenth century, my point is that the assertion of legal rights for fathers and foetuses is in itself a manifestation of similar ideas and assumptions about women's relation to motherhood. In some ways it may even be argued to be a more subtle - and thus more effective - reinforcement of the old blatantly oppressive notion that child-bearing is what women are "for" and if need be, they

\textsuperscript{118}Gavigan, "Beyond Morgentaler" \textit{supra} note 4 at 121.

\textsuperscript{119}See \textit{supra} at 95-96.
must be coerced into it by law. Upon an understanding that the concern of "right-to-life" campaigns is not exclusively (nor even primarily) with the foetus, but with re-instating time-honoured social constructions of motherhood as women's "natural" role, I have examined the judicial response to requests by "fathers" and anti-abortion advocates for the law's assistance in restoring wayward women to their rightful place. That these claims have to some extent been legitimized in judicial institutions which proclaim a commitment to "justice" and "neutrality", is for feminists an important sign that law may not be the best forum in which to contest and dismantle ideological constructions of motherhood. Anti-abortion activism and the relative success of extra-legal anti-choice campaigns have further shown us that law is certainly not the only forum for promoting newly articulated ideas on abortion. In the midst of all this, the recognition that

[t]he powerful idea that restricting abortion means compelling motherhood, that motherhood is a social relationship and not a punishment nor a destiny...still remains far removed from the consciousness of most people (emphasis added)

is some evidence of pro-choice's failure to develop an alternative vision, or to promote specifically feminist ideas about women's need for abortion autonomy in the cultural and political spheres. That as a result "feminists do not control the social meanings of our struggles or our victories" (emphasis added) is further indication that we need to re-evaluate our position via abortion regulation and perhaps, rethink our strategies. In particular feminists might now need to explore the possibilities of constructing and promoting our own "meanings" and

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120Petchesky, Woman's Choice supra note 7 at 131.

121Gavigan, "No Man's Land" supra note 59 at 9.
ideas about abortion, its restriction, and the conditions necessary to improving the reproductive autonomy of all women. It is to this innovative line of enquiry that I shall now turn.
CHAPTER FIVE

THE SCOPE FOR FEMINIST DISCOURSE

In this final Chapter some strategic suggestions from my foregoing analysis will be made. While I do not pretend to have arrived at a comprehensive and well defined blue-print for future feminist action in the abortion struggle (indeed it is questionable whether such might ever exist), I believe that I can offer some valuable insights as to the directions Canadian feminists might take in developing new methods of tackling recurrent problems. As this discussion has unfolded, I have used the concept of the "dominant ideology of motherhood" as a theoretical framework with which to analyze both past abortion regulation and the problems currently faced by Canadian women in their exercise of reproductive control. It has become apparent that despite the positive legal changes feminists have secured in this area over the past two decades, legal perceptions of abortion continue to be influenced by ideological notions of women's role as mothers. While this recognition is essential to understanding why, in failing to address or challenge these ideas, our past struggles have had limited impact, it is I believe only the first step. In order for this insight to be of value for future work, feminists must begin to question the implications of law's incorporation of the ideology of motherhood, and work towards devising a response which does not rely upon law alone to redress present grievances. As suggested at the outset of this thesis, the strategic discoveries that can be made through the use of ideological analysis may eventually prove indispensable in the ongoing abortion struggle. Here it will be argued further that an analysis of how the ideology of motherhood in particular informs abortion regulation may uncover the knowledge necessary to construct new frameworks within
which to develop specifically feminist or "woman-centred" discourse on abortion. In illuminating new methods of dealing with law, as well as highlighting the need for feminists to articulate new ideas with which to challenge and dismantle traditionally dominant constructions of women and abortion, it might enable us to create the foundations necessary to more effective strategizing.

Before proceeding to an investigation of the various directions feminists might pursue in countering the negative effects of the reproduction of the ideology of motherhood in law, I find it essential to draw the discussion back into the context of the law/ideology relationship. The role of law in incorporating external ideas and beliefs about social relations and in so prioritizing certain interests over others has been described. Moreover, concrete examples of how legislation and judicial decisions on abortion reflect dominant ideas about women and their relation to motherhood have appeared throughout my analysis. The ideological nature of law itself - the extent to which it naturalizes us to these particular ways of thinking - has also been briefly touched upon. However, at this point I believe that a more sophisticated analysis of this aspect of law is essential to understanding law's intransigence to feminists' demands for reproductive freedom, and to exposing the ways in which we might overcome our traditional preoccupation with legal (reform) strategies.

In the past feminists have been seduced by law's proclaimed commitment to objectivity and fairness, turning to law to reform repressive abortion legislation and requesting legal recognition of the "right to choose". Whilst we have been met with an apparently positive legal

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1See Chapter One and Chapter Four, supra at 18-21 and 116-18.
response to these demands, for many women little has changed, and the limited gains made are already under threat of erosion from judges and legislators more sympathetic to the supposed "rights of the foetus". It is with an awareness of this background that feminists must contemplate how to deal with law in the future. The dilemma as to whether we should continue to engage with it in the hope of making its content more favourable to women, or opt to ignore it completely currently pervades feminist academic debates on reproductive freedom and indeed, the entire field of feminist work. Whilst the second option does seem somewhat appealing given the contradictory and unsatisfactory experience of feminists' reliance upon the law, I believe it does not provide us with any, more attainable solutions to the central problem identified above -that of law's traditional and oppressive depiction of women in the abortion context. The awareness that law incorporates external ideas about women and reinforces them further in public consciousness, is sufficient reason for taking up struggle with it, if for no other reason than to ensure that the place of these particular beliefs in a supposedly "neutral" system of law does not go unchallenged. Given that law itself therefore exercises ideological power, it is essential that feminists do not overlook it at this stage of the struggle for reproductive freedom. In what follows it will be argued that feminist work must aim to expose the extent to which law operates to "protect the dominant system of social and power relations against political and ideological challenges."^3

