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An Abortion Law Preformed

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This article engages the transcribed testimony of Carolyn Egan and Janice Patricia Tripp in *R v Morgentaler* as a critical moment of lawmaking. There is something revealing, often amusing, and sometimes devastating, when a lawyer asks a non-lawyer, in this case, a social worker: "What is the law?" The article focuses on those moments in their testimony when Egan and Tripp answered questions about the 1969 abortion law that made the law itself, its rules and procedures, the subject of examination, and in doing so, constructed new meanings of the law and social action in relation to it in the tradition of critical legal pluralism and its prefigurative politics. Egan and Tripp testified to the power of the 1969 abortion law in the everyday lives of people and used this experience to challenge the idea of law itself and the institutions of its making.

IN MAY 1969, THE CANADIAN GOVERNMENT passed an omnibus *Criminal Code* reform bill to allow for abortion on approval of a therapeutic abortion committee (TAC) against an otherwise general prohibition.[1] Feminist activists greeted the 1969 reform with a cross-country caravan of protest, burning a copy of the *Criminal Code* on Parliament Hill.[2] The reform did not go far enough. These feminists called for 'abortion on demand,' the removal of abortion from the *Criminal Code*, a political vision unrealized until the Supreme Court struck down the 1969 law in *R v Morgentaler* (1988).[3]

The Supreme Court judgment is often celebrated for this idea alone: the constitutional right to decide whether to continue a pregnancy free from state interference. The judgment is the most celebrated moment of *R v Morgentaler*. This article celebrates an earlier lawmaking moment in the Ontario Supreme Court when defence counsel Morris Manning brought a motion to quash the criminal indictment as unconstitutional.[4] To assist the court, he called "evidence consisting of persons who work within, as best they can, the therapeutic abortion committee system, to show how that system works, or doesn't work."[5] This article revisits the courtroom testimonies of

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[1] *Criminal Code*, RSC 1970, c C-34, s 251.

[2] See Christabelle Sethna & Steve Hewitt, "Clandestine Operations: The Vancouver Women's Caucus, the Abortion Caravan, and the RCMP" (2009) 90:3 Can Historical Rev 463; Frances Jane Wasserlein, *'An Arrow Aimed at the Heart': The Vancouver Women's Caucus and the Abortion Campaign, 1969-1971* (Master's Thesis, Simon Fraser University, 1990), online: *Simon Fraser University Summit* <http://summit.sfu.ca/item/4914> [perma.cc/WE6Y-DETT].

[3] *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler* (1988)]. For a description of the feminist claims supporting the repeal of the 1969 law, see Joanna N Erdman, "Constitutionalizing Abortion Rights in Canada" (2018) 49:1 Ottawa L Rev 221 at 234-239.

[4] *R v Morgentaler*, (1984) 47 OR (2d) 353 [*Morgentaler* (1984)].

[5] The David Asper Center for Constitutional Rights at the Faculty of Law, University of Toronto made the complete record filed at the Supreme Court in *R v Morgentaler* (1988) *supra* note 3, including the trial transcript, available on their website. The following documents were used in this article and remain on file with the author: Preliminary Motions: 0105 Motion to Quash and Call Evidence [*Morgentaler* (Preliminary Motions)]; Witness Examinations:

Carolyn Egan and Janice Patricia Tripp, social workers at the Birth Control and VD Information Centre in Toronto, who laboured under the 1969 law as best they could to secure legal abortion services for their clients.[6]

The article presents a discursive analysis of the transcribed testimony of Egan and Tripp. Judith Shklar once observed that there is something revealing, often amusing, and sometimes devastating, when a lawyer asks a non-lawyer, in this case a social worker: "What is the law?"[7] Namely, it becomes obvious that the lawyer asks a very different question than the social worker answers. Discourse analysis is rooted in the idea that language is central to the making of our social world, including law.[8] In other words, law is made and remade through "talk"—especially the talk of a courtroom where people talk about, manage their relationships toward, and seek to make sense or meaning of law.[9] People do things with words in courtrooms.[10]

The witness examination is a site of rich discursive engagement because of its interactional structure: question-and-answer.[11] The lawyer asks the question, and the witness provides an answer. Yet there is imbalance in the interaction. By asking questions or speaking in ways that are heard as questions, the lawyer controls the interaction (save for interjections by the judge). The lawyer controls the content of the answer, which must fit within the frame of the question asked, but also by being habitually present in the courtroom, the lawyer controls the form of courtroom talk.

The witness is therefore typically at a disadvantage in the interaction, but not always. In some cases, the witness breaks the conventions of courtroom talk—this was true of Egan and Tripp. Morris Manning called these witnesses because as social workers they had direct experience under the law, but also because as social activists they had a vision for the law.[12] The 1969 reform had changed the nature of abortion activism in Canada with the emergence of so-called clinic advocacy groups formed by front-line service workers focused on the immediate needs of people in accessing services. These groups organized to help people navigate the TAC system and to

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0130 Egan in Chief [*Morgentaler* (Egan in Chief)]; 0171 Egan Cross [*Morgentaler* (Egan Cross)]; 0210 Egan Re-examination [*Morgentaler* (Egan Re-examination)]; 3287 to 3341 Witness Tripp, Janis Patricia [*Morgentaler* (Witness Tripp, Janis Patricia)]; Final Submissions and Verdict: 3701 Charges and Submission [*Morgentaler* (Final Submissions)]; 3711 Charge to the Jury [*Morgentaler* (Charge to the Jury)].

[6] See also Gail Kellough, *Aborting Law: An Exploration of the Politics of Motherhood and Medicine* (Toronto: University of Toronto Press, 1996) which examines the work of the *Ontario Coalition for Abortion Clinics* (OCAC) during the 1980s, at the time of the Morgentaler hearings, in their struggle to ensure access to abortion services with reference to texts of the legal proceedings.

[7] Judith N Shklar, "In Defense of Legalism" (1966) 19 J Leg Educ 51 at 52 (and at fn 2: "In Hobbes' words, 'My design being not to show what is law here and there; but what is law; as Plato, Aristotle, Cicero and diverse others have done, without taking upon them the profession of the study of the law.' *Leviathan*, ed. Michael Oakeshott (Oxford, 1947), p. 172")

[8] Pirjo Nikander, "Constructionism and Discourse Analysis" in James A Holstein & Jaber F Grubium, eds, *Handbook of Constructionist Research* (New York: Guilford Press, 2008) 413.

[9] Austin Sarat, "Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading" (1999) 23 Leg Studies Forum 355.

[10] John L Austin, *How to do things with words* (Oxford: Clarendon Press, 1962).

[11] Diana Eades, *Sociolinguistics and the Legal Process* (Bristol: Multilingual Matters, 2010) at 108. See also: Pirjo Nikander, "Interviews as Discourse Data," in Jaber F Gubrium et al, eds, *The SAGE Handbook of Interview Research: The Complexity of the Craft*, 2nd ed (London: Sage Publications, 2012).

[12] In planning the defense strategy, Manning collaborated with the feminist movement, and Carolyn Egan recounted heated strategy debates with Dr. Morgentaler. See Catherine Dunphy, *Morgentaler: A Difficult Hero* (Toronto: John Wiley & Sons Canada, Ltd, 2003) at 230-231. On social movement lawyering generally, see Austin Sarat & Stuart A Scheingold, eds, *Cause Lawyering and Social Movements* (Stanford: Stanford University Press, 2006).

establish services outside of it.[13] Egan and Tripp were members of the *Ontario Coalition for Abortion Clinics* (OCAC) and the *Committee for the Establishment of Abortion Clinics* respectively, groups that advocated for the repeal of the 1969 law and the establishment of free-standing, publicly-funded community clinics.[14] OCAC supported Dr. Morgentaler in opening his Toronto clinic, the alleged criminal act at the centre of the case.[15] The clinic advocacy groups represented a left popular bloc of the feminist movement and saw the primary injustice of 1969 abortion law in its distribution of abortion access on the basis of class and other social inequalities.[16] They linked abortion rights to a radical restructuring of society, including a reimagined role for the state and its law. Egan and Tripp brought this imagined legal world of reproductive freedom and justice into the courtroom.

This article analyzes the transcripts of their courtroom testimony for the striking moments between lawyer and witness that disrupt the conventions of courtroom talk. The article focuses on those moments when Egan and Tripp answered questions about the 1969 abortion law that went beyond "lawyer's law" or "state law"—the law as the lawyer understands it.[17] Egan and Tripp made the 1969 abortion law itself, its rules and procedures, the subject of examination, and in doing so, they constructed new meanings of the law and social action in relation to it. As Roger Cotterrell writes, "legal thinking is not merely lawyers' thinking."[18] For Egan and Tripp, state law was not a controlling force, but something to engage and to entangle; its categories like any category by which we understand the world could be remade.[19] Egan and Tripp moved between their own first-hand experience and the formal categories of the 1969 law, insisting on facts that the law deemed irrelevant, and returning these facts to a law that denied them. They reimagined the boundaries of what was inside and outside of the law, its legalities and illegalities, what the law is and what it should be. Critical legal pluralism accepts these dynamics of reciprocal construction, presuming that "legal subjects are not exclusively constituted by law, they also

[13] See Beth Palmer, *Choices and Compromises: The Abortion Movement in Canada 1969–1988* (PhD Dissertation, York University, 2012) [unpublished] [*Choices and Compromises*] describing how activists set up services to help people access services, covertly and in the open through publicly-funded health and social services organizations. By the 1980s, referral services were operating across the country to help connect people to services.

