Lawbreaking as Lawmaking: Redefining Women's Everyday Resistances to Injustice

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Table of Contents

Dedication

This thesis is dedicated to my greatest loves, the ones who have taught me to feel, think, listen, see, speak, dream and resist with my heart: my son Moshe Itzhak Harboun and my parents Annette and Meir Harboun.

Thank you all for giving birth to me.

הדוקטוראט הזה מוקדש לאהבות הכי גדולות בחיי, אלה שלימדו אותי לחוש, לחשוב, להקשיב, לראות, לדבר, לחלום ולהתנגד עם הלב: הבן שלי, משה יצחק חרבון, שליט״א, והוריי, אנט ומאיר חרבון, שליט״א.

תודה לכן/ם על שילדתן/ם אותי.

תודה לבורא עולם, הקדוש ברוך – הוא, שמסוכך עלינו ושפורש על כולנו את כנפי שכינתו, ועוטה אותנו באמונה.
תודה לך אבא שבמרומים.

״הם שנים חלמו על בית ועכשיו זו המציאות
גם בבית זה קורה, נמשכת הגלות [.....]
הם עומדים מול הבניין,
הם עומדים מול לב של אבן
מחכים שתיפתח הדלת מבפנים.״ (עבודה שחורה/אהוד בנאי).

“For years they dreamt of a home,
And now it is the reality,
Even at home it happens,
Exile still continues [.....]
They stand in front of a building,
They stand in front of heart made of stone,
Waiting for the door to open from the inside.” (Ehud Banai/Black Labour)

Abstract

In this thesis, I offer a new understanding of lawbreaking, particularly when committed by women belonging to racially and/or ethnically oppressed minorities, and especially in cases that do not fall within the traditional criteria of civil disobedience. I interpret their lawbreaking as a legitimate manifestation of resistance, aimed at correcting injustices, and as a viable form of lawmaking, capable of jurisgenerating, to use Robert Cover's term: creating legal meanings and mobilizing socio-legal change and reconciliation. Shifting the focus from the big, 'meta' and 'heroic' stories of mass disobedience committed in public by politically motivated people, my thesis suggests paying attention to the daily, 'small', private, and secret forms of 'everyday resistances' committed by women. These cases could be as intimate and covert as a woman putting makeup on her face under a burqa. Using the body as a legal site of defiance, the thesis particularly focuses on two contexts in which it explores women's resistance and agency: a) Lawbreaking and resistance through land in Israel, namely squatting in public housing by Mizrahi women in Israel; and b) Resistance 'through the womb,' by women having abortions in Canada, pre-and post-*Morgentaler*. Taking in particular a critical legal pluralist approach, shifting and deepening the focus from state law to society to the individual herself, the thesis focuses on women's jurisgenerative capacity to both transform state law, and/or create their own laws. Lawmaking is demonopolized, so that the state is not the sole 'producer', and 'the turning point' in the creation of legal meanings. However, unlike other critical approaches to law, the thesis does not offer various interpretations to law and legal phenomena from within state law, offering the theoretical and analytical means for interpreting the meaning of women's voice and agency <u>in</u>, or <u>about</u>, the law. Rather, the thesis approaches women's acts <u>as law/s</u>, as legal narratives in and of themselves, capable of creating legal meanings, and changing and altering the meaning of what we perceive as law.

Résumé

Dans cette thèse, je propose une nouvelle définition de la transgression des lois, surtout lorsqu'il s'agit de femmes appartenant à des minorités opprimées, et en particulier dans les cas qui ne relèvent pas des critères traditionnels de désobéissance civile. J'interprète leurs transgressions comme une manifestation légitime de résistance visant à corriger des injustices. Celles-ci pourraient donc être une forme viable de législation, capable de « jurisgenerate », citant le terme de Robert Cover, c'est-à-dire créer des significations juridiques et mobiliser le changement socio-juridique et la réconciliation. Cherchant à réorienter l'aspect juridique mettant en évidence les actes «méta» et « héroïques » publics de désobéissance commis par des personnes motivées politiquement, ma thèse suggère plutôt de tourner le regard vers des «résistances quotidiennes», mineures, invisible, privées, et secrètes des femmesqui échappent à la définition classique de la désobéissance civile. Un exemple d'un tel cas pourrait être aussi intime et discret qu'une femme portant du maquillage sur son visage sous une burqa.

Utilisant le corps humain comme un site légal de défi, ma thèse se concentre sur deux contextes dans lesquels j'explore la résistance des femmes et leur rôle: a) La violation des lois et la résistance en utilisant les terres en Israël, à savoir les squats dans les logements sociaux par les femmes Mizrahis (des juives originaires de pays arabes ou musulmans); et b) La résistance «via l'utérus» par des femmes ayant subi un avortement au Canada, avant et après Morgentaler.

Prenant en particulier une approche pluraliste juridique critique, en déplaçant et en approfondissant le droit public vers la société, et ensuite vers la femme elle-même, cette thèse se concentre sur la capacité des femmes à transformer le droit des États et/ou à créer leurs propres lois. La législation est dé-monopolisée, de sorte que l'État ne soit pas le seul «producteur» et «agent décisif» dans la création de significations juridiques. Cependant, contrairement à d'autres approches critiques du droit, la thèse n'offre pas différentes interprétations du droit et des phénomènes juridiques en droit

étatique, offrant des moyens théoriques et analytiques d'interpréter le sens de la voix et de la participation des femmes dans la loi. La thèse aborde plutôt les actes des femmes comme des lois, des récits juridiques en soi, capables de créer des significations juridiques et de modifier le sens de ce que nous percevons comme étant la loi.

Preface

In September 2014, after a long and hard process of reproductive treatments, I was informed that the IVF was successful, and that I was pregnant with my beloved son. Three months later, I was put on strict medical bedrest due to high medical risks associated with my pregnancy. Except for lying in bed, I was only allowed to stand for less than 15 minutes a day. I was not allowed to prepare food for myself nor perform the simplest of chores without the help of others. I was totally incapacitated, stripped of my mobility, control and independence. Having no family or close network, and during one of Montreal's longest and hardest winters, I was dependent on a few people who agreed to help. I was struck by fear and anxiety. I felt I lost my freedom, dignity and control.

By the time I was put on bedrest, I had already written 4 chapters for my dissertation, and the fifth was on its way. I was planning to edit the forth chapter on abortion, and embark on reading for and writing the sixth chapter, in which I critically discuss acts of squatting and abortion, two of the forms of lawbreaking discussed in this thesis. It was also the stage where I was supposed to start reading women's stories of abortion.

These strong and harrowing stories, mostly prior to the legalization of abortion in Canada in 1989, reveal horrific narratives of women who were willing go through tremendous pain, agony, humiliation and even death, rather than to remain pregnant and give birth. These stories reveal the magnitude of fear, shame and guilt that women have experienced, and the horrific obstacles they had to go through before, during and after abortion.

I found this process to be excruciating and painful - entirely impossible in fact. I was unable to read these stories, and could not get myself to write. How could I write about a woman's right to abortion, terminating with her unwanted pregnancy, whilst I was trying to protect the life of my baby? Whilst all I wanted was to become a mother? How can I refer to the fetus inside me as life

and baby whilst naming it as 'it' and fetus throughout the thesis? Can you advocate the right to abortion whilst wanting to be a mother? Does one exclude the other?

I fell into the trap created by the polarizing rhetoric of abortion, framing abortion in terms of woman's right to choose versus fetus' right to life. Pro-choice rhetoric, on the one hand, is relatively apologetic, attempting to distance itself from the rhetoric of pro-abortion, fearing it will be associated with "advocat[ing…] abortion over birth.[1] Anti-choice discourse, on the other hand, associates abortion with fear, shame and guilt, and instills these feelings into the notion of rights. Feeling guilt and fear is exactly what anti-choice activists aim for and they have succeeded.

I was trapped between two opposing extremes, feeling apologetic, guilty and shameful not just for advocating the right to abortion and the termination of unwanted pregnancies, but also for wanting to become a mother. My fears and guilt were generated by either side of the abortion conflict: I experienced guilt for wanting a child, and guilt for advocating the right to terminate a pregnancy when I am trying to protect my own. This, in turn, generated more guilt, feeling as if I was betraying my deep commitment to gender equality in general and the right to abortion in particular. These feelings trap women into what are perceived as unreconciled feelings, whereby fighting for reproductive justice necessarily means not wanting to have children, and that not wanting children should be condemned. It is a reductionist paradigm whereby experiencing pain and sadness necessarily means guilt, and guilt is necessarily indicative that abortion is wrong.

Indeed, I felt guilty, but reminded myself that it was the product of oppressive mechanisms indoctrinating me into guilt. It was in bed, incapacitated, that I came to realize and experience with, through and in my own body what I argue in this thesis – that having complex feelings, for example in the context of abortions, which are in and of themselves the product of socializing

[1] See: Joyce Arthur, "What Pro-choice Really Means" (Pro-choice Action Network, 2000) online: <http://www.prochoiceactionnetwork-canada.org/articles/realchoice.shtml> quoted by Laura Gillespie, "Expanding the Reproductive Justice Lexicon: A Case for the Label Pro-abortion" in Shannon Stettner, ed, *Without Apology: Writings on Abortion in Canada* (Edmonton: Athabasca University Press, 2016) 201 at 202.

indoctrinations, is not indicative of holding anti-choice views. And, further, that feelings of guilt and sadness are not the opposite of women's agency and activism.

Whilst struggling with sadness and guilt, I was also forced to become my own advocate, and litigate my day-to-day life in almost every aspect. Obstacles were everywhere. I was overwhelmed and felt that I was stripped of control. And yet, even when incapacitated and extremely lonely, like the women of this thesis, I fought back to regain my control over my body and life, and within my physical constraints I slowly regained control over decision-making. I resisted every step of the way, and with my small smart phone in bed I had to create solutions. These were everyday resistances, resisting compliance with the systemic obstacles that kept coming my way, obliging me to create change, and use language that engaged everyone involved in the process.

I thought of all the women who fight to re/gain control over their bodies and lives, and struggle everyday to get what they need and want. Women who experience hardship, destitution and despair, and who resist and break the law everyday, each in her unique and special way, in private, at home, in their beds, in, through and with their bodies, isolated and lonely, away from the public sphere, quietly and covertly. Women who are willing to die to get an abortion, and those like me who are willing to risk their physical and mental health and also their career to become single mothers, and stay in bed for months alone. Women who create languages of change, which I interpret as acts of law/s-making. Quiet resistances, and loud stories.

It is these women's daily, 'small', private, and secret forms of 'everyday resistances' and lawbreaking, creating legal meanings and generating laws in their beds, through, in and with their bodies that are the subject of this thesis. These notions of re/gaining control, decision-making and self-determination, creating solutions and generating socio-legal changes, despite and with isolation, are at the heart of this thesis. And it is for these women who have inspired my life and research that this thesis is dedicated.

Acknowledgments

First, I want to thank the women of this world, the women I worked with, women I met along the way, women I read about, listened to, and saw, and the women I will never meet, women of many colours, genders, cultures, sizes, ages, ethnicities, religions, sexes, nationalities and abilities. Women who have been and still are resisting against all forms of misogyny, whether at home and/or in the public sphere, whether alone or whether as a collective, whether living in 'free' democracies or under the shadows of an atrocious tyrant. Women who fight against transparency and silence, paving the way to visibility and recognition with their own lives. Women creating languages of hope for other women to enjoy equality and dignity.

I was fortunate to work with powerful and empowering women who taught me about humility and solidarity. Women whose 'small' and 'quiet' acts of resistance and lawbreaking have the magnitude and effect of sound of the fluttering wings of one tiny butterfly, changing the entire world. Thank you, for changing my world, and creating with, in and through your bodies platforms for change, so that women like me could later verbalize and theorize our sufferings and joys into words.

I wish to thank my doctoral supervisor, Prof. Shauna Van Praagh, for her insightful, profound and meaningful supervision and mentorship. I could not have asked for a better teacher and mentor to be part of this long journey. Writing about two controversial cases, land in Israel and abortion in Canada, you provided me with the safe and sheltering environment necessary for conducting rigorous and serious research. With your perceptive intellectual rigor, you could read between the lines, many lines, I wrote in the process, and detect what I wanted to say but did not write, or what I did end up writing but did not want to. You helped me to sharpen my thoughts and ask the hardest questions throughout the process. At the same time, with your remarkable kindness and calmness you were there to listen, guide, encourage and push forward allowing me the intellectual and

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Your concern for me, and your constant care and love are beyond words. Your support has always sustained me. This doctorate is for you, my beloved parents, for never ceasing to fight for my right to dream. Thank you Maman and Papa for being my wind, earth, water and fire.

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This doctorate is mostly dedicated to my son Moshe Itzhak Harboun. My life. You have taught me so much, and no one word can describe the depth of what you have brought to my life. You have allowed me to re-appreciate things such as the colors of leaves, and the sound of snow. Named after your great-grandfathers, Moshe Ben-Naim and Itzhak Harboun, and after Moshe Rabeinu (Moses our Teacher) and Itzhak the son of Jacob, you carry a legacy of resistance. You are my own ‘private’ Moshe, leading me to an oasis after more than 40 years in the dessert.

You are the one who gave birth to me.

Todda Rabba HaKadosh Baruch Hu, Baruch Shemo, for sheltering me with your sacred wings of faith. Of Emuna.

Thank you all, my Mizrahi sisters and brothers in Israel and beyond who are still looking for a home.

Introduction

In 2001, shortly after the invasion of Afghanistan, I was introduced to the story of the Revolutionary Association of the Women of Afghanistan (RAWA). RAWA is an organization founded and run by courageous women who, while risking their lives, resisted the Taliban regime by covertly documenting its brutality and providing what they were banned and deprived from as women, for example, medical treatment and education.[1]

In the wake of the events in Afghanistan, a documentary entitled "Beneath the Veil" was made by Saira Shah, a renowned Afghan-English film-maker.[2] The documentary, made before the invasion of Afghanistan, was filmed mostly undercover, using a hidden camera. Dressed in a burqa and risking her own life, Saira documented the hardship and terror inflicted on Afghans by the Taliban regime. In particular, her film offered a rare and shocking opportunity to expose the lives of oppressed Afghan women, especially by focusing on the covert and clandestine activities of RAWA. These "highly political, left-wing Afghan feminists", said Saira, "determined to fight for human rights in a country where women have been forced under the veil", were "everything the Taliban hate[d]".[3] Like various other political groups around the world, these women have reversed some of the means used for their oppression to their own advantage[4]: they "manipulated"

[1] For further reading on RAWA, see their Website: online: RAWA.org <http://www.rawa.org/index.php>

[2] See: Saira Shah, "Beneath the Veil: The Taliban's Harsh Rule of Afghanistan" (2001), online: <https://topdocumentaryfilms.com/dispatches-beneath-the-veil/> (Last visited: 30.8.2018) [Saira Shah, "Beneath the Veil"]. This movie was aired on CNN on August 26, 2001. Saira has also made other well-known movies such as Unholy War (2001). It is important to note here that it is commonplace in academic writing to refer to authors by mentioning their surnames. However, using this gender-blindness/'neutrality'-based praxis usually results in concealing the gender dimension of the author herself. Therefore, being a feminist legal theorist, this thesis will refer women writers either by their forename or full name, giving visibility to their gender.

[3] *Ibid.*

[4] See for example Queer Theory, which appropriated the word "Queer", the same name that was/is used for degrading and demeaning gays. This praxis of appropriation made a revertive, and in Judith Butler's words "performative", use of that name, deconstructing and reversing its 'original' meaning, and, thus, using it as a source of reaffirmation and pride. For further reading on Judith Butler's notion of "performance", See: Judith Butler, Butler, Judith. "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" (1988) 40:4 Theatre Journal 519.

the oppressive nature of the burqa, and used it to carry their "hidden cameras as their most powerful weapon",[5] depicting and revealing the crimes against humanity committed by the Taliban.

As a young lawyer engaged in representing underprivileged minorities in Israel at the time - particularly Mizrahi (Jews from Arab and/or Muslim countries) and Palestinian women - I found this film compelling. What I found most striking, however, in particular were two scenes. In the first, Saira was taken by RAWA "to see their riskiest activity: not a bomb factory or undercover newspaper, just a class for girls."[6] Since it was forbidden for women to get education beyond the age of 12 *"[e]very woman in the room [was] breaking the law".*[7] In the second scene, Saira was invited to what she called "the most subversive place of all",[8] a secret beauty parlor. Despite the risk of being imprisoned, women insisted on painting their nails and faces. What might have seemed trivial for other women around the world - and even as a sign of complying with patriarchy - items such as makeup and nail polish had different meanings for these women. For them, said the owner of the beauty parlor, it was *"a form of resistance".*[9] It was their way of holding, as Saira said, "on to their dignity".[10]

These two notions of breaking the law and resistance made a deep impression on me and made me think about acts of resistance and civil disobedience in Western jurisdictions whereby women are relatively, yet not entirely, freer than their Afghan sisters. I started reflecting on my clients, most of whom were Mizrahi and Palestinian women engaged in various forms of lawbreaking, from stealing food, water and electricity, to refusing to send their children to school, and refusing to pay rent or debts, to squatting in public housing, to name only a few examples. Similar to the Afghan women's acts, these were small cases of invisible and unknown women whose acts of lawbreaking

[5] See: Saira Shah, "Beneath the Veil", *supra* note 2.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*

seemed to be facially small and insignificant, not involving any great legal doctrines, but who, nevertheless, appeared to welcome disproportionately severe sanctions if and when caught. The law was sympathetic to neither these acts, perceiving them as mere acts of crime, nor the women involved, regarding them as ordinary criminals at best acting out of poverty, necessity or despair.

Years later, whilst at Yale Law School, reading about abortions in the US, and focusing primarily on *Roe v. Wade*,[11] I came across the story of 'Jane'. 'Jane' is the story of American women in the 1960s who were engaged in helping other women to procure illegal abortions (that is, prior to *Roe v. Wade*). During this era, some groups of women formed 'referral services', which referred pregnant women who wished to terminate their pregnancies to physicians. One of these groups was 'The Service' also known as 'Jane'. What was important was that these women, deploying 'intimate' and 'secret' forms of lawbreaking, had profound impacts on the American struggle for legalizing abortion. They created a well-functioning movement that consisted of committed women, gained popularity and reputation amongst many women who wanted to volunteer, and deeply influenced other women, both movement volunteers and the women who went through their abortion services. More importantly, by putting emphasis on their feminist politicization and theoretization, they located abortions within the larger context of women's liberation "and not as either a population question or a medical problem."[12]

It is these notions of private, covert and invisible lawbreaking and resistance that are the subject of this thesis.

[11] *Roe v. Wade*, 410 U.S. 113 (1973)

[12] See: Laura Kaplan, *The story of Jane: The Legendary Underground Feminist Abortion Service* (Chicago: University of Chicago Press, 1995) at 16. See also: Laura Kaplan, "Beyond Safe and Legal: The Lessons of Jane" in Rickie Solinger, ed, *Abortion Wars: A Half Century of Struggle, 1950-2000* (Berkeley & LA, CA: California University Press, 1998) at 33, 35-38.

1. Overview of the Underlying Argument

In this thesis, I offer a new understanding of lawbreaking, particularly when committed by women belonging to racially and/or ethnically oppressed minorities, and especially in cases that do not fall within the traditional criteria of civil disobedience. I interpret their lawbreaking as a legitimate manifestation of resistance, aimed at correcting injustices, and as a viable form of lawmaking, capable of jurisgenerating, to use Robert Cover's term: creating legal meanings and mobilizing socio-legal change and reconciliation. Focusing on the hermeneutics and language of lawbreaking, I argue that it is a language that reflects deep social meanings, and narratives of communities, generating dynamic processes, whereby lawbreakers can be perceived as participants in creating legal meanings.

Lawrence Friedman wrote about the importance of shifting the legal focus from "the dramatic, the intellectual high jinks on center stage, the great cases and great men" to the "day-to-day happenings … of small events, each one trivial in itself".[13] Shifting the legal focus away from the big, 'meta' and 'heroic' stories of mass disobedience committed in public by politically motivated people, I concentrate on the daily, 'small', private, and secret forms of 'everyday resistances' committed by women. These cases could be as intimate and covert as a woman putting makeup on her face under a burqa.

Using the body as a site of defiance, I focus on two contexts in which to explore women's resistance and agency: a) lawbreaking and resistance through land in Israel, namely squatting in public housing by Mizrahi women; and b) resistance 'through the womb,' namely abortion in North America, particularly in Canada. In terms of a), Mizrahis are Jews from Arab and/or Muslim countries who once brought to Israel have endured, and continue to endure, institutionalized discrimination by the dominant and hegemonic community of European (Ashkenazi) Jews. This

[13] See: Lawrence M Friedman, "American Legal History: Past and Present" (1984) 34 J Legal Educ 563 at 566 [Lawrence Friedman, "American Legal History"].

is a fascinating and an ongoing phenomenon with which I have experience as a student, an advocate and a representative. These are Mizrahi single mothers suffering from poverty who break and violate both the Israeli penal code and the Israeli Property Land Act, and take unlawful possession of, and squat in, vacant public houses. These women are considered trespassers and 'invaders', who have taken to unlawfully using over public property belonging to the State, and illegally occupying it without any formal legal entitlement. They are therefore, soon evicted either by court order or through mechanisms of 'self-help'.[14]

In terms of b), the 'official' Canadian story of abortion focuses most invariably on the story of Dr. Henry Morgentaler, who performed illegal abortions, and on his struggle for legalizing abortions eventually leading to the historic Supreme Court decision in *R v. Morgentaler,*[15] legalizing abortions by the nullification of Section 251 of the Criminal Code. I argue that despite the considerable growth in their number and activism, organized and politicized feminists and a gender-based discourse were relatively marginal and passive compared to the active, dominating and central role played by male doctors, such as Dr. Morgentaler, advancing a medicalized discourse. Even when heard, feminists were not listened to. Their voices were discarded. It was a relatively 'one man show'. Women were excluded from participating in formulating the legal language of abortion. I, however, shift the gaze to the 'unofficial' story of abortion in Canada, and focus on the individual, 'ordinary' women themselves, particularly those women having abortions. These two contexts of private forms of resistance – Mizrahi women squatters in Israel and Canadian women having abortions – are regarded as mere crimes, and not as forms of legitimate civil disobedience. Based on the supremacy of the rule of law, state law is committed to preserving order, and preventing the anarchy, chaos and lawlessness usually associated with lawbreaking.

[14] Land Law 5729-1967, Sections 18-19.
[15] See: *R. v. Morgentaler,* [1988] 1 SCR 30 [*Morgentaler*].

State law, then, "cannot justify the violation of the law".[16] Lawbreaking cannot be tolerated within the positivist paradigm of state law unless it falls within the criteria of civil disobedience.

Despite conceptual variations in the scope of its definition, it is still possible to identify some core themes that are associated with civil disobedience, and to draw a general 'formula' that, for the purpose of this thesis, can be presented as follows: for an act to qualify as civil disobedience it should be non-violent, overt, marked by openness and public visibility and rooted in deep political awareness and consciousness, and be accompanied by a willingness to bear the consequences of disobedience, such as arrests, criminal charges and convictions. As will be discussed further in *Chapter 1,* the acts falling within these criteria are in and of themselves 'big' and open acts, 'heroic' stories of mass resistance committed in public by politically involved people, motivated by greater moral and political causes that may be justified in challenging, and eventually repudiating, unjust laws or policies. Examples of such acts are large demonstrations, rallies, and sitting-in.

Acts of lawbreaking are perceived as a threat to law's order and stability, and above all to the integrity of the rule of law. They jeopardize law as a distinctive entity, separate from the 'chaos' of society. The theory of civil disobedience and its foundational criteria are the means by which state law can mitigate and minimize the inevitable infringement of the rule of law entailed in acts of disobedience. It accommodates illegality within the confines of the law's own premise of rule of law. Requiring openness, for example, could be interpreted as its role in ascertaining the state law's superiority, and preserving its ability to monitor and surveil society at all times, insuring respect and fidelity to law and the state. State law's legitimacy and centrality remain intact.

Socio-legal questions and phenomena, especially in cases involving lawbreaking, are 'judged' in reference to state law, observing whether the act of lawbreaking involved is committed within the

[16] See: Carl Cohen, "Civil Disobedience and the Law" (1966) 21 Rutgers L Rev 1 at 7.

premise of state law, acknowledging its superiority and demonstrating fidelity to it. Using Gunther Teubner's perceptive words, socio-legal phenomena are 'juridified'.[17] In order to explain legal phenomena or analyze 'problematizations', such as lawbreaking, in ways that ensure and reassure state law's centrality, legal positivism, using Emanuel Melissaris' words, "offer[s] tools for explaining the world and to which the world *must fit"*.[18] That is, legal positivism encodes realities and experiences into fixed categories and constructs, 'formulas' and definitions. The theory of civil disobedience is one such 'tool' for approaching and explaining lawbreaking, and the *only* 'tool' for 'translating' such defiance as acts of legitimate and justifiable resistance.

The theory of civil disobedience, then, sets forth the very specific and limited cases in which certain criminal, but nevertheless justifiable, acts can be tolerated by state law, not attracting the same legal condemnation that usually accompanies 'ordinary' lawbreakers. In turn, these acts can be conceptualized as a form of legitimate resistance, capable of creating legal meanings.

Any engagement with state law is institutionalized through state-channeled media, such as the courts and the legislature. State law is characterized by 'instrumentalism' – lawmaking and legal processes are monopolized by the state as the sole 'producer', and 'the turning point' in the creation of legal meanings. Legal knowledge and the sources of state law are official state-based sources, such as statutes. Their language is formal and professional. In this way, 'ordinary' people's location vis-à-vis, and engagement with, state law is external, characterized by professionalization, and portrayed as one-way and one-dimensional, hierarchical, and instrumentalist.

The sole actors participating in the process of lawmaking are state officials operating within the confines of the state. Their only means to make or change laws are the legal institutions of, and

[17] See: Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 Cardozo Law Rev 1443 at 1455 [Gunther Teubner, "The Two Faces of Janus"].
[18] See: Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Soc & Leg Stud 57 at 64 [Emmanuel Melissaris, "The More the Merrier?"]. Emphasis added.

created by, the state. Legal processes and lawmaking, then, are the sole product of state institutions and professionals, professing the language of state law. Non-state actors, especially ones breaking the law, can mobilize legal change, provided that their acts can be either 'legalized' by falling into the criteria of civil disobedience, or 'translated' by state officials, culminating in and leading to, again, state legal institutions.

Unless it falls within the scope of civil disobedience, lawbreaking is not a legitimate means for challenging state law, and lawbreakers are not considered to have any viable participatory role in this process. Nevertheless, even when falling within the scope of civil disobedience, the only means by which lawbreaking and lawbreakers could be understood to have a viable role in the process of lawmaking, is when the acts in question can be 'translated' into a 'professional' and feasible legal formula, 'legalizing' their voice, to which state legal institutions, legislative and adjudicative, could respond. Otherwise lawbreakers cannot be understood to be creating any legal processes. They may have a part in mobilizing legal processes, and may even be significant participants in generating them, however, it is only through state law institutions that these processes can receive the status of a law.

Civil disobedience is indeed an important tool for expressing one's dissatisfaction with injustices and inequalities. Yet, as this thesis elaborates, the current definition of civil disobedience is limited and androcentric in nature, reflecting narrow conceptions of justice, and thus cannot fully address other forms of lawbreaking, especially when committed by women, that do not fall within its somewhat heroic criteria. It is defined in a way that excludes certain forms of lawbreaking, especially when committed by women, approaching them as mere manifestations of crimes, or at best as acts motivated by despair, necessity and poverty, instead of approaching them as expressions against despair, necessity and poverty.

Mizrahi women squatters and Canadian women having abortions do not comply with the current definition of civil disobedience. They act covertly, in silence, alone. They seem not to be motivated by deep political convictions, and they strive to find solutions to their own 'private' problems, not appealing to the majority's sense of justice.

This thesis, however, questions this positivist state law 'totalitarianism', or, in Franz Von Benda-Beckmann's words "conceptual hegemony",[19] de-monopolizing and decolonizing its hierarchical exclusivity as the sole standpoint. The thesis argues that this positivist state of law does not and cannot explain these acts of lawbreaking. Positivism oversimplifies these acts, trivializing their particularities and contexts, and thus misses the richness embedded in them. It insists on order and stability, trying to control the 'chaotic' and 'messy' space by imposing uniformity, exclusivity and theoretical absolutism and abstractionism.

Instead, in order to reveal the marvels of these acts, this thesis shifts the focus from the *big* to the *'small',* the 'broken', unofficial and 'mundane' everyday happenings. It adopts various critical, inductive and contextual approaches, and employs different tools and methods to approach socio-legal phenomena, ones referred to in *Chapter 4* as *observation* of and *attentiveness* to everything that happens in daily life. In line with Eugene Ehrlich's concept of 'living law'[20] discussed in *Chapter 4,* this is a contextual, holistic and inclusive approach that puts real life at the center, placing it on an ongoing historical continuum that emphasizes the correlation between past and present, and reinforces the interconnectedness of everyday occurrences. Following Ehrlich, the key to understand the present, and the present state of the law in particular, lies in the past.[21] The acts of lawbreaking, then, should be put into a wide past context, and be explained as a response and in relation to this *past.*

[19] See: Franz Von Benda-Beckmann, "Who's Afraid of Legal Pluralism" (2013) 34:47 J Legal Pluralism 37 at 41.
[20] See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick, NJ: Transaction Publishers, 2002) [Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*].
[21] *Ibid* at 504.

Following critical approaches, I reverse the focus of this thesis from an internal conception of state law, separate from society, to society itself, engaged in dialectic and mutual relations with state law. Reversing the point of view from the positivist internal workings of state law, I look at state law from the internal vantage point of society itself.

Taking in particular a critical legal pluralist approach, shifting and deepening the focus from state law to society to the individual herself, I shift the focus even further internally, away from state law, to the legal meanings, discourses and processes, and law or laws created in and by society itself. And I focus on individuals and not on organizations. The focus, then, is on communities and individuals and their jurisgenerative capacity to both transform state law, and/or create their own laws. Lawmaking and legal processes are demonopolized, so that the state is not the sole 'producer', and 'the turning point' in the creation of legal meanings.

However, unlike other critical approaches to law, I do not offer various interpretations to law and legal phenomena from within state law, offering the theoretical and analytical means for interpreting the meaning of women's voice and agency in, or about, the law. This thesis, then, is not an approach in or about law. It takes a broad approach and does not interpret the voice, acts and agency of the women lawbreakers vis-à-vis the law, receiving new meanings in or about law. Rather, it approaches them as law/s; as legal narratives in and of themselves, capable of creating legal meanings, and changing and altering the meaning of what we perceive as law. They could, but do not necessarily have to culminate in, changing state law, in order to be understood as law. These are not external sites, usually referred to 'extra-legal', incidental or secondary to the concept of law, but are rather legal, laws in and of themselves. I shift the focus from a singular and hierarchical state law, 'allowing' 'external' 'folk' or 'customary' laws at best, or customs at worst, to exist under its rule, to the 'external' sources, people and sites themselves, and approach law/s

from their point of view. State law is only but one possible legal site, devoid of exclusivity and disarmed of its monopoly over the point of view.

I shift the gaze from the closed legal system[22] to these women, considered as viable participants in the process of lawmaking, and to the language/s, the legal meaning/s, the legal discourse/s produced and generated in the course of lawbreaking. I turn the focus from legal knowledge produced and jurisgenerated by society to the individual herself, and more specifically to her body. I focus on her legal language and discourse, and on her role in creating and jurisgenerating legal meanings and laws. This is an approach according to which even a single mother could protest against injustices in her own way, with her unique language and voice. It is an approach that will not insist on the question of whether this woman respects state law, but will rather focus on the language she creates.

These women's bodies, then, become local sites and institutions of law and legal meanings. They are not just passively "law abiding".[23] They are "law inventing",[24] creating local legal knowledge with, in and through their own bodies. They are engaged in a local process of self-knowing, self-learning and self-relearning law. It is a process where the law, any law, is learned and is being known in, with and through the body. Their knowledge is *embodied.* Mizrahi women squatters and women having abortions resist unjust laws with, in and through their bodies.

In the case of Mizrahi women squatters, when we explore the context in which squatting occurs, we find that these women are second and third generation Mizrahi women whose parents, most of whom are North African, particularly Moroccans, were brought[25] to Israel between the years 1952-

[22] See: Emmanuel Melissaris, "The More the Merrier?", *supra* note 18 at 58.
[23] See: Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism" (1997) 12 CLJS 25 at 39 [Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism"].
[24] *Ibid.*
[25] It is important to note here that the usual term used for describing the arrival of Mizrahis to Israel is 'immigrated'. Instead, I decided to use the alternative term 'brought' implying the passive role that they played in their decision to come to Israel. The term 'immigrated' portrays the Mizrahis as people who actively decided to immigrate to Israel, as the land of the Jews, and consequently, conceals the dialectic Ashkenazi-Zionist rhetoric that preceded their 'decision' to come to Israel.

1972. Their families and communities have endured structural and institutional discrimination, encompassing every aspect of the Mizrahis' lives and manifested in lack of access to education, employment, monetary resources and housing. One of the main discriminatory mechanisms was Israel's differential and segregative Land Regime and public housing policies, also known as 'from the boat to the permanent house', prioritizing Ashkenazi Jews. Whilst Ashkenazis were encouraged to purchase their homes with governmental subsidies, Mizrahis were sent to distant and remote parts of Israel, and were settled in public housing as contractual tenants with weak legal status, subject to arbitrary public housing companies that could easily evict them from their homes. [26]

Taking a critical perspective, Mizrahi women resist and seek to correct with their bodies the Israeli discriminatory land regime and public housing policies that have deprived them of the fundamental right to adequate housing and of the right to home ownership, and has created their special inferiority within the Israeli society, obliging them to squat. These women in effect redefine property law, by redistributing the power and wealth that the first generation Mizrahis were denied, and taking what could and should have been theirs as second and third generation had property and wealth been distributed equally. Their lawbreaking is their means of distributive justice. I, therefore, propose to redefine '*trespassing'* by conceptualizing and employing a new description: *Affirmative Squatting.*

The story of abortion in Canada has gone through long and complex processes of both criminalization and later of legalization. The triumphant and androcentric rhetoric was that of medicalization, especially that of necessity, depicting women as vulnerable victims, needing protection.

[26] I will elaborate in detail on this issue, drawing on relevant sources, in *Chapter 6* discussed below.

The official story of abortion is construed from a positivist perspective emphasizing instrumentalism and institutionalism. Women's engagement with and involvement in abortion is approached and interpreted institutionally and instrumentally, focusing on women's movement and organizations, rather than on individual women. Approached this way, women's involvement was regarded, as will be discussed further below in *Chapter 6,* as marginal and relatively passive. This organizational approach does not focus on the agency and role played by women who underwent abortions. It overlooks the processes she engages in, processes which are in and of themselves legal, further generating legal meanings and knowledge. When one takes an instrumental and organizational stand point, women's involvement in abortion decriminalization seems relatively small. It was channeled through and appropriated by Dr. Morgentaler, and was eventually ignored. A critical perspective, however, would reveal and show that women have always resisted and created legal meanings and knowledge about abortion from the stand point of their bodies. The emphasis is on these women's voice and agency, acknowledging their active role in producing legal knowledge.

Following Robert Cover's notion of jurisgenesis, this thesis focuses on the ability of these women to 'speak' and create legal meanings, specifically on the language that these women jurisgenerate throughout the entire process of terminating their pregnancies, prior, during and after abortion. These women speak through, in and with their wombs, tell their story and create their own vision of the law: their law/s. This is their way of communication. As in the case of squatting, their 'private' and allegedly not-politically-motivated acts of desperation and necessity, are embedded in, and reveal, a wider political context of gender inequality, invoking larger principles of equality and justice, and are aimed at correcting these past and lingering injustices. Approached and interpreted this way, their acts are political ones, bearing collective features of resistance to injustices. They resist and seek to correct with their bodies the inequalities and injustices that have

created and further perpetuate their socio-legal inferiority, allowing the state and its agents to control their reproductive freedom, and to decide on their fate. Abortion is their resistance and redemption.

As this thesis shows, the exclusion of women's voices, stories and experience of abortion has in turn manifested in deep and entrenched institutional- financial, procedural, emotional, geographical and personal- obstacles that Canadian women, and especially women from discriminated against minorities, have to confront nowadays in accessing abortion services.[27] Faced with these obstacles, women are forced yet again to seek help elsewhere. Some feel compelled to carry the pregnancy,[28] while others may feel compelled to try to self-induce[29], turn to unregulated providers outside the formal health system, and even "seek a back-alley abortion".[30] The reality of women's reproductive freedom in 2019 Canada, then, is a reality of women who are excluded from participating in the formation of their own rights, affecting their lives and bodies. It is a reality where they experience, in turn, many obstacles in exercising their rights, and where doctors and federal and provincial officials are the 'gatekeepers' of their rights to dignity and equality.

What this thesis argues is that Canadian women could have enjoyed an unfettered right to abortion, without needing to confront so many obstacles nowadays in exercising what is supposed to be their legal right to abortion, had it been framed differently, acknowledging women's unique experiences and voices. These obstacles, impeding the right to abortion, are the product of the state and its agents, whether doctors and/or women's movements joining them, failing to listen to

[27] I will elaborate on this later in the thesis in *Chapter 6* discussed below.
[28] See: Jessica Shaw, *Reality check. A close look at accessing abortion services in Canadian hospitals.* (Ottawa, Ontario: Canadians for Choice, 2006) at 40 [Jessica Shaw, *Reality check*]. See also: Rachael Elizabeth Grace Johnstone, *The Politics of Abortion in Canada After Morgentaler: Women's Rights as Citizenship Rights* (PHD Thesis, Queen's University, Department of Political Studies, 2012) [Unpublished] at 188 [Rachael Johnstone, *The Politics of Abortion*].
[29] See: Jessica Shaw, *Reality check, supra* note 28 at 2, 40.
[30] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 28 at 188.

these women. If the state had listened to their stories in the first place, challenging its own gender bias and entrenched rhetoric of necessity, women would not have needed to end up where the journey for legalization of abortion began, in the backalleys or in their homes self-inducing, confined again to secrecy and shame instead of celebrating their public right.

Mizrahi affirmative squatters and women having abortion resist with their bodies the unjust mechanisms- discriminatory land regimes and gender inequality- that have created their special socio-legal inferiority within society, obliging them to break the law. These are acts of self-determination and autonomy, marking these women's participation in a political process of decision-making. They 'speak back' with, in and through their bodies, perhaps for the first time, to the powers that have condemned them to socio-legal inferiority and invisibility. They create with, in and through their bodies important liberating local knowledge and language that are legal. Land and bodies, wombs in particular, have both been appropriated and *nationalized* as both tools and purpose of oppression and entrenchment of socio-legal inequalities. Each has become the tool for entrenching control over the other. The body has been used in both cases as a tool, facilitating both territorial expansion and invasion to land, and control of women's bodies and lives. As eloquently put by Adrienne Rich, "[t]he female body has been both territory and machine".[31] Similarly, land in Israel, and especially public housing has become the tool for controlling not only the land, but also the lives and bodies of Mizrahis, particularly Mizrahi women. These women, then, reversing the same mechanisms of oppression, *denationalize* their homes, wombs, bodies and lives.

By breaking the law, these women appropriate back, perhaps for the first time, their bodies and lives. They make law/s in and through their bodies. Their bodies are their legal texts. Following

[31] See: Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (New York: W.W. Norton, 1976) at 285.

the seminal words of Hélène Cixous, they "put [themselves] into the text."[32] These women's *contexts,* their lawbreakings, become a constituting *text.* Their lives are "a *continuing autobiography of meaning."*[33] Legal knowledge and law/s are approached as an everlasting process of storytelling, biographical and autobiographical. They are engaged in a process of "narrative imagination",[34] narrating a genealogy of histories, of the past, present and future, writing and rewriting, written and rewritten by, their stories, their legal stories and discourses that they generate, and the stories of the legal discourses inside and around them. They are their own legal institution. Their interaction with the world is characterized by a reciprocal evolutionary and constructivist relationship,[35] with others in and outside their 'immediate' world. Their relations with the law, any law, are not mediated by either state officials and/or "identified community spokespersons".[36] The emphasis here is on individual legal knowledge, narration, myth and imagination.

The acts of lawbreaking discussed here impose a language that, unless mediated by external state agents, such as lawyers and social movements, who can 'translate' the act of lawbreaking into a feasible state legal formula, cannot be understood to be making any legal or constitutional claims. The problem is, however, that these agents are perceived as these women's only voice, preserving, and further reproducing what they are supposed to protest and fight against, that is, the demonopolization of the power to speak. These women are prevented from framing their agency and their own voice in their own words, their own notion of participation and of resistance. By

[32] See: Hélène Cixous, "The Laugh of the Medusa", translated by Keith Cohen & Paula Cohen (1976) 1:4 Signs 875 at 875. Emphasis added.
[33] See: Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism", *supra* note 23 at 42. Emphasis added.
[34] *Ibid* at 43.
[35] *Ibid* at 46.
[36] *Ibid.*

their lawbreaking they 'take charge' of the role of who is speaking and for whom, and communicate their voice in their own words and in their own way.

2. Structure

This thesis is divided into two parts, moving from 'mapping' to 'digging and narrating' in order to explore resistance and lawbreaking in the two contexts selected.

2.1. Part One

Part One, entitled 'mapping the law of lawbreaking', focuses on targeting, scanning, canvassing and *'mapping'* the formal legal space relevant for this thesis, framing its foundational, theoretical, and conceptual borders and limits. It is designed to provide the reader with *some* maps with which she could 'travel' this legal space, including the index, the terminology, necessary for explaining and understanding their contents. Part One consists of the first three chapters:

Chapter 1 discusses the theory of civil disobedience according to which certain acts of lawbreaking could be regarded as legitimate instances of resisting 'law', as long as they are committed within the confinement of state law. It then lays the theoretical basis for understanding the state legal approach to lawbreaking, providing us with the 'big map' from which this thesis seeks to depart. This map focuses on the official, "the dramatic, the intellectual high jinks on *center* stage, the great cases and great men".[37] It is comprised of two sections: *Section 1* discusses the theory of civil disobedience, its origins, the principal and predominant writers in the field and its main definitional elements and themes; *Section 2* discusses the roles and importance of civil disobedience.

Chapter 1 serves as a general introduction to *'The Map',* that is, the only, single, sole, supreme, and exclusive positivist-state-centered-legal map available for approaching law in general, and lawbreaking in particular. This state-centered *map* offers the 'right' and only tools to approach

[37] See: Lawrence Friedman, "American Legal History", *supra* note 13 at 566. Emphasis added.

socio-legal phenomena. This *map* offers the exclusive internal foundational index, a legend, criteria, and language necessary for interpreting and explaining these details – that is, the socio-legal phenomena occurring within its space, such as acts of lawbreaking. In the context of this thesis, the theory of civil disobedience is the only available interpretive means by which one could, and in effect must, approach certain acts of lawbreaking in order to evaluate their legitimacy and validity and to articulate them as legitimate acts of civil disobedience. This map offers the mechanisms and the tools of control important for achieving, maintaining, and restoring order and stability against the dangers posed by the 'chaos', 'disorder' and 'mess' associated with lawbreaking. This positivist map, then, operates like a 'moral compass', enabling the dissenter to get back from the margins of illegality into the center of legality, order, stability, and legal fidelity. It emphasizes 'the big' and 'the large', praising 'Big Theories' that could explain acts of lawbreaking, translating them from acts of transgressive marginality into an official language of legitimacy and centrality.

After familiarizing the reader with the language of the *'The Map',* the thesis proceeds to *Chapters 2* and *3*, which concretize 'the map' introduced in *Chapter 1* into two specific sites and maps of lawbreaking, in which women's resistance and agency are explored. Both chapters involve 'small' women breaking the law, namely through squatting in Israel and abortions in Canada. *Chapters 2* and *3* introduce the reader to each of these contexts in order to challenge civil disobedience through the prism they offer. *Chapters 2* and *3* then serve as the 'maps' of 'law' and the 'resistance to the law' in these two contexts. They map the backdrop rules or legal story related, on the one hand, to squatting – specifically the regulatory scheme regarding access to public housing in Israel – and, on the other, to abortion – specifically, the story of criminalization and then legalization of abortion in Canada.

Chapter 2 introduces and describes the case of Mizrahi women squatters. It is divided into three sections designed to portray a story of squatting, from its early stages, starting *before* it occurs, then moving to describing *whilst* it occurs, and culminating in its *aftermath.* In a) the lead-up section tells the story prior to squatting, necessary to understand the legal context preceding and leading to the decision to squat. It offers the narrative of the woman squatter, outlining the main public housing policies and criteria that are relevant and important for our discussion. In b) the second section focuses on the question of how squatting happens, once the decision to squat is made, and sets out the different types of squatting and their actual practical aspects. This section will lead the reader to the next, and yet not final, part of the story. In c) the next and last section focuses on the inevitable legal response and consequences followed once squatting occurs. This thesis outlines the relevant Israeli legal basis and framework for discussion, namely land law, and, then proceeds to discuss the legal approach towards these cases, the arguments raised against these women, and the 'usual' defence these women receive, if any.

Chapter 3 tells the story of abortion laws in Canada. It outlines the history of criminalization and legalization of abortions in Canada. It is divided into two sections. In a) the focus is on the criminalization process of abortion in Canada, describing the status of abortion in pre-legalization Canada, and the key actors in the criminalization process. In b) the second section focuses on the processes of legalization that eventually led to the historic Canadian Supreme Court decision in *R v. Morgentaler*,[38] culminating in legalizing abortions by the nullification of *Section 251* of the Criminal Code. Again, the focus is on the key actors who mobilized this process, and on the socio-legal justifications and discourse which motivated and underlined these processes.

[38] See: *Morgentaler, supra* note 15.

Readers might question how such different contexts can be juxtaposed here. They will notice that the method and approach to provide the map for these two contexts are different, reflected in the structure of these two chapters. Let us briefly pause on this point.

Difference and Overlap

Chapters 2 and 3 provide two different contexts in which to explore women's resistance and agency. Mizrahi women squatting is an ongoing context, whilst abortion in Canada is considered a past and historical one, as abortions have been legalized in this country. It is important to note that these are not presented as comparative case studies. Rather, it is what they can teach us about law/s-making that is important. It is the notions of women's agency and their participatory roles in everyday law/s-making when they break state law/s that are at the centre of these two contexts. They are aimed at, and are used for, 'shaking' the positivist assumptions about law and lawmaking discussed in *Chapter 4*, and bring to the fore, instead, the idea of law/s as living and processual languages created anywhere and everywhere.

One can rightfully question the decision to bring together two contexts of lawbreaking when one is now legal, thus rendering void any claim of lawbreaking. As discussed in the abortion context, in *Chapter 6*, as of 2018 abortion may be legal in Canada, but it is still not fully accessible. Decades after *Morgentaler*, Canadian women, and especially women from discriminated against minorities, still face many institutional-financial, procedural, emotional, geographical and personal obstacles in exercising their reproductive rights and freedoms. In fact, having to go through so many obstacles in exercising what is a legal right, as Marilyn Wilson sharply puts it, seems "[i]ronically, […] to be getting worse rather than better since the Morgentaler decision in 1988."[39]

[39] See: Marilyn Wilson, Executive Director of the Canadian Abortion Rights Action League in Ottawa, brought in Laura Eggertson, "Abortion Services in Canada - A Patchwork Quilt with Many Holes" (2001) 164: 6 Can Med Assoc J 847 at 847. See also: Shelley A M Gavigan, "Beyond Morgentaler": The Legal Regulation of Reproduction" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 117 at 118.

The obstacles are deep and entrenched, obliging women to resort to extreme measures such as turning to unregulated abortion providers. It is, therefore, possible to argue that having an abortion even after its legalization is an act of resistance, carrying an element of almost lawbreaking, defying entrenched institutional misogyny and resisting provincial regulations preventing unfettered access to abortion services. In this sense, in breaking with some of the provinces' attempts to limit abortions, these women can be approached as lawbreakers, creating legal meanings in, with and through their bodies. Nevertheless, whether or not there is a lawbreaking component to their acts, their abortions are acts of laws-making jurisgenerating their own legal visions and meanings.

Having to resist an unjust reality, breaking with what is already legal, implies that laws-making is a continuous and everlasting process, shaping and reshaping legal meanings, even when there is already *a law* that on its face seems to have legalized a contested against act. These women do not need a judicial decision or an act of parliament to legalize abortions. They have been legalizing abortions with, in and through their bodies, whether or not legalized by state law. If laws can be created anywhere and everywhere, away from state institutions, such as Parliament and the courts, then, lawbreaking can also happen regardless of Parliament and the courts, even when there is no apparent law to break.

Besides drawing dialogic alliances between women who may seem racially and culturally estranged, promoting a cross-Atlantic solidarity, studying the Canadian stories of abortions, and learning about the deep and entrenched obstacles women have to confront in accessing abortion services in the current day can show us how important it is to approach Mizrahi women squatters differently, putting emphasis on their voices and narratives, rather than on the legalized and legalizing voices of state and non-state actors.

a) Structural Choices

Readers will also notice that the structure of discussing these two contexts is different. The reason for this structure is substantive and corresponds with my personal-professional experience and narrative, especially in the context of the research for this thesis.

The context of squatting discussed in *Chapter 2* is intertwined with data on life stories, narratives, and backgrounds of Mizrahi women squatters that I gathered in earlier work focused on Mizrahi women squatters in Israel,[40] and also in 2013 when I went back to some of the people involved to develop a critical discussion for the purposes of this thesis. It is only in *Chapter 6* that the historical context of racism and discrimination from which the Mizrahi squatting phenomenon has emerged and against which it needs to be approached is discussed. The reasons for this structural decision is that the stories are first (in *Chapter 2*) told against the backdrop of Israeli property laws and public housing policies and criteria, and fit within these property laws and policies frame. This division substantively corresponds with the actual processes, experiences and narratives entailed in working with these women. Taking on their cases motivated me to research the historical context of racism and discrimination, manifested in public housing policies, eventually obliging them to squat. These women and their stories motivated my academic research, leading me eventually to study the stories of abortions in Canada, drawing dialogic alliances between groups of women who may seem racially and culturally estranged.

In the abortion context this thesis follows the opposite structure, reflecting my processes as a researcher. *Chapter 3* does not introduce individual women's stories, nor does it discuss women's organized feminist involvement in the process of abortion legalization. Instead, *Chapter 3* is focused on the 'official' state story. The reason for this is again substantive. Organized and

[40] See: Claris Harbon, *Affirmative Squatting: Mizrahi Women Correcting Past Injustices, Looking for a home – Critical Legal Analysis of a Law Devoid of Past* (LL.M. Thesis, Tel-Aviv University, Law Faculty, 2007) [Unpublished] [Claris Harbon, *Affirmative Squatting*].

politicized feminist involvement and rhetoric in the legalization of abortion in Canada was relatively marginal and passive compared to the active, dominating and central role played by male doctors and physicians, including Dr. Henry Morgentaler, advancing a medicalized discourse. In an effort to emphasize the effects of the absence of women's voices and experiences from the state 'official' pantheon of the abortion story, I refrain at this stage from discussing their roles.

Most Canadians, both opponents and proponents, perceive legal abortion as a right granted by the Canadian Supreme Court in *R v. Morgentaler.* And indeed, when researching Canadian abortion history only the official state story displaying the roles of male doctors, predominantly Dr. Morgentaler, was accessible as the main information found in formal databases. I was not exposed to any women's involvement in the process whether institutional or individual. Not much is known about the role played by individual women having abortions, jurisgenerating legal meanings. They are absent from the official story of abortion. It was only later in the process that I was introduced to such stories. The official historical context, then, 'swallowed' the stories, and they had to be revealed later in the process of research. Following this loud absence, and implementing my own process of introduction to individual stories, it is only in *Chapter 6* that I discuss some individual narratives of abortion.

b) <u>A Potential Paradox</u>

Arguing that women's bodies are sites of laws-making, resisting possible forms of oppression, might, on its face, indicate an inner paradox and contradiction. On the one hand, I argue that women create and jurisgenerate in, with and through their bodies' legal meanings, whether or not culminating in state official institutions, either the legislature or the courts. And, yet, on the other hand, I criticize state exclusion of these women's stories and contexts.

For example, in the context of Mizrahi women squatters, I argue that state law should include these women's historical contexts in order to approach and explain their lawbreaking. In the context of

abortion, I criticize the processes of legalization of abortion, from decriminalization onward, for lacking women's voices, ignoring women's agency and role in the lawmaking of abortion. One might rightfully infer that we need to acknowledge the role of women in the legalization of abortion, thus, presumably falling into the same formalist and organizational 'trap' which I challenge, when clearly this thesis shifts the focus to the actual women themselves, arguing that their act of abortion is in and of itself laws-making.

My argument, however, avoids this paradox in the following way: I do not argue that women cannot make law/s through formal state institutions. Instead, I argue, first, that state lawmaking is not the only medium in which to create law/s. Women create laws, many laws, in many different ways. Institutional and formal media are just one possible way to jurisgenerate legal meanings. Sites of resistance and lawmaking are not confined by 'permissible' state sites, such as civil disobedience, but are rather diverse and endless. Women having abortions, then, resist and create legal languages in, with and through their bodies. Their acts do not need to culminate in, or be acknowledged by, state law to count as laws.

Second, I argue that, even in cases of lawmaking through state law channels, a positivist approach should give way to critical approaches to lawmaking. In order to enact state laws that are "more responsive",[41] and more self-reflexive to other normative universes,[42] state law's understanding of its inability to explain legal discourses from within itself, especially when it is state law itself that is being contested against, is crucial. This means reversing the gaze to the women themselves, and listening to their stories without the interference of intermediate actors, such as doctors, lawyers and even women's organizations.

This is not a thesis about civil disobedience, focusing on the failure of several acts of lawbreaking like the ones discussed in this thesis to comply with it. This is a thesis about how lawbreakers

[41] See: Gunther Teubner, "The Two Faces of Janus", *supra* note 17 at 1448, 1460.
[42] *Ibid* at 1451.

create law/s with, in and through their bodies. For reasons discussed in *Chapter 5*, state law cannot approach and explain certain acts of lawbreaking with the 'tools' available for it, such as civil disobedience, and thus perceives them as mere criminals. The way/s to approach such cases is to adopt critical approaches to law/s, whereby women are perceived as making law/s anywhere and everywhere whether or not culminating in state legal institutions. If state law wishes to explain these cases, then it would need to adopt different ways to approach them.

2.2. Part Two

After familiarizing the reader with these maps, I move to the second part.

Part Two, entitled *'Digging and Narrating',* explores even further the concrete aspects of these two cases. It revisits the foundations of civil disobedience, informed by the exploration of the two contexts begun in *Chapters 2* and *3*. *Part two* 'digs deeper' in two ways: first, to discover whether there is a way to describe the actions of the women as civil disobedience recognized in law, and second, to describe the actions of the women as law-constituting behaviour. The 'digging tools' necessary for digging into the concrete and particular are critical approaches to lawbreaking and lawmaking discussed in *Chapter 4*.

Chapter 4 offers several critical approaches to lawmaking that are necessary for re-reading these two contexts of lawbreaking as constructive law/s-making. These approaches are the 'tools', the 'shovel' with which to dig deeper in order to probe what is not seen at first on *'the map'* of civil disobedience. Deviating from *'the map'* offered by state law, this *Chapter*, in Lawrence Friedman's terms, shifts the legal focus to the "day-to-day happenings … of small events, each one trivial in itself",[43] and provides us with the language necessary to approach the acts of lawbreaking committed by the women of this thesis.

[43] See: Lawrence Friedman, "American Legal History", *supra* note 13 at 566.

Chapter 4 first converses with several positivist assumptions and observations about 'the big' and official, more specifically about law and lawmaking that are relevant to this thesis, arising from the theory of civil disobedience. It then proceeds to discuss some counter-assumptions and different critical ways to think about law/s. These are developed by several approaches to law and lawmaking, such as Legal Pluralism and Critical Legal Pluralism, and authors, including Robert Cover, Lawrence Friedman, Eugen Ehrlich, and Martha Minow, Margaret Davies, Clifford Geertz to name a few. These ideas and concepts may enable us to approach, understand and interpret the acts committed by the women of this thesis, offering ways to turn the agency, voice, and actions of people, not commonly perceived as legal through a positivist lens, into something that we can recognize as law.

Chapter 4 is divided into two interrelated sections: *Society IN Law,* where I discuss the interrelations between state law and the social world, and *Law/s IN Society,* where I address the participatory role of the social world in the process of creating legal meanings, legal knowledge, and law/s-making.

After familiarizing the reader with the language necessary for re-reading our two cases, the thesis proceeds to *Chapter 5*, which discusses why the acts of squatting and abortion cannot be explained by the current theory of civil disobedience. This chapter revisits the theory of civil disobedience, namely its features, roles, and assumptions about law, lawbreaking, and lawmaking. It asks whether our two contexts of lawbreaking can be explained by the 'tool' of civil disobedience? Do they fall within its definitional criteria? Can *'the map'* (from *Part One*) explain the concrete, the 'small'? Can it even detect, discover and expose these covert cases of lawbreaking in the first place, let alone later explain them? The answer is that *'the map'* of the theory of civil disobedience does not possess the ability to detect these cases, expose them and explain them, looking into their depth. It, therefore, does not and cannot explain these acts of lawbreaking, let alone categorize

them as legitimate acts of resistance and civil disobedience capable of jurisgenerating legal meanings and mobilizing socio-legal change. This chapter follows the same structure of *Chapter 1* on civil disobedience. Here, however, I refer to the two cases to provide a critical response to each of the definitional elements of civil disobedience.

Chapter 6 shows how the acts exemplified by the two cases can be approached differently, and can be redefined as acts of resistance, thereby revealing their jurisgenerative aspects. It is divided into three sections that focus on the jurisgenerative aspects entailed in the acts of Mizrahi women's squatting and embedded in the case of abortions situated in Canada.

The first section discusses the historical context from which I argue the squatting phenomenon has emerged and against which we need to approach it. It focuses on the discriminatory institutional structural mechanisms directed against Mizrahis, particularly Israel's differential and segregative Land Regime and public housing policies. I argue that Mizrahi women resist and seek to correct with their bodies these unjust laws and policies.

The second section shows how the medicalized rhetoric surrounding abortion has remained intact, and how this rhetoric has resulted in the hindering of a free and unfettered right to abortion. It first introduces the reader to the many institutional obstacles Canadian women are confronted nowadays in exercising their reproductive rights and freedom. It then moves on to explain that the reasons for these obstacles are rooted in and linked to the identity, and specifically the gender of the key players in the process of legalization. The debate was led, once again, by male doctors, whose rhetoric of medicalization, specifically that of necessity, remained intact. It has articulated the debate over abortion from decriminalization to legalization. I argue that the denial of women's rights to abortion at present is the outcome of, predetermined and caused by, the absence of women's voices and experiences from the processes of legalization. I then offer a critical approach to abortion, bringing together the stories of individual women and showing how a different reading

could reveal women whose acts of abortion, even ones that on their face seem to be motivated by despair and destitution, are in fact acts of agency and resistance.

The third section synthesizes the discussion on affirmative squatting and abortion. It invites the reader to connect our discussion here with an important body of work, derived from 'body politics', known as 'embodied resistance', using the body as a site of resistance, and creating counter embodied local knowledge produced in the course of resistance.

Finally, I proceed to the last chapter of the thesis. *Chapter 7* is framed not as a conclusion but rather as an invitation to commence, to start thinking about law/s-making as processes occurring everywhere, and anywhere, and by any, and everyone.

3. Methodologies

3.1. General Overview

This dissertation converses with several interrelated approaches or domains of legal thought, such as legal philosophy, legal positivism, natural law, and morality. It deploys various critical approaches to law, such as a) legal pluralism and critical legal pluralism, b) sociology of law and legal history, c) postmodern and post-colonial theories, d) feminist and gender critiques, e) critical legal studies, f) critical race theories, and g) critical/ethnic and cultural studies. Given the two cases analysed, it applies comparative and transnational methodologies, and takes on additional fields of study, emerging out from other contexts. These include Israeli property law and Canadian constitutional law, international human rights law, political and socio-economic rights such as the right to housing, restorative and transitional justice and reconciliation, discrimination and access to justice, health law and reproductive rights, abortion law and regulation in Canada and the United States, theories of resistance, political participation, democratic constitutionalism, and social movements.

3.2. Contextualization

This thesis also refers to the methodology of context.[44] It focuses on a methodological analysis of phenomena, questions and problems from a holistic and wide perspective, taking into account myriad and various considerations and parameters. Contextualization means abandoning formalism and proceduralism,[45] which views, in the context of lawbreaking for example, the lawbreaker involved as an autonomous individual with social ills being interpreted in a vacuum.[46] Rather, contextualization emphasizes the importance of contextual group identity analysis of 'individual' legal problems, and advocates the allocation of a 'singular' legal case within a larger community based framework. It would explain, in the context of Mizrahi women squatters for example, how their inferior socio-legal status is not a result of 'neutral' reasons, but is rather rooted in larger, deep, and entrenched notions of dominance and subordination transcending from the 'particularities' of any minority's own 'private' narrative of transparence.

The contextual approach provides the methodological means and tools to several critical theories, including critical legal studies (CLS), critical and postmodern theories, such as feminist theories and critical race theories, in order to understand the unique voice, narratives and visibility of discriminated minorities and groups.

3.3. Quantitative and Qualitative Methodologies

The research for this thesis uses quantitative and qualitative methodologies, especially in the form of empirical data and interviews. For example, in the Israeli context, empirical research was conducted using statistical data from formal governmental bureaucratic documents and protocols

[44] I will elabotrate on this in detail in *Chapter 4* discussed below.
[45] On this point see: Thomas Hilbink, "You know the Type… : Categories of Cause Lawyering" (2004) 29 Law & Soc Inquiry 657.
[46] *Ibid* at 672. See also: Gary Peller, "Race Consciousness," in Kimberle Crenshaw et al, eds, *Critical Race Theory – The Key Writings that Formed the Movement* (New York: The New Press, 1995) 127 at 130.

concerning public housing decisions, including those found in formal archives. In earlier work focused on Mizrahi women squatters in Israel, I gathered data on life stories, narratives and backgrounds of women squatters in Israel.[47] In 2013, I went back to some of the people involved to develop a critical discussion for the purposes of this thesis.

I discovered documents which reveal the *de facto* discriminatory basis of the Israeli land regime towards Mizrahis, mostly regarding public housing. Similarly, I use other statistical data showing the differences between Mizrahis and Ashkenazis in land ownership, education, access to higher education and monetary resources. These are all important to outlining the contextual basis for understanding the squatting phenomenon, illuminating its collective features of resistance to injustices.

Squatting cases are perceived as 'small cases' not involving 'significant' legal doctrines. Therefore, the decisions are usually short, not published in Israeli legal databases and do not receive legal exposure. Tracing 'case law' is therefore very difficult and, in itself, raises interesting questions, in a Foucauldian sense, about the oppressive nature of the law, which deprives the populace of access to important information that may be generated from these cases. It prevents important recognition and visibility of this fascinating and complex phenomenon.

Nevertheless, following ample meetings on several occasions throughout the years with officials from the Ministry of Housing and from several public housing companies, case law eventually was traced for me, revealing the courts' formal and strict rhetoric, ignoring the squatters' social and historical narratives.

I also interviewed officials in the Ministry of Housing and in several public housing companies in order to receive information about the eviction process, the narratives of the squatters, their marital status and ethnicity, and about the dilemmas that these officials may have confronted in dealing

[47] See: Claris Harbon, *Affirmative Squatting*, *supra* note 40.

with these cases. Following several interviews with some officials from 'Amigur' and 'Amidar', two of the largest public housing companies in Israel, I gathered data concerning the ethnic origins of the squatters, who are all second-generation Mizrahi women, and their marital status – all of whom are single mothers suffering from poverty. The use of these data and interviews for the purposes of this thesis was approved by the Ethics Committee at McGill University.

4. Language, Terminology, and the Use of Names in the Thesis

In a thesis that focuses on the importance of lawbreaking as language capable of jurisgenerating legal meanings, the names and terminology used bear fundamental significance.

4.1. The Use of Names

In working with the stories of Mizrahi women squatters, and in referring to many women authors, I have grappled with the issue of naming. In *Chapter 2*, where I relate to stories of the women squatters, I refrain from using the women's real names, respecting their privacy. Some of the stories shared with me by various officials in public housing companies were never published in any legal database, making privacy a paramount consideration. When referring to case citations I use the real initials of the women involved but not names. However, when describing their stories, I use pseudonyms rather than initials. The names of Canadian women telling their abortion stories are the same names used in the publications involved.

When including the names of female/women authors discussed and mentioned in the thesis, I have chosen not to follow the practice of referring to authors by their surnames because using this gender-blindness/'neutrality'-based praxis usually results in concealing the gender dimension of the author herself. This is of special importance in the context of this thesis, which strives to shift the focus to women's voices, stories and narratives, giving visibility to identity-based factors such

as gender, and emphasizing their important roles in laws-making. I have, therefore, decided to refer women writers either by their forename or full name.

5. Concluding Remarks

The aim of this thesis is to contextualize acts of lawbreaking by shifting the gaze from state law to individual women themselves, placing them on a larger continuum transcending time, geography, cultures, ethnicities, race, gender, and age. The goal is to shift the focus to these women's bodies as sites of laws-making, whereby each abortion is an act of legalization, and each squatting is an act of laws-making, 'corrupting' past and lingering discrimination.

Women lawbreakers have taught me that a house is more than a roof over one's head, and a body is more than tool 'to house' oppressive patriarchal demands. They are past, present and future. They are their means of restoring stolen memories and dignity. These women may silently break the law, but, their actions are loud and profound. These women create a language of change, and their bodies are their legal texts. This thesis is an invitation to reveal and read these texts.

I. Part One: Mapping the Law of Lawbreaking and Lawbreakers

"The rules break like a thermometer,
quicksilver spills across the charted systems,
we're out in a country that has no language
no laws, we're chasing the raven and the wren
through gorges unexplored since dawn
whatever we do together is pure invention
the maps they gave us were out of date
by years… we're driving through the desert
wondering if the water will hold out
the hallucinations turn to simple villages
the music on the radio comes clear—
neither Rosenkavalier nor Götterdämmerung
but a woman's voice singing old songs
with new words, with a quiet bass, a flute
plucked and fingered by women outside the law." (Adrienne Rich, "Twenty - One Love Poems". Poem XIII).

Chapter 1: Civil Disobedience and Lawbreaking- Defining Features and Importance.