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^2 As a result of R. v. Morgentaler, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter Morgentaler cited to D.L.R.] women in Canada now enjoy a certain right to abortion. Yet it is only a negative right or "liberty" to control their pregnancies exercisable under S7 of the Charter of Rights and Freedoms, instead of a more favourable positive right of access to abortion services. As shall be seen below, infra at 146-47, the implications of this are harshest for poorer women, whose interests have traditionally been overlooked not only by governments and courts, but also by the feminist movement itself.

The Feminist Response to Law

Although she does not rely on the term "ideology" as such, Carol Smart’s groundbreaking sociological work on law as a system of "discursive construction", provides some helpful pointers on how the insights from my foregoing analysis might be applied by feminists in our future engagement with law. Smart criticizes previous feminist law reform strategies as being overly dependent upon law to redress the circumstances of women’s oppression, without paying adequate attention to the role law plays in perpetuating them. Reviewing several areas of law in which reforms have been sought, she locates law’s power (to resist feminists’ demands) in its ability to define and consequently to "resist and disqualify alternative accounts of reality" - women’s accounts. Because law’s definitions often take precedence over women’s in areas most affecting women (such as rape and abortion), and because law retains the right to define even in the face of challenge, it is a powerful obstacle to feminism’s ability to promote alternative definitions and accounts. In resorting to law "as if it holds the key to unlock women’s oppression" feminists legitimate law’s definitions and thus, risk "invoking a power that will work against [us] rather than for [us]." Smart consequently claims that what is more

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4Carol Smart, Feminism and the Power of Law (London: Routledge, 1989) at 162 regards law as “a discourse which is able to refute and disregard alternative discourses and to claim a special place in the definition of events.”

5Ibid., at 4.

6Ibid.

7Ibid., at 5.

8Ibid., at 5 and 138. As Dawn Currie, "Feminist Encounters with Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law, (1992) 5 Canadian Journal of Women and the Law 67, explains "[e]ngagement with law requires acceptance of its discursive framework: if women’s grievances are framed within established categories of law the underlying structure or the ideas which inform
important at the present stage of feminist mobilization is the way in which we deal with the power of law. Since "law is so deaf to the core concerns of feminism" she warns that we must be extremely cautious as to whether and how we resort to it.\(^9\)

Smart's analysis of the discursive power\(^{10}\) exercised by law is most helpful in allowing us to see how law might remain a valid focus of feminist theoretical and political scrutiny. The discovery made above, that law has remained so intransigent to feminist demands for extending women's reproductive freedom primarily because it incorporates the most politically powerful ideas on women's role as mothers, has led us to doubt the validity of using law to resolve the problems still suffered in this area.\(^{11}\) Yet, the further understanding that the ideological or discursive power of law operates to make culturally dominant ideas and beliefs appear inevitable and insusceptible to change, means that we cannot afford to ignore it. On the contrary, it

\begin{quote}
the legal treatment of women will not be challenged."
\end{quote}

A similar understanding of law leads Carol Smart, "The Woman of Legal Discourse" (1992) 1 Social and Legal Studies 29 at 40, to the conclusion that, law is not a "set of tools or rules that we can bend into a more favourable shape."

\(^9\)Smart, "The Power of Law" supra note 4 at 2.

\(^{10}\)The notion that law exercises "discursive power" in resisting and disqualifying alternative accounts of reality has been raised in the recent body of work (see for example, Susan Boyd, "Some Post-modernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Canadian Journal of Family Law 79.), which rejects earlier Marxist and instrumentalist theories of ideology as distortion of "false consciousness". In what follows I rely greatly upon Boyd's assertion that, rather than being paralysed by the post-modernist displacement of the concept "ideology" by that of "discourse", feminist ideological analyses of law can actually benefit from new understandings of how law effectively resists challenges to the dominant ideas it reflects through the exercise of discursive power. Like Boyd, I too believe that post-modernist insights into law as a dominant discourse in society can supplement feminist analyses of the "ideological power" of law.

\(^{11}\)Smart, "The Woman of Legal Discourse" supra note 8 at 40, suggests that law may still a site if no longer a tool of struggle for feminists.
demands that we address law in order to expose the particularity of its depiction of women and, to modify the effects of this oppressive construction. Indeed, the insights gained from the previous ideological analysis of abortion regulation are some indication that we need a new basis for developing more effective feminist challenges to law and legal discourse. Whereas during the 1970’s and 80’s feminists concerned with improving women’s reproductive choice relied almost exclusively upon law (especially the courts), to attack dominant constructions of motherhood by overturning coercive abortion legislation, feminists now facing the disappointing results of this strategy must work at deconstructing law and at thereby destabilizing the power law exercises in marginalizing and discounting other ideas.