[14] In September 1982, the *Committee for the Establishment of Abortion Clinics* founded a political arm, which became the *Ontario Coalition for Abortion Clinics* (OCAC). The coalition was formed by social workers from the Immigrant Women's Health Centre, Hassle Free Clinic, and the Birth Control and VD Information Centre in Toronto. For a description of OCAC and its politics see Carolyn Egan & Linda Gardner, "Race, Class and Reproductive Freedom: Women Must Have Real Choices!" (1994) 14:2 Can Woman Studies 95 ["Race, Class and Reproductive Freedom"]; Carolyn Egan & Linda Gardner, "Racism, Women's Health, and Reproductive Freedom" in Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian, Anti-racist Feminist Thought* (Toronto: Women's Press, 1999) 295 ["Racism, Women's Health, and Reproductive Freedom"].

[15] Egan & Gardner, "Race, Class and Reproductive Freedom," *ibid* at 95-96. OCAC had intended to open a Toronto clinic themselves, with a full-page ad in the Globe & Mail declaring that "Women need access to safe medically insured abortions" accompanied by nearly 600 signatures. The landlord, however, cancelled the lease, and Dr. Morgentaler then assumed a principal role in the project, opening the Morgentaler Clinic of Toronto. See also Ann Thomson, *Winning Choice on Abortion: How British Columbian and Canadian Feminists Won the Battles of the 1970s and 1980s* (Victoria: Trafford Publishing, 2004) at 103-108.

[16] See generally Lorna Weir, "Left Popular Politics in Canadian Feminist Abortion Organizing, 1982–1991" (1994) 20:2 Feminist Studies 249. OCAC "employed the language of reproductive freedom and crisis of access to signal the social stratification of abortion service delivery in terms of class, race, and region" and to form a politic bloc among women divided by racial, class, ethnic, and regional grounds (Weir at 250, 260).

[17] Roger Cotterrell, "The sociological concept of law" (1983) 10:2 JL & Soc'y 241 at 246.

[18] *Ibid* at 248.

[19] See Derek Edwards, "Categories are for talking: On the cognitive and discursive bases of categorization" (1991) 1:4 Theory & Psychology 515.

constitute law."[20] This presumption stems from a conviction that there is no single, objectively apprehended law, but that law is always the creation of a social and political imagination. The transcript of these witness' courtroom testimony provides a highly detailed and accessible expression of this idea.

The Ontario Supreme Court ultimately ruled against Manning's motion, but the resulting trial led to a jury acquittal that was upheld by the Supreme Court of Canada when it declared the 1969 law unconstitutional. Traditionally, courts are the central actors of *Charter* cases.[21] Egan and Tripp are not even named in the law citation that serves as the historical record of *R v Morgentaler* (1988). Yet when we turn courts from engines of social reform into arenas of social action, we find other actors within the story.[22] This article provides an account of social movements and the law that decenters courts and focuses on the actors within them and the world outside of them.[23] Egan and Tripp testified to the power of the 1969 abortion law in the everyday lives of people and used this experience, in the words and theory of Lani Guinier and Gerald Torres, to bring about "significant and sustainable social and political change … by changing the people who make the law and the landscape in which that law is made."[24] Rather than simply challenging the 1969 abortion law, these activists challenged the idea of law itself and the institutions of its making.

I. A FORMALIST APOLOGY

The structure of the 1969 abortion law included a criminal offence and a statutory exception to that offence.[25] Subsections 251(1) and (2) of the *Criminal Code* retained the offences of providing or having an abortion:

> (1) Everyone who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
>
> (2) Every female person who, 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 is guilty of an indictable offence and is liable to imprisonment for two years.

Subsection 251(4) created an exception to these offences on a case-by-case basis by establishing the therapeutic abortion committee (TAC) system.

> Subsections (1) and (2) do not apply to …

[20] Martha-Marie Kleinhans & Roderick A Macdonald, "What Is a Critical Legal Pluralism" (1997) 12:2 CJLS 25.
[21] Sheilah L Martin, "Canada's Abortion Law and the Canadian Charter of Rights and Freedoms" (1986) 1:2 Can J Women & L 339 (emphasizing that a *Charter* challenge to Canadian abortion laws will raise serious questions about the respective role of judges and Courts).
[22] See Jules Lobel, "Courts as Forums for Protest" (2004) 52:2 UCLA L Rev 477 (describing courts as arenas where political and social movements agitate for, and communicate, their legal and political agendas).
[23] See generally Scott L Cummings, "The Puzzle of Social Movements in American Legal Theory" (2017) 64 UCLA L Rev 1554.
[24] Lani Guinier & Gerald Torres, "Changing the Wind: Notes toward a Demosprudence of Law and Social Movements" (2014) 123:8 Yale LJ 2740 at 2749-50.
[25] *Criminal Code*, *supra* note 1.

> (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 a 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 described in paragraph (a) 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 accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
>
> (c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
>
> (d) has caused a copy of such certificate to be given to the qualified medical practitioner.

Under the 1969 law, a medical practitioner acting in good faith could provide an abortion in an accredited or approved hospital if they had the prior approval of that hospital TAC. By section 251(6), such committees were,

> comprised of not less than three members each 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.

The medical practitioner who was to perform the abortion could not be a TAC member for *any* hospital. Neither was any hospital required to have a TAC under the law, and most did not.[26] Committee approval was evidenced by a written certificate issued after review of each case. The issuance of this certificate made an otherwise illegal abortion legal. These certificates were issued when a majority of a committee's members certified that, "in its opinion the continuation of the pregnancy of the female person would or would be likely to endanger her life or health" (section 251(4)(c)). The provision contained no definition of "health."

In 1983, Dr. Morgentaler and his colleagues, Drs. Robert Scott and Leslie Smoling, set up a clinic in Toronto to provide abortions outside of the TAC system. The police raided the clinic and arrested the doctors, although defiant staff reopened the clinic minutes later. The doctors were charged with "conspiracy to procure the miscarriage of female persons" contrary to section 251(1). Before pleas were entered, Morgentaler's lawyer, Morris Manning, moved to quash the indictment on the ground that section 251 was unconstitutional as a violation of *Charter* rights. Manning argued that,

[26] In *R v Morgentaler* (1988), Justice Dickson quoted the *Badgley Report* in noting the large numbers of Canadian hospitals that were either ineligible to establish a TAC or simply did not, and the decreasing availability of services over time. *Morgentaler* (1988), *supra* note 3 at 65-67.

> the effect of this legislation is to deprive women who seek access to safe therapeutic abortion, and doctors who seek to provide proper medical treatment for these women, of their rights to liberty and to the security of the person … The law deprives both the women and their doctors of their constitutional rights in such a way that is discriminatory, arbitrary, cruel, unusual and unfair.[27]

Manning further and specifically argued for the opportunity to call evidence on the *effect* of the legislation:

> In order to assist the Court with respect to this argument, and in order to lay a proper factual foundation and underpinning for the argument, I will be calling evidence consisting of persons who work within, as best they can, the therapeutic abortion committee system, to show how that system works, or doesn't work.[28]

The government lawyers, acting for the Crown (Province of Ontario) and the Attorney General of Canada, maintained that such factual evidence on the application of the abortion law was not a proper concern of the Court on a question of constitutional law.[29] Judge Parker allowed the evidence, and after a ten-minute break, Mr. Manning called as his first witness, Mrs. Carolyn Egan.

