THE IMPACT OF THE ABORTION LAW CONTROVERSY ON NORTH AMERICAN HUMAN EMBRYO RESEARCH POLICY

by

David M. Kaplan

A thesis submitted in conformity with the requirements for the degree of Master of Science
Graduate Department of Community Health (Health Administration)
Joint Centre for Bioethics
University of Toronto

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THE IMPACT OF THE ABORTION LAW CONTROVERSY ON NORTH AMERICAN HUMAN EMBRYO RESEARCH POLICY

Master of Science, 1997, David M. Kaplan, Graduate Department of Community Health (Health Administration), University of Toronto

This exploratory study examines why Canada and the United States of America have adopted different policies regarding research on human embryos. One possible explanation may rest in an examination of the history and the values expressed in the respective landmark abortion decisions. Before explicating the benefits of conducting research on embryos and the concerns that such research elicits, the moral status of the pre-embryo and its biological development are outlined. The relevant cases and policy documents are analyzed by wedding a neo-institutional approach to policy analysis with Dworkin’s theory of judicial review. While a right to abortion exists in United States, the Canadian judiciary has not identified such a right. Moreover, ‘protection of (potential) human life’ was found to be a highly institutionalized value in both countries; ‘protection of reproductive health’ was not as highly institutionalized. These differences may have differentially constrained the policymakers when contemplating human embryo research options.
"... from all my teachers, I have gained wisdom.” (Proverbs. The Hebrew Bible)

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The following is a glossary of all the biological terms used in the text of this study.1

**embryonic disc** the disc of tissue that separates the amniotic cavity from the yolk sac in the zygote

**blastocyst** the zygotic entity at around the fourth post-fertilization day; a hollow ball with a fluid-filled space.

**blastocoele** the fluid filled space of the blastocyst

**differentiation** the process by which cells become destined to perform a specific function and form a specific type of tissue

**embryo** the developing entity from the third to the eighth week after fertilization★; "that small part of the pre-embryo or conceptus, first distinguishable at the primitive streak stage, that later develops into the fetus."

**ectoderm** the outermost of the three primary germ layers in animal embryos; gives rise to the outer covering, the nervous system, inner ear and lens of the eye★

**endoderm** the innermost of the three primary germ layers in animal embryos ... gives rise to liver, pancreas, lungs, and the lining of the digestive tract★

**endometrium** the inner lining of the uterus, which is richly supplied with blood vessels that provide the maternal part of the placenta and nourish the developing embryo★

**fetus** the developing entity from the ninth week after fertilization until determination is made following delivery that it is viable or possibly viable. ★★

**gamete** haploid egg or sperm cells that unite during sexual reproduction to produce a diploid zygote★

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genome  the complete complement of an organism's genes; an organism's genetic material*
laparoscopy  a procedure by which ova are surgically removed from the ovary
mesoderm  the middle primary germ layer of an early embryo that develops into the notochord, the lining of the coelom, muscles, skeleton, gonads, kidneys, and most of the circulatory system*
pre-embryo  the zygote. The term pre-embryo was suggested in 1986 by Anne McLaren. It is the shortened form of pre-implantation embryo and is the human form prior to the fourteenth day after conception.
pregnancy
primitive node  the first element of the nervous system around which the neural tube develops
primitive streak  an opaque band which appears in the newly fertilized egg in the axial line of the embryo which represents the beginning of neural development for the embryo -- the beginning of the embryo's ability to sense even primitive sensations such as pain *
syngamy  the process though which the 23 chromosomes of an egg cell and the 23 chromosomes of a sperm cell combine so that the new cell has 46 chromosomes*
yolk sac  the primitive digestive and respiratory system of the embryo
zygote  the diploid product of the union of haploid gametes in conception;* the fertilized egg until two weeks after fertilization, when the embryo proper and the surrounding structures supporting it being to form. **
INTRODUCTION

Since the birth of Louise Brown, the first ‘test-tube’ baby in 1978, a myriad of research projects have been undertaken to improve the success of *in vitro* fertilization\(^2\) [IVF] and embryo transfer procedures. Some of these projects have focused on understanding the process of implantation and on increasing the probability of embryo implantation in the womb following IVF. To carry out this research, investigators require human pre-embryos and embryos. Canada and the United States of America have adopted different policies of intervention vis-à-vis human embryo research. Why?

It is contended that one possible explanation for the differences in Canadian and American human embryo research policy rests in an examination of the values expressed in the landmark abortion decisions in each country. A comparative analysis of the jurisprudence surrounding the abortion issue may account for these differences in American and Canadian policy. While other forms of legal institutionalism have been asserted (Black 1997), this study will rely on a marriage of neo-institutionalist theory and Ronald Dworkin’s

\(^2\) IVF, the procedure by which the union of sperm and ovum is accomplished outside of the womb, involves five stages. First, the collection of ripe eggs (actually preovulatory oocytes) is accomplished via laproscopy or transvaginal ultrasound-directed oocyte retrieval (TUDOR). Next, healthy sperm that are ready to fertilize must be collected from the male partner or sperm-donor. In the third step, the fertilization of the ova must occur in medium that closely mimics the female reproductive tract. The fertilized ova are then transferred into a growth medium for two-day incubation. In the final stage of IVF, the incubated ova are implanted into the uterus (Kaplan & Tong 1994). While the approximate cost of the procedure is approximately CAN$8500 (J. Tyson, personal communication, November 21, 1996), subsequent attempts are less costly since they do not involve the pre-procedure screening and diagnostic tests.
theory of legal rights. Coupling historical institutionalism with Dworkin's theory will provide sufficient leverage for supporting this exploratory investigation.

SCOPE AND RELEVANCY

Research on human embryos can be divided into two categories. Embryo research that focuses on producing 'healthier' babies has a therapeutic intent; the embryo under clinical research could directly benefit from the study and intervention. Other research, which emphasizes improving embryo transfer success rates following IVF, has a non-therapeutic intent; the embryo will see no direct benefit from the research being done on it. For the remainder of this discussion, references to human embryo research refer solely to non-therapeutic human embryo research, unless otherwise indicated.

Infertility

The availability of artificial reproductive technologies has social, economic and psychological impact for the fifteen to twenty percent of North American couples who are clinically diagnosed as infertile\(^3\) (Kaplan & Tong 1994). Numerous causes of infertility have been documented. They include: anovulation (an ovulatory problem sometimes associated with athletes and intense dieters), structural problems with the endocrine glands (which secrete the hormones necessary for controlling the female reproductive cycle), premature ovarian failure, defective mucus in the female reproductive tract, antibodies against sperm present in the seminal fluid or within the female reproductive tract, testicular abnormalities,

\(^3\) An infertile couple is defined a couple who are "unable to achieve a pregnancy within one year of unprotected sex." The Royal Commission (1994) defines an infertile couple as one that cannot achieve a pregnancy within two years of unprotected intercourse. This term is applied to couples and not individuals. (Kaplan 1994, 188)
sexually transmitted diseases and impotence (Kaplan & Tong 1994). IVF is the last choice for many infertile couples after intrauterine insemination procedures fail to result in pregnancy. It has been shown to be effective in producing pregnancies in women with bilateral fallopian tube blockage, severe endometriosis, unexplained infertility, and severe male factor infertility (Society of Obstetricians and Gynaecologists [SOGC] 1996). Currently, the success rate of IVF in producing pregnancies rivals that of spontaneous conception in the natural menstrual cycle (SOGC 1996). This procedure and the drug therapy that accompanies it pose many harms to the couples undergoing it (Collins 1995; Renate 1991; Seamark & Robinson 1995). Excessive government regulation of this procedure may result in a limited ability to execute research in this area (IVF Canada 1996; and Ikonomidis & Lowy 1994). Yet, research in the aforementioned areas may make this procedure both safer for the women undergoing it and more successful for resulting in pregnancy.

IVF is performed in Canada and the United States. Women and their spouses accept substantial emotional, financial and physical risks when they enter an IVF trial. Physicians who practice IVF have a responsibility both to decrease the safety risks associated with the procedure and to increase its success rate. If the North American governments and medical professions have condoned the practice of IVF they must be willing to conduct the necessary research to meet the aforementioned goals. The questions are how much research and of what type? It is the duty of social policy makers to answer these questions.

After reviewing the implications and justifications of available courses of action, the governments of Canada and the United States of America each adopted different policies of intervention vis-à-vis embryo research. This study will probe why Canada and the United
States of America have adopted such different policies by carrying out a legal-institutional investigation. Scientific knowledge is not restricted by geography. Canada may wish to prohibit research that her citizens find ethically repugnant, but she cannot deny her citizens the possible benefits of human embryo research. The scientific community is enriched from work carried out around the globe. Surely the future fruits of human embryo research will cross the United States-Canada border. If, at the end of the day, this is the case, then Canadian policymakers need to examine the goals they are attempting to achieve and why what they wish to accomplish by reaching them.
MORAL AND BIOLOGICAL BACKGROUND: PHILOSOPHICAL AND FACTUAL FRAMEWORK

MORAL STATUS AND BIOLOGICAL DEVELOPMENT OF THE EMBRYO

The Moral Status of the Pre-Implantation Embryo

The embryo is human and alive; therefore, it is not merely an object. The distinction individuals make between its moral worth and the moral worth of other human tissues rests on its potential for independent life (Discussion Group on Embryo Research [Discussion Group] 1995). This point needs some further clarification due to recent advances in the cloning and twining of mammals. To claim that an embryo is the only tissue that has potential for human life is not correct. With recent advances in cloning, one can replace the DNA of a new fertilized ovum of a species with the DNA of an adult of that species (even from highly specialized cells). The new organism will be genetically identical to the adult. Rather, the spoken distinctiveness of embryonic tissue rests in its potential for independent life under natural biological processes.

The discussion of the embryo’s moral distinctiveness can be legally, socially, biologically, and religiously based. The Tennessee Supreme Court (Davis v. Davis, (1992) 842 S.W. 688.) found that embryos are not legal persons (i.e. they do not have the legal right that

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4 Some embryos, however, are non-viable and therefore do not have the potential for independent life.

5 Twinning refers to the practise of inducing the cleavage of a blastomere form the rest of the developing zygotic cells prior to the 16-cell stage. The single blastomere develops simultaneously into a genetically identical organism.

The moral status that individuals award the human embryo results from different conceptions of when personhood begins. The status of personhood confers on an entity the moral rights, obligations and claims of a fully formed human. Some individuals believe that a pre-embryo is truly a person from the moment of fertilization; the claim, religious or secular, is that a developing human is ensouled at conception. Others hold that an embryo is a human life at some point after fertilization but before birth; this view is known as a vitalist, or developmental approach. Still others assert that a pre-embryo is not a human life. Hamilton (1973) writes, “I don’t know whether a blastocyst is a ‘thing,’ but I do know that it is not a person, not a human being.” Numerous developmental stages have been understood as junctions at which the unborn human being becomes a human person. They include fertilization, syngamy, appearance of the primitive streak, viability, and birth (Buckle et al. 1993; Kaplan & Tong 1994).

**Fertilization and Syngamy**

Fertilization and syngamy are two stages at which some individuals award the unborn human the status of personhood. The traditional belief that human life begins at fertilization is held by the Catholic Church and other natural-law theorists. The point at which the sperm comes into contact with the ovum is important because:
When the two membranes [i.e., of sperm and ovum] open to one another and the contents of sperm are released into the Ovum, the sperm loses its separate identity and the ovum gains a capacity it did not have while simply an ovum, that of developing as a human individual. ... The two cells (sperm and ovum) have become a single cell containing many interacting components which by their interaction have the capacity for organizing all the development. (St. Vincent Bioethics Centre 1987, p. 4)

Proponents of this view hold that the point at which the entity becomes a person is when the mixing of the sperm and ovum into a single cell occurs. The zygote or pre-embryo and fetus have the moral right not to be killed from the ‘instant’ of fertilization, or at conception. It is unclear whether this moral right includes the right to be saved from spontaneous death. Proponents of this view claim that one should not interfere with the natural process in a manner that damages or destroys an embryo or fetus.

Fertilization is a process that lasts 24 hours. It begins when the sperm penetrates the ovum’s zona pellucida, and ends with syngamy, when the male and female genetic material come together to form the new genotype, (Buckle et al. 1993). This last stage of the fertilization is the process though which the 23 chromosomes of an egg cell and the 23 chromosomes of a sperm cell combine so that the new cell has 46 chromosomes. Some individuals use syngamy as a biological marker of distinctiveness – the new entity has the full complement of genetic material that makes it a member of Homo sapiens. Individuals who hold this position believe that pre-embryos have the same moral rights as adult humans. The distinction between a mere human being and a full human person is not a distinction that counts (Kaplan & Tong 1994). Accordingly, these individuals would also need to award the same moral status to cloned embryos since they too have the full complement of the human
By virtue of the fact that the embryo is a member of *Homo sapiens* it is more than a mere human. It is a potential human person who possesses the capacity for sentience, self-consciousness, communication and rationality. It is this capacity that makes a human being worthy of respect and moral consideration.

**Viability**

The point of viability is also used to mark the unborn child’s passage to the status of personhood. Viability refers to the unborn child’s ability to survive as an independent entity outside of the womb, albeit with artificial support. Viability is placed roughly at the 24th week of gestation. Proponents of this view argue that since the fetus can survive *ex utero* without its mother, it warrants the same moral status as a fully developed human. Opponents of the viability argument assert that fetal development is smooth and continuous. There is a difference between an 8 day-old embryo and an 8 day-old newborn baby, but it is arbitrary to make a particular point such as viability the marker of personhood; the viable fetus has almost the same physical qualities as the week before it was ‘viable’. This argument against using viability is dubious. It is not arbitrary to select a particular point in a fetus’s development as the juncture for marking personhood. If after 24 weeks a fetus can support itself, whereas after 23 weeks it could not, then there is a qualitative difference between a 23 week-old fetus and one that 24 week-old fetus.

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6 Yet, many proponents of this view would argue that both twining and cloning are morally wrong; therefore, they would never have to make this claim regarding the moral status of cloned embryos.

7 Viability can also be viewed as a socially constructed determination with a contextual component. Early and late term abortions may elicit a different kind of line-drawing than if the question at hand has fetal research. Since the research on pre-embryos does not involve ‘viable’ unborn humans this theme is not picked up in this discussion.
Joseph Fletcher (1979) holds that embryos and fetuses do not deserve the moral considerations one affords to human persons. He rejects the view that “the mere fact of fertilization results directly in a truly human being or at least a nascent human being.” (Fletcher 1979, 82) This claim parallels Michael Tooley’s justification of infanticide under some conditions. Tooley (1972) argues that infanticide is as justified as abortion because only self-aware human beings are the human persons with the right to life. Ten-day-old infants, fetuses, and consequently embryos do not possess self-awareness, and therefore do not have a right to life.

Bonnie Steinbock (1992) asserts an independently plausible theory of moral status called ‘interest theory.’ Only entities with interests have moral worth. For example, plants, even though they are alive, do not have moral status because they do not care what is being done to them. “Without a welfare of their own, nothing can be done for their sake.” (Steinbock 1992, 6) She believes that policy makers can use ‘interest theory’ to develop a comprehensive and consistent legal and moral conception of the unborn.

Peter Singer (1985) states that:

If the potential of the embryo is so crucial, why do all sides agree that they would not object to disposing of the egg and the sperm before they have been combined? An egg and a drop of seminal fluid, viewed collectively, also have the potential to develop into a mature human being (p. 27).
The principle of 'the potential person' results in disallowing the destruction of a two, four, or eight-cell blastocyst. If so, *prima facie* it is also probably wrong to prevent the union of egg and sperm. This idea seems preposterous (Kass 1979). To this end, some proponents of the potentiality argument distinguish between non-sentient human materials that have no reasonable prospect of developing awareness and humans that are sentient (Grobstein 1978). Others distinguish between entities that are individuals from a biological standpoint, and those that lack developmental individualization. The former entities in both cases deserve respect, while the latter deserve the respect and moral consideration afforded to human persons.

Thus, some people argue that while embryos do not have the same moral status as infants and children they warrant serious moral considerations as a developing form of human life. This conclusion is based on the embryo's lack of developmental individualization, lack of possibility of sentience and high mortality rate (National Institutes of Health Human Embryo Research Panel [NIH HER], 1995). The point of developmental individualization has been identified as the point the primitive streak appears in the developing zygote. The brief overview of embryonic development that follows will illustrate, from a biological standpoint, why the appearance of the primitive streak and implantation into the uterus is a compelling marker for personhood.

**Embryonic Development**

*Overview*

In natural human reproduction following fertilization of an ovum by a sperm, the genetic material begins a developmental process leading from zygote to birth. About twenty-
four hours after fertilization syngamy occurs; this process lasts about two hours (Jones & Telfer 1995). The nuclear membranes that surround the genetic material in the sperm and the ovum begin to disappear and the chromosomes from the respective cells come together to give the zygote its full human genome (Royal Commission on New Reproductive Technologies [RCNRT] 1993). From this point forward the zygote possess the entire genetic coding of *Homo sapiens*. Of these zygotes, twenty-five percent will not implant into the endometrium of the uterus; fifty-percent of those that are able to implant result in no live birth (RCNRT 1993). Cleavage occurring at eighteen-hour intervals begins as the zygote undergoes several mitotic divisions. At this stage, the zygotic cells are called blastomeres. The blastomeres at the eight-cell stage are only loosely associated with each other. The individual blastomeres have the ability to develop into separate complete individuals if they are separated at this stage. This would suggest that blastomeres at this stage have the developmental potential of the zygote (Jones & Telfer 1995). As well, at the eight-cell stage, the zygote’s genes begin controlling development; until this point, development occurred solely as a result of the ovum’s genes (RCNRT 1993). The clump of blastomeres remains the same size until implantation; the products of each subsequent cleavage are half the size of the mother cell (Jones & Telfer 1995). As this zygote begins its three day journey through the oviduct to the uterus, it divides several more times to produce a solid ball of sixteen cells called the morula (Jones & Telfer 1995). In the uterine cavity the morula, which is now floating in the fluid of the uterus, continues to develop. Yet, once the thirty-two-cell stage is reached, it begins to possess the characteristics of a multi-cellular entity (Campbell 1990). It is here at around the fourth post-fertilization day that the morula is transformed via cellular rearrangement to the blastocyst, a hollow ball with a fluid-filled space (Jones & Telfer 1995).
At approximately seven days following conception, the 60-100 cell blastocyst consists of three layers: the outer layer, the trophoblast (made of trophectodermal cells) will become the embryonic membranes; the inner cell mass will become the embryo; and the cavity called the blastocoele. At around the seventh post-fertilization day the trophoblast makes contact with the uterine wall and, by an enzymatic process, encapsulates itself into the women’s uterus (Jones & Telfer 1995). By the end of this second week of development implantation is complete; pregnancy has begun.

*Placenta, Pre-embryo and the Primitive Streak*

With this general knowledge of pre-implantation embryonic development one can now examine the transformation from pre-embryo to embryo in greater detail. The first distinction to be made is at the blastocyst stage. By the mid-blastocyst stage, the trophectodermal cells are irreversibly differentiated — that is, they no longer have the potential to form any type of cell (non-totipotential cells); they are destined to become the tissue that gives rise to uteroplacental circulation. In contrast, the cells composing the inner mass of the blastocyst are still totipotential. Of these cells, some will form the fetus and the balance of the cells will form parts of the extraembryonic placenta (those parts of the placenta formed from the pre-embryo). What is interesting here is the discrepancy between the number of cells that comprise the trophoblast and the inner cell mass. According to a study by A.T. Hertig et al. (1954), only five of a sixty-celled blastocyst belonged to the inner mass. In another blastocyst, only eight of 107 cells comprised the inner mass (Jones & Telfer 1995). Approximately ninety-nine percent of the zygote does not form the embryo proper (RCNRT 1993).
The second point of detail to be examined is the split of the inner cell mass of the blastocyst at the beginning of the second post-fertilization week. At this juncture, the inner mass becomes the *embryonic disc*, which is comprised of the epiblast and the hypoblast. The epiblast gives rise to the *embryonic ectoderm, mesoderm and endoderm*. The hypoblast becomes the *extraembryonic endoderm*; most of these cells are destined to an extraembryonic fate by the fourteen to fifteen days after fertilization (Jones & Telfer 1995). At the end of the second post-fertilization week, the zygote consists of two fluid-filled masses separated by the embryonic disc; one fluid-filled cavity being the yolk sac and the other being the amniotic cavity (Campbell 1990). This entity has a mass ten times greater than the single fertilized ova (RCNRT 1990). A localized increase occurs at what would be the head of the hypoblast, the *prochordal plate*; this gives the embryo an orientation (Jones & Telfer 1995). At fifteen to sixteen days, the epiblast consists of a few thousand cells that migrate to the midline of the zygote to form the primitive streak, which is a linear band in the embryonic disc (Jones & Telfer 1995). The significance of this formation is that from this point of development forward the embryonic disc is committed to form only one individual. No twinning is possible unless two primitive streaks are formed (Jones & Telfer 1995). The streak elongates by the addition of cells at one end; at the head end, the streak thickens to form the *primitive node*. At this point the pre-embryo is no longer called such, rather it is now the embryo proper (Jones & Telfer 1995).