1. Section One: Defining Civil Disobedience

"But let the laws of Rome determine all;
Meanwhile I am possess'd of that is mine."[1]

A. Introduction

Civil disobedience is not a new phenomenon. It can be traced back to the early days of ancient history, from Adam and Eve's original sin, disobeying God's order, to Hebrew midwives disobeying Pharaoh's decree to kill newborn Hebrew baby boys, to the Greek myth of Prometheus, who stole fire from the gods[2], to Socrates in Plato's Crito and Sophocles' Antigone who buried her brother, thus, defying King Creon's decree. Referring to the ancient character of civil disobedience, Erich Fromm eloquently concludes: *"Human history began with an act of disobedience*[….]".[3]

However, it is only in modern history that the term *civil disobedience* has become "part of our political vocabulary".[4] It was Henry David Thoreau who first coined the term civil disobedience[5] in his famous essay "Civil Disobedience",[6] addressed to the public in Concord, Massachusetts in 1848. In this essay, Thoreau explained why he refused to pay state taxes for six years, "signify[ing]

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[1] See: Shakespeare, William. *Titus Andronicus* (1591) online: Shakespeare <www.shakespeare-literature.com>.
[2] See: Erich Fromm, "Untitled Article" in Clara Urquhart, ed, *A Matter of Life* (London: Jonathan Cape, Thirty bedford Square, 1963) 97 at 98 [Erich Fromm, in *A Matter of Life*].
[3] *Ibid* at 97. Emphasis in original. See also: George Woodcock, *Civil Disobedience* (Toronto: Canadian Broadcasting, 1966) at 3 [George Woodcock, *Civil Disobedience*], brought in Hugo Adam Bedau, "Introduction" in Hugo Adam Bedau, ed, *Civil Disobedience: Theory and Practice* (New York: Pegasus, 1969) 15 at 15 [Hugo Bedau in *Civil Disobedience: Theory and Practice*].
[4] See: Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, On Violence, Thoughts on Politics and Revolution* (San Diego, New York, London: A Harvest Book, Harcourt Brace & Company, 1972) at 60 [Hannah Arendt, *Crises of the Republic*]. See also: George Woodcock, *Civil Disobedience* brought in Hugo Adam Bedau, ed, *Civil Disobedience: Theory and Practice* (New York: Pegasus, 1969).
[5] On this point see: Christian Bay, "Civil Disobedience", in David L Sills, ed, *International Encyclopedia of the Social Sciences* (New York: Macmillan Company & Free Press, 1968) vol 2 473 at 475 [Christian Bay, "Civil Disobedience"]. Also available online: Encyclopedia.com <http://www.encyclopedia.com/doc/1G2-3045000190.html> (Last visited: 30.8.2018); See also: See: M.K. Gandhi, *Non-Violent Resistance: (Satyagraha)* (New York: Schocken Books, 1951) at 3 [Gandhi, *Non-Violent Resistance*].
[6] See: Henry D. Thoreau, "Civil Disobedience" in *Civil Disobedience: Theory and Practice, supra* note 3 [Henry Thoreau, "Civil Disobedience"]. This version of Thoreau's essay was first published in Henry D. Thoreau, *A Yankee in Canada with Anti-Slavery and Reform Papers* (Boston: Ticknor and Fields, 1866) at 123-151.

his own resistance to the laws of a slave state."[7] It is only since then that civil disobedience has "received such mass support, [becoming] the object of so much public attention"[8] and academic debate.[9]

Civil disobedience as a modern concept embraced both theorists and activists, ranging from Henry Thoreau to Mahatma Gandhi, Dr. Martin Luther King Jr., John Rawls, and many others, and encompassing many intersecting disciplines, from political science to philosophy, law and jurisprudence. It has become an important means for exercising one's moral and political convictions against what is presumed to be an unjust law or policy. It is an important medium by which certain criminal, but nevertheless justifiable, acts can be tolerated, not attracting the same legal condemnation that usually accompanies 'ordinary' lawbreakers.

The task here is to define civil disobedience, focusing on some of its main themes which have been identified as relevant for this thesis. However, some preliminary words of caution are needed here, which are both substantive and methodological.

Civil disobedience is a concept that has been the subject of ongoing debates, both scholarly and practical. The literature on civil disobedience is vast and encompasses many academic disciplines. It is, therefore, impossible to cover the entire literature on the subject within the scope of this thesis. Instead, I focus on the main theories of civil disobedience and, in so doing, identify the

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[7] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 3.

[8] See: George Woodcock, *Civil Disobedience*, brought in Hugo Bedau in *Civil Disobedience: Theory and Practice*, *supra* note 3.

[9] On this point see: Hugo Bedau in *Civil Disobedience: Theory and Practice, supra* note 3. Considering the key argument of this thesis, that is, the redefinition of Women's lawbreaking, giving rise to their unique contexts and backgrounds, it is important to briefly focus here on one of Hannah Arendt's arguments. She argues that civil disobedience "is primarily American in origin and substance; that no other country, and no other language, has even a word for it, and that the American republic is the only government having at least a chance to cope with it". (Hanna Arendt, *Crises of the Republic, supra* note 4 at 83). This argument is highly controversial, both when originally written and obviously at present. Indeed, American experience and scholarship have greatly contributed to the evolution of the theory of civil disobedience as a concept, obviously by contributing the name itself. However, Americanization of this phenomenon has the effect of trivializing and excluding other forms of resistances in different non-American jurisdictions, each with its unique context and cultural background. Not only that civil disobedience as a concept, not as a term, is not a recent phenomenon, it is certainly not an American concept. As writtem above, defiance of laws and orders, and the philosophical debates following these acts, can be traced back to ancient history.

major sources of reference, the predominant theorists and theses, and the challenges and qualifications which each attracted, contributing to the evolution of the concept of civil disobedience. The purpose in this chapter is to provide the reader with the theoretical and conceptual context and background necessary for understanding the overall thesis, the arguments that are raised and the contribution that the thesis wishes to offer.

The discussion of civil disobedience is conceptually interrelated to, and deeply embedded in, one of the larger, most important, and predominant debates in Western law, that is, the controversy between legal positivism and natural law, particularly with respect to the relations between law and morality, and legality and justice. Indeed, this debate is implicitly referred to throughout the course of the discussion on major themes of civil disobedience, such as those relating to non-violence. However this chapter does not approach civil disobedience against the larger backdrop questions of law and morality, which fall beyond the scope of this thesis. Instead, it is sufficient to note that there is an inherent conflict between the legal obligation or duty to obey the law and the moral need to disobey it.[10] Civil disobedience is usually understood as the deliberate defiance of a certain law, norm or policy based on moral, conscientious or political grounds. It breaks with the law and the language that it creates and preserves, and, thus, runs counter to one of the core

[10] It must be noted that this thesis does not discuss the question of whether there is a duty to obey the law. For further discussion on this point see, for example: John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Mass: The Belknap Press of Harvard University Press, 1999), in particular at 308-319 [John Rawls, *A Theory of Justice*]; See also: Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987) [Kent Greenawalt, *Conflicts of Law and Morality*]. Similarly, the thesis does not discuss the reverse question of whether there is a right to disobey. What can be said within the bounds of this *chapter* is that some scholars argue that there is no such right. See, for example Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 275 [Joseph Raz, *The Authority of Law*]). See also: Eugene V. Rostow, "The Rightful Limits of Freedom in a Liberal Democratic State: Of civil disobedience" in Eugene V. Rostow, ed, *Is Law Dead?* (New York: Simon and Schuster, 1971) 39 at 91 [Eugene Rostow, "Of Civil Disobedience"]). On the other hand, theorists such as John Rawls, Ronald Dworkin and Hugo Bedau have suggested, for different reasons and with different qualifications, that one has, under certain circumstances, a right to disobey. See: Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978) at 210-215 [Ronald Dworkin, *Taking Rights Seriously*]; See also: Hugo A. Bedau, "On Civil Disobedience" (1961) 58:21 The Journal of Philosophy 653 at 663. [Hereinafter: Hugo Bedau, "On Civil Disobedience"]). For further discussion on the right to civil disobedience, see: Vinit Haksar, "The Right to Civil Disobedience" (2003) 41: 2&3 Osgoode Hall LJ 407 [Vinit Haksar, "The Right to Civil Disobedience"].

premises of Western jurisprudence - the rule of law. Consequently, it poses the dangers of lawlessness and chaos.

Some theorists, taking a more naturalist approach to civil disobedience argue that "in the contest between obedience to law and obedience to morality"[11], one should not "resign his conscience to the legislator."[12] Henry Thoreau, for example, argued that people should not serve the state "as machines, with their bodies" or "with their heads [....] rarely mak[ing] any moral distinctions"[13], but rather should "serve the state with the consciences also".[14] Others, whilst criticizing prevailing positivist theories for artificially separating law and morality and for not acknowledging the legal merits entailed in moral considerations, take a more hybrid and integrative approach, based on what this thesis asserts to be a premise of balance.[15] Justice Holmes, for example, in what has become one of the most seminal arguments for bridging law and morality, argued that "[t]he law is the witness and deposit of our moral life".[16] Similarly, Howard Zinn argues that we should refrain from yielding to, and idolizing, the concept of the rule of law and its supremacy, a concept that resists "hold[ing] conscience above law".[17] Rather, we should strive to "close the gap between law and justice".[18] According to Howard Zinn, civil disobedience should be approached from a

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[11] See: Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* (Cambridge, Mass: South End Press, 2002) at 10 [Howard Zinn, *Disobedience and Democracy*].
[12] See: Henry Thoreau, "Civil Disobedience", *supra* note 6 at 28.
[13] *Ibid* at 29.
[14] *Ibid*. For an interesting discussion on the concept of conscience, as opposed to morality, and with regard to civil disobedience, see Hannah Arendt, *Crises of the Republic, supra* note 4 at 58-68.
[15] Ronald Dworkin, for example, argues that morality is not external to the law, but is, at least in the American case, embedded in and codified by the Constitution. See: Ronald Dworkin, *Taking Rights Seriously, supra* note 10 at 215. An interesting related example for the codification of morality in law is Michael Walzer's assertion that the right of workers to strike against their employers has its roots in lawbreaking. See: Michael Walzer, *Obligations: Essays on Disobedience War and Citizenship* (Cambridge, Mass: Harvard university Press, 1970) at 27 [Michael Walzer, *Obligations*]. Another example is the antiabortion laws discussed below in *Chapter 3*. It suffices to note at this stage that it is argued that these laws reflected the existing dominant social and sexual mores condemning abortions for their 'immorality', and subsequently codified these morality-based convictions against abortion into law. One example is the Canadian Criminal Code, 1892, Sections 272-274.
[16] See: Mr. Justice Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv L Rev 457 at 459.
[17] See: Howard Zinn, *Disobedience and Democracy, supra* note 11 at 26.
[18] *Ibid.*

wider perspective, according to which morals are not external, incidental or secondary to the rule of law, but are rather its main preliminary objective. For him, the law "way back in our democratic tradition, was set up to support"[19] and safeguard moral values and human rights. He argues that we need to engage in a process of balance, by which civil disobedience should be "measured to the size of the evil it is intended to illuminate",[20] i.e., that one needs to "begin to see that law is, like other institutions and actions, to be measured against moral principles, against human needs".[21]

Most theories of civil disobedience, however, are relatively positivist in nature, insisting on drawing a firm and rigid distinction between the legal and moral aspects of civil disobedience. Eugene Rostow, for example, one of the strongest opponents of civil disobedience, argued that moral-based approaches to civil disobedience result in blurring the distinction between the ""is" and "ought"".[22] Since "[t]he law cannot justify the violation of the law",[23] wrote Carl Cohen, "[d]eliberate disobedience to law can never receive a justification on legal grounds within the legal system".[24] On the other hand, Cohen continued, "[m]oral justification [....] is not impossible".[25] Therefore, as aptly put by Ronald Dworkin, "[m]any lawyers and intellectuals [....] recognize that disobedience to law may be *morally* justified, but they insist that it cannot be *legally* justified."[26] Reconciling this tension between law and morality can be done only by reference to possible justifications which lie "outside the legal system",[27] i.e., "by appealing to a higher law than any

[19] *Ibid* at 23.
[20] *Ibid* at 22.
[21] *Ibid* at 23.
[22] See: Eugene Rostow, "Of Civil Disobedience", *supra* note 10 at 54.
[23] See: Carl Cohen, "Civil Disobedience and the Law" (1966) 21 Rutgers L Rev 1 at 7 [Carl Cohen, "Civil Disobedience and the Law"].
[24] *Ibid.*
[25] *Ibid* at 16.
[26] See: Ronald Dworkin, *Taking Rights Seriously, supra* note 10 at 206. Emphasis in original.
[27] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 9.

positive law".[28] The dissenter "must give extra-legal reasons for breaking the law and, to justify his action, must show that these non-legal considerations override his obligation to obey the law".[29]

B. <u>The Definitional Elements of Civil Disobedience</u>

The literature on civil disobedience is vast, covering many different and inconsistent definitions. One of the difficulties with the concept of civil disobedience, wrote Christian Bay, "is the absence of systematic literature on the concept and the phenomenon, assuming that the term has a consensual core of meaning."[30] The term, he further argues, was "never [defined] with great precision".[31] Although written over 40 years ago, during which years the literature on civil disobedience has evolved, Bay's observation is still relevant and accurate today. It is, indeed, almost impossible to draw one conclusive and concise definition.

Yet, despite conceptual variations in the scope of its definition, it is still possible to identify some core themes that are associated with civil disobedience which, whatever the definition, are seemingly always referred to in the literature on the subject. The most common definition of civil disobedience, articulating these main themes, is the one formulated by Hugo Bedau, later adopted and further developed by John Rawls. It may not represent the most accurate and agreed upon definition, but it is the prevailing one that has been adopted by most contemporary writers as a theoretical starting point and a source of reference. Whatever is the conceptual framework, these themes are important for the discussion on civil disobedience. In the following part, the *Chapter* focuses on some of the main themes through an imaginary conversation amongst the various authors.

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[28] *Ibid* at 10.
[29] *Ibid* at 9.
[30] See: Christian Bay, "Civil Disobedience", *supra* note 5 at 473.
[31] *Ibid.*

Dr. Martin Luther King, Jr. wrote in his famous *Letter from Birmingham Jail* that "[o]ne who breaks an unjust law must do so *openly, lovingly* [....] and with a willingness to accept the penalty."[32] The vital role played by Dr. King in the American Civil Rights Movement, using civil disobedience as his main *modus operandi*, and his contribution to development of the concept's premise, cannot be overstated. His definition of civil disobedience, together with his practical use of it, have been celebrated as one of the most famous after Henry Thoreau. Yet it is the definitions by Hugo Bedau and, most notably, John Rawls that have become the most known sources of reference. Hugo Bedau wrote in 1961 that:

> Anyone commits an act of civil disobedience if and only if he acts *illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government*.[33]

Following this definition, John Rawls has further formulated what has become the most known definition of civil disobedience:

> civil disobedience as *a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government*.[34]

One can see that Dr. King included a theme that is missing from Bedau and Rawls' main 'ingredients' of civil disobedience, and is yet another important theme associated with it, that is the willingness to bear possible legal consequences and submit to punishment.[35] Following from these important compenents,[36] we can draw a general 'formula' that, for the purpose of this thesis,

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[32] See: Martin Luther King, Jr., "Letter from Birmingham City Jail" in *Civil Disobedience: Theory and Practice*, *supra* note 3 72 at 78 [Martin Luther King, Jr., "Letter from Birmingham City Jail"]. Emphasis in original.
[33] See: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 661. Emphasis added.
[34] See: John Rawls, *A Theory of Justice, supra* note 10 at 320. Emphasis added. See also: John Rawls, "The Justification of Civil Disobedience" in *Civil Disobedience: Theory and Practice, supra* note 3 240 at 246 [John Rawls, "The Justification of Civil Disobedience"]. Rawls has adopted Bedau's definition of civil disobedience, and further articulated it in his article "The Justification of Civil Disobedience", (*ibid)* which later constituted a part of his book *A Theory of Justice, supra* note 10.
[35] Nevertheless, both Bedau and Rawls do include this criterion in the rest of their writings on the subject, acknowledging its definitional importance and role.
[36] See Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 3.

can be presented as follows: for an act to qualify as civil disobedience it should be non-violent, overt, marked by openness and public visibility, rooted in deep political awareness and consciousness, and be accompanied by a willingness to bare the consequences of disobedience, such as arrests, criminal charges and convictions. These are, then, 'heroic' acts of resistance, committed by politically involved people, motivated by greater moral and political causes that may be justified in challenging and eventually repudiating unjust laws or policies.

Before turning to a discussion of these elements, one brief methodological comment is necessary: the reader will note that that these elements are strongly interrelated, and therefore it is difficult to discuss each without reference to others.

1. A Public and Open Act

"There would clearly be something odd about a policeman's reporting that he had surprised several persons in the act of committing civil disobedience or about employing detectives to root out conspiracies to commit civil disobedience."[37]

For an act to constitute civil disobedience, it cannot be "covert or secretive".[38] An act of civil disobedience is committed openly and in public.[39] Breaking the law "in open defiance,"[40] argues Hannah Arendt, is an important condition that marks a key distinction between the civil-disobedient and the ordinary criminal, and, thus, sets the grounds for possible future justifications for the relevant illegal act. This distinction, she argues, is "now recognized by all serious writers on the subject"[41] and is perceived as "the primary condition for all attempts that argue for the compatibility of civil disobedience with the law".[42] Following Hannah Arendt, then, most writers

[37] See: Hugo Bedau, "On Civil Disobedience" *supra* note 10 at 655.
[38] See John Rawls, *A Theory of Justice, supra* note 10 at 321.
[39] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 172.
[40] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 75.
[41] *Ibid.*
[42] *Ibid.*

are unequivocal on the matter. It is a straightforward prerequisite criterion that must be complied with. As sharply put by Carl Cohen: "[a]n act of civil disobedience **must** be public [....] Clandestine acts simply will not qualify as civil disobedience".[43]

According to Rawls, civil disobedience is a form of public speech.[44] In line with this view, Christian Bay wrote that the term "civil" is taken to distinguish between the public and the private, in the sense that "as citizens we act in public [....] seek[ing] not only to affirm a principle in private but also to call public attention to the view that a principle of moral importance is being violated by a law or a policy sanctioned by public authorities."[45] The concept of 'public', then, is understood both in terms of content and form, i.e., that the act in question is both "addressed to public principles"[46] and that "it is done in public".[47]

Rawls draws a conceptual linkage between the open nature of a disobedient act and two of his most important interrelated concepts, namely, the idea of fidelity to law, and what he called "the sense of justice of the majority".[48]

1.1. Sense of Justice

The dissenter believes that her act is "of concern to the entire community",[49] aimed at advocating, promoting and eventually bringing "change in the public life of [her] community."[50] Private disobedience, Christian Bay argues, "is not enough".[51] The act, "at the very least [....] must be communicated to representatives of the public order in an attempt to influence their thoughts and feelings on the general issues raised".[52] An act of civil disobedience, then, is not private, not only

[43] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 2. (Emphasis added).
[44] See: John Rawls, *A Theory of Justice, supra* note 10 at 321.
[45] See: Christian Bay, "Civil Disobedience", *supra* note 5 at 474.
[46] See: John Rawls, *A Theory of Justice, supra* note 10 at 321.
[47] *Ibid.*
[48] *Ibid.* See also John Rawls, "The Justification of Civil Disobedience", *supra* note 34 at 246-247.
[49] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 2.
[50] *Ibid.*
[51] See: Christian Bay, "Civil Disobedience", *supra* note 5 at 474.
[52] *Ibid.*

because it is not committed in private, but also because it bears public and collective aspects that she believes to be of relevance and importance to the community at large. It is located within an unbounded contextual backward-inward-forward continuum, which the dissenter considers to be vital to the overall community. Therefore, writes Carl Cohen, "no secret is made".[53]

To count as civil disobedience, the act invokes and addresses the public sense of justice. Embedded in his larger theory of justice as fairness, Rawls assumes "that in a reasonably just democratic regime"[54] the majority shares a common sense of justice "by reference to which citizens regulate their political affairs and interpret the constitution".[55] Just, or nearly just, regimes, as Rawls calls them,[56] are ones that ensure that "there is a public acceptance of the same principles of justice".[57] These "principles of justice are the principles of willing cooperation among equals", [58] commonly referred to as *the liberty principle* and *the difference principle.*[59] Appealing, then, by way of civil disobedience to the public sense of justice means that justice was denied and infringed.[60]

An interrelated theme associated with the concept of sense of justice and featured in the openness of the act is the collective nature of disobedience. Not only is the act of defiance not private, it is

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[53] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 2.

[54] See: John Rawls, *A Theory of Justice, supra* note 10 at 321. Rawls's theory, then, applies only to democratic regimes. This, however, is not devoid of criticisms, one of which is the fact that what follows is that the acts of women of RAWA, for example, could never be considered, at least by literature, if not by the Taliban, as viable manifestations of civil disobedience. The result is exactly what this thesis criticizes, that is, the narrowness of the definition of civil disobedience, excluding forms of lawbreaking from its scope.

[55] *Ibid.*

[56] *Ibid* at 319.

[57] *Ibid* at 340.

[58] *Ibid* at 336-337.

[59] In a nutshell, these two principles according to Rawls are the ones that were reached at and agreed upon in the "original position" (*ibid* at 52) behind what he called "the veil of ignorance" (*ibid* at 11, 118-123). The liberty principle provides that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." (*Ibid* at 53). The second principle, which consists of two sub-principles, the difference principle and the fair equality of opportunity principle, provides that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all". (*Ibid* at 53). For further analysis of these principles, see: *ibid* at 52-101.

[60] *Ibid* at 320. For further discussion on the relations between the two principles of justice and the theory of civil disobedience, John Rawls, *ibid* at 337. See also: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (New York and London, England: Columbia University Press, 1972) at 16 [Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law*].

also not an individual act which resembles that of the ordinary lawbreaker.[61] The act in question, then, is a rather collective act. It is collective in two ways. First, addressing principles of justice, and committed to the rule of law, the dissenter, who otherwise may be excluded from the majority by her deliberate defiance of the law, acts for the sake and on behalf of that majority, invoking its sense of justice. Second, the dissenter 'speaks' for a particular community, usually a political or cultural minority, that she is a member of, which the acts of disobedience are concerned with, and whose narrative and distinct needs she wishes to address and draw attention to.

1.2. Fidelity to Law

Fidelity to law is an important condition for Rawls, who tries to accommodate illegality within the rule of law. By expressing fidelity to law, the dissenter acknowledges her respect for the rule of law, thus filling the unavoidable illegality-void created by her lawbreaking. The openness of civilly disobedient acts is one of the means by which she communicates her respect for the law. Rawls argues that the openness of the act "manifests a respect for legal procedures."[62] The disobedient, indeed, breaks the law, but she does so whilst "express[ing] disobedience to the law within the limits of fidelity to law."[63] She recognizes and accepts, using Rawls's words, the legitimacy of the constitution.[64] Let us pause on this feature, which is important since it bears crucial implications on other interrelated themes associated with civil disobedience, discussed below.

First, respect and fidelity to the law, in turn, "helps to establish in the eyes of the majority that [the act of civil disobedience] is indeed conscientious and sincere, that it really is meant to address their sense of justice".[65] It is argued that breaking the law whilst respecting the legal order as a whole

[61] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 76.
[62] See: John Rawls, "The Justification of Civil Disobedience", *supra* note 34 at 246.
[63] *Ibid* at 247. For an interesting and interrelated discussion on the notion of respect to law, see: Joseph Raz, *The Authority of Law, supra* note 10 at 250-261.
[64] See: John Rawls, *A Theory of Justice, supra* note 10 at 319.
[65] See: John Rawls, "The Justification of Civil Disobedience", *supra* note 34 at 247.

is indicative of the dissenter's sincerity, differentiating her from the ordinary criminal. Unlike the latter, who breaks the law "avoiding the public eyes",[66] the dissenter does so openly.[67] Overt acts indicate that she is not motivated by greed, self-interest, selfishness,[68] or self-dealing[69] but is rather "invok[ing] the community shared conception of justice that underlies the political order".[70] Openness is her way of acquiring visibility for her cause and a form of communicating with both the public and the authorities.[71]

This communicative aspect of the dissenter's acts is an important feature of civil disobedience.[72] She "views what [s]he does as a civic act, an act that properly belongs to the public life of the community",[73] and communicates it to the public by "draw[ing] attention to something [s]he thinks the whole community should be brought to consider, since the community has as much interest in the act as [s]he does".[74] Evident in her appeal to the sense of justice of the majority, by acting openly the dissenter announces to the public that she is still part of the larger community and generally respects its laws. Similar to the ordinary criminal, the act of disobedience excludes the dissenter from the majority, but, unlike him, her fidelity to the law, featured by the openness of her act, has the opposite-inclusive effect. It 'brings her back' to the community.

Second, fidelity to law featured in the openness of the act is inherently linked to the theme of non-violence, discussed further below. For now, suffice it to say that an overt act of disobedience shows that the dissenter may indeed oppose certain laws or policies, but she does so publicly by

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[66] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 75.
[67] See: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 655.
[68] See: Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press,1985) at 105 [Ronald Dworkin, *A Matter of Principle*].
[69] See: Daniel Markovits, "Democratic Disobedience" (2005) 114 Yale LJ 1897 at 1898.
[70] See: John Rawls, *A Theory of Justice, supra* note 10 at 321.
[71] On this point see: Elliot M Zashin, *Civil Disobedience and Democracy* (New York: The Free Press, 1972) at 115 [Elliot M Zashin, *Civil Disobedience and Democracy*].
[72] See the discussion on the communicative aspects entailed in non-violence below.
[73] See: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 656.
[74] *Ibid.*

expressing that she does not wish or intend to coerce others, and that she is still allegiant and loyal to the regime itself, not wishing to repudiate it altogether.

Third, as noted briefly above, an open act of defiance which, nevertheless, expresses fidelity to law bears communicative features. Acts of lawbreaking usually generate alienation and animosity, creating a boundary separating the lawbreaker and the law-abiding community. The openness of the act, however, has the opposite effect. It is the dissenter's means of communication with the public and with the authorities, demonstrating her sincerity and allegiance to the rule of law. Kimberley Brownlee, writing about the communicative aspects of civil disobedience, called this process of communication a "moral dialogue"[75] between the dissenter and the authorities, the former trying to draw the latter's attention to the moral basis of her acts. For her, openness and violence are two of the features through which the communicative role of civil disobedience is exemplified. [76] The dissenter, then, is engaged in a dialogic process of persuasion and communication, eliciting a public response, aimed, eventually, at achieving socio-legal change.

Fourth, another issue associated with fidelity to law and featured in the openness of the act is the concept of acceptance of the punishment or any other legal implications resulting from breaking the law. It should be noted here that, by committing an act of civil disobedience in public, the dissenter shows the larger public that she is not afraid to bear the legal consequences of her act, and that, in turn, is indicative of her respect and fidelity to the operation of the law.

To conclude the discussion on the public nature of civil disobedience, we find an oppositional binary of *criminals/lawbreakers* versus *law-abiding citizens,* and of *law* versus *lawbreaking.*

[75] See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience and Lawful Punishment (2007) 1 Crim L & Philos 179 at 179 [Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience"]; See also: Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience" (2004) 10 Res Publica 337 at 346 [Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience"]. Kimberley Brownlee uses communication theories, especially ones that focus on punishment, in order to explain how the law should approach civil disobedience.

[76] See: Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience", *supra* note 75 at 348-349.

Fidelity to law and appealing to the general sense of justice, as exemplified in the open nature of acts of civil disobedience, operate in what could be referred to as a positivist mitigating circumstance, filling and narrowing the gap between these two dichotomous oppositions. Committing civil disobedience in public is the means for accommodating the *breaking* component into the concept of *law,* thus creating somewhat paradoxical relations.

2. <u>Willingness to Accept and Submit to Punishment</u>

> "*And when we are punished by her, whether with imprisonment or stripes, the punishment is to be endured in silence;*".[77]

Implicit in the notion of fidelity to law is the dissenter's willingness to submit to punishment for her act of disobedience. Since civil disobedience "must be scrupulously "civil", writes Elliot Zashin, "the civil disobedient must accept the sanction for breaking the law".[78] Requiring submission to law enforcement authorities derives from the general concern that most traditional, usually positivist, theorists of civil disobedience are occupied with, namely that civil disobedience might result in lawlessness and anarchy. They fear, writes Elliot Zashin, that "civil disobedience may bring disrespect to law in its train unless this criterion is met"[79] and "that the motivation of the act [may] be misinterpreted."[80]

Submitting to punishment, argues Carl Cohen, is more than a possible consequence of disobedience.[81] Accepting punishment is also "the natural and proper culmination of"[82] the dissenter's act of disobedience which she expects, accepting and understanding that she is not exempt from the operation and enforcement of the law. The dissenter does not merely submit to

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[77] See: Plato, *Crito,* translated by Benjamin Jowett (Charleston, South Carolina: Forgotten Books, 2008) at 14. Emphasis added.
[78] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 153.
[79] *Ibid* at 112.
[80] *Ibid.*
[81] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 6.
[82] *Ibid.*

punishment in a passive way but rather, using Cohen's words, invites it.[83] It is not incidental to her act of disobedience but is actually an important and integral component of it. It is what makes her act of disobedience 'civil'.[84]

The dissenter is not like the ordinary criminal who chooses to escape punishment.[85] To do so would result in blurring the vital distinction between her and the ordinary criminal and would thus run counter to her fidelity to law and her acknowledgment of the general sense of justice that she is committed to preserving and is advocating through her acts. It would also impede her ability to communicate her cause to the public.[86] It is, therefore, arguable that accepting punishment is both *a purposive statement* in itself and *a strategy.* Going to jail in this context is the dissenter's strategy for communicating her speech and message. It is one of her dialogic means, her stage for drawing attention, gaining publicity and raising awareness to the cause/s sought by lawbreaking.[87]

Submission to punishment is also a tactic capable of reducing the animosity and alienation that the public might feel about the dissenter and her act, and thus, as Kent Greenawalt argues, can significantly alter "[t]he actual effects of an illegal action".[88] "[T]he frustration, resentment, and insecurity people feel when their interests are jeopardized,"[89] Greenawalt continues, are some of

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[83] *Ibid.*
[84] On this point see: Gandhi, *Non-Violent Resistance, supra* note 5 at 60.
[85] On this point see: Kent Greenawalt, "A Contextual Approach to Disobedience" (1970) 70 Colum L Rev 48 at 69. [Kent Greenawalt, "A Contextual Approach to Disobedience"].
[86] See: Kent Greenawalt, *Conflicts of Law and Morality, supra* note 10 at 240.
[87] Henry Thoreau, for example, while not being explicit about submission to punishment per se (an issue which has been the subject of academic debate), did acknowledge the communicative aspects of imprisonment. See: Henry Thoreau, "Civil Disobedience", *supra* note 6 at 36-37. For a discussion on Henry Thoreau's approach towards submission to punishment, see: Henry Kalven, "On Thoreau" in *Civil Disobedience* (Santa Barbara, CA: The Center for the Study of Democratic Institutions, 1966) at 27, cited in Hugo Bedau in *Civil Disobedience: Theory and Practice, supra* note 3 at 20.
[88] See: Kent Greenawalt, *Conflicts of Law and Morality, supra* note 10 at 239-240. See also: Kent Greenawalt, "A Contextual Approach to Disobedience", *supra* note 85 at 70.
[89] See: Kent Greenawalt, *Conflicts of Law and Morality, supra* note 10 at 240. See also: Kent Greenawalt, "A Contextual Approach to Disobedience", *supra* note 85 at 70.

the possible effects of illegal acts that can be consequently "reduced if they realize that those who threaten them are willing to pay an even more costly price."[90]

Submitting to punishment is not only strategic, it also bears a purposive statement. As Cohen sharply stated: "[i]t not only increases the publicity of his act but gives open proof of his profound commitment to the cause for which he protests."[91] Submitting to punishment is a purposive statement in the sense that the dissenter declares that by submitting to punishment she is still part of the law-abiding community. Like the open nature of civil disobedience, it has an inclusive effect of admitting the dissenter back from outlawry-marginality and into the domains of legality. Indeed, as Greenawalt argues, the dissenter "does not accept the judgment of society as expressed in the law about the proper course of behavior".[92] But, "she does ultimately accept that judgment in the form of punishment for behavior society considers wrongful."[93] This, he argues, may be indicative of her "humility about [her] moral judgment,"[94] and, more importantly, it signifies that she "reaffirms [her] sense of being a member of the community by admitting the appropriateness of enforcement efforts."[95] This recognition of her membership in the community can mitigate the public resentment of the dissenter and her cause, and not less importantly, "reduces the probability that [she] will be considered an outsider, a heretic who has rejected the basic premises of a social system."[96]

The dissenter, then, may indeed have broken the law, exposing herself to exclusion from the premises of law-abiding community, but she does so by appealing to the public's sense of justice

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[90] *Ibid; Ibid.*
[91] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 6.
[92] See: Kent Greenawalt, *Conflicts of Law and Morality, supra* note 10 at 240. See also: Kent Greenawalt, "A Contextual Approach to Disobedience", *supra* note 85 at 71.
[93] *Ibid; Ibid.*
[94] *Ibid; Ibid.*
[95] *Ibid; Ibid.*
[96] See: Kent Greenawalt, "A Contextual Approach to Disobedience", *supra* note 85 at 71.

and, returning to Rawls's words, "within the limits of fidelity to law."[97] Following this line of analysis, Carl Cohen, a firm advocate of submission to punishment, contended that "[i]t is [....] unjust to accuse the civil disobedient of treating the law with contempt."[98] On the contrary, he continued, the civil-disobedient deliberately breaks the law, invoking the general sense of justice and wishing to draw the public's attention "to a wrong [s]he believes is infinitely worse than that [s]he commits."[99] Clearly, writes Cohen, the dissenter "is sufficiently concerned with the justice of the laws to sacrifice himself in the effort to improve them."[100] Moreover, we can also argue that requiring acceptance of punishment functions as a self-restraint caveat or form of guidance intended for the dissenter herself, helping her to focus on the general principles that she wishes to invoke by lawbreaking, and not to confuse them with self-interested ones.[101]

Submission to punishment here is understood in quite 'Gandhian-Dr. King' terms as a form of self-sacrifice. For example, Gandhi's philosophy of civil disobedience is based in his larger philosophy of *Satyagraha. Satyagraha* (in sanskrit), he wrote, "is literally holding on to Truth and it means, therefore, Truth-force."[102] One of Gandhi's key elements in the pursuit of Truth is patience. In one's quest for Truth, one must be tolerant of others' possibly opposing Truths, even when they might be wrong. The quest for the Truth is a process of persuasion that is characterized by patience and tolerance towards opponents, understanding that the latter, using Gandhi's words,

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[97] See: John Rawls, *A Theory of Justice, supra* note 10 at 322.
[98] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 6.
[99] *Ibid.*
[100] *Ibid.* On this see also: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 131.
[101] On this point see: Richard Wasserstorm, "Untitled Article" in *Civil Disobedience* (Santa Barbara, CA: The Center for the Study of Democratic Institutions, 1966) at 18, cited in Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 111.
[102] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 3. For a thorough explanation of the concept of *Satyagraha* and its origin, see *ibid* in particular at 6-9, 38-40. See also: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 149-151.

"must be weaned from error by patience and sympathy."[103] Patience for Gandhi necessarily implies the infliction of self-suffering and sacrifice.[104]

For Gandhi, "the quest of Truth involves *tapas* - self-suffering."[105] Articulating this concept of self-suffering and sacrifice in a quite utilitarian rhetoric, Gandhi argues that such an act of self-suffering has "no place in it for self-interest."[106] Instead, it is one "which conduces the most to the welfare of the greatest number in the widest area, and which can be performed by the largest number of men and women with the least trouble."[107] Civil disobedience according to Gandhi "is a branch of *Satyagraha*."[108] In the context of accepting legal penalties, *Satyagraha* means that in her patient pursuit of the Truth, "the resister's outlawry"[109] is articulated and manifested "in a civil, i.e., non-violent manner."[110]

Gandhi emphasized the importance of acting publicly and was concerned with the consequential and interrelated distinction between civil disobedience and ordinary crimes. He wrote that, unlike the civil-disobedient, the ordinary lawbreaker "breaks the law surreptitiously and tries to avoid the penalty".[111] The civil-disobedient, however, is motivated by the principles of self-suffering, devoid of self-interest and committed to the welfare of the general public. She breaks the law openly and does not fear the legal sanctions that might follow her lawbreaking.[112] Accepting the penalty is indicative of her patience and self-suffering, willing to sacrifice herself for her convictions.

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[103] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 6.
[104] *Ibid* at 6, 67-68.
[105] *Ibid* at 29.
[106] *Ibid* at 39.
[107] *Ibid* at 47.
[108] *Ibid* at 4.
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*

Put differently, accepting legal sanctions is a form of "moral weapon", designed at 'disarming' the opponents of their antagonism and negativity. Richard Gregg called this 'technique' "moral Jiu-jitsu".[113] Indeed, it mostly evolves around the concept of non-violence. Moral Jiu-jitsu follows the basic philosophy of the art of Jiu-jitsu, according to which an opponent's energy is reversed and used against him.[114] Instead of acting in counter-violence, and thus acting as the assailant himself, eventually resulting in "a certain reassurance and moral support"[115] of the attacker, the moral Jiu-jitsu practitioner "offers resistance, but only in moral terms".[116] In simple words she 'kills her enemy with her kindness'. This can defeat the anger and antagonism of the opponent, arousing instead his kindness, and will eventually culminate in the loss of his moral balance.[117]

Accepting legal consequences without resistance is a sort of moral Jiu-jitsu. The dissenter willingly accepts the legal sanctions following from her lawbreaking, knowing that by doing so she may reverse the public's antagonism against her and her convictions, and arouse instead compassion and public recognition. The key emphasis here is on self-suffering and patience.[118]

3. Non-Violence

The criterion of non-violence is considered to be one of the most important components in the definition of civil disobedience. Like the previous themes of openness and submission to punishment, non-violence is deeply embedded in the notion of fidelity to law, and is committed to mitigate and minimize the inevitable infringement of the rule of law entailed by acts of

[113] See: Richard B. Gregg, *The Power of Non-violence* (London, England: George Routledge and Sons, 1936) at 25 [Richard Gregg, *The Power of Non-violence*].
[114] *Ibid* at 27.
[115] *Ibid* at 25.
[116] *Ibid* at 26.
[117] *Ibid.*
[118] An interesting debate that arises in the context of submission to punishment concerns the question of punishment and the degree of punishment that civil-disobedients should receive. Carl Cohen, for example, argues that there is no crime of civil disobedience. For further discussion, see: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 6. See also: Ronald Dworkin, *Taking Rights Seriously, supra* note 10 at 207.

disobedience. Non-violence has been, and still is, the subject of intensive public and academic debates, drawing the attention of both intellectuals and activists.[119] Despite certain variations in the scope of the meaning of non-violence, most, if not "[a]ll academic commentators consider nonviolence an essential characteristic of civil disobedience".[120]

Within the 'orthodox' theories of civil disobedience examined here, non-violence is generally considered an essential component of civil disobedience, although we can discover variations as to scope. Below, I discuss arguments offered by proponents of non-violence, and also consider variations in the scope and degree of the meaning and extent of non-violence.

3.1. The Scope and Extent of Non-Violence

Most theories of civil disobedience consider non-violence an essential element of civil disobedience.[121] Scholars do, however, differ on the question of extent and degree of non-violence. Their approach to this question ranges from idealism to pragmatism. Some commentators approach non-violence rigorously and, rather idealistically, interpret it narrowly. They oppose the use of any form of violence under any circumstances. Others are more pragmatic.

Hugo Bedau, for example, took a quite rigorous approach. He argued that non-violence is implicit in the emphasis on the 'civil' component. Since "[t]he pun on 'civil' is essential", he argued, "only nonviolent acts thus can qualify."[122] He excludes from the scope of civil disobedience any acts of resistance which involve "deliberately destroying property, endangering life and limb, inciting to riot (e.g., sabotage, assassination, street fighting)."[123] In such cases, he argued, the dissenter "has not committed civil disobedience."[124]

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[119] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 3.
[120] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 116.
[121] Borrowing from Michael Walzer, non-violence is considered as one of the major requirements of *civility.* The second requirement is submission to punishment discussed above. See: Michael Walzer, *Obligations, supra* note 15 at 24.
[122] See: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 656.
[123] *Ibid.*
[124] *Ibid.*

His approach raises some questions. That is, what does 'deliberate' mean? What if the dissenter is attacked by an angry mob or violent police officers? Can't she act in self-defense? Will that be considered as violence for Bedau? His approach is unequivocal: the dissenter must remain non-violent no matter how much violence might be inflicted on her by others responding to her lawbreaking. She must be "prepared to suffer without defense the indignities and brutalities that often greet [her] act."[125]

Gandhi also believed in total abstention from violence. Inherent in and central to Gandhi's theory of *Satyagraha,* that is, the pursuit of Truth discussed above is the Buddhist/Hindu concept of *Ahimsa,*[126] also referred to as non-violence or love. As with submission to punishment, the satyagrahai who is committed to self-suffering and patience refrains from any kinds of violence. For Gandhi, avoidance of violence also includes avoidance of counter-violence and retaliation aimed at defending oneself against violence inflicted due to one's status as the dissenter.[127] The dissenter must display courage and "stand firm like a rock without retaliating"[128].

On the other hand, whilst acknowledging the importance of non-violence, some scholars nevertheless accept a more moderate and circumstantial-based approach, posing some qualifications to the premise of total non-violence. John Rawls, for example, did acknowledge, although he did not particularly further elaborate, that in certain circumstances, when non-violent

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[125] *Ibid.* It should be noted here that Carl Cohen used to be one of the most leading voices in demanding absolute non-violence, although he later changed his mind, a new approach mentioned in *Chapter 5.* See: Carl Cohen, "Essence and Ethics of Civil Disobedience", *The Nation* (16 March 1964) 257 at 258. Like with Hugo Bedau's view, Cohen's approach, even in cases of counter-violence as self-defence was unequivocal: the dissenter must remain non-violent in all circumstances. (*Ibid* at 258).

[126] For further discussion on the philosophy of Ahimsa, see: Henk W. Bodewitz, "Hindu Ahimsa and its Roots", in Jan E. M. Houben & K. R. van Kooij, eds, *Violence Denied: Violence, Non-violence and the Rationalization of Violence in South Asian Cultural History* (Leiden, The Netherlands: Brill Academic Publishers, 1999) 17. On the interrelations between Satyagraha and Ahimsa, see: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 150-152.

[127] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 56, 57. Gandhi contended that Ahimsa is more than its immediate literal meaning of "[n]ot to hurt any living thing". (*Ibid*). It is more than that. He argued that "[t]he principle of *ahimsa* is hurt by every evil thought, by undue haste, by lying, by hatred, by wishing ill to anybody." (*Ibid* at 41-42. Emphasis in original).

[128] *Ibid* at 57.

resistance "fails in its purpose"[129] to appeal to the majority sense of justice, "forceful resistance *may later be entertained."*[130] In such "circumstances militant action and other kinds of resistance *are surely justified."*[131]

Elliot Zashin elaborated on this point.[132] Whilst contending that non-violence is an essential definitional component of civil disobedience, he disagreed with an absolute non-circumstantial approach to non-violence. Focusing instead on the definitional aspects of civil disobedience, Zashin argues that "[a]s in the case of accepting legal punishment, an insistence on rigorous nonviolence puts the civil disobedient in a vulnerable position".[133] Namely, it expects her "to suffer whatever brutality might be vented upon [her]".[134] He therefore poses some qualifications to the narrow definition of non-violence and broadens its limited scope to encompass situations where the dissenter is faced with violence inflicted upon her and has to react in counter-violence, "in self-defense, seeking only to protect oneself from physical harm by police or spectators, not to escape arrest".[135] In such cases, he says, the dissenter's self-defense "should not exclude an initially nonviolent disobedience from the category".[136]

3.2. The Importance of Non-Violence

The importance entailed by non-violence is developed through two interrelated discussions: the first relating to the communicative merits embodied in non-violence, and the second regarding its significance to the concept of fidelity to law.

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[129] See: John Rawls, *A Theory of Justice, supra* note 10 at 321-322.
[130] *Ibid* at 322. Emphasis added.
[131] *Ibid* at 323. Emphasis added.
[132] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 116-117.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*

First, following Rawls, it can be argued that non-violence is one of the 'by-products' of understanding and interpreting civil disobedience in communicative terms, as a form of a persuasive public speech, addressing and appealing to the general public sense of justice. For Rawls, the avoidance of violence does not derive "from the abhorrence of the use of force in principle".[137] Rather, it is reflective of, and rooted in the communicative aspects of, civil disobedience. Civil disobedience, he writes, tries to avoid violence "because it is a final expression of one's case."[138] As he put it, "any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act."[139]

This "civilly disobedient quality of one's act" implies the presupposition of non-violence in the concept of 'civil': it is her means of engaging in what Kimberley Brownlee called a moral dialogue with the state and the public. The use of violence, on the other hand, impedes the *civil* notion of the *disobedience* and disrupts the dissenter's ability to communicate her cause and, perhaps, to persuade the state and the opposing public. It can result in raising more public antagonism and animosity towards the dissenter and her cause than what already exists by the mere breach of the law itself.[140]

Civil disobedience is aimed at delivering a message to the authorities and the entire community by using what is perceived as 'extra-legal' methods that are in themselves problematic and difficult to justify and accommodate within the realm of a law-abiding community. The dissenter breaks the law in order to draw attention to her cause, eliciting some public response and dialogue. Her lawbreaking, however, breaks with her membership in, and excludes her from, the law-abiding community. The use of violence, in particular, breaks with the prospect of dialogue, leaving her

[137] See: John Rawls, *A Theory of Justice, supra* note 10 at 321.
[138] *Ibid.*
[139] *Ibid.*
[140] On this point see: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 155-156.

outside the community, and breaks with one of the underlying principles of civil disobedience – addressing the general shared sense of justice.

But refraining from violence is the dissenter's means of creating dialogic alliances with that same community, which, in turn, will enable her return to it. Carl Cohen interpreted non-violence as a form of expression, conveying "the commitment to solve problems and disputes by persuasion without resort to violence".[141] Nonviolent acts, wrote Harrop Freeman, "are like words. They are means of persuasion."[142] They are the dissenter's means, according to Kimberley Brownlee, to engage in a moral dialogue with the authorities and the community. They are her language.

This notion of dialogue and persuasion was central to Gandhi. Implicit in his philosophy of *Satyagraha*, wrote Zashin, was "the idea of moral suasion"[143] and conversion of wrongdoers.[144] Ahimsa, then, was his means of persuasion, leading eventually to Truth.[145]

Following Richard Gregg's concept of "moral Jiu-jitsu", non-violence is used for disarming opponents of their antagonism and resentment, and wrongdoers of their own violence and evil. Instead of acting in violence, thus blocking the chance of convincing the public of the correctness of the dissenter's acts, and blurring the distinction between wronged and wrongdoers, a Gandhian dissenter shows self-restraint and is willing to suffer the consequences of her ahimsa.[146] This is 'a-step-by-step' process of making friends with one's opponent, in which the latter "is bound in the end to turn away from his evil ways."[147]

Following Gandhi, civil disobedience is a dialogic process of persuasion and conversion, by which dissenters are engaged in communicating their causes and convictions to the public at large. It can

[141] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 19.
[142] See: Harrop A. Freeman, "Civil Liberties: Acid Test of Democracy" (1959) 43 Minn L Rev 511 at 530.
[143] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 152.
[144] *Ibid.*
[145] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 42. Emphasis added.
[146] *Ibid.*
[147] *Ibid* at 41.

minimize public resentment and perhaps maximize instead the chance of support, refocusing public attention from the unlawfulness of acts involved to the causes invoked by these acts.

Second, as already noted above, opponents of civil disobedience fear the anarchy and chaos associated with lawbreaking. Whilst, violence, and the prospect of such, is a cause of legal anxiety, non-violence, on the other hand, is a kind of reassurance of the continuity of law-and-order. It is considered as an important manifestation of the Rawlsian fidelity to law.

Carl Cohen, for example, argued that "[l]aw and respect for the law is ultimately grounded in [....] non-violence".[148] Cohen further suggested that the courts should recognize the distinction between violent acts attempting "to overthrow the government by force"[149] and non-violent acts, which as he interpreted them, are a form of expression and persuasion. The jurisprudence behind this position, he argues, is that violent acts, or violent revolution as he called them, are anti-law and are "outside the law, whereas non-violent change, even civil disobedience, is within the law".[150]

Here, implicit in the concept of respect of law, and manifested in the element of non-violence, is the assertion that the dissenter does not wish to repudiate the entire regime, but rather acknowledges and accepts its legitimacy. Michael Walzer, for example, contended that the civil-disobedient "feels morally bound to disobey; he also recognizes the moral value of the state; civil disobedience is his way of maneuvering between these conflicting moralities."[151] If civil disobedience is the "way of maneuvering" between allegiance to the state and moral commitment to disobey, non-violence is its actual means. Non-violence functions as a self-imposed limitation upon civil-disobedients, preventing them from engaging in and inflicting violence on others. As

[148] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 19.
[149] *Ibid* at 20.
[150] *Ibid.*
[151] See: Michael Walzer, *Obligations, supra* note 15 at 24.

such, the threat of revolution often associated with civil disobedience can be minimized and even eliminated.[152]

What becomes apparent here is the attempt to distinguish civil disobedience from revolutionary/militant resistances. It is considered as an important distinction, which Carl Cohen, perceived as one "of the most . . . fundamental importance in understanding civil disobedience and in appraising it".[153] Similar to the distinction drawn between the ordinary criminal and the civil-disobedient, here the emphasis is on differentiating between the latter and the militant, the rebel. Non-violence, then, is the line drawn and the means to differentiate between the two.[154]

Unlike the rebel who does not accept the entire legal or political order, and does not exclude the use of violence in order to achieve her goals,[155] the dissenter is not interested in repudiating the entire regime. Rather, while she focuses on appealing to the general sense of justice by drawing attention to certain laws or policies she considers unjust, she will refrain from using violence. Non-violence, together with the features of openness and submission to punishment enable her inclusion in the community from which she was excluded by breaking the law. Further, for her, the unjust law or policy she challenges is not reflective or indicative of the level of democracy or justice, or lack thereof, present in the regime. Rather, following Rawls, the entire regime is "one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur."[156]

The differences between the rebel and the civil disobedient, using Cohen's dramatic words, are monumental.[157] The civil-disobedient is perhaps considered a lawbreaker, and may indeed be met with antagonism and animosity. However, it is easier to defend and justify her intentions, integrity

[152] On this point see: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 115. Emphasis is both in original and added.
[153] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 42-43.
[154] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 116.
[155] On this see: John Rawls, *A Theory of Justice, supra* note 10 at 322-323; Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 4; Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 44.
[156] See: John Rawls, *A Theory of Justice, supra* note 10 at 319.
[157] Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 45.

and sincerity, as long as she acts within the definitional boundaries of civil disobedience. As seen above, acting within this framework can render acts of lawbreaking relatively noble and heroic. The rebel's integrity and sincerity are harder to defend, and are mostly questioned and doubted.[158] Her actions cannot be tolerated because her intentions are subversive and dangerous.[159]

The problem is, however, that it is conceptually difficult to differentiate between the two. Both Hannah Arendt and Carl Cohen argued that in reality the distinction "turns out to be more difficult to sustain".[160] It is arguable that the same notion of non-violence that is used for drawing the line between the two is the one that can weaken it. According to Bedau, non-violent resistance can still be revolutionary since it can "be undertaken with the intention of collapsing an entire government".[161] Gandhi is a good example of this dichotomy.[162] Both Hannah Arendt and Cohen questioned whether he was indeed a civil-disobedient. He understood civil disobedience as a branch of *Satyagraha* and non-violence as its means. However, as both point out, Gandhi, who was indeed non-violent, still rejected the legitimacy of British Imperialism over India and wished (and succeeded) to collapse and repudiate it. This revolutionary intent, then, sheds some doubts on his civil-disobedient practice. Hannah Arendt was therefore right to ask, "Did Gandhi accept the "frame of established authority," which was British rule of India? Did he respect the "general legitimacy of the system of laws" in the colony?"[163] Cohen went even further and defined Gandhi

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[158] It should be noted here that most commentators who write about the distinction between civil disobedience and revolutionary resistance do not discuss the plausibility or justifiability of revolutions per se, although it is not difficult to understand their normative and judgmental criticism of revolutionary resistances. Rather, they discuss it, or rather criticize it, implicitly in reference to civil disobedience. Some have, however, briefly commented that in certain circumstances "even revolution may prove justifiable". (*Ibid* at 43; See also Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 4). See also: John Rawls, *A Theory of Justice, supra* note 10 at 323.

[159] See: Hugo Bedau, "On Civil Disobedience", *supra* note 20 at 659.

[160] See: Hannah Arendt, *Crises of the Republic, supra* note 14 at 77. See also: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 72 at 47.

[161] See: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 658.

[162] Another example is Henry Thoreau. Carl Cohen, for example, argued that Thoreau's intentions were clearly revolutionary, as evident from his famous essay. (*Ibid*). For a contrary view, see: Hugo Bedau in *Civil Disobedience: Theory and Practice, supra* note 3 at 21.

[163] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 77.

as a rebel.[164] One can see that the question before us is not based entirely on the premise of non-violence, but also on the intentions of the resisters.[165]

At this point, however, the disagreement as to this element of civil disobedience can be resolved conceptually by an approach to Gandhi's resistance as a synthesis of both civil disobedience and revolutionary resistance. Gandhi himself approached his resistance in a synthesizing manner: he developed the two distinguishable concepts of aggressive and defensive civil disobedience. Defensive civil disobedience includes acts of resistance against laws that run counter one's own "self respect or human dignity".[166] Aggressive disobedience is not intended to break specific contested immoral laws *per se*, but, rather, is aimed at breaking any State laws "as a symbol of revolt against the state."[167] Aggressive civil disobedience, Zashin argues, "implies an active rejection, even of symbolic, of the legitimacy of the State."[168]

To conclude this part, non-violence is considered an essential component of civil disobedience. It is the dissenter's form of speech through which she communicates her message to the public, expressing her respect for the law and acknowledgment of the entire political order, with which she might have certain moral conflicts, motivating her to break the law, but to which she still proves allegiant and loyal. It is what differentiates her from the rebel and what, in turn, allows her return to the community.

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[164] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 46.
[165] Cohen, for example, argued that as "in every case of moral significance, what a man is *doing* depends importantly not only upon his external deeds but also upon his internal intentions." (*Ibid* at 47. Emphasis in original). He concludes that, nonetheless, the majority of civil disobedience cases "leave no doubt about their real intentions". (*Ibid*). That is, "they make it very clear that their act is committed *under* the law, even if against it. (*Ibid.* Emphasis in original).
[166] See: Gandhi, *Non-Violent Resistance, supra* note 5 at 175.
[167] *Ibid.*
[168] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 154.

4. <u>Politically Motivated Acts</u>

"If no one fought except on his own conviction, there would be no wars".[169]

It is important, Zashin wrote, "that civil disobedience not be thought of as a mere lawbreaking".[170] So far, this chapter has covered several elements that can render acts of mere lawbreaking into legitimate manifestations of civil disobedience. Another definitional element that is largely agreed upon by scholars as one that can render acts of mere lawbreaking into legitimate manifestations of civil disobedience is that they should be politically motivated, designed at bringing about political, social and/or legal change. It is an act that should be motivated by political reasons and have political aims.

This thesis views such a requirement to be not only a distinct definitional prerequisite element of civil disobedience but also an element that is a consequential result of the criteria discussed above, reflecting their accumulated effects. When a civil-disobedient is acting openly and non-violently and is willing to suffer the legal consequences, one can rightly conclude that her act is indeed political.

In examining the political nature of a certain act, two interrelated questions are asked: 1) what makes an act of disobedience a political one? and 2) what is the act intended at achieving? Kimberley Brownlee articulated these questions in terms of the *backward-looking* and *forward-looking aims* of civil disobedience.[171] The former means that the dissenter condemns and argues against certain conduct that she considers unjust,[172] and the latter means that her act is aimed at

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[169] Leo Nickolayevitch Tolstoy, *War and Peace,* revised ed (Oxford & New York: Oxford University Press, 2010) at 27.
[170] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 114.
[171] See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience", *supra* note 75 at 179, 180; See also: Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience", *supra* note 75 at 346, 347. These terms are also drawn from the parallel that she has drawn between the communicative aspects of civil disobedience and the communicative aspects of lawful punishment by the state. See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience", *supra* note 90.
[172] *Ibid* at 179.

persuading the authorities to change their ways, eventually "bring[ing] about through moral dialogue a lasting change in that conduct".[173]

Following Rawls, the act of civil disobedience is not only political because "it is addressed to the majority that holds political power".[174] As noted above, it is also political in the sense that it is based on the dissenter's deep political mores which reflect the shared sense of justice of the community at large. The act is one that is not motivated by self-interest or greed. Rather, following Kimberley Brownlee, the dissenter's "convictions must be well-founded".[175] Her considerations for breaking the law must be based on established objective reasons, "such as justice, [….] rights, integrity, democracy, [….] autonomy, equality, privacy, and so on"?[176] It is an act which is, quoting Rawls, "guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally."[177] The dissenter believes that the majority's sense of justice was infringed and violated, and, therefore, she resorts to lawbreaking as a means for promoting public visibility for her cause. She does so while respecting the law and acknowledging the legitimacy of the political system at large.[178] Further, following Bay, the changes she strives to achieve should extend beyond the dissenter's immediate group and have a universal affect on the entire society.[179] Her act of civil disobedience, then, is an act of protest against a certain law or policy which she believes to be the cause of injustice and social ills, and one that is aimed at correcting these wrongs.

The emphasis here is on acts of protest. The civil disobedient, Carl Cohen argued, "must do more than knowingly break the law".[180] Her act should be also one of protest. This is a principled act in

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[173] *Ibid*.
[174] See: John Rawls, *A Theory of Justice, supra* note 10 at 321.
[175] See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience", *supra* note 75 at 183.
[176] *Ibid.*
[177] See: John Rawls, *A Theory of Justice, supra* note 10 at 321.
[178] See: Christian Bay, "Civil Disobedience", *supra* note 5 at 473.
[179] *Ibid* at 474.
[180] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 11.

the sense that it is a form of what Rawls called a public speech designed at conveying the dissenter's message to the public. According to Zashin, it is a protest against injustice,[181] an element important for distinguishing between "certain kinds of public law-breaking of a minor nature".[182] These characteristics are the ones that differentiate the civil-disobedient from the ordinary criminal who operates for personal gain, and from the revolutionary who does not appeal to the shared sense of justice since the latter, unlike the civil-disobedient, does not acknowledge the legitimacy of the general legal and political order.

The dissenter's acts are motivated by the Gandhian notion of self-sacrifice. In order to achieve her goals, and committed to her cause, which she considers of eminent relevance to the community at large, she is willing to suffer the consequences of her acts, including by submitting to imprisonment and legal penalties without resistance. An important feature here is the utilitarian notion of self-sacrifice for the greater good. Cohen eloquently concluded this point: "So we rightly say that all civil disobedience is a form of protest. It is a cry of conscience, publicized and concretized in the act of disobedience."[183] This notion of conscience "as a form of protest"[184] leads us to a related exploration of the concept of conscientiousness.

4.1. Conscience and Civil Disobedience

Civil disobedience, writes Matthew Hall, "entails an act of conscience".[185] Conscience is understood as an essential feature of civil disobedience. Ronald Dworkin, for example, acknowledged that conscience and civil disobedience are deeply connected.[186] Carl Cohen defends

[181] See: Elliot Zashin, *Civil Disobedience and Democracy, supra* note 71 at 114.
[182] *Ibid.*
[183] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 12. Emphasis both in original and added.
[184] *Ibid* at 20.
[185] See: Matthew R. Hall, "Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law" (2007) 28: 5 Cardozo L Rev 2083 at 2088 [Matthew Hall, "Guilty but Civilly Disobedient"].
[186] See: Ronald Dworkin, *Taking Rights Seriously, supra* note 10 at 219.

a similar view. He perceived conscience (together with non-violence as discussed above) as one of the most important elements of civil disobedience, undergirding the law and generating "respect for the law".[187]

Similarly, conscience was central to Thoreau. For him, it is what differentiates humans from machines. Thoreau criticized an understanding of the respect for the law in terms of total obedience, like machines devoid of conscience.[188] For Thoreau, serving the state as obedient machines is not indicative of respect for law. He warns of the dangers of a 'conscience-free' respect for the law. The law on its own "never made men a whit more just".[189] On the contrary, Thoreau writes, "by means of their respect for it, even the well-disposed are daily made the agents of injustice."[190] Conscience, then, operates as a safeguard from injustices.

The notion of conscience thus appears to have two distinct meanings. One involves the level of *consciousness* of the dissenter that preceded her decision to disobey. In plain words, this means that she consciously knows she is breaking the law.[191] The second meaning relates to the possible reasons for disobedience, which need to be *conscientious.* Carl Cohen argued that the "[e]very day citizen must decide whether or not to collaborate with law".[192] Deciding whether to obey is based on conscience-based considerations. Here, conscience is interpreted as "the internal sense of right and wrong",[193] and an act of conscience is one which involves "defiance of law borne out of a deeply-held belief in the injustice of a law or policy."[194] It is an injustice of such a magnitude that

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[187] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 19.
[188] See: Henry Thoreau, "Civil Disobedience", *supra* note 6 at at 29.
[189] *Ibid.*
[190] *Ibid* at 28.
[191] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 22. For a brief and yet interesting comment on the loose use of the terms conscience and consciousness see: Hannah Arendt, *Crises of the Republic, supra* note 4 at 65.
[192] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 19.
[193] See: Matthew Hall, "Guilty but Civilly Disobedient", *supra* note 185 at 2088. For an interesting discussion over the meaning of conscience, see: Erich Fromm, in *A Matter of Life, supra* note 2 at 100.
[194] See: Matthew Hall, "Guilty but Civilly Disobedient", *supra* note 185 at 2088. See also: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 20.

the dissenter deeply believes that complying with the law will create inevitably greater detrimental consequences to the larger public than the evil associated with disobedience. Conscientiousness, here, is, therefore, according to Carl Cohen, "a feature of high moral value",[195] as the civil-disobedient cannot comply with the law, since to do so will compromise her integrity and moral sincerity.[196]

The process of deciding whether to comply with the law is what Cohen called "the forum of conscience",[197] whereby the dissenter is involved in what Bedau termed the "weighing of consequences against one another".[198] Namely, the dissenter assesses whether the consequences people might suffer from compliance with a specific law which she deems unjust would be worse than the consequences of her actual acts of dissent.[199]

Nonetheless, this process of assessment is not devoid of limitations. Rawls, for example, posits some caveats for this process and warns that although a person has *the autonomy* or *the right* to disobey under certain conditions[200] and decide if civil disobedience is indeed justified under such circumstances,[201] she still has to act *responsibly* by deciding whether *it is right* to disobey.[202] She

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[195] *Ibid* at 22.
[196] *Ibid.*
[197] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 19.
[198] See: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 660.
[199] *Ibid* at 659.
[200] On this point see: John Rawls, *A Theory of Justice, supra* note 10 at 326-331. See also: John Rawls, "The Justification of Civil Disobedience", *supra* note 34 at 248-252. Rawls sets out three possible, and yet not exhaustive, conditions for determining the justifiability of, and the right to, civil disobedience. These are namely: a) the injustice against which civil disobedience is committed involves a clear violation of the principles of justice (See: John Rawls, *A Theory of Justice, supra* note 10 at 329); b) It is a relatively intentional (*ibid*) violation "over an extended period of time in the face of normal political opposition" (*ibid*), and; c) that the civil-disobedient accepts and acknowledges that "everyone else similarly subjected to the same degree of injustice has the right to protest in a similar way". (See John Rawls, "The Justification of Civil Disobedience", *supra* note 34 at 250). This last condition is very interesting, since it can enable less democratic communities, such as the New-Right in the US, objecting abortions, to use the same rhetoric of civil disobedience. This however deserves a thorough analysis that goes beyond the scope of this thesis.
[201] See: John Rawls, *A Theory of Justice, supra* note 10 at 341.
[202] Rawls argues that even when the right to disobey has been established, it does not follow that it would be "wise or prudent to exercise this right." (*Ibid* at 330; See also John Rawls, "The Justification of Civil Disobedience", *supra* note 34 at 252). On this point see also: Hugo Bedau, "On Civil Disobedience", *supra* note 10 at 663. Bedau argues that the fact that one has a right to disobey does not lead to the conclusion that it is the right thing to do. (*Ibid*).

must "make an effective appeal to the wider community"[203] and "look to the political principles that underlie and guide the interpretation of the constitution."[204] Connecting the political nature of the act of civil disobedience, namely the principles of justice, to the notion of conscientiousness, Rawls suggests that the civil-disobedient must weigh these principles against the actual circumstances.[205] Following this rationale, the process of weighing and assessment is located within two boundaries: the concepts of *autonomy* and of *responsibility.*

In summary, the dissenter is motivated by deep political convictions, based on principles of justice, and is committed to objectives larger than herself, affecting the entire society. In turn, these deep convictions mark, using Kimberley Brownlee's words, her sincerity and seriousness.[206]

2. Section Two: The Role of Civil Disobedience

"Human History began with an act of disobedience, and it is not unlikely that it will be terminated by an act of obedience."[207]

Even from the perspective of narrow prevailing traditional theory and theorists, civil disobedience is considered to play a viable and important role to a well-functioning democracy.

Opponents of civil disobedience argue that a) it is contrary to law, undermines its rule, and manifests disrespect to it; b) it poses the dangers of lawlessness, chaos, and anarchy, and therefore can defeat the entire regime; and c) it blurs the important distinction between law and morality. It is often argued that civil disobedience poses serious dangers to the well-being and continuance of a functioning democracy. The people's political participation in the democratic process of decision-making is an inherent characteristic of a well-functioning democracy.

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[203] See: John Rawls, *A Theory of Justice, supra* note 10 at 330.
[204] *Ibid* at 341.
[205] *Ibid.*
[206] See: Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience", *supra* note 75 at 340-341.
[207] See: Erich Fromm in *A Matter of Life, supra* note 2 at 97. Emphasis in original.

The civil-disobedient, on the other hand, not only breaks the law, but also breaks with these modes of political participation. Posing a kind of a counter-majoritarian difficulty, infringing the rights of the majority by resorting to illegal methods, she is, therefore, considered to be interfering with the rules of democracy. Using the uncompromising words of Eugene Rostow, she "seek[s] moral ends through the use of immoral means".[208] Rostow argues that citizens in societies of consent have no right to coerce the majority and break the law, no matter how eminent the grievances against which they contest.

Proponents of civil disobedience, on the other hand, acknowledge the significant role it plays. Rawls, for example, argued that not only is civil disobedience (assuming, of course, that it falls within his definition) not an undemocratic device, endangering the foundations of democracy, it is actually, despite its illegal nature, "one of the stabilizing devices of a constitutional system."[209] For Rawls, civil disobedience is not an illegitimate external means, but rather is internal and supplementary to existing socio-legal and political methods. It is a mode of action that, when used with restraint, as a last resort and after exhausting all "reasonable political appeals in the normal way",[210] can be "a final device to maintain the stability of a just constitution."[211]

Unlike Rostow, who feared that civil disobedience would fracture unity, Rawls argued that civil disobedience is not sectarian in nature, but rather appeals to the majority's shared and united sense of justice.[212] Further, it asks the majority to reconsider its laws or policies. As such, civil disobedience is in the interest of and for the benefit of the entire society. It is understood as a

[208] See: Eugene Rostow, "Of Civil Disobedience", *supra* note 10 at 90. See also: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience", *supra* note 75 at 180; Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law, supra* note 60 at 168, 170.
[209] See: John Rawls, *A Theory of Justice, supra* note 10 at 336.
[210] *Ibid* at 337.
[211] *Ibid*.
[212] *Ibid* at 338.

unifying method to uphold stability.[213] Rawls then concludes, "a conception of civil disobedience is part of the theory of free government."[214]

Civil disobedience, then, is not an impediment to democracy, but an important vehicle to achieve and maintain it. It offers the means and platform to contest what are perceived as unjust laws and/or policies, while still expressing fidelity to the law and the democratic regime. It may involve violation of the law but not a violation of "the fundamental political principles of a democratic regime."[215] It does the contrary, validating and affirming these principles.