The testimony of both Egan and Tripp focused on the crisis of access that many of their clients—women of colour and working-class women—faced under the TAC system. They testified to the humiliating and degrading way these women were forced to hunt for services, the cruelty of the delays and denials they faced, and the violent and exploitative practices they endured. "I'm not going to say here today that there is no access to abortion in Toronto," Egan remarked, "[t]here is access; but in my mind, it's a very privileged access."[30]

The Canadian government, however, already knew of the access crisis to which Egan and Tripp testified. In its 1977 report, the Badgley Commission fully documented these access disparities, delays, and denials.[31] The report bluntly found that, "[t]he procedures set out for the operation of the Abortion Law are not working equitably across Canada. In almost every aspect dealing with induced abortion … there was considerable confusion, unclear standards or social inequity."[32] The Commission's mandate was deliberately narrow: to assess the equitable operation of the *Criminal Code* procedures for therapeutic abortions, but not the law itself.[33] The Commission recognized the crisis of access, but on government directive, struggled to explain this crisis without impugning the law.[34] Its carefully formulated conclusion: "It is not the law that has

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[27] *Morgentaler* (Preliminary Motions), *supra* note 5 at 110.
[28] *Ibid* at 112.
[29] *Ibid* at 118-130.
[30] *Morgentaler* (Egan in Chief), *supra* note 5 at 160.
[31] Canada, *Report of the Committee on the Operation of the Abortion Law*, Catalogue No J2-30/1977 (Ottawa: Minister of Supply and Services Canada, 1977) (Chair: Robin F Badgley) [*Badgley Report*]. The report would prove highly persuasive to the Supreme Court of Canada in striking down the 1969 law as a violation of the constitutional right to security of the person (section 7) in *Morgentaler* (1988).
[32] *Ibid* at 17.
[33] *Ibid* at 3.
[34] See Larry D Collins, "The Politics of Abortion: Trends in Canadian Fertility Policy" (1982) 7:2 Atlantis 2 at 13-14. "The Committee was a creature of the federal Justice Department, … [and] [i]t drew the Committee's terms of reference very narrowly to ensure that the final report would not condemn the government. The Committee could not analyze or make recommendations on the underlying policy of the law … To be credible, the Badgley Committee

led to the inequities in its operation or the sharp disparities in how therapeutic abortions are obtained by women. It is the Canadian people, their health institutions, and the medical profession, who are responsible for this situation."[35]

The government lawyers and trial judge carried this line. While access inequalities are regrettable, they agreed with Egan and Tripp, the fault lies not with law, but with "people" and their imperfect health institutions. Acting for the Crown (Province of Ontario), Alan Cooper asked Egan about the women for whom the TAC system does not work.

> Q. But you're talking -- you're not talking about a large group of women in the city. You're talking about the poor, the young, the low-income, the immigrant women … It's unfortunate that, given no matter what system you have, given that we're human beings and there are always imperfections in any human system, that often those who will suffer are the poor and the ignorant and some immigrant classes, wouldn't you agree?
>
> A. Well, I think, in the system, yes. I think people who have less resources … have more problems.
>
> HIS LORDSHIP: That applies to law as well as medicine.[36]

Cooper agreed.

> Q. I guess it applies to almost anything.
>
> HIS LORDSHIP: Dentistry or anything, I suppose.
>
> Q. That's right. And so it's hard -- the facility may be there, but these people may not have the knowledge of how to get to it; wouldn't you agree? … My point, Mrs. Egan, is that we may have facilities in Toronto for abortion, adequate facilities, but if poor young immigrant women perhaps don't know where the resources are, then they might as well not be there. Isn't that the point you're trying to make?[37]

Cooper put this common-sense explanation of the access crisis to Tripp as well:

> Q. And isn't it true your clinic deals in large part with poor women or immigrant women or teenagers?

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could not deny the obvious social problem caused by the government's elite-permissive abortion policy. A considerable struggle occurred over exactly how it could explain the abortion problem without implicitly criticizing the abortion law. [One witness] put it, 'There was blood in the halls over what it [the Committee] would actually do. No way would Justice allow it to find fault with the law. The government was not about to blame itself. That's why the supporting studies are still locked up in the vaults.' The formula to resolve the difficulty for the Committee came in the form of a national patient survey which detailed the epidemiological nature of abortion, but blamed medical, hospital and provincial obstacles for preventing the law's equitable operation."

[35] Canada, *Badgley Report*, *supra* note 31 at 17.

[36] *Morgentaler* (Egan Cross), *supra* note 5 at 176, 181.

[37] *Ibid.*

> A. Young women in particular. Women with not a lot of money to spend.
>
> Q. And it is unfortunate, but in most systems, be it medicine or anything else, those are the people who always suffer?
>
> A. Yes.[38]

A lot of other people, Cooper noted, access abortion services in Toronto. Were Egan and Tripp aware of Statistics Canada's numbers on abortion, he asked.[39] In 1981, there were approximately sixty-five thousand in Canada, thirty thousand in Ontario, or what about that year, he inquired, when the abortion rate in Toronto was supposed to have exceeded the birth rate? "The rate is quite high," Cooper asked Egan, "wouldn't you agree?" [40]

Cooper's point was that although the law may have allowed for some injustice, the law was working for many. Cooper worked to efface any connection between those without access and the general scheme of the law. An unfortunate experience under the law, he insisted, must be distinguished from the good of the law; any failure in its vision is strictly empirical: a good law underenforced in a particular case. As such, against constitutional challenge, Cooper insisted, we should not abandon the 1969 law. On the contrary, the access crisis counsels us to better adhere to the law's rules and procedures, to ensure they are applied more fairly and impartially, such that all those in therapeutic need can access services. Law is the answer, not the injustice.

The 1969 abortion reform was indeed passed with a claim of redressing injustice. Prior to 1969, abortion appeared in public records as the most unfortunate and desperate of experiences, an act that resulted in harm and death.[41] The law in many respects was a health and safety regulation, a protective measure against the 'backstreet' by restricting abortion to skilled persons in a safe environment: a medical practitioner acting in good faith in an accredited or approved hospital. In truth, for decades, physicians had provided hospital-based abortions, as favours for friends and other persons of social status but masked under therapeutic need as menstrual regulation or emergency appendectomy.[42] A changing public attitude towards abortion and an increasing demand for services presented problems for this elite status-quo. Ordinary people came to believe themselves entitled both to decide on their own terms to end their pregnancies, and to lawfully access the services to do so. Many family physicians who received their requests wanted to help. A 1970 study in a large general hospital in Ontario documents the slow increase in abortions until 1967 whereupon the numbers doubled, then increased by 50 per cent the following year, and by 295 per cent between 1968 and 1969.[43] The authors of the study, RM Boyce and RW Osborne, credit the change to one or two physicians who were confident in their legal capacity to act and did.[44] Throughout Canada, physicians performed abortions in the belief that they were

[38] *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3329.
[39] *Morgentaler* (Egan Cross), *supra* note 5 at 177.
[40] *Ibid* at 178.
[41] Angus Mclaren, "IIlegal Operations: Women, Doctors, and Abortion, 1886- 1939" (1993) 26:4 J Social History 797 at 798.
[42] See Shelley AM Gavigan, "On 'Bringing on the Menses': The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986) 1:2 CJWL 279.
[43] RM Boyce & RW Osborn, "Therapeutic Abortion in a Canadian City" (1970) 103:5 CMAJ 461 at 462
[44] *Ibid* at 464.

lawful, or, if criminal, that governments would not prosecute.[45] Others wanted to help but were uncertain of the law, fearing liability against the seeming blanket prohibition in the *Criminal Code*.[46] Still, others wanted to distance themselves from and opposed "abortion on demand," or the growing sense of entitlement among people for control over their reproductive lives.

Abortion before the 1969 reform was therefore characterized by a sense of lawlessness, albeit differently perceived. For some, lawlessness abounded in the unregulated and unsafe practice of back-alley abortions. For others, lawlessness thrived in the informal and private system of abortion access through physician discretion, and the abuse of such "therapeutic abortions" to create abortion on demand. Finally, a sense of lawfulness inhered in abortion on demand itself, a growing belief in the freedom of people to decide for themselves, free from law, whether to continue or end a pregnancy.

In an effort to allay growing tensions over abortion in the medical profession, the Canadian Medical Association (CMA) petitioned for legal reform.[47] In 1966, the CMA, working with the Canadian Bar Association, resolved to amend the *Criminal Code* to protect physicians from legal risk while preserving medical control over abortion access.[48] The government, in large measure, adopted the CMA's resolution and its rhetoric of ensuring clarity in abortion practice through legal rules and procedures.[49] The government did not represent the 1969 reform as an act of abortion liberalization, or any shift in policy toward abortion on demand. On the contrary, the government emphasized the stabilizing, even conservatizing, effects of the law, affirming that the "amendments do [] no more than recognize what has actually been happening in a number of hospitals with

[45] There is no record of prosecutions during this time against licensed physicians acting within accredited hospitals. Graham E Parker, "Bill C-150: Abortion Reform" (1969) 11 Crim LQ 268 at 268.

[46] Immediately prior to 1969, the *Criminal Code* prohibited abortion without any explicit defense, resulting in uncertainty about whether abortion was ever lawful given that the defense of necessity had never been judicially applied in Canada. See JJ Lederman & GE Parker, "Therapeutic Abortions and the Canadian Criminal Code" (1964) 6 Crim LQ 36; Graham E Parker, "Bill C-150: Abortion Reform" (1969) 11 Crim LQ 267 at 268-27.