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8 Some individuals place the transition of terminology from pre-embryo to embryo at 6-7 days (US Congress, 1988), 10 days (J. Glover, 1989), and 21 days (Williams and Wendell-Smith, 1969). However, the majority places the shift in status at the 14-16 day mark (Ethics Committee of the American Fertility Society). This is the generally accepted juncture at which the transition from the pre-embryonic to the embryonic stage occurs (Jones and Telfer, 1995).
pre-embryo have been outlined, these and other influences on human embryo research policy will be addressed.

**FACTORS IN HUMAN EMBRYO RESEARCH POLICY**

The potential benefits arising from non-therapeutic embryo research

Proponents of human embryo research suggest that research on human embryos\(^9\) is needed to improve the reproductive health of women. If embryo research helps scientists to better understand the natural process of pregnancy, applications of embryo research might help to reduce the rate of spontaneous abortions. By examining the embryo and the extra embryonic tissue from an early spontaneous abortion, researchers might be able to diagnose the cause of the abortion and better understand the process of implantation. This knowledge could be used to prevent further spontaneous abortions in this woman and in other women (McLaren 1993). Before one notes other possible benefits of embryo research for ‘infertility research’ one must comment on the important role research on embryo could have on prevention and treatment of genetic and congenital defects.

Research on embryos has implications for the scientific and medical communities’ understanding of genetic diseases. For example, comparative research on pre-embryos could be carried out to understand the differences in gene expression in pre-embryos carrying the Duchenne muscular dystrophy\(^{10}\) gene signature and those that do not. More promising,

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\(^9\) Unless otherwise noted, references to ‘human embryo research’ refers only to research on pre-embryos, and does not include research on embryos after the appearance of the primitive streak.

\(^{10}\) DMD is a hereditary disease that causes gradual wasting of muscles. It is occurs only in males, often inherited from a mother who is a carrier of the DMD gene. The sons of women who carry the gene have a 50 percent chance of being affected with DMD. This disorder affects about 1 in 3,200 boys. Symptoms begin in early childhood (ages 2-6). Children are slow to learn to sit up and walk. Progressive weakening of the muscles results in frequent falls and difficulty climbing stairs.
Perhaps, are the implications of embryo research for congenital spinal tube defects. Neural tube defects occur in one out of every 1000 births. These defects can be detected prenatally via an alpha-fetoprotein test at the sixteen week of gestation (Carola et al. 1990). Neural defects are indicated when abnormally high levels of this protein are present in maternal blood. Basic research on embryos could clarify early embryonic physiological and anatomical development, especially abnormal development, and could project the success of using embryonic neural tissue later to correct neural defects occurring later in development (McLaren 1993). By conducting research on developing pre-embryos ex utero scientists could trace the nature of the genetic defect. Research on human embryos could give scientists a clearer understanding of the etiology of these congenital defects.

As mentioned, one of the objectives of human embryo research is to improve the reproductive health of women. Traditional western society highly values reproduction and reinforces the importance of the family unit. In that regard, reproductive health has biological, emotional and social implications for the women undergoing IVF treatment. Reproductive health has been asserted as a social right of both women and men. The World Health Organization [WHO] (1986) defines health as a “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” While a moral right to health may not exist, several authors have argued for a right to health care (Daniels, 1988) Within recent years, two international conferences have defined reproductive health.

By early-adolescence, affected boys lose their ability to walk. Treatments include physical therapy, braces, and corrective surgery. There is no cure for this disorder. Children with DMD are vulnerable to chest infections and heart disorders.
The Programme of Action of the United Nations International Conference on Population & Development [UN ICPD] in Cairo stated that:

7.2. Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.

Proponents of human embryo research argue that their research focuses improving the “right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.” (idem) They also claim that human embryo research is necessary to improve those “methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems” (idem) which are encompassed by this definition of reproductive health.

The Report of the Fourth World Conference on Women from the United Nations Fourth World Conference of Women in Beijing, China expanded on this notion of reproductive health. While it agreed with the definition of UNICPD, the Report asserted:
95. Bearing in mind the above definition, reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. ... The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning. As part of their commitment, full attention should be given to the promotion of mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality. ...

When researchers state the need to carry out embryo research, they point towards the assertion that “the promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning.” (idem) Through the advancement of scientific knowledge scientists will be able to provide more effective therapeutic interventions for women and men experiencing infertility. (Animal models are limited in this regard.)

Proposed embryo research may improve on the second part of in vitro fertilization treatment, embryo transfer. Clinicians can fertilize a human ovum at a success rate of 87% (RCNRT 1993). Unfortunately, the probability of the fertilized egg implanting itself in the woman’s womb is only 20% (RCNRT 1993). This low success rate negatively impacts on women’s health in two ways. Some women are placed on pharmacological agents that hyper-stimulate their ovaries to release more than one ovum at a time. The long-term affect of these drugs has not been examined. Furthermore, clinicians must transfer multiple fertilized eggs into the woman undergoing treatment. Increasing the amount of eggs transferred
increases the chance of a successful pregnancy. Yet, this sometimes results in multiple pregnancies and babies with low birth weights.

One must note that economic factors drive the ‘baby business’ as well (Krimsky & Hubbard 1995). Most clinics providing IVF treatment are private. Therefore, individuals must pay for treatment costs out-of-pocket. IVF treatment can cost several thousand dollars a cycle, excluding drug costs. Given its low success rate, multiple cycles are often necessary before pregnancy results. Higher success rates would increase the marketability of these private clinics. Thus, financial considerations also drive the ‘need’ for research on improved embryo transfer procedures.

**Why is state intervention necessary?**

Since publicly funded human and animal research is, generally speaking, self-regulated in both countries, why should the case be any different with research on human embryos? All proposed public scientific research protocols undergo scientific and ethical peer review. The fact that scientific peer review has occurred for over 100 years questions the need for state intervention. One point of contention is that, unlike adult humans, embryos cannot give their consent to be researched upon. Yet, accepting the proxy-consent of the gamete donors easily dispels this concern.11 What is qualitatively different about human embryo research that its practice should require regulation by the state?

The Canadian Discussion Group on Embryo Research [hereinafter, the Discussion Group] (1995) asserted that human embryo research is “inextricably linked to the physical

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11 Whether the consent of both gamete donors (i.e. the female, ovum donor and the male, sperm donor) is required has been discussed in other studies.
and emotional health of involved women, men and children.” In their 1995 report to Health Canada, the Discussion Group claimed that human embryo research poses several risks for these individuals, including pharmacological ovarian stimulation and invasive medical procedures to retrieve ova (laparoscopy, the surgical removal from the ovary and TUDOR, transvaginal ultrasound-directed oocyte retrieval). Moreover, women are often left out of the discussion about what research should occur. The procedure\textsuperscript{12} that this research wants to perfect is invasive to women. Couples with infertility may be better served if research focused on emphasizing fertility protection. Lastly, opponents of human embryo research claim that supporting research funding based on the social value of reproduction reinforces pronatalism.

Women of reproductive age, by virtue of their relatively lower socio-economic status, are distinctively susceptible to the consequences of these technologies. Moreover, it is on women that new reproductive technologies are chiefly performed. Women were specifically identified as being the unknowing subjects of research aimed at perfecting new reproductive and genetic techniques. Even if they are asked to participate in the research trial, such an ‘informed consent’ process takes place in a context with intrinsic power imbalances, resulting in a coercive relationship (Discussion Group 1995).

Lastly, research to improve IVF technology involves the tampering with, and destruction of, human embryos. Some individuals consider this tantamount to murder (Canadian Conference of Catholic Bishops 1996). Others believe that human embryos deserve to be treated with the same, or similar, respect afforded to fully formed persons. In

\textsuperscript{12}IVF is not a therapeutic treatment; it does not cure a couple's infertility. It allows them to have
short, some individuals believe that human embryo research needs to be regulated because it compromises “human dignity, the respect for life and the protection of the vulnerable.”

(Canada. Minister of Supply and Services Canada 1996) When the National Institutes of Health Human Embryo Research Panel [NIH HERP] made its recommendations for public funding of human pre-embryo research public, bioethicist Daniel Callahan (1995) wrote:

I believe that the panel failed to come even close to making a persuasive case for pre-implantation embryo research. It failed to tell us why there is a duty to carry out research that requires such techniques, and it failed to persuasively explain how such research is compatible with its expressed respect for the moral status of the fetus. It is one thing to be willing to swallow one’s worry about the moral status of the fetus in order to allow women to have abortions (as I still would), but still another to do so to justify embryo research. I suspect that the only way successfully to make the case for embryo research is not, as this panel tried to do, by showing that research needs to take precedence over the respect that it says is due to the embryo (p. 40)

Callahan in not the only bioethicist to be concerned with both the validity of the philosophical arguments for, and moral validity of, human embryo research in the United States. In the first volume of the *Kennedy Institute of Ethics Journal* John Robertson and Richard McCormick argue over the values of embryos and embryo research. A distilled version of this debate and their different positions on the values of embryos and embryo research follows below.

**MCCORMICK-ROBERTSON DEBATE ON HUMAN EMBRYO RESEARCH**

John Robertson (1991) asserts that embryos only have symbolic worth. That token value does not trump ‘reproductive liberty’. Therefore, pre-embryos can be the subjects of children regardless of their lack of fertility.
experimentation for valid scientific and medical reasons. This experimentation includes both therapeutic and non-therapeutic studies. Before outlining Robertson’s argument, his concept of reproductive liberty must be elucidated.

Reproductive Liberty

The theory of ‘reproductive liberty’ has played a central role in the judiciary’s understanding of the unborn human’s rights against the woman carrying it. In *Children of Choice: Freedom and the New Reproductive Technologies* Robertson proposes to look at the ethical problems surrounding the new reproductive technologies [NRTs] through a ‘lens of liberty.’ (Robertson 1994) In order to begin his investigation, he lists six possible ethical problems with each NRT:

- interference with nature; the minimization or even dispelling of the mystery behind conception
- respect for prenatal life; these technologies take a haughty attitude toward human life
- welfare of offspring; physical or psychological injury as a result of being born in this manner
- impact on family; degradation of nuclear family, secrecy and non-disclosure issues
- effect on women, while liberating, these NRTs may act as agents of oppression - ‘women as wombs’ concept
- costs, access and consumer protection; high cost results in widening of the health gap (in America, the rich get cake and the poor may get some crumbs)

Robertson argues that the principle of procreative liberty can resolve the challenges to the use and regulation of new reproductive and genetic technologies [NRGTs]. He defines procreative liberty as “the freedom to decide whether or not to have offspring and to control the use of one’s reproductive capacity.” (Robertson 1994, 16)
Balancing reproductive choice with other competing claims can set the scope of this liberty. Procreative liberty is to be given presumptive priority because it is encountered in our social, ethical and legal traditions and because it is of central importance to individual significance, dignity, and individuality (Robertson 1994). One can deduce which effects on family, the embryo, and women override this freedom by utilizing this balancing method. He states that the reproductive rights claimed under procreative liberty are not monolithic. Procreative choice will not always prevail, but some claims are too symbolic or speculative to justify interference with this liberty. For example, Robertson argues that deontological claims to protect embryos are insufficient to justify state intervention in in vitro fertilization.

Procreative liberty is to be distinguished from ancillary aspects of pregnancy such as choosing the mode and location of childbirth. It is subject to two qualifications; the liberty is a negative right — that is, while a person violates no moral duty in making a reproductive choice and an individual has a moral duty not to interfere with that choice, other individuals have no duty to provide the means to exercise that choice (Robertson 1994). Constitutionally speaking, the state has no right to interfere with the choice of procreating or refraining from procreating; yet, it has no duty to provide the resources to assist one in having or not having children.

Robertson speaks of two types of procreative liberty: the freedom to avoid pregnancy and the freedom to reproduce. The former includes the freedoms to refrain from sexual intercourse, use contraceptives, withhold gametes for non-coital conception, and to procure an abortion, while the latter includes the freedoms to marry, engage in sexual
intercourse, conceive a child, carry a fetus to term and give birth. Both these freedoms are grounded in an ethic of autonomy and an ethic of community.

From American jurisprudence Robertson cites Griswold v. Connecticut, where the United States Supreme Court recognized the right to use contraceptives, and Roe v. Wade and Planned Parenthood v. Casey, both in which the Court asserted a woman's right to have an abortion up to the point of fetal viability. He also relies on Justice Brennan's dicta in Eisenstadt v. Baird. "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Robertson 1994, 37) According to Robertson, it is clear that American courts have embraced a notion of procreative liberty.

With specific regard to embryo research Robertson argues that the confusion over the embryo research debate has overshadowed the consensus to perform certain forms of this research. He asserts that the central point of contention involves the moral status of the embryo and the obligations to offspring (Robertson 1990). The widely held contention is that embryos are to be treated with special respect but not the same respect afforded to human persons (e.g. NIH HERP; Warnock Report). Robertson claims that the adoption of this approach leads to a favourable view of embryo research. The arguments put forth by the opposition to such research occupy the minority position; every authoritative body that has contemplated the issue has rejected a total ban on embryo research. The potentiality of the embryo gives it only symbolic moral significance that is insufficient to justify a ban on the research (Robertson 1990).
McCormick (1991) holds that even if the pre-embryo is not yet a person, there might be reasons for holding that it ought to be treated as a person "at least most of the time." He states that his conclusion need not be a green light for treating the pre-embryo as disposable human tissue. First, interference with one's potential future\textsuperscript{13} as a member of God's family is weighty concern for the religiously minded. Second, he invokes the slippery slope argument. He raises his uncertainty as to how well enthusiasm for human pre-embryo research can be controlled. It may extend into embryo research by trivializing our reasons for permitting pre-embryo research; medical technology "has a way of establishing irreversible dynamics." (McCormick 1991b, p. 5) In light of his discussion he argues for a two-pronged public policy. Scientists and public policy makers have a strong prima facie obligation to treat the human pre-embryo as if it was a person. Yet practically speaking, any exceptions to this obligation should be based on national criteria.

Robertson claims that McCormick's logic is flawed. According to him, McCormick's argument would permit research with direct therapeutic benefit to the embryo. He may possibly permit some non-therapeutic research which have minimal risk associated with them. If one views research leading to the discard or manipulation of pre-embryos as harmful, a lot of research may be prohibited which otherwise would be permitted under the generally accepted guidelines (e.g. Warnock Report). Robertson argues that McCormick needs to show why these symbolic costs are so great since his reasons for a prima facie obligation could be met by a less restrictive standard. Legitimate medical and scientific

\textsuperscript{13} Again, recent advances in cloning cloud the issue here. With cloning, every cell in the body has the capacity to become a full human being. Yet, McCormick's argument must be understood to refer to the natural potential of embryonic tissue as opposed to the potential of other tissues to become distinct human life under artificial means.
experimentation cannot harm the pre-embryo since it does not have interests that can be infringed on. If these studies are done for a valid purpose they do not diminish the inherent value of the human being. In Robertson's words, embryo research has 'few symbolic costs.' (Robertson 1991) Moreover, Robertson also dismisses his call for national standards. He argues that since there is no national consensus on the basic values that guide our answers to the questions associated with embryo research (which, he asserts are the same as those that drive abortion politics), national standards are not politically feasible in the United States (Robertson 1991). Robertson (1991) believes that what McCormick 'gave with one hand' he 'took with the other.'

It has been established that infertility is not solely a biological issue, but it is also a social problem; as such, human reproduction has become an issue of public policy (Canadian Medical Association, Canada. Speaker of the House of Commons 1996; Cohen 1978; National Action Committee on the Status of Women 1991). Now that the impact of both the different moral states and biological development of the embryo on embryo research policy have been explained, one can begin investigating the different policies of intervention Canada and the United States have adopted vis-à-vis human embryo research.
HISTORY OF STATE INVENTION IN HUMAN EMBRYO RESEARCH

AMERICAN HISTORICAL BACKGROUND

American legislators have taken an ambivalent attitude to human embryo research. In the United States intervention in human embryo research dates back to 1978. IVF treatment experiments began in earnest in 1974, with success in 1978. Following the success of the first ‘test-tube baby’ in the United States, the National Commission for the Protection of Research Subjects of Biomedical and Behavioral [sic] Research recommended the creation of an Ethics Advisory Board (EAB). The EAB began its activities in 1978. During its meetings, members concluded that IVF and embryo transfer were ethically acceptable. They stated that, given certain guidelines, research into these procedures should be federally funded. To be eligible for funding, the research protocols needed to be approved by the EAB. Moreover, they concluded that "human in vitro fertilization research without embryo transfer" is ethically acceptable.

After the election of President Ronald Reagan, the EAB was not called into session. Without approval from the EAB, no embryo research protocols could be sent to the National Institutes of Health [NIH] for funding review. Some may view this as a de facto prohibition on human embryo research at public research institutions. The situation, which has remained the status quo for thirteen years, has led to a vacuum in which the private sector, being given the ethical green light by the EAB, has gone forward with research.
In 1993, Congress chose to bypass the need for the EAB. No one noticed that, with the passage of the National Institutes of Health Revitalization Act (Public Law No. 103-43), the federal government was back into the human embryo research game (Coleman 1996). The NIH Revitalization Act permitted the NIH to fund research protocols without the approval of the EAB. However, in February 1994, Dr. Harold Varmus, the director of the NIH, with approval from President Clinton, decided to delay the review of human embryo research protocols until the pertinent moral and ethical issues were examined (National Institutes of Health 1995; Kleiner 1994). To this end, the director struck the Human Embryo Research Panel [HERP], consisting of 19 people. The panel did not question whether human embryo research should be funded. Rather, HERP was mandated to comment on what type of research should be federally funded. The deliberations began shortly after its inception in February 1994.

The National Institutes of Health HERP had advised President Clinton and Congress on research practices that are acceptable for federal funding, those that warrant additional review and those that are unacceptable for funding. The panel members decided that while embryos do not have the same moral status as infants and children they warrant serious moral considerations as a developing form of human life. They based this conclusion on the embryo’s lack of developmental individualization, lack of possibility of sentience and high mortality rate (National Institutes of Health 1994). Following from this conclusion, they asserted that the following type of research acceptable for federal funding: research on pre-embryos left over from IVF; pre-implantation diagnosis up until the appearance of the primitive streak at fourteen days; and research on pre-embryos created in vitro given a
compelling reason for scientific and therapeutic value. Research on embryos up until the beginning of neural tube closure at day twenty-one was deemed as needing additional review. Those practices and research found to be unacceptable for federal funding included cloning by blastomere separation and research beyond the onset of neural tube closure (Paren 1995). On December 1, 1994, the same day that the HERP recommendations, which included the recommendation to proceed with embryological research, President Clinton prohibited the use of federal funds for research involving the creation of human embryos (Superintendent of Documents 1994; Kleiner 1994).

