

Abortion Rights Without Law: A Constitutional Reflection

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On June 24, 2022, the United States Supreme Court overturned *Roe v Wade*.¹ According to Justice Alito, writing for the majority, the US Constitution does not confer a right to abortion, and it never did. The right is nowhere in the text of the Constitution. It is not deeply rooted in US history or tradition. The abortion right as a constitutional right was egregiously wrong from the day *Roe* was decided. The Court stripped people of the Constitution's protection as something they never had or deserved.

The judgment returned abortion “to the people and their elected representatives,” triggered state restrictions into effect, and unleashed lawmakers to enact more. State by state moved to criminalize abortion, every conceivable act of it: to provide or have one, to assist or support another, all means of abortion and soon even the idea of it. This is what it means to be stripped of constitutional protection and, in this sense, the Supreme Court's judgment resounded beyond the US. People worldwide asked: Could it happen here? Do we have abortion rights? How well are they protected?

In Canada, in answer to these questions, many returned to *R v Morgentaler*² — our *Roe v Wade*. In this 1988 judgment, the Supreme Court of Canada struck down the criminal abortion law as a violation of the *Canadian Charter of Rights and Freedoms*.³ At the time, the *Criminal*

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1 *Dobbs v Jackson Women's Health Organization*, 597 US 215 (2022), rev'g *Roe v Wade* 410 US 113 (1973).

2 *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler*].

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

Code prohibited abortion except when a hospital committee authorized it as therapeutic, that is, when continued pregnancy was likely to endanger life or health.⁴ The *Code*, however, never defined a therapeutic abortion, which the Minister of Justice justified by stating that “[h]ealth [was] incapable of definition.”⁵ An abortion was lawful if a committee authorized it as therapeutic, which most committees did when a doctor claimed that it was.⁶

To be clear, there was no such thing as a therapeutic abortion. It was a statutory fiction. Mere years after the committee system was introduced, doctors expressed annoyance with the system and their required collusion in it. More than a decade before *Morgentaler*, the Canadian Medical Association recommended that the committee system be abolished, leaving authorization to the professional judgment of an individual doctor.⁷

Dr Morgentaler and his colleagues challenged Canada’s criminal abortion law. They set up a free-standing clinic in Toronto to provide services outside of the committee system for those denied care within it. They were criminally charged with conspiracy to procure an abortion, but on appeal of their conviction, a plurality of the Supreme Court declared the criminal abortion law unconstitutional, a violation of the *Charter*’s section 7 right to security of the person. The justices agreed that the administrative dysfunctions of the committee system endangered life and health by delaying or denying access to therapeutic abortion care as a statutory entitlement.

When it was clear that *Roe* would be overturned, after a draft of the US Supreme Court judgment was leaked,⁸ people asked: does *Morgentaler* protect a right to abortion? Did our Supreme Court constitutionalize abortion rights? Some commentators emphasized the restraint of the Canadian judgment, which could allow for a new, differently designed, criminal abortion law if Parliament could ever pass one.⁹ After all, *Morgentaler* did not turn on whether the *Charter* protects a right to abortion, only on whether the abortion law at the time violated *Charter* rights. Perhaps a fairer, less arbitrary abortion law would not.

Since *Morgentaler*, however, no federal abortion statute has ever passed, leaving Canada one of the few countries in the world with no abortion law. We have no abortion-related offences or penalties, nor do we have any statute that uniquely regulates acts taken with the intent to end a pregnancy. Our distinct constitutional history and traditions also complicate any direct comparison between *Morgentaler* and *Roe*.¹⁰ In Canada, unlike in the US, we would

4 *Criminal Code*, RSC 1970, c C-34, s 251.

5 *House of Commons Debates*, 28-1, No 8 (23 January 1969) at 8124 (Hon John N Turner).

6 Kenneth D Smith and Harris S Wineberg, “A Survey of Therapeutic Abortion Committees” (1970) 12 *Crim LQ* 290.

7 Douglas A Geekie, “Abortion: A Review of CMA Policy and Positions” (1974) 111:5 *CMAJ* 474.

8 Josh Gerstein & Alexander Ward, “Supreme Court has voted to overturn abortion rights, draft opinion shows”, *Politico* (2 May 2022), online: <<https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>>.