[47] Jane Jenson notes the absence of women's organizations in the 1960s abortion debates, explaining that women as a collective had not yet "gained recognition as major actors in the debate." Jane Jenson, "Getting to *Morgentaler*: From One Representation to Another" in Janine Brodie, Shelley AM Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 16 at 25-26. A few women's organizations made submissions to the parliamentary committee considering the 1969 reform bill, including the National Council of Women, which had long criticized the abortion provisions in the *Criminal Code* as "confused, conflicting, outdated, and cruel" (at 31). In 1967, the Liberal government appointed a Royal Commission on the Status of Women (RCSW). The Commission was designed to assess the quality of life of Canadian women, including the impact of the *Criminal Code* on their lives. With respect to abortion, the RCSW recommended that abortion be lawful on request up to twelve weeks of pregnancy. The RCSW played a marginal role in the reform, its report not tabled in Parliament until December 1970, after the new law was in effect. Nonetheless the contributions of individual women to the Commission, including by sharing their experiences with unwanted pregnancies and as mothers, should not be overlooked. See Shannon Stettner, "'He is still unwanted': Women's Assertions of Authority over Abortion in Letters to the Royal Commission on the Status of Women in Canada" (2012) 29:1 CBMH/BCHM 151.

[48] Douglas A Geekie, "Abortion: A Review of CMA Policy and Positions" (1974) 111 CMAJ 477. Jenson, *ibid* at 27 (claiming that the CMA's argument was based on the medical profession's "disingenuous appeal to being 'lawbreakers', despite their professional status and success, [which] could only effectively point out the impossibility of prolonging the current ambiguity. Indeed, there was a clear notion that the existing law was discredited, if persons of this stature had to break it"). Susan A McDaniel notes that the significant increase in the numbers of therapeutic abortions after the 1969 reform reflected less a liberalization of the law, than the transfer of responsibility for administration of the law to the medical profession. Susan A McDaniel, "Implementation of Abortion Policy in Canada as a Women's Issue" (1985) 10:2 Atlantis 74 at 77.

[49] According to then Justice Minister John Turner, "the fact is the present state of the law is not clear and one of the overriding purposes of the legislation is to clarify it." *House of Commons Debates*, 28th Parl, 1st Sess, Vol 8 (23 January 1969) at 4722 (Hon John N Turner) [*House of Commons Debates*, 1969]).

respect to therapeutic abortions."[50] Abortion was legalized not liberalized through a set of rules and procedures, namely the rule of the therapeutic abortion and the committee system of certification.

The 1969 reform promised open, public, and rationalized access to safe therapeutic abortion through legal rules and procedures.[51] In theory, this system corrected the arbitrariness and inequality of informal private access by physician discretion. The 1969 reform provided clarity and security for physicians who performed therapeutic abortions in good faith and against the patients who besieged them, and also allowed the government to shore up public faith that "the excuse of therapeutic abortion was not abused."[52] Any claim to constitutional justice required that we live up to this ideal of the law rather than depart from it—or so the government lawyers now argued in defense of the law.

The trial transcript of Egan and Tripp's testimony shows not simply how the 1969 reform failed to redress social injustice, but how the government and court used a formalist rule of law claim to explain away that injustice. Law is substituted for justice, and its rules and procedures are offered in apology and answer for any grim reality under it—an effort to explain injustice despite a good law.[53] Stanley Cohen uses the term "magical legalism" to capture this brand of legal formalism, especially as a government technique to deny allegations of malfeasance that cannot possibly be true because the law does not sanction it, or if it is true, because there is some extra-legal explanation for it.[54] Law negates the existence of facts that are inconsistent with it, or creates a reality consistent with them. In this case, the 1969 reform was designed to ensure access to safe, therapeutic abortion in hospital settings. If there was any social inequality in access to these services, the government argued, people were to blame for it, namely poor, young, and immigrant women who would have suffered no matter the system of law. A well-rehearsed apology of legal formalism, any social injustice of the abortion law "flow[ed] directly from an overinflated and unrealistic expectation of law … Scale down the expectations and the law will be seen to work."[55]

II. A REALIST FRAUD

Justice Parker of the Ontario Supreme Court also retreated behind this formalist apology to avoid the everyday crisis of access under the 1969 law and to insulate the law from constitutional review and himself from claims of injustice. Parker did not deny the social injustice of abortion access but deemed this injustice irrelevant to a constitutional review, a matter for Parliament and not for the courts to remedy. Although there might be a reality of social injustice, if it was not written into the law, it was not of the law. According to Parker, the "abortion prohibition clearly establishes the potential for criminal culpability, and anyone who is charged with an offence would know whether

[50] *Ibid* at 8058.
[51] See Frederick Schauer, "Formalism" (1988) 97 Yale LJ 509.
[52] "The 1969 abortion law, heralded by many as the law which liberalized abortion access in Canada, insulated elite groups, most notably doctors and federal government officials, from political and legal liability by permitting abortions to take place only in provincially accredited or approved hospitals and sanctioning doctors with making decisions about the advisability of abortion." McDaniel, *supra* note 48 at 77.
[53] Morton J Horowitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale LJ 561 at 566.
[54] Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity Press, 2002).
[55] Kleinhans & Macdonald, *supra* note 20 at 28.

she or he had received the exculpatory certificate from the therapeutic abortion committee."[56] In his view, there was a taken-for-granted clarity about the law. Abortion access under the TAC system was stripped to the literal terms of the law, and whatever could not be talked about in these terms was simply not talked about.

On appeal, the majority of the Supreme Court of Canada rejected this approach. The *Badgley Report* clearly demonstrated that what the Crown termed "administrative inefficiency" resulted from the rules and procedures of the law, rather than any external force, and in any case, both the purpose and effect of section 251 were entirely relevant in a *Charter* review.[57] The law itself prevented access to therapeutic abortion, the Court declared, and,

> [o]ne of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. … The procedure and restrictions stipulated in s. 251 for access to therapeutic abortions make the defence illusory resulting in a failure to comply with the principles of fundamental justice.[58]

This idea of the law's illusion was central to the testimony of Egan and Tripp. They testified not simply to the injustice of the law in denying people the freedom to decide whether to continue a pregnancy, nor even to the misfortunes of the law in the problems of people not knowing where to go or what to do under the law, the so-called administrative inefficiencies of the law. In a legal realist critique, Egan and Tripp testified to the law itself as a fraud. They showed how the 1969 law could never work to attain the justice that it promised: open, public, and rationalized access to safe therapeutic abortion.[59] On the contrary, its very rules and procedures created the conditions for arbitrary, unfair, and unsafe practices. By the text of the law, section 251(4) excluded a qualified medical practitioner from the offence of abortion if they received a committee certificate that the continuation of pregnancy endangered life or health.[60] Egan and Tripp identified these constructs of the 1969 law—the "therapeutic abortion" and "committee certification"—as the perpetrators of its fraud.

Manning began his examinations-in-chief by asking Egan and Tripp to describe their daily work in helping clients to access a legal abortion through the TAC system. Tripp answered that "[t]here is no straight forward way of requesting an abortion. There are certain routes, there are certain negotiations that have to be made and I think the average citizen is so unaware of what those routes and negotiations are."[61] If a person decided to have an abortion, they needed first to find a gynecologist willing to provide the service and to write a letter of therapeutic need on their behalf to a hospital TAC.

The *Criminal Code*, however, never defined the crucial phrase "therapeutic abortion," nor offered any statutory guidance on when continuation of pregnancy would, or would be likely to, endanger life or health. Rather, the 1969 law treated the therapeutic abortion as a thing in the world that could be objectively and impartially assessed, another instance of law creating its own reality.

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[56] *Morgentaler* (1984), *supra* note 4 at 412.
[57] *Morgentaler* (1988), supra note 3 at 42. To appreciate the innovation of the majority's approach, see Karen M Weiler, "Of Courts and Constitutional Review" (1989) 31:2 Crim LQ 121.
[58] *Morgentaler* (1988), *ibid* at 70.
[59] Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69 BUL Rev 781 at 797-801 (discussing rule skepticism).
[60] See the text of the *Criminal Code*, *supra* note 1, s 251(4).
[61] *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3289, 3292.

The "therapeutic abortion" came into being by sheer force of repeated assertion—the professional cover that physicians used to protect themselves from public scrutiny and state prosecution. This construct was then institutionalized in the concurring opinions of colleagues and department heads, and later in the bureaucracy of hospital committees.[62] Before 1969, the government did not enforce the *Criminal Code* prohibition on abortion on the fiction that all hospital-based abortions were for therapeutic need, and then, with the 1969 reform, inscribed the "therapeutic abortion" into the text of the law without definition. Justice Minister John Turner explained that "[h]ealth is incapable of definition and will be left to the good professional judgment of medical practitioners to decide."[63]

As such, the 1969 law preserved the almost unfettered discretion of physicians to decide whether an abortion was therapeutic and thus whether in good faith to refer a person to a committee for certification. In other words, physicians had absolute authority to decide whether to act on a person's request for services. Egan testified that,

> [w]e sometimes have family physicians refer to our clinic because they're not able to get a [gynecologist's] referral for therapeutic abortion for the patient. We also have the circumstance of a patient going to a physician who refuses to refer them … We have the unfortunate situation in which a doctor chooses to make a judgment of whether or not a woman should have access to this procedure, and through whatever religious or perhaps moral, philosophical outlook, puts delays in front of the woman.[64]