In the midst of the budget crisis of January 1996 (during which the Republicans shut down portions of the US government) President Clinton signed a bill that completely banned government funding of human embryo research as of the end of fiscal year 1996 (Act of Jan. 26, 1996, Public Law No. 104-99, 110 Stat. 26 s. 128; Wadman 1996). This move was a concession aimed at preventing further government shutdowns by a Republican Congress. The ban on federal funding was further tightened when the Senate passed an appropriation bill on March 19, 1996 that included restrictions on funding embryo research. On September 12, 1996, the Senate Appropriations Committee approved the FY97 Labor, Health, and Health Services Appropriations Bill that also included a provision passed by the House of Representative that excluded research on human embryos. While most US states permit research on pre-embryos, the federal government, the largest contributor to coffers of American scientific research, restricted its funding to this area. It must be noted, however, that in most states private individuals or groups are permitted to carry out human embryo research in the United States of America without the need for ethical and scientific review.
(Zapler 1995). The United States government’s attitude towards human embryo research is best described as ambivalent.

**CANADIAN HISTORICAL BACKGROUND**

The Government of Canada proposed to criminalize thirteen reproductive procedures and areas of research, including a prohibition of research on human embryos after the fourteenth post-conception day. Legislation was to be introduced later in 1997 that would have mandated a national organization, ‘possibly’ in the form of an agency separate from Health Canada, to govern NRGT procedures and research. By the end of this policy process, Canada would have had a comprehensive federal Act with both prohibitions and regulatory controls for reproductive and genetic technologies, including embryo research.

In Canada, much of the controversy over human reproductive health has focused on how the government should regulate IVF, embryo research and pre-natal genetic diagnosis. The Conservative Federal Government headed by Prime Minister Brian Mulroney established, by Order in Council No. P.C. 1989-2150, a Royal Commission on New Reproductive Technologies chaired by Dr. Patricia Baird. The government established the Baird Commission in response to pressure from the Canadian and Ontario Medical Associations and a group of governmental and non-governmental agencies and organizations, which formed the Canadian Coalition for a Royal Commission on New Reproductive Technologies. The Commission was to:
Inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest, recommending what policies and safeguards should be applied (Canada. RCNRT 1996, p. 3).

After some 40,000 submissions, cross-country public hearings and research studies, the Commission finally reported to the Liberal government in the fall of 1993. As a result of weighing this information, the Royal Commission on New Reproductive Technologies concluded that:

First, there is an urgent need for well-defined boundaries around the use of new reproductive technologies, so that unethical use of knowledge is not permitted. Second, within these boundaries, accountable regulation is needed to protect the interests of those involved, as well as those of society as a whole. Third, given the ongoing and, indeed, increasing pace of knowledge and development, a flexible and continuing response to evolving technologies that involves wide input from Canadians is an essential component of their response delivery. (Canada. RCNRT 1996, p. 19)

The lead agency involved with the regulation of IVF was Health Canada. More specifically, it was the Policy and Consultation Branch of the Health Policy Division. Madame Monette Haché was responsible for all correspondence with outside groups in this matter (personal communication, October 29, 1996). The legislative assistant to the Hon. David Dingwall, the then federal Minister of Health, was overseeing the progress of Bill C-47 through the House of Commons (November 22, 1996).

Health Canada and the Ministry of Health took over the matter of regulating embryo research and the NRGTs from the Justice Department, which had originally announced the will of the government to legislate in this area. Under its 'Peace, Order and Good Government [POGG] Power', the federal government has taken the initiative to regulate IVF. In doing so, the bureaucrats in Health Canada wished to begin a stable policy process
by attempting to form a crosscutting consensus among involved groups. In the process of conducting a vast review of the recommendations of the Baird Commission they consulted fifty groups, representing women, the medical profession, researchers, infertile couples, bioethicists, religion, consumers, children and ethno-cultural groups (Canada. Minister of Supply and Services Canada 1996a). On consultation with other departments of government and these aforementioned groups of organizations, the Ministry of Health and Health Canada has gone forward with its three-phase approach to regulating NRTs.

Health Canada believes that it has acted on behalf of Canadians to protect the health and safety of all Canadians. The rationale of the legislative framework is that the federal government has the responsibility to both ensure appropriate treatment of human reproductive measures and protect the dignity and security of Canadians. It has appealed to Canadians by acting on principles of protecting the vulnerable, accountability and ensuring the appropriate use of medical treatment (Canada. Minister of Supply and Services Canada 1996a). Moreover, it has announced that it is proper for the government in this situation to balance the rights of the individual and society. It is interesting to note that while the duty of protecting the vulnerable and human dignity usually falls under the purview of the Attorney General and the Justice Department, the Ministry of Health appealed to these principles in their proposed legislation. Health Canada seemed to claim that ‘health’ can be procured through a morality-centred prohibition.

Following the final report of the Royal Commission on New Reproductive Technologies in 1993, Health Canada and the federal Justice Department reviewed the commission’s 293 recommendations. These recommendations covered all aspects of
reproductive technologies and reproductive health and were based on 40,000 submissions.

In May 1994, the Minister of Justice announced that a bill regulating NRTs would be introduced in the fall of that year. The proposed bill was never tabled in Parliament. Instead, the former Minister of Health imposed a voluntary interim moratorium in July 1995. This moratorium, Canada’s first step to regulation of NRGTs, asked the providers of these services to refrain from nine practices. Those relevant to this study are:

- the sale, purchase or trade of human sperm, ova and embryos
- free IVF for women unable to afford this service in exchange for ova
- cytogenesis experimentation (keeping an embryo alive in an artificial womb)
- the use of ova from fetuses or cadavers to produce embryos or for research purposes (Canada. Minister of Supply and Services Canada 1996)

In April 1995, Health Canada assembled a multidisciplinary Discussion Group on Embryo Research that examined the human embryo research in detail. The Discussion Group reported in November 1995. To monitor the moratorium, an Advisory Committee on the Interim Moratorium on New Reproductive and Genetic Technologies was established in January 1996.

After the perceived failure of the interim moratorium, the Government of Canada introduced legislation in Parliament in June 1996 that would have criminalized thirteen procedures and services. The Government had also introduced a discussion document entitled New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health (herein called the Discussion Document) which outlined the government’s plans to regulate NRGTs, including human embryo research (Canada. Minister of Supply and Services Canada 1996).
Bill C-47

The Human Reproductive and Genetic Technologies Act, Bill C-47, was the second part of the three pronged strategy for regulating NRGTs. Thirteen services and procedures were to be prohibited by law. The Bill prohibited research on human embryos after fourteen days from conception. (Canada. Minister of Supply and Services Canada 1996). An individual who performs this or other acts and procedures is liable, on summary conviction, to a maximum fine of $250,000 and/or four years of prison; and, on indictment, to a maximum fine of $500,000 and/or ten years in prison. The relevant portions of Bill C-47 read:

4. (1) No person shall knowingly

(f) retrieve an ovum or sperm from a foetus or cadaver with the intention

(i) that the ovum mature outside the human body, be fertilized or be implanted in a woman, or
(ii) that the sperm be used to fertilize an ovum;

(g) cause an ovum or sperm retrieved from a foetus or cadaver to mature outside of the human body, or

(i) cause the fertilization of such an ovum, or fertilization of an ovum by such a sperm, or
(ii) implant in a woman such an ovum, or ovum fertilized by such a sperm;

(j) maintain an embryo outside of the human body; or

(k) cause the fertilization of an ovum outside of the human body for purposes of research

No person shall offer to carry out any procedure prohibited by subsection (1).

No person shall offer consideration to any person for carrying out any procedure prohibited by subsection (1).

6. (1) No person shall sell, purchase, barter or exchange, or offer to sell, purchase, barter or exchange, any ovum, sperm, zygote, embryo or foetus.
Subsection (1) does not apply in respect of the reimbursement of expenses incurred in the collection, storage or distribution of ova or sperm, except any such expenses incurred by their donor. (Canada. Speaker of the House of Commons 1996, p. 2-4)

The rationale for these prohibitions was that the “Parliament of Canada has grave concerns about the significant threat to human dignity, the risks to human health and safety ... posed by certain reproductive and genetic technologies.” (Canada. Speaker of the House of Commons 1996, session 1, 17946) Bill C-47 was being considered at the subcommittee level since the spring of 1997; however, with the call of the election on May 2, 1997 the Parliament of Canada dissolved. Even though the Liberals were re-elected to the Canadian Parliament to form a slim majority government, whether they plan to re-introduce the Bill into Parliament is unknown.

*Regulatory Structure*

The last stage of human embryo research and other NRGT regulation, legislative measures that would actually allow for the creation of a national regulatory agency, would have been amendments to the enacted *Human Reproductive and Genetic Technologies Act*. This legislative framework would have established an organization, ‘possibly’ in the form of an agency separate from Health Canada (Canada. Minister of Supply and Services Canada 1996). It would have had the power to govern NRGT’s procedures and research and it would have overseen the storage and donation of human eggs, sperm and embryos, approve licenses for clinic and research facilities, inspect these facilities, and ensure compliance with the regulated and prohibited practices and services. The final function of such an organization would be health surveillance. The agency would have both collected and analyzed information about the effect of fertility drugs on women and children born from
assisted-reproductive technologies, and would have created a donor/offspring registry. The Discussion Document claims that any province would be permitted to develop its own equivalent regulatory regime. If this process is restarted, its end result would be a comprehensive act with both prohibitions and regulatory controls for reproductive and genetic technologies, including human embryo research.

Of course, Canada and the United States are not alone in having to make social policy decisions around human embryo research and other assisted reproductive technologies. The Council of Europe, of which Canada is a member, declared in its “Convention for The Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Right and Biomedicine” that:

Convinced of the need to respect the human being both as an individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being ... Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine; Have agreed as follows: (p. 3-4)

Article 18. (Research on embryos in vitro)
Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo.

The creation of human embryos for research purposes is prohibited. (p. 9)

The United Kingdom, on advice of the Warnock Commission, has established a national regulatory authority to oversee both research and clinical practice (Warnock 1985). France has prohibited certain practices and has regulated IVF and embryo research through its extensive bioethics legislation. Lastly, Australia has allowed its territories and states to establish NRT-specific regulatory and licensing agencies (Ruberto & Del Valle 1996).
This research project is driven in part by a pressing normative question: What should be the level of state intervention in embryo research in Canada? If the government re-introduces Bill C-47, the Government of Canada may also introduce its second phase of regulation, the establishment of a national regulatory body. What sort of regulation is appropriate in the Canadian context? More importantly, what values define this context? Adopting an institutionalist approach married with Dworkin’s philosophy of judicial review will be helpful in examining why Canada and the United States have adopted different policies of intervention vis-à-vis human embryo research.
THEORETICAL FOUNDATION AND METHODS

THEORETICAL FOUNDATION FOR THIS STUDY

Institutionalism

Neo-institutionalist theory bears directly on the puzzling question identified in the introduction of this study and reiterated at the end of the last chapter. Historical institutionalism coupled with Ronald Dworkin’s theory of constitutional adjudication will provide sufficient leverage for supporting this exploratory investigation.

‘Old’ rational-choice institutionalists defined institutions as the rules and procedures that govern the relationships between individuals in various components of the policy process. They proposed using legal-historical analysis to describe how political institutions influence political action (Laski 1938). Research rooted in this institutionalist theory consisted mainly of normative comparative studies, which contrasted the effects of different institutional configurations (Thelen and Steinmo 1992). Such theory fell into disrepute in the 1950s because it did not explain the actual behaviour leading to distinct policy outcomes.

Historical Institutionalism

Neo-institutionalists attempt to answer the question of why these institutions exist at all. They see organizations as the products of human design and the outcomes of goal-directed action by means-oriented individuals. Institutions legitimize political actors, provide them with consistent behaviour rules, conceptions of reality, and give them the
capacity to carry out policy. Keohane (1989) explains institutions as “persistent and connected sets of rules (formal or informal) that prescribe behaviour, constrain activity and shape expectations.” (p. 163) Accordingly, not only do institutions lower transaction costs (Coase 1960) but they also help to formulate preferences and constrain the extent to which they can be actualized. Moreover, no presumption is made that any set of international or domestic institutional factors is more important than another in predicting action. An empirical researcher must explore her puzzle using an institutionalist approach to find out what particular factors most influenced a particular policy. (Thelen & Steinmo 1992)

Krasner (1988) provides a useful definition of institutionalism in his ‘punctuated equilibrium’ approach to institutional change:

An institutionalist perspective regards enduring institutional structures as the building blocks of social and political life. The preferences, capabilities, and basic self-identities of individuals are conditioned by these institutional structures. Historical developments are path-dependent; once certain choices are made, they constrain future possibilities. The range of options available to policymakers at any given time is a function of institutional capabilities that were put in place at some earlier period, possibly in response to very different environmental pressures. (p. 67)

Krasner (1988) argues that institutions do not cause political action. Rather they shape choices, frame questions, and constrain the possible solution set to these questions. It is during crises, which periodically ‘punctuate’ and disrupt institutional stasis, that major institutional change occurs. Unfortunately, because Krasner’s view explains so much, it explains little. Policy is the dependent variable to be explained with reference to the independent variables of social, political, and economic institutions. Yet, at some crisis point, the independent variable, institutions, becomes a dependent variable. The theoretical model becomes endogenous (Thelen and Steinmo 1992).
Attempting to salvage Krasner’s view of institutions and institutional change would be prudent since its only major fallacy lies in it explaining too much. Thelen’s model of ‘dynamic constraints’ may prove to be useful in this regard; it is a more parsimonious theory of institutional change (Thelen and Steinmo 1992). Thelen (1992) argues that institutions do not adapt solely during moments of crisis and institutional breakdown. Rather, political actors can manoeuvre within the constraints of the institutions in which they interact. Moreover, the actors take advantage of crisis within the institution; they do not act as bystanders and allow the power dynamics to change by themselves. Thelen’s elaboration of a ‘punctuated equilibrium’ theoretical model will provide substantial analytical leverage to explain the difference in American and Canadian human embryo research policy.

Using historical institutionalist theory, one could argue that the differences in embryo research policy could be explained by examining the different institutions that exist in the United States and Canada. Distinct institutional factors may have constrained what policy choices were available to legislators in the two countries. Within this theoretical framework, the research question can be revised to read: What institutional factors could explain why these two governments have embarked on very different policies concerning embryo research? Further explication of the place of values and ideas in institutionalist theory will be required before one’s specifies what institutional factors need to be examined. Peter Hall’s (1986) construction of the relationship between ideas and institutions is quite useful in this regard.
Peter Hall argues (1986) that the ideas and perceptions of political actors form a component of their rational action. Ideas, in general, are inherently powerful, but their social power is augmented when they are embraced by institutions. One must ask, however, how these ideas are formed. Ideas are formed by institutions. Replacing one interest with another reallocates power. Political projects are interactions between ideas and interests, in which interests are formed by ideas. Ideas can make political actors see problems in new ways. In this manner ideas constitute interests (Thelen and Steinmo 1992). As not to risk reifying social structures but instead to expose them as social constructs, Jepperson (1991) defines institutions as “socially constructed, routine procedures, program or rule systems.” (p. 149)

Thus, institutionalism is, in part, the study of norm-based behaviour.

The effect of highly institutionalized organizations or rules is often taken for granted. The law is such an institution. An analysis of the values in place in American and Canadian legal institutions will prove fruitful to explaining the research puzzle addressed by this study. Before analyzing my research question in light of this literature, one must show how interests and ideas play out in the law.

The legal institution

This study will focus its investigation on the judicial interpretations of the rights guaranteed to individuals by the Constitution of Canada\(^{14}\) and the Constitution of the United States of America\(^ {15}\). Both American and Canadian courts of law are vested with the power to decide

\(^{14}\)hereinafter the Canadian Constitution

\(^{15}\)Hereinafter the American Constitution. When I speak of the Constitution without specifying either country, I mean to refer to the written constitution of a Western democracy.
whether or not the laws enacted by Parliament, the legislature or Congress are consistent with the Canadian Constitution and its entrenched Charter of Rights and Freedoms, or the American Constitution and its entrenched Bill of Rights, respectively. The paramount idea behind judicial review is the supremacy of the Constitution of Canada over the legislature and the Constitution of the United States of America over Congress and the President. The majority, represented by elected legislators, cannot do everything it wishes; however, the minority cannot restrict the allowable actions of the majority.

Regulation is the major policy instrument under consideration in this study. Regulatory measures call for required compliance to obtain certain standards. According to Brooks (1995), the state has a "monopoly of legitimate use of physical force in the enforcement of its order.” Yet, Madam Justice Bertha Justice Wilson declared in R. v. Morgentaler (1988), that in Canada this monopoly is subject to an invisible fence mapped out by the Constitution of Canada over which the state cannot pass. The court, through constitutional adjudication, determines what these allowable actions are.

Some notions of judicial review assert that the court must make judgements based on external principles, which are free from bias. This constitutional theory will be explicated before it is demonstrated to lack explanatory power. Ronald Dworkin’s theory of judicial review, which fits into the historical institutional conceptualization of ideas and interests outlined earlier, will then be explained.

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16 Hereinafter the Charter.
Robert Bork's Theory of Original Intent

Robert Bork (1971) believes that the court must act on some general principles when deciding on constitutional challenges. The theory is based on the notion that society consents to be ruled 'undemocratically'— the unelected judiciary having the final decision — only if the court makes judgements based on external principles which are free from bias. These principles are found in the text of the Constitution. The role of the court is to interpret the words of the Constitution in order to find the principles based in the text. It may not, however, extrapolate from these general principles. Judges accomplish this duty by attempting to find the intent of the people who composed the Constitution. They search for the 'core idea' in the words of the document by placing it in a historical context. In effect Bork outlines an argument based on 'original intent.'

There are three main critiques of Bork's argument. First, the idea of finding a core idea in the text is dubious. Bork feels that one can eliminate judicial bias by not allowing them to interpret the Constitution. Rather they need to find the meaning of these rights that the framers of the Constitution had adopted when drafting the document. However, on what basis does one conclude what people were thinking? How does one enter into the mind of people who have undergone different socialization processes, who have possessed different knowledge, and who may have been a different gender? Surely, this is a strong criticism of Bork's theory.

A second critique of Bork's theory arises from his theme of "original intent." From Bork's argument one could conclude that the framers of the Constitution are more qualified than judges to impose their will on the populace. This claim seems preposterous given that
Bork asserts that a miscarriage of justice results when judges make value judgements in deciding cases. When deciding what rights to include, the individuals who drafted the Bill of Rights and the Charter surely made judgements based on their own values and aspirations. Moreover, Bork’s view leads to stagnation; the courts would basically never break out of the mould created years earlier. If the judiciary decided that the constitutional framers had made poor value judgements, they could never be corrected. The Supreme Court could never, as then Chief Justice Dickson said, “play a major role in shaping the legal, moral and social contours of our country.” (Mandel 1992, p. 61)

The third criticism of Bork’s theory lies in the fact that the Bill of Rights and the Charter are intentionally ambiguous. Bork demands that judges find clear fundamental principles in both documents. This demand is unachievable. No clear principles exist in the Charter’s phrases “fundamental justice,” “unreasonable search or seizure” or “demonstrably justified in a free and democratic society.” No lucidity can be found in the American mantra of “life, liberty and property.” Even from a brief examination of the Charter and the Bill of Rights, one can conclude that its writers intentionally made them ambiguous documents. Clearly, the Constitution is a legal document that requires interpretation.

Ronald Dworkin’s Theory of Constitutional Rights

Ronald Dworkin (1978) puts forth a philosophy of constitutional adjudication based on the premise that citizens have rights against the state. Rights trump legislation. Dworkin argues that it is absurd to assert that legislatures are best suited to protect minority rights. Minority groups lack the political power that majorities use to influence elected legislatures. Neither is it fair for the majority to advocate for the rights of the minority. The court must
rise and defend these rights especially in cases where the majority is inconvenient by
granting the minorities rights.