When feminist analyses begin to focus upon how some "dominant meanings" are constructed in and reproduced through law, we might also realize that law can be an important site of discursive resistance. In revealing the falsity of ideological assumptions about law’s neutrality, feminists might create greater space for feminism "as a form of knowledge". That "law is not an object that has power ... it is a form of the exercise of power and women can use this power", is for Smart some indication that although feminists must now necessarily have limited expectations of what we can achieve through law, we might nevertheless engage with it on a more theoretical level in order to resist its oppressive influence. It would therefore seem that what feminists need to do, is reveal in public forums that the ideas and beliefs about women

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13Currie, supra note 8 at 73.

14Smart, "The Power of Law" supra note 4 at 3.

and their role as mothers which law reproduces are not somehow "natural" or god-given but are rather the ideas espoused by the more politically powerful social actors. We need in particular, to work towards establishing in popular understanding the awareness that simply because such ideas are framed in law, this does not give them any greater legitimacy or truth, since law itself constitutes an "oppressive social order". In exposing law as the site of "struggles over meaning" under which women have traditionally been denied reproductive control, we might struggle to create the space necessary to articulate and promote our own alternative visions, and to use them in resisting and challenging those upheld by law.

A Basis for Feminist Discourse

At the same time, feminist deconstruction of the ideological power of law allows us to look for "other meanings" upon which to base feminist discourse. In giving rise to an exploration of those experiences and ideas about women's needs and wants in the area of abortion, which have traditionally been marginalized under the legal embracement of the ideology of motherhood, ideological analysis and critical deconstruction of law might provide the basis for the development of more challenging feminist discourse on abortion. When we look

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15The most powerful actors in the abortion debate since the inception of the initial prohibition, have not been women or pro-choice feminists. During the nineteenth century the views of the male clergy from the dominant Christian tradition, and of the newly emergent male medical profession that had the most influence upon Parliament's decision to outlaw the practice. Today, as noted in Chapter Four, the views of anti-abortionists on the rights of the foetus are currently dominating the debate.

16Smart, "The Power of Law" supra note 4 at 149.

at earlier feminist approaches aimed at securing reproductive choice and the limits of their achievements, the need to concentrate on devising new, more socially captivating discourse with which to address current problems becomes apparent.

As has been noted in Chapter Three, feminist demands for the "right to choose" during the 1970's and 80's were heavily influenced by the views of sympathetic medical professionals and consequently, by dominant medicalized notions of abortion.\(^\text{18}\) At that early stage of mobilization on abortion feminists had not constructed a specific discourse of their own through which to articulate the concerns and needs of women in this area. Whilst reliance upon medicalized discourse did enable feminists to challenge the employment of the criminal sanction in an area related to women's "health", this was to prove insufficient in getting law to address the real concern of many women - that of gaining access to abortion.\(^\text{19}\) The adherence to liberal rights discourse by pro-choice feminists during the 1970's and 80's may also be argued to have contributed to the problems we are currently facing. It has been adequately documented elsewhere that the concept of "rights" is unsuitable in making gains for women since, formulated in the abstract, rights are dissociated from the social conditions which often need to be changed in order to facilitate the exercise of the right claimed.\(^\text{20}\) Thus, the success of the "right to

\(^{18}\)See Chapter Three, supra at 69-72.

\(^{19}\)Despite decriminalization, women are still not guaranteed access to abortion services, since they only enjoy a negative right or "liberty" to abortion under s7 of the Charter. See footnote 2 supra.

\(^{20}\)See Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* (Boston: North Eastern University Press, 1990) [hereinafter Woman's Choice] at 14-17. The characterization of abortion in terms of a right to choose does not make it incumbent upon any government to provide the funds necessary for women to exercise this right. In Canada some provincial governments have responded by cutting off state funding of abortions in certain circumstances. Thus, it may even be seen as detrimental to poor women.
choose" campaign did by no means guarantee women all they needed or wanted in this area. On the contrary, in fuelling anti-abortionists into counter-claiming rights for the foetus and for the "father", it gave feminists and women everywhere something more to worry about than the legal restriction of abortion.

Thus, although feminists in the past two decades have consistently advanced oppositional views on abortion to those enshrined in law, the foregoing analysis demonstrates that while we have not so far been aware of the necessity of speaking about abortion in a discourse different to those of medicine or legal rights, the dominance of these other oppressive constructions has gone unchallenged. In relying upon existing (traditionally male-dominated) discursive frameworks to advance our competing claims, feminists have neglected the possibilities of constructing and achieving dominance for our own alternative discourse on abortion. What ideological analysis of abortion regulation and the recent recurrence of obstacles to women's exercise of abortion autonomy shows, is that instead of joining the debate as it is currently defined in legal discourse, (in terms of a "liberty" right and "the state's interest in protecting pre-natal life")

21 Feminists must now work to "re-examine and re-conceptualize" those constructions which continue to disadvantage women in this sphere. It is only when we move beyond the reliance upon concepts which, under an ideological system of law, can all too readily

21 A medicalized definition also arguably still does influence abortion regulation in Canada, given the policies on funding enacted by several provincial governments and the federal government's attempt to criminalize abortion once more (under Bill C-43, An Act Respecting Abortion, 2d Sess., 38 Parl., 1989.) subject to the opinion of the doctor from whom the procedure was requested.

be turned back against us, that we may make any real progress in this ongoing struggle. It is moreover, only when we attack the ideological premises upon which dominant discourses on abortion rest, that we may fully recognize the possibilities for the articulation and promotion of new, more challenging feminist constructions.