In a 1970 national survey of TACs, Smith and Wineberg observed that,

> [o]nly the sophisticated woman would have the presence of mind to consult another physician where her initial doctor rebuffed her … Surely an advantage is conferred upon a woman with a sympathetic family doctor or one with other medical connections. As one eminent gynecologist put it: 'Knowing the right people will definitely help get a girl to the committee.'[65]

Egan and Tripp emphasized that therapeutic need was first and foremost a measure of private wealth. They testified to family physicians who requested fees for releasing the names of willing gynecologists, and willing gynecologists who charged fees for writing referral letters.[66] Many people paid these fees, too frightened of and too vulnerable to being turned away.[67] Egan and Tripp named the law, and not simply bad doctors, as the source of exploitation. "There is no definition, to my knowledge of the word 'health' in the *Criminal Code*," Egan said, and "as a non-medical person myself, it would be difficult for me to make that determination."[68] Even medical persons had difficulty distinguishing therapeutic abortion from abortion on demand, it seemed. Egan and Tripp testified extensively about the quotas that Toronto hospitals imposed on these

[62] Jenson, *supra* note 47 at 24.
[63] Turner, *supra* note 49 at 8124.
[64] *Morgentaler* (Egan in Chief), *supra* note 5 at 162.
[65] Kenneth D Smith and Harris S Wineberg, "A Survey of Therapeutic Abortion Committees" (1970) 12 Crim LQ 290.
[66] *Morgentaler* (Egan in Chief), *supra* note 5 at 165-66, 169; *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3308, 3311.
[67] *Morgentaler* (Witness Tripp, Janis Patricia) *ibid* at 3311.
[68] *Morgentaler* (Egan Re-examination), *supra* note 5 at 213.

services, fearful of being known as "abortion mills," and creating a scarcity of supply.[69] They knew of no other therapeutic intervention subject to quotas. "[T]his is the only medical procedure that I'm aware of that there are quotas placed on," Egan observed, "I don't believe an obstetrician-gynaecologist has quotas on the number of deliveries, for example, that he could do in a week, or the number of hysterectomies, or whatever." [70]

By the terms of the 1969 reform, an abortion was legal so long as it was certified as "therapeutic" by a committee.[71] A term without meaning, TACs generally certified an abortion as therapeutic so long as the referring physician claimed that it was. A famous 1977 study of TACs in British Columbia showed that the committees almost always approved whatever application was before them, accepting the opinion of the referring physician, especially on mental health grounds of anxiety or depression, which were impossible to substantiate on the basis of a letter.[72] This was a system of abortion on demand, for those wealthy or lucky enough to demand it. The "certificate" became the thing itself that the law secured, rather than access based on need. There was no such thing as a therapeutic abortion, only the certificate of it. To certify an abortion as therapeutic was to make that abortion therapeutic: the utterance enacted itself. The law created the thing that it allegedly regulated.

This performativity of the law was entirely in keeping with the origins of TACs.[73] In the 1940s, Sinai Hospital in Baltimore established the first abortion committee known to have existed in the US.[74] These committees were later established across hospitals in the US and Canada, with the explicit goal of certifying abortions performed within them as "therapeutic." The function of these committees was defensive, intended to obscure what was happening within the hospital walls and to shield professional practice from public scrutiny. By legalizing the TAC, the 1969 reform institutionalized, as Susan McDaniel characterized it, "a random system … an idiosyncratic, locally controlled system" of abortion access.[75] In her testimony, Tripp affirmed this view,

> I really don't know what criteria each committee at each hospital uses in order to approve or disapprove of the requests from women for abortions. … We don't know what those criteria are, how that decision is made, we don't know … No woman, no patient and none of the workers in the field have access to any of the committees …

[69] *Morgentaler* (Egan in Chief), *supra* note 5 at 138, 143; *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3298-99. "No hospital as a public institution wishes to be seen as an abortion centre or to be known to provide exemplary care for abortion patients. Unlike other aspects of hospital work which are often matters of public pride, the social profile of the abortion procedure in hospitals was kept as low as possible." Canada, *Badgley Report*, *supra* note 31 at 23.

[70] *Morgentaler* (Egan Cross), *supra* note 5 at 203.

[71] Section 251(5b) provided provincial Ministers of Health with the authority to order a TAC to furnish a copy of any certificate issued together with relevant information, but there was little government oversight over TAC administration. There is only one recorded case of a challenge to a certificate issued by a TAC as having allowed an abortion for social and economic reasons, but the case never reached the courts on its merits. McDaniel, *supra* note 48 at 83-84, citing, "Abortion Law Challenge Rejected," *The Globe and Mail* (16 November 1983) 5.

[72] WJ Harris & LS Tupper, "A Study of Therapeutic Abortion Committees in British Columbia" (1977) 11 UBC L Rev 81. In a national survey, Smith and Wineberg similarly documented approval rates from 75% to over 95% for applications placed before committees. Smith & Wineberg, *supra* note 65. The Badgley report also found "a number of hospitals where all the applications which were received were virtually automatically approved." Canada, *Badgley Report*, *supra* note 31 at 251.

[73] For a critical analysis of TACs in the American context, see Rickie Solinger, "'A Complete Disaster': Abortion and the Politics of Hospital Abortion Committees, 1950-1970" (1993) 19:2 Feminist Studies 241.

[74] Irvin M Cushner, "The Therapeutic Abortion Committee" (1971) 14:4 Clinical Obstetrics and Gynecology 1248.

[75] McDaniel, *supra* note 48 at 89.

> We have no access, no control over that. Indeed, we often—we almost always don't know what criteria they are using in choosing to approve or not approve any of the requests out before them."[76]

By reducing everything to a single and absolute standard of therapeutic need, the criteria of which were unknown and unknowable, the 1969 reform perfected not only a more efficient, but a crueller form of injustice than a simple prohibition. Egan and Tripp testified to the human alienation of the law: its indifference to and disinterest in the lives of those subject to it.[77] "Women become upset and angry," Egan explained because,

> they have gone through a process of coming to terms with their life situation at a particular moment, and dealing with the very difficult question of whether or not to continue a pregnancy … They've balanced out the choices that were before them and they've made a decision. And yet once they have made the decision … .[78]

> [The law subjects every woman for judgment] by a committee of three doctors, none of whom she's ever met and from whom she has no appeal.[79]

Egan and Tripp exposed the pedantic nature of an abortion law that equated justice with rules and procedures, making it endemically liable to become alienated from and alienating to the people whose lives it so profoundly affected.[80] The law could care less, but Egan and Tripp cared deeply. As against the disinterest of the government lawyers and judge who defended the law and who questioned them, Egan and Tripp refused to let go of the humanity in their work. They did so by interjecting the lives of the clients they served into their testimony, focusing on the minute and mundane details that mattered most to these women.[81]

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[76] *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3010, 3300. In *R v Morgentaler* (1988), Justice Dickson cited the failure of s 251(4) to provide an adequate standard of therapeutic abortion for TAC certification as rendering the law inconsistent with the principles of fundamental. "The word 'health' is vague and no adequate guidelines have been established for therapeutic abortion committees. It is typically impossible for women to know in advance what standard of health will be applied by any given committee." *Morgentaler* (1988), *supra* note 3 at 33.

[77] Section 251(4) allowed TACs to establish their own procedures, with no statutory requirement for how often a committee must meet, or whether the committee ever needed to meet the person about whom they would make a decision. Most never did and relied on a medical history alone. McDaniel, *supra* note 48 at 78. By the text of the law, however, a person could not apply directly to a committee and had no right to make any representations before it.

[78] *Morgentaler* (Egan Cross), *supra* note 5 at 188. In *R v Morgentaler* (1988), Justice Wilson spoke of the decision of whether to continue a pregnancy in these terms, as "a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well." For Wilson, the fundamental harm of s 251 of the *Criminal Code* was to take this decision from a person and give it to a committee. *Morgentaler* (1988), *supra* note 3 at 171-172.

[79] *Morgentaler* (Egan in Chief), *supra* note 5 at 157. In listening to the testimony of physicians in Morgentaler's earlier 1973 trial in Montreal, Claude-Armand Sheppard, his defense lawyer said: "[W]hat happened to me when I listened to the Crown witnesses was that I became a convert to women's lib. Because until then I had never faced completely the inhumanity, the selfishness and the lack of comprehension toward women. At no time in the last 10 to 15 years, since I left university, did I feel such waves of personal indignation well in me as when I heard these arrogant, incomprehensible doctors decide the fate of others, the comforts of others, and the liberty of others as though it were a purely theoretical problem." Eleanor Wright Pelrine, *Morgentaler: The Doctor Who Couldn't Turn Away* (Halifax: Goodread Biography, 1983) at 109.

[80] Leslie Green, "Positivism and the inseparability of law and morals" (2008) 83:4 NYUL Rev 1035 at 1048.

[81] See Patricia Ewick & Susan S Silbey, "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative" (1995) 29:2 Law & Soc'y Rev 197.