9 Mark Gollom, “Why Canada’s *Roe v. Wade* didn’t enshrine abortion as a right”, *CBC News* (4 May 2022), online: <<https://www.cbc.ca/news/canada/abortion-rights-canada-morgentaler-court-1.6439612>> [perma.cc/5W5L-3UST].

10 Joanna Erdman, “Why Canada’s abortion right endures: our constitutional history and tradition”, *The Globe and Mail* (5 May 2022), online: <<https://www.theglobeandmail.com/opinion/article-why-canadas-abortion-right-endures-our-constitutional-history-and/>> [perma.cc/Z3SA-LA39].

not be rigidly bound by the *Charter's* text of 1982, much less a 1988 Supreme Court judgment, to know our rights today. Moreover, decades of activism since *Morgentaler* have shaped the abortion rights that people believe they have, even if these rights have never been tested or affirmed by a court.¹¹ In 2016, when activists served the Prince Edward Island government with notice to challenge its abortion policy and to bring services back to the Island, they claimed a constitutional right and violation.¹² Yet, they never had the chance to win or even litigate their challenge. Within months, the Premier announced that the provincial policy was likely unconstitutional and changed it. Sometimes you do not need (or want) a court to give you rights, lest you create an opportunity for the courts to take them back.

The same holds true of governments and statute. Like many US states and Congress that scrambled to protect or expand abortion rights after *Roe* was overturned, Canadian Prime Minister Justin Trudeau proposed a federal statute to enshrine the right to abortion and to guarantee its protection.¹³ His proposal was met with a resounding call to stay Parliament's hand and no bill was ever tabled. Abortion rights organizations campaigned that "Canada does not need an abortion law."¹⁴ They feared the courts, through which an abortion law could be challenged and overturned in the future. Without a statute, it is hard to get abortion law before the courts. They also feared Parliament, which in the making of an abortion law would inevitably narrow the abortion right, even in the name of its protection. This is a real fear. Most abortion laws cannot be easily classed as rights-protecting or rights-restricting. In *Morgentaler*, at trial, the government framed the criminal abortion law as a statutory entitlement to care, a repressive rights-based law.¹⁵ After *Morgentaler*, the federal government again argued for a new criminal law to protect a basic level of care nationwide, which failed to pass.¹⁶

There has always been a preoccupation with law in the abortion rights field, an obsessive statutory tinkering to control who can have an abortion, when, where, why, and how. There has also always been a controlling narrative in abortion law that fosters a narrow way of thinking about abortion rights. This is true of constitutional abortion law too. Rather than fail to guarantee a right to abortion, *Morgentaler*, read to its letter, guaranteed a right to abortion

11 Joanna N Erdman, "Constitutionalizing Abortion Rights in Canada" (2018) 49:1 Ottawa L Rev 221 [Erdman, "Constitutionalizing Abortion"].

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

13 Marieke Walsh & Safiyah Marhnouj, "Trudeau renews pledge to protect abortion rights in Canada, but unable to offer timeline", *The Globe and Mail* (4 May 2022), online: <<https://www.theglobeandmail.com/politics/article-canada-abortion-rights-trudeau>> [perma.cc/HB8N-EKCB].

14 Action Canada for Sexual Health & Rights & National Association of Women and the Law, "Why We Don't Need a New Abortion Law in Canada" (24 June 2022), online: *Action Canada* <<https://www.actioncanadashr.org/news/2022-06-24-why-we-dont-need-new-abortion-law-canada>> [perma.cc/259A-BJM7].

15 See discussion of trial transcripts from *R v Morgentaler* (1984), 47 OR (2d) 353, 12 DLR (4th) 502 in Joanna N Erdman, "An Abortion Law Preformed" (2021) 35 J of L & Soc Pol'y 45 at 50-51 [Erdman, "Abortion Law Preformed"].