The project of developing new feminist discourse on abortion is unquestionably a demanding one. It may indeed be impractical, if not impossible to move beyond the resort to traditional and widely accepted discursive concepts in the short term. Yet, a critical approach which identifies the oppressive aspects of traditionally dominant ideas, whilst simultaneously facilitating the construction of oppositional ones, may give us something valuable to work with. Thus, in considering where feminists might begin the search for alternative ideas and meanings upon which to base feminist discourse, I find it worthwhile to look behind the traditionally dominant and legally accepted medicalized discourse on abortion and, the currently powerful anti-choice ideology, to explore the hidden terrain in which "women have always struggled to find a voice of our own". As Marie Ashe contends, an exploration and exposition of the oppressive meanings and "profound ambivalences" inherent within those ideas and beliefs which inform legal perceptions of abortion, might enable feminists to "rupture the dominant rhetoric [in order to] express a different knowledge."^24

As has been demonstrated above (in Chapters Two and Three), the medical profession

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has been closely involved in the abortion debate since the mid-nineteenth century, when the influence of its ideas within Parliament, especially those on motherhood as women’s highest function, helped bring about the first instances of criminal prohibition. During this century the law has been relaxed to take account of actual medical practice in this area, giving doctors’ expertise in deciding when abortion was medically necessary (or "deserved"), official recognition. Medical definitions of, and discourse on abortion which have long acted as a vehicle for importing ideological notions of motherhood into laws regulating abortion, must be critiqued and overturned before we have any hope of transforming this field through feminist discourse. What I would therefore recommend is that feminists first set about exposing the ways in which medicalized views of abortion - that abortion is only required when a woman’s health is threatened - left largely intact despite abortion legalization, are in effect a means of coercing all healthy women into motherhood regardless of their own wishes. This approach might provide a particularly helpful response to current problems, given that the recent cuts in abortion funding have been mandated by provincial governments’ adherence to the concept of "medical necessity". In making clear the oppressive aims of such policies, including their capacity to reinforce stereotypical images of women and to discriminate against those who do not conform to the norms of "acceptable female behaviour", we might encourage the general public to regard

\[\text{\underline{\text{25}}}\text{Other ideas and interests influenced the emergent male medical profession to take a stand against abortion. These are documented throughout Chapter Two.}\]

\[\text{\underline{\text{26}}}\text{Provincial policies such as that of New Brunswick, which declared that abortions would not be paid for under medicare unless two doctors had certified that it was a medical necessity in a particular case, are discussed in Chapter Three, supra at 80-82.}\]
them as intolerable.\textsuperscript{27} It is less likely that governments would risk continuing policies which receive little electoral support, as opposed to ones which are tacitly accepted as valid. Moreover, in challenging medical definitions of and control over access to abortion, it is also important that feminists begin to attack a system which allows for the eugenic administration of abortion and often, the simultaneous sterilization of women, based upon their race and class.\textsuperscript{28}

As well as providing us with a means of reacting to immediate problems of access to abortion, an exploration of the meanings of medicalized discourse for women, may also provide us with a framework within which to articulate our own "woman-centred" ideas about abortion. A feminist critique which shows that the construct of "therapeutic" abortion distorts the reality of women's lives, might facilitate the public understanding that a multitude of other conditions create a genuine need for safe, legal and state-funded abortion.\textsuperscript{29} When it is made clear that the concept merely serves to create an improper and unfair distinction between abortions sought for "good (medical) reasons" and those sought for "selfish" motivations, it might eventually be widely recognized that the availability of abortion is essential to the economic, social, sexual, and professional needs of all women, as well as to their physical and psychological well-being.

\textsuperscript{27}As noted in the preceding Chapter, cuts in abortion funding arguably target poor, black and lower class women whom have traditionally been portrayed as sexually promiscuous under the dominant ideology of motherhood. While such women are made to pay for their abortions, and their sins through enforced motherhood.

\textsuperscript{28}See Petchesky, \textit{Woman's Choice supra} note 20 at 129. For a detailed account and statistics of the recent occurrence of medical pressure upon black and poor women to abort and to simultaneously consent to sterilization, see Nancy Chater, "Unexamined History Repeats Itself: Race and Class in the Canadian Reproductive Rights Movement" 33 \textit{Fireweed} (1991) 44.

\textsuperscript{29}See \textit{infra} at 152-53 for suggestions on how the "therapeutic" construction of abortion might be employed by feminists to improve Canadian women's access to abortion services.
Not only do we need to re-examine and contest the medicalized definition of abortion which has explicitly influenced legal regulation up until the late 1980's, we now also need to deconstruct current anti-abortion ideology which, as I have argued in the previous Chapter, facilitates the continued legal and extra-legal acceptance of the dominant idea that, above and beyond all their other aspirations in life, women are destined primarily for motherhood. That anti-choice advocates are now dominating the abortion debate with rhetorical notions of "life" in the abstract, might be seen to be more a reflection of feminists' failure to disclose the real messages and the real targets of their campaigns in public forums, than of any claim to legitimacy society regards them as having. As Ellen Willis suggests, feminists must acknowledge the extent to which anti-abortion efforts at controlling women's sexuality, forcing them to remain true to ideological conceptions of motherhood, are cleverly concealed in arguments on foetal rights, making it all the more difficult for us to challenge or dislodge them.\(^{30}\) An understanding of what these campaigns mean in terms of women's lives forces feminists to articulate the ideas necessary to express the one "truth" which in the rhetoric of "foetal rights" has been ignored: that foetuses are ultimately connected to and dependent upon the bodies of pregnant women, and that the recognition of foetal rights necessarily permits the violation of women's bodies, and the infringement of women's self-determination. From this position feminists might then devise our own moral issues for society to digest,\(^{31}\) such as, whether the "protection of foetal life" can