Dworkin (1978) believes that the distinction between concepts and conceptions is at the
core of judicial review\textsuperscript{17}. One appeals to a concept, but one applies a conception. The
distinction is a difference in the kind of instruction given. For example, when John appeals
to Jane's concept of justice, John instructs her to develop and apply her own conception of
justice. John sets the standard for her to meet; the concept poses a moral question.
However, if John lays down a conception of justice, his own view is at the heart of the
matter. The conception answers the moral question. The vague clauses of the Constitution
must be understood as concepts and not as specific conceptions of rights. An activist court
is one that goes ahead with undertaking the application of a concept as law.

Dworkin explains that judicial review under a constitution is a fusion of
constitutional law and moral theory. The court must decide what moral rights people have
against the State. Law is no more independent from philosophy as it is from economics and
sociology. This activist stance, however, may be compromised for practical reasons or for
completing reasons of principle.

The implication of entrenched constitutional rights on public policy

In order to speculate as to how the Charter and the Bill of Rights provide a framework
for public policymaking by legislators, one must examine the power and scope of both
documents. Parliament and Congress made a commitment to upholding the rights

\textsuperscript{17} In this fashion Dworkin's 'concept' is married with the historical institutionalist's 'idea' and his
'conception' with 'interest'.
guaranteed by the *Charter* and the *Bill of Rights*, respectively. The Constitution is a tool of the judiciary and a force that directs Parliament, Congress and the American President in the execution their legislative and executive powers (Hogg 1992; Ratushny & Beaudoin 1989). Section 52 of the Canadian Constitution affirms that a law that is in discord with any provision of the *Charter* is of no force. In *Marbury v. Madison* (the first instance of judicial review under the *American Constitution*) the Court asserted that law which is not in line with the *American Constitution* is null and void.

An example of the force of the court’s definition of constitutional rights in drafting legislation is the death of the Mulroney government’s 1991 abortion bill in the Canadian Senate. In her submission to the Standing Committee of the Senate: Legal & Constitution Affairs during the 1991 Canadian abortion debate, Weinrib (1991) argued that the proposed abortion Bill C-43 suffered from the same constitutional problems as the old Canadian abortion bill, which was struck down in the landmark *R. v. Morgentaler* (1988) decision (Weinrib 1991). In her argument she contextualizes the old abortion bill and the judicial reasoning for striking it down. The old 1969 *Criminal Code* amendment\(^{18}\) worked against women’s reproductive health but it also freed physicians from fear of criminal prosecution for performing therapeutic abortions. Doctors used their control over the abortion process to impose their moral, political and social values on women. Weinrib was successful in convincing enough senators that the proposed abortion bill suffered from the same constitutional shortcomings as the old amendment.

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\(^{18}\) The amendments were passed by the Canadian Parliament in 1968, but took effect on January 1, 1969.
While the court may not be able to force government to legislate specific issues, the state may be duty bound to do so by its Constitution. In *Reference Re Public Service Employment Relations Act* Canadian Chief Justice Dickson wrote that there are "situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms." (at 361) It is unclear however, whether constitutional documents carry such authority. In any case, the state must be careful that intended legislation does not contravene constitutional rights as defined by the courts. It is clear that Parliament and Congress must respect the force of their respective Constitutions; they carry enormous weight in the drafting of new legislation. "Ideally, then, a constitution authorizes the institution and institutions of government, establishes the rules of governance, and, most important, sets forth a vision to be secured through those institutions and rules." (Pilon 1992, 373) By passing the *Constitution Act, 1982* and obligating itself to uphold the *Charter*, the federal and provincial Canadian governments have a moral and legal obligation to ensure the rights guaranteed in that enactment. The US Congress and the American executive branch of government must respect the rights outlined in the *American Constitution*.

Constitutional exegesis is not limited to the courts; the legislative and executive branches of government themselves should interpret the clauses of the Constitution. Government has a responsibility to discern what the Constitution requires of it. These interpretations, however, may be subject to scrutiny by the judiciary. In this manner, while legal precedent sets the framework for this application, all three branches of democratic government are able to apply specific conceptions of the rights in the Constitution.
Yet, the court has the power to challenge the application of these conceptions. This is analogous to Thelen's idea of political actors working within the confines of institutions to accomplish change. Jenkins' (1978) definition of public policy can help clarify this relationship. He states that policy is:

A set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions should, in principle, be within the power of those actors to achieve. (p. 20)

Individuals choose one public policy over another because they intend to achieve a certain outcome. By definition, some policy approaches are bound to fail. Institutions house ideas. The institutionalization of these ideas by the courts clearly directs policymaking. Yet, political actors are able to maneuver within the constraints of these articulated valences (in that they restrict the range of policy options), define interests and goals, and make specific policy choices. To paraphrase Weir (1992), institutions channel the flow of ideas, create incentives for political actors, and help determine the meaning of policy choices.

METHODS

Overview

The review of the historical institutionalist and constitutional adjudication literature has suggested a final form for my research question. One would speculate that numerous political, social and institutional factors would account for the perceived difference in embryo research policy. Explanatory variables other than 'legal conceptions' might account for the different human embryo research policies. These alternative explanatory variables
include political culture, state capacity, and policy agendas. Before outlining the methods of this study, the possible influences of these factors will be examined.

Political culture can be defined as a method of describing civic behaviour in the political area. It includes the distinctive customs, skills and attitudes that people adopt as the shared experience of their polity. If 'political culture' was used to explain the differences in human embryo research policy in the United States and Canada, one might look at how Americans and Canadians conceptualize the family. Examining the distinctive role the 'religious right' plays in American policymaking would be helpful. Other areas of difference could include ideas about spousal and parental consent.

State capacity could also be an explanatory variable. It refers to the ability of the state to implement its policy objectives. By referring back to Jenkin's definition of policy, one notices that policymakers choose options that they have the means to achieve (Jenkins 1978). While the United States will usually not compromise principle for pragmatic reasons, this study will suggest that if American policymakers felt that the courts would find national regulation of human embryo research unconstitutional, then they may have not considered it as a policy option. Australian policymakers, who compromised their regulatory goals and set a less restrictive policy regulating commercial surrogacy, used a similar line of reasoning. Legislators believed that it would be impossible to insure compliance with a stricter policy of criminalization; therefore, they adopted a much more permissive regulatory structure.

I will not expand on the idea of different policy agendas. The theoretical model of historical institutionalism outlined earlier in this chapter includes 'framing' within the theoretical model. Framing policy issues is a large component of political agendas. Leaving a social policy issue off the political agenda is to frame it as being unimportant.
The idea of framing policy issues is about setting both the agenda and the vocabulary to be used in the discourse. Framing is a method of presenting the possible contentious policies by carefully cloaking them with accepted valences and institutionalized values (Schattschneider 1960). For example, in health care discourse a policy maker might appeal to concepts of equity, equality, accessibility, and comprehensiveness. The use of accepted values is an efficient way of making the proposal attractive to individuals because it is easier to build on existing valences than to change public attitudes.

Yet, this study will explore how the differences in American and Canadian human embryo research policy can be understood through a comparative analysis of the jurisprudence of the abortion issue. Social and political factors will not be put aside. Rather, jurisprudence in the abortion debate will serve to capture these political and social forces. One must be cognizant, however, that this ‘capture’ is biased; it represents the perception of these forces through the filter of the judicial mind.

By focussing on how jurists framed the abortion debate and analyzing the landmark American and Canadian constitutional decisions, this study will investigate whether the respective judiciaries appealed to different concepts in reaching their ‘resolutions’. Moreover, if they appealed to the same legal concepts, it is suspected that they applied different conceptions of these concepts to the abortion question. Historical institutionalism suggests that by institutionalizing these valences, the respective legal systems differentially constrained the Canadian and American policymakers who examined the question of whether the state should regulate human embryo research.
Why Abortion?

Abortion is a good choice as an analogous case for two reasons. Many of the issues that polarize the philosophical debate regarding embryo research are reflected in the abortion debate. Robertson asks the questions of who has the decisional authority over the early stages of human life and what power does the state have to limit that decisional authority in order to protect early embryos and other interests? He concluded “government restrictions on technological treatments for infertility should have to pass the same demanding test that would apply to restrictions on coital reproduction.” (Robertson 1994, 117) Similar questions have been addressed by the courts in both the American and Canadian abortion debate.

More importantly, not only are parallels in the abortion debate found in the courts and among special interest groups, but similarities are also found in American and Canadian public opinion. According to research conducted by Neil Nevitte, William P. Brandon and Lori Davis (1993), there are “striking parallels between the politics of abortion in the U.S. and Canada.” (p. 19) Americans and Canadians share similar views about abortion even out of legal context. For example, over the period from 1983-1993, public levels of support for legalizing abortion in both countries have been approximately the same (see appendix A). Attitudes towards abortion remain similar even when both health and discretionary dimensions are examined (Nevitte et al. 1993). A noticeable drop in the 1990 US approval rating for abortion is noted when the unborn child is likely to be born with a handicap. This drop can be attributed to other factors, namely the prevalence of issues confronting the physically disabled following the introduction of the federal Disabilities Act into Congress.
This data illustrates that the effect of public opinion can be controlled in a comparative abortion law study such as this.

As Eva Rubin (1987) noted in *Abortion, Politics and the Courts: Roe v. Wade and Its Aftermath*, the role played by the courts can be as powerful as legislation to instigate social change. One must examine the impact that such litigation can have and the ensuing political battles that may follow it. This is the task that this study will undertake.

**RESEARCH MODEL**

The research question will now be defined in terms of dependent and independent variables. The dependent variable to be explained is the level of state intervention in human embryo research. ‘Level of state intervention’ can be measured on an ordinal scale. The low end of the scale is ‘no state intervention’. ‘Level of state intervention’ increases as one moves from ‘low intervention (e.g. self-regulation), though to ‘medium regulation’ (e.g. national regulatory agency), to ‘high intervention’ (e.g. criminal law). The values of the dependent variable in both cases are known. In Canada, there was proposed medium-to-high level of state intervention; a lower level of state intervention exists in the United States.

The independent or explanatory variables, to be probed are the concepts of ‘protection of unborn humans and their symbolic value’ and ‘women’s autonomy and health’. Examining the philosophical debate concerning human embryo research has identified these concepts. The Robertson-McCormick debate, which examines different positions on the values of embryos and embryo research, will frame the explanatory portion of the study’s research model. The debate focuses on the conflict between two values,
'human dignity' and 'liberty'. John Robertson states that the embryo's symbolic claims (human dignity) are overridden by a woman's health interest (liberty applied with science). Richard McCormick believes that scientific progress (including progress in women's reproductive health) may not be important enough to override symbolic claims of the unborn human.

DATA COLLECTION

Data collection proceeded by searching the full-text case citations of the QUICKLaw Database of Canadian law and WESTLaw, the equivalent American legal database. The search began from the landmark abortion decisions in the two countries. \textit{R. v. Morgentaler} (1988), in Canada and \textit{Roe v. Wade} (1973) in the United States. The databases were searched only for subsequent decisions that either rely on \textit{Morgentaler} and \textit{Roe v. Wade} or distinguish themselves from them on relevant points of law, specifically definitions of liberty that are relevant to human reproduction.

Next, American and Canadian embryo research policy documents were collected. These included the \textit{Discussion Document} and the \textit{Presidential Announcements} found in the \textit{Weekly Compilations of Presidential Documents}. Due to the limited scope of this study the debates of the House of Commons and the debates of the House of Representatives will not be examined. The first document was available from Health Canada and the rest were available in electronic form via the Internet.
RESEARCH METHOD

Both the American and Canadian landmark abortion decisions, *R. v. Morgentaler* (1988) 1 S.C.R. 30 and *Roe v. Wade* (1973) 410 U.S. 113, will undergo substantive examination. Using discourse analysis, the values to which the respective judiciaries appealed will be identified. The relevant, subsequent case law collected through the legal databases will be used to ‘fine-tune’ the values identified in *R. v. Morgentaler* and *Roe v. Wade*. These values and conceptions will then be compared to the historical account of embryo research policy put forth in chapter 2 and to documents that explain each government’s policies on human embryo research, if available. Finally, this study will examine the implications of the analysis for American and Canadian policy makers in light of its findings.

The data will undergo two analyses, a legal-historical analysis and a discourse analysis. The former will attempt to outline the current state of law in both countries and to identify the historical path that led to that those decisions. The facts of each case and a brief explanation of the relevant constitutional concepts will be given prior to examining the judicial decisions. This portion of the analysis will serve as a legal-historical account of the abortion debate before the courts and as an overview of the data of the analysis conducted in the next chapter.

Then, two tools of discourse analysis will be used to examine the data. More specifically, I will be using ideological discourse analysis. Oral and written discourse is analyzed for the social indicators of the interests and ideas of the authors. It seeks to identify the underlying biases of the author and highlights power imbalances and ideologies. (Teun A. van Dijk 1985) The first mechanism, *transitivity*, refers to how the subject materially
affects, or seems to affect others (Fowler 1985) High levels of transitivity in a sentence, paragraph or in speech emphasize the control of the agent (Fowler 1985; Lind & O'Barr 1979). Transitivity contributes power to the subject to form relations and implies that they are active participants in decision-making. Next, it is necessary to introduce the concept of lexicalization, which refers both to how well a specific concept can be expressed in a term and to how many terms exist for that concept (Fowler 1985). It is a linguistic feature used to convey ideology. Overlexicalization refers to the phenomenon of many terms being available in one language to express a concept. Conversely, underlexicalization refers to the lack of a term, or the lack of a prevalence of terms, that would neatly encode a process or concept (Fowler 1985). It must be noted that this study is both qualitative and interpretative.

Why An American And Canadian Comparative Policy Study?

Prior to embarking on this study, a major methodological and design choice that was made must be justified. While the research question and thesis flow directly from the puzzle that focussed the author's attention on the American-Canadian dissimilarity in embryo research, the researcher must justify why he selected these cases based on the dependent variable, 'level of state intervention in embryo research'. To put it simply, one must explain why this study has chosen to compare Canadian policy and jurisprudence with that of the United States. The weakness of this approach shall be considered first and then its strengths shall be discussed.

A comparison of American and Canadian jurisprudence must be done carefully since the respective Constitutions call for different distribution of powers and the countries

20 No attempt at quantification of this measure was made in this study. Rather, discourse analysis was
embrace different conceptions of rights. For example, while criminal law is within the jurisdiction of the Federal government in Canada, it is primarily state law in the United States (save for matters dealing with interstate commerce). The Canadian federal government, therefore, may find it easier to legislate national standards vis-à-vis embryo research than its American counterpart. Yet, government can enforce regulatory measures through other measures and not need to resort to criminal law.

A second, more difficult, difference to address is the peculiar conception of rights in Canada. The Charter guarantees rights only to a reasonable limit. Section one of the Charter reads:

s. 1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Once a government law is found to infringe on a right protected by the Charter, section one, at the state’s request, can be used to save the offending legislation. The court must ask the following questions (as defined in R. v. Oakes, 26 D.L.R. (4th))21: Are the legislative means chosen rationally connected to the objective? Do they impair the individual’s right as little as possible? Is proportionality struck between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as being sufficiently important? While both courts may balance the rights of the individual against

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21 In Irwin Toy Ltd v. Que. (Attorney General.), a new Oakes test was established in which different criteria were set for the ‘minimal impairment’ test. The court only required that the government have a reasonable basis to believe that they were restricting rights as little as possible. This variation of the Oakes test is no longer objective, but rather subjective. The court felt that the legislature was only acting as a mediator of conflicting and therefore applied this weaker standard for the government.
societal concerns when they frame the scope of a constitutional right, no explicit procedure, such as s.1 of the Charter, exists in American constitutional law. Because of the court's broad definition of these rights and freedoms, the Canadian judiciary has relied heavily on the section 1 test as a method for saving governmental legislation.

A comparison of American and Canadian legal institutions within the context of abortion and embryo research makes sense. Both countries are western democracies that have accepted judicial review under the Constitution and the doctrine of stare decisis. The doctrine of stare decisis binds lower courts by the decisions in law of higher courts (Talos et al, 1990). It ensures continuity and prevents a plethora of rulings on the same issue (idem). The Supreme Court feels constrained by its rulings but can change its mind.

Thus, lower courts in both countries must respect the decisions of higher courts, but neither Supreme Court is bound by its earlier decisions. Hence, while the executive and legislative branches of government are bound to respect the conceptions of rights purported by the Supreme Court, the Court need not act within the constraints of its earlier decisions. Interestingly, many jurists feared that the US Supreme Court would overturn the Roe v. Wade decision during subsequent abortion cases. It did not. This phenomenon needs to be addressed as well.

There is an important historical note to be made as well. Like Germany, which has a recent shameful record of human genocide22 and cultural annihilation rooted in social Darwinism, the United States and Canada shared comparable ‘eugenic laws’ and have had a

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22 Nazi Germany, which claimed a high moral sensitivity, also banned abortion except for Jews.
comparable history of 'eugenics by the back door' (Duster 1990; Kevles 1985). These influences have probably had equivalent impact on social policy issues that confront issues of human dignity. The German government has banned all research on human embryos.

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23 The United States, however, has also had a history of unethical research on human subjects, most notably, the Tuskegee syphilis experiments on Black males.
THE ABORTION LAW CONTROVERSY

This chapter will examine the landmark abortion decisions in the United States and Canada. The facts of each case and a brief explanation of the relevant constitutional concepts will be given prior to examining the judicial decisions. This portion of the study will serve as a legal-historical account of the abortion debate before the courts and as an overview of the data of the analysis conducted in the next chapter.

ROE V. WADE- THE AMERICAN LANDMARK CASE

Case Overview
In 1854, the state of Texas criminalized abortion (Gammel 1898, p. 1502). Later amendments to the statute modernized the language, but the substance of the prohibition remained the same. The statutes under scrutiny in Roe v. Wade were 1191-1194 and 1196 of the Texas Penal Code. Under these statutes, it was a crime to "procure an abortion," or to attempt one, except with respect to "an abortion procured or attempted by medical advice or the purpose of saving the life of the mother." Prior to the litigation of Roe v. Wade, similar statutes were in existence in a majority of the States.

An unmarried woman, Norma McCorvey under the pseudonym Jane Roe, put together a class action federal suit in March of 1970. She sought a declaratory judgment
against the *Texas Penal Code* articles that restricted abortion services. As well, she applied for a court injunction to prevent the District Attorney of Dallas County from enforcing them. Roe claimed that she, as an unmarried and pregnant woman in Texas, could not get a safe, legal abortion because her life was not in danger from the pregnancy. Lacking the financial resources, she could not get to another jurisdiction where abortions were legal in her case. She maintained that the *Texas Penal Code* provisions were unconstitutionally 'vague'. Moreover, they infringed on her right to personal privacy found in the first, fourth, fifth, ninth, and fourteenth amendments. Roe asserted that she was suing ‘on behalf of herself and all other women’ similarly situated (*Roe v. Wade* 410 U.S. 113).

The three-judge district Court found that the ninth and fourteenth amendments to the United States Constitution protected the right of all women to choose whether to have children. The Texas abortion statutes were held unconstitutional because they were vague and infringed too broadly on that ninth amendment right. However, they dismissed the request for injunctive relief. Roe filed appeal to overturn the latter portion of the decision. At the same time, the District Attorney cross-appealed the decision of the trial Court. Since privacy rights are central to the American abortion issue they will be addressed prior to examining the judicial reasoning in *Roe v. Wade*.

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24 According to the head notes of the case: “A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife’s health.” This study will only focus on the court’s decision with regard to Jane Roe.

25 The 5th amendment protects individuals from laws that are so vaguely written that one can not ascertain whether one’s actions are lawful.
Privacy Rights in United States Constitutional Law

Constitutional Privacy

While the word privacy does not appear in the text of the United States Constitution, the United States Supreme Court has construed it as a broad, constitutionally entrenched right. This right is grounded in an article written by Louie Brandeis prior to his appointment to the United States Supreme Court. Justice Brandeis (1890) wrote:

That the individual shall have full protection in person and in property is a principle as old as the common law; ... Gradually, the scope of these legal rights broadened, and now the right to life has come to mean the right to enjoy life – the right to be let alone [emphasis added]; the right to liberty secures the exercise of civil privileges; and the term "property" has grown to compromise every form of possession – intangible as well as tangible. (Harvard Law Review; "The Right to Privacy")

In 1928, Justice Brandeis applied this notion of privacy in his dissent in *Olmstead v. United States* 277 U.S. 438 (1928) (5-4). This concept became the basis for a new form of common law action in tort law. Ultimately, the Court used privacy in a constitutional sense to define the limits of state interference with individual autonomy.