Singer also believed that such civil disobedience has an important positive role in a democracy, especially through its potential for rectifying one of the deficiencies of democratic theory,[216] the oblivion and indifference of the majority to issues that may be vital for certain minorities.[217] Such oblivion poses a danger of injustice, since the majority "can out-vote a minority for which the issue is of vital concern."[218] Civil disobedience is therefore the minority's means for 'mitigating' the majority's blindness, and a platform for publicity,[219] designed to draw the majority's attention to issues that are of eminent significance to the minority, and which have not, and could not have, received adequate publicity through orthodox means.

Rostow's assertion that in democratic societies people should use the legal political procedures loses its force here, since in reality some societies are based on hierarchical power-relations, in which some minorities do not have an equal access to legal or political media through which they

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[213] *Ibid*.
[214] *Ibid.*
[215] *Ibid.*
[216] See: Peter Singer, *Democracy and Disobedience* (Oxford: Calderon Press, 1973) [Peter Singer, *Democracy and Disobedience*] at 85.
[217] *Ibid.*
[218] *Ibid.*
[219] *Ibid* at 72-84. Singer relies heavily on Bertrand Russell's article, from which he quotes extensively. It is an interesting article in which Russell in a clear and eloquent way articulates his defense of civil disobedience contesting against nuclear weapons. See: Bertrand Russell, "Civil disobedience and the threat of nuclear war" in Hugo Adam Bedau, ed, *Civil Disobedience: Theory and Practice* (New York: Pegasus, 1969) 153.

can address their grievances. Some minorities lack relative political visibility, representation and voice. Matters that are of concern to them might not be adequately present in, or at worst might be absent from, the majority's agenda and awareness. They may therefore feel compelled to resort to civil disobedience as their only means to be heard.[220] Civil disobedience here is not a threat to democracy or a danger to law and order, but rather an important 'watch dog' having the exact opposite effect of chaos, that is, the potential of remedying democracy's own deficiencies and restoring justice. It operates as a dialogic means of persuasion of the majority, drawing its attention, alarming it of certain injustices, and further enables silenced minorities to be heard.

One of the themes we can draw from Singer's analysis is the idea of free speech. Related to Singer's concept of fair hearing and similar to Rawls's understanding of civil disobedience as a forum of public speech, Carl Cohen suggested that the acts of civil disobedience are protected by the American First Amendment as a forum of speech.[221] Taking a similar view to Singer, Cohen wrote that the dissenter is the voice of those who cannot be heard and are "normally deprived of speaking"[222] through more moderate channels. This is her way to raise publicity and attention.[223] It is, therefore possible to argue that for Cohen civil disobedience as a mode of action is not estranged from the law, running counter to democracy and the rule of law, but rather is a legitimate democratic device protected by it.[224]

Hannah Arendt defends a similar view. Referring to Alexis de Tocqueville, [225] she argues that civil disobedience is a form of voluntary association, deriving from the right to association, which is one of the corner stones of the American political tradition, having its origins in the early days of

[220] See: Peter Singer, *Democracy and Disobedience*, *supra* note 216 at 74.
[221] See: Carl Cohen, "Civil Disobedience and the Law", *supra* note 23 at 23, 24.
[222] *Ibid* at 24.
[223] *Ibid* at 21, 24, 25.
[224] *Ibid* at 25.
[225] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 94. She refers to Alexis de-Tocqueville, *Democracy in America* (New York: Vintage Books,1945), focusing especially on vol 1, chapter 12, and vol 2, Book ii, chapter 5.

formation of the US.[226] For her, what is of eminent danger to democracy, endangering the US,[227] is not lawbreaking and civil disobedience,[228] but is rather the loss of citizens' participation in the political process.[229]

Following this line of thought, civil disobedience is a form of association, whereby people gather and act together, manifesting their shared beliefs and concerns. Civil disobedience is seen as a means of regaining the role, and even as an actual form, of citizens' participation in the political process. This is all the more so with regard to certain minorities who never had any participatory role in this process. The liberty of association, of which civil disobedience constitutes an important part, "has become a necessary guarantee against the tyranny of the majority",[230] allowing minorities to demonopolize the majority of its exclusive power.[231]

Understood in this way, civil disobedience is an important self-empowering method used by minorities to demonopolize the means of participation, and, following Harrop Freeman's line of thought, the platforms of free speech. Further, pointing to the defects of American legal system, Hannah Arendt argues that most lawyers approach civil disobedience from a particularistic point of view, seeing the dissenter "as an individual lawbreaker, and hence a potential defendant in court",[232] rather than recognizing her "as a member of a group".[233] Taking this mode of reasoning, it is only the decontextualization of civil disobedience, perceiving it solely through the lens of criminal law, that can prove right Rostow's 'prophecy' of "dissolving organized society into its

[226] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 96.
[227] *Ibid* at 89.
[228] *Ibid*.
[229] *Ibid*.
[230] *Ibid* at 97.
[231] *Ibid.*
[232] *Ibid* at 99.
[233] *Ibid.*

individual atoms".[234] Civil disobedience here is a tool promoting unity and solidarity rather than disparity and isolation.[235]

Having examined the elements and role of civil disobedience, we now move to the task of mapping the two contexts of squatting and abortion discussed in *Chapters 2 and 3* in which law-breaking and the making of law/s will be analyzed in this thesis. The foundations of civil disobedience informed by the exploration of these two contexts open the door to a critical examination of these elements as they are traditionally understood, grounded in the concrete two contexts of women's lawbreaking. They will be revisited in *Part Two,* where I discuss whether there is a way to describe the actions of these women as civil disobedience recognized in law. I find this not to be possible, and offer, instead, ways for re-reading these two contexts of lawbreaking as constructive law-making and agency.

[234] See: Eugene Rostow, "Of Civil Disobedience", *supra* note 10 at 92.
[235] See: Hannah Arendt, *Crises of the Republic, supra* note 4 at 95.

Chapter Two - Squatting in Israel: Trespass to Land

"No longer is the 'savage' in the disciplinary backyard or front lawn. She has invaded the 'home' *Here,* fissuring it in the process."[1]

This chapter portrays a story of squatting through three stages, starting *before* it occurs, then moving to describing its actual happening, and culminating in its *aftermath.* The stages are addressed in three sections. The first section relays the narrative of the woman squatter, and focuses on the question of why these women are ineligible for public housing. Here, the thesis outlines the main public housing policies and criteria relevant to this question, thereby providing the the story prior to squatting, necessary to understand the legal context. The second section focuses on the question of how squatting happens, 'mapping' and setting out the different types of squatting and its actual practical aspects. The last section focuses on the inevitable legal response and consequences that follow squatting. This section 'digs' deeper into the squatting phenomenon and asks why the acts of the squatters are problematic. Here, the chapter outlines the relevant Israeli legal basis and framework and then discusses the legal approach towards these cases, the arguments raised against these women, and the 'usual' defense these women receive.

A. The Story Preceding Squatting

1. Who are the Women Squatters?

In 21st century Israel, Jewish women, on the whole, enjoy equal rights and recognition: they can join elite squads in the army[2], be elected and appointed to local religious Jewish councils traditionally dominated by men,[3] and be appointed to boards of directors in governmental

[1] See: Smadar Lavie & Ted Swedenburg, "Between and among the boundaries of culture: Bridging text and lived experience in the third timespace" Cultural Studies 10:1 154 at 158.
[2] See: HCJ 4541/94, *Miller v. The Minister of Defense,* P.D. [1995] 49 (3) 94.
[3] HCJ 153/87, *Shakdiel v. The Minister of Religious Affaires,* P.D. 42 (2) 221; HCJ 953/87, *Poraz v. The Mayor of Tel Aviv – Yafo,* P.D. 42 (2) 309.

companies by virtue of mandatory affirmative action.[4] However, at the same time, there are still 'other' marginal, invisible women who lack the fundamental right to adequate housing, devoid of basic shelter or a place to sleep.

These women, most of whom are single mothers with poor financial means, cannot afford to buy or rent an apartment. They usually apply to the Ministry of Construction and Housing (MCH), requesting a right to public housing, and are often denied on the basis of various problematic reasons, such as the number of children, income and 'personal status', based on various housing regulations set out below. Since they are faced with the danger of being on the street, these women are obliged to create their own solutions and some have taken to squatting in vacant public houses. As will be seen, these women are considered trespassers and 'invaders', and are soon evicted either by court order or through mechanisms of 'self-help'.

The story of Anita is a good starting point. Anita is a woman squatter I met in the summer of 2001.[5] A 44 year-old divorced woman and a mother of three children, Anita was born to a Mizrahi family suffering from poverty[6] and dependent on governmental support, including public housing. Anita had to drop out of high school and was married to a man suffering from drug addiction when she was 20 years-old. In 1997, after two years of domestic violence and abuse, Anita left her husband and filed for divorce at the rabbinical court. Her husband did not cooperate, did not attend court sessions, and refused to comply with the court's decisions. The case was eventually dismissed due to inactivity and in 2003 Anita finally received her divorce.

[4] Section 18A, Governmental Companies Law, 1975.
[5] See: Civ, (Rishon Lezion) 7943/01, *Amidar v. A. M.* As recalled from the introduction I use pseudonyms instead of either women's real names or name initials.
[6] It is important for me to note here that I prefer to use what I refer to as 'suffering from poverty', and not the usual expression of 'poor people'. 'Poor people' implicitly suggests that their poverty is an inherent active trait in their personality excluding the actual active role played by the weakening mechanisms of the state. By referring to them as people suffering from this social constructed disease, I believe that I broaden the understanding of poverty, whereby poverty is not implicitly and over-simplistically attributed to these people as having an active role, at least not the sole role, in their poverty.

From 1997 until the time she squatted, Anita lived in three different apartments. The burden of providing for the family rested solely upon her, and she was barely able to support them with her income support benefit paid by the Israeli National Insurance Institute. Anita could not afford her high rent as well as the obligation to provide for her kids and pay the bills, and consequently accumulated many large debts. Further, her kids were not healthy and had to be hospitalized often. Overwhelmed by her poverty, debts, kids' health, and the ongoing divorce proceedings, Anita heard that there was a public house available in the block where she had lived. In 2001, she decided that it was the time to take action and squat. The same year, in 2001, Amidar, one of the largest public housing companies in Israel, initiated legal proceedings, and filed a lawsuit for eviction.

Unlike land dispute cases involving Palestinians, and even squatting cases involving young Ashkenazi 'anarchists' and/or artists, public housing cases in general, and squatting cases in particular, involving single mothers suffering from poverty are commonly regarded as 'small' and non-prestigious cases, and have thus not received a great deal of attention in legal scholarship or practice. Since women squatters are viewed as trespassers who do not possess any legitimate right over the houses in which they squat, these cases are usually perceived as minor 'lost cases' not involving significant legal doctrines. Therefore, even in cases where women squatters receive some form of legal assistance, it is mostly for the purpose of settling the case, by which they agree to leave the homes in which they squatted within a certain period of time.

Legal representation in most cases is formal and procedural [7] emblematic of law's decontextualization, universalism and abstractionism discussed in *Chapter 4*. The cases are represented rather than the women themselves. Accordingly, a squatting case, let alone the woman

[7] On this point see: Thomas Hilbink, "You know the Type… : Categories of Cause Lawyering" (2004) 29 Law & Soc Inquiry 657.

squatter herself, does not "have a complex, particular, and historical context, but rather is a formal, numeric problem". [8]

In acting as representative for Anita and others like her, I began to question and consequently challenge the act of squatting from a historical perspective. When we explore the context in which squatting occurs, we typically find that these women squatters are second and third generation Mizrahi women whose parents, most of whom are North African, particularly Moroccan, were brought[9] to Israel between 1952-1972. As further discussed in *Chapter 6,* once brought to Israel, Mizrahis have endured, and continue to endure, institutionalized racism and discrimination, encompassing every aspect of their lives and manifested in lack of access to education, employment, monetary resources and housing.[10] These shared historical narratives situate the story of Anita and others like her in a wider context.

In earlier work focused on Mizrahi women squatters in Israel, I gathered data on their life stories, narratives and backgrounds.[11] In 2013, I went back to some of the people involved to develop a critical discussion for the purposes of this thesis.[12] What emerges is a composite picture.

Personal/Marital Status: Women squatters are generally single mothers, either divorced or never married. Some 'escaped' from the misery and poverty of their childhood homes at a young age, usually by getting married to abusive or drug addict men. Some, like Anita, have encountered

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[8] See: Gary Peller, "Race Consciousness," in Kimberle Crenshaw et al, eds, *Critical Race Theory – The Key Writings That Formed the Movement* (New York: The New Press, 1995) 127 at 130.

[9] On the use of the term 'brought', see the Introduction of this thesis, *supra* note 25 above.

[10] For further discussion on Mizrahis' oppression and its effects on their stratification including data, see: Isaac Saporta & Yossi Yona. "Pre-Vocational Education: The Making of Israel's Ethno-Working Class" (2004) 7:3 Race, Ethnicity & Education 251; Shlomo Swirsky & Deborah Bernstein, "Who Worked, at What, for Whom, and for How Much?" in Uri Ram, ed, *Israeli Society: Critical Perspectives* (Tel Aviv: Breirot, 1993) 120 [Hebrew]; Shlomo Swirsky, *Orientals and Ashkenazim in Israel: The Ethnic Division of Labor* (Haifa: Papers for Research and Criticism, 1981) [Hebrew].

[11] See: Claris Harbon, *Affirmative Squatting: Mizrahi Women Correcting Past Injustices, Looking for a home – Critical Legal Analysis of a Law Devoid of Past* (LL.M. Thesis, Tel-Aviv University, Law Faculty, 2007) [Unpublished] [Claris Harbon, *Affirmative Squatting*].

[12] The use of these data and interviews for the purposes of this thesis was approved by the Ethics Committee at McGill University. The transcripts of these interviews and the consent forms are on file with the author.

problems in getting divorced, mostly because their husbands refused to grant them with a divorce, thus preventing them from complying with the criteria of "single parent family", provided by the MCH, discussed below.

Ethnicity: Squatting women are generally Mizrahi. Mr. Raffi Navon, the Director of Ashdod-Ashkelon Region, the largest region in Amigur, stated that squatters are "typically and significantly Mizrahis."[13] Also, Mrs. Tikva Levy, the Director of Housing in Ashkelon Region has stated "[n]o doubt, they are mostly, and unambiguously, Mizrahi."[14] Similarly, Mr. Yuval Abutbul, Director of Ashdod region in 'Amigur'[15] and Mr. Amnon Akabi, Director of the Krayot Region in Amigur,[16] have recently reaffirmed that squatting women are Mizrahi single mothers. Mrs. Lea Kedar, Director of Housing in Ashdod Region also said in 2006[17] and in 2013[18] that women squatters have "only one Mizrahi profile and are all second and third generation to Mizrahi parents, who are also themselves public housing tenants".[19]

Intergenerational Public Housing Tenancy: During our conversations in 2006, Mrs. Kedar emphasized the historical context of women squatters. They are Mizrahi, second and third generation products of public housing, and trapped within patterns of a defeated society. They were all raised in disempowered Mizrahi families, with parents suffering from poverty due to structural and institutional discrimination.

Intergenerational Defeatism: As indicated by Mrs. Lea Kedar and based on her long professional experience as Director of Housing in Amigur, these women's lives reproduce a pre-dictated defeatism that is perpetuated and further inherited by the next generations.[20]

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[13] See: Interview of Raffi Navon, Director of Ashdod-Ashkelon Region in Amigur (11 June 2006) [Raffi Navon].
[14] See: Interviews of Tikva Levy, Director of Housing in Amigur, Ashkelon Region (12.6.2006-19.6.19.2006) [Tikva Levy].
[15] See: Interview of Mr. Yuval Abutbul, Director of Ashdod Region in 'Amigur' (17.3.2013) [Yuval Abutbul].
[16] See: Interview of Mr. Amnon Akabi, Director of the Krayot Region in 'Amigur' (20.3.2013) [Amnon Akabi].
[17] See: Interview of Lea Kedar, Director of Housing in Amigur, Ashdod Region (12.6.2006-21.6.2006) [Lea Kedar].
[18] See: Interview of Lea Kedar, Director of Housing in Amigur, Ashdod Region (17.3.2013) [Lea Kedar, 2013].
[19] See: Lea Kedar, *supra* note 17.
[20] *Ibid*.

Intergenerational Squatting: According to Mrs. Lea Kedar squatting or trespassing reproduces itself. She argues that "a new generation of women squatters" is being raised, since there is a high probability that the children of women squatters, living like their mothers in poverty and despair, will also be obliged to create their own housing solutions and squat. For example, she recalled the case of a Mizrahi woman, eventually evicted, who was a second generation squatter. Similarly, she said that Dina, one of the women squatters whose story is discussed below, had a sister that has also squatted. As the court in the case of Miriam, another women squatter, put it: "I understand the defendant's severe distress and the hard future waiting for her little children, unless housing will be allocated for them."[21] Not only is the squatting phenomenon located in a larger intergenerational continuum, whereby the ethnicity of the women squatters is interconnected with and linked to the act of squatting, the squatting itself is intergenerational, inherited, like an inevitable fate, from generation to generation.

2. Eligibility for Public Housing in Israel

To understand the interaction of the women whose stories I have introduced with the Israeli public housing situation, the wider context of the squatting phenomenon, and the reasons why Mizrahi women squatters do not comply with the criteria set forth by the Minstry of Construction and Housing (MCH), it is important to understand the relevant legal policies, criteria and mechanisms. This is especially important since squatting usually occurs after these women have applied to the MCH to request a right to public housing and were denied on the basis of various problematic elements contained in several housing regulations.

[21] See: Civ (Tel-Aviv) 29869/01 *M.A. et al v. Amidar* [Not Published, 31 October 2001] [Civ (Tel-Aviv) 29869/01 *M.A. et al v. Amidar*] [Hebrew]. Emphasis added.

Public housing is one of the most common means offered by the modern post-Second World War welfare State[22] to people who suffer from poverty, and who therefore cannot afford to buy or rent without the State's intervention.[23] The most prevailing rationale behind the idea of public housing is socio-economic,[24] striving "to achieve social justice",[25] and "reducing […] dependency on market forces."[26] Public housing in Israel is owned, monopolized, regulated and centralized by the state. These are housing units either built or purchased by the MCH for the purpose of renting them for a subsidized monthly rent to disempowered families suffering from poverty, provided that they comply with the eligibility criteria discussed below.

The day-to-day regulation, operation and and administration of the public housing was further delegated by the MCH to several public housing companies, either governmental or municipal.[27] Whilst the MCH is mostly engaged with forming and framing general housing policies and provisions on the macro-national level, and leads the process of decision-making concerning applications for public housing, it is the public housing companies that are responsible for the implementation and enforcement of these provisions, and for the day-to-day operation, maintenance and management of the houses.[28] These companies, then, play a central role in the lives of the public housing tenants. They operate as the guardians of the state's property and are

[22] See: Rachel Kallus & Hubert Law-Yone, "National Home/Personal Home: Public Housing and the Shaping of National Space" (2002) 10:6 European Planning Studies 765 at 766 [Rachel Kallus & Law-Yone, "National Home/ Personal Home"]. See also: Erez Tzfadia, "Public Housing as Control: Spatial Policy of Settling Immigrants in Israeli Development Towns" (2006) 21:4 Housing Studies 523 at 523 [Erez Tzfadia, "Public Housing as Control"].

[23] Rachel Kallus & Law-Yone, "National Home/ Personal Home", *supra* note 22 at 766. See also: Rachel Kallus, "The Political Role of the Everyday" (2007) 8:3 City 341 at 346; See: Bar Dadon, *Housing Policy in Israel: A Proposal for Reform* (Jerusalen: Institute for Advanced Strategies and Political Studies, 2000) at 1.

[24] See: Rachel Kallus & Hubert Law-Yone, "National Home/Personal Home", *supra* note 22 at 766.

[25] See: Erez Tzfadia, "Public Housing as Control", *supra* note 22 at 523.

[26] See: Rachel Kallus & Hubert Law-Yone, "National Home/Personal Home", *supra* note 22 at 766.

[27] For example, such companies are Amidar, Amigur (Amigur is a company owned by the Jewish Agency) - two of the largest public housing companies in Israel- Chalamish, Prazot, (which was liquidated and closed in January 2012), Heled, and Shikmona.

[28] See: Elia Werczberger & Nina Reshef, *The Privatization of Public Housing in Israel: Discussion Paper 5-91* (Tel Aviv: The Pinhas Sapir Center for Development, 1991) [Hebrew].

responsible for the tenants' compliance with the lease, rent collection, inspection, initiation of legal proceedings and eviction.

Except for two Israeli laws regarding *current public housing tenants*, granting them the right to purchase their public homes[29] and regulating their rights during tenancy, public housing is not enshrined in primary legislation, and is solely regulated by various MCH regulations and governmental decisions. These regulations relate to MCH's duties, authority, responsibility and activities and lay down the criteria of eligibility of *prospective tenants* for a public housing and other forms of governmental assistance.

Public housing support can be divided into two main categories. The first form of assistance, and the most desirable one, is the eligibility to a public house, granting prospective tenants with a right to an actual housing unit. The other medium is housing subsidies. These are monthly payments aimed to assist with rent payments in the private housing market, either to those who are not

[29] See: The Public Housing (Purchase) Act of 1998 [Purchase Act]. This Act was enacted after a long socio-legal and political struggle. Its main aim was to enable public housing tenants to purchase their homes at a reduced and subsidized price, taking into account several parameters, such as public tenancy seniority. Unfortunately, due to consistent objections raised by officials from the Ministry of Finance, the Purchase Act was immediately suspended ('frozen' in Israeli jargon) by the Economic Arrangements Law, (also referred to as the Israeli Economic Recuperation Law/Economic Policy Law). Nevertheless, the Purchase Act was indirectly implemented and enforced by different governmental programs, such as "My Home" (years 1999-2000), "Buy Your Home" (years 2000-2004), "Here is My Home" (years 2005-2010), and "An Apartment of My Own" (years 2008-2010). For further discussion of these programs, see: Israel, The Knesset Research and Information Center. *The Changes in Public Housing in Israel, 1998-2011* by Itai Fidelman (Jerusalem: The Knesset Research and Information Center, 2011) online: Knesset.gov <http://www.knesset.gov.il/mmm/data/pdf/m02936.pdf>. [Hebrew] [Itai Fidelman, *The Changes in Public Housing in Israel, 1998-2011*]. Last visited: 30.8.2018.
On January 1, 2013, almost 15 years after its initial enactment, the Purchase Act came into effect for the first time. However, the MCH and the public housing companies have impeded the implementation of the Act by raising many obstacles, preventing from public housing tenants to purchase their homes under the criteria set by the Act. Consequently, several petitions were submitted to the High Court of Justice (HCJ), asking the court to intervene by requiring the government to enforce and implement the Purchase Act. See: HCJ 519/13 *Former MP and Minister Ran Cohen et al vs The Minister of Construction and Housing & the Minister of Finance,* (1 April 2014). On April 1st, 2014 the HCJ instructed the MCH to implement and enforce the Act. The original Act was supposed to expire at the end of 2017. On a Bill passed in third reading, Israeli Parliament approved on March 5th, 2018 the Act's extension for 5 more years, until 2022. See: Government Bill 1191, Public Housing (Purchase) Act (Amendment 9), 2018. See also: Danieli, Anat. "The Purchase Act Was Extended for 5 More Years", *Calcalist* (5 March 2018) online: <https://www.calcalist.co.il/real_estate/articles/0,7340,L-3733353,00.html>. Last visited: 30.8.2018.

eligible for a public house or those eligible but who nevertheless need to wait for the allocation of an apartment, mainly due to the growing lack of available vacant public houses.

2.1. Eligibility for a Public House

As noted above, eligibility of prospective tenants is not enshrined in primary legislation, and is solely governed by internal MCH regulations and directives.

a) The Criteria of Eligibility for Public Housing

'Regulation 08/05: Allocation of Public Housing'[30] is the main and most important regulation, setting forth the criteria for eligibility of families and individuals. The ones most relevant for the purpose of this thesis are the provisions providing that the applicant must be *homeless,* i.e., a person who did not own or occupy a house prior to applying.[31] The applicant must also qualify as a family. This is one of the most important criteria for granting a right to a public housing, and the one most common in denying it. *Section 2.4* provides that a family is considered a family unit when comprised either of a married couple,[32] or a single parent family.

The definition of what constitutes *a single parent family* is one of the most important criteria relevant for this thesis since women squatters are usually single mothers with children. Defined narrowly, the criterion is the most common basis on which single mothers are denied a right to a public housing. *Single parent family* is defined as a family of at least three children[33] under the age

[30] See: Ministry of Construction and Housing, 'Regulation 08/05: Allocation of Public Housing', (18 July 2007), online: <http://www.moch.gov.il/SiteCollectionDocuments/nehalim/nohal_0805.pdf> [Regulation 08/05]. Last visited: 30.8.2018.

[31] *Ibid*, section: 2.3. This provision has no discretion and is applied arbitrarily regardless of the unique circumstances that might lead families, and women in particular, to losing their homes. For example, a family whose home was foreclosed by the bank due to a default in mortgage payments is not entitled to a public housing, even if no surplus money was left after the foreclosure. Similarly, and to a greater extent, a woman who has lost her home in divorce proceeding, where the family home was used as a 'bargaining' condition in exchange for her freedom is also not entitled to a public housing.

[32] *Ibid*, section: 2.4.

[33] *Ibid*, section: 5.1.2.

of 21, where the single parent does not live with a common law spouse, and further meets the requirement of *'personal status'.*

Section 2.4.b. lists the cases that qualify as 'personal status', such as a widower, divorcee, single woman, Agunah,[34] or a married person who has been living separately from her husband for at least two years prior to her application, has initiated legal proceedings, and filed for divorce in the two years preceding her application. This means that a woman whose marital status is not conclusive, i.e. a married woman who is not yet divorced, despite living separately from her spouse, is not entitled to public housing and is not officially categorized as a single mother.[35]

Let us return to the story of Anita, to illustrate the problematic operation and consequences of this provision. As mentioned above, in 1997 Anita filed for divorce at the rabbinical court. Nevertheless, her ex-husband did not cooperate – he did not attend any of the court's sessions and refused to comply with the latter's decisions. Since he did not attend the sessions, the court repeatedly had to dismiss her case due to inactivity, obliging her to initiate new proceedings and file for divorce over and over again. Having to initiate new proceedings due to her ex-husband's refusal to attend the court's sessions had a detrimental effect on her eligibility to a public housing. Since she was forced to initiate new divorce proceedings following each dismissal of her case, the

[34] 'Agunah', ('anchored' or 'chained' in Hebrew) is the halachic term describing a 'chained' Jewish woman whose husband either disappeared or refused to grant her with a divorce, thus condemning her to 'life in prison', particularly since she cannot remarry or have 'legitimate' children with another man (whilst her ex husband can live with another woman and even father children). This is one of the most complex and difficult problems concerning Jewish women in Israel (and in the rest of the world), giving rise to major controversies between feminist NGOs and both the state law and the Rabbinical Courts. The latter systematically refuse to enforce a compulsory divorce, leaving women 'chained' for many years, sometimes for 20-25 years, devoid of the basic right to freedom and dignity. In the Canadian context for example, see the landmark decision of the Supreme Court of Canada in *Bruker v. Marcovitz.* (*Bruker v. Marcovitz,* [2007] 3 S.C.R. 607, 2007 SCC 54.) For a further discussion on this case, see: Rosalie Jukier & Shauna Van Praagh. "Civil Law and Religion in the Supreme Court of Canada: What Should We Get Out of Bruker v. Marcovitz?" (2008) 43:2 Sup Ct L Rev 381.

[35] Regulation 08/05, *supra* note 30, section 2.4.b. In many of the cases, these women are subject to countless invasive mechanisms, such as inspectors sent by the welfare authorities and public housing companies to 'spy' on them, monitoring and surveilling them, checking, for example, whether they live with a man, a practice commonly referred to as the 'man in the house rule', thus, blatantly breaching their right to privacy.

two years continuity criterion was repeatedly broken. And, indeed, her applications for public housing were denied on the basis that she and her children did not qualify as *a single parent family.* This story is only one of many stories indicative of the structural problems that women generally endure in exercising their rights. On the one hand, a woman turns to one state institution, such as the rabbinical court, to exercise her rights but is prevented from exercising her rights. On the other hand, she is prevented from exercising her right to housing at the MCH. Moreover, it is evident from the regulations that a single mother of only two children, who otherwise complies with the other criteria and is dependent on receiving governmental income supplement benefits, and is not entitled to a public housing regardless the extent she suffers from poverty, unless she would have a third child.

Another important criterion, set in *section 2.12,* is one of income level, referred to as *the 'income/earning test'.* This section specifies the applicant's qualifying total monthly gross income with particular reference to its components. What is important for our purposes is that an applicant's monthly income must be comprised, wholly or partially, of governmental welfare payments.

It is interesting here that a critical and thorough review of the section reveals the interconnectedness of governmental institutions, preserving and further reproducing the applicant's dependency on governmental support. And, indeed, the section reveals a close correlation between the definition of what is the qualifying income for an applicant's compliance with the eligibility criteria for a public housing, and her eligibility to various social welfare payments, such as a monthly income support benefit paid by the Israeli National Insurance Institute. For example, a family complies with the 'income test' only when its income is comprised partially or wholly by an income support benefit for at least two years prior to the application for a public housing. Put differently, the family must be on welfare in order to be eligible to a public

house. It is important to note here that in the past this criterion was not conditioned upon receiving an income support benefit, and it allowed at least one parent to work and provide for her/his family without any dependence on the governmental support, as long as the total income did not exceed the income limits set by the MCH. Nevertheless, in 2004 following a governmental decision aimed at "ensuring that the right to public housing is granted to the neediest people,"[36] the definition of the 'income test' was modified and narrowed.[37]

b) <u>The Application Process</u>

The application process is long and bureaucratic. Various committees in the MCH review the relevant applications and deliver their decisions. In the case of a refusal, an applicant has the right to appeal to various MCH committees.[38] Eventually, after exhausting this administrative process, she has the right to initiate judicial proceedings, first by appealing to the Administrative Court,[39] and then, if necessary, to the Israeli Supreme Court.[40]

Once an applicant is found eligible for a public housing and is offered a house, assuming she does not have to join the long waiting list for an allocation of a house, she signs a lease. Her monthly rent rate varies depending on different criteria, such her total monthly gross income, the geographical location of the house, the family size, and the size of the house.[41]

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[36] Ministry of Construction and Housing, *Allocation of Public Housing* (Temporary Order), 2004. [Hebrew]. A copy of this document was kindly given to the author by one of the employees of 'Chalamish', a public housing company. The copy is with the author.

[37] See: Regulation 08/05, *supra* note 30, section 2.12.1.b.

[38] See: Ministry of Construction and Housing, Regulation 08/15, "Housing Allocation District Committee" (1.5.2002). [Regulation O8/15]; See also: Ministry of Construction and Housing, Regulation 08/13, "Housing Allocation Supreme Committee" (25 June 2003), online: <http://www.moch.gov.il/SiteCollectionDocuments/nehalim/nohal_0813.pdf> [Regulation O8/13]; Ministry of Construction and Housing, Regulation 08/17, "The Public Appeal Committee on Housing" (18 June 2009), online: <http://www.moch.gov.il/SiteCollectionDocuments/nehalim/nohal_0817.pdf>. [Regulation O8/17].

[39] See: Section 13, 1st Appendix of the Administrative Affairs Courts Act, 5760-2000 [Administrative Court Act].

[40] *Ibid*, section 11.

[41] See: Ministry of Construction and Housing, Regulation 08/28, "Gradual Rent in Public Housing" (29 December 2011) section 1.3 [Regulation 08/28]. This system, referred to as the 'public housing gradual rent', was introduced, on 1.11.2005, following a Government Resolution. (See: Government Secretariat, *Government Resolution No. 816* (Jerusalem: The Prime Minister's Office, 15 September 2003).

Granting a right to housing, however, does not guarantee an immediate allocation of a housing unit. Due to a growing lack of available vacant housing units and the government's failure to build or buy new ones, the demand for houses exceeds the limited number of available ones creating long-period waiting lists for available houses. Depending on geographical location, waiting times vary, and can range from 5 to 12 years,[42] or even up to 14 years[43] in the centre of Israel, mostly in the Greater Tel-Aviv Area, and from 2 to 4 years[44] in distant parts of Israel, especially in the peripheral developmental towns. Applicants found eligible for a public house but relegated to long waiting lists are eligible for rent subsidies with which they are supposed to rent a house in the private market until a public one is available.[45]

The long waiting periods can become a crucial catalyst factor in a woman's decision, and motivation, to squat. As discussed below, several women squatters who were actually found eligible for public housing nevertheless had to create their own housing solutions and squat into vacant public houses. This was mainly due to the long waiting periods and their inability to afford renting a house in the private market, even with the monthly housing subsidies which they receive from the MCH during the waiting period.

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[42] See: Michaela Granzon, deputy director of the housing allocation department in the MCH, brought in Committee for Immigration, Absorption, and Diaspora Affairs. *Raising Public Housing Monthly Rent Report* by Naomi Mi-Ami (Jerusalem: The Knesset Research and Information Center, 2005) online: Knesset.gov <http://www.knesset.gov.il/mmm/doc.asp?doc=m01299&type=pdf> at 3 [Naomi Mi-Ami, *Raising Public Housing Monthly Rent Report*] [Hebrew]. Last visited: 30.8.2018. See also: Itai Fidelman, *The Changes in Public Housing in Israel, 1998-2011* at 13, *supra* note 29. See also: State Comptroller (State Comptroller Annual Report 59B- 2008 and Receipts for Fiscal Year 2007) 251 at 254, 264-265 (Jerusalem: Government Printing Press, 2009) [State Comptroller's Report 59B] [Hebrew].

[43] *Ibid* at 264.

[44] See: Michaela Granzon, deputy director of the housing allocation department in the MCH, brought in Naomi Mi-Ami, *Raising Public Housing Monthly Rent Report*, *supra* note 42 at 3.

[45] See: Regulation 08/05, *supra* note 30, Section 10.2.1. See also: Itai Fidelman, *The Changes in Public Housing in Israel, 1998-2011*, *supra* note 29. There are always developments on this area regarding rent. See for example: Government Secretariat, *Government Resolution No. 4433* (Jerusalem: The Prime Minister's Office, 18 March 2012), online: <http://www.pmo.gov.il/English/MediaCenter/Spokesman/Pages/spokeTrach180312.aspx> [English]. [*Resolution No. 4433*]. Last visited: 30.8.2018; See also: State of Israel, The Committee for Social and Economic Change, *Trajtenberg Report,* (Jerusalem, 26 September 2012) 193 [*Trajtenberg Committee Report*] [Hebrew].

The story of Miriam, a Mizrahi mother of two young children provides a concrete illustration.[46] Miriam was married to a compulsive gambler and decided to leave him, but, like Anita, confronted problems since her ex-husband refused to grant her with a divorce. She applied to the MCH for a public housing, and, albeit having only two children, was found eligible, but had to wait for the allocation of a vacant apartment. Frustrated with waiting Miriam decided to squat. As Miriam explains:

> *"I was told that there were not any vacant apartments…* I understood that since I have found a vacant apartment, I was entitled to be in it until another apartment would be allocated for me. *That is why I have entered this apartment four months ago…* The apartment was empty for a long time, whilst my children and I, if we would get evicted from that apartment, have nowhere to go… traumatizing them again".[47]

She was eventually evicted by a court order granting her four months to find another housing solution.[48]

2.2. Housing Subsidies for Renting in the Private Market

Another form of public housing assistance is the grant of a monthly housing subsidy.[49] The monthly rent subsidy rates change from time to time and are dependent on several criteria, such as the applicant's monthly gross income.[50] This form of governmental assistance is less desirable than a finding of eligibility to public housing because the monthly rent subsidy rates are relatively low

[46] See: Civ (Tel-Aviv) 29869/01 *M.A. et al v. Amidar, supra* note 21.
[47] See: Miriam's Statement of claims. Civ (Tel-Aviv) 29869/01 *M.A. et al v. Amidar* [Not Published, 31 October 2001] (Hebrew), (Respondent's Statement of Claims) [Miriam's Statement of claims]. Emphasis added. The statement of claim and the Court's decision was given to the author by Mr. Yossi Shalom, Amidar's Attorney.
[48] It is worth noting that the MCH, frequently taking advantage of the eligible applicant's urgent and eminent need for an immediate housing solution, has the right to compel her to move to remote parts of Israel regardless of her preference and needs. And most importantly, away from her life center, where she raises her children, where they go to school, and particularly where she is close to her support network and larger family, which are in most cases public housing tenants in and of themselves, suffering from poverty. Two refusals to a housing unit allocation risk the eligible applicant with losing her right to housing. See: Regulation 08/05, *supra* note 30, Section 10.5.
[49] See: Ministry of Construction and Housing, Regulation 08/04 "Monthly Rent Subsidy Assistance" (29 January 2012), online: <http://www.moch.gov.il/SiteCollectionDocuments/nehalim/nohal_0804.pdf> [Hebrew] [Regulation 08/04].
[50] In pursuant with *Resolution No. 4433,* (*supra* note 45) incorporating some of the Trajtenberg Committee's recommendations on housing, (*supra* note 45), the monthly rent subsidy rate ranges from NIS530-NIS3,000.

and do not reflect the high costs of living in Israel, the lack of affordable housing, and the continuing increase in housing rent.

Applicants eligible for a monthly subsidy fall into two main categories. The first group refers to those eligible for a housing unit but who nevertheless need to wait for the allocation of suitable housing due to the growing lack of vacant public houses, during which time they are entitled to a monthly housing subsidy. The second group includes those who do not meet the criteria for public housing but who are nevertheless found eligible to a monthly housing subsidy.

The criteria for receiving a monthly rent subsidy are set by regulation 08/04. Similar to regulation 08/05, the applicant must be 'homeless', i.e. one who does not have any ownership rights over a house.[51] She should qualify as a family, which, similar to regulation 08/05, is defined as a family unit when comprised either of a married couple (with or without children),[52] a single parent living with a common law spouse,[53] or a single parent family.[54] A major novel change in the regulations is the inclusion of same sex couples in the definition of a family.[55] A single parent family is defined as it is defined under regulation 08/05 as a family of at least three children[56] under age 21, where the single parent does not live with a common law spouse and further meets the requirement of *'personal status'*.

Similar to regulation 08/05, the applicant must comply with *the 'income/earning test'*. A family complies with the income test when one member of the couple either works full time or is dependent upon an income support benefit, as long as the total income does not exceed the limits

[51] See: Regulation 08/04, *supra* note 49, Section 2.2.
[52] *Ibid*, Section: 2.3.
[53] *Ibid*, Section: 2.4.
[54] *Ibid*, Section: 2.5.
[55] *Ibid*, Section: 2.4.
[56] *Ibid*, Section: 2.5.

set by the MCH.[57] A single parent family complies with the income test criterion when the parent either works, full or part time, or receives alimony from her/his ex-spouse.[58]

In each of these cases the applicants from either group are supposed to find houses to rent in the private market by themselves and to pay the difference between the rent charged and the amount subsidized by the MCH. However, as mentioned above, these subsidies are often relatively low and do not meet the private market's high rent rates, especially in the center of Israel.They ignore the fact that those receiving the monthly subsidies are usually single mothers whose sole income is the welfare benefit support, which is hardly enough to pay private market rent and support their families. They are thus frequently obliged to add substantial amounts of money each month in order to match the difference in the monthly rent.

B. Squatting: What and How

1. The Different Types of Squatting

Squatters in Israel who actively take possession of vacant public houses fall into two major groups. The first group includes women who are entitled to a public housing but nevertheless have to wait for the allocation of a house due to the long waiting list, during which time they receive rent subsidies. The second group consists of women who did not meet the criteria set in Regulation 08/05, and subsequently were denied a right to a public housing but were nevertheless found eligible for receiving rent subsidies for renting houses in the private market. These women are mostly single mothers whose sole income is generated from welfare income support benefits.

Let me here return to my own experience as an advocate for single mothers suffering from poverty. The women who chose squatting had very limited monetary resources and struggled by themselves with the burden of raising their children. These women lived in constant fear that they would not

[57] *Ibid*, Sections: 3.1.3.2.1., 3.1.3.2.2.
[58] *Ibid*, Sections: 3.1.3.2.3.

be able to provide even basic shelter or a place to sleep for their families. Faced with this harsh reality, with the danger of being 'thrown out into the streets', and having to constantly fear for their kids safety and well-being, these women were eventually obliged to create their own solution and squat in vacant public houses.

One of many examples is the story of Dina, a Mizrahi single mother of two children who was married to a drug addict.[59] She received a monthly rent subsidy for a while but could not afford paying the difference between the actual rent and the subsidy granted, and her day-to-day expenses. Dina and her children moved from one apartment to another but were eventually evicted by one of the landlords. During this time her nine-year old daughter was sexually molested. Having no shelter and no family support, and worrying about her children's safety and wellbeing, Dina had "no other choice but to squat".[60] She was eventually evicted by a short and laconic court order that included no reference to her misery and poverty. She was nevertheless granted six months to find a housing solution. In Dina's words:

> I did not break the Law. I had no other choice. I accumulated debts, so I had no other choice but to enter the house. I have nowhere to go. Should I be thrown out with two kids?... Wherever I go someone shuts the door…[61]

Women squatters can also be categorized depending on their legal status in the public house in question. One group includes women who had a legal status as public housing tenants but have lost their legal status due to an alleged fundamental breach of their leases and are thus consequently considered as trespassers. They are therefore required to be evicted from the premises, either by a unilateral notice sent by the public housing company, with no judicial intervention, or by a court

[59] See: Civ (Ashdod) 2315/01 *Amigur v. V.B.D.* [Not Published, 22 April 2002] [Civ (Ashdod) 2315/01 *Amigur v. V.B.D.*]. [Hebrew].
[60] A social worker's report in Dina's case. This report was not handed to the author, but was nevertheless read to me by Lea Kedar, Director of Housing in Amigur, Ashdod Region.
[61] See: Civ (Ashdod) 2315/01 *Amigur v. V.B.D.*, *supra* note 59. Emphasis added.

order. Some of these cases concern debts, mostly for undue payments of rent, which is considered as a fundamental breach of the lease.[62]

The second group includes women squatters who do not have public housing leases. I call these women 'lease-less squatters'. Unlike the women in the first group, the women in this group have no former legal/legitimate status in the house in which they have squatted. I subdivide this group into two further groups as follows: First, women who claim to possess a legal entitlement to the house in question, namely as 'succeeding tenants' according to the 'Public Housing Tenant Rights Act';[63] and, second, women defined by the State Comptroller as 'Strangers or Aliens'.[64] In discussing the active resistance of squatting, I focus primarily on women in this group.[65]

2. How Does Squatting Happen?

There is no network that provides data and information about vacant public houses that 'prospective' women squatters may use before squatting. Usually, squatting women like Anita and Miriam receive information about vacant public houses by rumors coming from friends, neighbors and family.[66]

Once she decides to move, the squatting woman arrives at the apartment usually accompanied by a professional, such as a locksmith, to help her break the locks and enter the premises. Soon after,

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[62] It should be noted here that the public housing companies start with harsh eviction proceedings against public housing tenants due to their alleged failure to pay the rent, ignoring the fact that the tenants do have the administrative right to apply to the various MCH committees asking for debts settlements or contesting the validity of the alleged debt. Following several meetings on the matter, the MCH has issued a resolution ordering the public housing companies to refrain from evicting public housing tenants due to debts, at least not before the MCH deliberates on the matter. See: The Ministry of Construction and Housing. *The Summary Analysis of the Treatment of the Public Housing Companies of Public Housing Tenants Debts* (28 August 2005). A copy of the decision was personally given to the author by Mr. Eli Ben-Menachem, former MP and former deputy to the Minister of MCH, and is with her.

[63] For example, according to the State Comptroller Annual Report 47-1997, following data from Amidar, until August 1996, out of the 569 squatted houses, 312 cases involved women who claimed for a succeeding tenancy. See: State Comptroller (State Comptroller Annual Report 47- 1996, and Receipts for Fiscal Year 1995) 154 at 154 (Jerusalem: Government Printing Press, 1995) [State Comptroller Annual Report 47-1997].

[64] *Ibid*.

[65] Following data presented by Amidar, out of the 569 trespassed houses, 257 cases involved 'stranger/alien' women, who had no previous legal family affiliation to the houses. *Ibid.*

[66] See: Miriam's Statement of claims, *supra* note 47.

she moves in her furniture and her family. Anita, for example, once told me that she called the Fire Department, claiming that she lost her home keys and convinced the neighbors to tell the firefighters that she was indeed the legal tenant occupying that apartment.

Once the public housing company learns that a public house was trespassed, it files a criminal complaint for trespassing with the police. It also notifies the relevant local municipality and the electricity company so that the squatter is charged for any taxes or services. Soon, the public housing company initiates eviction proceedings. Mizrahi women squatters, unfortunately, are often not legally represented in the proceedings initiated against them. In many cases they do not even appear in court. Even in cases where they receive some form of legal assistance, most of which is governmental legal aid – raising some complex questions about the inevitability of conflicts of interests – it is usually formal and procedural. It is aimed mostly at settling the case, by which these women agree to leave the homes in which they squatted within a certain period of time. It is in this sense that their cases in law are 'lost' or rendered invisible.

C. The 'Final' Stage of Squatting, and The Initiation of Legal Proceedings

In the following section I dig even deeper into the squatting phenomenon by asking why squatting is problematic.

1. The Law Violated by Squatting

Squatting women break into vacant public houses. They take unlawful possession of vacant public houses and, therefore, not only *break* into a house but also *break* the law, particularly the rules of property law. These women are considered trespassers and 'invaders', who have unlawfully taken over public property belonging to the state, and occupy it without any formal legal entitlement. Borrowing from Eduardo Peñalver and Sonia Katyal, who write about "property outlaws", these

women are perceived as "greedy, lawless land grabbers who had no respect for law, order".[67] They are soon evicted either by court order or through mechanisms of "self-help".[68]

The right to property in Israel is considered one of the few constitutional super-legislative rights safeguarded by Basic Law: Human Dignity and Liberty – 1992.[69] As such, it is provided that the right cannot be violated or restricted "except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required".[70] Any legal norm associated with the right to property should be approached and interpreted in light of its constitutional super-legislative status.[71]

Israeli law offers few protections and remedies for property owners whose right to property was infringed by illegal possession. For example, the Israeli Penal Code of 1977 imposes criminal liability on trespassers, entitling the state to initiate criminal proceedings, issue indictments[72] against the trespassers, and even force their eviction from the property.[73]

Israeli Land Law establishes several property rights, such as ownership and possession, lease, mortgage and easement,[74] and sets out few protections and remedies for safeguarding and enforcing these rights. The right to ownership and possession is one of the most important property

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[67] See: Paul W. Gates, *History of Public Land Law Development* (Washington, DC: Government Printing Office, 1968). Quoted in Eduardo M. Peñalver & Sonia K. Katyal, "Property Outlaws" (2007) 155 U Pa L Rev 1095 at 1109 [Eduardo Peñalver & Sonia Katyal, *Property Outlaws*].

[68] Land Law 5729-1967, Sections 18-19 [Land Law 5729-1967]. These provisions are discussed further below. For an English translation of this law, see: Land Law, 5729-1969, 5 Isr. L. Rev. 292 (1970).

[69] Basic Law: Human Dignity and Liberty, 5752-1992, Section: 3. [Basic Law: Human Dignity and Liberty].

[70] *Ibid*, Section: 8.

[71] For further discussion on the super-legislative status of the right to property, see: HC 878/94, *Clal Insurance Company et al. vs. Minister of Finance et al,* [1994] PD 48(5) 441 [Hebrew]; Miguel Deutch, *Property,* vol 1 (Tel Aviv: Bursi, 1997) 203-297 [Miguel Deutch, *Property*] [Hebrew]; Hanoch Dagan, ed, *Land Law in Israel: Between Private and Public* (Tel Aviv: Ramot Publishing House, Tel-Aviv University, 1999) [Hanoch Dagan, ed, *Land Law in Israel: Between Private and Public*] [Hebrew]. In particular see: Aeyal M. Gross, "Property as a Constitutional Right and Basic Law: Human Dignity and Liberty" in Hanoch Dagan, ed, *Land Law in Israel: Between Private and Public* (*ibid*) at 53. This article was also published as Aeyal M. Gross, "Property as a Constitutional Right and Basic Law: Human Dignity and Liberty" (1998) 21 Tel-Aviv University Law Review 405 [Hebrew]. See also: Yoav Dotan, "The Constitutional Status of the Right for Private Property" (1996) 27 Mishpatim 535 [Hebrew].

[72] See: Penal Law 5737-1977, sections 189, 190, 447 [Penal Law 5737-1977].

[73] *Ibid*, section 502. Similarly, section 29 of Civil Wrongs Ordinance (New Version), 1968, defines trespassing as a civil wrong. See also section 8 of the Movable Property Law, 1971.

[74] See: Israeli Land Law, 5729-1969, *supra* note 68 sections: 2-5.

rights,[75] and *sections 15-20* of the Israeli Land Law provide certain provisions to protect it.[76] Israeli Land Law, explains Joshua Weisman, provides three principal courses of action against unlawful possessors.[77]

The first legal remedy is provided by *section 16* of the Israeli Land Act, according to which "[t]he owner of an immovable property and the person entitled to possession thereof" have the right to initiate '*petitory'* legal proceedings for eviction against the unlawful possessor. Put simply, this provision entitles the owner to apply to the courts and file a lawsuit for eviction. Eviction lawsuits against women squatters are filed in accordance with this section.

The second possible legal remedy granted by *section 19* is the initiation of '*possessory'* proceedings for restoring possession to the possessor "irrespective of whether or not he [or she] is the lawful possessor."[78] *Section 19* is aimed at preventing lawful owners or possessors from "taking the law into [their] hands" [79] and "resorting to self-help by taking possession without a court order".[80] It should be noted, however, that "the order to restore the possession to the trespasser is in effect of a provisional nature"[81] and the lawful possessor is entitled to initiate legal proceeding seeking an eviction order against the trespasser.

The third option is the right to self-help, granted by *section 18.* As discussed below, most squatting evictions are executed without applying to the courts, but rather by the *'help'* of the 'self-help' mechanism. The law wishes to restrict forms of 'vigilante justice', deterring people from 'taking the law into their hands' and use force, even in cases where legitimate rights were infringed by

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[75] See: Miguel Deutch, *Property, supra* note 71 at 301.
[76] See: Joshua Weisman, "The Land Law, 1969: A Critical Analysis" (1970) 5 Isr LR 379 [Joshua Weisman, "Land Law, 1969").
[77] See: Joshua Weisman, *Law of Property: Possession and Use,* vol 3, Part 1 (The Hebrew University of Jerusalem: 2006) at 45 [Joshua Weisman, *Possession and Use*] [Hebrew]; See also: Joshua Weisman, "Land Law, 1969"at 423-427, *supra* note 76.
[78] *Ibid* at 424.
[79] *Ibid* at 395.
[80] *Ibid* at 425.
[81] *Ibid* at 424.

trespassers.[82] Nevertheless, the law does acknowledge the right, albeit limited in scope, of a person to immediate relief in cases of property intrusion.[83] *Section 18*, therefore, allows, in certain limited circumstances, the use of self-help in order to protect a property from an unlawful possession and to recover it if unlawfully possessed.

Section 18(a) provides that a "lawful possessor of any immovable property may use a reasonable amount of force to prevent trespass thereon or the unlawful denial of his control thereof".[84] This section, then, provides the lawful possessor with a preventative and protective measure against trespassers.

Section 18(b) concerns situations in which the property was already trespassed upon. It provides that the lawful possessor has the right to use a "reasonable amount of force to take [her or his property] from the occupier", without a court order.[85] Since 'self-help' involves the use of force against a trespasser, *section 18(b)* further provides that the use of "reasonable amount of force" must be exercised within 30 days from the actual unlawful possession. Unlawful possession that is discovered within these 30 days is considered a *'fresh trespass'* against which the lawful possessor can use the mechanism of self-help.[86] However, in cases where the trespasser has been discovered more than 30 days after the actual act of trespassing the lawful possessor is refrained from using self-help, and must obtain a court order by initiating *a petitory claim* as provided by *section 16* of the Israeli Land Law.

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[82] See: Joshua Weisman, *Possession and Use, supra* note 77 at 80.
[83] *Ibid* at 80-81.
[84] Israeli Land Law, 5729-1969, *supra* note 68 section: 18(a).
[85] For further discussion on the scope of 'reasonable amount of force', and whether the force used was excessive or rather proportionate to the threat posed by the trespasser, and justified under the circumstances, see: Joshua Weisman, *Possession and Use, supra* note 77 at 105-107.
[86] It should be noted that the 30 days limitation was stipulated to the Israeli Land Law by force of section 7 of the Public Land (Eviction of Squatters) Law, 5741-1981 Before the enactment of this amendment the lawful possessor could evict an unlawful occupier using the right to self-help within *a reasonable time.* Note, however, that the English version of the Israeli Land Law referred to above in *supra* note 68 was published in 1970, before the above-mentioned amendment, and, therefore, does not contain the 30 days amendment.

A person entitled to the right of self-help has the right to ask the help of the police in exercising his/her statutory duty to maintain and promote public order and peace, and to provide personal security and safety to both life and property.[87] However, the police must determine whether the act of trespassing was committed without the lawful possessor's approval, and that the 30 days in which self-help is allowed have not yet elapsed.[88]

2. The Arguments For and Against Eviction
"Thou shalt not trespass"…..

The rationale behind the protection of the right to ownership is straightforward: a lawful owner has the right to enjoy and use her property without fearing any intrusion by and interference of illegal possessors. A woman squatter takes unlawful possession of properties that do not belong to her and is thus perceived as a "transgressor, a law-breaker; a wrong-doer, sinner, offender"[89], who should be condemned for breaking the law. However, squatting by women suffering from poverty, with no intention to make profit of the property in question, confronts us with more complex questions.

The main interrelated arguments raised against these women are twofold: violation of the state's right to property and violation of the public order causing anarchy and instability.

2.1. Violating the State's Basic Right to Property
Ex turpi causa non oritur actio….[90]

The main argument raised against women squatters is that they violate the state's basic constitutional right to property protected under *section 3* of the Basic Law: Human Dignity and

[87] See: Police Ordinance (New Version), 1971, Section 3. For further discussion on the Police duties in evicting trespassers, see: Joshua Weisman, *Possession and Use, supra* note 77 at 107-116. See also: Miguel Deutch, *Property, supra* note 71 at 418-421.
[88] See: HCJ 109/70 *Coptic Orthodox Mutran of Jerusalem v Minister of Police,* [1971] IsrSC 25(1) 225 at 240; See also: HCJ 418/78, *Avner v. Levy* [1979] IsrSC 23(2) 108, especially the words of Justice Asher at 112.
[89] See: Eduardo Peñalver & Sonia Katyal, *Property Outlaws supra* note 67 at 1097, quoting from James A. H. Murray et al, eds, The *Oxford English Dictionary* vol 1 (Oxford, 1961) at 328.
[90] The civil law doctrine in Latin that provides that an action cannot be based on illegality, also known as 'From a dishonorable cause an action does not arise', or in its American equitable version of "Those seeking equity must come with clean hands."

Liberty. The State, it is argued, has limited resources, and these must be distributed equally, but nevertheless cautiously, adequately balanced and prioritized against the needs and demands of those asking for its assistance. Women squatters, it is further argued, have no legal rights over the houses they have squatted in and must therefore be evicted.

In contrast, however, one of the counter-arguments raised in defending women squatters is based on their right to housing and the right to human dignity. The right to housing (together with the rights to adequate food and clothing) is considered to be one of the rights recognized under international law, namely article 11(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and is perceived as intrinsic to the right to dignity.[91] Although Israel ratified the ICESCR in 1992, the right to housing was never consolidated or codified under Israeli laws.[92] Nevertheless, this right is "defined as a *"mixed"* right, necessarily including social and civil aspects, *and recognized as part of the basic right of human dignity,* in the Basic Law: Human Dignity and Liberty."[93] Prof. Aharon Barak, for example, whilst presiding as the President of the Israeli Supreme Court held, in the renowned case of *Gamzu,* that: "Human dignity includes…protection of a minimum level of human subsistence…a person who lives in the streets and has no accommodation is a person whose dignity as a human being has been violated." [94]

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[91] Article 11(1) of *the International Covenant on Economic, Social, and Cultural Rights,* 16 December 1966, 993 UNTS, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967) (entered into force 3 January 1976) [ICESCR].

[92] Along the years there have been several legislative attempts to recognize and acknowledge the right to housing as a basic constitutional right. See for example: Hatzaot Hok (Draft Laws) 4228, *Basic law: The Right to Housing*, by MP Ilan Gilon (23 July 2012). Similarly, there have been several legislative attempts to recognize several social rights, not explicitly mentioned in the Basic Law: Human Dignity and Liberty, including the right to housing, as basic constitutional rights. See for example: Hatzaot Hok (Draft Laws) 1300*, Basic Law: Social Rights,* by MP Zahava Gal-On (filed on 27 May 2013). See also other legislation proposals, advocating the right to housing as a basic right, such as Hatzaot Hok (Draft Laws) 41, *Social Housing,* by MP Dov Khenin (13 March 2013).

[93] See: Sawsan Zaher, See: Sawsan Zaher, "The Right of Arab Bedouin Women to Adequate Housing and Accommodation" (2006) 23 Adalah's Newsletter 5 online: <http://www.adalah.org/newsletter/eng/mar06/ar2.pdf>. Emphasis added. Last visited: 30.8.2018.

[94] See: LCA 4905/98 *Gamzu v. Yeshayahu,* [2001] PD 55(3) 360 at 375-376 [*Gamzu*] [Hebrew].

Prof. Barak has referred in different instances to the right to adequate housing as a fundamental constitutional super-legislative right intrinsic to the basic right to human dignity, underlying, together with other basic social rights, the conceptual framework of human rights in Israel.[95] In one of his most important decisions,[96] Prof. Barak for the majority acknowledged that "the duty of the state under the Basic Law: Human Dignity and Liberty…to maintain a system that will ensure a 'protective net' for persons in society with limited means",[97] includes the duty to "ensure that a person has enough food and drink in order to live; ***a place to live*** in which he can realise his privacy and his family life and be protected from the elements."[98]

We are confronted then with two conflicting constitutional rights: the right of the state to property, and the women squatters' right to housing as part of their basic right to dignity. The State argues that the right to housing, "if it exists"[99] is not an unlimited right, and that it should be balanced and weighed against the need to protect its limited public resources.

The strongest counter-argument is that in striking the appropriate balance between these two competing rights, the balance should be in favour of these women's right to housing. This is so

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[95] See: Aharon Barak, "Introduction" in Aharon Barak & Chaim Berenson, eds, *Berenzon Book,* vol 2 (Jerusalem: Nevo Publishers, 2000) 7 at 8 [Hebrew].

[96] See: HCJ 366/03 *Commitment to Peace and Social Justice Society & Others v. Minister of Finance & Others,* P.D. 60(3) 464 [2005] (Isr.) (consolidated with HCJ 888/03 *Bilhah Rubinova and others v. Minister of Finance and Others*) (available in English on the Israeli Supreme Court Website: <http://elyon1.court.gov.il/files_eng/03/660/003/a39/03003660.a39.pdf> [*Commitment to Peace*]. Also available in English on the Supreme Court Website: <http://elyon1.court.gov.il/files_eng/03/660/003/a39/03003660.a39.pdf> [*Commitment to Peace*, English version] This petition concerned budgetary cuts to the income supplement benefits, incorporated into the Income Supplement Law by the Income Supplement Law by the State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002. It was held that the reduction in the income supplement benefits did not violate the right to dignity.

[97] See: *Commitment to Peace*, English version, *supra* note 96 at 126.

[98] *Ibid*. Emphasis added.

[99] See: Section 9 of Administrative Petition (Tel-Aviv) 1027/03 *A. M. v. The MCH* [Not Published 22 May 2003] (Respondent's Statements of Claims) [The State's Statement of Claim in 1027/03 *A. M. v. The MCH*] [Hebrew]. This was the State's response to a petition that I filed on behalf of Anita against the MCH to the Administrative Court. (Administrative Petition (Tel-Aviv) 1027/03 *A. M. v. The MCH* [Not Published 22 May 2003] [1027/03 *A. M. v. The MCH*]. After exhausting the appealing precesses within the MCH committees, I appealed against the MCH decision to deny Anita's application for a public housing under regulation 08/05, *supra* note 30. I asked the court to overturn the MCH decision, and declare, instead, that she was eligible for a public housing. A copy of this doicument is with the author.

especially when considering the relevant contextual background from which the squatting phenomenon has emerged and against which it is addressed, including the historical context.

In some cases regarding "the scope of the rights of debtors in enforcement proceedings",[100] the Supreme Court, when confronted with two competing individual rights, has held that the right of a debtor to basic human subsistence, as guaranteed by the right to dignity, overrides the right of the creditor to recover her money. Therefore, in balancing the right of a debtor to live "without being overcome by economic distress and being reduced to an intolerable poverty"[101] with the creditor's right to recover her money, the former must be protected from infringement or violation, "even if he has failed in business and fallen into debt*, and he should not be left without a roof over his head*".[102]

In the *Gamzu* case*,* the Supreme Court of Israel had to determine whether the right of a man to dignity outweighed his divorcee's right to alimony, important for her own subsistence and dignity, despite the fact that he had refused to pay her for many years. The Court ruled in his favour, emphasizing his right to dignity over her right to her alimony. The rationale behind the decision was that, since he had not paid for many years and accumulated large debts, ruling in his divorcee's favor would have the detrimental impact of bankruptcy:

> Human dignity includes... protection of a minimum level of human subsistence... a person who lives in the streets and has no accommodation is a person whose dignity as a human being has been violated.[103]

The *Gamzu* case is often cited and referred to as a landmark case involving social rights in Israel, bringing to the fore the importance of social rights to human dignity, especially the right to

[100] See: *Commitment to Peace*, English version, *supra* note 96 at 125.
[101] *Ibid* at 124.
[102] See: Justice Tova Strasberg-Cohen in CA 3295/94 *Parminger v. Mor* [1996] IsrSC 50(5) 111 at 121, quoted in *Commitment to Peace*, English version, *supra* note 96 at 125. Emphasis added.
[103] See: Former Chief Justic Aharon Barak in *Gamzu*, *supra* note 94 at 375-376, quoted in English in *Commitment to Peace*, English version, *supra* note 96 at 125.

housing. Nevertheless, this case raises some complex questions about its fairness, especially from gender-based and power-relations perspectives, questioning in particular the appropriateness of the balance struck in this case by preferring the right of a man who has intentionally refused to pay alimony to his divorcee, violating her own right to dignity.

What is important for our purposes is that if the Supreme Court could find that a male professor's right to dignity overrides a woman's right to her own dignity, then the argument is even stronger in the context of Mizrahi women squatters that their rights should prevail over those of the MCH as a public institution. The property of the state is not private. It holds public property that was designated in the first place for the purpose of providing housing solutions to disempowered populations:[104] to those, using President Barak's own words, "persons in society with limited means",[105] like these women, who would not have been able otherwise to afford renting a house without the intervention of the state. In such a case, the balance should be in these women's favour. Preferring the state's right to property over the right to housing has the effect not only of 'throwing' the women squatters out into the street, but also away from the domain of constitutional protection.

2.2. Violation of the Public Order

Another major interrelated argument raised by the state is that the women squatters violate and disrupt the public order, causing anarchy, chaos and instability, especially by violating the right to housing of "other miserable families that were legally found eligible for a public housing and have been waiting patiently for the allocation of accommodation".[106] Similar arguments are also raised in the context of other social rights, asserting that responding to one weakened person's needs and granting her with a right comes at the expense of another's needs, and prevents the allocation of rights to others, all competing over the same 'public goods'.

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[104] See: Justice, (former Chief Justice), Dorit Beinisch in *Commitment to Peace*, English version, *supra* note 96 at 139.
[105] See: Former Chief Justice Aharon Barak in *Commitment to Peace*, English version, *supra* note 96 at 126.
[106] See: The State's Statement of Claim in 1027/03 *A. M. v. The MCH, supra* note 99.

The state argues that since the growing demand for public housing exceeds the limited number of vacant houses, available houses should be allocated to the poorest families. These families should be prioritized in the allocation of such houses over any illegal possessor, such as the women squatters.[107] It is further argued that preferring a squatter, 'legalizing' her 'dishonorable cause', over an eligible family who has been waiting patiently for a public housing has the destabilizing effect of discriminating against these families and violating the principle of equality. Moreover, in line with the fear of chaos associated with lawbreaking discussed above in *Chapter 1*, the state fears that granting squatters any legal entitlement would amount to letting "a sinner profit from [her] sins",[108] rewarding her for her wrongdoing. This, it is argued, would consequently jeopardize the public order and promote anarchy, further encouraging "other women to break the law and squat, instead of legally exhausting their rights."[109]

This thesis argues, however, that women squatters are also an integral part of the public order and interest, and that it is the state that has failed to encompass them. As discussed further below, it is the Israeli discriminatory and segregated land regime and housing policies directed against Mizrahis, especially those policies concerning the deprivation of the right to land ownership, that had a central structuring role in the stratification system of Mizrahis in Israel, forming the basis for their socio-legal inferiority, and resulting in creating unique structural legal problems which I identify as collectively characterizing Mizrahis. More importantly, unlike Ashkenazis, Mizrahis were deprived of a fair opportunity to purchase their homes and enlarge their family capital designated for inheritance as a means of securing their children's socio-economic status, giving them a 'chance in life'. I argue that it is this historical context from which the squatting phenomenon has emerged and through which we need to approach it. These mechanisms and

[107] See: A Letter from Rina Markovitch, Director of Department of Internal Auditing & Public Complaints in the MCH, to Claris Harbon (21 January 2002) (On files with the author).
[108] See: The State's Statement of Claim in 1027/03 *A. M. v. The MCH, supra* note 99.
[109] *Ibid*.

policies have violated the public order in the first place, creating a discriminatory reality, whereby these second and third generation Mizrahi women lack the fundamental right to adequate housing and are, therefore, obliged to create their own solutions and squat. Their poverty, their dependence on state support, and their lack of housing are all the result of continuous injustice. Their act of squatting is a response to this unjust reality, not the cause of it.

Furthermore, the situation in which many families are forced to wait for several years for the allocation of a public house is the state's doing. It is, amongst other reasons, the result of the state's own negligence in failing to enlarge the number of pubic houses, either by building or purchasing new ones. At the same time, the eligibility criteria for public housing are being hardened and the number of available vacant public houses has been reduced due to the sale of public housing under the Purchase Act and the various governmental programs following it.