\(^{31}\)This point is based upon a suggestion made by Willis, ibid., at 131.
ever under any circumstances justify forcing a woman to continue an unwanted pregnancy against her will. Such an approach, in helping to construct feminist discourse which is more critically aware of the ideological and socially compelling content of anti-choice campaigns, might succeed in transforming the current situation where, "the anti-abortion perspective has .... crept subtly into ways of thinking and speaking about abortion."\textsuperscript{33}

Feminists might also focus upon the philosophical inconsistencies and tactical contradictions within anti-abortion campaigns in order to create more space for promoting our own more powerful discursive ideas about abortion. It has already been noted that the current widespread acceptance of anti-choice imagery and rhetoric as an accurate description of the foetus, has been due mainly to anti-abortionists’ reliance upon medical technology,\textsuperscript{34} which as Petchesky suggests, is arguably now regarded as a more authoritative source than the Christian morality on which their earliest campaigns were based.\textsuperscript{35} Yet, despite the fact it is medical science which gives a sense of validity to their claim that "life begins at conception", anti-abortion activists consistently deny that abortion is a medical matter to be decided by women and

\textsuperscript{32}This approach could also be developed to resist a situation whereby pregnant women might be legally required to submit to invasive medical procedures, or to behaviour surveillance and possible detention in preventing "maternal misconduct" towards the foetus.

\textsuperscript{33}Lynn S. Chancer, "Abortion Without Apology" in Gerber Fried ed., supra note 30 113 at 114.

\textsuperscript{34}As noted in Chapter Four, this mainly visual campaign was made possible by a sophistication in medical technology which allowed physicians to monitor and record various stages of foetal development.

\textsuperscript{35}Rosalind Pollack Petchesky, "Foetal Images in a Visual Culture" in Michelle Stanworth ed., Reproductive Technologies: Gender, Motherhood and Medicine (Minneaplois: University of Minnesota, 1987) at 59 [hereinafter "Foetal Images"]:}
When contradictions such as this are exposed through the media and other educational forums, feminists might create the space necessary for women's voices - the only voices of experience on this issue - to be heard.

**Feminist Discourse: "Woman-centred" Knowledge**

Whilst a critique of the traditional, and prevailing definitions of and ideas about abortion which are prioritized and upheld by law, provides feminists with some direction in the initial stages of developing our own discourse, there remain many questions as to how we should proceed in the long term. Although it is not my intention here to make concrete recommendations as to the detailed form this project should take, I want to make some tentative suggestions as to the avenues feminists might find worth exploring further at this stage. In this I necessarily rely upon what I consider to be the innovative work of other feminist scholars, who have raised some salient points as to how abortion and other areas of law affecting women might be transformed. Of particular interest in the abortion context is Marie Ashe's work on reproduction. In her opinion, since law relating to women and their reproductive capacity "originates in men, defines women with certainty and attempts to mask the operations of power at work in silencing other discourse", feminists must begin to challenge it, asking doctors, judges, and legislators alike, (and arguably also anti-abortionists) "how do you know what you

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36 Janine Brodie, "Choice and No Choice in the House" in Brodie, Gavigan & Jenson eds., supra note 17 at 78.

37 Ashe, supra note 24.
claim to know" about women and abortion?"38 The "unfounded confidence about the nature of women and of motherhood" exhibited in dominant ideas and legal regulation about abortion, has so far operated to discourage women from speaking of the "subjective realities of abortion" - most notably, of what its restriction means in terms of their own lives.39

It is Ashe's understanding that the ideas and beliefs about women and their relation to motherhood which are reproduced in law reflect an extremely selective knowledge,40 that I find most inspirational to the project of developing new, liberating feminist discourse. It makes explicit the demand for feminists to replace this particularized knowledge with alternative accounts which testify to the various experiences and concerns of women when faced with an unwanted pregnancy. When the findings of this thesis are re-considered, it becomes apparent that under dominant ideology, selectively chosen norms of "proper motherhood" have operated to impose artificial categorizations upon women, and that stereotypical beliefs about different women have mandated their differential treatment under abortion regulation since the nineteenth century. It has already been documented how notions of the "good mother", and the "unfit mother" were employed during the late 1800's and early 1900's to encourage the child-bearing of white, middle class women while discouraging (and often physically preventing) that of black, immigrant and lower class women. We have also more recently witnessed how notions of the

38Ibid., at 375.

39Ibid., at 355 and 361, Ashe contends that this "leaves us with feelings of anger, rage, humiliation, desperation and indignation", begging the question: "[i]s there something we ought have said, ought to begin to say to alter the legal understanding of women?"

40It might be argued that this knowledge, focussed mainly on women's biological capacity to reproduce, maintains the conditions of women's subordination in the reproductive sphere.
"healthy mother" were (and continue to be) used to discriminate among women in terms of entitlement to abortion, and how current constructions of the "selfish mother" enable anti-abortionists to make out a case for "state protection of the foetus". With this evidence of how legal definitions of and discourse on abortion rely upon a particular idealized, and most often oppressive conception of motherhood, feminists might recognize the necessity of getting women to speak out about their own views and ideas on abortion. As Ashe contends, feminist discourse must begin with women, with our own accounts of our experiences and concerns, if it is to bring about a necessary re-definition of the issue, or to avoid the abstraction resulting from our previous reliance upon other discourses of medicine and liberal rights.41