In *Griswold v. Connecticut*, 381 U.S. 479 Justice Douglas developed the ‘penumbra’ or ‘shadow’ doctrine and found that various enumerated rights in the Bill of Rights created zones of privacy. This doctrine stated that new constitutional rights can be found ‘in between the lines’ of the rights enumerated in the *Constitution*. Justice Douglas affirmed that the privacy of the marital relationship, grounded in the gaps between the first, third, fifth and ninth amendments, protected the right of a married couple to use contraception. In their concurring opinions, Justices Harlan and White focussed the right to privacy on the due process clause of the fourteenth amendment. Section one of the fourteenth amendment of the Constitution reads:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Const. amend. XIV, s. 1).

With its decision in *Griswold* the Court renewed the doctrine of substantive due process. The privacy rights found in the penumbras of the Bill of Rights, are therefore subject to regulation by government in cases where the state has a ‘compelling interest’ to do so.

Subsequently to *Griswold*, the Court held that the freedom of choice in many fundamental life decisions is grounded in numerous penumbras of the Bill of Rights. For example, the right to marry a person of one’s choice was asserted by the Court in *Loving v. Virginia*, 388 U.S. 1. The right to procreate was upheld in *Skinner v. Oklahoma*, 316 U.S. 535. Finally, the rights to use contraception and to privacy in sexual relationships were expanded in *Eisenstadt v. Baird*, 405 U.S. 438. The Court held:
It is true that, in *Griswold*, the right of privacy in question inhered in the marital relationship. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget children. (*Eisenstadt v. Baird*, 405 U.S. 438, 453)

The Massachusetts statute that made it a crime for anyone (save doctors) to distribute contraception was found to be unconstitutional by a 6 to 1 margin. *Eisenstadt v. Baird* 'set the stage', so to speak, for the Court's decision in *Roe v. Wade*.

**Limits on Privacy Rights**

Those privacy rights identified in the penumbra of the fourteenth amendment are fundamental rights. According to the Court's interpretation of the due process clause, fundamental rights can be infringed on by the state only if the offending legislation serves a compelling interest. Two standards for ascertaining compelling interests have been proposed. Those who hold by the 'strict scrutiny' standard maintain that a government can constitutionally interfere with a zone of privacy, if the state draws legislation that is narrowly scoped and carefully tailored to serve a compelling interest (Coleman 1996). Others hold by a weaker standard, 'undue burden', which finds regulations that invade fundamental zones of privacy constitutional if they are not overtly burdensome on the individual's right to privacy. For example, abortion regulations may be invalid under this standard if their purpose and effect is to place a substantial obstacle in the path of a woman wishing to have an abortion. The government would be, in effect, controlling a right as to discourage the conduct. In essence, this standard allows government to regulate a protected area as long as it is not an unreasonable or arbitrary attempt to limit a fundamental right. If a law or regulation does not infringe on a fundamental right it still must still be rationally related to a legitimate state interest. The burden of proof still remains with the state to prove this rational connection.
Regulations that have no conceivable purpose or that have effects, which are not rationally related to the means used, violate this standard.

Judicial Opinions in *Roe v. Wade*

Justice Blackmun (joined by Chief Justice Berger, Justices Douglas, Brennan, Stewart, Marshall and Powell)

The majority in *Roe v. Wade* found the criminal abortion legislation that denied access to abortion, save in cases when the mother's life was endangered, violated the due process of the fourteenth amendment. The fourteenth amendment was found to protect the right to privacy against state action, including a woman's qualified right to terminate her pregnancy. This was not to say, according to Justice Blackmun, that the state did not have a legitimate interest in protecting the potentiality of human life and the pregnant woman's health. Rather, these interests become compelling only at various stages of pregnancy.

Justice Blackmun began his decision by outlining the history of abortion laws. He noted that numerous criminal abortion laws at work in the United States were of relatively recent origin; these laws did not have common law or ancient origins. Rather, they were derived from social changes in the late nineteenth century. In the common law, abortions performed before quickening (the first notice of movement in the fetus) were not indictable offences. It is unclear whether even the abortion of a 'quick' fetus was punishable. Lord Ellenborough's Act, England's first criminal abortion law enacted in 1803, made abortion of a quick fetus a capital crime. The abortion of a fetus before quickening was punishable less severely. This distinction, along with the death penalty, was dropped in 1837. After providing an extended history, Justice Blackmun claimed that abortion was perceived with less disdain at the time of the adoption of the *United States Constitution* and throughout most
of the nineteenth century than it was in 1973. Women benefited from a wide right to terminate pregnancy well into the nineteenth century. The majority in *Roe v. Wade* contended that the right to privacy was broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The Court noted that this right had been extended to marriage, procreation, contraception, family relationships and child rearing.

According to Justice Blackmun, three reasons accounted for the shift in abortion public policy. First, it may have been the result of a “Victorian social concern to discourage illicit sexual conduct.” (*Roe v. Wade*, 410 U.S. 113, 148) Yet, Texas did not advance this as a justification for its abortion statutes. Even if it had, Justice Blackmun stated that no Court has taken this argument seriously. Second, the abortion provisions may have been enacted to protect women from the abortion procedure, which at the time was quite hazardous. While the procedure had become relatively safe due to advancements in medical technology and antiseptics, Justice Blackmun stated that “important state interests in the areas of health and medical standards do remain.” (*Roe v. Wade*, 410 U.S. 113, 150) Lastly, abortion may have been criminalized to protect the state’s interest in the unborn human. This claim did not rest on the notion that life, or status of moral personhood, begins at conception. Justice Blackmun explained that “recognition may be given to the less rigid claim that as long as at least potential life is involved, the state may assert interests beyond the protection of the pregnant woman alone.” (*Roe v. Wade*, 410 U.S. 113, 150)

The privacy right identified in *Roe v. Wade* is not absolute. While the Court noted that the right of personal privacy included the decision whether to have an abortion, it stipulated that this right is not unqualified, and must be balanced against the relevant considerations
noted above. At some point these considerations (protection of health, medical standards, and prenatal health) become dominant in this balance; they become compelling state interests. The state can claim important interests in protecting maternal health and protecting the potential life of the fetus. By meeting the 'strict scrutiny' standard, which means that the state must show that it has a compelling interest to legislate in this area, state government can regulate access to abortion.

The Court concluded that the Texas Penal Code statutes were unconstitutional. Yet, the Court did not stop at making this declaratory statement. The majority in *Roe v. Wade* 'wrote' new abortion legislation based on the trimesters of pregnancy. None of the lawyers suggested this system. Texas would have just re-enacted a new abortion law; the Supreme Court therefore set its standards. They stated that before the end of the first trimester (third month of pregnancy), the locus of control for the abortion decision lies solely with the woman and her physician. Beginning with the second trimester of pregnancy, the state may regulate abortion to protect the health of the mother. These regulations would need to be “reasonably related to maternal health.” (*Roe v. Wade*, 410 U.S. 113, 165) Finally, the Court concluded that subsequent to the point of fetal viability (specifically, at the end of the sixth gestational month), it is permissible for the state to regulate or prohibit abortion in order to promote its interest in the fetus. This permission to proscribe abortion was restricted in those cases where abortion is medically necessary to preserve the life or health of the mother.
Justice Stewart, concurring

In his concurring opinion, Justice Stewart asserted that the majority of the Court was right in identifying a right to abortion services. He agreed that such a right is found in the penumbra of the fourteenth amendment. He found that the Texas law directly, and completely, abridged that right. Justice Stewart maintained that the interests asserted by the state, the protection of the health and safety of the pregnant woman and the protection of potential human life, were legitimate objectives. However, these state objectives could not prohibit access to abortion in the complete manner accomplished by the Texas Penal Code. Justice Stewart concluded his judgment by stating that these state interests would be amply sufficient to warrant state intervention at the later stages of pregnancy.

Justice Rehnquist, dissenting (joined by Justice White)

Justice Rehnquist dissented from the majority opinion based on two factors. First, Justice Rehnquist held that Jane Roe did not have the standing to litigate the issue that was before the Court. The majority “decided that a state may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy.” (Roe v. Wade, 410 U.S. 113, 172) Previous Courts indicated that it would have been necessary for the plaintiff to be in the first trimester of her pregnancy during the “pendency of her lawsuit.” (Roe v. Wade, 410 U.S. 113, 172) Justice Rehnquist claimed that the Court did not know from the record that Jane Roe was ever in her first trimester during the pendency of the lawsuit.

Even if Jane Roe was capable of litigating this issue, Justice Rehnquist asserted that he would have held opposite to the majority. Citing earlier case law, he claimed that no right to abortion was “so rooted in the traditions and conscience of our people as to be ranked as
fundamental.” (Roe v. Wade, 410 U.S. 113, 176) He stated that he could not find a privacy right involved in this case. Even if the ‘right to privacy’ that the majority found in this case was merely the right not to have the state intervene in consensual transaction between a pregnant woman and her physician, Rehnquist held that the individual could still be constitutionally deprived of such a right. Invoking the ‘rational basis’ standard, Rehnquist claimed that he would have struck down the law only if the Texas Penal Code had prohibited abortions in cases where the mother’s life was in danger — only then would the law have lacked a rational relation to a state objective. For over twenty years subsequent to this dissent, Justices Rehnquist and White (concurring in dissent) continued to champion the cause against Roe v. Wade.

Important Case Law Subsequent to Roe v. Wade

In order to bring this discussion of American abortion law of the Supreme Court up-to-date, the case law subsequent to Roe v. Wade identified by the WESTLaw search must be briefly examined. The companion case to Roe v. Wade was Doe v. Bolton, 410 U.S. 179 (1973) in which the Court struck down a ‘liberal’ Georgia abortion statute. The majority found that a woman has a constitutional right to abortion even during the last trimester of pregnancy. The abortion is contingent, however, on the best clinical judgement of her doctor (Doe v. Bolton, 410 U.S. 179). The physician must find it a necessary procedure for preserving her physical or mental health in light of her age, or other physical, emotional, psychological [and] familial circumstances.

Case law subsequent to Roe v. Wade and Doe v. Bolton limited the scope of this abortion right. In Harris v. McRae, 448 U.S. 297 (1980), Justice Stewart, writing for the Court,
stated that the state has no obligation to pay for abortions. The right to abortion identified in
Roe v. Wade is a right to protection from interference. It does not require the state to facilitate
eexercising that right. While the Court in Webster v. Reproductive Health Services, 492 U.S. 490
(1989) upheld a statute that identified human life beginning at conception, it did not
overturn Roe v. Wade. The statute also prohibited the use of state land for abortion services
and required a fetal viability test before abortions were carried out. Four of the five majority
justices stated that the state has an interest in the fetus throughout pregnancy and discarded
the trimester approach of Roe v. Wade. Justice O'Connor did not join in the latter part of the
majority opinion. She asserted that if the state always has an interest in protecting potential
human life, then no therapeutic abortions could be performed based on the reasoning of Roe
v. Wade. The Court did not overturn Roe v. Wade, but neither did they fully follow it as
precedent.

Planned Parenthood v. Casey, 505 U.S. 833 (1992) has replaced Roe v. Wade as the
dominant precedent in United States abortion law; the judgment allows for limited state
regulation but preserves the goal of general access to abortion found in Roe v. Wade. By a
five-to-four margin, the Court upheld a statute that placed a twenty-four hour waiting
restriction on procuring abortions. While the Court also upheld the portions of the law that
required the informed consent of the woman and parental consent for minors, it struck
down the provision that required both spouses to consent to the abortion. Justice O'Connor,
writing for the majority, overturned the trimester approach of Roe v. Wade and spoke against
the 'strict scrutiny' standard that gave rise to it. Instead, O'Connor adopted a new standard
of due process, 'undue burden', and established a floating viability point to mark when the
state's interest in the protection of fetal life becomes compelling. Justices Blackmun and Stevens wanted to uphold more of the Roe v. Wade approach. In their dissent, Justices Rehnquist, White, Scalia and Thomas asserted that Roe v. Wade was wrong and that a 'rational basis' standard for due process needed to be adopted. While much of the Roe v. Wade approach to limiting the scope of an abortion right was laid to the wayside, Casey, the new precedent, still upheld a strong right of general access to abortion services.

R. V. MORGENTALER – THE CANADIAN LANDMARK CASE

Case Overview

In 1968, the Parliament of Canada passed amendments to the Criminal Code of Canada that permitted accredited hospitals to perform abortions only when a pregnant woman's health was in danger. The provisions of the Code provided a defense for physicians charged with procuring an unlawful abortion if they followed the correct administrative procedure. Since the administrative structure it sets out is complex, the relevant text of section 251 of the Criminal Code follows below.

251. (1) Every one 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.

(4) Subsections (1) and (2) do not apply to

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26 The full text of section 251 can be found in appendix C.
(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.

According to these regulations, a lawful abortion could only take place for reasons associated with protecting the health of the pregnant woman. Only accredited hospitals or those approved by the Minister of Health could conduct lawful abortions. Lastly, an abortion could only be lawfully performed if a therapeutic abortion committee approved it.

Dr. Henry Morgentaler was jailed during the 1970s for performing abortions in a clinic in Quebec. During subsequent prosecutions in the 1970s, Quebec juries refused to convict him (Talos, Liepner, Dickinson 1990). After opening a free-standing clinic in Toronto, Doctors Henry Morgentaler, Leslie Smoling and Robert Scott were charged with conspiring with each other in order to procure abortions contrary to sections 251 of the Criminal Code (R. v. Morgentaler 62 C.R. (3d)). The clinic they opened in Toronto was not an ‘accredited’ facility nor did it have a ‘therapeutic abortion committee.’
During pre-trial motions, the defence counsel for the doctors attempted to quash the indictment on the grounds that section 251 was *ultra vires* (outside of the powers) the federal government and that it violated sections 2(a), 7 and 12 of the *Charter*. The trial judges dismissed this motion, and the Ontario Court of Appeal later upheld his ruling. The trial proceeded and the jury acquitted the doctors. The Crown appealed the acquittal, and the Ontario Court of Appeal ordered a new trial. The decision of the Court of Appeal was appealed to the Supreme Court of Canada and judgment was given in 1988. While seven questions were posed to the Supreme Court, only questions 1 and 2 will be considered in this study. They read:

Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian *Charter of Rights and Freedoms*?

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian *Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the Canadian *Charter of Rights and Freedoms* and therefore not inconsistent with the Constitution Act, 1982?

By focussing solely on questions 1 and 2, this study will consider the court's decisions in reference to the abortion provisions being in violation of section 7 of the *Charter*. A definition of section 7 of the *Charter* and an explanation of the court's method of investigating section 7 breaches will be explained prior to beginning the analysis of *Morgentaler*.

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27 The questions posed to the court can be found in appendix D.
Rights to Life, Liberty and Security of the Person in Canadian Constitutional Law

**Definition**

Section 7 of the *Charter* provides that: “Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Chief Justice Dickson stated that the judiciary should apply a generous definition to section 7 of the *Charter*.

In general, a particular liberty is a complex combination of rights and duties. Not only does liberty afford the individual the permission to do or not to do something, it requires that government and other people not obstruct the individual from pursuing her goals and aspirations (Rawls 1971). It is also necessary to note that the inability “to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty.” (Rawls 1971, 204) These rights are equal opportunities to liberty; they do not ensure outcomes. According to Madam Justice Bertha Justice Wilson in *Morgentaler*, liberty is “inextricably tied to the concept of human dignity.” *(R. v. Morgentaler, 62 C.R. (3d), 101)* Section 7 confers on the individual a measure of autonomy in important decisions concerning his own life. The section 7 right to liberty has been characterized as a rich freedom.

**Fundamental Justice**

A right to life, liberty or security of the person can be suspended ‘in accordance with the principles of fundamental justice’ (Ratushny and Beaudoin 1989). The issues of deprivation and the principles of fundamental justice, in general, are the second part of an analysis of s. 7. Canadian courts have defined fundamental justice as the context for the rights guaranteed in section 7. The term is not synonymous with ‘natural justice’. Since
natural justice refers only to procedural justice, such a definition would leave the Charter’s liberty provisions in “a sorely emaciated state.” (Re: Motor Vehicle Reference, [1985] 24 D.L.R., 548) Fundamental justice refers both to procedural and substantive justice. According to Madam Justice Bertha Justice Wilson and Justice Antonio Lamer, the principles of fundamental justice cannot be exhaustively defined. These ideals are found in the 'basic tenets' of the legal system. As such, judges best define them since they have the greatest understanding of the Anglo-European legal tradition. The principles of fundamental justice are qualifiers of the rights to life, liberty and security of person as affirmed by section 7.

Judicial Opinions in R. v. Morgentaler

Chief Justice Dickson (writing for himself and Justice Lamer)

Chief Justice Dickson, who wrote the majority opinion in Morgentaler, stated that the principle issue under examination was whether the abortion provisions of the Criminal Code of Canada infringed on a right found in section 7 of the Charter. According to him, only the “security of the person” guarantee of section 7 needed to be considered to find such an infringement. He maintained that section 251 of the Criminal Code was a profound interference with the right to security of the person found in the Charter. The Chief Justice explained that state interference with bodily integrity and serious state-imposed psychological stress constituted a breach of security of the person. The abortion provisions under scrutiny took the decision-making power away from the pregnant woman and subjected her to the wishes and aspirations of others. In this regard, section 251 interfered with a woman’s bodily integrity and caused her great psychological apprehension.
While a fundamental justice examination can be both purposive and substantive, Chief Justice Dickson did not find it necessary to look at the substance of the abortion provisions. Relying on the Badgley and Powell Reports, he stated that the defence to physicians, provided under section 254(4), is illusory. Under the application of the *Code* almost twenty-five percent of Canadian hospitals were ineligible to carry out abortions. Moreover, the defence set out no adequate standard for the therapeutic abortion committees to follow. The law itself prevented access to local therapeutic abortion facilities. The Badgley report concluded, “The procedures set out for the operation of the Abortion Law are not working equitably across Canada.” (p.17)

According to the ‘basic tenets’ of the Canadian legal system, a criminal defence created by Parliament “should not be illusory, or so difficult to obtain as to be practically illusory.” (R. v. Morgentaler, 62 C.R. (3d), 31) If the defence provided by subsection 251(4) was not illusory, it was at the very least practically illusory. Not only did the Chief Justice find that section 251 interfered with a pregnant woman’s right to security of the person, but he also held that it did so without regard to the principles of fundamental justice.

In his section one analysis, Chief Justice Dickson concluded that while Parliament’s legislative objective in section 251 was pressing and substantial, the provision failed all three parts of the proportionality test. According to Chief Justice Dickson, the objective of section 251 of the *Criminal Code* was to balance the competing interests identified by Parliament. Protection of both the pregnant woman’s health and ‘foetal interests’ was a valid legislative

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28 The Report of the Committee on the Operation of the Abortion Law was named the "Badgley Report" after its chairperson Prof. Robin Badgley. Likewise the Report on Therapeutic Abortion Services in Ontario was named the "Powell Report" after its chairperson.
objective. By holding out an illusory defence, however, section 251(4) impaired the right to
security of the person more than necessary. Moreover, the effect of the limits placed on
section 7 right was out of proportion to the stated objective. Even a woman whose health
was in danger could have found it difficult, if not impossible, to procure an abortion. The
‘arbitrary’ and ‘unfair’ standards created by the legislation prevented it from receiving
protection under section 1 of the Charter.