Moreover, large sums of money were received from the sale of public houses under the Purchase Act of 1998 and/or the governmental programs following it. Section 10 of the Purchase Act provides that that money was supposed to be deposited in a special statutory governmental fund, designed for the enlargement of the available poll of public housing, either by the purchase or building of new ones. Unfortunately, most of the money received from the sale of public houses, between 1999-2010, amounting to NIS 2.75 billions,[110] was not even deposited in the special fund, mostly due to the failure and reluctance of some of the public housing companies to transfer the money to the state's treasury, and consequently, was never used for enlarging the number of public houses. [111]

[110] Approximately 37,500 public houses were sold from 1999-2011. See: The Changes in the Public Housing in Israel, 1998-2011, at pages: 6-7, 15. In 2008 the proceeds amounted to NIS 2 billion. See: State Comptroller's Report 59B at 253, 259, *supra* note 42.

[111] Following the State Comptroller Report 59B, until 2008, not even a single apartment was purchased nor built. (*Ibid*) Most of the money was not deposited in the special fund, mostly due to the failure and reluctance of some of the public housing companies to transfer the money to the state's treasury. On this see: The Ministry of Construction and Housing. *A Report Submitted to the Finance Committee of the Israeli Knesset* (18 December 2001). See also:

Similarly, the failure of public housing companies to efficiently and properly manage, supervise, and regulate available existing houses is also a major reason in the creation of the long waiting lists.[112] For example, the State Comptroller Annual Report 47 of 1996 found that many public houses remained vacant and deserted for many years varying from two to nine years,[113] whilst many families had to wait between one to more than three years for the allocation of a public house.[114] For instance, the report shows that out of 69,800 houses managed by Amidar, 4,700 were vacant.[115] It was also found that the housing companies did not keep an efficient registry of the deserted houses.[116] Keeping and promoting public order also implies the efficient and effective management of the existing public houses, and the expedient allocation of houses to those who are in need. These long waiting lists are not the result of squatting. Using the words of a special report submitted to the Knesset, pinpointing the correlation between the state's negligence and squatting, these long waiting lists are in fact "sometimes [….] the reason for squatting".[117] Nevertheless, Israeli Courts, albeit at times showing some empathy to the squatters' distress, do not accept these counter-arguments as justification for their illegal acts.

In order to better understand the arguments raised in the course of legal proceedings sought against Mizrahi women squatters, let me pause again on the story of Anita, focusing this time on the legal proceedings in her case. As mentioned above, following her squatting into a vacant public house

State Comptroller (State Comptroller Annual Report 53B- 2002, and Receipts for Fiscal Year 2001) 399 (Jerusalem: Government Printing Press, 2003) [Hebrew].

[112] See: State Comptroller (State Comptroller Annual Report 44-1993, and Receipts for Fiscal Year 1992) 152 (Jerusalem: Government Printing Press, 1992) [Hebrew]. See also: State Comptroller's Report 59B at 267-270, *supra* note 42.

[113] Deserted houses are ones that were vacant for more than five months and for which no one had claimed any legal possession or entitlement. See: State Comptroller Annual Report 47-1997, *supra* note 63 at 155.

[114] *Ibid* at 152.

[115] *Ibid* at 153.

[116] *Ibid* at 155.

[117] See: Israeli Kenesset. State Control Committee. *Invasions to Land and Buildings* by Michal Tabibian-Mizrahi (Jerusalem: The Knesset Research and Information Center, 2004) online: <https://www.knesset.gov.il/mmm/data/pdf/m00996.pdf> [Michal Tabibian-Mizrahi, *Invasions to Land and Buildings*] [Hebrew] at 6. Emphasis added. Last visited: 30.8.2018.

in 2001, Amidar initiated legal proceeding and filed a lawsuit for eviction. Amidar argued that Anita 'had no case to answer' since she broke the law and took unlawful possession of a property. My counter-arguments focused on Anita's right to housing as part of her basic right to dignity, which in these circumstances outweighed the state's right to property. In addition, I argued that she could not be evicted before exhausting her administrative rights to apply to the MCH for a public housing.

For almost three years, not uncommon in these cases, we exercised her administrative rights with the MCH and applied to the MCH requesting a right to a public housing. The judge refrained from ordering an eviction and allowed Anita to pursue her administrative proceedings with the MCH; he nevertheless kept on urging the state to help Anita, and "find a suitable housing solution as required by the special circumstances of this case".[118]

After two years, the court ordered Anita's eviction, but nevertheless granted 8 months extension in order to find Anita a housing solution, stressing the fact that despite sympathy with Anita, her social circumstances did not merit a legal right capable of justifying squatting:

> I have long deliberated on finding a legal ground that will prevent the hard outcome of eviction – *but such basis does not exist.* The Law does not acknowledge the rights of a trespasser who did not prove any legal ground for preventing his eviction…. *Needless to say that social-based reasons do not constitute a justifiable legal ground for prevention of eviction*.[119]

Relating to Anita's basic right to housing, the court held that it was the court's duty to protect the right of property and maintain the public order:

> I cannot accept the argument of the defendant's learned Advocate about the basic right to dignity as a justifiable ground for preventing an eviction. *There is no need to talk at length about the fact that accepting her arguments means violating public order….* disregarding a person's right to his property *and creating anarchy. I do not belittle the defendant's right to suitable housing, but the right to property…. deserves no less of protection*.[120]

[118] See: Civ, (Rishon Lezion) 7943/01, *Amidar v. A. M.* (Protocol from 21 February 2003) [Hebrew]. Emphasis added.
[119] See: Civ, (Rishon Lezion) 7943/01, *Amidar v. A. M.* [Not Published, 24 June 2003] at 4 [Hebrew]. Emphasis added.
[120] *Ibid* at 5. Emphasis added.

The court was empathetic and sensitive throughout the years of proceedings and refrained from ordering an eviction. Even when ordering her eviction, the court was considerate of the "severe distress, and the grave consequences that may be caused by the eviction",[121] and granted an 8 month extension, considered precedential within the practice of squatting cases. Nevertheless, pointing at the existing gap between the court's rhetoric and its formal legal stand, Anita's legal arguments were eventually rejected.

It is significant that throughout the proceedings Anita submitted applications for public housing. However, her applications were denied by all of the MCH committees for two reasons. The first reason concerned her marital status. It was argued by the state that she did not comply with *section 2.4.b.* of the Regulation 08/05 because she did not qualify as *a single parent family* since she was not a single mother who lived separately from her husband for at least two years prior to her application and who initiated legal proceedings for divorce in the two years preceding her application.

As the reader will recall, Anita's ex-husband did not cooperate, failed to attend any of the court's sessions, and refused to comply with the court's decisions, leading the court to dismiss her case repeatedly, obliging her to initiate new proceedings and file for divorce over and over again. Since she was forced to initiate new divorce proceedings following each dismissal of her case, the two years continuity criterion was repeatedly broken. Further, Anita maintained a co-parental relationship with her ex-husband, mainly regarding visitation rights of their two children, conceived and gave birth to their third child during the period of the separation from her spouse.[122]

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[121] *Ibid* at 7.

[122] For a further discussion on the legal and moral dilemmas involved in giving birth to a third child whilst arguing for separation from her husband, and on the implications of having a third child in order to comply with the MCH's regulations, see: Claris Harbon, "On Sense and Sensitivity: A De/constructive Quest for My Mizrahi (Grass) Roots

The MCH interpreted the birth of the third child and the fact that her ex-husband was once found in her house during the visit of one of the MCH inspector as a proof that she did not live separately from her ex-husband and was in effect in a relationship with him.[123] In spite of the third child, the presumption of an ongoing relationship acted as a block to complying with the MCH criteria. The second reason concerned her lawbreaking, and the state argued that Anita squatted and was now trying to legalize her "dishonorable cause".

Anita filed a petition to the Administrative Court, challenging the MCH decision.[124] The court decided not to interfere with the MCH decision and dismissed Anita's petition. Nevertheless, even here, the court expressed empathy to Anita's distress and instructed the authorities to find her an appropriate solution:

> Nevertheless, we are dealing with a hard case of a mother of three children and a drug addict husband*; <u>everything, then, must be done</u>* in order to help the petitioner within the appropriate framework.[125]

One interesting theme here is the court's rhetoric in describing Anita's act of squatting. The court adopted the language I offered, redefining the act of trespassing – usually referred to in the Israeli legal jargon as 'invasion' – as an act of unauthorized squatting. Describing Anita's reason for squatting, Judge Rubinstein referred to Anita as one who "*<u>squatted in Amidar's apartment with out permission ("invaded")</u>…."*[126]

The petition was dismissed, but the empathy that the court expressed in Anita's case, including its use of an alternative legal language to describe the act of squatting are not without significance, especially in the context of squatting cases whereby evictions are usually issued without drawing

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and Identity in Legal Representation" in Shlomit Leer et al, eds, *For my sista: Mizrahi Feminist Politics* (Babel Publishers, 2008) [Hebrew].

[123] This is indicative of the larger context of gender-based power relations that are based on the presumptive correlation between sex and reproduction, motherhood and marriage, implying that a woman who engages in sexual relations and conceives a child must have a relationship with that man, and that that man must be supporting her.

[124] See: 1027/03 *A. M. v. The MCH*, *supra* note 99.

[125] *Ibid* at 6. Emphasis added.

[126] *Ibid* at 1. Emphasis added.

much, if any, attention to the squatters' narrative. Despite the fact that the court ruled against Anita, strictly following the MCH regulations and criteria, it nevertheless opened a space to an alternative contextual and narrative-based legal discourse that is relatively significant considering the limits of Israeli state-centered formalism.

In Anita's case, the situation continued to become more complex after the petition was denied. She appealed to the Supreme Court but since she got divorced whilst awaiting its decision her marital status has changed, thus rendering the petition unnecessary. Nevertheless, it was only after applying again to the MCH and filing another petition to the Administrative Court that her application was finally considered by the MCH, finally agreeing to grant her Anita a right to public housing. Ten years after she was granted a right to public housing, Anita was still waiting for the allocation of a house, struggling to pay her rent and support her family.

Whilst the story of Anita reveals some judicial empathy and sensitivity to her narrative, it is, nevertheless, not indicative of squatting cases. Unlike most squatters, she was legally represented in a holistic manner that encompassed almost every aspect of her life, from her divorce to squatting, aimed at exercising her administrative rights, and declaring her eligibility to a public housing. Further, while she, like the other Mizrahi women squatters I personally represented, was not evicted and was eventually granted a right to a public housing, many or most women squatters are ultimately evicted.

In general, Israeli law is not sympathetic to acts of squatting or to the women involved. Seen as ordinary criminals, motivated by self-interest and selfishness, or at best as acting out of poverty, necessity or despair, these women's pursuit for equity jeopardize the public order, causing instability and anarchy. Any attempts to offer arguments on behalf of these women fall on deaf ears as the courts reject any counter-arguments raised in the course of representation.

Squatting typically ends with eviction, whether or not these women have defended themselves in court, and whether or not they have attended any of the court's sessions.[127] Decisions given in cases where the women have not defended themselves or attended the court are short and laconic, lacking any substantive legal discourse and reasoning. The courts do not attribute importance to squatting cases, nor do they warn themselves of, or ascribe any importance to, the severe implications and outcomes entailed in evictions, especially in cases where judgments were given without the squatter defending herself.

Preoccupied with surviving, Mizrahi women squatters do not defend themselves in court for two main possible interrelated reasons. One reason is that they are mostly unaware of the legal proceedings initiated against them. A possible explanation for their lack of awareness could be the fact some of them cannot read and write which is, in and of itself, a result of the institutional discrimination inflicted against them as Mizrahis, depriving them of access, let alone equal access, to education. Further, it is indicative of the interconnectedness of the different discriminatory mechanisms inflicted against Mizrahis, encompassing every aspect of their lives, and their cumulative and intersecting effects, entrapping them within a cycle of dependency. A Mizrahi woman who did not have equal access to education, resulting in her illiteracy, will most likely be unable to defend herself in legal proceedings sought against her for eviction from a public housing, which is, in and of itself, a result of these injustices.

The second possible and interrelated reason for not defending themselves is that they cannot afford legal representation and are not entitled to governmental legal aid since they do not comply with the criteria. One of the criteria for receiving legal aid, apart from financial eligibility, is what is commonly referred to as 'the legal prospects of the case and the chances for winning it'. Since

[127] From data published by the MCH, in 2004 there were more than 1,000 cases of squatting in public housing. See: Michal Tabibian-Mizrahi, *Invasions to Land and Buildings, supra* note 117 at 6. The data also shows that some of the squatters were evicted either by the mechanism of self-help granted by section 18(b) or following a court order according to section 16 of the Israeli Land Law. (Israeli Land Law, *supra* note 68).

Mizrahi women squatters have no legal right over the houses into which they have squatted, it is formally 'worthless' to defend them. Similarly, failure to attend the court's session could be attributed to the fact that these women may have been unable to afford the travel costs to court, and/or find a babysitter for their children, and or the fearing the risk of losing their jobs. Such was the story of Galit, a divorced Mizrahi mother of three, who despite submitting a statement of defense, could not attend the court hearing and defend herself since she was unable to afford traveling to court and find a babysitter for her children.[128]

Even when Mizrahi women squatters do defend themselves and attend the court hearings, eviction is inevitable since their defenses and counter-arguments do not bear any substantive merits. Put another way, they do not have any valid legal defense. In these cases, most decisions ignore the women squatters' stories. They lack substantive legal analysis of the questions at stake, acknowledging the importance of these women's right to housing as part of their constitutional right to dignity. As Lea Kedar from Amigur has aptly put it: "[t]hese are laconic and patterned evictions. As if it were settled that one has to evict a refrigerator".[129]

The story of Keren offers a good example of this point. Keren was a divorced Mizrahi single mother of three children. Keren, said Lea Kedar, was an extremely disempowered woman suffering from extreme poverty, who was born and raised in a very underprivileged Mizrahi family, and therefore second generation of public housing tenancy. Keren applied to the MCH for public housing but was denied on the basis that since, at the time, she had only two children, she did not qualify as a single parent family provided by *section 2.4* of Regulation 08/05. Since Keren did not have any viable housing solution, and could not depend on family support, she therefore had to squat in public housing. Amigur initiated legal proceedings against her and filed a lawsuit

[128] See: Civ, (Tel-Aviv) 109646/01 *Amigur v. A.S.* [Not Published, 24 February 2002] [Hebrew]; Civ, (Ashdod) 822/02 *Amigur v. A.S.* [Not Published, 26 March 2003].
[129] See: Lea Kedar, *supra* note 17.

for eviction in the Magistrates Court in Tel Aviv-Yaffo. After hearing Keren and her mother, Judge Dan Mor, in a brief and cold decision ordered her eviction:

> "The defendant has no legal relief. She admits that she has invaded*, and all she does is **just** describing her difficult situation*. This court understands that*. But it is neither a welfare authority nor the Ministry of Housing*. She should address her requests in the appropriate place."[130]

The court was not empathetic towards Keren. Most eviction decisions are indeed short. Nevertheless, in some of the cases that I have traced, the courts, although ruling against these women, at least expressed some sympathy with their stories, and in some of the cases even granted extensions of the evictions dates, advising the MCH to find housing solutions for them. This court, however expressed no compassion for Keren. Nevertheless, since Keren was pregnant with her third child, the MCH decided to reconsider her application, conditional upon leaving the apartment in which she had squatted. Keren left that apartment and received a monthly rent subsidy until a suitable apartment was allocated for her.

The story of squatting, and more importantly the story of women squatters, is not the starting point of reference. It does not begin with their need for a public housing. Neither are eviction or eligibility for public housing the final stages in the squatting 'drama'. It is a story within a story, wherein the lack of access to housing is only one, symptomatic part of this past and lingering discrimination. It is a story whose chapters are still being written. As such the concluding section of this part, discussing the 'final' stages in the squatting story is not final, but, rather, the beginning of other stories.

Judges differ in their level of empathy and compassion towards these women, and in their willingness to help them, even within the boundaries of state-law centralism and formalism, either by deferring the eviction date or by urging the state authorities to find a suitable housing solution

[130] See: Civ 51843/01, *Amigur v. K.L.L.* [Not Published, 19 November 2001]. Emphasis added.

to the relevant squatter. One must not, however, overestimate the importance of courts' decisions that embody some compassion toward the squatters' lives and narratives. Despite their empathy, these women eventually are evicted and lose their homes. Nevertheless, attributing some significance to the context of the woman squatter, and acknowledging the narrative in which squatting is located, does bear some symbolic importance. In doing so, the courts enable these women, who are usually invisible and marginal, some platform for voice and visibility, even for only a few moments during a hearing, or through a few words in the court's decision. It is appropriate to relay here the words of Lea Kedar: "In every eviction case there is a human being. *Even if she is a trespasser. A person must feel important,* even if he has committed a crime. He did not steal or murder. *This is a mother wanting to save her children".*

These strong notions of motherhood, 'saving' and 'children' and the interdependency between them, leads me to the next chapter, and my second case, that of abortions in Canada. Here, women strive to save themselves, and the families they may have, not by having children, but, rather by undergoing abortions. If having children in the case of squatting is at times the only solution available to a Mizrahi woman who needs housing, then, in the case of abortions, having an abortion is at times the only possible solution envisaged by a woman. With this in mind, I now turn to discuss abortions in Canada.

Chapter Three - Abortions in Canada: Trespass to the Body

"There's no place for the state in the bedrooms of the nation." (Pierre Elliott Trudeau).[1]

In the summer of 1989, two Canadian women, Barbara Dodd and Chantal Daigle asked the courts to answer the question of whether male partners had any rights in the decision of a woman to have an abortion. In Toronto, Gregory Murphy secured a court injunction prohibiting his girlfriend, Barbara Dodd, from having an abortion; a few days later, following a decision by the Ontario High Court of Justice to set aside the injunction,[2] Barbara Dodd had an abortion, and was known to later regret her decision.

At the same time, the Quebec Superior Court granted Jean-Guy Tremblay an injunction order, prohibiting Chantal Daigle, his former girlfriend, from having an abortion. Ten days later, the Quebec Superior Court upheld the injunction,[3] holding that the fetus was a 'human being' under the Quebec Charter of Human Rights and Freedoms, and as such was protected by *section 1* of that Charter, guaranteeing the right to life. The Court also found that Tremblay "had a sufficient interest, both on his own and on behalf of the foetus."[4]

After the Quebec Court of Appeal upheld the injunction order,[5] Chantal Daigle appealed to the Supreme Court of Canada. In the interim, she acted against the court's rulings and travelled to a clinic in Boston for an abortion. Despite the fact that she had the abortion, the Supreme Court rendered a decision. In a unanimous decision, the Court held that the fetus was not a 'human being'

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[1] See: Interview of Pierre Elliott Trudeau (21 December 1967) CBC Television News. Online: <http://www.cbc.ca/archives/entry/omnibus-bill-theres-no-place-for-the-state-in-the-bedrooms-of-the-nation>. Last visited: 30.8.2018.

[2] See: *Murphy v. Dodd*, [1989] 63 D.L.R. (4th) 515, 70 O.R. (2d) 681 (Ont HC). *Tremblay v. Daigle,* [1989] 2 SCR 530, 62 DLR (4th) 634, 102 N.R. 81, 11 C.H.R.R. D/165, 27 QAC. 81, J.E. 89-1530, EYB 1989-67833; *Tremblay v. Daigle,* [1989] R.J.Q. 1980; *Tremblay v. Daigle* [1989], 59 D.L.R. (4th) 609, [1989] R.J.Q. 1735.

[3] See: Tremblay v. Daigle, [1989] R.J.Q. 1980.

[4] See: The Supreme Court unanimous decision, *Tremblay v. Daigle,* [1989] 2 SCR 530 at 542 para 15, 62 DLR (4th) 634, 102 N.R. 81, 11 C.H.R.R. D/165, 27 QAC. 81, J.E. 89-1530, EYB 1989-67833. [*Chantal Daigle decision*].

[5] See: Tremblay v. Daigle (1989), 59 D.L.R. (4th) 609, [1989] R.J.Q. 1735.

under the Quebec Charter or under civil or common law, and rejected the argument that a man had a "potential father's rights"[6] in the fetus, or a "right to veto a woman's decisions in respect of the foetus she is carrying."[7]

How did Canada move from strict anti-abortion laws, enacted from the nineteenth century onward, to the point of 'allowing' women, such as Chantal Daigle and Barbara Dodd, the right to legally terminate pregnancies? This *chapter* tells the story of criminalization and legalization of abortions in Canada. It is divided into two sections. The *chapter* begins by describing the status of abortion in pre-legalization Canada and the key actors in the criminalization process. It then turns to the 'official' historical story of legalization, that is, the processes that eventually led to the historic Supreme Court decision in *R v. Mogentaler*,[8] legalizing abortions by the nullification of *Section 251* of the Criminal Code. Again, the focus is on the key actors who mobilized this process, and on the socio-legal justifications and discourse that motivated and underlined these processes. The *chapter* draws on the historical and critical work of others to understand what the narrative of abortion law has been in Canada and how it has impacted women. For example, I relay on the work done primarily by feminist legal historians, such as Constance Backhouse.

Several clarifications precede and ground the discussion. First, the literature on abortion is vast and encompasses many academic disciplines, including medicine, psychology, political science, history, and law. It is, therefore, not intended, to cover the entire literature on the subject within the scope of this thesis. Second, abortion is at the centre of much heated and controversial debates, divided into two main movements, known as 'pro-choice' and 'anti-choice', both motivated by

[6] See: the *Chantal Daigle decision, supra* note 4 at 572, para 78.
[7] *Ibid,* para 79. For an interesting gender-critique and discussion on this case and its implications on women, see: Donna Greschner, "Abortion and Democracy for Women: A Critique of Tremblay v. Daigle" (1990) 35 McGill LJ 633.
[8] See: *R. v. Morgentaler,* [1988] 1 SCR 30 [*Morgentaler Decision*].

strong convictions pro/against abortions.[9] For the purposes of situating this case within the project of this thesis, that debate is not the centre of discussion. This leads to the third qualification of the *chapter*, concerning the use of language and rhetoric. In political movements, Kristin Luker argues, "language becomes politicized: a choice of words is a choice of sides."[10] She therefore decides to use 'neutral' terms in writing about abortion. Here, given my insistence on the importance of context and on revealing the language, meaning and rhetoric of lawbreaking and women lawbreakers themselves, this thesis does indeed 'take sides'.

Rejecting the rhetoric of choice, and wishing to extend beyond the polarizing rhetoric of the right to choose versus the right to life, the thesis instead uses the terminology of 'reproductive justice'.[11] This term was coined in 1994 by a group of black American feminists dissatisfied with the articulation of the right to abortion in terms of 'choice'. They argued that the concept of choice is limited and oblivious to the larger intersecting oppressive mechanisms directed against women of colour and indigenous women.[12]

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[9] As I argue elsewhere, critically analyzing the use of the rhetoric of rights by anti-choice advocates, the term *'pro-life'* marks the shift in the antichoice rhetoric, framing the debate as a clash between the *fetus's right to life* and the *woman's right to choose.* Framing the debate as a binary of opposing and competing rights, using the right of the fetus to life, and articulating it as an absolute right to life overriding women's right, if any, to choose, implies that any opposing view is taken to be *against/anti life.* (Claris Harbon, "Aborted Fetus Imagery as Pornography: Illegal Exploitation of Aborted Fetuses Images - Using Anti-Choice Rhetoric Against Itself" [work in progress]. For further critique on the use of the terms 'pro/anti-abortion', see: Janine Brodie, Shelley A M Gavigan & Jane Jenson, "Chapter 1: The Politics of Abortion" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) especially at 152 n 1 [Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1"].

[10] See: Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984) at 2 [Kristin Luker, *Abortion and the Politics of Motherhood*].

[11] For further discussion on and critique of the concept of 'choice', see: Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States* (New York: Hill and Wang, 2001); Lisa Brown, "When a Woman's Choice is Not a Choice" (2009) 3:2 Health Law & Policy Brief 25. See also: Rosalind Pollack Petchesky, "Antiabortion, Antifeminism and the Rise of the New Right" (1981) 7 Feminist Studies 206; See also: Rosalind Pollack Petchesky, "Reproductive Freedom: "Beyond A Woman's Right to Choose"", Special issue on Women: Sex and Sexuality (1980) 5:4 Signs 661 especially at 670-671.

[12] On this, see: Shannon Stettner, "Without Apology: An Introduction" in Shannon Stettner, ed, *Without Apology: Writings on Abortion in Canada* (Edmonton: Athabasca University Press, 2016) 18 [Shannon Stettner, *Without Apology*].

These mechanisms, they argue, limit their ability to make decisions affecting their lives, including in the context of reproduction. As with the larger context surrounding squatting, this approach allocates abortion within larger intersecting contexts of oppression/s and patriarchal and racial violence against women, suggesting that the struggle for reproductive rights and abortion is linked to, embedded in and cannot be separate from the larger struggle for social justice and equality.[13] In what follows, then, unless referring to a particular quote or citation, any references to the abortion debate, taken from a pro-choice/abortion perspective, will be framed and referred to as reproductive justice (RJ). The opposite of RJ will be referred to as anti-RJ.

The reader will also notice references to the fetus in gender-neutral (as much as it is neutral) terms, such as 'it'.[14] "Appreciating the power of language"[15] anti-RJ activists have shifted their language from strictly anti-abortion rhetoric, focusing solely on women's sexual immorality and 'sinful (mis)conduct', to a relatively more secular and sophisticated rhetoric of rights, focusing on the fetus itself, placing fetus' right to life at the center of debate. In their effort to humanize and personify the fetus as a viable entity having competing rights, they "have been adept at describing

[13] For further discussion on the concept of Reproductive Justice, see: Loretta Ross, SisterSong Women of Color Reproductive Health Collective, "What is Reproductive Justice?" in *Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change* (2007) 4 at 4 online: <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051>; Laura Gillespie, "Expanding the Reproductive Justice Lexicon: A Case for the Label Pro-abortion" in Shannon Stettner, *Without Apology*, *supra* note 12 at 201; Karen Stote, "Myth of Reproductive Choice: A Call for Radical Change" in Shannon Stettner, *Without Apology*, *supra* note 12 at 277; Loretta Ross et al, *Undivided Rights: Women of Color Organizing for Reproductive Justice* (Chicago: Haymarket Books, 2016); Loretta Ross, "Understanding Reproductive Justice: Transforming the Pro-Choice Movement," (2006) 36:4 Off Our Backs 14; Loretta Ross, "The Color of Choice: White Supremacy and Reproductive Justice" online: <https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity_key=2K2QA27B>; Andrea Smith, "Beyond Pro-Choice Versus Pro-Life: Women of Color and Reproductive Justice" (2005) 17:1 NWSA Journal 119, also available in: <https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity_key=RD3G3I35>; Zaikya T. Luna, "Marching Toward Reproductive Justice: Coalitional (Re) Framing of the March for Women's Lives" (2010) 80:4 Sociological Inquiry 554; Miriam Pérez, "The Meaning of Reproductive Justice: Simplifying a Complex Concept", *Rewire News* (8 February 2013) online: Rewire News <https://rewire.news/article/2013/02/08/communicating-complexity-reproductive-justice/>.

[14] Kristin Luker for example uses the term embryo. See: Kristin Luker, *Abortion and the Politics of Motherhood*, *supra* note 10 at 2. In contrast, Ayn Rand, for example, has referred to the fetus as "not-yet-living (or the unborn)". See: Ayn Rand, *The Voice of Reason: Essays in Objectivist Thought* (New York: Meridian, 1990) at 58.

[15] Richard M Perloff, *The Dynamics of Persuasion: Communication and Attitudes in the Twenty-First Century* 4th ed (New York: Routledge, 2010) at 215.

the entity that is removed from the womb as a "baby" rather than a "fetus"".[16] That 'entity' was no longer a fetus. *It* became a 'baby'. However, as noted above, this thesis does 'take sides'.[17] I, therefore, do not wish to personify and humanize the fetus, both by referring to it using terms, such as a *'baby', 'infant', 'unborn'* etc, and by referring to it in gender-based references, such as 'she/her' or 'he/his/him'. Therefore, unless referring to a particular quote, I refer to the fetus as 'it'.

The reader will also note that this *chapter* does not discuss organized feminist involvement in the process of abortion legalization, and instead leaves this significant component to *Chapter 6*. Organized and politicized feminist involvement and rhetoric in the legalization of abortion in Canada was relatively marginal and passive compared to the active, dominating and central role played by male doctors and physicians including Dr. Henry Morgentaler, advancing a medicalized discourse.[18]

Lastly, reference is made to both English and United States legislation on abortions, as these jurisdictions have had major constitutive influence on Canadian law in general and in particular on Canadian abortion law.[19]

1. The Criminalization Process of Abortions in Canada

"Contrary to what is popularly assumed",[20] writes Lisa DeLorme, abortion in North America "does not have a long history of illegality".[21] It does, however, "have a long history of practice".[22] It was

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[16] *Ibid*.
[17] See: Kristin Luker, *Abortion and the Politics of Motherhood*, *supra* note 10 at 2.
[18] On this point see: Jane Jenson, "Getting to Morgentaler: From One Representation to Another" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 15 at 43 [Jane Jenson, "Getting to Morgentaler"].
[19] See: Shelley A.M. Gavigan, "On "Bringinging on the Menses": The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986) 1 CJWL 279 at 293, 294 [Shelley Gavigan, "On Bringing on the Menses"].
[20] See: Lisa DeLorme, "Gaining a Right to Abortion in the United States and Canada: The Role of Judicial Capacities" (1991) 36 Berkeley J Sociol 93 at 94 [Lisa DeLorme, "Gaining a Right to Abortion in the United States and Canada"].
[21] *Ibid*.
[22] *Ibid*.

only in 1892, with the enactment of the Canadian Criminal Code, that abortion was prohibited by a consolidated federal law. Prior to the nineteenth century, abortion was not regulated in Canada (or in England or the US) nor were there statutes[23] which prohibited its practice.[24] During this time, in the absence of any legislation, it was regulated by English common law.[25] Under English common law abortions were not a criminal offense provided, and this is the key element, they were procured *prior* to *'quickening',*[26] that is, when the woman had first felt the fetus moving and stirring in the womb. Prior to statutory criminalization of abortions, Canadian women enjoyed, if not total freedom,[27] at least a relative tolerance regarding abortions.[28]

However, the nineteenth century was marked by a gradual evolution of anti-abortion laws, ending a long history of tolerance under common law. Canadian law followed the lead of English statutory anti-abortion laws, namely the enactment in 1803 of what is known as the Lord Ellenborough's

[23] See: Constance Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth-Century Canada" (1983) 3 Windsor YB Access to Just 61 at 64 [Constance Backhouse, "Involuntary Motherhood"].

[24] *Ibid*. James Mohr, for example, writing in the American context, which is also relevant to the Canadian case, argues that prior to 1800 there were no laws regarding abortions. (See: James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York: Oxford University Press, 1978) at vii [James Mohr, *Abortion in America*]. Therefore, he continues, "most forms of abortion were not illegal and those American women who wished to practice abortion did so". (*Ibid*).

[25] *Ibid* at 3.

[26] The concept of quickening was introduced to English common law by the early Christian/theological doctrine of the sanctity of life, according to which life begins with the ensoulment of the body. (See: Tom Campbell, "Abortion Law in Canada: A Need for Reform." (1977) 42:2 Sask L Rev 221 at 222 [Tom Campbell, "Abortion Law in Canada]. For further account on the concept of quickening, see: Cyril C. Means Jr., "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty" (1971) 17 N Y Law Forum 335 [Cyril Means Jr., "The Phoenix of Abortional Freedom"]; See also: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 65; James Mohr, "Abortion in America", *supra* note 24 at 3; Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion" (1984) 5 J Legal Hist 20, 21 [Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction"]; Shelley Gavigan, "On "Bringinging on the Menses" *supra* note 19 at 299.

[27] On this see: Cyril Means Jr., "The Phoenix of Abortional Freedom", *supra* note 26 at 336, 337.

[28] On the question of whether abortion also carried criminal liability *after* quickening, see: Cyril Means, Jr., "The Phoenix of Abortional Freedom", *ibid* at 341; John Keown, *Abortions, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge; New-York: Cambridge University Press 1988) at 10, 173 note 39 [John Keown, *Abortions, Doctors and the Law*]; Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 65; See also: Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction", *supra* note 26 at 21, 26; Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 287.

Act.[29] The Act established the general capital felony of abortion, punishable by death,[30] and made it unequivocally clear that it was a criminal offense to procure an abortion both *before* and *after* quickening.[31]

In line with this English legislation, Canadian law, both before and after confederation, demonstrated a firm and strict condemnation of abortions.[32] Starting with legislation prohibiting abortions after quickening,[33] Canadian legislators proceeded to outlaw any kinds of abortions, prior and after quickening.[34] From 1867 onward, however, as of Confederation, Canadian Criminal law moved towards consolidation under the sole jurisdiction of federal law. In 1869, following the English Offences Against the Person Act of 1861, the federal government enacted the Offences Against the Person Act, 1869*,* prohibiting abortions and setting the penalty to a maximum of life imprisonment.[35] In 1892 the 1869 Act was codified and consolidated into what we now know as the Canadian Criminal Code,[36] signifying "the culmination of the nineteenth century legislative drive against fertility control."[37]

Except for codifying the various statutory offenses regarding abortion,[38] the new Code introduced few major innovations. Most notably, *section 273* introduced new offenders, such as the women

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[29] See: Lord Ellenborough's Act, 1803 (UK), 43 Geo III c 58 [Lord Ellenborough's Act, 1803]. Lord Ellenborough was the Chief Justice of the King's Bench. For a thorough discussion on the evolutionary stages of enactments of the 1803 Act, see: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 12-21.
[30] Lord Ellenborough's Act, 1803, *supra* note 29 section 1.
[31] *Ibid* at section 2.
[32] For a thorough study and discussion of the evolution of Canadian anti-abortion laws, See: Constance Backhouse, "The Prosecution of Abortions" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Crime and Criminal Justice: Essays in the History of Canadian Law, Volume 5* (Toronto: The Osgoode Society, 1994) 252, especially at 276 note 1 [Constance Backhouse, "The Prosecution of Abortions"]. See also: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 67-69.
[33] On this see: *ibid* at 67-68.
[34] On this point see: *ibid* at 69. See also: *An Act Respecting Offences Against the Person,* 1859 CSC (Can) 22 Vict c 91, section 24, referred to in Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 69. See also: *An Act for Consolidating and Amending the Statutes in This Province Relative to Offences against the Person,* 1841 (Upper Can) 4 & 5 Vict c 27, section 13.
[35] See: *Offences Against the Person Act,* 1869 (Canada) 31 & 33 Vict c 20, sections 59-60.
[36] See: *Criminal Code,* 1892, (Can.), 55 & 56 Vict c. 29 [*Criminal Code,* 1892].
[37] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 110.
[38] See: *Criminal Code,* 1892, *supra* note 36 at sections 272-274.

themselves, making it irrelevant whether the woman was pregnant for prosecution of self-inducing abortion.[39] The Code also introduced new offenses. *Section 271(1)*, for example, established the offence of killing the unborn, punishable by life imprisonment.[40] Constance Backhouse argues that the motive behind this enactment was probably the need to distinguish between the sometimes-overlapping offenses of abortion and infanticide,[41] the latter regarded as a homicide.[42] *Section 179* established a new offense of obscenity, punishable by a maximum of two years imprisonment, prohibiting supplying, selling and advertising abortifacients, contraceptives materials and instruments used for procuring an abortion.[43]

With this inclusion of abortions and contraceptives within provisions against obscenity and immorality, the Canadian government, "was following the more stringent line of the American Comstock laws".[44] It was indicative of the Canadian shift away from leniency towards abortion, and the adoption of a more severe approach.[45]

What, one might rightly ask, "accounts for these characteristics?"[46] What, or rather who, motivated this shift? Who were the actors in the process of criminalization of abortions in Canada? These questions are the subject of the following part.

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[39] This provision followed section 58 of the English Offences Against the Person Act of 1861, which provided that in the case of third parties involved it was no longer necessary to prove that the woman was actually pregnant. Non-pregnant women who self-induced their abortion could not have been prosecuted prior to this new provision. This meant that under the new provison a woman could be prosecuted for self-inducing her abortion whether or not she was pregnant. On this point, see: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 33. See also: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 74 n 42. See also: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 292.

[40] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 111.

[41] *Ibid* at 112. For a thorough discussion on Infanticide in 19th century Canada, see: Constance Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34:4 UTLJ 447. For a further discussion on the differences between, and the different judicial, legislative and public attitudes towards, infanticide and abortion, see: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 112-117.

[42] See: *Criminal Code,* 1892, *supra* note 36 at section 219.

[43] On this point, see: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 117.

[44] See: Angus McLaren, "Birth Control and Abortion in Canada, 1870-1920" (1978) 59:3 Canadian Historical Review 319 at 323 [Angus McLaren, "Birth Control and Abortion in Canada"].

[45] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 71, 119.

[46] See: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 27. John Keown wrote indeed in the English context, and yet his question is applicable to the Canadian case.

1.1. The Engine 'Behind' the Criminalization of Abortions in Canada

Writing about the genesis and origins of abortion laws in Canada, Constance Backhouse argues that the question of what has motivated their enactment in Canada is a difficult one.[47] Abortions, she argues, did not confront any large public condemnation, nor any deep morally based convictions.[48] And, indeed, as she further indicates, there is no evidence to suggest, and in fact vast evidence points to the contrary, that these laws were enacted as a response to, and were motivated by, any public moral convictions and feelings against abortion.[49]

In fact, "[t]here was no evidence that these early laws were ever enforced",[50] and indeed from 1800 to 1840 "[t]here were no reported cases of abortion trials in Canada".[51] Even later, in the cases that were brought to trial, there was a clear gap between the harsh and strict attitude and intent of the legislators towards these women and the actual enforcement.[52] It is, she concludes, "difficult to know why these abortion statutes were first enacted in Canada."[53] Abortion was not perceived as a sin by many women in the nineteenth century,[54] and as noted was regarded as an acceptable form of birth control.[55]

What changed was the rise and emergence of an interesting interplay of several new powerful, dominant and dominating actors, namely those from the medical profession. In England and the US, for example, physicians played a significant formative and performative role in the evolution

[47] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 68.
[48] *Ibid* at 68, 129, 130.
[49] *Ibid*.
[50] *Ibid* at 129.
[51] *Ibid* at 69.
[52] *Ibid* at 75, 84.
[53] *Ibid* at 68.
[54] *Ibid* at 69.
[55] See: Angus McLaren, "Birth Control and Abortion in Canada", *supra* note 44 at 330. See also: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 129.

and expansion of stricter anti-abortion legislation.[56] They were referred to as 'regulars',[57] that is, elitist university graduates,[58] most of whom were "predominantly white, middle class males".[59] Their reference name was given in an attempt to differentiate between them and the 'irregulars', also known as 'quacks', who were "mostly female members of the emerging profession",[60] and also midwives, healers and homeopaths.[61] Refusing to perform abortions, they launched a vehement and aggressive campaign,[62] against abortions, calling for stricter anti-abortion laws. They had an impact on the relative tolerance of both state legislators and public opinion about abortions, eventually shifting their stand on the matter.[63]

In the Canadian context, 'regular' physicians also played an important role in the criminalization of the abortion process, having a profound impact on Parliament and motivating it to enact anti-abortion laws.[64] Constance Backhouse, however, argues that there is no direct evidence to suggest that anti-abortion legislation was, indeed, a direct response to the medical profession.[65] And,

[56] For one of the most thorough discussions on the evolution of abortion laws in the US and the role played by physicians in their expansion, see: James Mohr, "Abortion in America", *supra* note 24 particularly ch 6 at 147-170 ("The Physicians' Crusade Against Abortion, 1857-1880). For a discussion on the influence of English physicians on the evolution of anti-abortion laws, see: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 27-28, 35.
[57] For further discussion on the notion of 'regularism', see: James Mohr, "Abortion in America", *supra* note 24 at 31-45. In particular see his short discussion at 271 n 24, on the difficulties to define 'Regularism'.
[58] See: Carole Joffe, "Portraits of Three "Physicians of Conscience": Abortion before Legalization in the United States" (1991) 2:1 Journal of the History of Sexuality 46 at 48 [Carole Joffe, "Physicians of Conscience"]. [Reprinted in John C. Fout & Maura Shaw Tantillo eds, *American Sexual Politics: Sex, Gender and Race Since the Civil War* (Chicago: University of Chicago Press, 1993)]. See also: Carole Joffe, *Doctors of Conscience: The Struggle to Provide Abortion Before and After Roe V. Wade* (Boston: Beacon Press, 1995) [Carole Joffe, *Doctors of Conscience*].
[59] See: Eileen Veronica Fegan, *Abortion, Law and the Ideology of Motherhood: New Perspectives on Old Problems* (LLM Thesis, University of British Columbia, Law School, 1994) [Unpublished] at 38 n 38 [Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*]. See also: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 76.
[60] See: Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*, *supra* note 59 at 38, n 37.
[61] See: Carole Joffe, "Physicians of Conscience", *supra* note 58 at 48.
[62] See: James Mohr, "Abortion in America", *supra* note 24 at 147. He focuses on one particular young physician, Dr. Horatio Robinson Storer from Boston who was the 'engine' and leading force behind the crusade against abortions.
[63] *Ibid* at 147-148, 157.
[64] See: Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*, *supra* note 59 at 38 n 38.
[65] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 82 n 72. Constance Backhous argues that there is a need for further research before such straightforward conclusion could be inferred (*ibid* at 78, 82 n 72).

indeed, there were other important actors,[66] such as the Protestant and Catholic clergy[67] and lawyers,[68] whose campaigns and involvement against abortions may have also played a role in the evolution and expansion of anti-abortion laws.[69] Whether Canadian physicians' involvement was indeed the sole factor or one of many remains to be researched. What is apparent, however, is that it was one of the strongest campaigns launched against abortions having at least a considerable effect on the legislature. [70]

As argued by James Mohr, these physicians' opposition to abortion was motivated by several reasons, partly ideological, moral/ethical and practical. [71] For example, echoing some of the rhetoric used today by anti-RJ advocates, it was partially motivated by morally/ethically-based arguments, contending that abortions were immoral,[72] unethical,[73] and sinful, and were a direct assault on human life, or at least a risk to the sanctity of 'fetal life'.[74] Underlined by and rooted in an intersecting larger rhetorical context of misogyny and eugenics, 'regulars' regarded abortions as a "rejection of maternal responsibility",[75] and thus posing the danger of distorting the balance of the traditional and 'natural' gender power-relations between women and men, risking the sanctity of motherhood which was seen as the main function of women.[76] Similarly, Canadian

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[66] *Ibid* at 82.
[67] See: Carole Joffe, "Abortion and Medicine: A Sociopolitical History" in Maureen Paul et al eds, *The Management of Abnormal and Unintended Pregnancy* (Oxford, UK: Wiley-Blackwell, 2009) at 2 [Carole Joffe, "Abortion and Medicine"].
[68] See: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 22. See also: James Mohr, "Abortion in America", *supra* note 24 at 42.
[69] Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 82.
[70] *Ibid*.
[71] See: James Mohr, "Abortion in America", *supra* note 24 at 34-35, 160.
[72] See: Carole Joffe, "Physicians of Conscience", *supra* note 58 at 48.
[73] For further discussion on this point, with regards to the Hippocratic oath, see: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 77. See also: James Mohr, "Abortion in America", *supra* note 24 at 35.
[74] *Ibid* at 35-36, 164-166.
[75] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 81.
[76] *Ibid*. Constance Backhouse refers to the work of Wendy Mitchinson, "Historical Attitudes Toward Women and Childbirth" (1979) 4 Atlantis 13. For further discussion on the misogyny-based rhetoric, see Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 78. See also: Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*, *supra* note 59 at 38-39; See also: James Mohr, "Abortion in America", *supra* note 24 at 168, 169; See: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 296-297.

physicians saw abortions as one of the major means of 'race suicide', leading to lower birth rates, especially in the 'fit' classes, namely, white, Protestant, of English descent, native-born, middle class and married women.[77]

It is suggested that physicians' main motive for their decisive involvement in outlawing abortions was not just, if at all, 'altruistic' or protecting fetal and maternal life. Nor was it just concerns over birthrates that sparked their campaign. Rather, the campaign was strategic, part "of a larger battle"[78] against, and in competition with, the 'irregulars'[79] over dominance and monopoly.[80] Constance Backhouse, for example, argues that Canadian physicians used morality-based arguments as a camouflage[81] in order to conceal the true motive behind their campaign – the desire for professional monopoly.[82] Understood this way, it was the competition with the 'irregulars' over dominance, prestige, power and control that fueled their 'crusade'.[83] Abortion was their 'ignition switch', their means and platform to mobilize, as sharply put by Constance Backhouse, their "selfish desires to curb the medical practices of competitors."[84]

To summarize, the abortion issue has gone through major transitions in Canada since the nineteenth century. There were few minor amendments between 1892 and 1950.[85] One was a 1900

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[77] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 24 at 76, 80. For further discussion, see: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 154-155 n 7; Angus McLaren, "Birth Control and Abortion in Canada", *supra* note 44 at 320-321. For data on the decline of birthrates of English families, see: *Ibid* at 322. For a reference to the eugenic and racist-based rhetoric in the US and England, see: *Ibid* at 321; and, James Mohr, "Abortion in America", *supra* note 24 at 166-167.

[78] See: Carole Joffe, "Physicians of Conscience", *supra* note 58 at 48. See also: Carole Joffe, "Abortion and Medicine", *supra* note 67 at 2.

[79] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 79.

[80] See: Carole Joffe, "Abortion and Medicine", *supra* note 67 at 2.

[81] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 77.

[82] *Ibid* at 81.

[83] See: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 49. For further discussion on 'regular' physicians' fear of competition, see: James Mohr, "Abortion in America", *supra* note 24 at 37, 160-164; See also: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 77, 79. For the English context, see: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 40.

[84] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 81. See also: James Mohr, "Abortion in America", *supra* note 24 at 161, quoting William G. Rothstein, *American Physicians in the Nineteenth Century: From Facts to Science* (Baltimore: Johns Hopkins University Press, 1972) at 174.

[85] See: Constance Backhouse, "The Prosecution of Abortions", *supra* note 32 at 252.

amendment "authoriz[ing] the trial judge to exclude the public from the courtroom during an abortion trial, 'in the interest of the public morals'".[86] Also, the abortion provisions were renumbered,[87] by virtue of later amendments, leading eventually to the 'birth' of *section 251*.[88] However, except for these minor changes, anti-abortion laws in Canada remained intact throughout the first half of the twentieth century, until the 1969 reforms.[89] Things only started to change in favour of legalization during the second half of the 20th century, in the aftermath of World War II and the formation of the Universal Declaration of Human Rights in 1948.[90] Until then, "women were denied any vestige of fertility control.[91]

2. The Legalization Processes of Abortions in Canada

"- You perform an abortion. Is that right, Mrs. Drake? You perform abortions, don't you?
- That's not what I do, dear. That's what you call it, but they need help. Who else are they gonna turn to? They've got no one. I help them out ….
- How much do they pay you?
- I don't take money. I never take money. I wouldn't... That's not why...
- You do it for nothing.
- Of course I do. They need help." ('Vera Drake' by Mike Leigh, 2004).

As noted above, the anti-abortion laws in Canada remained unchanged throughout the first half of the twentieth century. Abortions were illegal and it seems that during that time, despite some unsuccessful calls for removing the prohibition on "advertisement and sale of birth control devices",[92] there was no lobby advocating the legalization of abortion.[93] How does a country go

[86] *Ibid* at 276 n 3, referring to *An Act further to Amend the Criminal Code,* 1892, SC 1900, c46, section 3.
[87] See: Constance Backhouse, "The Prosecution of Abortions" *supra* note 32 at 276 n 3.
[88] Section 179(c) was renumbered and became 207(1)(c), (*An Act respecting the Criminal Law*, RSC, 1906, c.146.), and was later further renumbered 207(2)(c) (*An Act to Amend the Criminal Code,* SC 1949, 2d Section c 13, section 1). Section 271 was renumbered to 306 (*An Act Respecting the Criminal Law,* RSC, 1906, c.146). Section 272 to 303, (*ibid.*) later becoming section 237, (*Criminal Code of Canada,* S.C. 1953-54, c. 51), and which was later embodied in section 251. (Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 229). On this see: Constance Backhouse, "The Prosecution of Abortions" *supra* note 32 at 276 n 3.
[89] *Ibid* at 252. See also: Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 224.
[90] See: Beatrice du Prey, "Reflections on the History of Abortion", Proceedings of the 17th Annual History of Medicine Days, March 2008, 171, at 174.
[91] See: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 130.
[92] See: Constance Backhouse, "The Prosecution of Abortions" *supra* note 32 at 253.
[93] *Ibid*.

from total criminalization of abortion to legalizing it? And not only legalizing abortions but striking all anti-abortion provisions from the Criminal Code, thus becoming one of the only countries in the world that has no legal provisions whatsoever prohibiting it?

There are two major milestone 'moments' in the legalization process of abortions in Canada. The first was the 1969 enactment of *section 251* of the Criminal Code, also referred to as the 1969 reform, allowing, in certain circumstances, the exemption of physicians from criminal liability for performing 'therapeutic abortions'. Marking a relative relaxation in anti-abortion laws, the 1969 reform eventually culminated in the second cornerstone 'moment' – the famous Supreme Court of Canada decision in the 1988 *Morgentaler* case.

2.1. The 1969 Therapeutic Abortions Reform

a) The First Half of the Twentieth Century

Throughout the first half of the 20th century, women's independence and autonomy, especially with regards to control over their bodies, fertility and reproduction, was controlled and regulated by the state through its anti-abortion laws. Nevertheless, this did not prevent or deter women from resisting these laws and seeking abortions. As insightfully stated by Shelley Gavigan, "[t]he criminal law may continue to prohibit it, but it can never prevent it".[94] Women were compelled "to go to considerable lengths to do so".[95] The notion of women's self-determination and resistance, which is at the heart of this thesis, will be discussed further below in *Chapter 6*.

Women's privacy was regulated by the state. Confining women to the private spheres of life, preventing them from exercising their rights in the public realm, and expropriating their right to control the privacy and autonomy of their bodies, further pushed these women deeper into a world of illegality, secrecy, and danger, privately and covertly breaking the law. Since they did not, or

[94] See: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 312.
[95] See: Gail Kellough, *Aborting Law: An Exploration of the Politics of Motherhood and Medicine* (Toronto: University of Toronto Press, 1996) at 43. See also: Constance Backhouse, "The Prosecution of Abortions" *supra* note 32 at 253.

rather could not, abide with the forced-upon anti-abortion regime, these women, like Mizrahi women squatters in Israel, had to find their own solutions, creating their own private underground world of illegal abortions, a world that Janine Brodie, Jane Jenson and Shelley Gavigan call the "extra-legal abortion regime".[96]

However, as they point out, this regime had its costs.[97] Risking their own lives, and at times even losing their lives, they had two main 'options': 1) attempt to self-induce their own abortions, using dangerous instruments, one of which was the coat hanger, which has become one of the most (in)famous symbolic icons of several abortion legalization movements[98]; and/or 2) resort to the aid of illegal abortionists, 'regular' physicians and 'irregulars', either as a first attempt to induce an abortion, or in cases in which the first attempted self-induced abortion was unsuccessful. Exposed and vulnerable to "sexual abuse, injury, and death",[99] they placed their wellbeing, welfare and lives at the hands of total strangers, some of whom were known as back-alley butchers, who were at best extremely indifferent and uncompassionate to these women's needs and distress, and at worst professionally incompetent to perform this medical procedure.

As recalled, until the enactment of 273 section of the Criminal Code of 1892, the women themselves could not be charged for procuring their own abortions.[100] Even after the criminalization of these women, it was very rare to charge and prosecute the women themselves.[101] However, even in the rare cases that these women were charged and prosecuted, and contrary to

[96] See: Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1", *supra* note 9 at 11.
[97] *Ibid*.
[98] For further discussion on self-induced methods see: Angus McLaren, "Illegal Operations: Women, Doctors, and Abortion, 1886-1939" (1993) 46: 4 Journal of Social History 797 at 800-801 [Angus McLaren, "Illegal Operations"].
[99] See: Carole Joffe, "Physicians of Conscience", *supra* note 58 at 46.
[100] For a thorough study on this period and the rarity of prosecuting the women themselves, see: Constance Backhouse, "Involuntary Motherhood", *supra* note 23 at 82-85.
[101] See: Constance Backhouse, "The Prosecution of Abortions" *supra* note 32 at 259.

the evidence presented,[102] "juries not infrequently refused to convict"[103] these women, mostly because they were perceived as desperate victims.[104]

It is interesting to note two things in this story. First is the important role played by juries in refusing to convict these women for either self-inducing abortion or turning to an abortionist despite and contrary to the law and the explicit instructions of the judges.[105] This pattern of resistance, somewhat lawbreaking and paradigmatically civilly disobedient in and of itself, would repeat itself in the *Morgentaler* case, discussed further below. For now, it suffices to note that it is significant for two reasons: it demonstrates the gap between the strictness of the anti-abortion laws and the more lenient public opinion; and, although I argue that it falls within the paradigmatic definition of civil disobedience of which I am critical, it does indicate the lawmaking potential entailed in lawbreaking. Second is the rationale and reasoning underlying the juries' acquittals of these women, namely their desperation and victimhood. This notion of necessity and desperation upon which these women were acquitted is the same rhetoric that has dominated the rhetoric of legalization.

b) <u>The Second Half of the Twentieth Century - Setting the Stage for Reform</u>

The second half of the 20th century marked the beginning of a relative relaxation in anti-abortion laws. By the end of the 1960s, there was a rise of the postwar movement calling for reform to abortion laws and contraceptives.[106] In most countries, the reasoning behind the calls for reform

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[102] See: Angus McLaren, "Illegal Operations", *supra* note 98 at 808.
[103] See: The Honourable Madame Justice B. M. McLachlin, "Crime and Women--Feminine Equality and the Criminal Law" (1991) 25 U Brit Colum L Rev 1 at 9; See also: Angus McLaren, "Illegal Operations", *supra* note 98 at 808.
[104] *Ibid*.
[105] Angus McLaren, for example, brings the story of *Rex v. Bella* Howe, a case involving a woman charged with an attempt to self-induce her abortion. Despite her own confession of the offense, and disregarding the judge's explicit instructions, the jury refused to convict her. See: *Rex v. Bella Howe,* AG (BC) Court Records, 1902:20 (v.92), brought in Angus McLaren, "Illegal Operations", *supra* note 98 at 808-809. See also: Constance Backhouse, "The Prosecution of Abortions" *supra* note 32 at 281, n 29.
[106] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 21.

was largely socio-economic, advancing a discourse based on the rationales of welfare and social equality,[107] and the Canadian reform movement was embedded in this larger universal context. Despite some criticism suggesting that this rationale was eugenic in nature, advancing family planning in non-western/white countries and communities,[108] what is important here is the linkage that was drawn between abortion and inequality. Reforming anti-abortion and contraception laws bore special significance with regards to families and individuals suffering from poverty, marking a class and perhaps also ethnic/race inequality. As pointed out by Shelley Gavigan and Jane Jenson, affluent families had better access to both contraception and adequate abortion services, whether illegal or legal.[109] Women suffering from poverty, on the other hand, lacked the financial means necessary for access to contraception and abortion services.[110] They had to turn to ""backstreet" abortionists".[111] As aptly put by Vitoria Greenwood and Jock Young: "The existence of the private sector demonstrated that existing abortion legislation [sic] applied largely to those without means: 'abortion is like equal pay, the women who are best off get it.'"[112] This notion of inequality persists in that access to abortion today is still marked by ethnic/class/race differences.

As pointed out by Jane Jenson, except for a few socio-economic-based arguments raised sporadically, the discourse of socio-economic factors was not the leading discourse of reform in Canada. The Canadian movement for reform, as with abortion law itself, was mostly influenced by English authority. Once again it was advancing a discourse led by physicians, and advocating a medical discourse,[113] this time in the opposite direction of reform.

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[107] *Ibid* at 23. For further discussion on this post-war rhetoric, particularly in the Canadian context, see: *ibid* at 21-26. See also: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 310.
[108] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 22.
[109] *Ibid* at 23. See also: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 310.
[110] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 23. See also: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 310.
[111] *Ibid*.
[112] *Ibid* quoting Vitoria Greenwood & Jock Young, *Abortion in Demand* (London: Pluto Press, 1976) at 21.
[113] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 24-25, 26.

One of the major moments marking the beginning of reform in English anti-abortion laws[114] was the case of *R v. Bourne.*[115] *Bourne* concerned a physician, Dr. Aleck Bourne, who admitted to procuring an abortion on a 14 year-old girl raped by three soldiers. He testified that the basis for his decision was the eminent threat posed by the pregnancy to the mental health of the girl.[116] Holding that his actions were "medically necessary",[117] he was acquitted.

Although still not explicitly allowed by a statutory provision, *Bourne* is often celebrated and commonly referred to as the case which set the precedent for therapeutic abortions in "Anglo-Canadian criminal law".[118] Although not explicitly referring "to the defence of necessity,"[119] it is said to have laid the ground for this defense in subsequent abortion cases involving physicians.[120] This defense is of great importance to this thesis and will be critically discussed in *Chapter 6*. For now it is sufficient to note that, following *Bourne,* a physician who acted in good faith, believing that an abortion was medically necessary, was relatively protected from criminal liability and prosecution.[121] Even in the case of prosecution, "they were of the view that an acquittal would surely follow".[122]

It is worth mentioning here that there is some evidence suggesting that Dr. Bourne, wishing to bring about a test case,[123] "instigated his prosecution,"[124] and "actively courted the initiations of

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[114] See: Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1", *supra* note 9 at 10.
[115] See: *R v. Bourne* [1939] l K.B. 687; [1938] 3 All E.R. 615.
[116] See: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 50. See also: Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1", *supra* note 9 at 10.
[117] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 24.
[118] See: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 307. See also: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 24. See also: Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1", *supra* note 9 at 10.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*. For further critical discussion of this case in the English context, see: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 59, 78-79. For a further discussion in the Canadian context, see: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 307, 309. See also: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 24.
[123] See: John Keown, *Abortions, Doctors and the Law, supra* note 28 at 79.
[124] *Ibid* at 188 n 189 and accompanying text.

proceeding".[125] If such evidence is correct, Dr. Bourne not only "opened space"[126] to 'therapeutic abortions', he also acted in intentional defiance of the law, preceding and resembling the acts of yet another physician who several decades later has become the iconic symbol of the struggle for legalization of abortions in Canada, namely, Dr. Henry Morgentaler.

The *Bourne* decision set the stage for a later major English abortion reform, namely the enactment of the Abortion Act, 1967.[127] The innovation of that Act was more than giving a statutory authority to a common practice.[128] By virtue of *section 1(1)*, it has also broadened the scope of justified bases for medical intervention and extended the notion of 'risk' "beyond the preservation of the woman's life and health."[129]

In Canada, physicians, following the *Bourne* decision, confronted an interpretational ambiguity. As indicated by Jane Jenson, despite the obvious importance of the notion of 'health' for determining the medical necessity of an abortion, the court in *Bourne* did not define the meaning of 'health' and what amounts to a risk to health.[130] Physicians were the ones who were entrusted with this authority, and could 'fill in' this interpretational void.[131]

In their efforts to "clarify the ambiguity",[132] Canadian physicians set several procedures and mechanisms designed at 'facilitating' and 'formalizing',[133] or rather 'legalizing' the decision to obtain and subsequently the act of procuring, a 'legal' abortion. They consulted each other and,[134] in some cases, special committees, later known under the 1969 reform, as 'Therapeutic Abortion

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[125] *Ibid* at 78.
[126] See: Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1", *supra* note 9 at 10.
[127] See: Abortion Act 1967 (UK) c 87.
[128] John Keown, *Abortions, Doctors and the Law, supra* note 28 at 84.
[129] *Ibid*.
[130] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 24-25.
[131] *Ibid* at 25.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.

Committees' (TAC), were established in "non-Catholic hospitals",[135] aimed at generating a 'formal' decision in each case.

Physicians were the sole professionals vested with the responsibility of deciding whether health was at risk. And yet, abortions were still illegal and the possibility of prosecution, albeit rare, still existed. Moreover, as asserted by Shelley Gavigan, Canadian physicians feared that *Bourne* would be withheld, "rendering them liable again for prosecution".[136] Joining their English counterparts, they had to change the law so that it could conform with and reflect their needs. As of mid-1960s they launched a new campaign, this time in the other direction of reforming and 'relaxing' anti-abortion laws.[137]

During this time period, the leading rhetoric was that of medicalization. Since abortion was understood "as a medical practice,"[138] involving health issues,[139] the only ones who could exercise any discretion on such matters were physicians.[140] As succinctly put by Jane Jenson, "[m]ost simply, if doctors saw any pregnancy as 'unhealthy', they could legally abort it."[141]

Doctors did not advocate any of the socio-economic arguments voiced mostly by the European postwar movement, and grounded in the rationales of welfare and social equality. Nor were their arguments connected to gender-equality. Rather, they were driven and motivated, as before, by an ulterior reasoning underlying their campaign for reform, namely "professional self-interest",[142] and their wish to protect themselves from criminal liability.

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[135] *Ibid*.
[136] See: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 310.
[137] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 25.
[138] *Ibid* at 19.
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid*.
[142] See: F.L. Morton, *Pro-Choice vs. Pro-Life: Abortion and the Courts in Canada* (Norman, OK: University of Oklahoma Press, 1992) at 19 [Morton, *Pro-Choice vs. Pro-Life*].

Again, the law was instrumental for achieving these goals. Previously, such forms of self-interest initially meant the monopolization of the medical practice with the aim of protecting it against encroachment on its dominance and authority by 'irregulars', subsequently motivating changes in the law, so that it could offer them such protection by criminalizing abortion. Now, these 'self-interests' meant physicians' protection against that same law,[143] this time motivating them to seek law reform.

Physicians, then, sought to reform current anti-abortion laws to protect their interests "paying little attention to the needs of anyone but [themselves]".[144] For them, reforming abortion was not designed at protecting the needs and, more importantly, the rights of women, who were "the object of the practice, if not the perceived subject of the law."[145] Obviously, it did not mean reforming the status of women and expanding their rights. The reform, and women in general, were instrumental for advancing their own interests and protecting their own needs. The implications of this rhetoric will be discussed in *Chapter 6*.

Lawyers also played an important part in the campaign.[146] Their underlying rhetoric was based both on discourses of medicalization and liberalization. Naturally, on the one hand, they adopted a medicalized discourse, reflective of the needs of the doctors and their prospective clients,[147] who were still exposed to criminal liability for procuring an abortion even when medically needed. On the other hand, they raised other arguments for reform based on a somewhat welfare-based rhetoric, wishing "to improve the condition of 'the pregnant female'".[148] Other arguments were based on the discourse of liberalization. According to this line of thought, since "abortion was

[143] *Ibid*. See also: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 30.
[144] *Ibid* at 25.
[145] *Ibid*.
[146] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 29. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 19.
[147] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 32.
[148] *Ibid* at 30.

indirectly related to sexual practice",[149] it should be approached from a wider context of liberalization of sexuality in general. As observed by Jane Jenson, a linkage was drawn "to a more general liberalization of social mores",[150] and advocating "an expanding space for sexuality free from state interference."[151]

However, as observed by Jane Jenson, despite the initial importance of this discourse, the triumphant rhetoric was that of medicalization.[152] For the lawyers, she argues, the interests that needed to be prioritized and protected were those of physicians and their prospective clients.[153] These were the prospective 'criminals' who should be protected, not the women themselves and not the 'irregular' abortionists. Doctors were the only 'victims' of the initial campaign against abortion.

The United Church of Canada also played an important role in the campaign for reform.[154] Indeed, the Church pursued a discourse of liberalization, advocating for less state control and "enforcement of moral codes."[155] However, in line with the position taken by the Church of England, it did follow the discourse of medicalization,[156] advocating for decriminalizing abortions on the basis of health and medical necessity. It argued that doctors were the only ones who could decide on such matters, having the medical expertise to determine whether there were any risks to the health of the woman/girl involved should pregnancy continue.[157] Notably, the Church opposed abortions on socio-economic grounds.[158]

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[149] *Ibid* at 19.
[150] *Ibid* at 20.
[151] *Ibid*.
[152] *Ibid* at 19.
[153] *Ibid* at 30.
[154] *Ibid*.
[155] *Ibid* at 24.
[156] *Ibid* at 30.
[157] *Ibid*.
[158] *Ibid*. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 21.

The dominating rhetoric was once again the one sought by the doctors, this time using the discourse of medicalization, pushing, as aptly put by Morton "for legislative reform that would legalize what they were already doing."[159] Following debates and deliberations,[160] in 1966 both the Canadian Medical Association (CMA) and Canadian Bar Association (CBA) reached resolutions regarding abortion, "calling for decriminalization of abortion in certain carefully defined circumstances".[161] They received political support from Pierre Elliott Trudeau, then the Justice Minister.[162] On October 3, 1967, a Parliamentary Committee, the House of Commons Standing Committee on Health and Welfare, convened in order to debate and examine the proposals for reform to abortion laws.[163] The most predominant voice in these meetings was that of the CMA, arguing that reform was needed for "'tidying up' the situation so that the law and common practices would again coincide".[164] Their proposals, together with the ones submitted by the CBA, had the most important impact on the Committee.[165]

Their rhetoric in the hearings was that of medicalization. As observed by Jane Jenson, the CMA spoke of 'people' and of 'pregnant females', whose sole relevance to the case of abortion was that of being a patient, "who had oftentimes no gender".[166] They had no other identity but that of 'patients', typically approached through the prism of motherhood. There were 'alternative' voices that came from several women's organizations. The National Council for Women, for example, "explicitly addressed women's interests",[167] albeit, as pointed out by Jane Jenson, not grounded

[159] *Ibid* at 20.
[160] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 25.
[161] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 19.
[162] *Ibid* at 20.
[163] *Ibid* at 20-21.
[164] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 27.
[165] *Ibid* at 32.
[166] *Ibid* at 29.
[167] *Ibid* at 31.

on the discourse of the right to choose.[168] Nevertheless, women's organizations were marginalized, relatively excluded, and did not have much impact on the debates, the reform processes in general or on their outcome.[169]

Dr. Henry Morgentaler also spoke in the Committee on behalf of the Humanist Fellowship of Montreal, and his brief was one of the rare occasions in which the figure of the woman "suddenly appeared".[170] Dr. Morgentaler was unique in raising "[o]ne of the most radical" arguments,[171] advocating 'abortions on demand/request'.[172] His approach was rooted in a larger context of women's liberation and as pointed out by Morton, called for liberation from biology which entrapped them into motherhood.[173]

Nevertheless, the most powerful and vocal voice was that of the physicians, advancing their own self-interests. Following the rhetoric sought by the lawyers, the doctors were portrayed as victims of the ambiguity entailed in the antiabortion laws, the same laws that they had mobilized. An interesting theme arising from the debates was the CMA's self-portrayal of themselves as 'lawbreakers'.[174] The use of the notion of lawbreaking is interesting, if not ironic, considering the subject of this thesis. It is the same argument that was soon used and further 'translated' and interpreted as a form of civil disobedience by Dr. Morgentaler, who managed to mobilize legal change through his acts of lawbreaking.