16 Melissa Haussman, "Of Rights and Power: Canada's Federal Abortion Policy 1969-1991" in Dorothy McBride Stetson, ed, *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism* (New York: Oxford University Press, 2001) 63 at 78-79, citing Bill C-43, *An Act respecting abortion*, 2nd Sess, 34th Parl, Elizabeth II, 1989-91, 38-40.

only as a right to access clinical care. This is the restraint of *Morgentaler*. It is also how almost every province interpreted the judgment when they restricted public funding for abortions to clinically indicated care, which most abortions are not.¹⁷ It then took decades of activism for abortion care to be folded into the Canadian healthcare system, and when it was, abortion rights took on the character of that system. Abortion rights in Canada have a techno-managerial quality to them, with a focus on service access and delivery that silently organizes how we think and talk about them. Abortion is health care, simple and complete, with no lifeworld beyond it.

Even Justice Wilson's opinion in *Morgentaler*, which lingers in our constitutional memory, ties abortion rights to a controlling narrative of the right to liberty. While Wilson agreed with her colleagues that the dysfunctions of the criminal law endangered access to care, she also wrote of the law's more fundamental flaw. Even with perfect administration, she reasoned, the criminal abortion law deprived a person of a fundamental decision of an intimate and private nature: the right to develop their full potential, to plan their own life, and to make their own choices.¹⁸ Justice Wilson's reasoning is classically liberal by conceiving the abortion right exclusively as the pursuit of self-interest. People are free to arrange and manage their lives, and should they decide differently from one another, it is only a mark of their freedom. In this articulation, abortion rights are defended as a personal choice rather than a structured one. In most jurisdictions, constitutional law rarely talks of abortion rights as a critical form of social and economic security. Yet these are rights that people exercise in the hard corners of life, where unwanted pregnancy is a measure of social injustice, and where people choose to end their pregnancies because of a lack of choice in reproductive life and living. By converting these structural inequalities into simplified expressions of personal liberty, constitutional abortion law cultivates a habit of ignoring these inequalities.

The fear over abortion law in Canada may thus be rooted less in a fear that it will limit rights and more in the concern that law, any law, will reveal the limits of our rights. It is a fear most acute about abortion rights born of constitutional judgments, that is, abortion rights made as a counter-image to abortion laws. While these rights may have been called into existence in powerful and convincing terms by advocates and courts, abortion rights originating as the antithesis of their violation always remain somewhat defined by this violation. Abortion rights always bear the imprint of the laws they challenge. By the time of its overturning, the abortion right of *Roe* had been so compromised, the language of statutory obstacles and burdens so much a part of the right as its violation, that some were reluctant to call it any right at all.¹⁹ The right existed mainly in the doctrinal worship of abstract ideas and in the desperate attachment to the legal rules that represented them, rules alienated from and alienating to the people whose lives they so profoundly affected. In many states, abortion statutes passed and upheld during the *Roe* era all but denied care to those most in need. This is what the US abortion right had become long ago and what, in the end, the US Supreme Court overturned.

Unlike the US, however, Canada has not had a dizzying array of abortion legislation and litigation. In Canada, people have been somewhat left alone by law, free not only from

17 Erdman, "Constitutionalizing Abortion", *supra* note 11.

18 *Morgentaler*, *supra* note 2 at paras 98–120.

19 Gillian E Metzger, "Unburdening the Undue Burden Standard: Orienting *Casey* in Constitutional Jurisprudence" (1994) 94(7) *Columbia L Rev* 2025.

restrictive abortion laws but from law itself. They have escaped the controlling narrative of law, free to do and have abortions and to exercise abortion rights apart from the law. These are not illegal, but *alegal* abortions. It is a freedom which the advent of abortion with pills has only strengthened. Well into a pregnancy, you can use pills to safely end it. As common regimens used earlier in pregnancy, you can swallow one pill of mifepristone and 24 hours later dissolve four pills of misoprostol between your gums and cheeks, or you can dissolve four pills of misoprostol under your tongue, three times every three hours.²⁰ Your abortion will happen over days with cramping and bleeding stronger than a usual menstrual period and like an early miscarriage. After *Roe* was overturned, the *Globe and Mail* published a report on abortion access in Canada, with a map showing driving times to abortion clinics from cities across the country.²¹ The map was criticized as outdated, but frankly, it was a strange map to see in the era of abortion with pills, which travel more easily than people. Rather than any map at all, it should have been a bed or bathroom floorplan that showed the distance to the drawer where you keep your pills until you need them.