She was married with a two-year-old daughter and a husband about to be laid off work, Egan told the Court: "She and her husband did a page with the 'pros and cons,' juggling back and forth, and they made their decision on the basis of this."[82] She was "from a very small community in a Maritime Province," Tripp began,

> [a]shamed and embarrassed to stay there … [s]he took her life savings and got on the bus and she hitch-hiked, she stopped, I think, at almost every major city along the way [to Toronto] looking for a procedure, for a gynecologist who would do the procedure for her. She didn't get anywhere, needless to say. She arrived in Toronto late on Friday afternoon. We were about to close at the Birth Control Centre … she started to give us her story and we said, come right up, we will see what we can do. So she arrived, she hadn't eaten or slept since Tuesday and this was already Friday … She had been travelling for several weeks prior to that.[83]

With these vivid descriptions of real women and their real lives, Egan and Tripp worked to render abortion in *living* rather than *conceptual* terms, softening the distinction between fact and law—implicitly challenging what was or should be relevant under the law.[84] Egan and Tripp cared for people when the law would not, but this also made them suspect under the law. The government lawyers used this testimony to discredit Egan and Tripp as social activists, persons who worked against not within the law and, therefore, as unreliable witnesses.[85] Those who dare to speak against the injustices of a law are often accused of setting themselves against the law, but Egan and Tripp refused this categorization too, causing more trouble for the government lawyers and the Court than had they simply defied the law.

III. A PLURALIST PREFIGURATION

A major aim of cross-examination is to show a witness as unreliable or lacking in credibility by challenging their story. If the 1969 abortion law was a fraud and the source of injustice as claimed, the government lawyers proposed, then there was nothing for social activists to do except break it, would not the witnesses agree? Egan and Tripp were social activists, members of organizations that advocated for the repeal of the abortion law and the establishment of free-standing, publicly-funded community clinics. In cross-examination, Cooper, the Ontario Crown prosecutor, asked Egan directly if as an activist she believed that "you need to break the law to change the law."[86]

Cooper's question was provocative, albeit not in the way he intended. He appeared unaware that the witness did not share his sense of the law, namely a belief that the rules and procedures of the 1969 law are determinative of social meaning and conclusive of social fact. The transcript is almost comical when Arthur Pennington, acting for the Attorney General of Canada, asked Egan directly: "Have you broken the law?" She answered: "How could I?" Pennington had asked Egan about the "therapeutic abortion," which by her own prior testimony did not exist or rather could always be made to exist by virtue (or vice) of the law:

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[82] *Morgentaler* (Egan in Chief), *supra* note 5 at 156-157.
[83] *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3303.
[84] Ewick & Silbey, *supra* note 81 at 217-22 (describing the use of subversive narratives in law).
[85] *Morgentaler* (Egan Cross), *supra* note 5 at 171–76; *Morgentaler* (Witness Tripp, Janis Patricia), *supra* note 5 at 3326–27 (emphasizing that the witnesses are involved with political advocacy organizations).
[86] *Morgentaler* (Egan Cross), *supra* note 5 at 174.

> Q. You have from time to time in your testimony, used the expression "therapeutic abortion." And I would be grateful if you would just indicate for me what you intended by that term, therapeutic abortion.
>
> A. … Well, I used the term "therapeutic" because it's the term that is commonly used in the health field. And I think it's most probably commonly used because the existing law, if I may paraphrase it, says something to the effect that if the life or health of a woman is threatened by continued pregnancy, she may have a therapeutic abortion
>
> Q. And that is, generally speaking, what you have in mind when you use that term; am I correct? There's nothing tricky about that. I'm just trying to understand what you intended.
>
> A. No, I think it's just the commonly used term.
>
> HIS LORDSHIP. Commonly used term to describe an abortion carried out under Section 251? Is that it?
>
> A. Yes. …[87]

Justice Parker attempted to confirm that there was no such thing as a "therapeutic abortion" outside of the law. Abortions undertaken to help people were not therapeutic, nor legal. Both lawyer and judge wanted to ensure there was nothing tricky in Egan's use of the term therapeutic, no intention to obscure or deceive. Pennington continued:

> Q. Now, I take it you also are consulted by other pregnant women who simply wish to have an abortion for their own reason of convenience, or whatever other reason, but are not in a situation where their life or health is in danger.
>
> A. Well, our experience -- and I think this is borne out by many other birth control centres as well -- is to use the World Health Organization definition of health, which again, if I may paraphrase, is both the emotional and physical well-being of a woman. And if a woman is confronted with an unplanned pregnancy that she feels, for whatever reason, she can't deal with at this time -- and women have all kinds of reasons, obviously, for making that choice -- am I answering your question properly?
>
> Q. I'm waiting for the end of the sentence. That would --? …
>
> A. Well, when we get back the letters from the physicians that … [we] may refer our patients to, the most general comment, after the doctor describes the patient, is, "Pregnancy complicated by depression." That seems to be the common comment that a physician will make on women we refer to him, or her.

[87] *Morgentaler* (Egan Cross), *supra* note 5 at 191-210.

> Q. Then I don't think you are answering my question.
>
> A. Okay.
>
> HIS LORDSHIP. … Could we go back. Excuse me, but I think you started off by saying -- the question was, are you consulted by women who want an abortion where life and health are not in danger? … [88]

Like the vast majority of physician referrals and TAC certifications within the system, Egan spoke of legal abortions on the basis of mental health risk: an unwanted pregnancy was depressing. The cases that Justice Parker looked for, quite literally, could not exist by law. Egan explained:

> A. … [I]f I may go on, I cited an example this morning of a woman who came to see us fairly recently, who was pregnant -- it was because of a birth control pill failure -- and she and her husband felt, because of their economic circumstances, they were not in a position to be able to afford a second child at this time … So we certainly would get women who would come to our clinic who would say, "I've become pregnant. I didn't intend it. This is the circumstance. … I would want to have another child, but it's impossible right now." And so …
>
> Q: For economic reasons?
>
> A. For economic reasons, which would then of course have a bearing on her emotional state of affairs at that time. But that would be an example of a woman who would come to us, if I'm answering that properly. [89]

There was nothing tricky about it. Every abortion could be made a therapeutic abortion, but this would mean abortion on demand. Pennington tried again to find the non-therapeutic and thus the illegal abortion:

> Q. Well, I guess my question relates to -- I can visualize, in some circumstances, where a woman's emotional health would be sufficiently fragile that serious economic difficulties might well endanger her health. Let's take that as one situation … But then there may be other women, of stronger fibre, who, while they don't like their economic situation, nevertheless in that situation can and probably do carry the baby to full term, and cope with it … and do not suffer injury to their mental health as a result … Now, I'm trying to distinguish between women in those two categories. It may be that you have never encountered anybody in that second category, but that's really what my question is. Do you get some people who come in who want an abortion for reasons other than danger to their life or health?
>
> A. Well, I think, as I outlined it in the example I gave you, that we do have people who come in to us because of economic or social circumstances, feeling they must have an abortion. The question is -- I happen to feel that one must give a certain level of respect

[88] *Ibid.*
[89] *Ibid.*

> and dignity to a patient when she comes to a clinic, that she has the resourcefulness and the right to make the decision around such a basic question as this, and ---
>
> Q. If I could just interrupt … would you characterize that as being what some people describe as abortion on request or abortion on demand? [90]

Pennington asked Egan the question directly: Is this therapeutic abortion or abortion on demand? He was desperate to make real the aspiration of the law as a "gapless system of rules" where every abortion falls on one side or the other: therapeutic or on demand, legal or illegal.[91] Yet, this is what the social workers refused. They acted neither inside nor outside the law, but neither would they do away with the law.

> A. Well --- abortion on demand, I know, was a slogan that had been used many years ago. My own feeling is that I respect a woman's right to make her own decision, in relationship to a pregnancy, an unplanned pregnancy …
>
> Q. Is it your personal view that she should be entitled to receive an abortion, once she has made the decision that she wishes one?
>
> A. Yes, I think that it is the right of a woman …[92]

When Pennington asked Egan about entitlement to abortion under the law, she answered him not by the rules and procedures of the "therapeutic abortion," but by the right of a person to make their own decision. It is a sly response because her answer does not contradict section 251(4). Pennington cannot deny, after all, that a legal entitlement to an abortion even under the TAC system must follow from a person's decision that they wished one, even if this decision alone was insufficient to authorize one.[93] Pennington returned again to the categorical:

> Q. Yes. Coming back, then, to my question about the categories of women, I'm not sure you've answered that question … Have you ever had somebody come into your clinic where clearly, in your opinion, there is no risk to her life or health, although you may feel, from the personal point of view you've expressed, that she should be entitled to obtain an abortion?
>
> A. Well, firstly, I'm not a physician. We provide information. We have physicians at our clinic who would be probably more able to make that kind of distinction. But we certainly would have, say, a sixteen- year-old -- I'll give another example -- who would come in, she would come in perhaps with a parent, and she is pregnant, and the young woman and the parent have discussed it and feel that an abortion is appropriate in her

[90] *Ibid.*
[91] Roberto Mangabeira Unger, "The Critical Legal Studies Movement," (1983) 96 Harv L Rev 561 at 564.
[92] *Morgentaler* (Egan Cross), *supra* note 5 at 191-210.
[93] Indeed s 251(7) of the *Criminal Code*, *supra* note 1, stated, "Nothing in subsection (4) shall be construed as making unnecessary *the obtaining of any authorization or consent that is or may be required*, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person" (emphasis added).