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[168] *Ibid*. For further discussion, see also *ibid* at 31-32. See also: Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*, *supra* note 59 at 66-67.
[169] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 31. See also: Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*, *supra* note 59 at 66 n 30. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 19.
[170] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 29.
[171] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 21.
[172] *Ibid* at 22. See also: See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 29.
[173] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 22.
[174] *Ibid* at 21. See also: See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 26-27.

In December 1967, the Committee published its interim report proposing the legalization of therapeutic abortions in cases of a serious risk to a woman's health or life.[175] At the same time, on December 21, 1967, before the Committee resumed its deliberations,[176] Trudeau submitted and 'tabled' an Omnibus Reform Bill, C-150, suggesting major and comprehensive reforms of the Criminal Code, amongst which were the decriminalization of abortion, homosexuality, divorce, and contraception. The Committee submitted its final report on March 13, 1968, recommending the inclusion of threat to health into the therapeutic abortion exception.[177]

On May 14, 1969, Bill C-150 became law, the Criminal Law Amendment Act,[178] including amendments to *section 251* of the Criminal Code.[179] *Section 251(1)(2)* still preserved the general prohibition on abortion as a criminal offense punishable by life imprisonment in the case of an abortionist[180] and two years for the woman herself.[181] It did, however, introduce several amendments, decriminalizing and allowing the performance of abortion in certain limited therapeutic circumstances listed in subsection 4. *Section 251(4)* provided that women could undergo abortions provided that a therapeutic abortion committee comprised of three doctors[182] in a certified hospital confirmed that the continuation of the pregnancy would endanger a woman's life or health. Since health was not defined, the question of what constituted endangerment of health was, therefore, left open to interpretation.

Indeed, there was some discourse of liberalization preceding the enactment of *section 251*, and Trudeau's famous quote echoes the spirit of this discourse of sexual liberalization and

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[175] *Ibid* at 33. See also: Alphonse de Valk, *Morality and Law in Canadian Politics: The Abortion Controversy* (Montreal: Palm Publishers, 1974) at 55 [de Valk, *Morality and Law in Canadian Politics*].
[176] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 23.
[177] *Ibid*.
[178] *Criminal Law Amendment Act,* 1968-69 S.C.1968-69, c. 38.
[179] For further discussion on the process of enactment, see: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 22-28. See also: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 32-36.
[180] See: Section 251(1).
[181] See: Section 251(2).
[182] See: Section 251(6).

minimization of state's control over and regulation of private matters: "There's no place for the state in the bedrooms of the nation." However, the 'reigning' and most influential rhetoric was that of medicalization, reflecting doctors' needs and self-interests. They won. They achieved what they were seeking for: legal protection from criminal liability, formalizing what they had already been doing prior to decriminalization. The wording of *section 251(4)* leaves no space for mistake. It reveals an overwhelmingly medical discourse, setting procedures to be followed by doctors in order to decide whether to approve abortions based solely on medical questions. It was for them to decide on matters of health, and the woman was just a patient, whose needs or rights, or lack thereof, were irrelevant.

2.2. The Road to *R v. Morgentaler*

a) The Obstacles to Therapeutic Abortions

The impact and reception of the new law could be described as follows: as indicated by Alphonse de Valk "[a]fter the passage of the abortion law, dissatisfaction broke out almost at once".[183] Under the new 'regime' of legal 'therapeutic abortions' many problems, both procedural and substantive, confronted women with major obstacles to equal access to abortion services. These, according to Jane Jenson, were attributed to and associated with the discourse of medicalization.[184]

A major problem with the new law was the fact that the establishment of 'Therapeutic Abortion Committees' (TAC) was not mandatory.[185] As indicated by Shelley Gavigan, some hospitals refused to establish TAC based on "religious morals and professional ethics".[186] Consequently, other hospitals, especially public hospitals, were burdened with an overload of applications,[187]

[183] See: de Valk, *Morality and Law in Canadian Politics*, *supra* note 175 at 134. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 125.
[184] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 37.
[185] See: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 311.
[186] *Ibid*.
[187] See: de Valk, *Morality and Law in Canadian Politics*, *supra* note 175 at 134.

resulting in delaying the work of the TACs, their ability to reach decisions in time and, consequently, delaying the performance of abortions themselves. The delays were so substantial that, on some occasions, it was "impossible to perform the abortion at an early stage of the pregnancy".[188]

These problems, and others discussed below, were addressed by the Committee on the Operation of the Abortion Law, also known as the *Badgley Committee/Report,* which was appointed in September 1975 by Prime Minister Trudeau to study the problems associated with and created by *Section 251* provisions.[189] The Committee published its report on February 1977, containing important data about the operation and failures of *section 251*.[190]

For example, addressing the crucial issue of delays, it found that in average, it took eight weeks for a woman to go through therapeutic abortion, from the first moment of turning to a doctor to the actual procedure.[191] Such delays bore significant impact on women in the context of abortion, where time was a crucial factor: the sooner the abortion is performed the safer it is for the women involved.[192] The Badgley Committee also found that in 1976 only 271 out of the 559 certified and accredited general hospitals within the meaning of *section 251* had set a TAC.[193]

Coupled with the fact that a hospital had to be 'approved' and 'accredited' in order to meet the requirements of *section 251*, this meant that abortions were not equally available and accessible

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[188] *Ibid*.
[189] See: Robin F Badgley, *Report of the Committee on the Operation of the Abortion Law* (Ottawa: Ministry of Supply and Services, 1977) [Badgley Report].
[190] See: Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 227.
[191] See: Badgley Report, *supra* note 189 at 146. This data was also referred to by C.J.C. Dickson in the *Morgentaler Decision*, *supra* note 8 at 21, para 29. See also: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 311-312.
[192] See: C.J.C. Dickson in *Morgentaler*, *supra* note 8 at 21, para 30. Facing major delays, and fearing that they will not be able to terminate their pregnancies, some women felt compelled to apply to more than one TAC in order to enlarge the chances of receiving a decision in due time. This issue was also addressed and confirmed by a later report, from 1987, known as the 'Report on Therapeutic Abortion Services in Ontario', conducted by Dr. Marion Powell, also referred to as the *'Powell Report'*. See: Ontario Ministry of Health, *Report on Therapeutic Abortion Services in Ontario* by Marion Powell (Ottawa: Minister of Supply and Services, 1987).
[193] See: Badgley Report, *supra* note 189 at 105. This data was also referred to by C.J.C. Dickson in *Morgentaler*, *supra* note 8 at 26, para 45.

across Canada. That had a significant bearing on women, confronting them with many obstacles impeding their way to have these 'decriminalized' abortions, and even preventing them from having ones. This likely had greater impact on women coming from further underprivileged minorities, and particularly women who live in rural or remote areas, and whose socio-legal inferiority lies within the intersection of several identity based-affiliations, including sex, gender, race, class or ethnicity, further impeding their 'right' to a fair and equal access to abortions.

Unlike more affluent and likely white women, these women did not have the financial resources and means to 'overcome' these obstacles, and travel, for example, to other provinces or US states where abortion services were more accessible. As put by Shelley Gavigan, "in practice there was one law for the rich and another for the poor".[194] Similar to the line drawn between women in accessing 'therapeutic abortions' before the 1969 reform, a line of inequality was drawn amongst women themselves, confronting them with somewhat de-facto discriminatory, unequal and differential access to abortion services.

Another major problem with *section 251*, also resulting in unequal access to abortion, was the lack of definition of 'health' in general and 'mental health' in particular.[195] Since the new law failed to provide what constitutes 'health', and what amounts to an endangerment to health, each physician was vested with a wide and considerable discretion to 'fill in' this void by her/himself, referring to and adopting different standards and criteria.[196] This incoherence and ambiguity, along with the

[194] See: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 310.
[195] See: Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 226-227. See also: Kenneth Smith & Harris Wineberg, "A Survey of Therapeutic Abortion Committee" (1970) 12 Crim LQ 279 [Kenneth Smith & Harris Wineberg, "A Survey of Therapeutic Abortion Committee"]. Also brought in Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 225.
[196] One of such standards was the definition of health adopted by the World Health Organization (WHO). WHO defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." (See: World Health Organization. *Preamble to the Constitution of the World Health Organization* (as adopted by the International Health Conference, New York, 19-22 June 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100); entered into force on 7 April 1948), also available online: <http://www.who.int/about/definition/en/print.html>. (Last visited: 30.8.2018).

lack of legal criteria, resulted in different and non-uniform bias decisions, having doctors' personal biases dictate the operation of TAC, and influence their considerations in deciding their cases,[197] thus, risking "the seemingly objective Criminal Code provisions" [198] with interpretational subjectivity.[199]

It was of no surprise, then, that the CBA was worried that the ambiguity of the law and the lack of coherent legal criteria[200] would expose doctors to criminal liability. One could rightly feel that they had returned to the 19th century or the pre-1969 era, 'stuck' in a somewhat 'never-ending-story' situation, whereby physicians were not satisfied with existing law, or lack thereof, and were confronted with legal ambiguity and 'lacunas' which they have taken upon themselves to 'solve'. It is of no surprise that both the CMA and CBA called for clarification, revision and further liberalization of the law,[201] and eventually for "the complete elimination of abortion from the Criminal Code".[202] One cannot read this without perhaps sarcastically wondering about the long distance from the time where abortions were the target of physicians' crusade for criminalization to the time where they were now calling for total repeal of the law. This time, however, part of the public was no longer as indifferent or tolerant to abortions as it was prior to criminalization. Physicians' campaigns have placed abortion on the public agenda, and people have started forming strong opinions about it.

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[197] See: Kenneth Smith & Harris Wineberg, "A Survey of Therapeutic Abortion Committee", *supra* note 195 at 306. See also: Shelley Gavigan, "On Bringing on the Menses", *supra* note 19 at 311; Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 226-227; Badgley Report, *supra* note 189 at 20; This data was also referred to by C.J.C. Dickson the *Morgentaler Decision*, *supra* note 8 at 27, para 49. See also: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 38; Eleanor Wright Pelrine, *Abortion in Canada* (Toronto: New Press, 1971) at 37, referred to by Tom Campbell, "Abortion Law in Canada", *supra* note 26 at 227.

[198] See: Kenneth Smith & Harris Wineberg, "A Survey of Therapeutic Abortion Committee", *supra* note 195 at 303.

[199] Further on this point, see: *ibid*.

[200] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 38.

[201] *Ibid*.

[202] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 125.

Responding to these demands, Trudeau commissioned the Badgley Committee, which confirmed much of the problems created by *section 251*. The Committee concluded that "[t]he procedures set out for the operation of the Abortion Law are not working equitably across Canada",[203] and that "the procedure provided in the Criminal Code for obtaining therapeutic abortions is in practice illusory for many Canadian women".[204] In a reality where abortion was not accessible for women, having only numerous hospitals around the country that legally performed abortions, and raising many obstacles on the women who were fortunate enough to have an access to a TAC, it is unsurprising that women were forced to create their own solutions and seek abortions elsewhere, even illegal ones, "outside the letter of the law",[205] back in the back-alleys. Into this context stepped another physician, Dr. Henry Morgentaler.

b) <u>From Henry Thoreau to Henry Morgentaler</u>

On May 29, 2013, as I worked on this thesis, Dr. Morgentaler died at age 90. He left behind a famous, and no less controversial, legacy of pro-RJ activism. While I will not summarize his biography or his path to the Supreme Court of Canada, I will point to key aspects relevant to my analysis.[206] Dr. Morgentaler was a Jewish holocaust survivor who immigrated in 1950 to Canada together with his wife, making Montreal their home. He completed his medical degree at l'Université de Montréal, from which he graduated in 1953 and, after first practicing as a general practitioner, he soon moved to his own family practice. It seems that his experience of the

[203] See: Badgley Report, *supra* note 189 at 17.
[204] *Ibid* at 140-141.
[205] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 43.
[206] For more discussion on his life and biography, see: Catherine Dunphy, *Morgentaler: A Difficult Hero* (Toronto: Random House of Canada, 1996); See also: Eleanor Wright Pelrine, *Morgentaler: The Doctor Who Couldn't Turn Away,* 2d ed (Halifax: Goodread Biographies, 1983) [Eleanor Pelrine, *Morgentaler: The Doctor Who Couldn't Turn Away*]; See also: Anne Collins, *The Big Evasion: Abortion: The Issue That Won't Go Away* (Toronto: Lester & Orpen Dennys,1985).

Holocaust shaped his political consciousness, and fear of authoritarianism, and was later manifested in his struggle for abortion legalization, particularly his acts of civil disobedience.[207]

He soon received medical recognition for his work and became involved in the Montreal Humanist Fellowship, ultimately selected for its president in 1964.[208] Together with the growing societal interest in separation of reproduction from sex, birth control and abortion, Dr. Morgentaler, who had himself practiced family planning, soon became interested in these areas. Believing that women should have control over their bodies and lives,[209] he advocated the legalization of abortion as a means to terminate and overcome what he perceived as "accidents".[210] Abortion, writes Morton, "seems to have provided the issue that the new Henry Morgentaler was looking for: […] *individual conscience versus law,* and - if he chose - Morgentaler versus the state".[211]

In 1967, Morgentaler appeared before the Parliamentary committee on behalf of the Montreal Humanist Fellowship, and presented what were at that time the most innovative and radical arguments urging the legislature to repeal anti-abortion laws and instead legalize 'abortions on request/demand' for the first three months of pregnancy.[212] However, his recommendations were not implemented in the 1969 reform.

Back in Montreal, Dr. Morgentaler, who had gained some public recognition, was approached by women seeking abortions.[213] However, Morgentaler, worried about the legal consequences that could follow, at first declined. Abortion, Morgentaler argued "was against the law".[214] He felt

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[207] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 31.
[208] *Ibid* at 32.
[209] *Ibid*.
[210] See: de Valk, *Morality and Law in Canadian Politics*, *supra* note 175 at 48.
[211] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 32.
[212] See: de Valk, *Morality and Law in Canadian Politics*, *supra* note 175 at 48. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 22.
[213] *Ibid* at 33.
[214] See: Eleanor Pelrine, *Morgentaler: The Doctor Who Couldn't Turn Away*, *supra* note 206 at 2, brought in Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 33.

trapped, "between his conscience"[215] advocating for abortions on demand, "and the law".[216] Eventually, Dr. Morgentaler, recalling Henry Thoreau in the latter's pursuit of conscience, "chose conscience over law".[217] On January 9, 1968, he acted upon his conscience, finally breaking the law and "performed his first abortion."[218] He soon after closed his general practice so that he could focus on family planning,[219] providing full abortion services alongside other interrelated services.[220] In 1970, he opened his first abortion clinic in Montreal. Morgentaler was clearly breaking the law by defying "the law's requirement of approval by a hospital board".[221] At first, however, Dr. Morgentaler tried to remain discrete and performed abortions covertly.[222] However, Morgentaler's 'secret lawbreaking' soon came to an end, and, on June 1, 1970, his clinic was raided by the police and he was arrested. Facing criminal charges, he was charged with three counts of illegal abortion.[223]

Not deterred by the legal implications of his acts, and the outstanding criminal charges against him, in March 1973 Morgentaler publicly announced on several occasions that he had performed over 5,000 'illegal' abortions.[224] He even performed an abortion on television, which was broadcast on Mother's Day 1973.[225] Televising one's own acts of lawbreaking, whilst awaiting prosecution and trial for the same previous 'illegal' acts, was indeed a bold example of civil

[215] *Ibid*.
[216] *Ibid*.
[217] *Ibid*.
[218] *Ibid*.
[219] *Ibid*.
[220] Such services were "vasectomies, providing IUDs and oral contraceptives". *Ibid*. IUD is an abbreviation of 'intra uterine device', which is a birth control/contraceptive device that is inserted into the uterus to prevent conception.
[221] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 39.
[222] See: Eleanor Pelrine, *Morgentaler: The Doctor Who Couldn't Turn Away*, *supra* note 206 at 80, quoted in Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 34.
[223] *Ibid* at 35.
[224] *Ibid* at 36.
[225] *Ibid* at 37.

disobedience. Following another police raid and arrest, he was charged with ten additional counts of 'illegal' abortion.

1. The First Trial

On trial, Morgentaler's main defense was that of necessity, relying on the precedent set by *Bourne*. Following *Bourne's* medicalized discourse, Morgentaler argued that performing the abortion was a medically necessary act to save the life of the woman involved.[226] In that case, the woman involved, Verona Parkinson, was a young black foreign student from Sierra Leone.[227] She was portrayed at the trial as "*desperate:* single, poor, alone in a foreign country with an unwanted pregnancy",[228] afraid of her family and the impact it might have on her studies.[229] Morgentaler argued that continuing with the pregnancy could have had devastating consequences, considering that fact that "he found her in a state of severe psychological distress".[230] Morgentaler therefore decided that abortion was indeed a necessary act.[231]

Another line of defense was the one provided by *Section 45* of the Criminal Code, often referred to as "the Good Samaritan defense",[232] providing safeguards from criminal liability for people who perform a surgical operation "in order to save the life or limb of an injured person".[233] Accordingly, it was argued that Dr. Morgentaler had to perform an abortion in order to save Verona Parkinson's health and her life.[234]

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[226] *Ibid* at 50, 55.
[227] *Ibid* at 50.
[228] *Ibid*. Emphasis added.
[229] *Ibid*.
[230] *Ibid* at 53.
[231] See: Eleanor Pelrine, *Morgentaler: The Doctor Who Couldn't Turn Away*, *supra* note 206 at 102, quoted in Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 53.
[232] *Ibid*.
[233] *Ibid*.
[234] *Ibid*.

On November 13, 1973, the jury delivered its verdict, acquitting Morgentaler.[235] As observed by Morton, the acquittal bore more than personal significance for Morgentaler, 'saving' him from imprisonment. It also bore wider political and legal implications on abortion in general, becoming a mobilizing factor towards the total repeal of anti-abortion laws. As aptly put by Morton:

> for Morgentaler, his own acquittal was only a means to a more important goal: to make the restrictive provisions of Canada's abortion law unenforceable. *The Crown had put Henry Morgentaler on trial. But in so doing, the government allowed him to put Canada's abortion law on trial.*[236]

This victory did not last long. The Crown appealed to the Quebec Court of Appeal and, on April 26, 1974, the Court of Appeal delivered its decision, unanimously holding that the trial judge, Justice James K. Hugessen, "misinstructed the jury"[237] in finding that the defenses of necessity and *Section 45* were admissible, and, subsequently erred in instructing the jury to consider them in its deliberations.[238]

Rather than ordering a retrial, the Court of Appeal overturned the acquittal by jury and rendered a conviction. Morgentaler was found guilty and his case was returned to the previous trial judge for sentencing.[239] With this decision, Morgentaler was the first person in Canadian history to receive a prison sentence after acquittal by a jury."[240]

On appeal to the Supreme Court of Canada, Morgentaler's conviction was upheld in 1975.[241] The majority of the Supreme Court, finding that abortion law was a political matter for the legislature to address,[242] included Justices Dickson and Beetz, who ruled in Morgentaler's favour by striking

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[235] See: *R. v. Morgentaler,* (No. 5) [1973], 42 D.L.R. (3d) 448 (Que. Q.B.).
[236] See Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 55. Emphasis added.
[237] *Ibid* at 58-59.
[238] See: *R. v. Morgentaler* [1974], 47 D.L.R. (3d) 211 (Que. C.A.). See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 58.
[239] *Ibid* at 59.
[240] See: Lisa DeLorme, "Gaining a Right to Abortion in the United States and Canada", *supra* note 20 at 109 n 19. On July 25, 1974 Morgentaler was sentenced by the trial judge, Justice Hugessen, to eighteen months imprisonment.
[241] See: *Morgentaler v. The Queen,* [1976] 1 S.C.R. 616.
[242] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 78.

down *Section 251* of the Criminal Code under the Canadian Charter of Rights and Freedoms only several years later.

On March 28, 1975, Morgentaler began serving his sentence. Whilst serving his sentence, Morgentaler was prosecuted again, this time for other five pending charges of illegal abortion.[243] Responding to massive public outcry condemning the Supreme Court's decision, the federal government decided to amend *Section 613(4)* of the Criminal Code so that it would no longer be possible for an appellate court to reverse an acquittal by a jury, substituting it with a conviction. The only option would be to order a retrial. This amendment, soon referred to as the '*Morgentaler Amendment*',[244] is indicative of the significant mobilizing power entailed in lawbreaking.

2. <u>The Second Trial</u>

When, in May 1975, Morgentaler appeared in court for his second trial the only defence available was that of necessity. [245] He tried to convince the jury that the abortion in question was medically necessary in order to save the life of Mary D'Abramo, "a poor and unmarried seventeen-year-old patient". [246] Despite the clear instruction from the trial judge to disregard the defense of necessity,[247] and to focus on Morgentaler's breach of *section 251*, the jury acquitted him.[248]

The fact that the jury acted contrary to clear instructions despite the lack of any justifiable defense is remarkable in the context of civil disobedience. Its act of defiance could be interpreted as an indication of the growing gap between public opinion and the law of abortion. These were laypeople resisting what they considered an unjust law. In a way the jurors' acts could also be interpreted as forms of civil disobedience, publicly and explicitly 'breaking' and disobeying the

[243] *Ibid* at 83.
[244] *Ibid* at 82. See also: Lisa DeLorme, "Gaining a Right to Abortion in the United States and Canada", *supra* note 20 at 109 n 19.
[245] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 83.
[246] *Ibid*.
[247] *Ibid* at 84.
[248] *Ibid*.

law and acting for the greater good. It was an inner civil disobedience story within a story; that is, this was disobedience committed in open court, in the name of the law, in the act of examining the legality of acts of civil disobedience committed by another. It was this act of civil disobedience that provided the legal justification for Morgentaler's act of dissent. This time, the Court of Appeal dismissed the appeal and upheld the acquittal.[249] Shortly thereafter, the federal Minister of Justice set aside Morgentaler's original conviction and ordered a retrial.[250] Morgentaler was released from prison after serving ten months of his sentence.

3. The Third Trial - Retrial

In September 1976, Morgentaler's retrial began and he was eventually acquitted by the jury, "[f]or the third time in three years".[251] The Quebec government, however, refused to acknowledge what Morton described as "any implicit message in the three jury acquittals",[252] and brought eight more charges against Morgentaler.[253] That stance changed with the election of the Parti Québécois (PQ) in November 1976. Soon after the elections, the Quebec Minister of Justice dropped all pending charges against Morgentaler[254] and it was soon decided that the Quebec government would no longer enforce abortion laws in the province.[255] This meant that there would be no charges brought against people acting contrary to *section 251*.[256]

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[249] See: *R. v. Morgentaler,* [1976] 33 C.R.N.S. 244, 27 C.C.C. (2d) 81, 64 D.L.R. (3d) 718, C.A. 172. For further discussion on Morgentaler's cases, see: Bernard M. Dickens, "The Morgentaler Case: Criminal Process and Abortion Law" (1976) 14 Osgoode Hall LJ 229; See also: Bernard M. Dickens, "A Canadian Development: Non-Party Intervention" (1977) 40:6 Mod L Rev 666; See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 42 at 84-85.
[250] *Ibid* at 85.
[251] *Ibid* at 86.
[252] *Ibid*.
[253] *Ibid*.
[254] See: Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago and London: University of Chicago Press, 2011) at 175 [Drew Halfmann, *Doctors and Demonstrators*]. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 86.
[255] See: Drew Halfmann, *Doctors and Demonstrators*, *supra* note 254 at 175, 324, n 35. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 86; and Lisa DeLorme, "Gaining a Right to Abortion in the United States and Canada", *supra* note 20 at 109.
[256] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 86.

Understanding this broader context is indeed crucial for appreciating the narrative of Dr. Morgentaler and the legalization of abortion. Further discussion, however, goes beyond the scope of this thesis. What can be briefly noted here is that the rise of the PQ is considered to have had an important bearing on the abortion issue, and its story intersects with Morgentaler's struggle for legalization of abortion. Both were advocating independence from federal law, even though the PQ's struggle was embedded in the larger context of liberation from Canada in general.[257]

Following these decisions, abortion clinics offering abortion on demand were founded, this time not having the fear of being prosecuted. And, by 1978, the PQ government declared its intention to expand its provincial health care system to reimburse even private abortion clinics for related abortion costs.[258] Ironically, Quebec, "the most Catholic province in Canada, was the only province with a *de facto* policy of abortion on demand".[259]

4. <u>The Expansion of Lawbreaking - The Toronto Clinic Trials</u>

Now having the ease to operate freely in Quebec, Morgentaler expanded his abortion services by opening two more abortion clinics outside Quebec, one in Winnipeg, Manitoba, and the other in Toronto, Ontario. On July 5, 1983, his clinic in Toronto was raided by the police and he and two other doctors, Dr. Leslie Frank Smoling and Dr. Robert Scott, were charged and prosecuted for performing illegal abortions.

This time a new actor intervened, marking an important shift in the struggle for legalization of abortion. The new presence was the *Canadian Charter of Rights and Freedoms,* enacted just a year beforehand.[260] The *Charter* provided Morgentaler and his colleagues with a new line of defense and means of challenging the validity of *section 251*. The most important provision was *section 7*

[257] On this see: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 52. See also: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 86.
[258] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 51.
[259] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 87. Emphasis added.
[260] See: *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter of Rights and Freedoms*].

of the *Charter*, guaranteeing "the right to life, liberty and security of the person". On November 21, 1983, in a pre-trial motion, Morgentater and his colleagues moved to quash the indictments against them by arguing that *section 251* was unconstitutional, violating some of the fundamental rights guaranteed by the *Charter*, including the rights guaranteed by *section 7*.[261]

After eight months, the trial judge dismissed the motion, holding that *section 251* was constitutional,[262] and the trial began on October 15, 1984. On November 8, 1984, Morgentaler and his associates were acquitted by the jury. As expected, the Crown soon appealed to the Ontario Court of Appeal and, on November 1, 1985, the Court of Appeal, dismissing the constitutional arguments raised against *section 251*,[263] overturned the acquittals, and ordered a new trial. Morgentaler and his associates appealed to the Supreme Court.

5. <u>The Supreme Court</u>

On January 28, 1988, the Supreme Court delivered its historic decision,[264] making abortion legal in Canada. In a 5-2 vote, the Court held that *section 251* of the Criminal Code was unconstitutional in that it violated the right to the 'security of the person' guaranteed by *section 7* of the *Charter*. In an unprecedented move, the Court struck *section 251* from the Criminal Code, thereby abolishing anti-abortion laws. This meant that actions regarding abortion disappeared from Canadian criminal law. Canada was (and is) now one of the only places in the world that has no laws whatsoever governing abortion.

The decision bears significant impact not only on women but also on Canadian legal culture due to the entrance of the *Charter*, which marked an important shift in the struggle for legalization of abortion. The *Charter* provided individual and collectives with the rhetoric of rights. It offered a

[261] For a thorough discussion on this pre-trial motion and the constitutional arguments raised, see: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 170-182.
[262] See: *R. v. Morgentaler, Smoling and Scott,* [1984], 12 DLR (4th) 502 (Ont. HCJ). 41 CR. (3d) 193, 47 OR (2d) 353, 14 CCC (3d) 258, 12 DLR (4th) 502, 11 CRR 116.
[263] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 142 at 211.
[264] See: the *Morgentaler Decision*, *supra* note 8.

new socio-legal language not only for individuals and collectives, who now could translate their grievances into the language of rights, but also to the Court. And, indeed, as pointed out by Jane Jenson, the Supreme Court, echoing the *Charter*'s reinforcement of the rhetoric of individual and collective rights, started to deploy a rights-based language in approaching and reinterpreting the abortion issue.[265]

The decision is long, complex and covers many important aspects that cannot be addressed here. Given the length of the decision and, as rightly indicated by Sheila Noonan, "the lack of agreement among the justices writing for the majority",[266] this thesis only focuses on the main rationales of the decision. Moreover, the decision raises many critical questions, some of which will be discussed in *Chapter 6*.

The Supreme Court was faced with and examined several constitutional questions regarding the validity and constitutionality of *section 251*.[267] However, as put forward by then Chief Justice Dickson, the main issue at stake was whether *section 251* infringed the rights guaranteed by *section 7* of the *Charter*.[268] The majority agreed that *section 251* violated *section 7*. They disagreed, however, about: 1) the extent and scope of *section 7*; 2) which of the rights listed in it, that is, the rights to life, liberty and security of the person, was actually infringed; and 3) the scope and content of that particular infringed right. Chief Justice Dickson and Justices Lamer, Beetz and Estey approached *section 7* narrowly, focusing solely on the right to 'security of the person' and differing on the scope and content of that right. They based their decisions on procedural and administrative

[265] See: Jane Jenson, "Getting to Morgentaler", *supra* note 18 at 16.
[266] See: Sheila M. Noonan, "What the Court Giveth: Abortion and Bill C-43" (1991) 16 Queen's LJ 321 at 329.
[267] There were seven constitutional questions focusing on the constitutionality of section 251 vis-a-vis other rights, some of which were rights protected by the Charter. One of the questions, for example, concerned whether "section 251 of the Criminal Code of Canada infringe[s] or den[ies] the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms?" See: the *Morgentaler Decision*, *supra* note 8 at 31-32, para 4.
[268] *Ibid* at 45, para: 1.

grounds using a medical rhetoric, "reinforc[ing] the notion that abortion is a medical matter".[269] Abortion was perceived as a private issue[270] and approached individually as "an *individual* right to life, liberty, and security of the person".[271]

C.J.C. Dickinson, for example, found *section 251* to be in breach of the right to security of the person, forcing women to carry a pregnancy to term against their will, and exposing those who complied with its criteria to physical and psychological risks[272] caused by the serious delays in obtaining decisions from TACs.[273] *Section 251*, he argued, created a special 'exception' and defense to criminal liability for illegal abortion, that is, therapeutic abortions, one which cannot be attained due to the vast problems embedded in and entailed with its operation. The structure of *section 251* raises and creates many obstacles that in practice it is "illusory",[274] preventing women from accessing it and complying with its criteria, and is, therefore, in the words of the court "manifestly unfair".[275]

Justice Beetz, concurred by Justice Estey, took an even narrower approach, attributing "the minimum content"[276] to 'security of the person'. For Justice Beetz, this right is limited to the notion of endangerment of the life or health of the woman. Setting criteria and rules in the contexts of abortion was not unconstitutional in and of itself. What was unconstitutional, in his view, was rather the administrative and procedural aspects of these criteria that practically precluded women from receiving medical treatment when their life or health was in danger. According to him the

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[269] See: Shelley A M Gavigan, "Beyond Morgentaler": The Legal Regulation of Reproduction" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 117 at 127.
[270] *Ibid*.
[271] *Ibid*. Emphasis in original.
[272] See: the *Morgentaler Decision*, *supra* note 8 at 63, para 35.
[273] *Ibid*.
[274] *Ibid* at 70, para 48.
[275] *Ibid* at 72, para 52. See in particular *ibid* at 70, para 48; 70-71, para 49; 72-73, para 52.
[276] *Ibid* at 89, para 83.

primary objective of the *section 251* is the protection of the fetus.[277] Protecting the life or health of the woman, he stated, "is an ancillary objective."[278] What was problematic for him was the system itself not the purpose or objective in "pursuant to which this system was adopted."[279] Protecting the life of the fetus would justify, for example, "requiring a reliable, independent and medically sound opinion".[280] Since the objective itself is valid and does not violate the right of the person of the woman, then, "another system, free of the failings of s. 251(4)",[281] could be adopted by Parliament.

On the other hand, unlike the procedural-based approach taken by the rest of the majority Justices, Justice Bertha Wilson took a substantive-based approach,[282] and approached *section 7* widely, not only broadening the scope of the right to 'security of the person', but also focusing on the right to liberty.

To summarize, abortion in Canada has gone through long and complex processes of both criminalization, and later of legalization. It has been the subject of aggressive crusades launched by doctors, striving to advance it, either by criminalization or legalization, to 'fit' their professional self-interests and needs. Whilst men were debating issues central to women's bodies, lives, autonomy, self-respect and identity, women were absent from the debate.

Abortions may have been legalized in Canada. But, as discussed below, the *Morgentaler* decision did not put an end to the era of hardships women had to endure. Three decades later women still confront major obstacles in exercising the right to abortion. Throughout the years there have been several attempts, both legislative and adjudicative, to repeal the *Morgentaler* decision, some also

[277] *Ibid* at 82, para 70V.
[278] *Ibid*.
[279] *Ibid* at 110, para 133.
[280] *Ibid* at 110, para 134.
[281] *Ibid* at 110, para 133.
[282] *Ibid* at 163, para 224.

advocating the right to life of the fetus. For example, in 2012, Motion M-312[283] introduced by MP Stephen Woodworth, proposed to include the fetus within the definition of a 'human being' provided by section 223(1) of the Criminal Code, which states that a child becomes a human being only after birth is complete.[284] It was eventually defeated by the House of Commons on September 26, 2012, with former Prime Minister Stephen Harper voting against it. Legalized abortion was also challenged in the courts. Two of these cases were the cases with which the *chapter* opened, those of Barbara Dodd and Chantal Daigle.[285]

The Supreme Court decision in *Morgentaler* did not settle the issue of and controversy surrounding abortion. It also marked the entrance of yet another player that has dominated ever since the debate of and struggles about abortion - the fetus. Indeed, this player was always present in the debate over abortion. But it was only in the last few decades that it has changed its image and rhetoric. The *Morgentaler* decision sparked a backlash manifested in the creation of the anti-RJ and the rise of the New Right, resulting in mobilizing and strongly jurisgenerating the fetus into its new mega-political dimensions. More alarming is the escalation in anti-RJ violence targeted mostly against abortion providers at their clinics or in their homes:[286] all a reminder of how fragile is the 'right' to have an abortion in Canada.

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[283] See: Stephen Woodworth, *M-312: Studying Canada's 400-Year-Old Definition of Human Being*, 1st Sess, 41st Parl, 2012. M-312: Studying Canada's 400 Year Old Definition of Human Being.

[284] For a full version of the Parliamentary Debate, see: *House of Commons Debates,* 41st Parl, 1st Sess, Vol 146, No 111 (26 April 2012) (Hon Andrew Scheer) online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5524696&Language=E&Mode=1> Last visited: 30.8.2018.

[285] See also: *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342; See also: *R v. Sullivan,* [1991] 1 S.C.R. 489. (55 B.C.L.R. (2d) 1, 122 N.R. 166, 63 C.C.C. (3d) 97, 3 C.R. (4th) 277, [1991] 1 S.C.R. 489, J.E. 91-516, EYB 1991-67046).

[286] Notable examples are the bombing of Dr. Morgentaler's Toronto clinic in 1991, and attacking his Edmonton one with butyric acid in 1996; the shooting and wounding of Dr. Garson Romalis in his home in Vancouver in 1994, attacking him again in 2000 stabbing him in the back; the shooting and wounding of Dr. Hugh Short in his home in Hamilton, Ontario, in 1995; and, the shooting and wounding of Dr. Jack Fainman from Winnipeg, Manitoba, in 1997.

II. Part Two: Digging and Narrating

> ***"Perhaps it's true that things can change in a day. That a few dozen hours can affect the outcome of whole lifetimes. And that when they do, those few dozen hours, like the salvaged remains of a burned house---the charred clock, the singed photograph, the scorched furniture---must be resurrected from the ruins and examined. Preserved. Accounted for. Little events, ordinary things, smashed and reconstituted. Imbued with new meaning. Suddenly they become the bleached bones of a story."***[1]

Introduction

The previous part mapped the formal legal space relevant for this thesis, framing its foundational, theoretical, and conceptual borders and limits. It introduced the reader to the language of the *'The Map',* namely that of civil disobedience, and to two concrete, specific and 'small' sites and maps of lawbreaking, in which women's resistance and agency were explored.

This part 'digs deeper' into concrete aspects of these two maps. It revisits the foundations of civil disobedience, informed by the exploration of the two contexts begun in *Chapters 2* and *3*. *Part Two* 'digs deeper' in two ways: first, to discover whether there is a way to describe the actions of the women as civil disobedience recognized in law, which is found not to be possible; and second, to describe the actions of the women as law-constituting behaviour. The 'digging tools' necessary for digging into the concrete and particular are critical approaches to lawbreaking and lawmaking discussed in this part as well.

Chapter 4 offers the means with which to revisit and break some of the positivist assumptions, through reference to selected critical theory, raising essential questions about their (in)applicability to the two cases in this thesis, and their inability to explain these cases. This *chapter* sets out and discusses the key ideas and concepts, in particular Legal Pluralism and Critical Legal Pluralism, and predominant authors who challenge the formalist paradigm of state law and lawmaking,

[1] See: Arundhati Roy, *The God of Small Things* (New York: Random House, 1997) at 32.

including Robert Cover, Lawrence Friedman, Eugen Ehrlich, Martha Minow, Margaret Davies and Clifford Geertz.

Chapter 5 discusses why the acts of squatting and abortion cannot be explained by the current theory of civil disobedience. This *chapter* revisits the theory of civil disobedience, namely its features, roles, and assumptions about law, lawbreaking and lawmaking. Finally, *Chapter 6* shows how the acts exemplified in the two cases can be approached differently, and can be redefined as acts of resistance, thereby revealing their jurisgenerative aspects.

Chapter Four - From Text to Context: Critical Approaches to Lawbreaking

A. Introduction

"Thoughts without content are void; intuitions without conceptions, blind."/[1] "Experience without theory is blind, but theory without experience is mere intellectual play."[2]

Chapter 1 discussed the theory of civil disobedience according to which certain acts of lawbreaking could be regarded as instances of resisting 'law', as long as they are committed within the confinement of state law. A critical reflection on the theory of civil disobedience, and its inapplicability and inability to explain cases of lawbreaking such as squatting and abortion discussed in *Chapters 2 and 3*, includes a focus on the ***actor/s*** participating in the process of lawmaking and creation of legal meanings, and on the ***means*** capable of challenging state law. Following this, what is important for our purposes are the interrelated assumptions and themes that can be drawn about ***lawmaking*** and ***law*** from these acts of *lawbreaking*, mainly state law. In particular, there are a number of questions which can be answered. ***What*** is Law? ***Where*** is it located and created? ***Where*** are individuals and communities located vis-à-vis the law? ***How*** is it created? ***Who*** are the legal actors, the participants in its creation? ***How*** do we understand individuals and communities' location in and engagement with law?

As is apparent from the discussion on the theory of civil disobedience, the only actor who can participate in the process of lawmaking is the state, and state law is the only means of challenging the law, whether by means of legislation and/or adjudication. Unless falling within the scope of

[1] See: Immanuel Kant, *Critique of Pure Reason (Great Books in Philosophy),* 1st ed, translated by J. M. D. (John Miller Dow) Meiklejohn, (Amherst, NY: Prometheus Books, 1990) at 45.

[2] On various variations of this quote see: Hoover, D Kevin, Selva Demiralp & Stephen J. Perez, ""Empirical Identification of the Vector Autoregression: The Causes and Effects of U.S. M2" in Jennifer L Castle & and Neil N Shephard, eds, *The Methodology and Practice of Econometrics: A Festschrift in Honour of David F. Hendry.* (Oxford: Oxford University Press, 2009) 37, at 37. Also Available at SSRN: https://ssrn.com/abstract=1091249 or http://dx.doi.org/10.2139/ssrn.1091249

civil disobedience – the main medium by which lawbreaking can be understood as a form of legitimate resistance – lawbreaking is not a legitimate means for challenging state law, and lawbreakers are not considered to have any viable role in this process. However, even when falling within the scope of civil disobedience, the only means by which lawbreaking and lawbreakers could be understood to have a viable role in the process of lawmaking, is when the acts in question can be translated into a professional and feasible legal formula, legalizing their voice, to which state legal institutions, legislative and adjudicative can respond. Acts of civil disobedience can create legal meanings only when confined to state law institutions, leading to and eventually culminating in them.

The theory of civil disobedience and its foundational criteria are the means by which state law can mitigate and minimize the inevitable infringement of the rule of law entailed in acts of disobedience. It accommodates illegality within the confines of the law's own premise of the rule of law, provided that the act in question demonstrates fidelity and respect to law. What is important is that the dissenter resists and challenges the law from *within* it, acknowledging that state law is always at the *center* of legitimacy and validation even when broken and violated. State law may have been violated, but it has structured civil disobedience in such a manner that certain individuals can be exempt from ordinary illegality, whilst the laws and state themselves are not threatened, nor are their centrality, legitimacy, and supremacy.

These features of centrality, supremacy and internality are important to the philosophy of *Legal Positivism.* Legal positivism is the underlying ethos that lies at the foundational basis of modern state law. It is a self-internalized culture that is "understood in terms of its own mode of operation".[3] Modern law is understood as static, rational, non-dialogic and not-dynamic. It is

[3] See: Ronen Shamir, "Suspended in Space: Bedouins Under the Law of Israel" (1996) 30 Law & Soc'y Rev 231 at 233 [Ronen Shamir, "Suspended in Space"].

featured by *institutionalization* and *systematization,* approaching law as an *exclusive* and *singular*[4] *entity.* Positivism perceives state law as a closed, uniform, neutral, rational, scientific, abstract, autonomous, certain and predictable[5] system. State law is organized and based exclusively on a hierarchy and supremacy of 'objective' legal doctrines originated from appellate courts.[6] It is perceived as "technical, competent, [and] lawyerly,"[7] ahistorical,[8] apolitical and isolated from exogenous socioeconomic contexts and experiences.

It owns and determines "the interpretive standpoint"[9] and holds a monopoly over the point of view taken: an inside-outside one, approaching society from the inside-of-law-to-outside. It operates from the inside out and is resistant, using Nikolas Rose and Mariana Valverde's words, to external "forms of knowledge and expertise that were non-legal".[10] It is categorical, unifying and presumably universal.

In response to the *"who-how-what-where"* questions, positivism answers that the law is located in the state and belongs to the state. It is exemplied by what Joseph Raz called an "institutionalized character."[11] Any engagement with state law is institutionalized through state-channeled media, such as the courts and the legislature. State law is characterized by what John Griffiths refers to

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[4] For an important discussion on the meaning of the notion of singularity, see: Margaret Davies, "The Ethos of Pluralism" (2005) 27 Sydney L Rev 87, at 90-93 [Margaret Davies, "The Ethos of Pluralism"].

[5] See: Robert Gordon, "Critical Legal Symposium: Critical Legal Histories" (1984) 36 Stan L Rev 57 at 65 [Robert Gordon, "Critical Legal Histories"].

[6] See: See: Lawrence M Friedman, "American Legal History: Past and Present" (1984) 34 J Legal Educ 563 at 566 [Lawrence Friedman, "American Legal History"].

[7] *Ibid* at 563.

[8] For a thorough discussion on the evolution of legal historiography, and on the dialectic, intersecting, and at times conflicting relationship between law and history, see: *ibid*; See also: Lawrence Friedman, *A History of American Law* 3d ed (New-York: Simon & Schuster, 2005). For further discussion on Friedman's work, see: Robert W Gordon & Morton J. Horwitz eds, *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (New-York: Cambridge University Press, 2011).

[9] See: Boaventura de-Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279 at 291 [de-Sousa Santos, "Law: A Map of Misreading"].

[10] See: Nikolas Rose & Mariana Valverde, "Governed by Law" (1998) 7 Soc & Leg Stud 541 [Nikolas Rose & Mariana Valverde, "Governed by Law"].

[11] See: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 43 [Joseph Raz, *The Authority of Law*].

as 'instrumentalism'[12] – lawmaking and legal processes are monopolized by the state as the sole 'producer', and 'the turning point' in the creation of legal meanings. Legal knowledge and the sources of state law are official state-based sources, such as statutes.

The sole actors participating in the process of lawmaking are state officials operating within the state. Their only means to make or change laws are the legal institutions of and created by the state. Legal processes and lawmaking are the sole product of state institutions and professionals, professing the formal and professional language of state law. Ordinary people's location vis-à-vis, and engagement with, state law is external, characterized by professionalization, and portrayed as one-way-one-dimensional, hierarchical, and instrumentalist of *lawgivers and law-recipients/abiders.* Non-state actors, especially those breaking the law, can mobilize legal change, provided that their acts can be either *legalized* by falling into the criteria of civil disobedience, or *translated* by state officials, culminating in and leading to state legal institutions.

State law perceives and understands itself internally as a closed set of rules. Any external sources of law, especially when produced in the course of breaking the law, are discarded. Taking a formalist approach, the law is perceived as a statist language which is confined to two formal modes of lawmaking, namely legislation or adjudication, as 'the turning point' in the creation of legal meanings. These two paradigmatic ways of lawmaking are both the mechanisms and the end result. That is, they are the only legitimate means for lawmaking, and, in terms of form, the only legitimate result of lawmaking. Lawmaking can be achieved by either legislation or adjudication and exists only in the form of a written law or a precedent.

Writing in the context of 'nomadism' and 'nativism', particularly about the role played by the Israeli land regime in portraying indigenous Bedouins "as rootless nomads"[13], Shamir argues that

[12] See: John Griffiths, "What is Legal Pluralism?" (1986) 18:24 J Legal Pluralism 1 at 33 [John Griffiths, "What is Legal Pluralism?"].
[13] See: Ronen Shamir, "Suspended in Space", *supra* note 3 at 231.

nomadism is "associated with chaos and rootlessness".[14] Therefore, since it threatens state law's order and stability and its ability to strive to produce scientific and rational knowledge, "modern law cannot but attempt to correct".[15] Its means are what Shamir calls "the law's "conceptualist" mode of operation."[16] The mechanism of *conceptualism* is "a praxis of extracting and isolating elements from the indeterminate and chaotic flow of events and bounding them as fixed categories."[17] It "works through isolation, division, separation, and fixity, conceiving reality as a series of moments and not as an ongoing process."[18] The only narratives that state law can tolerate are the ones that can be "deconstructed and then reconstructed"[19] through the process of conceptualism using, and adapting them to, the framework of the rules of objectivity and universalism of the modern state law.[20]

State law treats both the native space and the native herself narrowly as "space-expecting space to be divided, parceled, registered, and bounded"[21] and, thus, places, or rather entraps, non-ruling minorities with competing and 'chaotic' narratives, experiences and knowledge behind what Shamir calls "conceptual grids".[22] State law controls and suspends them in time and space. It "imposes [a] conceptual grid on time-*treating time as a series of distinct moments* and refusing any notions of unbounded continuity"[23] and "treat[s] them *as clusters of autonomous individuals who should be readily identified and located in time and space."*[24]

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[14] *Ibid* at 236.
[15] *Ibid* at 236-237, 253.
[16] *Ibid* at 233.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid* at 234.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*. Emphasis added.
[24] *Ibid*. Emphasis added.

State law is positioned above any external normative orderings and is the reference point against which such orderings are evaluated and categorized. Socio-legal phenomena, for example, especially in cases involving lawbreaking, are judged in reference to state law, observing whether the act of lawbreaking involved is committed within the premise of state law, acknowledging its superiority and demonstrating fidelity to it.[25] It is characterized by one-dimensional dynamics of subordinating top-bottom-up relations, whereby state law is the sole point of reference to be looked at by anything associated with the sphere of social life and against which the latter is judged and evaluated.

Interrelated to the division between law and society is Eugen Ehrlich's division of law into two main categories.[26] One is the *rules or "norms for decision",*[27] referring essentially to state law and embedded, most notably, in statues, court decisions and civil codes.[28] These rules are "defined from the point of view of an official of the state".[29] Borrowing from Raz on his discussion of Hans Kelsen, "the legal point of view"[30] is that of *"the legal man".*[31] The other kind of law is what he called *rules or norms of conduct,* also known as *living law,* discussed below. They operate in society and are derived from the interactions and conduct of people in real life. The key elements here are the notions of *internality* and *singularity:* the law perceives and understands itself *internally* as a closed set of rules, as *"one law".*[32] Any alternative and external textual sources of law, such as contexts, narratives and stories that reside outside the domains of these unified rules,

[25] See: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 3.
[26] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick, NJ: Transaction Publishers, 2002) at 10-11 [Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*]. See also: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 23.
[27] *Ibid*.
[28] *See: David Nelken,* "Law in Action or Living Law? Back to the Beginning in Sociology of Law" (1984) 4 LS 157, at *161 [David Nelken,* "Law in Action or Living Law?"].
[29] See: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 23.
[30] See: Joseph Raz, *The Authority of Law*, *supra* note 11 at 140.
[31] *Ibid*. Emphasis in original.
[32] See: Margaret Davies, "The Ethos of Pluralism", *supra* note 4 at 92.

and which are governed by principles that are not featured by or cannot be reduced to, nor controlled by state singularity, are usually ignored.

In order to explain legal phenomena or analyze problematizations in ways that ensure and reassure state law's centrality, legal positivism "offer[s] tools for explaining the world and to which the world *must fit".*[33] It encodes realities and experiences into fixed categories and constructs 'formulas' and definitions. Hence, this thesis asserts, state law's insistence on defining civil disobedience, unifying acts of lawbreaking, and the contexts preceding and motivating them into fixed and universal categories.

Legal positivism lies at the heart of the current definition of civil disobedience. Some scholars have criticized not only its narrow scope but also the entire concept of the definition as such, arguing, for example, that it is too rigid.[34] This thesis in itself is an attempt to show the deficiencies entailed in current definition of civil disobedience. What is important to note here is that defining civil disobedience, especially the narrow way in which it is currently defined, is a positivist reaction to, and a way of preventing, the possible invasion of society and communities into the domains of state law. It is indicative of the positivist praxis of defining, unifying, encoding, separating, schematizing and decontextualizing the social sphere into fixed, fitting categories.

The definitional elements of civil disobedience seen above operate as the state law's means to ascertain its supremacy, hierarchy and power over validation and legitimation. They enable the creation and mobilization of legal change for the benefit of the larger public and community from "*within the working of law itself"*[35] without undermining it or challenging its foundational ethos. Requiring openness, for example, could be interpreted as preserving state law's ability to monitor

[33] See: Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Soc & Leg Stud 57 at 64. [Emmanuel Melissaris, "The More the Merrier?"]. Emphasis added.
[34] See for example: Michael Walzer, *Obligations: Essays on Disobedience War and Citizenship* (Cambridge, Mass: Harvard university Press, 1970) at 24; and Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience" (2004) 10 Res Publica 337 at 337-339.
[35] See: Nikolas Rose & Mariana Valverde, "Governed by Law", *supra* note 10 at 545. Emphasis added.

and survey society at all times, insuring respect and fidelity to law and the state. State law's legitimacy and centrality remain intact. The entire process is legalized, neutralized and professionalized. Legal knowledge is systematized, confined to state law and its officials, and the only medium through which lawmaking can occur is the state.

Acts of lawbreaking, like nomadic 'Others', and perhaps especially when committed by them, are perceived as a threat to law's order and stability, and above all to the integrity of the rule of law. They jeopardize its own distinctive entity, separate from the 'chaos' of society. The theory of civil disobedience, then, can be understood as state law's reaction to these threats, and its way of solving the problematizations entailed in and posed by lawbreaking. As suggested above, civil disobedience in and of itself is considered by some scholars as a threat to law and democracy. Nevertheless, it is, using Melissaris' words, the law's "tools for explaining the world and to which the world must fit".[36] It can be interpreted here as the state law's effort to accommodate lawbreaking and illegality within its own premise of the rule of law, by decontextualizing it and categorizing it. Acts of civil disobedience embody important communicative aspects, creating what Kimberley Brownlee called, a "moral dialogue"[37] between the dissenter and the authorities, the former trying to draw the latter's attention to the moral basis of her acts. These aspects are especially exemplified in the criteria of openness and nonviolence.

Using Lawrence Friedman's poetic words, the legal system was perceived as an independent entity where "[n]ot much attention is paid to exogenous variables."[38] In this ""legal science," concepts and doctrines were the raw materials and the outside world, with its messy politics and economics, was definitely shut out."[39] This kind of "legal science" aspires to differentiate itself from the

[36] See: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 64.
[37] See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience and Lawful Punishment (2007) 1 Crim L & Philos 179 at 179.
[38] See: Lawrence Friedman, "American Legal History", *supra* note 6 at 563-564.
[39] *Ibid*.

everyday life[40] - it does not perform any dialogue with the external 'chaotic' world that might interrupt with its quest for structural and logical "systematism *(Systematik)"*.[41]

The two contexts of squatting and abortion in which I explore women's resistance and agency, are aimed at, and are used for, 'shaking' these positivist assumptions about law. Here, in *chapter 4*, I offer several critical approaches to lawmaking and lawbreaking that are necessary for re-reading these two contexts of lawbreaking as constructive laws-making. I will demonstrate and explore what kinds of questions and inquiries are raised within the context of civil disobedience.

Before examining these critical approaches below, it is important to briefly discuss some issues regarding structure, definitions, and terminology.

a) First, I foucs on several 'competing' critical and counter-assumptions and themes, developed by theories such as Legal Pluralism and Critical Legal Pluralism. There are obviously many other theories and literatures that could be relevant. However, within the scope of this thesis it is impossible to discuss them all. Also, even in the theories used, it is not possible to cover all of their aspects and concepts. Further, they are not presented chronologically.

b) Second, this *chapter* discusses some critical approaches to state law positivism, and is structured in a manner that may be interpreted as "present[ing] them as opposite theoretical positions".[42] However, it is not the theories themselves that are at the heart of this part, but rather several themes and concepts embedded in, and arising from, them that are highly relevant for this thesis.

In particular, the thesis focuses on several interrelated main themes and concepts which it identifies as key themes for our discussion about critical ways to think about law, lawbreaking, and lawmaking, and which are mostly relevant to the reader's understanding of the two contexts of

[40] See: Menachem Mautner, "The Hidden Law" Alpayim (1998) 16 45 at 46 [Menachem Mautner, "The Hidden Law"] [In Hebrew].
[41] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 477.
[42] See: Margaret Davies, "The Ethos of Pluralism", *supra* note 4 at 91.

squatting and abortion which the thesis recasts as law/s-making. These themes are: living, day-to-day, or 'small' law; critical legal pluralism; Radical Pluralist approaches and contextualization.

The thesis adopts Margaret Davies' approach to legal pluralism and legal positivism, interpreting them as ethea[43] rather than two distinct and opposing theories.[44] Although she wrote in the context of legal pluralism, her analysis could be broadened and applied to other critical approaches to law. This thesis asserts that the mere idea of one dominant theory runs counter the idea of pluralism and plurality. The discussion here transcends the 'particularities' of one dominant theory, one which focuses on the different underlying *ethea* and concepts that "extend[] beyond the defined boundaries of any theory".[45] It is a discussion about the "broad discordance of approaches with cultural, ethical, ideological and aesthetic dimensions",[46] whereby certain themes may not necessarily always clash but rather intertwine and interrelate. The thesis accepts that these are different and distinct ways to think about the law.[47]

c) The literature on critical approaches to law is vast and encompasses many academic disciplines, such as anthropology, sociology and law. It is, therefore, impossible to cover the entire literature on the subject within the scope of this thesis. The thesis escapes from what Margaret Davies called "theoretical totalities"[48] or, in Franz Von Benda-Beckmann's words, "conceptual hegemony",[49] by underscoring the ideas, rather than full theoretical structures, in order to guide the reader through this part.

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[43] 'Ethea' is the plural of 'ethos'.
[44] See: Margaret Davies, "The Ethos of Pluralism", *supra* note 4 at 90, 91.
[45] *Ibid* at 90.
[46] *Ibid*.
[47] For example, the themes of state law centrality and monism, two concepts traditionally perceived as positivist in nature, are not exclusively confined to the philosophy of legal positivism but do feature in some critical approaches to law, characterizing, for example, some of the scholarship on legal pluralism. Further on this see: *Ibid* at 91. John Griffiths has referred to legal pluralism that recognizes and acknowledges pluralism and differences only when conditioned by deference to *one* hegemonic, unifying and hierarchical state law as 'weak legal pluralism'. See: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 5.
[48] See: Margaret Davies, "The Ethos of Pluralism", *supra* note 4 at 99, 105.
[49] See: Franz Von Benda-Beckmann, "Who's Afraid of Legal Pluralism" (2013) 34:47 J Legal Pluralism 37 at 41.

My intention here is to discuss some interrelated themes and assumptions about law that are in a way cross-theoretical, rising from different theories and developed by predominant authors. My selection of writers is based on their emphasis on the decentralization of the concept of law, reversing and shifting the socio-legal gaze to the social world itself, commonly perceived as 'external' to law. Going back to the 'who-where-how-what' questions raised above, what has drawn the thesis to their work is their challenging views on what law is, perceiving it, each from her/his own perspective, as a language and process, questioning what the sites in which and where law and legal meanings and knowledge can be created are, and by whom they can be created. They challenge the position of state law as the superior centre and source of power, capable of generating legal processes and creating the language of law.

d) One might rightfully argue that the thesis should focus on providing a working definition of law within the parameters of this project, one that defies the centrality of state law and focuses, instead, on the legal meanings created in the course of lawbreaking from outside state law. Indeed, it is usually this question that arises in both positivist and critical legal discussions, in and about each other, as if it were the sole question that must be answered and the major point of criticism as a theoretical failure when one refrains or does not adequately address it.[50]

This thesis does not write about the issue of what is law, but rather about the ways in which we think about law as a language and process, what are the sites in which and where law and legal meanings can be created, and by whom. Defining law would fall into the same categorical, unifying, centralist and universalizing paradigmatic patterns featuring positivist approaches to law, discussed below, which this thesis criticizes and from which it departs.

As discussed in *Chapter 5*, it is the definition of civil disobedience, grounded in the philosophy of state law centrality, that excludes from its domains of legality and legitimacy certain forms of

[50] See for example: Brian Z Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20:2 JL & Soc'y 192 [Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism"].

lawbreaking, such as those committed by the women focused on this thesis. The thesis' approach is one "which defies definition and escapes systematisation",[51] aiming at breaking with definitions, not creating new ones. Defining law is problematic in two interrelated ways: methodologically, that is, formulating a definition, and substantively, deciding what could and should be its content, what is regarded as law, and what are its sources and content.

I recognize that this decision might be interpreted as naive at best, or a failure at worst, and indeed, some critical legal theorists, such as legal pluralists, have been criticized for this 'failure'.[52] I am aware of this. However, going back to the 'who-where-how-what' questions, I do think that breaking with 'conceptual hegemonies' and state law's appropriation of the point of view, as the sole provider and creator of legal meanings, can be done by shifting the gaze, not only by deciding on *who* to look at and write about, looking at society itself and deciding to focus on other forms of laws, but, also by deciding on *how* to write about it.

e) In writing about law, this thesis refers to law that is linked to the state as 'state law'. However, it should be noted that since the thesis criticizes centralism in and of itself and state-law centralism in particular, arguing against law's appropriation and monopolization by the state as its sole 'representative', it is difficult, especially when discussing critical approaches to law, to use the same terms to which the thesis objects, that is, state-law. Perhaps using *'hegemonic law',* referring to the laws of the ruling hegemony,[53] could have been more appropriate. 'Hegemonic law' bears

[51] See: Margaret Davies, "The Ethos of Pluralism", *supra* note 4 at 91.

[52] For interesting critique see: Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *supra* note 50 at 192, 199-202, 205-211.

[53] Sally Engle Merry, for example, discusses different theoretical attempts to redefine non-state law, such as: "Imposed Law"; (See: Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869 at 876 [Sally Engle Merry, "Legal Pluralism"] and "folk law"(*ibid* at 877); Marc Galanter's "indigenous ordering and indigenous law"; (Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J Legal Pluralism 1 at 17 [Marc Galanter, "Justice in Many Rooms"]. See also Sally Engle Merry, "Legal Pluralism" at 876); Stewart Macaulay's "concept of "private government,""; (*Ibid* at 877, see also: Stewart Macaulay, "Private Government", Disputes Processing Research Program Working Paper 1983-86 (Madison, Wis.: University of Wisconsin Law School, 1986), reprinted in Leon Lipson & Stanton Wheeler, eds, *Law and the Social Sciences,* (New York: Russell Sage Foundation, 1986) 445.

a post-colonialist and feminist critique, defying the dominance of one particular point of view. In line with post-colonialist critique, when referring to non-ruling communities, this thesis does not refer to their laws in a negative form, that is, 'non-state laws'. Rather, it uses what it calls *'others' laws',* placing the discussion within the wider context of Eurocentrism and ethnocentrism. And, yet, the two cases involve acts of lawbreaking committed by women against the state, concerning and conveying conflicts between these women and the state. Therefore, the standard for hegemonic-law would be state-law.

f) Throughout the work, I have been confronted with a continuous unease because of certain Eurocentric terms and expressions used to describe the 'Others', that are found troubling, such as 'exotic', 'primitive', 'civilized' and 'uncivilized', 'developed', 'undeveloped' and 'developing'.[54] It was mostly later writings, from the past 30 years which are particularly problematic, using derogatory and disturbing expressions about the 'Others', rooted in and reproducing the same Eurocentric language and discourse that they were presumed to be departing from. In what follows, the thesis refrains from using such language unless referring to a particular quote or citation.

g) This *chapter* discusses several critical ideas and concepts that criticize, each from its own unique perspective, legal positivism by deconstructing its underlying themes of centralism, supremacy and internality, and showing the exact opposite effect: they *decentralize, de-hierarchize* and *externalize* the concept of law. They provide different ways to think about law/s as a language and process, and offer critical ways to engage with questions, such as what are the

[54] This is perhaps unsurprising when reading legal positivist materials or even early or "classic" legal pluralist writings. (Sally Engle Merry, "Legal Pluralism", *supra* note 53 at 872). After all, the latter is deeply interrelated to colonialism, striving to control the geopolitical colonized space by colonizing the local laws under the guise of 'accommodating' them, within a paradigm of hierarchy, dividing histories and societies into oppositional binaries of 'Civilized' versus 'Primitive'. On the connection between Legal Pluralism and Colonialism, see also: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 5-6. For a further thorough discussion on the evolution of legal pluralism and its colonialist legacy, see: Sally Engle Merry, "Legal Pluralism", *supra* note 53 at 874.

sites in which and where law/s and legal meanings can be created, and by whom. These will enable us to understand the acts committed by the women in this thesis, offering ways to turn the agency, voice and actions of people which are not commonly perceived as legal through a positivist lens, into something that we can recognize as law/s.

There are, then, two interrelated questions: 1) how is state law understood, not internally by itself, but, rather 'externally' by the 'external' world?; and 2) shifting the focus into the social world itself, how do we understand the relationship between state law and communities and individuals, and more specifically, what is the latter's participatory role in the creation of legal meanings and law/s? Taking these two questions into account, the substantive discussion in this *chapter* is divided into two interrelated sections: the first, *Society IN Law,* discusses the interrelations between law and the social world, illuminating the interconnectedness between the two; and the second, *Law/s IN Society,* converses with the participatory role of the social world in the process of creating legal meanings, legal knowledge, and lawmaking.

This structure corresponds with the critical approach used in this thesis. It reverses, both structurally and substantively, the usual point of view, by decentralizing, de-hierarchizing and externalizing the concept of law, and approaches law/s in general, and state law in particular from the 'outside' world.

1. Society IN Law

"Writers imagine that they cull stories from the world. I'm beginning to believe that vanity makes them think so. That it's actually the other way around. Stories cull writers from the world. Stories reveal themselves to us. [....] There can never be a single story. There are only ways of seeing. So, when I tell a story, I tell it not as an ideologue who wants to pit one absolutist ideology against another, but as a storyteller who wants to share her way of seeing."[55]

Legal positivism is featured by statism and is understood, using Alexander Bickel's words, "not so much a process, and certainly not a process in continual flux [....]."[56] What is important is that the law is perceived as non-dynamic, non-communicative and non-processual. These notions of *dynamism, communication,* and *process* are the key guiding elements in this section, and a good starting point for embarking the discussion on critical approaches to law. New ideas, schools of thought and theories have evolved, challenging this positivist non-processual rigidity, including the notion of law as a day-to-day, living language.

1.1. Day-to-Day, Living Law

"In order to acquire dominion over nature, man strives to understand the laws of nature; and in order to gain mastery over life as a jurist, he must know life".[57]

One of the important themes of legal positivism is that of *decontextualization,* separating law from society, unifying, and codifying the law into fixed categories within a 'sterile', bounded and limited space, existing in a "cultural vacuum".[58] In contrast, the idea of law as a day-to-day, living phenomenon emphasizes the importance of the dialogic relationship between law and society.[59]. The key feature here is that the law is featured by and engaged in processual relations to and with the social context, and is attentive to the world of symbols and values surrounding it. As aptly put

[55] See: Arundhati Roy, *War Talk* (Cambridge, MA: South End Press, 2003) at 45-46.
[56] See: Alexander Bickel, *Morality of Consent* (New Haven, CT: Yale University Press, 1975) at 5.
[57] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 476. Emphasis added.
[58] See: Robert Gordon, "Critical Legal Histories", *supra* note 5 at 69.
[59] See: Lawrence Friedman, "American Legal History", *supra* note 6 at 570, 572.

by Lawrence Friedman, "[w]hat is crucial is the relationship of law to "general values and processes"-and a *"living"* relationship to that".[60]

One of the leading voices of the evolution of the concept of the law as a living language is Eugen Ehrlich.[61] One of his core arguments, for which he is particularly known, is the concept of *'living law'.* Because of his central contribution to the concept of living law, this thesis uses his main ideas as 'guiding tools' for discussion in this section.

1.1.1. <u>What is 'Living Law'?</u>

Ehrlich divided law into two main categories. One is the *rules or norms of decision,* referring essentially to state law, and embedded, most notably, in statues, court decisions, and civil codes.[62] The other kind of law is what he called *rules or norms of conduct,* also known as *living law.*

'Living law' is a significant concept. There have been many attempts to define it. It has been, and still is, the subject of ongoing scholarly debates, from different disciplines.[63] Wishing to avoid repetition, the thesis approaches and defines it by 'breaking' it down into, and focusing on, several interrelated themes identified through a reading of Erhlich's work. These themes are: *a)* mutual and dialogic relations with the social life; *b)* context, and; *c)* concreteness, abstractionism, and

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[60] *Ibid* at 565. Emphasis added.

[61] Ehrlich is considered to be one of the most predominant 'forefathers', and by some scholars even the founder of the sociology of law. See: David Nelken, Legal Pluralism, Privatization of Law and Multiculturalism: Eugen Ehrlich, Living Law, and Plural Legalities" (2008) 9 Theor Inq L 443 at 444 [David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities"]. For a contrary view, arguing that it was Leon Petrazycki (1862-1922) who was the founder and forefather of sociology of law, and yet the unrecognized one, see: Jan Gorecki, ed, *Sociology and Jurisprudence of Leon Petrazycki* (Urbana, IL: University of Illinois Press, 1975); See also, Adam Podgorecki, "Unrecognized Father of Sociology of Law: Leon Petrazycki, Reflections Based on Jan Gorecki's Sociology and Jurisprudence of Leon Petrazycki", Book Review of *Sociology and Jurisprudence of Leon Petrazycki* by Jan Gorecki, (1980-1981) 15:1 Law & Soc'y Rev 183. For a thorough and interesting discussion on Ehrlich's legacy, see: David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities"; David Nelken, "Law in Action or Living Law?", *supra* note 28. See also: Peter Fitzpatrick, "Law and societies" (1984) 22 Osgoode Hall LJ 115, at 116-117 [Peter Fitzpatrick, "Law and societies"].