In 1988, the same year as *Morgentaler*, this was the imagined future of abortion rights in Canada as people awaited the arrival of the “new French abortion pill.”²² Right before the judgment, the President of the Canadian Abortion Rights Action League worried that after decades of agonizing struggle to change abortion law, with abortion pills, the whole question would be irrelevant.²³ This is not simply because with pills and by your own hands, you can do an abortion yourself and use your body to enact the abortion right. There is also an interpretive flexibility to the taking of pills and what happens in your body when you do. Abortion pills have a specific chemical structure that produces biological effects, but how many of us, all the time, use pills with little information about what they are or how they work? Abortion law is premised on a categorical difference between being pregnant or not, ending a pregnancy, and preventing one. The effects of pills, however, are often related to the expectations that you have for them. You can use pills to have an abortion, but you can also have no abortion at all. Abortion pills give you a right of silence. A right to withhold the name of your act, perhaps also to yourself. A right to see what you are doing in a way that is different from how any law would describe it.

This may be where the real fear of abortion law resides, in the effacement of abortion rights by subsuming them into a legal order, any legal order. It is the fear of setting down abortion rights in terms that will always be inadequate to capture what people do when they have abortions and how they feel about them. It is the fear of state-sanctioned ways of knowing and acting on your body. It is the fear of having abortion rights pinned down in the language of law and in association with a state agenda. A defense attorney of Dr Morgentaler once remarked, “I became a convert to women’s liberation after listening to these doctors testify ... [u]ntil then

20 Both medical abortion regimes, and their self-management, are described in the “Abortion Care Guideline” (8 March 2022), online: *World Health Organization* <www.who.int/publications/i/item/9789240039483> [perma.cc/7S5A-XK3W].

21 Carly Weeks, “What access to abortion looks like across Canada”, *The Globe and Mail* (3 May 2022), online: <<https://www.theglobeandmail.com/canada/article-abortion-access-laws-canada>> [perma.cc/86S3-PQH2].

22 Patricia Campbell, “Making Sense of the Abortion Pill: A Sociotechnical Analysis of RU486 in Canada” (2018) 2 *Health Sociology Review* 121.

23 Doris Anderson, “New pill, sex education, are progress”, *Toronto Star* (14 February 1987) H1.

I had never felt such waves of personal indignation 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.”²⁴ The attorney was speaking to the inherent violence of abortion law, which treats someone’s life as a philosophical exercise.

The epistemic culture of abortion rights in Canada appears to have escaped this fate. After *Roe* was overturned and people were asked, “What is the law on abortion in Canada today?” most answered, “We have a right to it.” People knew they had a right to abortion, even if they were not quite sure how or why. There is something immensely powerful in this answer, the power of acting “as if” Canadian law already protected a right to abortion and making the whole question of an abortion law to confirm it irrelevant.²⁵

Abortion rights in Canada seem both too small and too big for law, or perhaps we only think so because of how we think about law, which confirms the view that we are better off without it. Maybe then we should ask a different question: is there an abortion rights law to which we would say yes? Can we imagine a statutory scheme, or, more provocatively, a legislative package, with a radically reimagined role for the state and its power? Could law assemble the diverse experiences of abortion into something material rather than abstract? Could law create a care infrastructure to support people in all their reproductive decisions and throughout their reproductive lives: the right to end a pregnancy, the right to continue one, and the right to parent your child in a safe and healthy environment?²⁶ Wouldn’t we say yes to a law that holds space for this political future? In Canada, this is no speculative imagination. Our Supreme Court accepts that constitutional futures can take shape in innovative laws that affirm and reach ahead to our political aspirations.²⁷ We need only make them.

24 Eleanor Wright Pelrine, *Morgentaler: The Doctor Who Couldn’t Turn Away* (Halifax: Formac, 1983) at 109.

25 Erdman, “Abortion Law Performed”, *supra* note 15.

26 Loretta Ross, Elena Gutiérrez, Marlene Gerber and Jael Silliman, *Undivided Rights: Women of Color Organizing for Reproductive Justice* (Chicago, IL: Haymarket Books, 2016); Loretta J Ross, “Reproductive Justice as Intersectional Feminist Activism” (2018) 19(13) *Souls Journal* 159.

27 *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5.