Of the many difficulties involved in the project of bringing "women's perspectives" to bear on the abortion issue, the first hurdle would seem to lie in devising a suitable method for discovering those perspectives. Here, once again the work of Carol Smart proves illuminating. In considering how feminists might begin to "construct an alternative reality to the version which is manifested in legal discourse", Smart looks at the possibilities provided by the method of "consciousness-raising".42 While (rightly) criticizing the elevation of consciousness-raising as a formula for divining women's "real or true experience" of events which the power of law obscures, she suggests that it might be useful in facilitating "the emergence of the alternative

41 Ashe, supra note 30 at 375.

42 Smart, The Power of Law supra note 4 at 160 and 79.
perspectives of women". Since I believe the purpose of developing new feminist on abortion is not to reveal women's true experience which is suppressed under law's commitment to the ideology of motherhood, but rather to explore the many alternative ideas about abortion which have been "thrust beyond the bounds of the unthinkable" (and the unspeakable), consciousness-raising might become an important focus in this project. According to Kristin Luker, the very notion of "raising consciousness" implies that "people can be made to experience as problematic events or situations which they had previously accepted" as inevitable. Thus, this method may be invaluable in attacking a dominant ideology and a system of law, both of which "render their beliefs natural and self-evident". In facilitating the telling of women's alternative accounts and the construction of new oppositional definitions of motherhood and abortion, consciousness-raising may be essential to a feminist "re-ordering [of] understanding" as Smart claims and, to allowing women themselves to recognize that "things can

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This criticism reflects Smart's position in the current debate among feminist scholars, on the efficacy of consciousness-raising as a method for constructing "feminist jurisprudence". Connected to the early Marxist idea of ideology as "false consciousness", it has been suggested by some radical feminists, (see for eg. Catharine MacKinnon, "Feminism, Method, Marxism and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635) that consciousness-raising will reveal the "truth" about women's oppression and as such, will allow for the "construction of Women anew". While the Marxist understanding of ideology has recently been profoundly challenged by socialist feminists, so too has this employment of consciousness-raising, since it implies that women have always been constructed by male power for its own interests. In assuming that there is but one true version of "women's reality" which will emerge once male power has been removed, consciousness-raising as a method of divining that reality, may be attacked for its inherent universalism and essentialism, which as Smart asserts, might prove ultimately self-defeating for feminists. However this is not to say that the method may not be used to other ends. Like Smart, I believe that although consciousness-raising may be of value in promoting the alternative accounts of diverse women on various feminist issues, as a method of revealing the truth of women's oppression, it is extremely suspect.

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45 Eagleton, *supra* note 44 at 58.
be different\textsuperscript{47} The claim made by Dorothy Roberts that "too often we accept the limitations society places on women's reproductive choice because we have learned that that is \textit{what it means to be a woman}" (emphasis added),\textsuperscript{48} makes quite explicit the need to bring to the fore the silenced voices of women in contesting dominant social constructions of motherhood as the "natural" goal of all "proper" women.

Feminist discourse needs to make clear that ever since the nineteenth century, prohibitions and restrictions upon abortion have been justified, under the ideology of motherhood, by appeals to women's "natural" biological capacity to reproduce.\textsuperscript{49} We can then go about establishing in all women's consciousness the oppositional idea that it is not "nature", but law that dictates how we can deal with unwanted pregnancy, along with the understanding that it is not inherently "unnatural" for women to "reject" motherhood in choosing abortion.\textsuperscript{50} Moreover, as Dawn Currie suggests, feminist challenges to the ideological power of law might also assist in dismantling "naturalized conceptions of women and women's oppression which law reinforces."\textsuperscript{51} In contextualizing these notions within an ideological system of law which

\textsuperscript{47}Smart, \textit{The Power of Law}, supra note 4 at 80, "what was once 'natural' [thus] comes to be defined as political and change is potentiated."


\textsuperscript{49}See Chapter Two, supra at 41.

\textsuperscript{50}As Sheilah L. Martin, "The Control of Women Through Gender-Biased Laws on Reproduction" in Richard F. Devlin ed., \textit{Canadian Perspectives on Legal Theory} (Edmond Montgomery Publications Ltd: Toronto, 1991) at 34, contends, we need also to work at establishing in popular understanding the idea that women do not always welcome pregnancy, and may on occasions even experience it as violative."

\textsuperscript{51}Currie, \textit{supra} note 8 at 77.
equates women's position under abortion regulation with the "natural order," rather than the socially constructed one which it helps maintain, we might find a powerful tool with which to challenge long taken-for-granted beliefs about women's roles as mothers. It is in this that feminist discourse might eventually succeed in having motherhood recognized as a "private discretionary choice ... and not an involuntary, low-status role to which women can be banished at any time."^53

The Problem of Difference

Further difficulties emerge when we attempt to establish alternative understandings and meanings of motherhood and abortion as a basis for feminist discourse. Of particular concern is the fact that such a project necessarily highlights "the way in which knowledge of the social world is produced through relations of gender, race and class."^54 According to Dawn Currie, an exploration of women's ideas and beliefs which have been traditionally suppressed by law, will uncover little except the contradictory nature of the accounts of differently situated women. Whilst for Currie, this negates the possibility of ever constructing feminist discourse, I do not consider the problems inherent in dealing with women's differences as sufficient reason for discounting new, and as yet untried methods of overcoming all our oppressions.

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^52Ibid., at 72.

^53Luker, supra note 45 at 201 and 176.