[62] See: David Nelken, "Law in Action or Living Law?", *supra* note 28 at 161.

[63] One of the earliest and most notable criticism of 'living law'was that of Hans Kelsen. See: Hans Kelsen, Kelsen Hans. *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, translated by Bonnie Litschewski Paulson & Stanley L. Paulson (Oxford: Clarendon Press, 1992). See also: Bart van Klink, "Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen" in Hertogh, *Living Law* in Marc Hertogh, ed, *Living Law*: *Reconsidering Eugen Ehrlich* (Oxford, Hart Publishing, 2009) 127.

universalism. Such themes are important for this discussion, not only because the thesis asserts that they are at the core of Ehrlich's 'living law' but, also because they are key themes for our discussion about critical ways to think about law, differentiating 'living law' from legal positivism. This discussion begins by going back to 'the source' itself. Ehrlich defined 'living law' as:

> This is then the living law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.[64]

Ehrlich himself explained 'living law' "in contradistinction" to legal positivism. Unlike the positivist monopolization of the legal point of view, appropriating and 'assigning' it to the hands of a state official, be it a judge or a legislator, 'living law' expropriates the point of view by shifting the gaze to society itself. To real life. It operates in society and is derived from the constant interactions and conduct of people "who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them."[65] These rules of conduct are "social facts",[66] such as "rules of law, of morals, of religion",[67] derived from and embedded in society. What is apparent here is the deep interconnectedness between *law* and *real life.*

What is important for our purposes, is the emphasis on shifting the legal focus and gaze from "the dramatic, the intellectual high jinks on center stage, the great cases and great men" to the "day-to-day happenings…of small events, each one trivial in itself".[68] The shift to the 'small' and

[64] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 493. Emphasis is both in original and added.
[65] *Ibid* at 39.
[66] *Ibid*.
[67] *Ibid*.
[68] See: Lawrence Friedman, "American Legal History", *supra* note 6 at 566.

'mundane' events is both substantively and methodologically intrinsic to the thesis. While this shift might still be positioned as a shift in reference to state law as the vantage point of reference, this thesis adopts and acknowledges the praxis itself, that is the shift of focus, turning the gaze to society itself and to the possible legal sites created by, and existing within it. I move the legal focus from the heroic stories of mass resistance committed in public by politically motivated people to the daily small, trivial, invisible, 'private', intimate and covert forms of resistance, committed by women, but which are, nevertheless, regarded as mere crimes and not as forms of legitimate resistance.

a) Mutual and Dialogic Relations with the Social Life

Law, writes Peter Fitzpatrick, "cannot bear very much reality"[69] posed by the real social world. State law, Ehrlich argues, is oblivious to real life and its institutions, such as the judiciary, exclude, for instance by the rules of evidence, even the "tiny bit of real life"[70] that has managed to 'penetrate the walls of exclusion' and was "brought before the courts".[71]

Wishing to protect itself from an 'infiltration' of the social into the legal, legal positivism imposes one law over its jurisdiction/s. Melissaries argues that unless 'translated' into its own positivist language, legal positivism "is not able to make sense of any other normative order as such".[72] It is impossible, he further argues, for legal orders to communicate "unless they are merged into one."[73] Even when it seems that state law does communicate and engage in a dialogue with other legal orders, it is really, according to Melissaris, "a case of *disagreement* about the law *from within* rather than a conflict of different legal orders."[74]

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[69] See: Peter Fitzpatrick, "Law and societies", *supra* note 61 at 127.
[70] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 495.
[71] *Ibid*.
[72] See: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 69.
[73] *Ibid*.
[74] *Ibid*. Emphasis added.

This observation corresponds with, and is very important in the context of, the theory of civil disobedience. As previously explained, the theory of civil disobedience and its foundational criteria enable the accommodation of illegality within the confinement of state law. What is important is that the dissenter may break the law but she resists and challenges the law from *within* it, acknowledging that state law is always at the *center* of legitimacy and validation even when broken and violated. Following Melissaris, given the communicative aspects of civil disobedience, it can be understood as a disagreement about law from within rather than as a clash between conflicting legal orders.

Such a positivist approach to legal discourses does not promote communication, but rather obedience, requiring ultimate deference to state law's superiority. According to Melissaris, this approach does not integrate legal discourses but rather colonizes them.[75] There is a gap, then, between law and social life, "between law in books and law in action or between what law says and what it does."[76] Such a gap can be seen, following Peter Fitzpatrick, as both the law's "lack of responsiveness to society and sometimes in terms of its efforts to bring society into line with it."[77]

Living law, on the other hand, points to the opposite: mutual interconnectedness and inclusivity over separation, internality, exclusivity, and superiority. It reverses the point of reference and shifts the focus to society itself. Living law demonopolizes state exclusivity over the law and decentralizes the latter. [78] In contrast to the positivist approach of 'One Law', state law according to Ehrlich has no singular colonizing monopoly over other social normative orderings. The social life is not distinct from and subordinate to the realm of state law. Following John Griffiths'

[75] *Ibid*.
[76] See: Peter Fitzpatrick, "Law and societies", *supra* note 61 at 128.
[77] *Ibid* at 127.
[78] See on this point: David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities", *supra* note 61 at 451.

discussion on Ehrlich's work, state law is just one association like any other association, and, in his words, "has no special position in relation to the others".[79]

Taking this view, the gap between law and society is not considered to be an obstacle to overcome. Fitzpatrick, for example, focuses on the importance of conflicts and dialectics for the evolution and constitution of law. He argues that the gap between state law and society should not be bridged because it is through this gap, "in relation to a plurality of social forms",[80] and through "constitutive, but contradictory"[81] relations of opposition and support with these forms,[82] that law "is integrally constituted."[83] He calls this approach 'Integral Plurality'.[84] The gap and the conflictual relations of opposition and support entailed in it should not be concealed. This is an approach for which disagreement is not an impediment to law but rather an important communicative prerequisite.

Human life is diverse, complex and rich, whereby people share multiple and intersecting identities, such as gender, sex, ethnicity and race, and, therefore, may belong to more than one community or group. They are engaged in daily interactions, which are simultaneously affected by these identities and further construct them, thus having a constitutive role in forming their diverse and constantly evolving social consciousness. There is a gap, "an unbridgeable gap"[85] according to Menachem Mautner, between "the uniformity of modern law",[86] and the diverse and complex richness of people's consciousness and the meaning and interpretation they may give to certain problems and situations they might confront.[87]

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[79] See: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 27.
[80] See: Peter Fitzpatrick, "Law and societies", *supra* note 61 at 115.
[81] *Ibid* at 136.
[82] *Ibid* at 128.
[83] *Ibid* at 115.
[84] *Ibid*.
[85] See: Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press, 2011) at 223.
[86] *Ibid* at 223.
[87] See: Menachem Mautner, "The Hidden Law", *supra* note 41 at 71.

State law and society are engaged in and constituted by mutual dialogic relations devoid of hierarchy, whereby both are equally positioned to each other, shaping and reshaping, influencing, and contributing to, each other. Understanding the state of the law, Ehrlich argues, is dependent upon a mutual "investigation as to the *contribution* that is being made *by society itself as well as by state law,* and also to the actual influence of the state upon social life."[88] Living law shifts the focus ""beyond" the law books",[89] and is marked instead by mutual relations between state law and society perceiving both as equal entities.

The key issue here is the shift in focus to real life. An interesting and important theme that is associated with the shift in focus to society itself is Ehrlich's inclusion of associations, both those recognized by law, and, using David Nelken's words, "most remarkably",[90] those "that it has overlooked and passed by, indeed even of those that it has disapproved."[91] This is an important concept for our discussion, since this thesis converses with acts of lawbreaking committed by women who both belong to invisible, "passed by" and "overlooked" groups and communities, even not recognized by law, as in the case of Mizrahi women squatters, and whose acts are disapproved by the law. Despite the fact that he does not focus on individuals, as with these two cases, Ehrlich's inclusion of these associations is therefore intrinsic to this thesis, extending and broadening the scope of mutual engagement between law and society to rather excluded groups. This praxis of shifting the focus to real life is facilitated and featured by the use of "[t]he sociological method"[92] of contextualization.

[88] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 504. Emphasis added.
[89] See: David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities", *supra* note 61 at 447.
[90] *Ibid* at 446.
[91] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 493.
[92] *Ibid* at 495.

b) <u>Context</u>

Ehrlich criticized positivist law for being oblivious to real life, preferring legal knowledge that is found exclusively in the statutes, resulting in being "far from giving a picture of that which actually takes place in life".[93] Because of the use of these methods "by modern legal science",[94] isolating life events, we are prevented from understanding and knowing "the present state of our law".[95] For Ehrlich such an oblivion to real life is considered as a failure of legal theory.[96]

He takes a different view, one that prefers social context and experience, and emphasizes their important role in the constitution of the living law. Instead of focusing on the traditional institutional sources to law such as "appellate courts and their doctrines",[97] the focus is shifted to other sources of legal knowledge, such as the lower courts, legislation, policy makers, "administrative behavior",[98] and even lawyers. For example, in the context of the two cases of lawbreaking in this thesis, such possible sources could be the Israeli public housing company, the lawyer representing a Mizrahi woman squatter, and an abortion clinic.[99] More importantly, what is crucial here is the relevance to lawmaking: all are considered to be participants "in the process of making law".[100] They are all perceived as "law makers".[101] State law's hierarchical exclusivity over the process of lawmaking is demonopolized, encompassing several other sites. We will return to this notion of lawmaking further below, particularly when discussing the idea of jurisgenesis coined and developed by Robert Cover.

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[93] *Ibid* at 491.
[94] *Ibid* at 489.
[95] *Ibid*.
[96] *Ibid* at 491.
[97] See Lawrence Friedman, "American Legal History", *supra* note 6 at 566.
[98] *Ibid*.
[99] It is interesting to note here in the context of abortions, Friedman's argument that one of the main criticisms against the Wisconsin School is its narrow economic orientation, (*ibid* at 575), excluding from its focus "social issues", (*ibid*), such as family law and abortion. (*Ibid*). He does argue, however, that these "issues are now coming into their own, and this is an important development." (*Ibid*).
[100] *Ibid* at 566. Emphasis added.
[101] *Ibid*.

Real life is not a series of broken and isolated events having no correlation between them.[102] Ehrlich takes a contextual, holistic, and inclusive approach that puts real life at the center, placing it on an ongoing historical continuum that emphasizes the correlation between past and present, and reinforces the interconnectedness of everyday occurrences. The key to understanding the present, and the present state of the law in particular, lies in the past. This approach, which brings the past into the legal fore, is at the heart of this thesis. There is no better way to convey this approach except for using Ehrlich's seminal words:

> It is true we shall never understand the past but through the present; but the path to the understanding of the innermost nature of the present lies through the understanding of the past. *Within every part of the present lies its entire past, which can be clearly discerned by the eye that is able to look into these depths.*[103]

If legal science uses *oblivion* to real life as its method resulting in unknowing the actual state of the law, Ehrlich uses and emphasizes the opposite, that of *observation* of and *attentiveness* to everything that happens in daily life. "[O]pen[ing] our eyes and ears"[104] constitues the means to know, understand and "learn everything that is of significance for the law of our time."[105] Accordingly, everything is relevant, even the dull, minor, and "so obscure a subject as the courts of Chippewa County." [106] These are studied like "an archaeologist might study an ancient civilization, digging patiently through the rubble, and deriving information from the tiniest shards of pottery, scraps of metal, old bits of bone."[107]

One cannot approach the law in isolation. The law is not static – it is alive. It is a living language, created by, and creating, life interactions, experiences and constant bargains between communities, individuals, and institutions, drawing an evolving, even dialectic and conflicting,

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[102] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 489.
[103] *Ibid* at 504. Emphasis added.
[104] *Ibid* at 489.
[105] *Ibid*.
[106] See: Lawrence Friedman, "American Legal History", *supra* note 6 at 565.
[107] *Ibid*.

dialogue between them. It is marked by relations whereby all are engaged in shaping and reshaping legal meanings by negotiating and bargaining their competing visions and understandings of the law. Following Ehrlich, legal codes exist within rich and vast territories, and the legal relations "with which they deal",[108] are even richer and more complex.[109] The law cannot be derived solely from, and be reduced to, the code itself, and to do otherwise, that is to "mak[e] a complete presentation in a code",[110] would be in Ehrlich's eyes monstrous.[111] For Ehrlich, social life is part of the law, and both are reflected in, and reflective of, each other. Living law cannot be approached reductively. In other words, it cannot be entrapped nor confined "within the sections of a code".[112] For Ehrlich, doing so is:

> about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond.[113]

Living law is understood as a continual and evolving language that reflects and focuses on the complex preceding ongoing socio-legal processes, and not on the positivist 'end-result' of the code. Borrowing the archeologist image from Friedman, living law is like an archeological mound, one which is in an everlasting-ongoing-construction, covering the remains of several linked periods, each with its own unique context, different from its predecessor and successor, built on the remains of preceding schools, and laying the basis for the succeeding one/s. In order to reveal the marvels of these periods, the archaeologist's work focuses on the small, broken and non-homogenous or uniform pieces, looking at the linkages between them, and bringing them together into a bigger piece in order to learn about the contexts in which they existed. What is important is

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[108] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 448.
[109] *Ibid*.
[110] *Ibid*.
[111] *Ibid*.
[112] *Ibid*.
[113] *Ibid* at 488.

that it is the ongoing processes entailed in real life, its concrete and actual events, all tied together and placed on a larger unbounded continuum of past, present and future, that precede, and lay at the basis of, the law and theory.[114]

c) Concreteness and Universalism

In addition to separating state law from society and decontextualizing the latter, legal positivism is based on the premise of unification and universalism, i.e., the creation of a whole, generalizing, unifying and universal system that is independent of any particular or concrete contexts. State law strives to achieve abstractionism so that it could universally apply to all societies, and defies the concrete and the particular. Society is perceived as a uniform and "homogeneous whole".[115] Universalism and abstractionism are the desired features of a positivist legal system.

Drawing on the world of maps and cartography, Boaventura de Sousa Santos argues that like maps, "law has become the privileged way of imagining, representing, and distorting, that is to say, of mapping"[116] realities. Laws, like maps, have different scales. Corresponding with the positivist assumption of singularity, it is usually the scale of state that law is presumed to be operating on.[117] The state monopolizes the scale of law. Borrowing de Sousa Santos' example of the process of map-making to the context of lawmaking, it is possible to say that the process of lawmaking entails the screening and "the filtering of details",[118] and it is the state that is in charge of the process of filtering, of lawmaking. It uses what he calls "regulation thresholds",[119] that is the process "which determines what belongs to the realm of the law and what does not."[120] Following a positivist vision of the law, that of abstractionism and universalism, only few, if any,

[114] *Ibid* at 479.
[115] See: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 27.
[116] See: De Sousa, "Law: A Map of Misreading", *supra* note 9 at 286.
[117] *Ibid* at 287.
[118] *Ibid* at 283. Emphasis in original.
[119] *Ibid* at 290.
[120] *Ibid*.

small and concrete details are represented. Positivist state law's scale is a small or medium one,[121] covering, representing, and controlling a large space with no attention to the small, particular, and concrete. It follows a 'small scale-abstract details' paradigm. The state, then, is perceived as the sole single scale upon which law is constituted, holding "the monopoly of legal production",[122] and as separate from the spheres of real life.[123]

Ehrlich, on the other hand, objected to the hierarchical binary of concrete and universalism, imposing uniformity both of law and on society. He argued that sociology of law must prioritize its attention and focus not on the abstract, but, rather, primarily on the concrete.[124] In line with the use of the methods of *'observance'* and *'attentiveness',* focusing on the events, even the small ones, of real life, Ehrlich's reasoning is that "[i]t is only the concrete that can be observed."[125] Ehrlich not only defied the hierarchical relations between the universal and the concrete. Following his general focus on the interconnectedness between state law and social life, he went further and objected to the dichotomous binary relations themselves, pointing instead to the interconnectedness of the two. He takes an inductive approach to the study of law. "Every deduction", he writes, "is preceded by an induction".[126] Any generalization, any deductive conclusion or finding, even ones that "allegedly [are] purely deductive",[127] are actually based on an inductive analysis that precedes it. Learning and generalizing are achieved "by means of simple, informal observation directly from common everyday life as it presents itself to every one of us."[128] Similarly, sociology and the sociology of law, he further argues, "must be a science of

[121] *Ibid* at 287.
[122] *Ibid* at 280.
[123] De Sousa Santos mentions legal pluralism amongst other theoretical attempts to challenge legal monism, such as, critical legal studies.
[124] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 501.
[125] *Ibid*.
[126] *Ibid* at 472.
[127] *Ibid* at 473.
[128] *Ibid*.

observation".[129] And in the context of living law, it is only the concrete that can be observed.[130] The concrete, he argues, is the basis upon which the universal lies. It is not the opposite of universalism, but rather its preliminary and necessary preceding precondition, one that without which the universal cannot be ascertained.[131]

Interrelated with the notion of context, studying and investigating the law involves the observance of the little, of the small, the particular and "the concrete usages",[132] all rooted in and derived from real life.[133] These are the rules or norms of conduct:[134] the living law that is the basis upon which the rules or norms of decision are based.[135]

In contrast to positivist insistence on order and stability, trying to control the 'chaotic' and 'messy' by imposing uniformity, for Ehrlich neither society nor law are uniform. Both exist within vast and rich contexts that constantly shape and reshape them, and both are engaged in dialogic relations further influencing each other. Because of this contextual richness, there is no uniform law even in the[136] same legal jurisdiction. Living law breaks with the positivist notions of 'conceptual hegemony' or 'theoretical totalities.' Challenging what de Sousa Santos called the "theoretical gulag",[137] it rejects theoretical absolutism and abstractionism. Similarly, following this line of thought, society is not a "homogeneous whole",[138] an absolute entity, but rather is heterogeneous and multilayered.[139]

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[129] *Ibid*.
[130] *Ibid* at 501.
[131] *Ibid*.
[132] *Ibid*
[133] *Ibid*.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid* at 505.
[137] See: De Sousa, "Law: A Map of Misreading", *supra* note 9 at 280.
[138] See: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 27.
[139] On this point see: *ibid*.

Drawing again on the world of maps, our attention is shifted to the multiplicity of other legal orders and legalities, each with their own different scales and processes of scaling, of filtering – of lawmaking. Accordingly, since our legal worlds are complex and diverse, with several legal orders interacting and intersecting,[140] and each using different scales, "one cannot properly speak of *law* and *legality* but rather of *interlaw* and *interlegality*."[141]

In line with Friedman's concept of shifting the legal focus to the 'dull day-to-day happenings', law is found everywhere, such as "in occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life."[142] These "multiple networks of legal orders,"[143] de Sousa Santos writes, "forc[e] us to constant transitions and *trespassings"*.[144] The use of the term *'trespassing'* in this context can be seen as an example of the dialectic, dialogic and communicative aspects entailed in the interactions of and between legal orders or discourses, and is highly symbolic given the subject of this thesis, that is of lawbreaking, and in particular in the context of trespassing, which is one of the cases in this thesis. Trespassing, be it of legal orders or an actual act imposing its own legal language, is perceived as the 'natural' state of affairs, not an irregularity.

The focus is shifted from the small-scale maps to the large-scale ones: those which reflect and represent more details, and in particular small and concrete ones. It follows a 'large scale-small/concrete details' paradigm that is attentive to the multilayered and rich complexities of social realities.

To conclude, Ehrlich's living law may have been written close to a century ago, but many of the themes associated with it, especially the ones focused on here, are still prevalent today, and are

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[140] See: De Sousa, "Law: A Map of Misreading", *supra* note 9 at 288.
[141] *Ibid*. Emphasis added.
[142] *Ibid* at 298.
[143] *Ibid*.
[144] *Ibid*. Emphasis added.

important for this thesis. One of the main critiques of his work, relevant for our discussion is that his work was relatively positivist in nature and centralist, remaining within the confinements of state law and written in reference to the latter.[145]

Another critique, also associated with positivism, is the organizational and institutional character of Ehrlich's work, having no emphasis on the individual herself.[146] This critique is extremely important for this thesis and to the core argument raised in it: the two cases are preoccupied with 'private' cases of resistance and lawbreaking, committed by women as individuals, who might belong to a minority or discriminated group based on their shared identities, but who are, nevertheless, not affiliated with any larger association or group of lawbreakers, thus not falling into the definition of civil disobedience.

Yet, living law is still important today. In the words of Melissaris, "it was a very important first step",[147] mainly since it offered "a socially oriented legal pluralism",[148] that drew a distinction between 'the law in the books', "the 'law of the lawyers', the technical concept of law void of social or moral meaning",[149] and the law rooted in and derived from the daily engagements in the social world.

More importantly, one of Ehrlich's living law's most important strengths is that it has provided us with a method, "tell[ing] us where (and how) to look for something".[150] This corresponds with the demonopolization of the state's 'conceptual hegemony' over the law by shifting the gaze, not only

[145] Emanuel Melissaris, for example, writes that Ehrlich's positivism is exemplified in the fact that "he understands law exclusively as a formal rational order." (See: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 60). Similarly, Griffiths argues that Ehrlich's understanding of the law is limited "to legal rules", (John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 27. Emphasis in original), and that the state and state law, despite his argument that "the state is just another association", (*ibid*) are in fact still "central to his discussion". (*ibid*) One might rightly argue that such centralism might fall under Griffith's 'weak legal pluralism'. This is again a valid point, especially in the context of this thesis, whereby I try to avoid using the same language, terms, and concepts, that we criticize in writing critically about state law, wishing to break the positivist monopolization of the point of reference.

[146] On this point, criticizing Ehrlich for focusing on state institutions and not on individuals, see for example: John Griffiths, "What is Legal Pluralism?", *supra* note 12 at 28.

[147] Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 59.

[148] *Ibid*.

[149] *Ibid*.

[150] See: David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities", *supra* note 61 at 446.

by deciding on *who* to look at and write about, looking at society itself and deciding to focus on other forms of laws, but, also by deciding on *how* to write about it. What is at stake here is the adoption of the practice and method of shifting the gaze and point of reference from the statutes and codes to social life, emphasizing the importance of context in studying law: any law/s.

Indeed, Ehrlich's shift of focus to real life still evolves around relatively positivist concepts: it is largely explained in reference to the state, and relatively still falls into positivist centralism and institutionalism by focusing solely on associations and not also on individuals. I, however, adopt Ehrlich's shift of focus, not its limitations. I shift the focus, even further than Ehrlich did, away from state law to society itself, and reverse the point of reference itself to society. And I focus on individuals and not on organizations. What I take from Ehrlich's living law is an image of a law that is alive, engaged in mutual and reciprocal relations with the social world, both influencing and influenced by the latter, constituted, shaped, and reshaped by these relations, and attentive to the concrete, even small events of real life.

1.2. Radical Pluralist Approaches

Emmanuel Melissaris called for the "radicalization of the way we think about the law, which must permeate and inform all theorizing of the law."[151] Although written in the context of legal pluralism, the key concept here is that of radicalization. This extra-inter-theoretical approach is very important for this thesis, since it shifts "the focus from strictly defined and hermetically closed legal systems to legal discourses that are vested with the commitment of their participants".[152] The underlying interrelated key words and concepts here are: shifting the focus, legal discourses, and participants, all of which are predominant features in this thesis.

[151] See: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 58. Emphasis in original.
[152] *Ibid*. Emphasis in original.

As already explained, this thesis adopts the practice of shifting the focus from the internal workings of state law to the social world. Following Melissaris, the thesis shifts the gaze from the closed legal system,[153] which would perceive the women of this thesis as mere criminals and their acts as transgressive acts, to these women themselves, considering them instead as viable participants in the process of lawmaking, and to the language/s, the legal meaning/s, the legal discourse/s produced and generated in the course of lawbreaking.

Thinking radically about the legal, argues Melissaris, "cannot happen from within a legal system, which is necessarily closed and inflexible".[154] Following him, shifting the focus to the acts of lawbreaking, and to the language and discourse produced by them, cannot be done internally, from within the legal system using its own language. And, indeed, in trying to explain these acts of lawbreaking from within state legal system, the only language available is that offered by the definition of civil disobedience. Approaching these women from a discursive point of view allows us to 'radically' think of their acts, not as mere crimes, but rather as a deep language carrying and generating legal discourses and meanings. Moreover, this shift in focus to the legal discourses gives "those discourses a voice in order for them to explain themselves without the distorting interference of a distant observer."[155] This also is a key concept in this thesis: state law does not and cannot explain these acts of lawbreaking using its own internal language, but rather insists that the acts be 'translated' and 'mediated' by 'the distorting interference of distant observers', state 'agents', such as lawyers.

Radicalizing the way we think about the law involves reversing the point of view, that is, shifting the focus to society itself, and to its internal working and operation, rejecting the interference of that distant and external observer. Melissaris criticizes legal positivism for decontextualizing the

[153] *Ibid*.
[154] *Ibid* at 59.
[155] *Ibid* at 58-59.

point of view taken and ignoring its external interfering effect.[156] Trying to explain the legality of a group which is "colonized by the dominant legality",[157] using the language "of the dominant legality has an equally colonizing effect."[158] Melissaris calls this imposition of the language of the dominant legality over other groups with their own legality, "epistemological heteronomy".[159] Gunther Teubner holds a similar view. He argues that closed legal systems cannot explain other legal discourses existing in other social fields, using their own internal language.[160] The meaning of such discourses is bound to be distorted when approached by state law as an *external* observer, using its own *internal* language. Each field has its own legal discourses with their own "boundaries of meanings".[161] When one discursive field enters another field, and especially when using its own language and legal discourses to explain the legal discourses of that other field, a distortion of meanings is inevitable, leading to a distortion of communication.[162] Teubner called this process of meaning distortion "productive misreading";[163] for him, each field has its own autonomous, and not semiautonomous, diverse discourses.[164] Similar to Ehrlich's emphasis on the richness of contexts, these cannot be approached over-simplistically and reductively, since each discourse has its own "radical diversity",[165] that differentiates it from others, depending, for example, on their own internal characteristics, contexts, "the idiosyncracies of personal interaction",[166] and the list goes on. This radical diversity is the one "responsible for distorted communication",[167] making

[156] *Ibid* at 57, 59-61.
[157] *Ibid* at 68.
[158] *Ibid*.
[159] *Ibid*.
[160] *Ibid* at 62.
[161] Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 Cardozo Law Rev 1443 at 1456 [Gunther Teubner, "The Two Faces of Janus"].
[162] *Ibid* at 1456.
[163] *Ibid* at 1447. On this point see also: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 62.
[164] See: Gunther Teubner, "The Two Faces of Janus", *supra* note 161 at 1453. Teubner here insists on defining legal discourses as autonomous and not semiautonomous like Sally Falk Moore. (See: Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law & Soc'y Rev 719).
[165] See: Gunther Teubner, "The Two Faces of Janus", *supra* note 161 at 1456.
[166] *Ibid*.
[167] *Ibid*.

the interaction between different legal discourses much more complex. Therefore, as Teubner argues "[o]ne cannot simply speak of a "transfer" of constructs from one normative order to the other as older theories of legal pluralism had it."[168]

When approaching legal discourses of different social fields, the language of the 'intervener' is crucial. For example, Teubner would probably be cautious of the role of lawyers in the 'translation' of lawbreaking. He would say that approaching social phenomena from within state law, or in his words "[t]he juridification of social phenomena",[169] is in effect "the legal distortion of social realities".[170] He even goes on to say that in certain occasions, it is advisable "to keep the lawyers out",[171] since lawyers tend to "misread [....and] misunderstand"[172] the facts presented to them, and thus, having the risk of "distort[ing] business realities."[173] Taking a 'Teubnerian' approach, communication is almost impossible, given the risk of legal discourses getting 'lost in translation'.

In order to keep the real meaning of legal discourses unaltered and uncolonized by the 'intervening' legal discourse, Teubner offers a theory based on the distinction between observation and participation.[174] Accordingly, in approaching legal discourses, one should ask herself whether she is an observer or a participant, an outsider or an insider. Either of these positions will determine the outcome of the study of that legal discourse.

The distinction between observers and participants is important since it concerns the role of state law in general, as an external observer of legal discourses in different social fields, understanding its position as such, and refraining from imposing its language on fields whose internal language

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[168] *Ibid* at 1455-1456.
[169] *Ibid* at 1455.
[170] *Ibid*.
[171] *Ibid* at 1454.
[172] *Ibid*.
[173] *Ibid*.
[174] On this point see: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 73.

is different. With the understanding of state law's inability to explain legal discourses from within the law, especially when it is state law itself that is being contested against, state law becomes more responsive to other legal discourses,[175] and that is what Teubner calls "reflexive law". [176] The emphasis is on a contextual-based approach to study the law of other normative orders, without imposing the "internal point of view to a different context". [177] Such an approach acknowledges the fact that each context raises different legal discourses that cannot be explained by an external observer, especially one coming from a unifying and decontextualizing perspective. "[I]t is wrong" Melissaris writes, "to assume the content of the internal point of view of a different people based on the external observation of their practices."[178] To do otherwise, he concludes, "inevitably misinterprets the object of our study."[179]

1.3. Contextuality

Martha Minow and Elizabeth Spelman have analyzed and discussed the meaning and importance of the methodology of context to law. [180] They argue that justice is not devoid of context. Achieving justice, they assert, cannot happen in a legal reality based on a universal application of narrow and doctrinal "case-by-case"[181] methodologies. Rather, justice is dependent on whether the law can place itself and the legal issue at stake in context.[182]

Their basic premise is that we cannot understand moral decisions by a simplistic deductive, as Ehrlich would say, and abstract application of laws and rules, since there are many complex details

[175] See: *Ibid* at 62. See also: Gunther Teubner, "The Two Faces of Janus", *supra* note 161 at 1448, 1460.
[176] See: Gunther Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17:2 Law & Soc'y Rev 239, at 239. See also: Emmanuel Melissaris, "The More the Merrier?", *supra* note 33 at 62.
[177] *Ibid* at 68.
[178] *Ibid*.
[179] *Ibid*.
[180] See: Martha Minow & Elizabeth V. Spelman, "In Context" (1990) 63 S Cal L Rev 1597 [Martha Minow & Elizabeth Spelman, "In Context"]. For further discussion, see: Brook K. Baker, "Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning" (1994) 36 Ariz L Rev 287 at 295.
[181] See: Martha Minow & Elizabeth Spelman, "In Context", *supra* note 180 at 1599.
[182] *Ibid* at 1598-1599.

embedded into and preceding such decisions, rendering each situation unique and different.[183] Taking such an approach would explain, for example, why a woman has not responded to a legal claim made against her, and/or has not appeared in court in order to present her case. Instead of understanding this in terms of 'omission' and failure to appear in court, or lack of responsibility, contextualizing this woman would reveal the oppressive mechanisms in which she lives, that may have prevented her, for example, from affording a bus ticket to court, or from understanding the legal claims made against her, or even reading them.[184]

The contextual approach provides methodological means and tools to several critical theories. One example is Critical Legal Studies (CLS), which perceives the law as a site of non-neutral forces and powers, being the product and construct of white hetero-hegemonic power relations, further reproducing and preserving them.[185] Similarly, feminist theories, each from its unique perspective, also understand the law as a site of power and dominance, based on and constructed from an androcentric stand point, devoid of and blind to the personal and yet political experiences of women.[186] They place questions and phenomena in the wider, holistic contexts of the oppressive male mechanisms, subordinating women on the basis of gender and sex, and constructing their inferior status as compared to men.[187] Taking a feminist approach, the legal problem that a woman confronts is not incidental, random or private, but is rather rooted in a wider context of oppressive and dominating gender-based power relations.

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[183] *Ibid* at 1603. Emphasis added.

[184] For furher discussion on the importance of context for acheieving justice and socio-legal change, see: Iris Marion Young, *Justice and the Politics of Difference* 21 (Princeton, NJ: Princeton University Press, 1990).

[185] For a further discussion on the law as a non-neutral site of power, but rather, a product of hegemonic constructions and social power relations, see: Gary Minda, "The Jurisprudential Movements of the 1980's" (1989) 50 Ohio St LJ 599 at 617. For a critical discussion on the liberal approach to law, emphasizing the centrality of the individual, see: Robin West, "Jurisprudence and Gender" (1988) 55 U Chicago L Rev 1.

[186] For further discussion on this point, see: Simone de Beauvoir, *The Second Sex,* translated by HM Parshley, ed (New York: Alfred A Knopf, 1953). See also: Lucinda Finley, "Choices and Freedom: Elusive Issues in the Search for Gender Justice" (1987) 96 Yale LJ 914 at 941.

[187] On this point see: Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 85-89.

To summarize and conclude this section on society IN state law, state law is approached and understood contextually. It is not appropriated, or monopolized, by the state, as the sole and single point of reference, nor is it the product of state legal institutions only. Critical theories reverse the stand point taken and shift the focus from state law's unifying internal positivist sources, such as statutes and courts decisions, to the social world, and provide us with different approaches, each to a different extent, and each from its unique perspective, to look at state law from the stand point of society itself. They challenge the absolutist/positivist notions of universality and uniformity. They illuminate, instead, the importance of taking into consideration the concrete, particular, small, even mundane details, when approaching legal questions and phenomena. Law is not conceived as static, but rather is portrayed as alive, dialectic, processual, and engaged in mutual and even conflictual dialogic relations with the social world, thus, undermining the rigid notion of separation between the two.

Critical approaches offer us the tools to discover the radical diversity and richness entailed in the social world and their relevance to law and legality. Drawing on the world of photography, they show us how 'zooming out', seeking to cover as much area in one single shot, cannot display the real, the reality of the objects, or 'subjects' depicted. They provide us, instead, with a camera that 'zooms in' on the concrete, challenging its presumed narrowness and particularism, allowing us to discover, instead its internal richness, width, breadth, and depth, each a world in and of itself. To discover their 'particular universality'. They challenge both the notion of universalism in and of itself, showing that one needs to approach law inductively and look at the concrete, and also challenge the meaning of universalism – that is, if universalism is still a desired feature of the law, then it is only through 'zooming in' and particularizing the stand point of the lens, that one can draw general and universal assumptions.

2. Law/s IN Society

".....Where outside authority enters always after the precedence of inside authority,
Where the citizen is always the head and ideal, and President, Mayor, Governor and what not, are agents for pay,
Where children are taught to be laws to themselves, and to depend on themselves,
Where equanimity is illustrated in affairs…"[188]

This section shifts the focus further internally, away from state law, to the legal meanings, discourses and processes, and law/s created in and by society itself. These do not necessarily have to culminate in state legal institutions in order to carry the validity, affirmation and legitimacy of a law. Here, the thesis converses with several ideas and themes regarding the creation and generation of legal meanings and laws, away from, and even competing with, state law. This section is divided into two subsections: the first looks at critical legal pluralism, and the second converses with the notion of creating legal knowledge, focusing on Robert Cover, in particular with his concept of 'jurisgenesis', and on Clifford Geertz's concept of 'local knowledge'. Critical Legal Pluralism, with its emphasis on the individual herself and her role in the creation of legal knowledge and meanings, provides a good starting point for the discussion.

2.1. Critical Legal Pluralism

Critical legal pluralism has evolved as a critical theoretical reaction to legal pluralism. Legal pluralism has been criticized for various reasons and from different schools of thought, ranging from legal positivists, arguing, for example, against the jeopardization of the concept of the rule of law, to legal pluralists themselves.[189] Another criticism is that legal pluralism, despite its criticism of state law institutionalism, is still institutionalist and organizational in nature, focusing

[188] See: Walt Whitman, *The Great City* (1819-1892).
[189] For a discussion on some of these criticisms, see: Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 CLJS 25, 32-33 [Martha-Marie Kleinhans & Roderick Macdonald, "What is a Critical Legal Pluralism?"]. For further critical discussion on legal pluralism, see also: Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *supra* note 50; Brian Z. Tamanaha, "An Analytical Map of Social Scientific Approaches to the Concept of Law" (1995) 15 Oxford J Legal Stud 501; Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2001) 27 & Soc'y 296.

on organizations, organized groups and communities and their legal institutions. Even when writing about the plurality of legal orders and discourses, besides that of state law, such writings still focus on orders and legal regimes of organized communities. De Sousa Santos, for example, in his famous article about the Favelas in Rio de Janeiro, Brazil, writes about the legality produced by squatters 'outside' the legal institutions of the state. He focuses on the creation of what he called "internal legality", such as the creation of legal institutions that have been developed by the community itself to deal and resolve squatting issues, and which are "parallel to (and sometimes conflicting with) State legality."[190] Legal pluralism focuses on the modus of 'Other' organized and institutionalized social fields and the legal discourses they produce. Legal processes produced by and in other social fields are eventually 'translated' and legalized either by the state legality or by the 'internal legality' of other normative orders.

The problem is that legal pluralists give considerable weight to the formal and official form and structure of law, even when produced in normative orders other than the state. They use an official language, and internalize state legal rhetoric, language and mode of operation, in order to give these processes the form of an authoritative binding law. They are, therefore, criticized for "accept[ing] State law as the defining instantiation of law."[191] This use of an official and "authoritative language",[192] as Martha-Marie Kleinhans and Roderick Macdonald call it, results in excluding "non-State normativity from its realm, or incorporates this non-State normativity into State law".[193]

[190] See: Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada" (1977) 12 Law & Soc'y Rev 5 at 5.
[191] See: Martha-Marie Kleinhans & Roderick Macdonald, "What is a Critical Legal Pluralism?", *supra* note 189 at 41.
[192] *Ibid*.
[193] *Ibid*.

The legal environment is institutionalized and 'professionalized' under either legal order, be it by state officials, such as lawyers, or by "identified community spokespersons",[194] dominating the language used, the participation process, and its outcome. Thus, legal pluralism falls into the same 'trap' of positivist institutionalism and internality that it has originally sought to 'escape'.

There is not much emphasis on the individual herself and her unique voice, nor on her role in the process of creating legal knowledge and meanings. Such oblivion to the individual amounts, eventually, to what legal pluralism was criticizing against, and supposed to be departing from, that is the reductionist abstractionism of socio-legal realities and the hierarchization of legal discoursivity.[195]

Legal pluralism, with all of its emphasis on the richness of the legal discourses embedded in the social world, and its sensitivity to the concrete and particular, misses the richness of particularities of the particular individual, and the processes she engages in, processes which might be in and of themselves legal, further generating legal meanings and knowledge. It ignores her participatory role in shaping and reshaping legal meanings, negotiating, and bargaining her competing vision and understanding of the law and of herself in the process.[196]

This is where critical legal pluralism comes to play.[197] Critical legal pluralism acknowledges some of the legal pluralist rationales, such as concreteness and context, and what it has sought to accomplish, mainly that of being attentive to the 'radical diversity' of the social world. But it is where legal pluralism has failed that critical legal pluralism becomes an alternative: shifting and deepening the focus even further, from state law to society to the individual herself, and her legal language and discourse. The individual and her world are at the center of legal research and study.

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[194] *Ibid* 46.
[195] On this point, see: *ibid* at 36.
[196] *Ibid*.
[197] For a thorough analysis of critical legal pluralism, see: *ibid*, especially at 29-46. See also: Roderick A. Macdonald, "Custom Made--For a Non-Chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301.

Instead of approaching individuals by "abstract[ing] [them] as individuals without a particular substantive content",[198] it focuses on revealing the opposite, that is, their rich substantive content. It defies the legal pluralist relatively determinist and statist (speaking of positivism), approach towards the individual, perceiving her passively, as "wholly determined".[199] It recognizes her evolutionary and processual capacity to change and transform,[200] allowing her "to produce legal knowledge and to fashion the very structures of law that contribute to constituting [her] legal subjectivity."[201] The emphasis is on her voice and agency, acknowledging her active role in producing legal knowledge.

Most importantly for critical legal pluralism, the individual is given "access to and responsibility toward law."[202] She is not just passively "law abiding".[203] She is "law inventing".[204] She is an "irreducible site of normativity and internormativity",[205] engaged in dialogic relations with the world. Using the perceptive and insightful words of Martha-Marie Kleinhans and Roderick Macdonald, "[t]he emphasis, then, is on the constructive capacity of the constructed self."[206] This 'irreducibility' means that she is multilayered and diverse, more than her own oneness, and is "characterized as a multiplicity of selves".[207] As beautifully described by Martha-Marie Kleinhans and Roderick Macdonald, her life "is a *continuing autobiography of meaning."*[208] In fact, they further argue, "the very idea of law must be autobiographical".[209] Legal knowledge and law/s are approached as an everlasting process of storytelling, biographical and autobiographical.

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[198] See: Martha-Marie Kleinhans & Roderick Macdonald, "What is a Critical Legal Pluralism?", *supra* note 189 at 37.
[199] *Ibid* at 38.
[200] *Ibid*.
[201] *Ibid*.
[202] *Ibid* at 39.
[203] *Ibid*.
[204] *Ibid*.
[205] *Ibid* at 46.
[206] *Ibid* at 39.
[207] *Ibid* at 42.
[208] *Ibid*. Emphasis added.
[209] *Ibid* at 46.

The individual's role in creating legal knowledge is central, and she is, following Martha-Marie Kleinhans and Roderick Macdonald, both the subject and object of legal knowledge.[210] She is engaged in a process of "narrative imagination",[211] narrating a genealogy of histories, of the past, present and future, writing and rewriting, written and rewritten by, her story, her legal story and the discourses that she generates, and the stories of the legal discourses inside and around her. She is her own legal institution.

The organizational character of legal pluralism, perceiving the process of lawmaking through the lenses of institutions, and not emphasizing the role of individuals in the process of creating legal knowledge and meanings bears some implications and significance, all relevant in the context of this thesis. First, it resonates with what has been asserted in the context of civil disobedience – that eventually, even when originated by acts 'outside' the concept of state legality, and when mobilizing and generating legal discourses and meanings that are not, at first, compatible with state law language, it is only through, and only if culminating in and leading to, state law institutions that these processes can receive the status of a formal law. Lawmaking and the language produced in the course of it is institutionalized, perceived only through the lenses of legal institutions, whether state or other normative orders. Whether or not resulting in a state official law, even when approached from a legal pluralist approach, lawmaking processes still carry, and are featured by, this 'authoritative language' of institutionalism. On the contrary, as written above, and central to this thesis, is the understanding of lawbreaking as law; as legal narratives in and of themselves, capable of further creating legal meanings, and changing and altering the meaning of what we perceive as law. They could, but do not necessarily have to, culminate in changing state law in order to be understood as law.

[210] *Ibid* at 39.
[211] *Ibid* at 43.

Second, and more specifically, this organizational character bears some significance, especially in the context of abortion, one of the two cases discussed in this thesis. *Chapter 3* examines and shows how the entire process of legalization of abortions in Canada, originating from the acts of civil disobedience committed by Dr. Henry Morgentaller and led mostly by him, as the "identified community spokesperson[]",[212] of the abortion movement, did not focus on the individual women themselves, and missed – not accidentally – much of their language and voice. It was his lawbreaking that mobilized the process of legalizing abortions in Canada, leading to, and culminating eventually in, one of the most important Canadian Supreme Court decisions legalizing abortions by the nullification of *Section 251* of the Criminal Code.[213] But it was only after 'channeling' his lawbreaking into state legal institutions that it has received the status of a formal law in the form of a legal precedent.

Third, focusing on groups and organized communities and minorities ignores the fact that in certain cases the notion of membership and belonging to a certain group is complex and problematic. Some individuals, such as the women of this thesis, might belong to a certain group because of a particular identity affiliation, such as ethnicity, but such a group might not be a recognized one by state law, as in the case of Mizrahi women squatters,[214] nor organized by internal institutions that regulate their lives. Moreover, and especially in the context of 'Women' as a group, which is a homogenous abstraction in and of itself – homogeneity that legal pluralism was supposed to depart from – women might belong to several intersecting communities, such as, black and/or aboriginal women having abortions, thus, complicating the notion of a homogenous membership and community organization.

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[212] *Ibid* at 46.
[213] See: *R. v. Morgentaler,* [1988] 1 SCR 30.
[214] See: Yifat Bitton, "The Limits of Equality and Virtues of Discrimination" (2006) 3 Mich St L Rev 593; See also: Yifat Bitton, "The Limits of Equality – Wishing for Discrimination?" (2005) bepress Legal Series. Working Paper 679. Online: <http://law.bepress.com/expresso/eps/679>

Now, it should be emphasized here that shifting the focus to the individual/s does not stem from nor is it based on any liberal understanding of the law, praising the individual as such, and negating the importance of community and belonging. Quite the contrary, this thesis takes a community and contextual-based approach to lawbreaking by revealing the collective nature of individual acts of lawbreaking, located on a larger community-based continuum, and from which they have stemmed, even in cases where such communities might not be organized nor recognized as such.

Finally, legal pluralist emphasis on organized groups also corresponds with the positivist criteria of civil disobedience, revisited in *Chapter 5*. Suffice it to say that, for example, the criteria of openness and public visibility, emphasizing group or community collectivity, exclude women, such as the women of this thesis, who do not belong to an organized community and, not accidentally, for reasons discussed in *Chapter 5*, resist alone, in private, as individuals. We are, then, prevented from exposure to the voices and narratives of the women involved, and from understanding the legal depth embedded in their acts of lawbreaking. These are women that despite their 'private', individual, and allegedly not-politically-based acts, are located on larger, collective and historical continuums, bearing collective and political features.

Moreover, and especially when internalizing state law's official and 'authoritative language', and in particular in groups whose members belong to other intersecting groups, focusing on the organizational aspect of communities ignores the fact that groups in and of themselves can be oppressive, non-egalitarian, and "based on relations of domination"[215] and power relations.

Critical legal pluralism, however, reverses the traditional premise of how "society and subjects"[216] can be treated by the law,[217] to "how narrating subjects treat law."[218] She is a site of power and control. Her relations with law/s are not relations of hierarchy and subordination but reciprocal

[215] See: Marc Galanter, "Justice in Many Rooms", *supra* note 53 at 25.
[216] See: Martha-Marie Kleinhans & Roderick Macdonald, "What is a Critical Legal Pluralism?", *supra* note 189 at 46.
[217] *Ibid*.
[218] *Ibid*.

and symmetric relations of power and control: she possesses and exercises control over the law "as much as law controls"[219] her. The emphasis here is on individual legal knowledge, narration, myth and imagination, themes that are important to this thesis.

2.2. The Creation of Legal Knowledge

a) Robert Cover and the Concept of Jurisgenesis

Robert Cover argued that we need to broaden our conception and understanding of what the law is. According to his arguments, the meaning of law should not be perceived only as a set of rules and principles of justice dominated by the formal legal institutions of the state.[220] Rather, the law does not exist "apart from the narratives that locate it and give it meaning."[221] It is a part of a larger normative universe, which he calls "nomos",[222] where the law of the state is "but a small part of th[is] normative universe",[223] and is embedded in deeper and wider social contexts reflecting different nomoi (the plural of nomos) and narratives of different communities. This nomos, the normative universe, exists in the communities themselves, in the social world, and is comprised

[219] *Ibid* at 40.
[220] See: Robert Cover, The Supreme Court, 1982 Term- Forward: Nomos and Narrative" (1983) 97 Harv L Rev 4 at 4 [Robert Cover, "Nomos and Narrative"]; For another seminal article, see: Robert Cover, "Violence and the Word" (1986) 95 Yale LJ 1601; See also: Robert Cover, "The Folktales Of Justice: Tables of Jurisdiction" (1985) 14 Capital UL Rev 179; Robert Cover, Cover, Robert. *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn: Yale University Press, 1975). For further reading on Robert Cover, see: Richard Mullender, "Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union" (2006) 6:1 Issues in Legal Scholarship; Judith Resnik, "Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover (An Essay on Racial Segregation at Bob Jones University, Patrilineal Membership Rules, Veiling, and Jurisgenerative Practices)" (2005) 17 Yale JL & Human 17, at 18 [Judith Resnik, "Living Their Legal Commitments"]; Robert Post, "Who's Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative" (2005) 17 Yale J.L. & Human 9 (2005); Owen M. Fiss, "Remarks at Memorial Service for Robert M. Cover" (1987) 96 Yale LJ 1717; Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale LJ 1860; Thom Brooks, "Let a Thousand Nomoi Bloom? Four Problems with Robert Cover's Nomos and Narrative" (2006) Issues in Legal Scholarship. Katherine Hunt Federle, "Violence is the Word" (2000) 37 Hous L Rev 97; Martha Minow, Michael Ryan, & Austin Sarat, eds, *Narrative, Violence and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995).
[221] Robert Cover, "Nomos and Narrative", *supra* note 220 at 4.
[222] *Ibid*.
[223] *Ibid*.

of "narratives, experiences, and visions",[224] of symbols, "language and mythos",[225] and includes several genres, such as "history, fiction, tragedy, comedy".[226]

In line with Fitzpatrick's legal positivist fear of reality, the law, according to Cover, is the barrier that separates and "holds our reality apart from our visions".[227] Narratives, on the other hand, are the forces that connect between the normative universe and the reality, they are the actual models, and in Cover's words, "[t]he codes that relate *our normative system* to *our social constructions of reality* and to *our visions of what the world might be."*[228] They are created when "a normative force"[229] is imposed "upon a state of affairs, real or imagined".[230] A nomos, a narrative, "is a present world constituted by a system of tension between reality and vision,"[231] and is the component that integrates both the present, the "state of affairs"[232] and the future, "our visions of alternative futures".[233] Integrating reality, vision and imagination, it connects, then, not only the traditional "'is' and the 'ought'",[234] but adds another domain of consideration, that is, "the 'what might be.'"[235]

The law is embedded in these narratives and nomoi, and these are what give it meaning. These are not just "the professional paraphernalia of social control"[236] that lawyers usually identify with the normative universe,[237] such as "bodies of rules or doctrine"[238] or the "principles of justice, the

[224] *Ibid* at 42.
[225] *Ibid* at 9.
[226] *Ibid* at 10.
[227] *Ibid*.
[228] *Ibid*. Emphasis added.
[229] *Ibid* 10.
[230] *Ibid*.
[231] *Ibid* at 9.
[232] *Ibid*.
[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid*.
[236] *Ibid* at 4.
[237] *Ibid*.
[238] *Ibid* at 6.

formal institutions of the law, and the conventions of a social order".[239] These doctrines and rules, "are, indeed, important to that world",[240] but they comprise only "a small part of the normative universe."[241] What constitutes the normative universe, and gives the law its meanings, are also the nomoi grounded in real life, in the interactions with each other, in each individual's commitments. Once we understand the law "in the context of the narratives that give it meaning",[242] it "becomes not merely a system of rules to be observed, but a world in which we live".[243]

The law is not merely rules "to be understood"[244] but "also worlds to be inhabited".[245] What is interesting here is the distinction Cover seems to draw between *understanding* and *inhabiting,* turning "away from reliance on a scientific understanding of law and its social role",[246] and correlating, instead, between law and lived experience, law and life. Inhabiting a nomos, Cover writes, "is to know how to live in it".[247] Similar to Martha-Marie Kleinhans and Roderick Macdonald's understanding of the law and of society, separately and jointly, and of the interrelation between the two as a process of storytelling and autobiography of meaning,[248] for Cover the law is inherently connected to what "a people does out of, and in response to, *their story of themselves."*[249] The emphasis is on the connection between people and life, their lives. On living the law. Unlike Ehrlich's living law, whereby the focus is on the law itself and on its living character, Cover shifts the focus to the people themselves. It is not just the law that is alive. It is also lived by the people whose actions, narratives and nomoi give it its meaning. As put by Judith

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[239] *Ibid* at 4.
[240] *Ibid*.
[241] *Ibid*.
[242] *Ibid* at 4-5.
[243] *Ibid* at 5.
[244] *Ibid* at 6.
[245] *Ibid*.
[246] See: Howard J. Vogel, "In the Cause of Justice: Reflections on Robert Cover's Turn Toward Narrative" (1989) 7:1 JL & Religion 173 at 176 [Howard Vogel, "In the Cause of Justice"].
[247] See: Robert Cover, "Nomos and Narrative", *supra* note 220 at 6.
[248] See: Martha-Marie Kleinhans & Roderick Macdonald, "What is a Critical Legal Pluralism?", *supra* note 189 at 42.
[249] See: Howard Vogel, Howard Vogel, "In the Cause of Justice", *supra* note 246 at 175. Emphasis added.

Resnik in an essay about Cover, it is "through regular acts of affiliation, [that] community members *live* law's meaning.[250] It is within these interactions between the state of affairs, and the normative visions surrounding it that legal meanings are created, a process Cover called "jurisgenesis" – the creation of "the legal DNA".[251]

Cover's nomos, "requires no state"[252] and, is not exclusively monopolized by it. Legal meanings and law are not only the product of the state's formal legal institutions, but rather are the reflection of ongoing processes where communities are engaged in jurisgenerating and creating their own meaning for, and vision of, the law. To put it differently, taking a Coverian approach, the law is understood as a continual and evolving language which reflects complex preceding ongoing socio-legal processes which are not confined to the traditional modes of lawmaking as the 'turning point' in the creation of legal meanings. What is important here with respect to lawbreaking is that Cover broadened the concept of lawmaking, its width, breadth, and the range of possible participants in such a process. He "expand[ed] the inquiry (and hence our understanding) of legal actors and processes to encompass"[253] communities and groups, their nomoi and narratives.

Cover's emphasis on the jurisgenerative capacity of communities corresponds with Martha-Marie Kleinhans and Roderick Macdonald's idea of law-inventing. Communities are active participants in the creation and jurisgensis of legal meanings and laws. However, and this is where he differs from their critical legal pluralism and from my focus on individuals, Cover has not focused on individuals but rather on communities and groups.[254] Cover 'falls' into the same positivist 'trap' as does legal pluralism, striving to demonopolize the state from its control over the creation of legal meanings, and yet, forming a relatively institutional and organizational approach to

[250] See: Judith Resnik, "Living Their Legal Commitments", *supra* note 220 at 18. Emphasis in original.
[251] See: Robert Cover, "Nomos and Narrative", *supra* note 220 at 15, 46.
[252] *Ibid* at 11.
[253] See: Judith Resnik, "Living Their Legal Commitments", *supra* note 220 at 18.
[254] See: Robert Cover, "Nomos and Narrative", *supra* note 220 at 11.

jurisgenesis. Nevertheless, it is the idea of jurisgenesis, and its underlying ethos and reasoning – the creation of legal meanings and law away from the legal institutions of the state – that this thesis adopts, not its narrow application to organized communities.

Clearly, Cover's idea of jurisgenesis is not devoid of problems and criticism. Other challenges and questions relate, for example, to what are the boundaries, if any, to be drawn in deciding which kinds of lawbreaking can jurisgenerate legal meanings and be regarded as legal narratives in and of themselves? Could, and taking a normative stand should, all kinds of lawbreaking be understood as reflecting, creating, and further enhancing distinct nomoi of communities? After all, nomoi are diverse and different, may constantly change as people interact with the world and each other, and may bear different and competing perceptions of how the world should be understood.

What is important for us here, despite these and other questions, is what Cover did leave us: a language with which we could articulate people's acts as valid acts of lawmaking. Communities, and in the context of this thesis, individuals, have a valid and important jurisgenerative role in the process of creating legal meanings, based on their norms, nomoi, experiences and narratives: that is to say, their own life story. It is this importance of the process of storytelling that I take from Cover: to 'dis-cover' the richness entailed in the acts of lawbreaking committed by the women of this thesis, and revealing their own legal interpretations to their acts. Their own laws. We discover the narratives that are central in connecting between their harsh realities, that their acts were aimed at correcting, and their visionary world, into which that their acts were designed to transform.

b) <u>Law as Local Knowledge</u>

State legal positivism appropriates the role of creating legal meanings and knowledge. Critical approaches demonopolize this 'legal cartel', and emphasize the active role of the real world, of groups, communities and individuals in jurisgenerating laws and legal meanings. These approaches 'localize' the meaning of law, deemphasizing universalism and abstractionism. The

law, any law, exists IN the real world which, following Cover, holds the capacity to imagine the real, and jurisgenerate a transformative legal vision. This theme of localization of law is at the centre of this final part of the analysis.

Similar to Robert Cover's focus on the creation of hermeneutics and legal meanings in society itself is what Clifford Geertz referred to and defined as "local knowledge".[255] Deemphasizing legal positivist perception of exclusivity and self-internalized distinction from other spheres of life, and emphasizing instead law's interconnectedness to real life, Geertz compares law to other disciplines and activities, such as "sailing, gardening, politics, and poetry".[256] These, he agues, "are crafts of place: they work by the light of local knowledge."[257] Like them, Geertz argues, law is not an abstract and placeless concept, devoid of and detached from place and geography, but rather one that is local and contextualized. Local knowledge here is construed not only literally, referring "just as to place, time, class, and variety of issue",[258] but also figuratively and conceptually, as a concept referring "to accent – vernacular characterizations of what happens connected to vernacular imaginings of what can".[259]

For Geertz, taking a non-functionalist approach to law, the law is "not reflective, or anyway not just reflective, of"[260] social life, but rather one that is both constructive and constitutive of social life. [261] Similar to Cover's nomos and narratives, local knowledge, i.e., "ideas of some local depth",[262] produced in and by society itself connect between the real and the visionary, the present and the future, between the 'what happens' and the 'what can': between the 'Is' and the 'Ought'.[263]

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[255] See: Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167-234 [Clifford Geertz, *Local Knowledge*].
[256] *Ibid* at 167.
[257] *Ibid*.
[258] *Ibid* at 215
[259] *Ibid*. Emphasis added.
[260] *Ibid* at 218.
[261] *Ibid*.
[262] *Ibid* at 187.
[263] *Ibid*.

Turning to the 'mess', 'chaos' and 'disorder' associated with the real world, referred to by Friedman,[264] and to which legal positivism responds by imposing uniformity, this local knowledge, "however various and ill ordered",[265] can, as Geertz argues, "direct us toward some of the defining characteristics, [....], of what it is we want to grasp: a different sense of law."[266]

The key element here is the "different sense of law", or what Geertz refers to as "legal sensibility".[267] In line with Fitzpatrick's state law's fear of reality, and Ehrlich's law's oblivion to real life, for Geertz state law is characterized by "fear of fact",[268] a fear of the vast facts rooted in and deriving from the real world. Its response to this fear is sterilizing the facts,[269] categorizing and unifying them under, and requiring their conformity to, the various exclusionary criteria set by the state legal bodies of rules, evidence, and procedure. Legal sensibility, on the other hand, is one whereby the law is localized and *sensitive* to and derived from its social surroundings.[270]

It is one that deemphasizes the 'rules' and their detachment from reality, and emphasizes, instead, the interconnectedness between law and society, connecting, for example, respectively, between the "proper"[271] and the "real",[272] the "suitable"[273] and the "true",[274] between "correct behavior"[275] and "correct understanding".[276] The notion of 'understanding' and its positioning vis-à-vis 'behavior' is at the heart of local knowledge. It implies relativism,[277] making the law "of the council-man"[278] more sensitive and, following Teubner, reflexive, and aware of other forms of

[264] See: Lawrence Friedman, "American Legal History", *supra* note 6 at 563-564.
[265] See: Clifford Geertz, *Local Knowledge*, *supra* note 255 at 187.
[266] *Ibid*.
[267] *Ibid* at 175.
[268] *Ibid* at 171.
[269] *Ibid*.
[270] *Ibid* at 215.
[271] *Ibid* at 187.
[272] *Ibid*.
[273] *Ibid*.
[274] *Ibid*.
[275] *Ibid*.
[276] *Ibid*.
[277] *Ibid* at 181.
[278] *Ibid*.

law, of other "forms of legal sensibility other than its own".[279] It also means becoming more aware "of the exact quality of its own."[280] This is a processual understanding of the law that reinforces "the processes of self-knowledge, self-perception, self-understanding",[281] and self-formation. In contrast to positivist objectification and abstractionism, it illuminates the law's personification, individuation, and, borrowing from Michel Foucault, subjectification.[282] It is the process of becoming wo/men or masters of learning.[283] It shifts the gaze from a mere focus on behavior to the understanding of the law, and to their interrelations; from a mere positivist submission to the power of the state, acting upon its law and complying with it, to learning it, "to the knowing of it",[284] or in Martha-Marie Kleinhans and Roderick Macdonald's words, from 'law-abiding' to 'law-inventing'.

Local knowledge and meaning are approached contextually, shifting the focus to the particular, and concrete.[285] Hence the emphasis on the local. For Geertz, law is diverse and complex and thus cannot be approached universally and deductively.[286] Instead of "reducing concrete difference to abstract commonalities",[287] or applying general principles to particular and "local circumstances",[288] law should be approached inductively. The law is located in the "grand actualities",[289] and not in the "forceless generalities".[290]

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[279] *Ibid*.
[280] *Ibid*.
[281] *Ibid*.
[282] See: Michel Foucault, "Technologies of the self" in Luther H. Martin, Huck Gutman & Patrick H. Hutton, eds, *Technologies of the self. A seminar with Michel Foucault* (Amherst: The University of Massachusetts Press, 1988) 16; Michel Foucault, "The Ethic of Care for the Self as a Practice of Freedom" in James Bernauer & David Rasmussen, eds, *The final Foucault* (Cambridge, MA: MIT Press, 1988) 1.
[283] See: Clifford Geertz, *Local Knowledge*, *supra* note 255 at 200, 204.
[284] *Ibid* at 201.
[285] *Ibid* at 216.
[286] *Ibid* at 186.
[287] *Ibid* at 215.
[288] *Ibid* at 214.
[289] *Ibid* at 234.
[290] *Ibid*.

Geertz's concluding 'message' is a good point for proceeding to the conclusion of this section and, from there, to conclude this *chapter*. Law/s, any law/s, are present IN society, and can be created and jurisgenerated away from state legal institutions. People, both individuals and groups have the jurisgenerative capacity to create laws and legal meanings. Unlike legal positivism, which universalizes people's lives and experiences, law here is approached hermeneutically, as a normative universe "which enfolds individuals and integrates their whole life experience".[291] It is perceived as a set of norms, nomoi, narratives and experiences, all equal and important parts of that universe. Law is not an abstract notion, transcending geography and applying 'equally' and comprehensively to all societies, but rather is one that is local, relative, concrete and particular. It is everywhere and can be found everywhere. Marc Galanter has an illustrative way to convey this message, and also conclude this part: *"Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions.*[292]

To conclude, this *chapter* first discussed legal positivist assumptions rising from the definition of civil disobedience, assumptions that will later enable the reader to understand, and for the thesis to articulate, the reasons for excluding the women of this thesis and their acts from the applicability of the definition of civil disobedience in particular, and from the domain of legality in general, discarding their jurisgenerative capacity to create legal meanings and laws.

The *chapter* then shifted from state law to the social real world. It discussed some critical themes arising from several theories chosen for their critical emphasis on these positivist assumptions. As mentioned, these critical ideas and concepts, each from its own unique perspective and each to a certain extent, criticize legal positivism by deconstructing the themes of centralism, supremacy,

[291] See: Marc Galanter, "Justice in Many Rooms", *supra* note 53 at 22.
[292] *Ibid* at 17. Emphasis added.

and internality, and showing the exact opposite effect: they decentralize, de-hierarchize and externalize the concept of law. These have shown that society and law, not just state law but any law are interrelated and interwoven: society is present IN law/s, and law/s are present IN society. Some of these critical themes are centralist, and thus relatively positivist, while some emphasize the jurisgenerative capacity of groups, and others, such as critical legal pluralism, shift the focus to individuals and their jurisgenesis, as law-inventing. The following insights about law, drawn from the discussion are as follows:

1) Law is not static, but rather is living, alive, lived, evolutionary, dialogic, and dynamic; 2) State law is not separate from the spheres of society and social life, and is constructive, and constituting, yet also reflective of the social life; 3) Law is vast and diverse and cannot be 'fitted' into unifying categories; 4) Law is contextual, emphasizing the importance of the local, concrete, and particular, the actual; 5) State legal knowledge and the sources of state law derive from the interactions with the social world, and official state-based sources, such as statutes, are only one source and medium of reference; 6) Law, any law, is a part of a larger normative universe, in which state law is only one part, and is embedded in deeper and wider social contexts reflecting different nomoi and narratives of different communities; 7) People's location vis-à-vis, and engagement with, state law is not external, but rather one that reverses state law's appropriation of the internal point of view taken. It is multi-dimensional, mutual, and reciprocal; 8) The focus is on communities and individuals and their jurisgenerative capacity to both transform state law, and/or create their own laws, and, finally; 9) Law is not instrumentalist or functionalist: lawmaking and legal processes are demonopolized, so that the state is not the sole 'producer', and 'the turning point' in the creation of legal meanings.

These critical themes and ideas provide different ways to think about law as a language and process, enabling us to later understand the acts committed by the women focused on in this thesis,

offering ways to turn the agency, voice and actions of people which are not commonly perceived as legal through positivist lens and into something that we can recognize as law.

Critical approaches question and challenge state law 'totalitarianism'. Marc Galanter has vividly compared the colonization of the 'law in action' by the 'law in the books' to the subordination of spoken languages by written ones. And, in his own words, "[n]o one would deny the utility or importance of written language, but it does not invariably afford the best guidance about how to speak."[293]

Law is a language that is spoken, and, in turn, is further developed and evolved daily by people, individuals and groups, in their daily activities and interactions with each other. It is embedded in the most 'trivial' and 'small' activities. Being attuned to the languages, sentences, words, syllables, vowels, sounds, can reveal the richness entailed in these 'foreign' languages. Ignoring them, however, and focusing our socio-legal attention on state law only, on the 'law in the books', would amount, ironically, to 'missing the law in action'.

However, taking critical approaches to understanding socio-legal phenomena is not always an "easy and pleasant task[]".[294] As mentioned above, there are gaps between state law and society, that some theorists have conceived as unbridgeable. Because of these gaps, and obviously because of the diversity of nomoi and narratives, and their evolving nature, and more importantly because of the conception of law as a living law, always changing and evolving, it is obvious that our knowledge, as Erhlich argued, "in this sphere will always remain full of gaps, and unsatisfactory".[295]

This is not an easy task, indeed, all the more so in the context of this thesis, writing about acts of lawbreaking, particularly controversial ones such as squatting and abortions, which jeopardize the

[293] *Ibid* at 5.
[294] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 26 at 505.
[295] *Ibid*.

integrity of the rule of law and confront the state and its law with difficult questions. Moreover, it is not an easy task when the cases involved have not received much legal attention from the perspective taken in this thesis.

As quoted earlier, Ehrlich argued that "[w]ithin every part of the present lies its entire past".[296] What I have omitted above, and am about to add here, is the second part of the sentence: "[w]ithin every part of the present lies its entire past, ***which can be clearly discerned by the eye that is able to look into these depths".***[297] This is a powerful image, especially in the context of the 'small', 'mundane', private and covert cases, such as those in this thesis . In such cases, one would need to have such an *able eye* to begin with, in order to discover new cases, which have already existed, but which are not yet known to legal scholarship, or at best perceived as small and insignificant ones, with not much legal depth, not involving significant legal theories or doctrines, waiting to be discovered.