*Justice Beetz (writing for himself and Justice Estey)*

Justice Beetz agreed that the resolution of the Morgentaler case lay in sections 7 and 1
of the Charter. Yet, he found that the abortion law violated sections 7 and 1 for different
reasons than those articulated by the Chief Justice. Justice Beetz asserted that the right to
security of the person included a “right of access to medical treatment for a condition
representing a danger to life or health without fear of criminal sanction.” (p. 101) If a
criminal law impeded a person from getting appropriate medical care when the person’s life
is in danger, then that intervention by the state constituted a violation of the Charter’s
security of the person provisions. Section 251 of the Criminal Code required a woman to
choose between committing a crime or not finding adequate and effective medical
treatment. In this manner the operation of the criminal law caused both physical and
psychological harm to pregnant women; thus, it violated their right to security of the person.
The additional dangers to women’s health were caused by the delays resulting from
application of section 251. Justice Beetz identified these delays as (1) lack of hospitals with
therapeutic abortion committees, (2) delays caused by quotas, and (3) delays caused by the
committee requirement.
The deprivation of a pregnant woman’s right to security of the person did not accord with the principles of fundamental justice. Justice Beetz stated that the rules set out by section 251 for procuring an abortion for health reasons were manifestly unfair. While Parliament was exercising it power justly in protecting the fetus by requiring an independent medical opinion, the administrative structure, as a whole, that was set up by the Code was unnecessary in respect to this objective.

Justice Beetz did not save the abortion provisions under the ‘reasonable limits’ clause of the Charter. He stated that the legislative object of the Criminal Code was not to balance fetal interests with those of the pregnant women, as the Chief Justice had claimed. The primary objective of Parliament was to protect its interest in the fetus. The protection of the life and health of the pregnant woman, possibly balanced against fetal interests, were secondary objectives. When viewed as a whole, section 251’s objective was the protection of the fetus. Only when the mother’s life or health is in danger did subsection 251(4) apply. It is only in subsection 251(4) that one could say Parliament wished to strike a ‘balance’. Justice Beetz asserted that the protection of the fetus related to concerns that are pressing and substantial in a free and democratic society; it has always been an valid objective of Canadian criminal law.

While the protection of the fetus is a pressing and substantial concern, the rules set up by section 251 were not rationally connected to that purpose. As noted earlier, Justice Beetz found that the rules in section 251 were, as a whole, unnecessary for the protection of the state interest in the fetus. Moreover, he maintained that the practical effect of the legislation itself undermines the health of women, the secondary objective of the provisions.
Justice Beetz concluded that removing subsection (4) could not save section 251 of the Criminal Code. The violation of the security of the person would be greater without the exculpatory provision; women whose health is at risk from pregnancy would never be able to procure an abortion.

Justice McIntyre, dissenting (Writing for himself and Justice LaForest)

Justices McIntyre and Justice LaForest disagreed with the majority in Morgentaler, and found that section 251 of the Criminal Code did not violate section 7 of the Charter. Justice McIntyre identified the legislative objective of Parliament as an attempt to balance the competing claims of the unborn child and the pregnant woman. He felt that the task of the Supreme Court was to “simply measure the content of s.251 against the Charter” and not “to solve what might be called the abortion issue.” (R. v. Morgentaler 62 C.R. (3d), 82)

According to Justice McIntyre, the doctors, the appellants in this case, did not show that a right included in the concept of security of the person was infringed. The constitutional text of the Charter shows no support for the appellants’ position. According to McIntyre, the concept of security of the person does not include the right “not to be compelled to carry the child to completion of her pregnancy.” (R. v. Morgentaler 62 C.R. (3d), 82) Section 7 was not violated because the legislation did not go beyond interfering with ‘priorities and aspirations’. State-imposed stress does not constitute an infringement of security of the person.

Madam Justice Wilson (writing for herself)

Madam Justice Wilson found a right to abortion in the liberty clause of the Charter. While she agreed with the majority’s decision that the abortion provisions of the Criminal
Code were unconstitutional, she found that they infringed on the Charter for different reasons. She identified the principle issue before the Court as whether a pregnant woman may be compelled by law to carry the fetus to term. Unlike the other judges joining in the majority, she asserted that the primary issue before the Court appealed to the guarantee of liberty. According to her judgment, the section 7 liberty right requires the state to respect choices made by individuals and to avoid subordinating these choices to a specific concept of the ‘good’. Section 7 guarantees all individuals the right to make “fundamental personal decisions”. Justice Wilson declared that the decision to terminate a pregnancy is one such fundamental decision. It has medical, social and ethical dimensions; it has economic and social implications as well. This decision was taken away from a woman by section 251, and the locus of decisional control was shifted to a committee. By taking the control of a woman’s reproductive capacity away from her, the abortion provisions violated the right to liberty found in section 7 of the Charter.

Not only did the provisions violate section 7 of the Charter, but they also invaded on the right to freedom of conscience. Justice Wilson found that section 251 of the Criminal Code took away the liberty right without regard to the principles of fundamental justice. A regulation that infringes on another Charter right can never be in accord with the principles of fundamental justice. Justice Wilson held that the abortion provisions violate section 2(a) of the Charter.29 As noted earlier, the decision to terminate a pregnancy is not solely a

29 The ‘conscience clause’ present in s.2(a) guarantees the right to hold non-theological beliefs. The reason for specifically enunciating these beliefs is that they may not be characterized as religious beliefs since they are not religiously motivated; they are seen as personal morals. Not only does s. 2 of the Charter protect everyone’s freedom to hold and practice personal convictions, but it also protects ‘everyone’ from being forced “to affirm specific religious practices for a sectarian purpose.” (R. v. Big M. Drag Mart 1985, p. 347)
medical decision; rather, it has moral dimensions as well. Thus, section 251 violates the right to freedom of conscience and religion because it prohibits a decision that, in part, is morally based.

According to Justice Wilson, the abortion provisions could not be saved under section 1 of the Charter. She asserted the legislative objective of protection of the fetus may be a valid government objective only at some point in the development of the unborn human. She contended that point is viability. The Criminal Code provision failed the minimal impairment test because it took the decision away from the pregnant woman at all stages of her pregnancy. Prior to viability, the state interest in the protection of the unborn is not pressing enough to warrant the infringement of the Charter right. Moreover, the provisions set out in section 251 were not “tailored” to the legislative objective. In this manner, the law is not rationally connected to the objective it purports to maintain. Justice Wilson asserted, however, that even if the procedural issues under the law were fixed, section 251 would still violate sections 1 and 7. Section 251 of the Criminal Code could not be saved under the ‘reasonable limits’ clause because it failed both the minimal impairment and rational connection tests.

Section 2 of the Charter provides:
s. 2 Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; …
ANALYSIS OF THE DECISIONS IN THE LANDMARK ABORTION CASES

Word choice is never neutral. When written or oral discourse presents a reality, it does so reflecting an ideology. An ideology is a systematic set of beliefs, ideas, assumptions and values that individuals use to make sense of society. It assists the individual to systematically organize a presentation of reality to his or her mind. Public discourse instils values in people when it institutionalizes these valences into society. This chapter will begin by examining how the right to abortion and the concepts of 'state interest in women’s health' and 'state interest in protection of potential life' were conceptualized and applied by the courts in North American abortion judicial decisions.

THE RIGHT TO ABORTION AND STATE INTEREST IN WOMEN’S HEALTH

American Context

Seven of the nine justices in Roe v. Wade identified a right of access to abortion services as part of the zone of personal privacy found in the fourteenth amendment of the United States Constitution. Justice Blackmun presented a lengthy history of abortion in the law as a device to justify that the ‘current’ distaste towards abortion was not rooted in antiquity. He writes that:
It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. *(Roe v. Wade, 410 U.S. 113, 141)*

Justice Blackmun's word choice is noteworthy. Instead of using a positive sentence structure and stating that “abortion was viewed more favourably in the nineteenth century,” he wrote, “abortion was viewed with less disfavour,” a negative structure. This choice of syntax emphasizes the current attitude of disfavour that Justice Blackmun wishes to call into question through his historical review. He claims that once later term abortions were prohibited, the law still continued to treat early abortions less punitively. This historical overview set the tone for the rest of the majority decision.

The right of access to abortion was found to be a fundamental freedom protected within the rubric of personal privacy rights of the fourteenth amendment. Using the decision in *Griswold* as precedent for his finding, Justice Stewart, who wrote a concurring opinion, asserted that:

... the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the due process clause of the fourteenth amendment. *(Roe v. Wade, 410 U.S. 113, 168)*

The specific use of the modifier 'rationally' to shape the word 'understood' implies that all individuals would have come to this sensible conclusion because all people are endowed with reason. Justice Stewart labelled the operation of the current Texas law as an 'invasion' of liberty to highlight the manifestly dangerous consequences of infringements to this right to abortion. State infringement on this fundamental liberty resulted in 'specific and direct harm'; it may have forced a distressful life and psychological harm on a pregnant woman.
Justice Stewart expanded the extent of this harm by professing that the new child, when carried to term, would be subject to these dangers.

The majority opinions that found a constitutional right to abortion invoked a high degree of transitivity when discussing women as decision-makers. Transitivity refers to how the subject materially affects, or seems to affect others (Fowler 1985) Justice Blackmun wrote that this capacity is taken away from them in the Texas Statute:

This right of privacy, whether it be founded in the fourteenth amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the district court determined, in the ninth amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (Roe v. Wade, 410 U.S. 113, 153)

This paragraph illustrates two points. First, Justice Blackmun revealed that there are evidently a multitude of ways to find a constitutional right to abortion. This theme will be discussed below. Second, Justice Blackmun declared that the decision whether or not to terminate a pregnancy is rightfully the decision of a woman. Women, and their liberty rights, were at the focus of the majority decisions. Women were not relegated to being merely objects – commodities being acted on by other forces. Rather, they were the active subjects of these sentences. In the majority decisions, pregnant women were characterized as decision-makers; they were agents whose actions affect others.

Attempting to find a right of access to abortion in American constitutional history was extremely contentious. The Court did not claim that it found the only way of identifying this right to abortion. Justice Stewart explained that:
Several decisions of this court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the fourteenth amendment. (Roe v. Wade, 410 U.S. 113, 169)

Stating that 'several decisions ... make it clear' instead of writing 'in the past this Court decided' builds the appearance of stronger argument. This use of language increases the level of transitivity in the sentence. It increased the extent to which the subject, here the previous decisions, seemed to materially support the logic of the Court's claim. Moreover, by focussing on these 'decisions' it highlighted the previous decisions of the Court and took away the focus from the present decision. Justice Stewart wrote that the decision in Roe v. Wade is not a fresh commentary on the Bill of Rights, but it is a reaffirmation of previous decisions by the Court.

The primary importance of maternal health was evident in the discussion of the scope of the liberty right identified in Roe v. Wade. The Court stated that while a woman has a right to making fundamental choices about her life and body, including the right to abort a fetus, this right is not absolute.

... [A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life at some point in pregnancy, to sustain regulation of the factors that govern the abortion decision. (Roe v. Wade, 410 U.S. 113, 154)

Maintaining medical standards and safeguarding maternal health were important and legitimate legislative objectives. From the sequencing of these objectives, one can speculate either that safeguarding a woman's health is more important than protecting potential human life or that safeguarding a woman's health becomes a pressing state interest before the protection of the fetus becomes compelling. Here, the use of the modalities of this clause, 'may' and 'properly', indicate both the uncertainty and certainty of the Court. Like
other modalities, it indicates the speaker's attitude toward what he or she is expressing (Fowler 1985; Lind & O'Barr 1979). Rather than state clearly that these interests can legitimately sustain regulatory measures, the use of modifier 'may' implies that it might be possible for the state to do so. The Court would go on to narrowly define if and when these interests can legitimately sustain regulatory measures. On the other hand, the Court explained that it is 'proper' for the government to exercise its legislative power to protect these interests. The reason for this perceived duality can be explained by examining when maternal health is a pressing objective.

In order to assert the state's proper interest in regulating abortion, the Court attempted to equate it with other medical procedures. In Roe v. Wade, the majority following Justice Blackmun stated:

> Of course, important state interests in the areas of health and medical standards do remain [in light of the right to abortion]. The state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. (Roe v. Wade, 410 U.S. 113, 149-150)

The deletion of the term 'pregnant woman' and insertion of 'patient' here is a relevant observation. One can construe from this choice that the Court wished to subtly equate pregnant woman seeking abortions with other medical patients. Just as the state can regulate medical practice in ways that affect other patients, so too it may control abortion, a medical procedure. It has been argued that “a state's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.” (Roe v. Wade, 410 U.S. 113, 149) Only when the concern is compelling can it infringe on a woman's liberty right to abortion. Justice
Blackmun advocated that protection of maternal health was important enough of a concern to impinge on the right to abortion after the end of the first trimester of pregnancy. This followed from the fact that until the third month of gestation, the mortality rate during childbirth is higher than during abortion. At the point where mortality during abortion becomes a significant concern, maternal health becomes a 'compelling state interest'.

According to the decision in *Roe v. Wade*, when maternal health becomes a compelling interest, the state may place qualifications on who performs abortions, how these individuals are licensed, and in what facilities they operate.

**Canadian Context**

In *Morgentaler*, the majority of the Court, except Madam Justice Wilson, did not identify a right to abortion in their analysis of section 7 of the *Charter*, rather, they relied on identifying infringements on the right to security of the person in order to strike down the 1969 abortion law. Chief Justice Dickson asserted at the outset:

> In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation. (*R. v. Morgentaler* 62 C.R. (3d) 16)

The Chief Justice made it clear that the Court, in his opinion, would not consider the 'broadest' scope of section 7, including the right to life and the right to liberty. His use of "necessary nor wise" (*R. v. Morgentaler* 62 C.R. (3d) 16) is an example of parallelism, the repetitive use of language. The connotation of this remark is clear. The Court wished to stay clear of needing to interpret the rights to life and liberty in this case. Chief Justice Dickson claimed that he chose to construct his argument on a narrow interpretation in order to avoid
an improper interpretation section 7 so early in Charter history. Clearly, this aversion to
deciding whether a right to abortion exists in the scope of section 7 was a recurring theme in
his discussion.

While explaining why the abortion law interfered with the security of the pregnant
woman he stated that the issue before the Court remains squarely on the constitutionality of
subsection 251(4).

It may well be that constitutional protection of the above interests is specific
to, and is only triggered by, the invocation of our system of criminal justice.
It must not be forgotten, however, that s. 251 of the Code, subject to subs.
(4), makes it an indictable offence for a person to procure the miscarriage
and provides a maximum sentence of two years in the case of the woman
herself, and a maximum sentence of life imprisonment in the case of another
person. Like Beetz J., I do not find it necessary to decide how s. 7 would
apply in other cases. (R. v. Morgentaler 62 C.R. (3d) 20)

Two choices in argument become clear. First, the use of the modality ‘may’ indicates
that Chief Justice Dickson did not wish to state with complete certainty that a right has been
infringed only because of the provision’s place in criminal law. But, given that the case at
hand was a criminal matter, he conveniently narrowed the scope of the issue under
consideration, namely abortion. Second, he asserted that the provision invaded the security
of the person not because a woman lost the control over important life decisions under the
law. Rather, it was because that decision was placed in the hands of a committee without regard to her own
‘wishes and aspirations’ that subsection 251(4) was in violation of the Charter.

It is interesting to note that Chief Justice Dickson concentrated on a procedural
examination of section 251(4)’s violation of fundamental justice. At the outset of his
discussion of fundamental justice, however, he claimed:
Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component (Re B.C. Motor Vehicle Act, at p. 499), I have already indicated that it is not necessary in this appeal to evaluate the substantive content of s. 251 of the Criminal Code. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions. [italics added] (R. v. Morgentaler 62 C.R. (3d) 26)

Chief Justice Dickson purposively limited his discussion of fundamental justice to the procedural consequences of section 251(4). He claimed that “it is not necessary in this appeal to evaluate the substantive content of s. 251 of the Criminal Code.” [italics added] (R. v. Morgentaler 62 C.R. (3d) 26) On the surface, the Chief Justice was saying that he could invalidate section 251(4) on procedural grounds alone. This is an example of understanding sentence meaning versus comprehending the speaker or writer’s meaning – that is, distinguishing what was said from what was meant. The denotation of his statement is that section 251 can be found unconstitutional solely on procedural grounds. Yet within the scope of his entire argument, the connotation is that he wished not to address the offending section of the Criminal Code in a substantive analysis.

The following passage further verifies this claim. Chief Justice Dickson paraphrased Justice Lamer’s (as he then was) comments in Re: B.C. Motor Vehicle Act, saying that:

... any attempt to draw a sharp line between procedure and substance would be ill-conceived. He suggested further that it would not be beneficial in Canada to allow a debate which is rooted in United States constitutional dilemmas to shape our interpretation of s. 7 (p. 498) (R. v. Morgentaler 62 C.R. (3d) 18)

The Chief Justice’s choice of words indicated his aversion towards a substantive analysis of the Criminal Code abortion provision. Implicitly referring to Roe v. Wade as “a debate rooted

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30 Justice Antonio Lamer is currently the Chief Justice of the Supreme Court of Canada.
in United States constitutional dilemmas" (R. v. Morgentaler 62 C.R. (3d) 18) implied that he would not carry out the same type of judicial examination that was used to examine the Texas abortion statutes in 1973. Moreover, he did not state that such a right would be ‘ill-advised’ in the Canadian context. Rather, he claimed that it is ‘ill-conceived’ – that the basis of such an argument, Roe v. Wade, is wrong. Lexical choices like these allow one to craftily impose one’s ideology on the reader. It was no accident that Chief Justice Dickson used these terms. The contention is that he would not look for a constitutional right to abortion.31

On the other hand, Justice Beetz, who wrote a second majority opinion, seemed to expand the scope of the right to security of person. Regarding the regulation of abortion

Justice Beetz stated that:

... the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". In my view, this standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the Canadian Charter of Rights and Freedoms at s. 7. (R. v. Morgentaler 62 C.R. (3d) 39)

Justice Beetz began his judgment stating that “the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions ... when the continuation of the pregnancy of such female person would or would be likely to endanger her life or health” (R. v. Morgentaler 62 C.R. (3d) 18) was a minimum standard entrenched in the Charter in 1982. In this passage, the life and health of the woman are at the forefront. Since he felt that section

31 One should also note that Justice Lamer was on the Law Reform Commission of Canada during its involvement in drafting the 1968 Criminal Code amendment that produced s. 251 (then s.287). Justice Lamer must have thought the law to be proper. In 1988, however, he had to consider it in its new factual milieu – in light of the Charter.
251(4) was a *minimum* right to security of the pregnant woman's person at the time of the declaration of the *Charter*; one could expect that Justice Beetz would have expanded the reproductive rights of women under the *Charter*. Justice Beetz identified the physical and psychological harm caused by the operation of the criminal law - but only to the extent that they were caused by subsection 251(4). Narrowing his focus on this subsection, Justice Beetz wrote:

"Security of the person", within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated. (*R. v. Morgentaler* 62 C.R. (3d) 39)

In this paragraph, Justice Beetz artfully narrowed the scope of conflict to abortion and criminal law. Like the Chief Justice, Justice Beetz wished to focus only on the violation of the *Charter* caused by section 251(4). That this judgment wished to highlight a technicality is evident through a cursory examination of this text. He spoke of the pregnant woman being subjected to the laws of Parliament. The intransitivity of this paragraph reinforced the notion that she is merely an object undergoing a process. In this paragraph, the pregnant woman is not the active agent; neither is the prohibited action, abortion, explicitly the subject of the passage. The focus still remains on the offending Act of Parliament, which is explicitly made the issue of contention. The security of the person right included the right of access to appropriate medical care without fear of criminal prosecution in circumstances of danger to life or health.
Like the Chief Justice, Justice Beetz found it unnecessary to address whether a right to abortion exists in the Charter. He explained that the provisions were not solely at odds with a Charter guarantee because the condition of pregnancy made her vulnerable. Justice Beetz qualified why a pregnant woman’s security of person was invaded by the Criminal Code provisions.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man’s or that woman’s security of the person. (R. v. Morgentaler 62 C.R. (3d) 39)

The abortion law offended the Charter only because the state actively intervened and because this intervention caused additional danger to the pregnant woman’s health. This subtly connotes that a pregnant woman does not have special rights under section 7 of the Charter by virtue of the fact that she is with child. This understanding of the Charter violation was central when Justice Beetz states that:

… s. 7 cannot be invoked simply because a woman’s pregnancy amounts to a medically dangerous condition. If, however, the delays occasioned by s. 251(4) of the Criminal Code result in an additional danger to the pregnant woman’s health, then the state has intervened and this intervention constitutes a violation of that woman’s security of the person. (R. v. Morgentaler 62 C.R. (3d) 54)

Justice Beetz did not claim that a liberty right was being offended in Morgentaler. It is only a criminal law that, without regard to the principles of fundamental justice, interfered with the security of person of a pregnant woman. He could not have identified a right of access to abortion because he found it “sufficient” to invalidate section 251(4) on the basis of violations to security of the person.
The scope of legitimate state interest in women's health was explored when the Court examined whether this deprivation of security of the person was in accord with the principles of fundamental justice. The issue of danger to a woman's health was the focus of both Chief Justice Dickson and Justice Beetz's respective examinations. Justice Beetz stated:

These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and that they result in additional risks to the health of pregnant women. (R. v. Morgentaler 62 C.R. (3d) 69-70)

He found that additional dangers to a woman's health, such as those caused by the requirements of the abortion provision, made these requirements 'manifestly unfair'.