^54Currie, supra note 8 at 78-79.
Indeed, new challenges to feminist theory, posed mainly by the work of black women dissatisfied with "the racist and ethnocentric assumptions" of white feminists, command that we pay greater attention to the differential forms of oppression suffered by women on the grounds of race and class. The history of the Canadian women's movement, and indeed those of all western nations, has more recently been shown to be one of domination by white, middle class women and of a single-minded focus upon their concerns. In the struggle for reproductive rights this has led to developments which discriminate between women on the basis of race and class, and which serve only to reinforce these divisions. The currently problematic issue of government funding of abortions, which was largely ignored by the pro-choice movement during the 1970's and 80's, necessarily has different implications for women depending on their income. Women of colour and working class women (those traditionally in society's lowest income bracket) are therefore disproportionately affected by recent measures which restrict funding under certain circumstances. Also, other abuses of non-white middle class women, such as involuntary sterilization, continue without much attention directed at ending them. As Nancy Chater submits, even in Canada today there is a degree of common knowledge that sterilization abuse of immigrant women, First Nations women, poor women and women with disabilities is

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56Cerise Cox, "Anything Less is not Feminism: Racial Difference and the W(hite) M(iddle) C(lass) W(omen's) M(ovement)" (1990) 1(2) Law and Critique 237, suggests that "[i]t was the racism and classism of a society founded and thriving upon race and class divisions that became enmeshed within the Women's Movement....From the beginning (North American) feminism was defined from the standpoint of the white, middle class, college-educated housewife." Ibid., at 237 and 238.

57See Chater, supra note 28.
occurring, despite the unavailability of documentation or official statistics as to its extent.\textsuperscript{58} Information collected from the Immigrant Women’s Health Centre in Toronto in 1989, reveals that less educated women are twice to ten times more likely to be subtly coerced by their doctors into being sterilized in conjunction with an abortion or a request for birth control than white, middle-class patients seeking similar treatment.\textsuperscript{59} While such evidence exists at all, Canadian feminists must make a commitment to construct feminist discourse which attacks these oppressive conditions and to thereby extend the struggle for reproductive choice beyond the narrow issue of legalized abortion.

It is therefore crucial that new feminist discourse on abortion reflect, rather than attempt to ignore or obscure women’s differences. The fear that the diversity of our lives (and for white women, our position of privilege\textsuperscript{60}) will prevent us from understanding each other’s various concerns, wants and needs, must no longer be invoked to justify our non-treatment of issues of race and class in this area. Otherwise we will deconstruct existing oppressive understandings of women - those reflected in the dominant ideology of motherhood - simply to "re-impose other

\textsuperscript{58}Ibid., at 54-56.

\textsuperscript{59}Ibid.

\textsuperscript{60}As a white, middle class woman I have often felt a sense of unease in dealing with how issues of race and poverty exacerbate less privileged women’s experience of gender oppression. This is because I believed that from my own privileged position I had neither the right, nor the necessary understanding of that experience to comment upon it. While I do not pretend to have totally overcome this unease or my inadequate understanding of the reproductive issues faced by differently situated women, I have come to realize that by ignoring the differences of race and class among women, in "locating the struggle in a framework that supports rather than subverts existing social structures", (Ibid., at 56.) white feminists actually help perpetuate the differential oppressions suffered by other women.
homogenous norms which [are] all too often cast in our own privileged, white likeness". Because this has been the character of much feminist work in the past, it is not surprising that black and poor women’s groups harbour a deep distrust in the movement. It would seem then that serious anti-racist work must first be conducted by the white women’s organizations who continue to dominate the movement, if women of colour are to be persuaded to participate in the construction of new feminist discourse. With a genuine and open commitment to share power and resources within the movement, white women can create new opportunities for working alongside groups of women of colour, thereby "developing broader-based coalitions that reflect the diversity of women and a wide spectrum of reproductive experiences."

When the necessary conditions are in place for all women to articulate their own versions of the denial of reproductive choice, we will find that although "our stories will be different because of the oppressions that have cut into women on the basis of race and class", this in no way invalidates our search for new feminist discourse on abortion. Rather, in providing us with "a richer understanding of [our] heterogeneity and diversity", it will enable us to confront the differential oppressions which continue to be suffered by variously situated women under the dominant ideology of motherhood. Above all, we must ensure that the class and race biases

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61 Smart, "The Woman of Legal Discourse" supra note 8 at 40.
62 See Loretta Ross, "Raising Our Voices" in Gerber Fried ed., supra note 30 139.
63 Kathryn Kolbert, "Developing a Reproductive Rights Agenda for the 1990’s" in Gerber Fried ed., supra note 30 297 at 299.
64 Greshner, supra note 23 at 647.
65 Barret & Phillips, supra note 55 at 9.
which have characterized prior feminist work on abortion not be repeated, lest the oppressions suffered by many women be left intact. Nowhere has it been suggested that this will be an easy task or one that can be achieved in the short-term, but I believe that this is the standpoint from which we must consider the possibilities and, the tremendous transformative potential of alternative feminist discourse.
CONCLUSION