Then, this *able eye* would enable us to expose these cases, a purpose in and of itself, to look at the depths and richness entailed in them, and to define them as viable legal phenomena deserving to be studied. This will, in turn, enable us to better approach and understand other legal phenomena. This is where critical approaches come to play, helping the already critical and *able eye* to better approach, understand and articulate these cases. After familiarizing the reader with the language necessary for re-reading our two cases, I now proceed to *Chapter 5*, where we continue to dig like an archeologist, into these women's lives and presents and reveal their pasts. These themes and ideas would be my way of translating into words and concepts the vision, insight and depths discovered by that *able eye*.

[296] *Ibid* at 504.
[297] *Ibid*. Emphasis added.

Chapter Five - Revisiting the Theory of Civil Disobedience

"One measure of the success of such indoctrination is that we perpetuate both consciously and unconsciously the very evils that oppressed us. [….] implanted in our psyches a seed of the racial imperialism that would keep us forever in bondage. For how does one overthrow, change, or even challenge a system that you have been taught to admire, to love, to believe in?"[1]

Introduction

Chapter 1 introduced the theory of civil disobedience. It discussed the main definitional elements of civil disobedience, namely, that for an act to qualify as civil disobedience it should be non-violent, overt, marked by openness and public visibility, rooted in deep political awareness and consciousness, and be accompanied by a willingness to bear the consequences of disobedience, such as arrests and criminal charges.

As further discussed in *Chapter 1*, despite certain variations in its scope, the prevailing definition of civil disobedience is reflective of, rooted in and committed to preserving the premise of the rule of law. It is based on formalistic and decontextualizing approaches to law. As such, it is mostly occupied with attempting to find justifications of civil disobedience that could accommodate it and mitigate its lawbreaking nature within the concept of the rule of law.

Acts of lawbreaking are perceived as a threat to law's order and stability and, above all, to the integrity of the rule of law. They jeopardize law's own distinctive entity, separate from the 'chaos' of society. The theory of civil disobedience and its foundational criteria are the means by which state law could mitigate and minimize the inevitable infringement of the rule of law entailed by acts of disobedience.

[1] See: Bell Hooks, *Ain't I a Woman: Black Women and Feminism* (Boston, MA: South End Press, 1981) at 120-121. Emphasis added.

Like *'The Map',* the law in its positivist version is "big [,]public, national, official[]".[2] This emphasis on width, praising 'big theories' that could explain acts of lawbreaking, translating them from acts of transgressive marginality into an official language of legitimacy and centrality, strikingly corresponds with the definitional criteria of civil disobedience, requiring, amongst others, public visibility and openness, emphasizing group or community collectivity. Consequently, the acts falling within these criteria are in and of themselves 'big' and open acts, 'heroic' stories of mass resistance committed in public by politically motivated people, motivated by greater moral and political causes that may be justified in challenging and eventually repudiating unjust laws or policies.

Can our two cases – squatting and criminalized abortion – be explained by the 'tool' of civil disobedience? Do they fall within its definitional criteria? Can the '*Big Map'* explain the concrete, the 'small'? Can it even detect, discover, and expose these covert cases of lawbreaking in the first place, let alone later explain them?

In addressing these questions, I adopt the critical praxis discussed in *Chapter 4* of shifting the focus from the '*big map'* to the *small,* the broken, unofficial and mundane, and digging deeper into the more concrete. I adopt Eugen Ehrlich's *able eye*,[3] necessary "to look into the[ir] depths"[4] and the richness entailed in them. Accordingly, my answer is that since the *big map,* as exemplified in the theory of civil disobedience, does not possess this 'able eye', it therefore does not possess the ability to detect these cases, expose them and explain them, looking into their depth. It does not and cannot explain these acts of lawbreaking, let alone categorize them as legitimate acts of resistance, capable of jurisgenerating legal meanings, and mobilizing socio-legal change.

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[2] See: Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J Legal Pluralism 1 at 21.
[3] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick, NJ: Transaction Publishers, 2002) at 504.
[4] *Ibid*.

Below I follow the same structure of *Chapter 1* on civil disobedience. Here, however, I refer to my two cases to provide a critical response to each of the definitional elements of civil disobedience.

Let me briefly reemphasize here an earlier point made in the introductory *chapter*. This is not a thesis strictly about civil disobedience, focusing on the failure of several acts of lawbreaking like the ones discussed in this thesis to comply with it. This is a thesis about how lawbreakers create law/s with, in and through their bodies. For reasons discussed in this *chapter (5)*, state law cannot approach and explain certain acts of lawbreaking with the 'tools' available for it, such as civil disobedience, and thus perceives them as mere criminals. The way/s to approach such cases is to adopt critical approaches to law/s, whereby women are perceived as making law/s anywhere and everywhere, whether or not culminating in state legal institutions.

1. Openness and Publicity

As shown above, for an act to be civilly disobedient it must be overt and committed in public. The concept of 'public' is understood both in terms of content and form: the act in question both invokes and addresses the public sense of justice, and it is committed in public and visible.[5].

1.1. Public and Visible

Requiring public visibility excludes certain forms of viable resistances that cannot be committed in public. The women of 'Jane' are a good example. As recalled these American women were engaged during the 1960's in helping other women to procure illegal abortions. What is important here is that they operated in absolute secrecy, without which their entire operation could have been compromised, risking not only themselves, and their political cause, but also the women whom they helped.

[5] See: John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Mass: The Belknap Press of Harvard University Press, 1999) at 321.

Indeed, some scholars have acknowledged that there are situations that defeat the requirement of openness. Kent Greenawalt, for example, argues that in certain cases "one's effectiveness may depend on secrecy".[6] Martha Minow also argues that at times it is secrecy rather than publicity that is "essential to the act of disobedience".[7] Both give the well-known example of the 'Underground Railway.'[8] The acts of defiance of its members, such as Harriet Tubman, defying slavery laws and helping slave fugitives to escape to Canada, could not have been committed publicly, since to do so would have jeopardized and frustrated the entire mission of helping these and future slaves. It had to be committed covertly, and yet it has always been referred to as an example of civil disobedience. Another example on which both focus is the 'Sanctuary Movement' helping undocumented immigrants to evade American immigration laws. Here as well, disobedience has to be clandestine.[9]

However, even these exceptions to the rule still do not apply to most of the women of this thesis. The examples that are given may indeed accept covert acts but they still presuppose political and conscientious convictions as the motivating basis for lawbreaking. Carl Cohen, for example, wrote that secrecy in civil disobedience is a tactic that is based on conscientious and moral beliefs obliging people to dissent. It is one that stems "from concern about the welfare of specific human beings, not from shame or remorse".[10] Their conscientiousness, he argues, "gives to their protest a sense of partial publicity".[11]

The acts of squatting and abortions are not considered as strategic or tactical, let alone based on deep political or conscientious convictions. In the case of abortions, for example, because of the

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[6] See: Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987) at 239 [Kent Greenawalt, *Conflicts of Law and Morality*].
[7] See: Martha Minow, "Breaking the Law: Lawyers and Clients in Struggles for Social Change" (1991) 52 U Pitt L Rev 723 at 737 [Martha Minow, "Breaking the Law: Lawyers and Clients"].
[8] *Ibid* at 736, 737; Kent Greenawalt, *Conflicts of Law and Morality*, *supra* note 6 at 230.
[9] *Ibid* at 230; Martha Minow, "Breaking the Law: Lawyers and Clients", *supra* note 7 at 737, 738.
[10] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (New York and London, England: Columbia University Press, 1972) at 20, 22 [Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law*].
[11] *Ibid* at 22.

sense of shame and immorality attached to the act (and to sex in general) a woman may feel ashamed and, thus, compelled to conceal her act. This is all the more so in a case of an illegal abortion. At best, and still not devoid of shame, her act can be interpreted as an act of despair, poverty, and necessity.

Taking the exception to the openness criterion, especially the one articulated by Carl Cohen, it is arguable that although the women of 'Jane' operated in secrecy, they were still civilly disobedient since their secrecy was tactical and conscientious, and concerned the welfare of other women. Nonetheless, even in such a case, their acts do not fall within prevailing definitions of civil disobedience since they lacked some other definitional elements, such as submission to punishment, which was not part of their political philosophy.

It can be argued that not only was their secrecy not tactical in Cohen's terms, or based on a strategic decision, but that it was instead reactionary and motivated by their fear of being caught. It was based on their experience and narrative as women, who, due to the larger contexts of gender bias and discrimination, may not be as willing as men to risk themselves of being caught. The women of 'Jane' insisted on secrecy because they knew that they could not risk themselves or the women they helped being caught and, therefore, wanted to avoid the possibility of legal sanctions and to evade punishment.[12] I would, therefore, not interpret their secrecy as falling within the definition of civil disobedience.

Instead, a critical approach that shifts the gaze and point of reference from the statutes, codes, definitions, and criteria to social life, and emphasizes the importance of context, could explain why the women of 'Jane' disobey in secrecy. An example could be the women of RAWA. As recalled, RAWA women acted in secrecy, resisting the terror of the Taliban from behind the veil. Were they mere criminals? Or were they civilly disobedient, defying unjust laws, and in their case the entire

[12] See: Laura Kaplan, *The story of Jane: The Legendary Underground Feminist Abortion Service* (Chicago: University of Chicago Press, 1995) at 40, 177.

regime? They viewed their acts as acts of resistance despite the secrecy involved. To act publicly in their case could have ended in catastrophic consequences for them and the women and children to whom they have helped.

As discussed above, feminist, critical race and gender-based theories, each from a unique perspective, understand the law as a site of power and dominance, based on and constructed from an androcentric and racial stand point, devoid of and blind to the personal and yet political experiences of women.[13] They explain socio-legal phenomena from wider and intersecting contexts and perspectives, such as gender and race, and reveal state law's role in subordinating underprivileged minorities and groups, and in the construction of racial and gender-based identities. Taking a feminist perspective focuses on how these women's decisions to act secretly, and their subsequent acts, cannot be read without reference to these wider contexts, correlating, amongst others, between the privacy and secrecy of their acts and their gender.

Read against this background, the criterion of public visibility is oblivious to the fact that there are cases in which women, such as Mizrahi women squatters and women having abortions, cannot perform their acts of disobedience in public, not because they are motivated by greed, self-interest and selfishness, like an 'ordinary' criminal, "avoiding the public eyes."[14] Rather, it is due to several interrelated factors obliging them to act covertly.

A key factor is comprised of the larger socio-historical and gender-based contexts of male subordination that have confined women to the private sphere of life for centuries, preventing them from appearing, operating and expressing themselves, let alone resisting, in the public domain. Another factor is that defying the law in public endangers these women not only with public denunciation and resentment, but also with the danger of imprisonment and legal sanctions. In the

[13] See *Chapter 4*.

[14] See: Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, On Violence, Thoughts on Politics and Revolution* (San Diego, New York, London: A Harvest Book, Harcourt Brace & Company, 1972) at 75 [Hannah Arendt, *Crises of the Republic*].

case of Mizrahi women squatters, for example, squatting openly will expose them to the risk of an immediate eviction by the mechanism of *self-help* in the case of *fresh trespass*, or by a court order in the case of a trespass discovered more than 30 days after the actual act of trespassing.[15] It is in their interest to stay unnoticed as long as they can, at least for the first 30 days.

Finally it is often the case that these women are categorized as criminals not only for acting contrary to law, but for acting contrary to prevailing sense of morality. Abortions, for example, may be viewed as morally wrong, regardless of their legal status. As discussed above, in both pre- and post-legalization Canada, starting with physicians, and currently encompassing larger parts of the public, abortions have been and still are perceived as immoral, and as an indication of a deterioration in sexual mores, which have traditionally confined women to the sanctity of marriage, as wives and mothers. Given the gender-based rhetoric of motherhood, confining women to the corners of their wombs, and wishing to avoid embarrassment, 'shame' and perhaps public disapproval and denunciation, even prosecution in the case of illegal abortions, and, the possible impacts on others, such as midwives and physicians, these women will try to conceal their acts of lawbreaking.

1.2. The Majority's Sense of Justice

As recalled from the discussion on civil disobedience, John Rawls stated that for an act to be civilly disobedient it must appeal to the majority's sense of justice.[16] The rationale behind this requirement is the need to distinguish between the civilly disobedient whose acts are based on *collective* notions of *justice* applying to all and reflective of the *majority,* and the 'ordinary' criminal, whose acts are based solely on self-interest and greed.

[15] See: Land Law 5729-1967, Sections 18-19.
[16] See, *Chapter 1* on civil disobedience.

Central to this concept is the theme of collectivity. Not only is the act of defiance not private, it is also not an individual act resembling that of the 'ordinary' lawbreaker. The act in question is a rather collective act. As noted above, it is collective in two ways: 1) by addressing principles of justice, and committed to the rule of law, the dissenter acts for the sake and on behalf of that majority, invoking its sense of justice; and 2) the dissenter 'speaks' for a particular community, usually a political or cultural minority, that she is a member of, which the acts of disobedience are concerned with, and whose narrative and distinct needs she wishes to address and draw attention to. These two key aspects of *majority* and *justice* and *group membership* provoke several questions and qualifications.

a) Majority and Justice

Requiring a shared and unifying sense of justice corresponds with and is reflective of the monist and positivist premise of singularity, insisting on universalization, categorization and codification of contexts, experiences and normative orders under One Law regardless of difference. It reflects an androcentric understanding of what justice is, and excludes the unique life experiences of women. As such, it prevents any possibility of understanding what these women are actually saying by and communicating through lawbreaking, and, thus, prevents us from approaching their acts as justifiable resistance.

The women of this thesis do not appeal to the sense of justice of the majority, and cannot be considered to act justifiably in breaking the law. Mizrahi women squatters break the sacred right to property, provoking general Israeli sentiment against their acts; and women having an abortion, all the more so when illegal, violate the society's sense of justice by 'killing' the fetus, and jeopardizing the marriage institution.

b) <u>Group Membership</u>

As noted above, the act in question is a collective one, whereby the dissenter 'speaks' for a particular community, usually a political or cultural minority of which she is a member. This requirement of group membership resonates with the organizational and institutional characters associated with legal centralism and positivism, and also with what is referred to by John Griffiths as 'weak legal pluralism'.[17] The two cases in this thesis are occupied with 'private' cases of resistance and lawbreaking, committed by women as individuals, who might belong to a minority or discriminated against group based on their shared identities, but who are, nevertheless, not affiliated with any larger association or group of lawbreakers.

Such institutional insistence on group affiliation is problematic for several reasons. It ignores the collective aspects of these women's acts, resisting injustice, as further discussed in *Chapter 6*. Instead, taking a community and contextual-based approach to lawbreaking, would reveal the *collective* nature of *individual* acts of lawbreaking, located on a larger community-based continuum, from which they have stemmed even in cases where such communities might not be organized nor recognized as such.

Insistence on group affiliation ignores the fact that in certain cases the notion of membership and belonging to a certain group is fluid and complex. Some individuals, such as the women of this thesis, might belong to a certain group because of a particular identity affiliation, such as ethnicity, but such a group might not be recognized by state law, as in the case of Mizrahi women squatters, nor organized by internal institutions regulating their lives. Moreover, as discussed above, and especially in the context of 'women' as a group, women might belong to several intersecting communities. For example, black and/or aboriginal women having abortions complicate the notion of a homogenous membership and community organization.

[17] See: John Griffiths, "What is Legal Pluralism?" (1986) 18:24 J Legal Pluralism 1 at 5.

The criterion of openness and public visibility, then, emphasizing group or community collectivity, excludes women who do not belong to an organized community, but who resist alone, in private. We are prevented from exposure to the voices and narratives of the women involved, and also from understanding the legal depth embedded in their acts of lawbreaking. These are acts that despite their 'private', individual, and allegedly not-politically-based acts are located on larger, collective and historical continuums, bearing collective and political features.

2. <u>Submission to Punishment</u>

Submission to punishment is considered an important heroic virtue by which the dissenter declares that she may be indeed breaking the law but is willing, as a proof of her fidelity to the law, to bear the consequences, and sacrifice herself for the greater cause invoked by her lawbreaking.

This criterion, however, particularly requiring imprisonment, is problematic since it reflects ideals that were probably formulated, written and practiced mostly by men, and in particular ones who had privilege both in terms of access to monetary resources and social networks, and could bear the consequence of their acts. It does not take into consideration the different and complex contexts of lawbreakers, each articulating unique rhetorics of resistance and dictating different forms and modes of defiance. This is true especially in the case of women for whom submission to punishment could be devastating and at times even disproportionate to their acts. How can a Mizrahi single mother submit to punishment? Who will take care of her children? Are not they at risk of being taken by the social services, tearing her family apart? Can she afford legal counseling and representation?

The women in this thesis do not have the privilege to submit to, and cannot risk, imprisonment, let alone follow the Gandhian principle of submitting to it willingly and lovingly. The Gandhian concept of patience and *tapas,* self-suffering, may prove to be too idealistic and not entirely realistic in the context of these women. Can a pregnant woman who wishes to have an abortion

afford to be patient? Can a Mizrahi single mother afford to wait without a roof over her and her children's head? How can she wait, when waiting and patience are ones of the problems and factors leading to squatting?

The punishment that these women may face if caught is not only legal, it is also moral and social. As discussed above, they risk community denunciation not only of their acts but also of themselves. The public humiliation associated with abortion, for example, and sexual 'misconduct' in general, can be much more intimidating for these women than the actual legal sanction. One could, therefore, go even further and argue that submission to punishment may be even relatively less significant than what these women have to go through in the course of their lawbreaking. For example, in the context of abortion, what women undergoing abortions have to endure and sacrifice may render imprisonment relatively less significant. As pointed out above, Canadian women, like Mizrahi women squatters, had to create their own solutions, creating their own private underground world of illegal abortions, of "extra-legal abortion regime".[18] They risked their lives, and at times actually lost their lives, having two main 'options': either attempt to self-induce abortion using dangerous instruments; and/or to resort to the aid of illegal abortionists, some of whom are infamously known as 'back-alley butchers', exposed to "sexual abuse, injury, and death".[19] Perhaps this is *tapas* and self-sacrifice in this particular cotext.

Fidelity to law is yet another important theme associated with submission to punishment. Willingness to bear the legal consequences of her act is indicative of the dissenter's respect for and fidelity to the law. Following this rationale, being willing to submit to punishment, especially imprisonment, bears some important communicative aspects – going to prison is one of the

[18] See: Janine Brodie, Shelley A M Gavigan & Jane Jenson, "Chapter 1: The Politics of Abortion" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) at 11.
[19] See: Carole Joffe, "Portraits of Three "Physicians of Conscience": Abortion before Legalization in the United States" (1991) 2:1 Journal of the History of Sexuality 46 at 46 [Reprinted in John C. Fout & Maura Shaw Tantillo eds, *American Sexual Politics: Sex, Gender and Race Since the Civil War* (Chicago: University of Chicago Press, 1993)].

dissenter's platforms for communicating her speech and message. It is one of her dialogic means for eliminating or at least reducing public animosity and alienation towards her and her acts, and drawing attention, gaining publicity and raising awareness to the cause/s promoted by her lawbreaking. By accepting punishment, she declares that she is still part of the law-abiding community. Her fidelity to the law, then, manifested in her submission to punishment, has the opposite-inclusive effect, of 'bringing her back' to the community.

It may well be argued that the women of this thesis are, indeed, risking their disassociation from the law-abiding community by not submitting to punishment, jeopardizing the opportunity for a dialogic persuasion and communication with the authorities and the public. However, these women's acts are not the ones that exclude them from the domains of law-abiding communities, and their unwillingness to submit to punishment is not what can 'bring them back'. That is, these women belong to groups already discriminated against. It is their societies and 'law-abiding' communities that have appropriated them into the domains of marginality by discriminating against them and subjecting them to inequality and injustice. Lawbreaking is the result of their reaction and response to the misogynist or racist mechanisms, and at times the intersection of both, that have discriminated and excluded them. They cannot be more excluded than they already are. It is their lawbreaking that could generate a 'moral dialogue' with society and state law, and it is, therefore, what can signify and enable not only their inclusion into society but also society's inclusion into their own worlds.

From a critical approach perspective, submission to punishment is not a necessary criterion for expressing fidelity to law. The Black-American sit-in movement is a good example. Their lawbreaking sparked the civil-rights movement and eventually led to the enactment of Title II of the Civil Rights Act of 1964 prohibiting racial discrimination in places of public accommodation. One of their tactics was 'jail not bail', preferring to remain in prison. They were using the state

legal system for their own advantage, using jail as a platform for addressing their cause and as a means of reversing the burdens of bail over to the system itself. It is, nonetheless, arguable whether the sit-inners considered that they were sacrificing themselves, engaged in a patient dialogic persuasive process, or whether they were indeed concerned with expressing fidelity to the law. In fact, it is well documented that they were not concerned with the legal aspects of their protests, causing major controversies with the NAACP.[20] If anything, they were deeply disappointed with the law and were extremely impatient, especially with lack of "progress of school desegregation."[21]And yet, despite their disrespect of the legal system, the sit-ins are considered pioneering expressions of mass civil disobedience.

3. Non-Violence

As discussed above, most theories on civil disobedience, albeit differing on the question of extent and degree, consider non-violence an essential element. They all perceive non-violence as an important medium for demonstrating the dissenter's fidelity to law, and as a communicative means of public persuasion. Some scholars, however, take a different view. Whilst acknowledging that non-violence is, of course, preferable, they do recognize the possible merits of violence, the existence of which should not be approached as revolutionary acts and, thus, exclude one's acts from the definition of civil disobedience. Carl Cohen, for example, who used to be one of the leading voices in demanding absolute non-violence,[22] later changed his mind and argued that

[20] For further discussion, see: Martin Oppenheimer, *The Sit-In Movement of 1960* (Brooklyn, NY: Carlson Publishing, 1989) [Martin Oppenheimer, *The Sit-In Movement of 1960*]; Jack M Bloom, *Class, Race, and the Civil Rights Movement* (Bloomington: University of Indiana Press, 1987); Derrick Bell, "An Epistolary Exploration for a Thurgood Marshall Biography" (1989) 6 Harv BlackLetter LJ 51.

[21] See: Martin Oppenheimer, *The Sit-In Movement of* 1960, *supra* note 20 at 21, quoting Leslie W. Dunbar, "Reflections on the Latest Reform of the South" (1961) 22 Phylon 251 at 251-252.

[22] As recalled, at one point, Carl Cohen used to argue that even in cases involving severe violence inflicted upon the dissenter, "an act of civil disobedience must be *nonviolent",* (See: Carl Cohen, "Essence and Ethics of Civil Disobedience", *The Nation* (16 March 1964) 257 at 258).

requiring non-violence as an essential element of civil disobedience "would be arbitrary",[23] for there are situations where violent conduct can qualify as civil disobedience.[24] Unlike Elliot Zashin, who accepted only counter-violence as self-defense, but nonetheless asserted that this counter-violence could never be deliberate,[25] Cohen argued that certain circumstances could justify a deliberate use of violence.[26] Such circumstances could include wanting to attract greater and faster public attention[27] or when compliance with an unjust law will result in "personal injury to innocents".[28]

Howard Zinn was perhaps one of the most vocal voices against non-violence in civil disobedience. He considered an absolute non-violence approach to civil disobedience as a fallacy given the complexities of reality,[29] and suggested that "circumstances and results determine tactics".[30] Similarly, Christian Bay not only clearly objected to absolute non-violence but argued that under certain circumstances violence can be tolerated. For him, civil disobedience is not a "nonviolent action".[31] Unlike the latter concept, civil disobedience does not rule out violent acts. The dissenter should deploy "carefully chosen and limited means".[32] This means that she should not choose the means of protest lightly, but rather should "rationally calculate[]"[33] the efficiency of the available means to achieve her goals, one of which, carefully chosen and proved to be the most effective

[23] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law*, *supra* note 10 at 24.
[24] *Ibid* at 25.
[25] See: Elliot M Zashin, *Civil Disobedience and Democracy* (New York: The Free Press, 1972) at 116-117 [Elliot Zashin, *Civil Disobedience and Democracy*].
[26] See: Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law*, *supra* note 10 at 25-26.
[27] *Ibid* at 25.
[28] *Ibid*.
[29] See: Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* (Cambridge, Mass: South End Press, 2002) at 52.
[30] *Ibid* at 42.
[31] See: Christian Bay, "Civil Disobedience", in David L Sills, ed, *International Encyclopedia of the Social Sciences* (New York: Macmillan Company & Free Press, 1968) vol 2 473 at 474. Also available online: Encyclopedia.com <http://www.encyclopedia.com/doc/1G2-3045000190.html> (Last visited: 30.8.2018).
[32] *Ibid* at 473, 474.
[33] *Ibid* at 474

could be violence.[34] Joseph Raz also argued that non-violence cannot be absolute, ruling out violence for political gains completely.[35] He pointed out that at times non-violent acts may be much more harmful than an actual violent act.[36] Furthermore, commenting on Eugene Rostow's article against civil disobedience discussed above, Patricia Harris argues that violence does have important merits, some of which are the social changes that it can lead to.[37]

Both non-violence criterion, whether absolute or moderate, and the views allowing violence in civil disobedience, exclude these women's lawbreaking from the scope of civil disobedience. The debate over violence focuses on whether or not violence should be used as a supplementary, extra means by dissenters in the course of their acts of disobedience. Here, however, the women's acts are in and of themselves considered violent. Mizrahi women squatters are acting violently against the State's property and prevent legally eligible families from enjoying their right to housing. Women having abortions are said to be acting violently against the fetus. As such, by committing acts of lawbreaking that are considered in and of themselves violent, it is arguable that it is immaterial and irrelevant whether or not they use violent means in their defiance of the law. They are already considered violent. Their acts are not external to them. They are not their 'extra-legal' means but are their protest in and of themselves.

Even if that were not the case, they would still be excluded from the definitional scope of non-violence. For example, one of the major arguments raised by the state in squatting cases is that the women squatters violate and disrupt the public order, causing anarchy, chaos and instability, especially by violating the right to housing of families that were found eligible for public housing, and who have been waiting patiently for the allocation of one. The state fears that granting

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[34] *Ibid*.
[35] See: See: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 268.
[36] *Ibid* at 267.
[37] See: Patricia Roberts Harris, "Comment" in Eugene V. Rostow, ed, *Is Law Dead?* (New York: Simon and Schuster, 1971) 103 at 107-109.

squatters with any legal entitlement would amount to rewarding them for their wrongdoing and would jeopardize the public order and promote anarchy, further encouraging "other women to break the law and squat, instead of legally exhausting their rights."[38]

The question now asked is whether these women's acts should be characterized as acts of violence. It can be argued that it is the state's own violence to which the women squatters react.

That is, as argued below, it is the Israeli discriminatory and segregating land regime and housing policies directed against Mizrahis, especially those concerning the deprivation of the right to land ownership, from which the squatting phenomenon has emerged, and through which we need to approach this phenomenon. It is these mechanisms and policies that have violated the public order in the first place, creating a discriminatory reality, whereby these second and third generation Mizrahi women lack the fundamental right to adequate housing and are, therefore, obliged to create their own solutions and squat. Their poverty, dependence on state support, and lack of housing are all the results of a continuous injustice. Their act of squatting, then, is a response to this unjust reality, not the cause of it.

Furthermore, the reality in which many families are forced to wait for several years for the allocation of a public house is the result of both the state's negligence in failing to enlarge the number of public houses – either by building or purchasing new ones – and also the public housing companies in failing to efficiently and properly manage, supervise and regulate available existing houses. At the same time, the criteria of eligibility for public housing are being hardened and the number of available vacant public houses reduced due to the sale of public housing, in accordance with the Purchase Act and the various governmental programs following it. These long waiting lists are not the result of squatting but rather are one of the reasons for it. The state could be characterized as violent, both historically and presently, in creating an impossible situation

[38] See: Section 9 of Administrative Petition (Tel-Aviv) 1027/03 *A. M. v. The MCH* [Not Published 22 May 2003] (Respondent's Statements of Claims) [Hebrew].

whereby people, most of whom are Mizrahis, have to compete against each other for the same public good.

In the case of abortions, it is possible to argue that preventing women from exercising freedom over their bodies, and appropriating their rights to decide for and by themselves, is an act of violence. On the one hand, carrying on with an unwanted pregnancy could expose these women to violence by their families and society, ranging from emotionally inflicted violence – such as family and public denunciation, outcasting, humiliation, and forced-marriage – to physical violence and even death. Forced to carry on with an unwanted pregnancy, whether made to by family and/or as an act of despair, and having no access to abortion services could be interpreted in and of itself as an infliction of violence.

On the other hand, having an abortion, particularly under a legal regime where abortions are illegal, also exposes women to violence. As discussed above, these women risk their lives, and at times lose their lives. Moreover, sexual relations resulting in pregnancy may be perceived as sinful in the case of adultery, shameful in the case of unmarried women, or selfish in the case of married women not wanting to be mothers or not wishing to have more children, such that women having abortions could be at further risk of violence when their abortion is found out. It could be argued, then, that these women's acts of lawbreaking are a kind of self-defence, acting in counter-violence against the state's own violence directed against them, while having to protect themselves from the violent possibilities of homelessness and social condemnation.

The argument that their acts constitute self-defense is difficult to make in the context of squatting and abortion. Self-defense is a reactive act, reacting to, initiated as a result of, and forced upon her by, violence inflicted upon the dissenter in the course of her civil disobedience. It is consequential and external to her civil disobedience. Squatting and abortion, however, are initially, in and of themselves acts of active violence. Consequently, they do not fall within Zashin's self-defense

exception.[39] Moreover, their acts, endangering property and the life of the fetus, are deliberate acts of violence and are difficult to define as civil disobedience.[40]

4. Political Convictions

This criterion of political conviction demands that acts of civil disobedience should be politically motivated, designed at bringing about political, social, and/or legal change. The emphasis is on distinguishing the dissenter from both the 'ordinary' criminal who is motivated by greed and self-interest, and from the revolutionary who does not acknowledge the legitimacy of the general legal and political order. This criterion is exclusionary, reflecting and further privileging the interests, needs and values of relatively strong groups and communities that can comply with openness and political engagement. It consequently enables only such communities to be engaged in justifiable lawbreaking.

Following feminist critique that connects the personal and the political,[41] women may be engaged in lawbreaking, but due to the larger political and social constructions that have excluded them from the political domains, these women cannot translate their acts of personal experience into a recognizable language that could presumably entail deep political mores and convictions.

This is an important point. This inability to translate their grievances into a recognized and feasible political language is manifested in and translated into their exclusion from participating in the process of state lawmaking, all the more so in the context of lawbreaking. As argued above, even in the form of civil disobedience, lawbreaking and lawbreakers can mobilize legal change, provided that their acts can be legalized by falling into the criteria of civil disobedience, and translated by state officials and professionals, culminating in and leading to, state legal institutions.

[39] See: Elliot Zashin, *Civil Disobedience and Democracy*, *supra* note 25 at 117.
[40] See: Hugo A. Bedau, "On Civil Disobedience" (1961) 58:21 The Journal of Philosophy 653 at 656.
[41] See for example: Carol Hanisch, "The Personal is Political" in Shulamith Firestone & Anne Koedt, eds, *Notes from the Second Year: Women's Liberation in 1970* (New York Notes, 1970) 76.

Even in the paradigmatic cases of civil disobedience with well-articulated and well-founded politically motivated people, the language of lawbreaking is translated into state law language. For the women of this thesis, their language of lawbreaking is not political and, thus, does not meet the criteria of civil disobedience.

These women may be guided by something the thesis would label 'intuitive resistance', which reflects what may seem on its face as personal necessity and self-interest, but which is actually grounded in the wider political context of discrimination, and invokes larger principles of equality and justice. For example, as noted above, Israeli law is neither sympathetic to acts of squatting nor sympathetic to the women involved. Taking a contextual approach, it is argued that their 'private' and allegedly not-politically-motivated acts are embedded in, and reveal, a larger context of Ashkenazi discrimination, and have a political dimension. Reading lawbreaking from its static and non-processual monist perspective not only prevents us from revealing the political motives underlying these women's acts of lawbreaking, but also prevents us from understanding the deep political implications and effects of their acts. For example, in the context of abortions, the act of abortion may have an important redeeming, mobilizing and politicizing effect on the woman involved. From reading several personal stories of women who had abortions, it was evident that for some of them the decision to abort, and acting upon it had strong self-empowering effects. The words of Natalie provide insight:

> I feel it was an important *turning point* in my life; perhaps the *decision* to carry it out *was my first adult decision,* made with willingness to sustain the consequences myself.[42]

The key element here is the concept of 'decision-making'. It could be argued that taking the decision to abort, and further acting upon it, were Natalie's medium and platform to participate in

[42] Natalie, brought in Childbirth by Choice Trust, ed. *No Choice: Canadian Women Tell Their Stories of Illegal Abortion* (Toronto: Childbirth by Choice Trust, 1998) 105 at 109. Emphasis added.

a political and democratic process of decision-making. Was her decision not an act of self-determination and autonomy?[43] Read this way, abortion for Natalie was not a desperate act based on a personal necessity. It was a political and politicizing act, a mile-stone moment, signifying the moment of realization, acknowledgement, and appropriation, of her right of control over herself, her life and body, and her right to make decisions regarding herself.

The actor may act intuitively but her acts may also bear lager public and political implications. She does not have to articulate her lawbreaking in political terms in order for it to be political, especially when she might not have the 'required' vocabulary. By approaching socio-legal phenomena internally, state law cannot approach, explain and interpret these acts, striving to 'legalize' their language, by using the same language that excludes them from its scope initially.

It is interesting to briefly pause here on a counter-argument that arises in the context of 'intuitivity'. One might rightly argue that these women are motivated by a political conviction that is not entirely intuitive. Rather, this is an explicitly political act, even if they are not aware of it, or do not realize the larger contexts in which it lies or perhaps do not have the 'required' vocabulary and language to articulate it in 'accepted' and legitimate political terms. A key example comes from the women of RAWA. As recalled from Saira Shah's documentary "Beneath the Veil", despite the risk of being imprisoned, some Afghan women insisted on painting their nails and faces. For them, said the owner of the beauty parlor to Saira Shah, it was *"a form of resistance"*.[44] It was their way of holding, as Saira Shah said, *"on to their dignity"*.[45]

[43] On this point see: Donna Greschner, "Abortion and Democracy for Women: A Critique of Tremblay v. Daigle" (1990) 35 McGill LJ 633 [Donna Greschner, "Abortion and Democracy for Women"].
[44] See: Saira Shah, "Beneath the Veil: The Taliban's Harsh Rule of Afghanistan" (2001), online: <https://topdocumentaryfilms.com/dispatches-beneath-the-veil/> (Last visited: 30.8.2018).
[45] *Ibid.*

Another example is Anita. On our first meeting, explaining why she had squatted, Anita, said: *"You know Claris, all I want is to live in dignity"*. This short, and yet deep, sentence, bore profound significance and implications (also upon myself).[46]

It should be noted that the women of RAWA do contextualize their lawbreaking and correlate it to resistance, and in this differ from the women of this thesis. Nevertheless, what is important is the mundane aspect of the day-to-day entailed in their acts of resistance. For these women, human dignity was not an abstract concept dependent on 'great' philosophical or political theories. Rather, it was a right based on the equal distribution of what seemed facially to be basic necessities.

Capturing in few words the essence of the right to dignity, these women translated their needs into rights, correlating, for example in the case of Anita, between the right to dignity and the right to housing which as recalled, is not yet recognized by Israeli law as right in and of itself, but, as a part of the right to dignity. Embedded in this political and legal language of rights, Anita's squatting, and these Afghan women's makeup, then, are more than a desperate response to a desperate situation. It is a political act of protest against an unjust reality.

These women politicized their personal narrative of need and allocated it on a larger context of their basic right to dignity. Their acts are more than a desperate response to a desperate situation. They are political acts of protest against an unjust reality. Following Kimberley Brownlee, their lawbreakings are political acts, since they are grounded in established and well-founded convictions,[47] and are based on and motivated by objective reasons, "such as justice, [….] rights, integrity, [….] autonomy, equality, privacy, and so on."[48] Interestingly, Kimberley Brownlee does not include 'dignity' in her list.

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[46] For further discussion, see: Claris Harbon, "On Sense and Sensitivity: A De/constructive Quest for My Mizrahi (Grass) Roots and Identity in Legal Representation" in Shlomit Leer et al, eds, *For my sista: Mizrahi Feminist Politics* (Babel Publishers, 2008) [Hebrew].

[47] See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience and Lawful Punishment (2007) 1 Crim L & Philos 179 at 183.

[48] *Ibid*.

Interrelated with the criterion of political conviction is the concept of conscience. As discussed above, the dissenter truly believes that a certain law or policy is deeply unjust and that compliance with it would jeopardize her sincerity and integrity. Two issues arise here.

First, this articulation of conscience excludes women, such as those in this thesis. Their actions are interpreted at best as reactionary responses to a personal necessity devoid of a deep belief that the law in question is unjust. They may have not articulated their actions in terms of contestation and response to ethnic and/or gender discrimination, however they knew they were deprived of the right to dignity. Why, then, do they have to conscientiously explain their acts vis-à-vis an unjust law?

An approach that requires conscience potentially excludes people with different levels or kinds of conscience and with different understandings of what is political and how to articulate it. It silences them by taking their voices and delegitimizes them and their actions. It is oblivious to the possibility that perhaps the fact that one cannot explain her acts in the way that state law allows her stems from the same injustice/s against which she now contests. These are the same oppressive mechanisms that have deprived her of the privilege to contextualize and politicize herself and her actions by locating them on a larger historical continuum, understanding that her problem is not isolated, but rather is collective. Such mechanisms have entrapped her in a vicious cycle. Not only do they discriminate against her and deprive her of a certain right, they also deprive her of the right and legitimacy to protest, and of the means, and in our case the linguistic means, with which she could one day legitimately contest it, and 'translate' and articulate it in terms that state law could understand and find justified.

Second, articulating civil disobedience in terms of conscience can lead, following Hannah Arendt, to clashes and conflicts of consciences, whereby "conscience will stand against conscience".[49]

[49] See: Hannah Arendt, *Crises of the Republic, supra* note14 at 64.

The women of Jane for example, were motivated by strong conscientious convictions, deeply believing that the law prohibiting abortions was unjust and thus had to be disobeyed. However, such a strong conviction can be argued to be in conflict with the conscience of a person who thinks that abortion is a sin, a crime and, thus, that any law allowing it must be disobeyed. Similarly, as seen above in the context of the legal arguments raised against Mizrahi women squatters, it could be argued that Anita's legitimate wish and right to live in dignity clashes with the rights of other families, probably also Mizrahi, who were found eligible for a public housing but did not break the law and are patiently waiting for the allocation of one.[50]

Civil disobedience is an important tool for expressing one's dissatisfaction with injustices and inequalities. Yet, it is defined in a way that excludes certain forms of lawbreaking, especially when committed by women, approaching them as mere manifestations of crimes, or at best as acts motivated by despair, necessity, and poverty, instead of approaching them as expressions against despair, necessity and poverty.

The acts of the women in this thesis do not fall within the current definition of civil disobedience. They act covertly, in silence, alone. They seem not to be motivated by deep political convictions, and they strive to find solutions to their own 'private' problems, not appealing to the majority sense of justice. Their acts do not express fidelity to law. Even when their acts might fall within a certain exception to a specific definitional element, as with the criterion of openness, having to secretly break the law, since to do otherwise would frustrate their mission and goals, they still do not comply with the rest of the definition. As argued above, their secrecy is presumably not

[50] On this question of conflicts, see: Robert M Cover, Owen M Fiss, & Judith Resnik. *Procedure* (West Company Publishing, 1988) at 729-730. Cover recognized that there are cases in which certain nomoi attract different normative-moral judgments that might justify their exclusion, for example, when he referred to the white southerners who resisted the decision in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954). Peter Singer argued that in such cases of 'conflicts of conscience' one should refer to the question of fairness. For example, in the context of school segregation, he argued that disobeying segregationist laws is not the same as disobeying integrationist ones. (See: Peter Singer, *Democracy and Disobedience* (Oxford: Calderon Press, 1973) at 71). For an opposing view, see: Hugo A. Bedau, "On Civil Disobedience" (1961) 58:21 The Journal of Philosophy 653 at 660. Bedau thought that there was no logical reason why one could not disobey racial desegregation. (*Ibid*).

political, regarded as motivated by fear and shame, and is, therefore, following Carl Cohen, excluded from the scope of the definition.

Even the more progressive theories of civil disobedience eventually follow the centralist and positivist theme of internality and criticize the definition internally, i.e., from inside it, perceiving it as a source of reference from which they might depart, wholly or partially, but which is still central and prevalent. Moreover, even when debating a certain definitional element, the discussion does not extend beyond the concept of definition itself. The definition still exists. It is only the scope and extent of its elements that are questioned and debated. The point is that, even if violence may be accepted, and even when secrecy may be legitimized, civil-disobedients are still political people, acting collectively, and willing to sacrifice themselves for a greater public cause. Civil disobedience theory is articulated as one of heroism and nobility. The result is that only organized groups, mostly relatively privileged ones, can comply with this definition and, thus, engage in justifiable lawbreaking.[51]

This thesis departs from such a theory altogether and offers a contextual approach for understanding acts of lawbreaking. This is an approach by which even a single mother could protest against injustices in her own way, with her unique language and voice. It is an approach that will not insist on the question of whether these women respect state law, but will rather focus on the language she creates. Donna Greschner wrote that "[t]he essential first step toward the understanding and unfolding of a women's language, concepts, theories and morality, is to hear

[51] Ironically, this narrowness results in allowing well-organized, extreme non-egalitarian groups, such as the New-Right and anti-RJ movements in the US, to articulate their resistance to certain laws, such as laws of abortions, in terms of civil disobedience. Using relatively left-oriented language, adopting some important themes from the black-American sit-in and civil-rights movements' rhetoric, these groups deploy the rhetoric of civil disobedience: acting collectively, motivated by deep political convictions, and addressing what they think to be the sense of justice of the majority. 'Operation Rescue' is one of the most predominant anti-RJ organizations to use the civil disobedience tactic of sit-ins. Whilst they use this rhetoric to intimidate women and physicians, the women in this thesis are excluded from the protection of the theory of civil disobedience; which, ironically, was designed to allow aggrieved people, amongst which are the women of my thesis, to protest against injustices.

every woman's story."[52] Freedom and equality, she argues, cannot be achieved, "unless we listen very, very carefully to what women are saying, unless we begin with a phenomenology of women's lives."[53]

This is what I try to do: listen very carefully to what these women are saying when they break the law, and open that *able eye* so that their depth can be seen and heard. This theme is at the centre of the next *chapter*, listening very carefully to these women's music of legal meanings, jurisgenerated in the course of their lawbreaking. With this I now turn to the next *chapter*.

[52] See: Donna Greschner, "Abortion and Democracy for Women", *supra* note 43 at 647.
[53] *Ibid*.

Chapter Six - Resisting the Present, Redefining the Past: Lawbreaking, Resistance and Lawmaking

"... history is teacher and judge, and historical truth in and of itself is justice."[1]

Chapter 5 discussed how the definitional elements of civil disobedience cannot encompass the acts of resistance described in this thesis. The question that now arises is why the reference point of state law has to be the only way to lend meaning and significance to the resistance actions of the women. This is where critical approaches to law allow us to understand and respond to squatting and abortions very differently, not in a way that emphasizes the vulnerability of these women, but rather in a way that illustrates their strength, determination and, indeed, power. *Chapter 6* shows how the acts of squatting and abortion, if approached differently using the critical approaches discussed in *Chapter 4*, might be redefined as acts of resistance with jurisgenerative aspects through which they can be seen as laws in and of themselves.

The following three sections focus respectively on the jurisgenesis entailed in the acts of Mizrahi women's squatting and embedded in the case of abortions situated in Canada. *Section 1* shows how squatting can be interpreted as meaningful message and participation. *Section 2* shows how we can interpret women's abortion experiences as indicative of struggle and assertion. *Section 3* synthesizes the discussion on affirmative squatting and abortion.

[1] See: Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) at 69.

1. Mizrahi Women Squatters – From Object to Subject

"My students, most of whom signed up expecting to experience that crisp, refreshing, clear-headed sensation that "thinking like a lawyer" purportedly endows, are confused by this and all the stories I tell them in my class on Women and Notions of Property. ***They are confused enough by the idea of property alone, overwhelmed by the thought of dogs and women as academic subjects, and paralyzed by the idea that property might have a gender and that gender might be a matter of words."***[2]

The reader has already been introduced to the individual stories of Anita, Miriam, Dina, and Keren. The purpose of this section is to place these stories in broader perspective. As we have seen, their acts of squatting do not count as civil disobedience. These Mizrahi women squatters break the rules of property law by taking unlawful possession of vacant public houses. These women are considered trespassers and 'invaders', who have unlawfully taken over public property belonging to the state, and are illegally occupying it without any formal legal entitlement to that property. They are, therefore, soon evicted either by court order or through mechanisms of "self-help".[3]

As further explained, Israeli courts, following Western legal tradition, are committed to preserving the premise of the rule of law, preferring state-centered legalism. Socio-legal questions and phenomena, especially in cases involving lawbreaking, are 'juridified',[4] in Gunther Teubner's words, when the act of lawbreaking is assessed within the boundaries of state law. Guided by what Ehrlich called 'rules of decision',[5] courts use and apply the 'permissible' and exclusive 'tools' offered by state law to explain these acts, and to which these acts *'must fit'*.[6] The courts approach these cases internally, in isolation, viewing the squatting woman involved as an autonomous

[2] See: Patricia J Williams, *The Alchemy of Race and Rights: A Diary of a Law Professor* 13 (Cambridge, Mass: Harvard University Press, 1991) [Patricia J Williams, *The Alchemy of Race and Rights*]. Emphasis added.
[3] See: Land Law 5729-1967, Sections 18-19, discussed in *Chapter 2*.
[4] See: Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 Cardozo Law Rev 1443 at 1455 [Gunther Teubner, "The Two Faces of Janus"].
[5] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick, NJ: Transaction Publishers, 2002) at 10-11. [Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*].
[6] See: Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Soc & Leg Stud 57 at 64. [Emmanuel Melissaris, "The More the Merrier?"]. Emphasis added.

individual isolated from any group affiliation, and devoid of larger external normative universe/s, ordering/s and context/s.

This thesis argues that the internal approach does not and cannot explain these acts of lawbreaking. It oversimplifies these acts, trivializing their particularities and contexts, and, thus, misses the richness embedded in them. When we adopt, however, critical approaches to lawbreaking, especially contextuality – allowing us to better 'hear' the Mizrahi narrative – we see that these women are indeed resistant.

This is a contextual, holistic, and inclusive approach that puts real life at the centre, placing it on an ongoing historical continuum that emphasizes the correlation between past and present and reinforces the interconnectedness of everyday occurrences. Following Ehrlich, the key to understanding the present, and the present state of the law in particular, lies in the past.[7] The acts of squatting in *the present* should be put into a wide past context and explained as a response and in relation to this *past.*

A narrow interpretation of their acts, from the standpoint of state law, portrays their engagement with it only as outlaws. This, especially when one considers the fact that it is a public property, dictates a misleading legal perception that we are presumably dealing with an isolated moment in time and a given reality of an ordinary infringement of the state's property by 'an ordinary criminal',[8] whilst ignoring the historical context from which these 'violations' have emerged. Taking a decontextualizing approach, their only engagement with state law is through breaking it, not as participants in the creation of legal meanings. Their acts are non-processual, isolated, separate and distinct acts devoid of context.[9] Daniel Rabinowitz wrote that "land and real estate

[7] See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 5 at 504.
[8] See: Hannah Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, On Violence, Thoughts on Politics and Revolution* (San Diego, New York, London: A Harvest Book, Harcourt Brace & Company, 1972) at 75.
[9] Ronen Shamir, "Suspended in Space: Bedouins Under the Law of Israel" (1996) 30 Law & Soc'y Rev 231 at 233, 234 [Ronen Shamir, "Suspended in Space"].

are not a given situation [but rather] a historical process."[10] Such is the case of Mizrahi women squatters. Squatting by Mizrahi women is not a given situation of lack of homeownership as a result of 'objective' and 'neutral' causes but rather as a result of socially discriminatory structuring mechanisms. It is located within an unbounded contextual, backward-inward-forward continuum, and is a reflection of an historical process, starting back in the past with their parents and continuing through to their present.

We can understand their squatting as a response to the deprivation of equality. These women redefine property law, by redistributing the power and wealth that the first generation Mizrahis were denied, and take what could and should have been theirs as second and third generations had property and wealth been distributed equally. Their lawbreaking is their means of distributive justice. In this thesis I propose to redefine '*trespassing'* by conceptualizing it with a new label: *Affirmative Squatting.*

This critical way of thinking about Mizrahi women squatters allows us to better approach, understand and interpret their acts, and to turn these women's agency, voice, and actions into something that we can recognize as law/s. For example, following feminist critiques, approaching socio-legal phenomena from the standing point of gender and its intersection with other identity components such as ethnicity could explain the causes of inferior status and positioning of these Mizrahi women in Israeli society. In acting as a representative for Mizrahi women squatter clients, I began to question and consequently challenge the act of squatting from wider contextual perspectives, revealing the larger historical contexts from which their acts have emerged, in which they were located, and against which they were directed. With Ehrlich's 'able eye', I began to read

[10] See: Daniel Rabinowitz, "The Forgotten Option: Collective Urban Housing" (2000) 16 Theory and Criticism 101 at 105 [Daniel Rabinowitz, "The Forgotten Option"] [Hebrew].

history into their acts. Using the eloquent words of Patricia Williams, I discovered "that property might have a gender and that gender might be a matter of words."[11]

In order to learn about the contexts in which they existed, like an archaeologist whose work focuses on the small, broken and non-homogenous nor uniform pieces, I started to look at the linkages between these women, bringing them together, 'assembling' them into a bigger piece. What is important is that it is the ongoing processes entailed in real life, its concrete and actual events, all tied together and placed on a larger unbounded continuum of past, present and future, that precede and form the basis of, the law and theory. Mizrahi women squatting can be put in a historical context. And, indeed, when we explore the context in which squatting occurs, we find that these women squatters are second and third generation Mizrahi women whose parents, most of whom are North African, were brought[12] to Israel between the years 1952-1972.

1.1. The Historical Context from which the Squatting Phenomenon has Emerged

Mizrahis are Jews from Arab and/or Muslim countries who were brought to Israel after its establishment. They constitute one of the poorest and most underprivileged communities in Israel, a community that endured, and still does, structural and institutionalized discrimination by the Ashkenazi establishment. The oppressive and violent processes of exclusion and marginalization that Mizrahis have confronted in Israel, is complex and goes far beyond the scope of this thesis. For our purposes, suffice it to say that oppression has encompassed every aspect of their lives and been manifested in lack of access to education, employment, monetary resources and housing.[13]

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[11] See: Patricia J Williams, *The Alchemy of Race and Rights*, *supra* note 2 at 13.

[12] On this see see the Introduction of this thesis, *supra* note 25 above.

[13] For further discussion on Mizrahis' oppression and its effects on their socio-legal stratification including data, see: Ella Shohat, "Sephardim in Israel: Zionism from the Standpoint of Its Jewish Victims" (1988) 19:20 Social Text 1 [Ella Shohat, "Sephardim in Israel"]; Ella Shohat, "Narrative of the Nation and the Discourse of Modernization: The Case of the Mizrahim" (1997) 6:10 Middle Eastern Critique 3 [Ella Shohat, "Narrative of the Nation and the Discourse of Modernization]; Ella Shohat, *On the Arab-Jew, Palestine, and Other Displacements: Selected Writings* (London: Pluto Press, 2017); Ella Shohat, *Israeli Cinema: East/West and the Politics of Representation,* revised ed (New York

They were subject to several eugenic-based policies, from Ashkenazi kidnapping of thousands of Jewish Yemenite, Mizrahi and Balkan babies, and placing them for adoption by Ashkenazi families, also known as the Yemenite Babies Affair,[14] to the radiation experiments, especially on Jewish Moroccan children, known as the Ringworm Affair to name only a few.[15]

Mizrahis are a social and cultural category that was invented by Ashkenazi Zionism in the same manner that Orientalism[16] was invented by the West.[17] They were dehumanized and have been referred to, amongst others, as 'Schwartze-Chaies' (black animals in Yiddish), or 'Indians' in the North-American context, using the latter as a derogatory term, explicitly referring to their alleged primitiveness and savagery. Like Aboriginals in Canada, Mizrahis have suffered from a forced cultural erasure and assimilation. Similar to Canadian perception of the 'Indian', Mizrahis were perceived as savages, pre-modern and decadent, lacking whiteness and devoid of the prerequisite

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& London: I.B. Tauris, 2010) [Ella Shohat, *Israeli Cinema*]; Ella Shohat, *Taboo Memories, Diasporic Voices*, (Next Wave Book series coedited by Inderpal Grewal, Caren Kaplan, and Robyn Wiegman) (Durham, NC: Duke University Press, 2006) [Ella Shohat, *Taboo Memories, Diasporic Voices*]. See also: Joseph Massad, "Zionism's Internal Others: Israel and the Oriental Jews" (1996) 25:4 Journal of Palestine Studies 53; Sami Shalom Chetrit, *Intra-Jewish Conflict in Israel: White Jews, Black Jews* (London, England & New York: Routledge, 2010); Sami Shalom Chetrit, *The Mizrahi Struggle in Israel: Between Oppression and Liberation Identification and Alternative, 1948-2003* (Tel Aviv: Am Oved Publishers/Ofakim Series, 2004) [Hebrew]; Sami Shalom-Chetrit, *New State, Old Land, The East and the Easterners in The Jewish State of Theodor Herzl* (MA Thesis, Columbia University, 1992) [Unpublished]; Isaac Saporta & Yossi Yona, "Pre-Vocational Education: The Making of Israel's Ethno-Working Class" (2004) 7:3 Race, Ethnicity & Education 251; Shlomo Swirsky & Deborah Bernstein, "Who Worked, at What, for Whom, and for How Much?" in Uri Ram, ed, *Israeli Society: Critical Perspectives* (Tel Aviv: Breirot, 1993) 120 [Shlomo Swirsky & Deborah Bernstein, "Who Worked, at What, for Whom, and for How Much?"] [Hebrew]; Shlomo Swirsky, *Orientals and Ashkenazim in Israel: The Ethnic Division of Labor* (Haifa: Papers for Research and Criticism, 1981) [Shlomo Swirsky, *Orientals and Ashkenazim in Israel*] [Hebrew].

[14] For a thorough discussion on the affair, see: Shoshana Madmoni-Gerber, *Israeli Media and the Framing of Internal Conflict: The Yemenite Babies Affair* (New York: Palgrave Macmillan, 2009) [Shoshana Madmoni-Gerber, *The Yemenite Babies Affair*]; Claris Harbon, "Revealing the Past-Breaking with Silence: The Yemenite Babies Affairs and the Israeli Media" (2011) 10:2 Holy Land Studies (Edinburgh University Press) 229.

[15] See: Asher Nachmias & David Balchasan, "The Ringworm Children (Yaldei Hagazezet)", DVD: (Dimona, Israel: Dimona Communications Center 2003); Compensation of Scalp RingwormVictims Law-1994.

[16] See: Edward Said, *Orientalism* (New York: Vintage Book, 1979).

[17] Dialoguing with the work of critics of colonialism such as Franz Fanon and Edward Said, Ella Shohat was the first to broaden the scope of the Mizrahi narrative by placing it within the wider global context of the critique of racism and colonialism. Moving beyond the rhetoric of discrimination ('Aflaya' in Hebrew), previously used to explain the Mizrahi socio-economic position, she articulated a new Mizrahi critical language that transcended the nationalist framework of sociological, anthropological, historical, and cultural work on the subject, dismantling the Eurocentric assumptions of the hegemonic Zionist scholarship. See: Ella Shohat, "Sephardim in Israel", *supra* note 13; and Ella Shohat, *Israeli Cinema*, *supra* note 13.

features of the 'utopian-Jewish-archetype' suitable for taking part in the Ashkenazi enterprise.[18] They were subjected to racist-Eurocentric mechanisms of discrimination encompassing every aspect of their lives. Strikingly, though not surprisingly, considering the wider context of subordination whereby whiteness and blackness are not merely colours of skin, Mizrahis were compared, using David Ben-Gurion's words, to the black slaves who were 'brought' to America.[19] Ashkenazi leaders tried to portray the bringing of the Mizrahis as a heroic endeavour, saving and rescuing them[20] from their decadent Levantine cultures.[21] They were perceived as 'third-world' children deprived of the parental capacity of controlling their lives without "the benevolent help of the more "adult" and "advanced" societies".[22] The Mizrahi narrative was perceived as an 'endangerment' to the western and 'civilized' meta-foundations of the Ashkenazi ethos, and was therefore excluded from the Israeli/Ashkenazi collective memory and narrative. In a related but different vein, critiquing the East/West binarism of Zionist discourse, Ella Shohat, furthermore, argues that the fear of the Mizrahis has been deeply linked to their Eastern 'otherness', especially their Arabness, viewed as endangering the idea of a homogeneous Israeli nation.[23] In their deep affinities with the presumed enemy across the border, Shohat argues, the Arab-Jews have represented a threat to the Eurocentric imagination of Jewishness.[24]

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[18] An analysis of these images, of savagery, comparing the representation of Mizrahis and Palestinians to that of indigenous and Africans in the context of the Americas was done by Ella Shohat. She contextualized and globalized the Mizrahi narrative by placing it within the larger contexts of racial/colonial oppressions focusing on images, representaions and cultural discourses. Building on this approach, I now extend this analysis to the Canadian socio-legal context. For further discussion see: Ella Shohat, *Taboo Memories, Diasporic Voices*, *supra* note 13. See also: Ella Shohat, *Israeli Cinema*, *supra* note 13.

[19] See: Ella Shohat, "Sephardim in Israel", *supra* note 13 at 5, quoting from Tom Segev, *1949 – The First Israelis* (Jerusalem: The Domino Press, 1984) at 156-157 [Tom Segev, *1949 – The First Israelis*] [Hebrew].

[20] See: Ella Shohat, "Sephardim in Israel", *supra* note 13 at 13, 16.

[21] See: Shoshana Madmoni-Gerber, *The Yemenite Babies Affair*, *supra* note 14 at 3, referring Ella Shohat, "Sephardim in Israel", *supra* note 13.

[22] See: Ella Shohat, "Narrative of the Nation and the Discourse of Modernization", *supra* note 13 at 9.

[23] See: Ella Shohat, "Sephardim in Israel", *supra* note 13, especially at 23-26 ('Ordeals of Civility').

[24] *Ibid.*

The solution to this 'threat', striving to preserve western values of modernity and progress,[25] was the absorption policy, known as 'Absorption through Modernization'. Since Mizrahis were not perceived as equal members of the Israeli-Ashkenazi enterprise, they were forced, writes Barouch Kimmerling, "to undergo through the mechanisms of the melting-pot, a process of modernization (at times called "Israelization")".[26] In order to form part of the collective national Euro-Israeli project, as Ella Shohat argues, Mizrahis/Arab-Jews were assimilated, having to reject and conceal their cultural difference, undergoing through a process of de-Arabization, of being cleansed of their Arabness, leading to the repudiation of the Arab-Jew.[27]

Israel used inclusive-exclusive mechanisms that worked simultaneously placing Mizrahis within an impossible Israeli-Mizrahi continuum. They were located between a hammer of *'compulsory Israeliness'* that has tried to assimilate them into an imaginary Israeliness and to erase any cultural characteristics with which they came from 'there', and an anvil of '*compulsory Mizrahiness,'* aimed at constituting the relations of dominance and subordination by way of opposition to an identified 'Other'.[28] This "dual game"[29] has resulted in a situation where the Mizrahis have been entrapped between inability to assimilate into the mainstream and inability "to mobilize a

[25] See: Barouch Kimmerling, *Immigrants, Settlers, Natives: The Israeli State Between Cultural Pluralism and Cultural Wars* (Tel Aviv: Am Oved Publishers, 2004) at 294 [Hebrew] [Barouch Kimmerling, Immigrants, Settlers, Natives]. His argument here builds on the work of Ella Shohat and Shlomo Swirski.
[26] *Ibid.*
[27] See: Ella Shohat, "Sephardim in Israel", *supra* note 13, especially at 7-9, 23-26; Ella Shohat, "Dislocated Identities: Reflections of an Arab-Jew" (1992) 5 Movement Research: Performance Journal 8; Ella Shohat "The Invention of the Mizrahim" (1999) 1 Journal of Palestine Studies 5; and Ella Shohat, "Rupture and Return: The Shaping of a Mizrahi Epistemology" (2000) 2:1 Hagar: International Social Science Review 61. For further discussion, see also: Henriette Dahan-Kalev, *Ethnicity in Israel: A Post-Modernism Approach* in Ilan Gur – Ze'ev, ed, *Education and Society: Modernity, Post-Modernity and Education* (Tel-Aviv: Ramot Tel-Aviv University Press, 1999) 197 [Henriette Dahan-Kalev, *Ethnicity in Israel*] [Hebrew].
[28] I borrowed this concept of compulsion from Adrienne Rich's "compulsory heterosexuality". See: Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" in *Blood, Bread and Poetry, Selected Prose, 1978–1985* (New York: W. W. Norton, 1986) 23.
[29] See: Oren Yiftachel, *Ethnocracy* (Philadelphia: University of Pennsylvania Press, 2006) at 38 [Oren Yiftachel, *Ethnocracy*].

competing communal project."[30] Borrowing from W.E.B. Du Bois, they have been entrapped in the "double-consciousness"[31] of their "unreconciled"[32] "two-ness"[33]: being Israeli Jews and Mizrahis.

In the process of formation of a nation, the ruling group forms a land regime and creates different institutions and mechanisms designed at facilitating its regulation over the allocation of resources, supervision and management of that territorial space, and preservation and reproduction of its superiority, power, and constitutive underlying ethos. Oren Yiftachel terms this kind of regime that is determined to preserve its own economic, political and cultural superiority, a 'Settling Ethnocracy'.[34] By 'ethnocracy' he means a regime that is "founded on the interests and dominance of one specific ethnic group."[35] As in other settler societies, one of the main discriminatory mechanisms used to ensure its ethnocratic hegemony and dominance over the land and over other non-ruling minorities, such as Mizrahis, was Israel's differential and segregative Land Regime, and particularly its public housing policies, also known as 'from the boat to the permanent house', prioritizing Ashkenazis.

As briefly discussed above, public housing is one of the main and most common means offered by the modern post-Second World War welfare state[36] to people who suffer from poverty, and who

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[30] *Ibid* at 212. See also: Oren Yiftachel & Alexander (Sandy) Kedar, "Landed Power: The Making of the Israeli Land Regime" (2000) 16 Theory and Criticism 67 at 71 [Hebrew]. See also: Daniel Rabinowitz, "The Forgotten Option", *supra* note 10 at 105.

[31] See: W.E.B. Du Bois, *The Souls of Black Folk* (New York: Penguin Books, 1989) at 5.

[32] *Ibid*.

[33] *Ibid*.

[34] See: Oren Yiftachel, *Ethnocracy*, *supra* note 29 at 5.

[35] See: Oren Yiftachel, "Nation-Building and National Land: Social and Legal Dimensions" (1998) 21 Iyunei Mishpat 637 at 646-647 [Oren Yiftachel, "Nation-Building and National Land"] [Hebrew]. See also: Oren Yiftachel, *Ethnocracy*, *supra* note29 at 11.

[36] See: Rachel Kallus & Hubert Law-Yone. "National Home/Personal Home: Public Housing and the Shaping of National Space" (2002) 10:6 European Planning Studies 765 at 766 [Rachel Kallus & Law-Yone, "National Home/Personal Home"]. See also: Erez Tzfadia, "Public Housing as Control: Spatial Policy of Settling Immigrants in Israeli Development Towns" (2006) 21:4 Housing Studies 523 at 523 [Erez Tzfadia, "Public Housing as Control"].

cannot afford to buy or rent without the state's intervention.[37] Similar to the rationales marking the post-war movement for abortion law reform in the late 1960s, the main rationale behind the idea of public housing is socio-economic,[38] striving "to achieve social justice",[39] and "reducing […] dependency on market forces."[40] An important and in-depth study of public housing in Israel comes from the work of Rachel Kallus and Hubert Law-Yone. They argue that this notion of "the 'Benevolent State'"[41] is not the sole rationale upon which public housing is based and morally founded.

Instead, they argue that a deeper analysis of the public housing phenomenon reveals much more complex "latent […] agendas"[42] that these States are not willing to reveal, risking their philanthropic and benevolent self-image.[43] From the beginning, public housing in Israel was constituted by and based upon ethnocratic ideals of hegemonic territorial control. It was not based on necessity and/or dependency on the state's intervention resulting from economic hardship and poverty, but rather on ethnicity. Race/ethnicity and class/poverty are deeply intertwined. Poverty and dependency on governmental support such as public housing are the result of lingering injustices, and are preceded by identity-based factors, such as race and ethnicity.

The correlation between ethnicity and class in the Israeli case was created by the state, allocating Mizrahis to public housing projects.[44] It was one of the mechanisms to create their dependency on the state, not to solve it. Dependency and necessity based on poverty and socio-economic despair

[37] See: Rachel Kallus & Law-Yone, "National Home/Personal Home", *supra* note 36 at 766. See also: Rachel Kallus, "The Political Role of the Everyday" (2007) 8:3 City 341 at 346; See: Bar Dadon, *Housing Policy in Israel: A Proposal for Reform* (Jerusalen: Institute for Advanced Strategies and Political Studies, 2000) at 1 [Bar Dadon, *Housing Policy in Israel*].
[38] *Ibid*.
[39] See: Erez Tzfadia, "Public Housing as Control", *supra* note 36 at 523.
[40] See: Rachel Kallus & Law-Yone, "National Home/Personal Home", *supra* note 36 at 766.
[41] *Ibid* at 767.
[42] *Ibid* at 766-767.
[43] *Ibid*.
[44] For a discussion on Mizrahis as a class versus Mizrahis as an ethnicity, see: Shlomo Swirsky, *Orientals and Ashkenazim in Israel*, *supra* note 13; and Henriette Dahan-Kalev, *Ethnicity in Israel*, *supra* note 27.

simply did not exist then. Mizrahis were like any other people arriving to Israel during these same years, needing temporary help with housing to start their new lives. These needs were based on their status as newcomers or immigrants, not as people suffering from poverty. Everyone needed housing, both Mizrahis and Ashkenazis. And yet, unlike Ashkenazis, Mizrahis were deprived of equal and fair access to housing.

In the early years of modern Israel (1948-1952) most of the newcomers, largely Ashkenazi holocaust survivors, were settled in vacant houses, previously owned by Palestinians, usually in the main city centres, and in the 'mixed' cities (Yaffo, Haifa, Jerusalem, Acre, Ramla, Lod) and also in towns close to the big cities along the coast.[45] They paid low rent, below the market rates.[46] More importantly, they were encouraged by the government to buy their houses, and enjoyed comfortable loan terms. Consequently, many of them soon became the owners of their homes.[47]

This, however, soon changed. During 1953-1972 Israel confronted massive waves of Jews brought to Israel mostly from North Africa. Israel began to carry out a policy of settling the peripheries, also known as 'the National Planning Project of the Architect Arie Sharon', 'From the Boat to the Permanent Housing', or 'the Population Dispersal Plan'.[48] This plan strived to facilitate the

[45] See: Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel: Another Approach on Ethnic Inequality" (1998) 39:3 Megamot 243 at 248 [Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel"] [Hebrew].