Manifestly unfair requirements are those that obviously and unmistakably can be demonstrated not to be connected to the legislative purpose. Requirements that further endangered a woman's life and health could not accord with a legislative purpose of protecting a woman's health over the claims of the unborn child, as was the intent of subsection 251(4). Clearly, the Court found that protection of women's health was, and always was, a valid legislative objective; moreover, securing it takes precedence over protecting the life, or potential life of an unborn child.

Only Justice Wilson, writing for herself, identified a right of access to abortion in section 7. She maintained that:

...s. 7 encompasses more than the right to security of the person; it speaks also of the right to liberty, and (2) because security of the person may encompass more than physical and psychological security... (R. v. Morgentaler 62 C.R. (3d) 101)

Her use of the modality "may encompass" subtly attributed qualities over and above "physical and psychological security" to her definition of section 7. By using this linguistic
feature, Justice Wilson implied that a section 7 investigation should not be limited to speaking of the right to security of the person. One could say that she foreshadowed what was to come in the rest of her opinion. She believed that “[w]ith all due respect, ... the Court must tackle the primary issue first.” (R. v. Morgentaler 62 C.R. (3d) 100) She identified the primary issue as whether or not woman can be compelled by a law to carry their fetus to birth. Justice Wilson expanded the scope of conflict that the Court addressed in Morgentaler and found “in [her] view, this right [liberty], properly construed, grant[ed] the individual a degree of autonomy in making decisions of fundamental personal importance.” (R. v. Morgentaler 62 C.R. (3d) 104) Here the use of the term “properly construed” expressed the confidence in which Justice Wilson made her claim. She characterized the right of access to abortion as being a clear and legitimate right, which was found to be consistent with principles of interpretation of the Charter.

Madam Justice Wilson did not examine the offending legislation’s impact on woman’s health at length. Instead, as noted in the last chapter, she reasoned that section 251(4) took away the right to abortion services without regard for the principles of fundamental justice because it also violated the right to ‘freedom of conscience’.

In summary, two distinct issues were addressed in this analysis.32 First, the United States Supreme Court struck down the abortion statute in Texas for reasons other than those used by the Supreme Court of Canada in Morgentaler. In Roe v. Wade, the majority of the Court found a fundamental constitutional right of access to abortion services in the

32 Here again, it must be noted that the conclusions in this study are drawn from interpretations and not from observations.
penumbra of the Bill of Rights. In Morgentaler, four out of the five majority justices found no such right to abortion. Rather, they struck down the abortion provisions of the Criminal Code because they unjustly invaded the security of a woman's person. Only Madam Justice Wilson found a right to abortion rooted in the section 7 guarantee of liberty. It is interesting to note that the judges who found a right to abortion used a high level of transitive language when discussing women and their decision-making capacity. High levels of transitivity emphasize the control of the agent (Fowler 1985; Lind & O'Barr 1979). Transitivity contributes power to the subject to form relations and implies that they are active participants in decision-making. Women, the subjects of the discussion, were agents who materially affected others, instead of being objects affected by actions of others or instruments used to effect others.

Second, reliance on a conceptualization of a constitutional duty that included the 'protection of women's health' was relatively one for both Courts. Here it is necessary to invoke the concept of lexicalization; that is, how well a specific concept can be expressed in a term and to how many terms exist for that concept (Fowler 1985). It is a linguistic feature used to convey ideology. The concept of 'protection of women's health' was underlexicalized in all the abortion decisions. This is not to imply that it was not appealed to in the decisions; clearly it was the focus of discussion, especially, in Chief Justice Dickson's and Justice Beetz's opinions. Rather, underlexicalization refers to the lack of a term, or the lack of a prevalence of terms, that would neatly encode a process or concept (Fowler 1985). In this case only two terms were used: 'safeguarding the health of pregnant woman' and 'protecting the health of the pregnant woman (or the pregnant woman's health).' Vocabulary reflects the interests of a group or society. The absence of multiple terms indicates that a specific and
neatly conceptualized articulation of this interest was not a highly institutionalized value in the legal institution of either country.

**THE STATE INTEREST IN PROTECTING POTENTIAL LIFE**

**American Context**

In *Roe v. Wade*, the majority opinions examined the state's interest in protecting unborn human life. In general, government has a responsibility to safeguard the lives of its citizens. Some individuals claim that the state has a duty to interfere with access to abortion, even to proscribe the procedure. Justification for that opinion has come from the view that human life begins at conception; therefore, the state's general obligation to protect life extends prenatally. Others justify this claim using a less rigid standard. Even if one does not adopt the view that life begins at conception, the state may assert an interest in the protection of the fetus because it is at least potential life. Some proponents of these views accept that the state should allow abortions only when the mother's life would be in danger from carrying the fetus to term. In *Roe v. Wade*, the Court declares that "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." (*Roe v. Wade*, 410 U.S. 113, 162) Without commenting on when human life begins (i.e. when humans become persons), the majority of the Court in *Roe v. Wade* maintained that a state interest in protecting unborn humans needs to become compelling if it is to significantly interfere with the right to abortion services.

The Court adopted a 'logical and biological' justification for when the state interest in the fetus becomes compelling. The biological point was marked at the end of the second trimester, the point of viability. At viability, the fetus could have a 'meaningful' life outside
the mother's womb. Moreover, once *ex utero*, the state must protect the newborn from harm because it is a legal person. The Court maintained that the state has an interest in protecting the potential life of the viable fetus, because it differs from the *ex utero* viable child only in geographic location. It has reached the same stage of biologic development. The Court therefore held that the protection of life, or potential life, becomes compelling at viability. Thus, the woman’s right to abortion was not absolute with respect to the state’s interest in protecting the fetus.

Yet, in *Casey* the United States Supreme Court removed the static point of viability (at the end of the sixth month of gestation) as the standard for marking the ‘compelling’ claim of the state. They held that state interest in potential life was compelling from the outset of pregnancy. This may give some legal credence to a secular ensoulment argument. The shift in standard from ‘strict scrutiny’ to ‘undue burden’ allows for more constitutional regulation of abortion services. In order for an abortion law to be invalid, its purpose or effect must place a substantial obstacle in the path of a woman seeking an abortion before fetal viability.

**Canadian Context**

In the section 1 analysis of *Morgentaler*, it is unclear whether the majority of the Court believed that the state’s interest in the fetus took *prima facie* precedence over the health of the mother or whether the state’s interest in protecting the fetus became a pressing and substantial concern at some point during its development. Chief Justice Dickson believed that the role of the Court was to evaluate only the particular balance struck by Parliament in section 251(4). He wrote:
Nor are we required to measure the full extent of the state's interest in establishing criteria unrelated to the pregnant woman's own priorities and aspirations. What we must do is evaluate the particular balance struck by Parliament in s. 251, as it relates to the priorities and aspirations of pregnant women and the government's interests in the protection of the foetus. (R. v. Morgentaler 62 C.R. (3d) 34)

Even though he asserted that the Court did not have a duty to assess the measure of state interest in the fetus, he did maintain that the protection of fetal interests was a valid objective. From the following passage, it seems protecting fetal interests is more important than safeguarding maternal health, the other major identified objective in 251(4).

Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women as a major factor, is clearly an important governmental objective. As the Court of Appeal stated at p. 366, "the contemporary view [is] that abortion is not always socially undesirable behaviour." (R. v. Morgentaler 62 C.R. (3d) 34)

It is difficult to ascertain the true meaning of this passage. The Chief Justice may have claimed that the objective of section 251 was pressing and substantial only when assessed together with the protection of maternal health. On the other hand, by relying on the sequencing of these interests in this passage, his remarks may mean that the fetal protection interest was paramount. Within the context of Chief Justice Dickson's remarks it is difficult to separate these two interests from each other. The syntax of the last sentence of the passage added to this confusion. Chief Justice Dickson quoted the Court of Appeal noting that "the contemporary view [is] that abortion is not always socially undesirable behaviour." (R. v. Morgentaler 62 C.R. (3d) 34) Alternatively, Chief Justice Dickson could have noted that, "the contemporary view is that abortion is sometimes socially desirable." In the former structure, the idea of abortion being socially undesirable was central. Had the Chief Justice used the latter syntax one might have inferred that abortion was more desirable than not.
The deletion of “undesirable” in the alternative form would have taken the negative connotation away from the act of abortion. The usage of the former phrasing increased the validity of state’s justification for regulating abortion.

Yet, Chief Justice Dickson struck down section 251, whose intent (according to him) was to protect the state’s interest in both the fetus and the mother’s health. While he found the Criminal Code provisions unconstitutional, he still ‘left the door open’ for Parliament to regulate abortion in order to achieve that objective.

State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion. (R. v. Morgentaler 62 C.R. (3d) 35)

It would seem that fetal interests, according to Chief Justice Dickson, were not absolute. If Parliament was to legislate to advance those interests, it would be their duty to establish procedures and standards that are both clear and fair. It might be possible for Parliament to properly balance these interests against the ‘priorities and aspirations’ of pregnant women. Yet, in obiter the Chief Justice said that Parliament was justified to legislate in this area to protect its interests in the fetus; this objective is different from that which he identified in his section 1 analysis.

At times it seemed that Justice Beetz believed that the state’s interest in the fetus took prima facie precedence over the health of the mother; however, he also claimed the state’s interest in protecting the fetus only became pressing and substantial at some point during its development. He identified the protection of the state’s interest in unborn life to
be the primary goal of section 251 of the *Criminal Code*. In support of the former claim, he stated:

Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus. This is undoubtedly the objective of a rule which requires an independent verification of the practising physician’s opinion that the life or health of the pregnant woman is in danger. ... Parliament decided that it was necessary to ascertain this from a medical point of view before the law would allow the interest of the pregnant woman to indeed take precedence over that of the foetus and permit an abortion to be performed without criminal sanction. *(R. v. Morgentaler 62 C.R. (3d) 39-40)*

Not only did Justice Beetz clearly maintain that the state has an interest in the fetus, but he also found that Parliament was justified in requiring a second medical opinion before termination of pregnancy. He stated that this is a necessary condition “...before the law would allow the interest of the pregnant woman *to indeed take precedence* over that of the foetus...” [italics added] *(R. v. Morgentaler 62 C.R. (3d) 62)* His justification definitely provided the fetus *prima facie* importance over a woman’s health.

On the one hand Justice Beetz claimed that “the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law.” *(R. v. Morgentaler 62 C.R. (3d) 72)*; however, later in his judgment he spoke of the interest in fetal protection *becoming* compelling. The confusion as to how much weight he attached ‘protecting unborn human life’ began when he made the following assertion:

Assuming without deciding that a right of access to abortion can be founded upon the right to "liberty", there would be a point in time at which the state interest in the foetus would become compelling. *(R. v. Morgentaler 62 C.R. (3d) 63)*
From this claim, it would seem he believed that the state’s interest in the fetus only became compelling at some point in fetal development. According to Justice Beetz, this objective has always been compelling; hence, a requirement for a second medical opinion is always justifiable intervention. Yet, he asserted that if “a right of access to abortion [could have been] founded upon the right to ‘liberty,’” (R. v. Morgentaler 62 C.R. (3d) 63); the state’s interest in protecting the fetus would have also become compelling at some “point in time.”

Logically, these two assertions are at odds with each other. In the former case, he adopted a vitalistic view towards unborn human life; in the latter, he embraced a developmental or physicalistic approach to assess the worth of the unborn child’s life. In any event, Justice Beetz asserted without qualification that he is “of the view that the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law.” (R. v. Morgentaler 62 C.R. (3d) 72)

Madam Justice Wilson found the primary objective of section 251, the protection of the fetus, to be a “perfectly valid objective.” (R. v. Morgentaler 62 C.R. (3d) 115) She stated that the legislation,

undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman’s s. 7 right is the protection of the foetus. I think this is a perfectly valid legislative objective. (R. v. Morgentaler 62 C.R. (3d) 72)

Claiming that the protection of the fetus was a valid objective does not indicate that she believed that there was a prima facie obligation to protect it over a woman’s liberty. Rather, by adopting a developmental approach, she stated that the state objective is not always pressing and substantial. Justice Wilson relies on the “developmental progression [that] takes place in
between these two extremes;” (R. v. Morgentaler 62 C.R. (3d) 72) in her opinion “this progression has a direct bearing on the value of the foetus as potential life.” (R. v. Morgentaler 62 C.R. (3d) 72) Thus, Justice Wilson adopted the ‘lower standard’ of justification of which Justice Blackmun spoke in Roe v. Wade. She referred therefore to the developing foetus as "potential life" and to the state's interest as "the protection of potential life". (R. v. Morgentaler 62 C.R. (3d) 72) Once the fetus is viable, the state’s interest in protecting its potential life becomes pressing and substantial.

In summary, one can conclude that in the landmark abortion cases considered in this study the American and Canadian judiciaries found the state interest in protecting life or potential life to be a valid legislative objective. Analysis of the lexical choice in the judicial opinion confirms that this objective is deeply rooted in both societies. Overlexicalization of this concept confirms this inference. As opposed to underlexicalization (discussed earlier in this chapter), overlexicalization refers to the phenomenon of many terms being available in one language to express a concept. Both judiciaries used a plethora of terms to express the concept of a state that acts like a surrogate parent to protect the lives of unborn humans. The terms used included: ‘protection of human life’, ‘protection of potential human life’, ‘safeguarding the fetus’, ‘fetal interests’ and ‘protecting the fetus’. The presence of multiple terms indicates the prominence and acceptance of this concept by the respective judiciaries.

This study argues that history and legal precedent strengthened by both judicial value choices and the adoption of specific conceptualizations of constitutional concepts (identified through lexical choices and other linguistic devices) predispose policy makers to see the world in certain ways. Policy makers not limited to these ways, but these institutionalized
ideas and choices act as constraints to policy choices. The prevalence of different values presented in the landmark abortion decisions of each country influenced policy makers when they examined social policy options regarding non-therapeutic human embryo research.
DISCUSSION AND IMPLICATIONS

DISCUSSION

Human Embryo Research Policy in the United States of America

In relation to Canada, the United States adopted a lower level of state intervention in human embryo research. While in the late 1970s and early 1980s the Ethics Advisory Board needed to review all human embryo research protocols requesting federal funding, this requirement was dropped in 1993. Currently, the Republicans have attempted to stop research on human embryos by tightening the purse strings of the federal budget. In the vast majority of the states, private researchers and research institutions may still carry out human embryo research. Those state statutes that prohibit embryo research do so only because the legislation that bans fetal research is vague in its definition and not narrowly drawn. None of the states require research institutions carrying out embryo research to have special licensure.

This study claims that the concept of procreative liberty has been institutionalized in United States law and this has influenced American policy makers. The institutionalization of this value by the Courts, combined with the low legitimate level of state interest in potential life prior to embryo implantation in the uterus (i.e. pregnancy) may have controlled embryo research policy in the United States.

The analysis of the United States abortion decisions in this study suggests that a right to abortion clearly exists in the United States of America. While a majority in Casey limited
that right, one can still claim, as Robertson does, that procreative liberty has played a central role in the judiciary's understanding of the abortion issue. In these decisions, women were characterized as active, rational decision-makers. Procreative liberty, "the freedom to decide whether or not to have offspring and to control the use of one's reproductive capacity," (Robertson 1994a, 16) has been given presumptive authority in the judicial decisions. American justices have maintained that other interests limit this right only when they become compelling. According to Robertson (1994a), this value only requires that the state not interfere with the choice of procreating or refraining from procreating; the state has no duty to provide the resources to assist one in having or not having children.

The second factor that may have shaped embryo research policy in the United States is the 'constitutionally permissible' level of state interest in the pre-embryo. In Roe v. Wade, the majority held that the state's interest in protecting potential human life becomes compelling at viability (set at the end of the second trimester). In Casey, this interest was said to be compelling through pregnancy. According to the justices in Casey this allowed for more state regulation of abortion than under Roe v. Wade. However, the research on pre-embryos, the subject of this study, involves human life before pregnancy. If the state's interest in protecting potential life only begins at pregnancy, then the state has no legitimate interest in protecting pre-embryos, which have not yet been implanted in a uterus. In other words, the pre-embryo has not reached either of the developmental stages that qualify it for state protection.

This argument clearly played out in the NIH Human Embryo Research Panel's deliberations. The panel claimed, like the EAB before it, that while embryos do not have the
same moral status as infants and children they warrant serious moral considerations as a
developing form of human life (National Institutes of Health 1994; Ethics Advisory Board
1979). It based this conclusion on the embryo’s lack of developmental individualization,
lack of possibility of sentience and high mortality rate. These three developmental and
physical characteristics all change their value at around the time of implantation in the uterus
(about the fourteenth post-fertilization day).

It would seem that Robertson’s philosophical argument sheds lights on this study’s
examination of embryo research policy in the United States. The potentiality of the pre-
embryo seems to give it only symbolic moral significance in light of the United States
abortion decisions. This symbolic significance is insufficient to justify a ban on research,
which would help women exercise both their right to choose to procreate and their right to
do so safely. This reading of United States abortion decisions suggests that Republican
legislators, who wished to ban embryo research, were limited in their available and their
justified legislative means to do so. After the declaration by the EAB that IVF and embryo
transfer are ethically acceptable and that “human in vitro fertilization research without
embryo transfer” is ethically acceptable as well, an outright federal ban on this research was
not in the cards. Moreover, the contemporary state of affairs in the legal institution suggests
that such a ban may be unconstitutional (Coleman 1996). American policy makers who
wished to prevent research from being carried out on human embryos could not achieve that
objective by legislating an outright ban on human embryo research.

The only remaining policy instrument to effect regulation was money; the
Republicans could limit embryo research by not allocating federal monies to it. Under the
Reagan and Bush administrations, the Republican pro-lifer influence effectively limited federal funding of embryo research by dissolving the EAB. Without an EAB, this research could not receive federal funding since research protocols required EAB in order to be federally funded. The dissolution of the EAB created a *de facto* ban on research involving human embryos.

With the election of President Clinton to office, the Democratic Congress\(^{33}\) chose to bypass the need for the EAB. The National Institutes of Health Revitalization Act permitted the NIH to fund research protocols without the approval of the EAB (Annas et al. 1996). However, following the election of a majority of Republicans to the United States House of Representatives, control over allocations was passed to the Republicans. During the height of the budget crisis in 1996, conservative Republicans were able to force President Clinton to sign a bill that completely banned government funding of human embryo research. Those policy makers who wished to prohibit research on human embryos were able to do so by manoeuvring within the institutional constraints of the law and constitution. Control of fiscal resources was the only policy instrument that could be justifiably used to ‘regulate’ human embryo research in the United States.