BEYOND LAW: FEMINIST DISCOURSE IN CULTURE AND POLITICS

Apart from the broad theoretical/political discussion as to the direction new feminist discourse should take, other strategic questions remain as to how, and perhaps more importantly, where to promote it. The insights uncovered throughout this thesis, on how law incorporates and reinforces dominant ideological images of women, and the theoretical observations made in this Chapter, on how law remains resistant to challenge by less powerful discourses, suggests that we may (at least initially) have limited expectations of having our discourse received in legal forums. However, as I have argued above, a feminist deconstruction of the ideological nature of law itself, can increase our opportunities for dealing with law. If this deconstruction is conducted as a preliminary to, and occupies a continuing focus in the construction of feminist discourse, we might find that law may still provide a forum for articulating alternative feminist visions and ideas about abortion. With an ongoing commitment to "deconstruct[ing] the naturalistic, gender-blind discourse of law by constantly revealing the context in which it is constituted",¹ we might take untold advantage of the legal forum. As Brodie et al. contend, although legal institutions, and especially the courts, are involved in organizing and reproducing relations of women's subordination, they may at the same time create the space for change.² Indeed, it was the Supreme Court of Canada which provided feminists with an arena in which to pursue abortion decriminalization. Indeed, even after decriminalization the courts have


remained a major focus of activism around this issue. Several cases contesting the new provincial government funding arrangements have been brought, and as documented in the previous Chapter, there have been numerous cases asserting the rights of the foetus and of "fathers'". While such issues continue to grab the attention of pro-choice activists (namely Dr. Morgentaler and his colleagues) and anti-abortion sympathizers, feminists may have an opportunity to parade our own alternative accounts and perspectives before the courts. Each oppressive government enactment or instance of judicial definition of abortion or "foetal rights", provides feminists with an opportunity to intervene with our own "woman-centred" re-definitions. As Smart aptly puts it "at the point at which law asserts its definition, feminism can assert its alternative."

Yet, whilst on occasions law may still provide a focal point for a feminist voice to be heard, we must avoid at all costs the assumption that it is the only forum in which to promote feminist discourse. We have seen how some ideas and "meanings" dominate in the legal arena by marginalizing and silencing other accounts, but as Brodie et al. contend, this does not prevent alternative voices from emerging and gaining political strength outside law, with which "to

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4 As for example the United States feminist action group, NARAL did in Thornburgh v. American College of Obstetricians and Gynaecologists, 90 L. Ed 779, 2169 (U.S.S.C., 1986) presenting to the court a Brief constructed around an anthology of women's accounts on abortion and reproductive matters. The existence of a similar feminist group in Canada - L.E.A.F. (Legal Education and Action Fund) - provides some optimism for the potential of pursuing such a strategy here. For a detailed discussion of the work already carried out of this group, see Sherene A. Razack, Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991).

5 Smart, supra note 1 at 165.
represent their interests differently ... and to contest hegemonic understandings." Ideological analysis of law, and the most recent experience of extra-legal challenges from anti-abortionists show that other avenues do exist and indeed, may prove more important in the long term ideological struggle over "meanings".

While the law's reinforcement of the ideology of motherhood and our prior preoccupation with legal strategies have "impeded our speaking truly and deeply about abortion in public forums", feminists must now concentrate upon transforming public consciousness on this issue, if we are to transcend the effects of the dominant ideology of motherhood in law, or of anti-choice successes in culture and politics. Legal changes already secured by feminists in this area have proved inadequate, demonstrating that little progress might be made without a "revolution in consciousness". The evidence uncovered above, on how law incorporates ideas external to it, demands that we take feminist discourse beyond the courtrooms and legislatures out into the public domain, before we can have any hope of overturning culturally dominant understandings of abortion. In any event, since women do not (yet) exercise sufficient power over law or legal discourse, the cultural and political realm may be more receptive to feminist demands than law. We still of course have to work at increasing our political representation and at expanding our

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6 Brodie, Gavigan & Jenson, supra note 2 at 12-13.


resources, especially given the relative political power of oppositional anti-choice forces. It is with an awareness of these practical concerns, and the realization that something more than our previous dependence upon law is needed to establish firmly women’s alternative ideas and meanings of abortion in social attitudes and practices, that we must embark upon the long term strategy of promoting feminist discourse in extra-legal forums.

Immediate Concerns

In the meantime however, feminists must exploit the resources already available to us in attacking the most immediate problems of reproductive decision-making suffered by women in Canada today. It has been suggested by some for instance, that Canada’s universal health care system may prove invaluable in solving current problems of inequality in abortion access. As Shelley Gavigan contends, taking the traditional definition of abortion as a "medical" procedure to its logical conclusion, we might succeed in establishing a positive right of access to abortion by way of amendment to the federal Canada Health Act or provincial health care legislation. Lorenne Clark and Moira McConnell further suggest that feminists campaign for legislation requiring all provinces to provide abortion services, and to ensure that sufficient facilities are available to allow all women within the jurisdiction (of each province) access to safe and insured

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9Yet, Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Oxford: Basil Blackwell, 1987) at 110-11 suggests that "even where feminist discourses lack the social power to realize their versions in institutional practices, they can offer discursive space" from which to resist dominant meanings.

10Shelley A. M. Gavigan, "Beyond Morgentaler: The Legal Regulation of Reproduction" in Brodie, Gavigan & Jenson eds., *supra* note 2 at 145-6. This would ensure women’s universal access to abortion as a "health care" need, by making it incumbent upon all governments to provide medicare funding for abortions performed under any circumstances.
abortion. While this might involve engaging with law to some degree, it is imperative that feminists avoid the assumption that this is the only avenue available for pursuing the changes yet to be made in this field. Above all, we must begin to work at bringing the perspectives of all women to bear in public forums, in the media and education, exposing and deconstructing the particular and oppressive ideas and beliefs that have traditionally informed laws on abortion and which, despite the legality of the present context, continue to influence legal perceptions and treatment of women's reproductive choice.

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