> circumstance … She would then see the physician, who would examine her, speak to her, and then, if that was the decision, she would be referred … .[94]

Again, there was nothing tricky about it. The law itself made every abortion therapeutic upon physician referral and committee certification, including the abortion that a young woman had decided was appropriate in her circumstance having discussed the matter with her parent.

> Q. I see. Well, then, I'm – I'm just wondering -- and it may be that you never encounter it, given your philosophy. But if there is some person who is pregnant -- let's take a more case -- married, twenty-five years old, in apparent good health, … no previous children … who states that she wishes the abortion because she is presently unemployed, say, doesn't want to lose her job, and she and her husband, would like to save some money and have their children at a later stage … but she doesn't put it on the basis of her life or health, and there is nothing apparent in the medical examination that would put it on that basis. I take it, from what you tell me, that your clinic would still refer her …
>
> A. If what you're asking is -- if a woman comes to us and asks for a referral to a local area gynaecologist, which is always our priority, we would most probably make that referral …[95]

Pennington again attempted to place Egan outside the law.

> Q. And have you, in your work at the clinic, ever undertaken anything which you would regard as being an effort to further an abortion that is not in conformity with the law of Canada as you understand it?
>
> A. I don't think so.[96]

The abortion law itself trapped Pennington and kept Egan safe. These abortions may have been for reason of convenience, social or economic need, or by simple request, but that was irrelevant. None of these abortions were illegal because they were physician-referred and TAC-certified. Pennington asked about a kind of illegality which the law itself negated. He demanded a truth that the law itself made institutionally unavailable. Once the certificate is issued, the abortion is therapeutic. Any obscurity or deceit was that of the law. The law was the trickster.

The 1969 reform rendered abortion no longer a substantive offence, but a question of formal compliance and the social workers took that to heart. On a cynical read of the transcript, they engaged in a form of subversive legalism, subverting the abortion law to all fantastical outcomes by literal adherence to it.[97] The formalism of the "therapeutic abortion" was a valuable resource, and they exploited the near absolute discretion given to physicians to gain access to

[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] Patricia Ewick & Susan Silbey, "Narrating Social Structure: Stories of Resistance to Legal Authority" (2003) 108:6 Am J of Sociology 1328.

services for their clients.[98] The structure of the law contained the conditions for its own subversion. Nonetheless, a paradoxical quality can be read into their direct service activism. By appropriating the TAC system, conforming to its rules and procedures to gain access to services, the activists inadvertently bolstered an inherently flawed law.[99] Those who should have railed against the injustice of the 1969 reform were brought within its ambit, bought off by its goods and quieted. The abortion law made hypocrites of us all.

Yet the parody in Egan's testimony, "making therapeutic abortions of them all," suggests more critique than conformance. While the activists mimicked the legal formalities of the law—in physician referral and TAC certification—they did not adhere to the social norms of the therapeutic abortion, quite the contrary. They presented their clients with respect and dignity, as having the resourcefulness and the right to make the decision of whether to continue a pregnancy. They refused the categories of the law for their clients: therapeutic abortion or abortion on demand. They acted out openly the fraud of the law, the socially constructed nature of the therapeutic abortion, and the performativity of certification, creating anxiety for those who served under the law. Shortly after reform, physicians themselves expressed annoyance with the 1969 law and its committee system, embarrassed and degraded by their required collusion in it. In a survey of TACs, a Chairman of one committee where 85% of certifications were on psychiatric grounds said, "[v]irtually every one of these cases is for pure socio-economic or personal reasons … There are no psychiatric grounds for termination of pregnancy."[100] Rather, psychiatrists had been made the "fall guy for the system."[101] Even the CMA turned on its own creation, and by 1971 recommended that the *Criminal Code* be amended to delete all reference to TACs, and the decision of a lawful abortion be returned to the attending physician alone.[102]

There is yet a third reading of the transcript, which recognizes that these activists played not only inside the abortion law, but with the very concept of law itself. The government lawyers attempted to position Egan as breaking the law to fulfil a political vision of what she believed the law should be. Yet when Egan was asked, "Have you broken the law?" she answered the question with her vision of the law, in the present, namely "the right [of every person] to make the decision around such a basic question as this."[103] Egan answered for the present, not the future. The 1969 reform, Egan explained, codified what the law had allowed before: "[A]bortions if the public good could be served … I'm paraphrasing, obviously, as I'm not a legal— … Someone could not be prosecuted under that law if they could prove that the public good could be served by their deed, from what I understand. And that law was codified."[104] Egan articulated a political vision for the present, the 1969 law.[105] By improvising upon the law, rather than defying it, Egan claimed a

[98] See Annelise Riles, "The Empty Place: Legal Formalities and the Cultural State" in Austin Sarat, Lawrence Douglas & Martha Umphrey, eds, *The Place of Law* (Ann Arbor: University of Michigan Press, 2006) 43 (describing the use of technical legal rules in creating empty space, which is then available as a resource for resistance and empowerment).
[99] See generally Palmer, *supra* note 13.
[100] Smith & Wineberg, *supra* note 65 at 301. The *Badgley* report similarly noted that "[m]any physicians who the Committee met on its visits to hospitals across Canada openly acknowledged that their diagnoses for mental health were given for purposes of expediency and they could not be considered as a valid assessment of an abortion patient's mental health." Canada, *Badgley Report*, *supra* note 31 at 212.
[101] Smith & Wineberg, *ibid* at 302.
[102] Geekie, *supra* note 48 at 477. See also Collins, *supra* note 34 at 12-13.
[103] *Morgentaler* (Egan Cross), *supra* note 5 at 195.
[104] *Ibid* at 182.
[105] Robert Cover, "The Folktales of Justice: Tales of Jurisdiction" in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995)

different identity for herself in relation to the law: not lawbreaker, but lawmaker.[106] In cross-examination, when Pennington asked Egan the more particular question about the "need to break the law to change the law," she replied:

> Well, I'm not a legal expert, sir, and I'm not always sure how laws are changed. I understand that laws are changed through Parliament and through court challenges. I'm not an expert, so I don't know all the methods that one would use.[107]

The tension in Egan's answer between "what is" and "what could be"—the present and future, the real and ideal—lies at the heart of prefigurative politics and the power of acting "as if" things were already otherwise.[108] Prefigurative politics refers to a particular kind of direct activism where a person acts as if a preferred set of norms—in this case, legal norms—were already in place, and even more profoundly, as if they have the power to put them in place.[109] Prefiguration is rooted in a critical legal pluralist tradition because it privileges people as "law inventing," and not merely "law abiding," and recognizes their capacity to create a future normative order in the law of the present, without waiting for official propriety or formal legitimacy.[110] "State law," Martha-Marie Kleinhans and Roderick Macdonald explain, "has been symbolized as a limit, a boundary which the legal subject must transgress in order to overcome or change law … largely to avoid deeper epistemological questions of law's normativity."[111] Critical legal pluralism, however, rejects this image of necessary linear transgression. In prefiguration, future-oriented aspirations are enacted as present-day norms, collapsing the future into the present, giving people reason to believe that the future is already here, that an alternative world is achievable.

Egan and Tripp had more than just personal beliefs about the repeal of the 1969 law, and the right of every person to decide freely the course of their reproductive lives. They were social activists who struggled for abortion rights as part of a radical restructuring of society, including a reimagined role for the state and its law. They supported the establishment of community clinics and demanded that government decriminalize and fund these clinics.[112] Not only were these clinics "indispensable in providing desperately needed services," they served "as a model for the future … an understandable and realizable alternative that can seize peoples' imagination and enthusiasm."[113] Years after the trial, Egan wrote of this imagined world,

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173 at 176 ("Law is neither to be wholly identified with the understanding of the present state of affairs nor with the imagined alternatives. It is the bridge.")

[106] See Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Abingdon: Routledge, 2013).

[107] *Morgentaler* (Egan Cross), *supra* note 5 at 174.

[108] Davina Cooper, "Towards an adventurous institutional politics: The prefigurative 'as if' and the reposing of what's real" (2020) 68:5 Sociological Review 893.

[109] The term was coined by Carl Boggs (1977) as a political logic describing tensions between "direct or community action" and "political advocacy or protest," and gained prominence in Winifred Breines' (1982) study of the New Left in the 1960s. Dan Swain, "Not Not but Not yet: Present and Future in Prefigurative Politics" (2019) 67:1 Political Studies 47 at 49.

[110] Kleinhans & Macdonald, *supra* note 20. See also: Boaventura de Sousa Santos, "Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South" (1995) 29:4 Law and Soc'y Rev 569 at 573.

[111] Kleinhans & Macdonald, *ibid* at 44.