**Human Embryo Research Policy in Canada**

Canadian legislators had attempted to introduce a high level of state intervention in human embryo research. The proposed legislative framework, Bill C-47, and its *Discussion Document* called for the use of criminal law to prohibit certain procedures and forms of research. Since these prohibitions would have carried stiff penalties, one could assume that

\[^{33}\text{This bill was passed in 1993, prior to the Republican domination of the House of Representatives.}\]
the government wished that the penalties would not be accepted as 'a cost of doing business'. It had also called for the establishment of a national authority that would license all facilities wishing to conduct human embryo research and would review all research protocols involving human embryos. By examining the preamble to the Bill and the justifications put forth in the Discussion Document one can discover the values that the Canadian government invoked.

This study proposes that 'the quintessential Canadian compromise' of the Morgentaler decision may have framed this policy regarding embryo research. Canadian policy makers drafted 'highly interventionist' legislation that would have invoked both regulatory and criminal powers. It seems that something similar to Richard McCormick's philosophical argument was at work here. The legislation suggests that the government identified a duty to potential human life. Four justices of the majority maintained that the protection of that interest is a valid objective of criminal law. If scientists wish to override this duty to protect, the research they proposed must be subject to national scrutiny.

The preamble and stated objectives of Bill C-47 speak of the government's duty to protect human dignity. The preamble reads:

WHEREAS the Parliament of Canada is gravely concerned about the significant threat to human dignity, the risks to human health and safety, both known and unknown, and other serious social and ethical issues posed by certain reproductive and genetic technologies.

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34 Not that Canadian policy making follows McCormick's religious and moral framework in general. Rather in this case, it seems that Canadian policymaking follows a similar line of argument.
... AND WHEREAS the Parliament of Canada recognizes the need for measures to protect and promote human dignity and equality and the best interests of children in relations to such technologies and transactions. (Canada. Speaker of the House of Commons 1996, p. 1)

Here again, the sequencing of the objectives is noteworthy. It would suggest that the primary intent is “to protect and promote human dignity and equality” in response to the grave concerns regarding “the significant threat to human dignity ... posed by certain reproductive and genetic technologies.” (Canada. Speaker of the House of Commons 1996, session 1, 17946) The stated objectives of the Bill propose the same justification for the criminalization of research on post-implantation embryos and creation of embryos solely for research purposes. One of the objectives makes reference to ‘human dignity.’ A second refers to safeguarding, or ensuring, the treatment of sperm, ova, and ex utero embryos because of their “potential to form human life.”

The claim that human embryo research policy reflects the values institutionalized in the law following Morgentaler is further supported by the introductory message in the *Discussion Document* by then Health Minister David Dingwall. Dingwall suggested that certain NRGTs make some Canadians uneasy because they challenge fundamental values. The Minister suggested that these technologies threaten “human dignity, and treat reproduction, women and children as commodities.” The order of the articulated ‘fundamental’ values suggests that the protection of human dignity is the focal concern. Dingwall alleged that:

*Opinion is divided on many of these issues, and consensus has not yet fully emerged on their appropriate place in Canadian society. However, Canadians have made it clear that they are looking to the federal government to manage these technologies in a way that protects those most affected and reflects our collective values. (Canada. Speaker of the House of Commons 1996, p. 5)*
The Minister argued that the federal government invoked Canadian values in response to a request from Canadians to protect those involved and affected by NRGTs.

Moreover, the enumerated guiding principles for this legislative framework include the “non-commercialization of reproduction and reproductive materials” and “balancing individual and collective interests.” (Canada. Speaker of the House of Commons 1996) The value of non-commercialization is justified as protection of human dignity. Yet, human dignity, or respect for persons, is referred to in the Discussion Document as being “closely related to the principle of individual autonomy.” (Canada. Speaker of the House of Commons 1996, p. 16) The government asserted:

Individuals have the right to make autonomous decisions in all aspects of their health care, including the right to decide whether or not to reproduce or, in the case of pregnant women, to make decisions regarding interventions which may affect themselves or their fetuses. Although individual autonomy is central to ethical decisions in the area of NRGTs, each individual is part of a larger society and the actions of the individual may affect that collectivity. (Canada. Speaker of the House of Commons 1996, p. 15-16)

The interesting observation here is that human dignity, which the government says is the root of respect for autonomous decision making, is itself used to limit individual autonomy within the document. The invocation of collective values, the need to strike a “balance [between] individual and collective interests” and the need “ to protect the interests of those involved, as well as those of society as a whole” (Canada. Speaker of the House of Commons 1996, p. 6-12) is used to justify federal state intervention in the NRGTs.

Finally, the Canadian government had justified the proposed ban on the creation of embryos for research purposes by invoking the common value of ‘human dignity’. In the
Discussion Document's definition of "creation of embryos for research purposes only" it explained:

Although embryo research has the potential to yield valuable information about the human condition, the "need" for embryos for research is not compelling enough to justify their creation and use solely for this purpose. This practice would commodify human embryos, which have the potential to become human beings, and undermine human dignity. (Canada. Speaker of the House of Commons 1996, p. 44)

The Canadian government has infused the human embryo with symbolic moral worth. The need to create embryos in order to carry out 'enough' research seems not to override that dignity. The repetitive use of human dignity and the positioning human dignity in a second principle of "non-commercialization" illustrates that these values are institutionalized in Canadian society. As noted in this study's discussion of ideas and institution, policy-makers appeal to widely accepted valences when trying to find consensus. Moreover, the lack of explaining the benefits of human embryo research denotes that scientific benefit is not a value that drove this policy.

While the Court maintained that protecting women's health during pregnancy was a pressing and substantial objective, the analysis suggested that the concept of female reproductive health was not highly institutionalized in the Canadian courts at the time of Morgentaler. However, earlier in this study it was claimed that if the North American governments and medical professions have condoned the practice of IVF they must be willing to conduct the necessary research to meet the aforementioned goals. If protecting a woman's reproductive health and safeguarding her life are important, why did the Canadian government wish to prohibit, or restrict human embryo research – research that could increase the efficacy of IVF and decrease the safety risks involved with fertility treatments?
While it is true that Parliament was merely striking a balance between competing interests, as it did in the 1969-abortion law, the proposed regulations would have severely restricted the amount of non-therapeutic human embryo research that could have been undertaken in Canada. The balance that the Canadian government had proposed might have curbed the necessary research to make IVF safer and more effective.

Since the concept of procreative liberty is not an institutionalized valence it can be assumed not to be a factor in Canadian science policy. This claim is made on two counts. First, John Robertson’s concept of procreative liberty is grounded on “the freedom to decide whether or not to have offspring and to control the use of one’s reproductive capacity.” At the moment no such right exists in Canada. Only Madam Justice Wilson identified such a right within the scope of the right to liberty in her Charter analysis of Morgentaler. It has been argued that the other justices writing for the majority had wished not to identify such a right. Second, while the Court based much of their argument for striking down section 251 on the harms it caused to women’s health, ‘protection of women’s health’ was only construed as a negative right, or a duty of the state not to interfere. The reading of the Morgentaler case put forward in this study suggests that the conceptualization of reproductive health put forth by numerous international groups is not yet protected as part of the rubric of “life, liberty and the security of person.” The UN ICPD identified the positive aspects of procreative liberty when they asserted that individuals should have access to “the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems.” [UN ICPD 1994, 7.2] The Report of the UN Conference on Women in Beijing (1994) declared that “the promotion of the
responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health." (s. 95) The Charter is a force that Parliament must consider and an instrument they should utilize when drafting new legislation. As a constitutional document it "authorizes the institution and institutions of government, establishes the rules of governance, and, most important, sets forth a vision to be secured through those institutions and rules." (Pilon 1992, 373) Thus, the vision that the institution of government wished to secure may have been compelled by this limited conceptualization of procreative liberty coupled with the institutionalized value of protecting potential human life.

IMPLICATIONS

This study has both methodological and political implications. The methodological implications will be addressed first.

Methodological Innovation

From a methodological standpoint, this study introduced a noteworthy technological innovation. All the data for this study, save the Discussion Document, was found via large computer databases and acquired electronically from the same database. The Canadian case law was located and retrieved via QUICKLAW; WESTlaw was used to find and retrieve the American legal material. The use of computer databases saved the researcher time both during the data collection and write-up phases of this study. Not only did this use of technology save time but it also contributed to the completeness of the data set. QUICKLAW's user interface was not as intuitive as that of its American cousin, WESTLaw. WESTLaw allows the user to enter searches in plain English. For example, one could enter
the following: “Find all Supreme Court decisions that are distinguished from Roe v. Wade on the basis of liberty interpretations.” QUICKLAW’s lack of pagination referenced to legal reporters was even more frustrating. Given its smaller market, it will take the developers at QUICKLAW more time to ‘upgrade’ the search engine to include this type of technology. This textual analysis section of this write-up was made easier since there was no need to retype the passages that were to be examined. Once the entire data set was retrieved, relevant sections of the data could be located using the word processor’s ‘Find’ function. Since data in these databases can be downloaded in ASCII, it can be directly imported into content analysis programs such as NUDIST. Other qualitative researchers who analyze large amounts of government documents should take note of the luxuries that electronic data collection offers.

Limitations

Before addressing the other implications of this study and making some general conclusions, it must be noted that this study is limited in its scope. A form of legal institutionalism was used as the theoretical underpinning of this study. By marrying historical institutionalism with Dworkin’s concept of judicial conceptualizations of rights, it was argued the differences in American and Canadian human embryo research policy might be understood through a comparative analysis of the jurisprudence of the abortion issue. It was argued that by institutionalizing these different values, the respective legal systems differentially constrained the Canadian and American policymakers who examined the question of whether the state should regulate human embryo research.

ASCII stands for the American Standard Code for Information Interchange. Data in ASCII is pure text without any formatting, save carriage returns.
The enterprise embarked on in this study can be best described as theory building. The study did not set out to verify a hypothesis. Rather, it attempted to explore the implications of the different resolutions to the legal abortion issue to a related area of policy, human embryo research. Researchers like Julia Black at the London School of Economics and Political Science have proposed similar theories of legal institutionalism (Black 1997). It was impossible in the scope of this Master’s study to analyze all the available data that could shed light on this area of policy. Until more work is done, including elite interviews with both the policy makers and Supreme Court justices in the relevant countries, the conclusions of this study will be no more than glorified hypotheses. Moreover, it would beneficial to examine all transcripts from committee hearings in the United States Congress and Canadian Parliament. Once these two items are complete, one would be able to assert the conclusions of this study with a higher degree of certainty. This exploratory study could benefit from increased investigation not only in this area but also in other policy areas.

**Policy Implications**

Both general and issue specific issues arise from this study. Government legislators and those in opposition government can discover many helpful insights into policy making from this theory of legal institutionalism. Both legislators and opposition members must understand that history, law and institutionalized values influence policy choices. Lawmakers must come to understand the power of invoking common values; therefore, in their public exhortation they should appeal to institutionalized valences. It is quite difficult to change public opinion. Instead, effective politicians should set the political agenda by setting the vocabulary of the discourse. That art form is referred to as framing. It is a method of presenting the possible contentious policies by carefully disguising them with accepted
valences and institutionalized values. Those in opposition to the government's policies (both
elected members of the House and special interest groups) should focus on uncloaking the
policies and exposing them to careful scrutiny.

Policy makers define conflicts in such a way that they manage the scope of conflict
in order to ensure policy adoption. Scope of conflict is partly defined as the definition of a
policy issue. The scope is the area over which the issue extends. It is determined by three
factors. Visibility, the first factor, is the ease with which individuals can assess the gains or
losses in any policy issue. Intensity of attachment to policy issue is sometimes determined by
what seems to be an irrational relevance. Otherwise, one can parallel different levels of
attachment with public/private distinctions. Intensity increases when the "consumption of a
good by one person detracts from the enjoyment of that good by another." Direction, the
most important factor, is based on the agenda of the individual. Individuals will be involved
in lesser conflicts, only if they are not involved with greater conflicts. Thus, Schattschneider
says that the power rests with those who have the ability to define the policy alternatives.
The ability to define alternatives lies in the choice of conflicts. One should therefore limit
the scope in a certain way to guarantee a specific set of solutions; the scope of conflict
determines its possible outcomes. In order to ensure policy adoption, people involved with
policy define conflicts in a manner that allows them to manage the scope of the conflict.
Opponents, conversely, will attempt to expand the scope of conflict. One can learn from
legal institutionalist theory that law, and the values that are incorporated into the legal
tradition, can be used as an instrument to either ensure policy adoption or to ensure that
‘offensive’ policies are not embraced.
While fiscal expenditure and regulations have traditionally been viewed as distinct policy instruments, this study has also shown that precise control of expenditure can sometime achieve ‘regulatory’ objectives. It has been suggested that the Republicans could not have used traditional regulatory instruments to prohibit embryo research in the United States. Instead, they effectively banned embryo research by restricting the federal funds allocated to it through the NIH. The following analogy will serve as a useful illustration: Sometimes one can persuade a horse not to drink from the lake by regulation. One can also persuade the horse not to drink from the lake without force, if one entices the horse with other rewards. This study has shown that sometime one can force the horse not to drink from the lake by putting a muzzle on its mouth. One should take precaution, however, when adopting this method of coercion. Horses do not like being muzzled. In other words, policy makers may have prevented embryo research from being carried out in public institutions, but nothing stops this research from going on, without subject to regulation and ethical review, in private laboratories.

Aside from the type of embryo research this study specifically addressed, the conclusions of this study have implications for human cloning. Recently, human cloning has received much attention in the world press. In February 1997, Nature reported that researchers at the Roslin Institute outside of Edinburgh had cloned a sheep (Wilmut et al. 1997). Even though they were successful in cloning this sheep, Dolly was the only sheep born of 277 attempts. While no one knows how likely cloning in animals is to succeed, the cloning of higher mammals, and eventually of humans, may become a safe and effective procedure. It is necessary to make the distinction between cloning and twinning again. In
cloning, one replaces the DNA of a new fertilized ovum of a species with the DNA of a cell from an adult of that species (even from highly specialized cells). The new developing organism will be genetically identical to the adult. Twinning refers to the practise of inducing the cleavage of a blastomere form the rest of the developing zygotic cells prior to the 16-cell stage. The single blastocyst develops simultaneously into a genetically identical organism.

In response to this possible reality, United States President Clinton instituted a ban on federal funds to support research that would lead to cloning of humans. President Clinton also instructed a Presidential Ethics Commission to recommend the possible federal actions to prevent the “abuse” of cloning. The Commission, in its letter to the President, recommended that legislation be proposed to prohibit private groups, which receive no federal monies for research, from attempting to clone humans. According to Prof. Alexander Morgan Capron, a member of the commission and professor of Law at the University of Southern California, the panel members were divided into two extremes. In an interview with the New York Times, Prof. Capron said that there “are those who stress ‘scientific and reproductive freedom,’” and “those who emphasize the ‘sanctity of life and traditional family values.” (Kolata 1997a) In light of this study, it will be interesting to see if Congress passes legislation to ban all research which aims at cloning humans rather than instituting President Clinton’s moratorium into the law books. Another question arises: How would the United States policy treat implantation for gestation and birth of an embryo that has been altered. What would be its policies regarding genetic qualities changed by germ-line ‘therapy’? Keeping with the comparative nature of this study, one needs to note that Bill C-47 would have criminalized human cloning and germ-line therapy.
The issue turns on the distinction between cloning and twinning. Cloning is a "politically dirty word." (Kolata 1997b) The recommendations from the Commission do not make the distinction. In some ways, twining does not have the same ethical implications that cloning has. Twining does not involve making a genetically identical copy of an adult organism. Rather, it is merely the artificial induction of a naturally occurring process – in humans, one that results in identical twins. Within the rubric of reproductive health, twinning would benefit women undergoing IVF treatment. Instead of being subject to highly invasive procedures like laparoscopy and to ovarian stimulants with unknown long-term effects, women could have one ovum fertilized via IVF. Clinicians could then theoretically induce multiple twinning of that fertilized ovum and place the multiple pre-embryos back into the uterus. A second question arises: If a blastocyst is twinned into two or more blastocysts, can a ‘twin’ be used for research provided that at least one potential person is preserved? Of course, this brief gleam cannot replace a full study of cloning and twinning similar to that carried out here for human embryo research policy. Central to this study, however, is whether Congress will follow the recommendations of the Commission – and if they do, whether the Supreme Court would find such legislation constitutional.

One must note that while Canada may attempt to prohibit embryo research from being carried out on her soil, it is being done elsewhere in the world. If, in 1998, the Democrats win a majority in the House of Representative and/or in the Senate, embryo research may be conducted at American publicly funded research institutions shortly afterward. While the NIH HERP has provided the NIH with a framework for reviewing research protocols, and has endorsed the ‘14-day limit/primitive streak’ on human embryo
research, the ethical underpinnings of their argument still beg many questions (Annas et al. 1996). If the United States, or Canada, finds itself in a position where it is permissible and possible for human embryo research to be conducted, policy makers must be sure that it follows appropriate ethical guidelines. For example, many ethicists, policy makers, and researchers have concluded that research should not occur on embryos after implantation and the appearance of the primitive streak occur at the fourteenth post-fertilization day (Callahan 1995; Parens 1995). Yet, does this distinction make moral sense? After all, even proponents of human embryo research assert that pre-embryos warrant serious moral considerations as a developing form of human life (National Institutes of Health 1994).

Embryo research should not be divorced from the politics of abortion. But understanding why these moral claims are important to some people and examining underlying issues – for example, why the possible commodification of human reproductive capacity is an important concern – truly inclusive and enlightened ethical discussions may ensue.
CONCLUSION

This exploratory study examined why Canada and the United States of America had adopted different policies regarding research on human embryos. It was contended that a possible explanation rests in an examination of the history and the values expressed in the respective landmark abortion decisions. The benefits of conducting research on embryos and the concerns that such research elicits were explicated; the moral status of the pre-embryo and its biological development were outlined. The relevant cases and policy documents were analyzed by wedding a neo-institutional approach to policy analysis with Dworkin's theory of judicial review. While a right to abortion exists in United States, the Canadian judiciary has not identified such a right. Moreover, 'protection of (potential) human life' was found to be a highly institutionalized value in both countries; 'protection of reproductive health' was not as highly institutionalized. It is concluded that these differences may have differentially constrained the policymakers when contemplating human embryo research options. This exploratory study could benefit from increased investigation not only in this area but also in other policy areas.
APPENDICIES


(Data for the charts in Appendix A was taken from Nevitte et al. (1993) “The American Abortion Controversy: Lessons from Cross-National Evidence. PLS, 12(1) 19-30.)
ATTITUDES TOWARDS ABORTION: GALLUP US AND CANADA, 1992

% Approval

Always Legal
Legal in circumstances
Always Illegal

US
CAN
ATTITUDES TOWARDS ABORTION: US AND CANADIAN RESPONSES TO FOUR ABORTION QUESTIONS

% approve

Mother's Health
Handicapped
Unmarried
Unwanted

APPENDIX B: SECTION 251 OF THE CRIMINAL CODE

251. (1) Every one 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.

(4) Subsections (1) and (2) do not apply to

(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.

(5) The Minister of Health of a province may by order

(a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(c) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or
(b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection "accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;
"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(a) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,
(a.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,
(b) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,
(c) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and
(d) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, 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.

(7) 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.
APPENDIX C: QUESTIONS OF LAW IN R. V. MORGENTALER [1988]

The following questions were posed to the Supreme Court in R. V. Morgentaler [1988] 1 S.C.R 30:

1. Does section 251 of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms?

2. If section 251 of the Criminal Code of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms, is s. 251 justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

3. Is section 251 of the Criminal Code of Canada ultra vires the Parliament of Canada?

4. Does section 251 of the Criminal Code of Canada violate s. 96 of the Constitution Act, 1867?

5. Does section 251 of the Criminal Code of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

6. Do sections 605 and 610(3) of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d), 11(f), 11(h) and 24(1) of the Canadian Charter of Rights and Freedoms?

7. If sections 605 and 610(3) of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d), 11(f), 11(h) and 24(1) of the Canadian Charter of Rights and Freedoms, are ss. 605 and 610(3) justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?
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