[112] Egan & Gardner, "Race, Class and Reproductive Freedom," *supra* note 14 at 95-96.

[113] Patricia Antonyshyn, B Lee & Alex Merrill, "Marching for Women's Lives: The Campaign for Free-Standing Abortion Clinics in Ontario" in Frank Cunningham et al, eds, *Social Movements/Social Change: The Politics and Practice of Organizing* (Toronto: Between the Lines, Society for Socialist Studies, 1988) 129 at 499-500.

> [w]e live in a world where inadequate wages make women the largest percentage of the poor, where racism is systemic, where women are subject to rape and violence, sexual and racial harassment, and still bear the major responsibility for domestic work and childcare. It is in this context that OCAC raised the demand for abortion rights.
>
> … For all women regardless of class, race, ability or sexuality to truly have choices in our society, we require: safe and effective birth control with information and services in our own languages and in our own communities, decent jobs, paid parental leave, free childcare, the right to live freely and openly as lesbians, an end to forced or coerced sterilization, employment equity, an end to sexual and racial harassment, the right to have the children we choose to have, and the right to full access to free abortion. All of these must be achieved if we are truly to have reproductive freedom.[114]

The free-standing, publicly-funded community clinic, a social structure foreclosed by the 1969 law, was an exercise in legal world-making. When Egan and Tripp brought this legal world into the courtroom, they engaged in something different than legal interpretation or even law reform. They asserted faith in an abortion law, albeit one not yet qualified as such in any ordinary sense, enacted by Parliament or pronounced by the court. By acting as if "the right of every person to decide for themselves" was already the law, Egan and Tripp challenged more than the 1969 abortion law, they challenged the idea of law itself and the institutions of its making.

IV. CONCLUSION

Egan and Tripp did not persuade the Ontario Supreme Court of their vision. Justice Parker denied the constitutional motion, and Dr. Morgentaler and his colleagues were tried before a jury on the charge of criminal conspiracy. However, the testimony of Egan and Tripp remained fundamental to the theory of case and its outcome. Sometimes acting "as if" something was the law can bring this state into existence.[115]

At trial, Morris Manning conceded that Dr. Morgentaler and his colleagues established a free-standing clinic in Toronto for the purpose of providing abortion care outside of the rules and procedures of section 251. Yet he argued that their actions were lawful, protected by the defence of necessity. The 1969 law caused a crisis of access that necessitated the provision of abortion care outside hospitals and without TAC certification to avoid the graver harm of obeying the law. The evidence of Egan and Tripp on "how the law worked" was admitted as relevant to the defence. Manning argued, in other words, that the provision of safe and dignified abortion care by a medical practitioner in a free-standing clinic was already lawful. He argued that the future was already here, that an alternative world was possible in the present.

[114] Carolyn Egan, "Reproductive Rights" in Robert Argue et al, eds, *Working People and Hard Times* (Toronto: Garamond Press, 1987) 30.

[115] See Jessica A Clarke, "Adverse possession of identity: Radical theory, conventional practice" (2005) 84:2 Or L Rev 563 (describing "performance reification," or the conditions whereby acting "as if" one had legal status is sufficient to secure that status in the eyes of the law, or the transformation of de facto performance into de jure protection).

By this time, Morgentaler had been tried multiple times in Québec for performing "illegal" abortions, but every time, juries acquitted him on the defence of necessity.[116] In the first case, on appeal, the Supreme Court of Canada accepted that the common law defence of necessity could be invoked against an abortion charge, but only if the person believed there was a life or health "emergency," and observance of the law was "impossible."[117] The Court held that the facts of the particular case, like all of Morgentaler's cases, did not warrant the application of the defence and returned the case to trial. Yet the jury acquitted.[118]

In the Ontario Supreme Court trial, Justice Parker recognized the power of the prefigurative and warned in his charge to the jury that, "[i]f he [Morgentaler] is saying that because the purpose was to help people the act became legal, that is not the law … ."[119] Not only did the defendants fail to make every reasonable effort to comply with the law, they consciously agreed to violate it. Yet the jury acquitted on the law "as if." Indeed, Manning invited them to do so. In his closing statement to the jury, Manning explained that,

> [t]he judge will tell you what the law is. He will tell you about the ingredients of the offence, what the Crown has to prove, what the defences may be or may not be, and you must take the law from him. But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied.[120]

Manning suggested that the jurors had the power to give meaning to this law—to remake the law—especially where a law that promised to protect people harmed them and where politicians refused to relieve the injustice. He called on the jurors to send a message to politicians by acquittal to stop prosecuting doctors for helping people in need: "That is the message that has to be delivered and there is only one body in our society that can deliver that message … You can bring freedom."[121] Against this vision of lawmaker, Parker instructed the jurors that they were not legislators: "Your duty is to decide the facts and then to apply the law. You are not here to judge the law and you have no right to do so."[122] Yet the jury acquitted.

Decades later, a *Globe and Mail* article recounted the experience of Susan Bishop, one of the jurors in the Toronto courtroom:

> [T]hen 36 and an engineer with Nortel, [Ms. Bishop] hadn't felt strongly about being on the jury. … [or] the subject of abortion. … She figured that made her the ideal juror, someone who could approach the case with an open mind. In the end, she was one of the 12 who chose … to acquit Dr. Morgentaler and two other doctors of performing an illegal abortion. The trial gave her a new faith in the legal system. For her, the case

[116] See Bernard M Dickens, "The Morgentaler Case: Criminal Process and Abortion Law" (1976) 14:2 Osgoode Hall LJ 229.
[117] *Morgentaler v The Queen*, [1976] 1 SCR 616.
[118] When the Québec Court of Appeal upheld the second jury acquittal, and the Supreme Court refused the appeal, Morgentaler's lawyer, Claude-Armand Sheppard said, "the defence of necessity had [now] become part of the law." Catherine Dunphy, *Morgentaler: A Difficult Hero* (Toronto: John Wiley & Sons Canada Ltd, 2003) at152. Subsequent to a third acquittal, the Québec government refused to further prosecute on the law, dropped all outstanding charges, and called on the federal government to amend the *Criminal Code*.
[119] *Morgentaler* (Charge to Jury), *supra* note 5 at 3802-03.
[120] *Morgentaler* (Final Submissions), *supra* note 5 at 3746–47.
[121] *Ibid.*
[122] *Morgentaler* (Charge to the Jury), *supra* note 5 at 3851.

> was an education. She says she realized how many women were affected by the restrictions then in place, how the system created an inequality for poor or rural women whose options were more limited. … 'We felt confident we were doing the right thing.'[123]

Bishop and the other jurors improvised on the 1969 abortion law, as Québec jurors had done before them. There is a kind of role playing of the state and its lawmaking power in their actions, but in the spirit of prefigurative politics, it is a mimicry that seeks to critique, and more importantly to affect, the structures that it mimics.[124]

The Court of Appeal ruled that Manning had seriously erred in his statement to the jury and ordered a new trial: "One cannot defend a criminal case by putting the law on trial and asking a jury to condemn a decision of Parliament in enacting or continuing a law because the jury thinks that it is, at the moment, bad law."[125] The Supreme Court would have upheld the appeal if it had not decided that the abortion law was unconstitutional and therefore unenforceable, but this is what the jury had already decided.

From the moment that Manning called Egan and Tripp into the courtroom he transformed the nature of the trial: from the indictment of an individual into a general indictment of the law, from a criminal act to a constitutional right, from a legal dispute into a political action. There are many ways to politicize trials, but they all involve breaking consensus in the courtroom and presenting an alternative worldview.[126] Reva Siegel credits the prefigurative politics of social movements—the advancement of both interpretive and amendatory claims, the convergence of *what is* and *what if,* with the power of such movements to restore faith in law as they unsettle it.[127]

The Supreme Court of Canada in ***R v Morgentaler*** declared the criminal law on abortion unconstitutional. A discursive study of the witness testimony of Egan and Tripp, however, shows the small-scale courtroom struggles by which such radical change in law happens. With a growing global skepticism of abortion legalization, more than fifty years from the 1969 reform, the deeply subversive engagement of these activists begs a moment for reflection. The question "what is law?" often yields a vision of law as something that must be transgressed to be overcome: "you must break the law to change the law." This image is held by many abortion rights activists, the impossibility of imagining a future that is not rooted in the law of today. The courtroom testimonies of Egan and Tripp show us an alternative path—the power to create a just future in the law of the present. There is no waiting for tomorrow.

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[123] Erin Anderseen & Ingrid Peritz, "Flashback: 'I practically told the jury to find him guilty'," *The Globe and Mail* (5 July 2008) F3.
[124] Cooper, *supra* note 108 at 12-14.
[125] *R v Morgentaler*, [1985] 52 OR (2d) 353 (ON CA) at 730.
[126] See Zenon Bankowski & Geoff Mungham, *Images of Law* (New York: Routledge, 1976).
[127] Reva B Siegel, "Text in Contest: Gender and the Constitution from a Social Movement Perspective" (2001) 150 U Pa L Rev 297 at 323.