[46] See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality: Homeownership in Israel" (2000) 47(3) Social Problems 425, at 430 [Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality"]. See: Noah Lewin-Epstein, Yuval Elmelech & Moshe Semyonov, "Ethnic Inequality in Home Ownership and the Value of Housing: The Case of Immigrants in Israel" (1997) 75:4 Social Forces 1432 at 1444 [Noah Lewin-Epstein, Yuval Elmelech & Moshe Semyonov, "Ethnic Inequality in Home Ownership"].

[47] See: Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 247-248. See also: Chaim Darin (Drebkin), "Social and Economic Trends of Housing in Israel in the First Decade" in Chaim Darin (Drebkin), ed, *Public Housing: Surveys and Assessment of Public Housing in Israel in the First Decade, 1948-1958* (Tel Aviv: Sifrey Gadish, 1959) 13 at 16-23 [Hebrew]; Elia Werczberger & Nina Reshef, *The Privatization of Public Housing in Israel: Discussion Paper 5-91* (Tel Aviv: The Pinhas Sapir Center for Development, 1991) [Elia Werczberger & Nina Reshef, *The Privatization of Public Housing in Israel*] [Hebrew].

[48] For further discussion on Sharon's Plan, see: Oren Yiftachel, *Ethnocracy*, *supra* note 29 at 214-217. See also: Zvi Efrat "The Plan" (2000) 16 Theory and Criticism 203 [Hebrew]; Ravit Hananel, "From 'Sharon's Plan (1952)' to 'Netanyahu's plan (2003)': The Politics of Regional Land Allocation in Israel". (2008) 4 Law Society & Culture Law Review (2008) 237. [Hebrew]. See also: Irit Adler, Noah Lewin-Epstein & Yossi Shavit, "Ethnic Stratification and Place of Residence in Israel: A Truism Revisited" (2005) 23 Research in Social Stratification and Mobility 155 [Irit Adler, Noah Lewin-Epstein & Yossi Shavit, "Ethnic Stratification and Place of Residence in Israel"].

implementation of the Ashkenazi vision of 'redeeming' the land, settling the Mizrahis in the peripheries[49] and using them as a means for spatial Judaizing of the 'empty'/terra nullius regions of the Negev in the south and the Galilee in the north. The intention was to create a human 'security wall' along the borders, securing Israeli territorial continuum and preventing Palestinians *fedayeen* (infiltrators) from entering Israel and returning to their homes.

The guiding principle was a rigorous, centralized and monopolized State intervention in the planning and construction of new housing projects.[50] That meant settling Mizrahis in distant peripheries, mostly in 'developmental towns', according to the goals set forth by the government, its needs, standards and conditions,[51] regardless of their preferences or needs.[52] Mizrahis, who left most of their capital and property in their home countries, feared that their only option was either "homelessness or tents in immigrant transit camps".[53] They had no choice but to comply with their allocation in remote and secluded areas of Israel. As aptly put by Rachel Kallus:

> The immigrants had hardly any choice in the matter, because they were provided with their housing upon arrival, no questions asked. Transported directly from the port to their dwellings [usually at nights so they could not have seen where they were taken], the immigrants were given no chance to familiarize themselves with the country and choose the place of residence best suited to their personal preferences and the available employment opportunities.[54]

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[49] See: Hubert Law-Yone and Rachel Kallus, "Housing in Israel: Policy and Inequality" (Tel - Aviv, Adva Center: September 1994) at 32 [Hubert Law-Yone and Rachel Kallus, "Housing in Israel"] [Hebrew]. See also: Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 247-248.

[50] See: Amiram Gonen, "The Geography of Public Housing in Israeli Cities" (1979) 18-19 Bitahon Soziali (Social Security) 22 at 24 [Amiram Gonen, "The Geography of Public Housing in Israeli Cities"] [Hebrew]; Elia Werczberger & Nina Reshef, *The Privatization of Public Housing in Israel*, *supra* note 47 at 33; Yuval Elmelech & Noah Lewin-Epstein, "The Housing Market, Government Policy and Inequality Among Immigrants of the 1950s and 1960s: Reply to E. Borochov" (2002) 41:4 Megamot 628 at 630 [Hebrew].

[51] See: Hubert Law-Yone and Rachel Kallus, "Housing in Israel", *supra* note 49 at 5.

[52] *Ibid*. See also: Oren Yiftachel, "Nation-Building and National Land", *supra* note 35 at 638. See also: Rachel Kallus & Law-Yone, "National Home/Personal Home", *supra* note 36 at 771; Hubert Law-Yone and Rachel Kallus, "Housing in Israel", *supra* note 49 at 5; Barouch Kimmerling, *Immigrants, Settlers, Natives*, *supra* note 25 at 292; Bar Dadon, *Housing Policy in Israel*, *supra* note 37 at 7.

[53] See: Erez Tzfadia, "Public Housing as Control", *supra* note 36 at 525. See also: Amiram Gonen, "The Geography of Public Housing in Israeli Cities", *supra* note 50 at 28.

[54] See: Rachel Kalush, "Housing Policy" (1995) Israel Equality Monitor, on line: thefreelibrary.com < http://www.thefreelibrary.com/Housing+policy.-a085250994> [Rachel Kalush, "Housing Policy"].

In contrast, Ashkenazi immigrants coming to Israel at the same time were formally and informally[55] prioritized by the state, offering them better, attractive and more adequate permanent housing opportunities.[56] As sharply put by MP Itzchak Rephael at the Jewish Agency Meeting in 2.1.1950: "[…] Preference should be twofold: a. the Polish Jews should be given a higher priority for housing. b. (…) better benefits in the camps (…)".[57]

Ashkenazis were treated on an individual and personal basis, and no efforts were made, writes Daniel Rabinowitz, "to settle them as organic communities in designated places."[58] Further, even in cases where Ashkenazis were sent to transit camps or to development towns, it was only temporary and for short periods of time.[59] Their goal was to distance themselves from highly Mizrahi populated areas.[60] Acquiring a socio-geographical-political mobility allowed them to leave as soon as they could for the centre of Israel and to reside in better apartments in major city centres.[61] This was facilitated by several interrelated factors: *a)* the state's discriminatory and preferential absorption policy in general, and housing policies in particular, prioritizing Ashkenazis. For example, Ashkenazis were encouraged to purchase their homes with governmental subsidized mortgages;[62] *b)* using personal, familial and social connections and

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[55] See: Barouch Kimmerling, *Immigrants, Settlers, Natives*, *supra* note 25 at 294.
[56] See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 428. See also Tom Segev, *1949 – The First Israelis*, *supra* note 19 at 171-174.
[57] *Ibid* at 173. Segev quotes MP Itzchak Rephael from the Jewish Agency Meeting on 2.1.1950. See also: Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 265; Barouch Kimmerling, *Immigrants, Settlers, Natives*, *supra* note 25 at 294; Amiram Gonen, *Between City and Suburb, Urban Residential Patterns and Processes in Israel* (Aldershot, England: Avebury Press, 1995) at 74 [Amiram Gonen, *Between City and Suburb*]. See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 428.
[58] See: Daniel Rabinowitz, "The Forgotten Option", *supra* note 10 at 121.
[59] See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 428. See: Amiram Gonen, "The Geography of Public Housing in Israeli Cities", *supra* note 50 at 22, 29; Amiram Gonen, *Between City and Suburb*, *supra* note 57 at 98.
[60] See: Shlomo Swirsky & Deborah Bernstein, "Who Worked, at What, for Whom, and for How Much?", *supra* note 13 at 128-129. See also: Hubert Law-Yone and Rachel Kallus, "Housing in Israel", *supra* note 49 at 6.
[61] See: Rachel Kallus & Law-Yone, "National Home/Personal Home", *supra* note 36 at 776 n 11.
[62] See: Amiram Gonen, *Between City and Suburb*, *supra* note 57 at 74; Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 265; Tom Segev, *1949 – The First Israelis*, *supra* note 19 at 171-174; Barouch Kimmerling, *Immigrants, Settlers, Natives*, *supra* note 25 at 294. See: Daniel Rabinowitz, "The Forgotten Option", *supra* note 10 at 121. For a further comprehensive analysis on the mobility of Ashkenazi immigrants and its reasons, see: Rachel Kallus & Law-Yone, "National Home/Personal Home: The Role of Public

networks,[63] receiving assistance from family and friends who immigrated earlier[64]; *c)* using the reparations received from Germany,[65] and; *d)* Ashkenazi-flight from Mizrahi-populated cities.

The combination of these resulting factors led to the creation of intergenerational poverty slums[66] and a growing Mizrahi dependency upon governmental support. Mizrahis found themselves imprisoned in the public houses as contractual tenants with weak legal status, subject to arbitrary public housing companies that could easily evict them from their homes. Those few who could have left did so.[67] Mizrahis have turned into "a social periphery",[68] isolated and segregated from Ashkenazis.[69] As Bar Dadon concludes: "This has resulted in a vicious cycle of intergenerational poverty in which tenants are unable to better their lives".[70]

These policies resulted in creating and further perpetuating the correlation between housing and ethno-class.[71] They had a formative role in constructing and further reproducing inequality and injustices between Ashkenazis and Mizrahis.[72] More importantly, Mizrahis were deprived of a fair opportunity to purchase their homes and enlarge family capital designated for inheritance as a means of securing their children's socio-economic status, giving them a 'chance in life'. Indeed,

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Housing in Shaping Space" (2000) 16 Theory and Criticism 157 at 162-163 [Hebrew]. See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 428.

[63] See: Oren Yiftachel, "Nation-Building and National Land", *supra* note 35 at 652; Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 250; Amiram Gonen, *Between City and Suburb*, *supra* note 57 at 97. See also: Rachel Kallus & Law-Yone, "National Home/Personal Home", *supra* note 36 at 772, 776 n 11.

[64] See: Noah Lewin-Epstein, Yuval Elmelech & Moshe Semyonov, "Ethnic Inequality in Home Ownership", *supra* note 46 at 1457.

[65] *Ibid* at 1457-1458. See also: Barouch Kimmerling, *Immigrants, Settlers, Natives*, *supra* note 25 at 294; Amiram Gonen, "The Geography of Public Housing in Israeli Cities", *supra* note 50 at 30.

[66] See: Hubert Law-Yone and Rachel Kallus, "Housing in Israel", *supra* note 49 at 5.

[67] See: Rachel Kalush, "Housing Policy", *supra* note 54.

[68] See: Amiram Gonen, "The Geography of Public Housing in Israeli Cities", *supra* note 50 at 28.

[69] Irit Adler, Noah Lewin-Epstein & Yossi Shavit, "Ethnic Stratification and Place of Residence in Israel", *supra* note 48 at 159.

[70] See: Bar Dadon, *Housing Policy in Israel*, *supra* note 37 at 1.

[71] See: Rachel Kalush, "Housing Policy", *supra* note 54. Whilst Rachel Kallus refers to the correlation between class and housing, I added the ethnic component. Mizrahis discrimination goes beyond the traditional Marxist categorization of class, and is rather embedded in a wider ethnic-based rhetoric.

[72] See: Barouch Kimmerling, *Immigrants, Settlers, Natives*, *supra* note 25 at 294. See also: Rachel Kallus & Law-Yone, "National Home/Personal Home", *supra* note 36 at 773.

over the years several programs have been developed designed at enabling the tenants to purchase their homes at cost.[73] Nevertheless, the purchase terms were not as comfortable or worthwhile as the government wished to present, and in many cases it appeared that this 'at cost' was much higher than the market value, and that the houses' actual value was lower than the evaluated purchase sum.[74] Even when they have managed to purchase homes, these were located in distant peripheral development towns with scarce employment and educational opportunities, hence rendering these properties less attractive. Consequently, concludes Rachel Kallus, "development-town homeowners who wished to move elsewhere found themselves saddled with properties that could not command their nominal value on the market."[75]

Different studies have shown that homeownership bears socio-economic and symbolic importance. Following Margaret Radin, ownership of property in the form of housing has the identity-constituting effect of representing our personhood[76] - of who we are. Similarly, housing is associated with promoting a sense of self-security, providing the individual with a sense of belonging especially due to the lack of social relations attributed to and associated with modern life.[77] For immigrants in particular, "homeownership represents an important step in the settlement process and a degree of permanency in the host society."[78] Moreover, since homeownership is viewed as "a manifestation of wealth accumulation and improved material wellbeing"[79] it has a

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[73] See: Hubert Law-Yone and Rachel Kallus, "Housing in Israel", *supra* note 49 at 33.
[74] See: Rachel Kalush, "Housing Policy", *supra* note 54.
[75] *Ibid*. See also: Yuval Elmelech, *Ethnic Inequality in the Housing Market: The Case of Immigrants to Israel* (M.A. Thesis, Tel-Aviv University, 1995) at 26-30 [Unpublished] [Yuval Elmelech, *Ethnic Inequality in the Housing Market*] [Hebrew].
[76] See: Margaret J. Radin, "Property and Personhood" (1982) 34 Stan L Rev 957 [Margaret Radin, "Property and Personhood"].
[77] See: Gilat Benchetrit, *Housing Policy in Israel* (Jerusalem: The Taub Center for Social Policy Studies in Israel, 2003) at 8.
[78] See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 427; See: Noah Lewin-Epstein, Yuval Elmelech & Moshe Semyonov, "Ethnic Inequality in Home Ownership", *supra* note 46 at 1440-1441.
[79] See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 426.

substantive influence on the creation and further preservation of social stratification and inequality.[80]

Noah Lewin-Epstein and Moshe Semyonov argue that this is especially important considering the fact that for most families, and especially for immigrant families, fortune and wealth "accumulated in housing is the single most important form of wealth".[81] Further, since homeownership constitutes a major and dominant component of families' total capital, it has therefore major implications on intergenerational inheritance designed at securing next generations chances in life:[82] "Disparities in homeownership, then, may generate the reproduction of ethnic inequality in wealth and standard of living across generations".[83]

In sum, upon being brought to Israel, Mizrahis were exposed to differential and discriminatory absorbing mechanisms. Israeli housing policies in particular have prevented them from accumulating wealth and have created, amongst other factors embedded in their ethnic inferiority, ever-growing ethnoclass-based gaps between them and Ashkenazis. Importantly, it has been argued that Mizrahis were never explicitly legally recognized or categorized as a discriminated against group.[84] This means that the legal sphere has been both structurally and symbolically irrelevant for the Mizrahi struggle for equality, and has prevented them from addressing legal claims based on their distinct identity, let alone when intersecting with gender. The formal law

[80] *Ibid*. See also: Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 245-246.
[81] See: Noah Lewin-Epstein & Moshe Semyonov, "Migration, Ethnicity, and Inequality", *supra* note 46 at 426.
[82] See: Seymour Spilerman, "Inheritance of Economic Assets - Ownership of an Apartment", in Ya'akov Kop, ed, *Allocating Resources for Social Services* (Jerusalem: Centre for Social Policy Research in Israel, 1997) 99 at 100-103 [Hebrew]. See also: Yuval Elimelech & Noah Lewin-Epstein, "Immigration and Housing in Israel", *supra* note 45 at 263-266; 245-246. See also: Yuval Elmelech, *Ethnic Inequality in the Housing Market*, *supra* note 75 at 5-7, 59-69.
[83] See: Noah Lewin-Epstein, Yuval Elmelech & Moshe Semyonov, "Ethnic Inequality in Home Ownership", *supra* note 56 at 1458.
[84] See: Yifat Bitton, "The Limits of Equality and Virtues of Discrimination" (2006) 3 Mich St L Rev 593; See also: Yifat Bitton, "The Limits of Equality – Wishing for Discrimination?" (2005) bepress Legal Series. Working Paper 679. Online: <http://law.bepress.com/expresso/eps/679>.

does not recognize intra-Jewish discrimination[85] unless it is based on recognized classifications such as gender,[86] sexual orientation[87] or disability.[88] Israeli law, then, does not recognize the 'Otherness' of Mizrahis as a legitimate minority suffering from discrimination, laying a possible relevant basis for addressing past and/or lingering injustices.[89]

Even Israeli critical scholarship, from CLS to feminist theories, questioning the state law's neutrality and objectivity, cannot explain Mizrahi squatting, for two interrelated reasons. One is general. Based on the criticism raised by several critical approaches discussed in *Chapter 4*, this scholarship, albeit criticizing the sole unifying centrality of the state to the concept of law, is still referring to the state as a reference point. It is internal, written from within the legal system using its own language. This leads to the second and more specific reason: this scholarship tends to be narrow in scope, not revealing the complex oppressive mechanisms that have been and still are directed against Mizrahis, from which the squatting phenomenon has emerged and through which we need to approach it. For example, there has been a considerable feminist scholarship focusing on offering various interpretations to Israeli state law and socio-legal phenomena from the standpoint of gender and power-relations. Israeli feminist activism and advocacy succeeded in

[85] See: Yifat Bitton, "Legally Mizrahi: The Legal Component in Mizrahi Identity" (Spring 2006) 3 Hakeshet 6 [Hebrew]. Israeli law has only recognized non-Jewish populations, such as Palestinians-Israelis (Israeli-Arabs), as discriminated groups, thereby protected by "the rule of equality" and anti-discrimination mechanisms.
[86] See: HCJ 4541/94, *Miller v. The Minister of Defense,* P.D. [1995] 49 (3) 94.
[87] See: HCJ 721/94 *El-Al v. Yonatan Danielovitch,* [1994] PD 48 (5) 749.
[88] See: HCJ 2599/00 *Yated, Parents of Children with Down Syndrome v. Ministry of Education,* [2002] PD 84 (5) 834.
[89] A symbolic example is the HCJ ruling in *HCJ 1/81 Vicki Shiran* concerning a petition of several Mizrahi activists demanding the inclusion of Mizrahi History within the State official story and its contribution to Zionism. In her concurring opinion, Justice Miriam Ben-Porat held that "the argument raised by the petitioners that the "Jews of the East" were hurt is outrageous. Jew can live either in the East or in the West, but, Judaism is a one all-inclusive concept, embracing Jews from all other the worlds. "Jews of the East" like "Jews of Ashkenaz" are nothing but the organs of the same body, that should be protected from a destructive dismembering, and from which a smell of separation of hearts dissipates." (See: HC 1/81 *Vicki Shiran v. Israel Broadcasting Authority,* [1981] PD 35(3) 365 at 388 [in Hebrew] [translated by author]. For further discussion see also: Pnina Lahav, "(Forum) Assessing the Field. New Departures in Israel Legal History, Part Three: A "Jewish State . . . to Be Known as the State of Israel": Notes on Israeli Legal Historiography" (2001) 19 LHR 387at 414.

mobilizing many important legal precedents advancing gender equality in different public and private spheres.

Mizrahi feminists have criticized Ashkenazi feminists for being partial and revealing bias through the narratives, problems, needs, priorities and experiences of "satiated, usually educated and wealthy Ashkenazi women."[90] These struggles, writes Daphne Barak-Erez, have ignored "the daily assaults on women's rights whose life experience and reality have rendered these equality achievements remote and distant [and irrelevant] and hardly applicable for them."[91] How can a Mizrahi woman enjoy a right based on affirmative action when she is not recognized as a discriminated minority, thus rendering anti-discrimination legislation and/or decisions irrelevant in her case?

Mizrahi women suffer from distinct and unique socio-legal problems resulting not only from the social construction of *gender* as an inferior other based on male patriarchy, but also from the intersecting oppressive ethno-based mechanisms that have shaped their lives as inferior *Mizrahis.* They are located within wider multicultural-dimensional[92] intersecting[93] contexts of gender and ethnicity, rooted not only in being Mizrahi *Women* but also in being *Mizrahi* Women.[94] In any event, it is an everlasting dialogue between these two intersecting, at times overlapping, identity-based components that constantly shape, reshape and reconstitute each other. Mizrahi women are

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[90] Daphne Barak-Erez, "Social Feminism and Social Rights of Women" in Yoram Rabin and Yuval Shany, eds, *Economic, Social and Cultural Rights in Israel* (Tel Aviv: Ramot Publishing House, Tel Aviv University, 2004) 855 at 866 [Hebrew].

[91] *Ibid*.

[92] See: Martha Minow, "Not Only for Myself: Identity, Politics, and Law" (1996) 75 Or L Rev 647 at 657; Martha Minow, *Not Only for Myself: Identity, Politics, and Law* (New York: The New Press, 1997) at 38-40.

[93] See: Kimberle Crenshaw, "A Black Feminist Critique of Antidiscrimination Law and Politics" in David Kairys, ed, *The Politics of Law: A Progressive* Critique (New York: Pantheon, 1990) 195; Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989 U Chicago Legal F 139 at 157-159. See also: Joon O. Calmore, "A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty" (1999) 67 Fordham L Rev 1927 at 1942-1952.

[94] On this point of multi-identities, see: David B. Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) 57 Md L Rev 1502.

subjected to the accumulative effect of these several structural subordinating mechanisms, confronting gender discrimination from either Ashkenazi and Mizrahi men, and ethnic discrimination from both Ashkenazi women and men. As Gayatri Chakravorty Spivak sharply puts it: "Clearly, if you are poor, black and female you get it three ways."[95]

Socio-legal problems experienced by Mizrahi women should be contextualized by their allocation within a larger context recognizing their unique history; illumination of the institutional and systemic causes of their marginalization; and de-privatization of their 'private' and 'personal' problems, 'translating' them into a collective language jurisgenerating legal meanings. Mizrahi feminists have argued that by illuminating these causes we could discover the inner oppressive-hegemonic relations within Israeli feminisms. Ashkenazi feminists, whilst fighting against gender-blindness and misogynist laws, have nevertheless directed against Mizrahi women the same oppressive mechanisms of power relations and dominance that they have sought to revoke. This time, however, it was an ethnic-blindness rhetoric imposing uniformity,[96] thus bleaching-out[97] Mizrahi personal and group-identity-based affiliations, and ignoring its relevance to the unique life experiences of Mizrahi women. Israeli-Ashkenazi feminists may have challenged the role of state law in the construction of gender inferiority, but nevertheless have neglected to acknowledge 'Mizrahiness' as a relevant factor in the oppressive construction of gender.

These critical approaches to law, imposing uniformity, do not depart from positivist legalistic rhetoric, but rather reaffirm it. Not only do they remain within the confinements of state law, they also cooperate with it, and preserve its dominance over and superiority to other laws. In the words

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[95] See: Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Cary Nelson & Lawrence Grossberg, eds, *Marxism and the Interpretation of Culture* (Urbana, IL: University of Illinois Press, 1988) 271 at 294-295.

[96] See: Henriette Dahan-Kalev, "Tensions in Israeli Feminism: The Mizrahi Ashkenazi Rift" (2001) 24 Women's Studies International Forum 669 at 673. For further discussion see: Henriette Dahan-Kalev, "Made to Be Inept: The Case of the Mizrahi Women" (2003) 4:2 Israeli Sociology 365 [Hebrew].

[97] See: Sanford Levinson, "Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity" (1993) 14 Cardozo L Rev 1577.

of Rachel Benziman, an Israeli Ashkenazi lawyer, and former counsel of the Israeli Women's network, a major Israeli feminist NGO: "We are working with the system and within the system."[98] Approaching socio-legal phenomena from the inside of state law, as external observers using their own internal language, these monopolizing internal approaches, whether positivist or critical, do not and cannot explain Mizrahi women squatting. Except for condemning Mizrahi women squatters for breaking the law as 'ordinary criminals', squatting cannot be explained by an external observer, especially one coming from a unifying and relatively decontextualizing perspective. Following Teubner, this "juridification of social phenomena"[99] results in "the legal distortion of social realities".[100]

In order to approach socio-legal phenomena, such as Mizrahi women squatting, we need, Melissaris would argue, to radicalize the way we think about the law.[101] This involves reversing the point of view, and shifting the focus to society itself, to Mizrahi women squatters, and to their internal working and operation, rejecting the interference of distant and external observers.

When we shift the focus to these women themselves we also begin to unravel their pasts. It is argued that the differential ethnocratic mechanisms, especially those concerning the deprivation of the right to land ownership, had a central structuring role in the stratification system of Mizrahis in Israel. They have resulted in constructing an enclosed and secluded Mizrahi community suffering from structural injustices and discrimination encompassing every aspect of their lives: poverty, with an everlasting increasing socio-economic gaps between them and Ashkenazis; educational underachievement both in schools and in higher education; high rate of

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[98] See: Attorney Rachel Benziman, then the legal counselor of "The Women Coalition NGO", brought in Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (Ann Arbor: Michigan University Press, 2003) at 182; On this point see also: Neta Amar, "Appropriate Representation for All Women in Public Service? The Lack of Ethnic Consideration in Affirmative Action Legislation" (Jerusalem, Van Leer Institute, 2001).
[99] See: Gunther Teubner, "The Two Faces of Janus", *supra* note 4 at 1455.
[100] *Ibid*.
[101] See: Emmanuel Melissaris, "The More the Merrier?", *supra* note 6 at 58.
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unemployment; intergenerational dependence on governmental welfare support and public housing; and comprising the majority of prisoners in Israeli prisons. There are daily cases of discrimination in admission to schools, police brutality, ethnic profiling in restaurants, bars, clubs, and discrimination in employment, to name only a few. Mizrahis are the subject of ridicule in movies, satire programs, schools curricula and commercials. Mizrahi music is prevented from getting into the playlists of official radio stations. Furthermore, there has been a growing and entrenched sense of alienation and inferiority that does not receive any public, let alone, institutional recognition, except for blaming Mizrahis for 'whining' and 'using the race card'. This is the historical context from which the squatting phenomenon has emerged, and through which we need to approach it.

If we focused, as Robert Cover might suggest, on the language that these women jurisgenerate in the course of lawbreaking, and their ability to 'speak' and create legal meanings, we could discover that these women speak through lawbreaking, tell their story and create their own vision of the law – their law. We know from Kimberley Brownlee, that this is their way of communication, engaging in a "moral dialogue"[102] with the state and the public.[103] Their 'private' and allegedly not-politically-motivated acts, then, are embedded in, and reveal, a wider political context of Ashkenazi discrimination. They invoke larger principles of equality and justice, and are aimed at correcting these past and lingering injustices. Approached and interpreted this way, their acts are political, bearing collective features of resistance to injustices. They resist and seek to correct with their bodies the Israeli discriminatory land regime that has denied them equal access to land rights, depriving them of the fundamental right to adequate housing and of the right to home ownership

[102] See: Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience and Lawful Punishment (2007) 1 Crim L & Philos 179 at 179; See also: Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience" (2004) 10 Res Publica 337 at 346.
[103] *Ibid*.

by preferring Ashkenazis. Their poverty, their dependence on state support, their lack of housing, are all the results of continuous injustices. Their act of squatting is a response to this unjust reality. Land has always been one of the main causes for disputes between nations, tribes, families and even family members, and is also one of the main means for restoring and achieving peace. As mentioned earlier, control over land is one of the main means employed for strengthening the control of ethnocratic settlers over non-ruling communities and is a keystone in the latter's discrimination. It is nevertheless perceived in the current global legal climate as a predominant mechanism for redressing historical injustices and for redistribution of power and wealth in post-colonial states.[104]

Like the women of RAWA, 'manipulating' the oppressive nature of the burqa, and various other political groups around the world that reverse some of the means used for their oppression to their own advantage, affirmative squatters use the same mechanism that was employed against their parents and that is still being used for their continuous marginalization. They resist structural injustices through breaking property law, taking *possession* over the means that were used for their *dispossession.* Property law disobedience then can play a central role in challenging social and historical injustices. As Penalver and Katyal put it:

> Whether they fail or succeed, outlaws reveal an essential ambiguity at the core of property law… ***property was both the object and the subject of their disobedience -*** the instrumental tool upon which the protest was based…[105]

Affirmative squatting is an example of "intentional property lawbreaking,"[106] designed at redefining property laws, and reorganizing property rights[107] on an egalitarian basis by

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[104] See: *Government of the Republic of South Africa and Others v. Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC). In this case, the post-apartheid South African Constitutional Court recognized the right of access to social assistance for underprivileged people including the right of access to housing. In Australian context, see: *Mabo v. State of Queensland,* [1992] 66 ALJR 408; and *Wik Peoples v. State of Queensland,* [1996] 141 ALR 129.
[105] See: Eduardo M Peñalver & Sonia K Katyal, "Property Outlaws" (2007) 155 U Pa L Rev 1095 at 1104-1105 [Eduardo Peñalver & Sonia Katyal, "Property Outlaws"]. Emphasis Added.
[106] *Ibid* at 1114.
[107] *Ibid* at 1114-1115.

redistributing the wealth and power accumulated in property, so that they would be equally enjoyed by the discriminated against minority. Land and property are important means in excluding and discriminating against subaltern minorities. Breaking property laws is not merely infringing upon someone's right to enjoy her private property, or disrupting with public property, as with affirmative squatters in Israel. It is an invasion of the exclusive realm of hegemony, 'violating' the socially construed 'balance and order'. The same land and property are now the sites for resistance and the means to address social injustices, contesting inequality in property rights by violating the same rights. As Penalver and Katyal explain: "the black students participating in lunch-counter sit-ins were…*intentionally disregarding the very property rights they sought to change."*[108]

This endangerment of state property bears greater significance in the Israeli context, where the land regime, property laws and public housing policies were used to entrench the Ashkenazi hegemony over the Israeli 'empty' space. In this case, lawbreaking not only threatens state property but also the state's own basis and foundational ethos, whereby control over land is at its heart. For these women a house is more than a roof over one's head. It is their past, present and future. It is their way of restoring stolen memories and dignity. We might say that the act of squatting has the redeeming effect of deconstructing the squatter's subordinated self from being "objects of oppression" [109] to being active subjects,[110] enabling her to regain, perhaps for the first time, some control over her life, and reconstitute the boundaries of her personhood. The sharp words of Margaret Radin capture this idea:

> *There is more to the rationale based on sanctity of the home; it contains a strand of property for personhood… There is also the feeling that it would be an insult for the state to invade one's home because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself – property for personhood – and not just the greed – on locale for protection from outside interference.*[111]

[108] *Ibid* at 1115. Emphasis added.
[109] See: Monique Wittig, *The Straight Mind and Other Essays* (Boston, Mass: Beacon Press, 1992) at 16.
[110] *Ibid*.
[111] See Margaret Radin, "Property and Personhood", *supra* note 76 at 922. Emphasis added.

By squatting, the Mizrahi affirmative squatter is protecting herself and her family not only from the dangers posed by homelessness but also from the outside interference of state law. She forces the latter to reconsider its intrusive role as an external intervener who is incapable to explain her acts, unless it shifts the focus to these women themselves, and understands their roles as participants, taking an active and affirmative role in creating their homes, and jurisgenerating legal meanings.

2. Women Having Abortions in Canada- From Invisible to Visible

"When women are segregated in private, separated from each other, one at a time, a right to that privacy isolates us at once from each other and from public resource. This right to privacy is a right of men "to be left alone" to oppress women one at a time. It embodies and reflects the private sphere's existing definition of womanhood. [….] It is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is a very material division that keeps private beyond public redress and depoliticizes women's subjection within it. It keeps some men out of the bedrooms of other men"[112]

In 1956 when she was 18, in her second year of university, Natalie discovered that she was pregnant. Deciding to have an abortion, she was subjected to sexual harassment,[113] pain and humiliation, involving doctors abusing her vulnerability and need, 'stripping' her of her power.[114] The story of Natalie discussed is only one story out of countless stories of women who had to confront horrific obstacles to terminate with an unwanted pregnancy. Abortion was their way to resist the unjust reality preventing them from excercizing their rights to control their bodies. As seen in *Chapter 3*, the official story of abortions in Canada is predominately the story of male doctors and physicians including Dr. Henry Morgentaler, advancing a medicalized discourse. Not much is known about the role played by individual women having abortions, jurisgenerating legal meanings. They are absent from the official story of abortions. There is no space to hear Natalie's and other women's stories in the official historical and legal narrative, nor in the civil disobedience framework. The official historical context, then, 'swallowed' these stories, and it is now that such space is created, revealing the importance of these voices.

In *Morgentaler,* the Supreme Court of Canada held that *section 251* of the Criminal Code was unconstitutional as a violation of the right to the 'security of the person' guaranteed by *section 7* of the Canadian Charter of Rights and Freedoms. [115] In what is celebrated as a historic ruling, the

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[112] See: Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) at 102 [Catharine MacKinnon, *Feminism Unmodified*]. Emphasis added.
[113] See: Natalie, brought in Childbirth by Choice Trust, ed. *No Choice: Canadian Women Tell Their Stories of Illegal Abortion* (Toronto: Childbirth by Choice Trust, 1998) 105 at 109 [Childbirth by Choice Trust, *No Choice*].
[114] *Ibid* at 108.
[115] See: *R. v. Morgentaler,* [1988] 1 SCR 30 [*Morgentaler Decision*].

Supreme Court struck the provision from the Criminal Code, thereby abolishing anti-abortion laws entirely. Since then, abortions are legal in Canada, and one might rightfully assume that Canadian women would have an unfettered access to abortion services.

Unfortunately, in reality, the de-criminalization of abortion did not bring about that level of access. A *de jure* right to abortion and guarantee of women's reproductive freedom[116] has not resulted in *de facto* realization. Decades after *Morgentaler,* women in Canada are still confronted with major financial, procedural, emotional, geographical and personal obstacles and barriers to equal access to abortion services.[117] Whilst abortions are now legal, we are back in many ways to the situation that preceded the legalization of abortions under the regime of *section 251* – that is, inaccessibility to abortion services.

As set out in the *Badgley Report* of 1976, Canadian women at the time faced many problems of accessibility to therapeutic abortions: major delays in the operation of the Therapeutic Abortion Committees (TAC), risking women's lives and health; lack of uniform and coherent legal guidelines; and, differential interpretation and application of the law by hospitals and discretionary interpretation of 'health' and 'mental health'.[118] The report concluded that "the procedure provided in the Criminal Code for obtaining therapeutic abortions is in practice illusory for many Canadian

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[116] See: Joanna Erdman, "In the Back Alleys of Health Care: Abortion, Equality and Community in Canada" (2007) 56 Emory LJ 1093 [Joanna Erdman, "In the Back Alleys of Health Care"]; See also: Rachael Elizabeth Grace Johnstone, *The Politics of Abortion in Canada After Morgentaler: Women's Rights as Citizenship Rights* (PHD Thesis, Queen's University, Department of Political Studies, 2012) [Unpublished] [Rachael Johnstone, *The Politics of Abortion*]; See: Shelley A M Gavigan, "Beyond Morgentaler: The Legal Regulation of Reproduction" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 117 [Janine Brodie, Shelley Gavigan & Jane Jenson, *The Politics of Abortion*] [Shelley Gavigan, "Beyond Morgentaler"].

[117] See: Jeanelle N. Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions and Related Areas of Concern in Canada" (2012) 34:6 J Obstet Gynaecol Can 532 at 540 [Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions"]. For a thorough discussion on the barriers to access to abortion services, see: Chris Kaposy, "Improving Abortion Access in Canada" (2010) 18:1 Health Care Analysis 17 <http://dx.doi.org/10.1007/s10728-008-0101-0> [Chris Kaposy, "Improving Abortion Access in Canada"]. See also: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion Through a Legal Lens" (2008) 15 Health LJ 143 at 151-152 [Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion"]. See also: Jessica Shaw, *Reality check. A close look at accessing abortion services in Canadian hospitals.* (Ottawa, Ontario: Canadians for Choice, 2006) at 39-46 [Jessica Shaw, *Reality check*].

[118] See *Chapter 3*.

women".[119] The lack of accessibility, documented over 40 years ago, as the reason that legalized abortions were "in practice illusory for many Canadian women",[120] is far from a thing of the past. Soon after the *Morgentaler* decision, abortions were reclassified "as a healthcare issue".[121] The "jurisdiction over the procedure",[122] Rachael Johnston explains, was shifted to the provinces.[123] This meant that abortions were left to the discretion of each of the provinces, which, subject to the prevailing socio-political, moral and religious "climate in each province",[124] were thus now free to impose their own interpretation and "specific understandings of abortion on individuals",[125] shape the public discourse accordingly, and regulate, scrutinize, limit and prohibit access to abortions.[126] Whilst unable to outlaw abortions,[127] provinces can and have adopted various laws and regulations[128] that have created obstacles preventing timely, free and affordable access to abortions.

In what follows I discuss the obstacles identified in the literatue. This review is important as it shows that in Canada of 2019 abortion may be legal, but it is still not fully accessible. Except for "only the most forceful of women [who] are able to overcome such institutional roadblocks,"[129] women, and especially women from discriminated against minorities, still face many institutional obstacles in exercising their reproductive rights and freedom. Rachael Johnston explains that by

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[119] See: Robin F Badgley, *Report of the Committee on the Operation of the Abortion Law* (Ottawa: Ministry of Supply and Services, 1977) [Badgley Report] at 140-141.
[120] *Ibid*.
[121] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 1.
[122] *Ibid*.
[123] *Ibid*.
[124] *Ibid* at 4.
[125] *Ibid*.
[126] See: Shannon Stettner, "A Brief History of Abortion in Canada" in Shannon Stettner, ed, *Without Apology: Writings on Abortion in Canada* (Edmonton: Athabasca University Press, 2016) 50 [Shannon Stettner, *Without Apology*].
[127] *Ibid*.
[128] See: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1094.
[129] See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 158.

placing obstacles, blocking in effect access to abortion, the provinces are "effectively trying to recriminalize the procedure".[130]

2.1. Barriers and Obstacles to Abortion Services

Studies show the ongoing existence of barriers to access that range from formal obstacles to less formal and yet significant obstacles. These are summarized below.

2.1.1. Funding and Financial Barriers

Financial barriers and restrictions on funding have become one of the most effective tools used by the provinces to impede access to abortion. According to Joanna Erdman, all provinces, except for Quebec and Ontario, limit, restrict or refuse "funding for abortion under public health insurance schemes."[131] Other restrictive conditions for eligibility for funding include those placed on location, (for example in Nova Scotia, abortions can be performed only in hospitals and not in clinics[132]); qualifications and level of expertise of the abortion provider, (requiring, for example, a specialization in obstetrics and gynecology)[133]; and, medical access (requiring, as was the case prior to legalization,[134] that an abortion is found 'medically necessary' by two doctors.[135]).

2.1.2. Medical Maltreatment and Un-Professional Misconduct

The right to abortion does not protect women from stigma, shame, self-blame and guilt that still surround abortions.[136] For many women, the fear of shame and stigma associated with abortion poses a real threat to their physical and mental wellbeing, becoming a major obstacle in accessing

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[130] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 1.
[131] Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1094, 1150-1152. See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 168-169; Shannon Stettner, *Without Apology*, *supra* note126 at 46-47, 50.
[132] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 128; Shannon Stettner, *Without Apology*, *supra* note 126 at 50. This requirement however "was struck down on the grounds that the province was attempting to legislate in the area of criminal law (a federal domain)". (*Ibid*).
[133] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 128; Shannon Stettner, *Without Apology*, *supra* note 126 at 50-51.
[134] See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 152.
[135] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 50-51. This was changed only in 2015.
[136] For further discussion on these notions of stigma and shame, see: *Ibid* at 4-7, 247, 249.

abortion services.[137] Stories have emerged of women experiencing shaming, humiliation and public denunciation by medical staff.[138]

The right to abortion does not guarantee the quality and nature of the medical treatment, nor the level, if any, of care, empathy and support offered by hospital staff and personnel. Throughout the process, before, during and even after abortion, Canadian women report having experienced hospital personnel, both nurses, physicians and even administrative staff, who were unprofessional 'at best', and disrespectful, hostile, and even violent and abusive at worst. These are not 'just' misfortunate 'personal' extreme experiences, but rather are indicative of a widespread and larger day-to-day reality of dangerous medical violence directed against women, deterring them from and inhibiting their access to abortion.[139]

Further, there have been reports documenting false information and misdirection. These reports have shown that medical and administrative staff, such as receptionists, nurses and physicians, act as 'gatekeepers' to important information about abortions,[140] deliberately depriving women seeking abortions from important information. There are many cases involving the use of various stalling tactics,[141] trying to avoid and postpone the disclosure of important medical and procedural information about abortion, the process, the procedure, eligibility, and funding.[142]

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[137] See: Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions", *supra* note 117 at 540.
[138] See, for example, Shannon Stettner, *Without Apology*, *supra* note 126 at 165.
[139] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 186-187. Rachael Johnstone has conducted several interviews with various women, and brings disturbing testimonies of maltreatment and abuse. See for example: Interview of Judy Burwell, Former Manager of the Fredericton Morgentaler Clinic by Rachael Johnstone (24 January 2011) in Rachael Johnstone, *ibid* at 186. See also: Elizabeth in Martha Solomon & Kathryn Palmateer, eds, *One Kind Word: Women Share Their Abortion Stories*. (Toronto: Three O'Clock Press, 2014) [Martha Solomon & Kathryn Palmateer, *One Kind Word*].
[140] See: Jessica Shaw, *Reality check, supra* note 117 at 3, 43; Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 19-20; See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 158; International Reproductive and Sexual Health Law Programme, *Access to Abortion Reports: An Annotated Bibliography* (Faculty of Law, University of Toronto, January 2008) <http://www.law.utoronto.ca/documents/reprohealth/abortionbib.pdf> at 12 [*Access to Abortion Reports*].
[141] See: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 19.
[142] See: Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions", *supra* note 117 at 539, 540; Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 186-187. See also: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 19; *Access to Abortion Reports*, *supra* note140 at 12; Jessica Shaw, *Reality*

As shown by Jocelyn Downie and Carla Nassar, doctors, at times having the sole access to and monopoly over medical information,[143] have been misusing their status and powers to mislead women, and have been reported to actively attempt to block, and in some cases effectively blocking, access to abortion.[144] They would also lie about the actual week of gestation, intentionally tricking women to pass the gestational time limit set by the relevant province[145] so that they would be too far along with the pregnancy. In such a case, these women are prevented from having an abortion in that particular province and are forced, if they are 'privileged' enough to have the means, to travel to another province with longer gestational time limits.[146]

2.1.3. Breach of Privacy

Women's testimonials gathered by several studies reveal a disturbing reality of deliberate breaches and invasions to privacy, disrespecting the boundaries of both 'the self' and of space. Privacy, especially in small communities,[147] is of special importance in the context of abortion where stigma and shame still persist. Shame and the fear of public denunciation are, unfortunately, strong motivating factors behind the need for privacy. Shame misleadingly correlates between privacy, as a political right, and secrecy, and misplaces trust and confidentiality with fear, thus further condemning women to anonymity and invisibility. Women's wish for privacy is a reaction to that fear,[148] and the justification for the need of privacy is a fear of shame.[149]

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check, supra note 117 44-45, 46; See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 158.

[143] *Ibid* at 157-158.

[144] *Ibid* at 145.

[145] See: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 19; See also: Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions", *supra* note 117 at 540.

[146] See: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 19; See also Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions", *supra* note 117 at 540. For more testimonials of women recounting the barriers they had to endure, see: Jessica Shaw, *Reality check, supra* note 117 at 48-51.

[147] See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 156-157.

[148] On this point see: Shannon Stettner, *Without Apology*, *supra* note 126 at 5.

[149] See for example the story of Tabatha in Martha Solomon & Kathryn Palmateer, *One Kind Word*, *supra* note 139.

2.1.4. Lack of Abortion providers[150]

Across Canada, there are not enough hospitals that provide abortion services, and not enough qualified physicians who can perform abortions.[151] Abortion services are scarce especially in the rural and remote parts of Canada.[152] Statistics on abortion providers, gathered by Canadians for Choice show the striking problem of the scarcity of abortion services in Canada:

> in spring 2012, the total number of providers in Canada was 134, with the provincial and territorial breakdown as follows: Nunavut, 1; Yukon, 1, Northwest Territories, 2; British Columbia, 23; Alberta, 4; Saskatchewan, 3; Manitoba, 4; Ontario, 36; Québec, 54; New Brunswick, 3; Prince Edward Island, 0; and Newfoundland and Labrador, 3.[153]

The shortage in abortion providers can be attributed to several reasons, such as the fear of anti-RJ escalating violence and harassment,[154] targeted mostly against abortion providers; lack of appropriate training is another reason;[155] aging and retirement of older physicians, coupled with

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[150] See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 146-149; Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 20-21; Jessica Shaw, *Reality check, supra* note 117 at 2, 39-40; Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions", *supra* note 117 at 539; Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 188.

[151] See: Jessica Shaw, *Reality check, supra* note 117 at 39.

[152] Shannon Stettner, *Without Apology*, *supra* note 126 at 53.

[153] Shannon Stettner, *Without Apology*, *supra* note 126 at 338: quoting Canadian for Choice, "Access at a Glance: Abortion Services in Canada" (Spring 2012), online: <http://www.sexualhealthandrights.ca/wp-content/uploads/2015/09/Access-at-a-Glance-Abortion-Services-in-Canada.pdf> (Last visited: 30.8.2018). The report brings important information, such as the number of medical and surgical abortions, gestational limit, the number of private providers, the need for parental consent. For further information on access to abortion providers in Canada in the autumn of 2000, see also: Laura Eggertson, "Abortion Services in Canada - A Patchwork Quilt with Many Holes" (2001) 164: 6 Can Med Assoc J 847 at 849 [Laura Eggertson, "Abortion Services in Canada"]. See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 11-12.

[154] See: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 146-147; Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 20-21; Jessica Shaw, *Reality check, supra* note 117 at 39.

[155] *Ibid* at 148-149; Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 21; Jessica Shaw, *Reality check, supra* note 117 at 39-40. Medical schools in Canada do not incorporate the study of abortion in their curricula. It was found that almost 40% of medical schools do not offer any training in or teaching of abortion, its different approaches, methods, procedures and policies, not to mention its historical, moral and ethical aspects and implications. (*Ibid*, referring to Atsuko Koyama & Robin Williams, "Abortion in Medical School Curricula" (2005) 8:2 McGill Journal of Medicine 157). See also: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 21. One study found that the average time spent on abortion by medical schools is less than an hour, whereas the time spent by two Canadian medical schools on the study of Viagra "exceeded the time spent discussing abortion by a factor of nine." See: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 21, referring to "Medical Students for Choice, Fact sheet: The lack of abortion training and providers in Canada (2003). See also: Jessica Shaw, *Reality check, supra* note 117 at 40.

the lack of training of new future providers that could replace them, is another impediment to access.[156]

2.1.5. Minors and Parental Consent

Depending on the age of consent of minors to medical treatment defined by each of the provinces, in some cases parental consent must be obtained prior to abortion.[157] Minors in general are vulnerable, even when parental consent is not mandatory, especially in small places such as in distant rural areas. They may therefore find access to abortion services particularly difficult. Requiring parental consent from minors is blind to the vast contexts in which these minors live, and the complex circumstances that may have resulted in and led to their pregnancies.

In sum, these obstacles have impeded women's access to abortion services, depriving them of their reproductive independence and control. In a reality of an already heavily over burdened public health system[158] they have resulted, for example, in creating considerable delays and very long waiting periods for abortion services.[159] Even when abortion services do exist, even when women are eligible for public funding, and even when a woman wishing to terminate a pregnancy complies with the bureaucracy and criteria set by the province and the hospitals, that does not guarantee the waiting time for the actual performance of the procedure. Depending on the hospital, the waiting time can vary between 1-6 weeks.[160] Ontario, for example, is known to be the "home to the three hospitals with the longest wait-times to access an abortion in the entire country."[161] Waiting times

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[156] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 189; Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 149.
[157] *Ibid* at 158-159. See also: https://www.kidshelpphone.ca/Teens/InfoBooth/Money-jobs-laws/Laws/The-law-and-your-body.aspx#abortion (Last visited: 30.8.2018).
[158] See: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1113.
[159] *Ibid* at 1095. See also: Jessica Shaw, *Reality check, supra* note 117 at 1, 30-31, 36; See also: Laura Eggertson, "Abortion Services in Canada", *supra* note 154 at 849.
[160] See: Jessica Shaw, *Reality check, supra* note 117 at 1.
[161] *Ibid* at 30.

in Ottawa can reach to up to 6 weeks.[162] In Saskatchewan, which has only 3 providing hospitals in the entire province,[163] the waiting time is also 6 weeks.[164]

Time is obviously of the essence in the context of abortion. Every delay could lead to unnecessary complications in performing an abortion at a later stage, posing risks to the health of the woman involved,[165] and confronting her with unnecessary emotional distress involved in waiting for her right to abortion to materialize, while carrying on with a pregnancy that she wanted to terminate in the first place. As discussed above, delays, at times used as a deliberate 'stalling' mechanism by anti-RJ medical personnel, can also result in exceeding the possible gestational age limits set by the province, again, obliging women to look for an abortion provider outside her province.[166]

Impeding Canadian women from unfettered 'timely and safe' access to abortions has obliged them yet again to create their own solutions, and seek help elsewhere. One such solution is private abortion clinics.[167] Unlike hospitals, these private services are widely known for their professional and high quality services.[168] Clinics are equipped to offer better, compassionate, friendlier, non-

[162] *Ibid* at 30-31.
[163] Shannon Stettner, *Without Apology*, *supra* note 126 at 338.
[164] See: Jessica Shaw, *Reality check, supra* note 117 at 36.
[165] See: C.J.C. Dickson in the *Morgentaler Decision*, *supra* note 115 at para 30. See also: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1096.
[166] In PEI, for example, the gestational age is 15 weeks. See: Jeanelle Sabourin & Margaret Burnett, "A Review of Therapeutic Abortions", *supra* note 117 at 535.
[167] See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 176-182. As shown by Rachael Johnston, in 1996 hospitals were the primary providers of abortion services, performing 66.7% of total abortions in Canada. (*Ibid* at 184, referring to Statistics Canada. *Induced Abortion Statistics* (Ottawa: StatCan, 2005a). However, as the barriers to access to public abortion services have become more common and complex, the predominance of provision of abortions in hospitals has gradually and continuously declined, and private clinics have become the main providers of abortion services in Canada. (*Ibid* at 179). In 2009 clinics performed 55.5% of abortions in Canada (*ibid*), and approximately 58% in 2014. Out of the 93,755 abortions that were performed in Canada in 2009, 52,115 were performed in clinics. See: Canadian Institute for Health Information (CIHI), *Induced Abortion, Quick Stats, 2009* (28 October 2011) online <https://www.cihi.ca/sites/default/files/ta_09_alldatatables20111028_en_0.pdf> at 1. (Last visited: 30.8.2018). Out of the 81,897 abortions performed that year in Canada, 47,966 were performed in clinics. See: Canadian Institute for Health Information (CIHI), *Induced Abortions Reported in Canada in 2014* (2 December, 2015) online: <https://www.cihi.ca/en/access-data-reports/results?query=Induced+Abortion+Statistics&Search+Submit=> Table 1. See also: Abortion rights Coalition of Canada. *Statistics - Abortion in Canada* (Updated3 July, 2018, Online <http://www.arcc-cdac.ca/backrounders/statistics-abortion-in-canada.pdf> at 2. (Last visited: 30.8.2018).
[168] See: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1095.

judgmental treatment, support, counselling and care for women.[169] Staff members are usually pro-RJ,[170] and in some cases, private clinics even employ feminist approaches.[171]

Unfortunately, access to and availability of private clinics are hindered by financial and geographical obstacles. Private abortion clinics are not equally "available nor accessible to all Canadian women".[172] They are not covered by provincial health care plans,[173] obliging women to pay fully or partially for their abortions,[174] and they do not exist in all provinces.[175] "[S]afe and timely access to abortion services"[176] has therefore become "a privilege of wealth".[177] Access is dependent upon and marked by discriminatory and stratifying lines drawn between relatively affluent and educated women, generally white, and women from further underprivileged minorities whose socio-legal inferiority lies at the intersection of several identity based-affiliations, such as gender, ethnicity, race, age, geography and/or class.[178] As aptly put by Laura Eggerston: "[t]he availability of abortions in Canada now depends on a woman's location and the size of her pocketbook."[179]

Indeed, as Shannon Stettner points out, there have been some recent developments aimed at improving access to abortion services by removing several previous obstacles. For example, in 2015, following the election of Liberal Premier Brian Gallant, New Brunswick repealed some of its criteria, now no longer requiring that two doctors must confirm that an abortion is medically

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[169] *Ibid*. See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 176, 194.
[170] *Ibid* at 194.
[171] *Ibid* at 179. An example is the Centre de santé des femmes de Montréal, referred to by Rachael Johnstone (*ibid*). As she describes, this clinic, one of three in Quebec, follow and use feminist approaches and philosophy.
[172] See: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1095.
[173] *Ibid*; See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 194.
[174] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 104-107. See also: Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 153-154.
[175] Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1095.
[176] *Ibid* at 1096.
[177] *Ibid*.
[178] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 14. See also: Chris Kaposy, "Improving Abortion Access in Canada", *supra* note 117 at 21; Jocelyn Downie & Carla Nassar, "Barriers to Access to Abortion", *supra* note 117 at 153, 158.
[179] See: Laura Eggertson, "Abortion Services in Canada", *supra* note 153at 847.

necessary, and that the doctor performing the abortion must be an obstetrician and gynaecologist.[180] Also in 2015, RU-486, an abortion medication also known as the 'abortion pill' used for the termination of pregnancies up to first 50 days of gestation was approved by Health Canada. Despite its estimated high cost, approximately $270, and the fact that it must be prescribed by, and can only be taken under, a doctor's supervision,[181] it might still improve accessibility and availability to abortions, especially for those who live at remote and distant areas.[182]

As Shannon Stettner further indicates, in March 2016, the PEI government declared that abortion services, which did not exist at all in PEI, would be available by the end of the year.[183] As of January 2017, following PEI government's new Women's Wellness Program,[184] women can finally access surgical abortion services up to 12 weeks of gestation. In cases greater than 12 weeks, women would be consulted as to available options, such as providers in other provinces.[185] Faced with these obstacles, women are forced yet again to seek help elsewhere. Some are "forced to carry their unwanted pregnancy to term."[186] Others may even feel compelled to try to self-induce[187], turn to unregulated providers outside the formal health system, and even "seek a back-alley abortion".[188] As Marilyn Wilson sharply puts it, it seems "[i]ronically, […] to be getting worse rather than better since the *Morgentaler* decision in 1988."[189] We are back to where it all started - to the back-alleys. This time, however, abortions are legal. Having to go through so many

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[180] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 56, 88.
[181] *Ibid* at 56-57.
[182] *Ibid* at 57.
[183] *Ibid*.
[184] See: Prince Edwards Island Government, Health PEI. *New Women's Wellness Program* PEI Health <https://www.princeedwardisland.ca/en/information/health-pei/womens-wellness-program> (Last visited: 30.8.2018).
[185] *Ibid*.
[186] See: Jessica Shaw, *Reality check, supra* note 117 at 40. See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 188.
[187] See: Jessica Shaw, *Reality check, supra* note 117 at 2, 40.
[188] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 188.
[189] See: Marilyn Wilson, Executive Director of the Canadian Abortion Rights Action League in Ottawa, brought in Laura Eggertson, "Abortion Services in Canada", *supra* note 153 at 847. See also: Shelley Gavigan, "Beyond Morgentaler", *supra* note 116 at 118.

obstacles in exercising what is a legal right, has led to the conclusion that "[t]he Supreme Court's decision, profound as it was, did not create a right to abortion for Canadian women, nor did it offer any resolution of the abortion issue".[190] Using the sharp words of Catharine MacKinnon writing in the American context of *Roe v. Wade*, "[a]bortion was not decriminalized; it was legalized".[191] The question that now arises is "how an apparently positive legal change could result in some women being much worse off than before".[192] The reasons are rooted in and linked to the identity, and specifically the gender of the key players in the process of legalization. The debate was led by male doctors whose rhetoric of medicalization, specifically that of necessity, remained intact. It has articulated the debate over abortion from decriminalization, leading to the 1969 reform, to legalization, culminating in the *Morgentaler* decision. Donna Greschner explains that women were excluded from "framing the terms and the vocabulary of the abortion debate".[193] This exclusion from participating in formulating the state legal language of abortion, has "predetermine[d] its outcome."[194] Put it in other words, the denial of women's rights to abortion was the outcome of, predetermined and caused by, the absence of women's voice and experience from the processes of legalization.

2.2. Abortion WITHOUT Women: The Rhetoric of Abortion and the Absence of Women's Voice and Experience

[190] *Ibid*.
[191] See: Catharine MacKinnon, *Feminism Unmodified*, *supare* note 112 at 100-101.
[192] See: Eileen V Fegan, "'Subjects' of Regulation/Resistance? Postmodern Feminism and Agency in Abortion-Decision-Making" (1999) 7 Fem Legal Stud 241 at 244 [Eileen Fegan, "'Subjects' of Regulation/Resistance?"].
[193] See: Donna Greschner, "Abortion and Democracy for Women: A Critique of Tremblay v. Daigle" (1990) 35 McGill LJ 633 at 633 [Donna Greschner, "Abortion and Democracy for Women].
[194] *Ibid*.

I) <u>The Rhetoric During the Abortion Reform Campaign</u>

As discussed in *Chapter 3*, the abortion reform campaign leading to *Morgentaler* was predominantly male-oriented, led, once again, by male professionals, such as physicians, lawyers, state officials and clergy.[195] It embodied a problematic androcentric medical discourse, especially that of necessity. Abortion was not perceived "'as a women's issue'",[196] but rather as a health issue. Women were talked about "as if the pregnant women had little interest and few rights in the matter".[197] They were depoliticized and objectified, stripped of the ability to make their own sound decisions, exercising their autonomy over their bodies. They were portrayed, instead, as weak victims needing to be saved by "protective legislation"[198] from the back-alley abortion provider.[199] Women's voices that questioned and challenged the discourse of medicalization, articulating abortion, instead, by deploying rights-based rhetoric,[200] mainly the rights to equality and access[201] "had had much harder time being heard".[202]

Women's groups played a marginal role in the original reform of *section 251*.[203] They were relatively excluded from the debates and the reform processes in general.[204] Even after the struggle was taken over and led by Dr. Morgentaler, shifting its focus from reform to total repudiation of abortions laws, and despite the considerable growth in their number and activism, women's

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[195] See: Jane Jenson, "Getting to Morgentaler: From One Representation to Another" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 15 at 16 [Jane Jenson, "Getting to Morgentaler"].
[196] *Ibid*.
[197] *Ibid*.
[198] See: Janine Brodie, Shelley A M Gavigan & Jane Jenson, "Chapter 1: The Politics of Abortion" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 3 especially at 11 [Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1"].
[199] *Ibid*.
[200] *Ibid*.
[201] See: Shelley Gavigan, "Beyond Morgentaler", *supra* note 116 at 127.
[202] See: Jane Jenson, "Getting to Morgentaler", *supra* note 195 at 16.
[203] *Ibid* at 21.
[204] *Ibid* at 31. See also: Eileen Veronica Fegan, *Abortion, Law and the Ideology of Motherhood: New Perspectives on Old Problems* (LLM Thesis, University of British Columbia, Law School, 1994) [Unpublished] at 66, particularly n 30 [Eileen Fegan, *Abortion, Law and the Ideology of Motherhood*]. See also: F.L. Morton, *Pro-Choice vs. Pro-Life: Abortion and the Courts in Canada* (Norman, OK: University of Oklahoma Press, 1992) at 19 [Morton, *Pro-Choice vs. Pro-Life*].

groups, or feminist rhetorics, were not at the center stage of the struggle. Dr. Morgentaler was the one who represented women in the Courts. It was a one-man show.

It is important to emphasize here that this thesis does not wish to trivialize Dr. Morgentaler's activism and acts of civil disobedience, nor his important role in mobilizing the legalization of abortions in Canada. His lawbreaking is indicative of the lawmaking potential entailed in civil disobedience. His acts of defiance led to the legalization of abortion in Canada, and had a profound evolutional impact on the entire Canadian nation. He accomplished through lawbreaking major political and legal achievements, such as invoking a further debate over abortion, and mobilizing the Canadian Government to enact the Canadian Charter of Rights and Freedoms,[205] mobilizing Canadian civil society, and in particular in the form of the emergence of several women's organizations and coalitions, pro and antiabortion, and, lastly, having a profound impact on the relationship between the judiciary and the Parliament, and on the possibilities for judicial activism and noninterpretivism.[206] But, Dr. Morgentaler's lawbreaking falls within the paradigmatic definition of civil disobedience. The space and voice for women was very limited. It was a discourse of medicalization, led by a doctor, that did not advance an overall gender-rights-based rhetoric.

This is not to say, however, that women did not have any role in the campaign.[207] Following the 1969 reform, the 1970s and 1980s were marked by a rise in feminist activism and women's movements and organizations in general, taking greater part in the abortion legalization struggles.[208] One example is the foundation of the Abortion Caravan of 1970 by the Vancouver Women's Caucus, travelling to Ottawa through several Canadian cities with 'abortion on demand'

[205] See: Morton, *Pro-Choice vs. Pro-Life, supra* note 205 especialy at 11.
[206] *Ibid* especially at 222-227, 303-305.
[207] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 32.
[208] *Ibid* at 49.

as its main slogan.[209] Similarly, in several parts of Canada by mid 1980s abortion had become a predominant issue.[210] Organizations began to question and challenge the articulation of abortion in terms of choice, setting the ground for the later discourse of Reproductive Justice. The Ontario Coalition for Abortion Clinics (OCAC), for example, using socialist feminist rhetoric, articulated their agency "as one of reproductive rights",[211] linking "reproductive rights and health to child care, pay equity, and new power relations between women and men".[212]

The feminist movement, however, was fragmented and polarized over the abortion issue, especially regarding questions of scope and methods. Some feminists refused to focus their political agenda on reproductive rights all together while others "were reluctant to place it high on their agenda of demands".[213] Moreover, politics of identity and difference and the rise of critical feminist voices and theories, focusing on the relevance of race, colour, ethnicity and class and their intersection with gender especially in the context of abortion had begun to polarize the women's movement. Their argument was that approaching abortion narrowly as a single issue, articulating it in 'neutral' terms of choice, has the effect of excluding minority women, such as women of colour.[214] A narrow approach discards the particular experiences of women based on their intersecting identity-based affiliations such race, class, ethnicity, and citizenship, and ignores the relevance of the latter in the construction of their gender and life experience, and in particular in the context of abortion and reproductive rights. In a country where forced sterilization of aboriginal women has been used as a eugenic means of controlling and eliminating aboriginal childbirth and

[209] See: Jane Jenson, "Getting to Morgentaler", *supra* note 195 at 44.
[210] *Ibid* at 52. In Quebec, for example, the Federation des Femmes du Quebec started to articulate their activism and agency using the political language of pro-choice. *Ibid* at 44.
[211] *Ibid* at 52.
[212] *Ibid*.
[213] *Ibid*. For further discussion, see also: *ibid* at 43-50.
[214] *Ibid* at 52.

population, women of colour also feared that abortion activism could be used as a tacit weapon of the State to monitor and even prevent non-white childbirth and childbearing.[215]

Abortion, then, was not the main focus of the women's movement in the 1970s and 1980s.[216] Jane Jenson explains that since the women's movement was fragmented from the start, having no alternative "visions and arrangements"[217] that could be forced "into the centre of the universe of political discourse",[218] the debate over and campaign for abortion remained dominated by the discourse of medicalization.[219] The women's movement's involvement in abortion was mediated by and channelled through Dr. Morgentaler and his legal struggles. They supported him on his journey to legalize abortions. In fact, some women's organizations such as the Canadian Association for Repeal of the Abortion Law (CARAL),[220] established in 1978, and OCAC, founded in 1982, were founded "with the specific goal"[221] of supporting and helping Dr. Morgentaler,[222] providing him with financial and political support.[223] The process of legalization focused most invariably on the story of Dr. Henry Morgentaler and on his struggle for legalizing abortion. While the women's movement defended Dr. Morgentaler, he defended himself and his actions, not his women client's actions or their right over their bodies. Except for the women *upon which* he performed abortions and whose stories were relatively marginal and instrumental for *his* defence of necessity, and shadowed by his heroism, women and feminist discourse advancing rights-based rhetoric were not the focus of his struggle.

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[215] *Ibid*.
[216] *Ibid* at 50.
[217] *Ibid*.
[218] *Ibid*.
[219] *Ibid*.
[220] In 1980 CARAL changed its name to the Canadian Abortion Rights Action League. In 1982 it consolidated its' research and educational initiatives and programs into the Childbirth by Choice Trust. See: Shannon Stettner, *Without Apology*, *supra* note 126 at 49-50. In 2004 it dismantled and in 2005 was replaced by the Abortion Rights Coalition of Canada (ARCC).
[221] *Ibid* at 50.
[222] *Ibid* at 49-50.
[223] *Ibid* at 50.

It is interesting to note that Dr. Morgentaler's reference to necessity for the women involved turned into *his* defence. *Their* necessity became *his* defence. The women's voices were appropriated by him, used to defend *his actions*, rather than theirs. They were absent and marginalized, used as the means of defence for a male physician, and a medium through which state law could be challenged and changed. Once again, women were talked about and discussed, but, only indirectly in the third form, and from a medical perspective, as a patient. Again, women's bodies and wombs were appropriated, and, again, on their behalf, but devoid of their voice. This time, however, it was trickier since it ended in legalizing the right to abortion, presumably guaranteeing the right to control one's body. Stemming from the same larger context of male power-relations that has motivated the criminalization of abortions in the first place, women were perceived once again as mere vessels and national wombs, as "passive objects—bodies on which laws are imposed and procedures carried out."[224]

II) The Rhetoric of Abortion in the Supreme Court

The Supreme Court in the *Morgentaler* decision was faced with and examined several constitutional questions regarding the constitutionality of *section 251*. However, the principal issue at stake was whether *section 251* infringed the rights guaranteed by *section 7* of the Charter of Rights and Freedoms. The majority Justices agreed that *section 251* violated *section 7*. What they disagreed about, however, was the extent and scope of *section 7*.

The Justices based their decisions on procedural and administrative grounds using a medical rhetoric, "reinforc[ing] the notion that abortion is a medical matter".[225] Abortion was perceived as a private issue,[226] and approached individually, as "an *individual* right to life, liberty, and security of the person".[227] C.J.C. Dickinson, for example, found *section 251* to be in breach of the right to

[224] *Ibid* at 32.
[225] See: Shelley Gavigan, "Beyond Morgentaler", *supra* note 116 at 127.
[226] *Ibid*.
[227] *Ibid*. Emphasis in original.

security of the person, forcing women to carry a pregnancy to term against their will, and exposing the ones who comply with its criteria to physical and psychological risks[228] caused by the serious delays.[229]

Justice Bertha Wilson, on the other hand, approached *section 7* broadly, not only widening the scope of the right to 'security of the person', but also focusing on the right to liberty. Unlike the procedural approach taken by the rest of the majority Justices, Justice Bertha Wilson took a substantive approach.[230] Taking a broader approach, she criticized her majority colleagues for focusing solely on the right to security of the person, both in its physical and psychological sense, failing to deal, as she wrote, with the right to liberty also encompassed within the scope of *section 7*.[231] The right to liberty, she asserted, and the Charter in general, are inherently and "inextricably"[232] interconnected to the notion of human dignity.[233] The right to make important personal and private decisions, she further continued, free from any interference from the state is one of the aspects of human dignity, and comprises an important part of the right to liberty.[234] The right to liberty, in her view, is interpreted as a right conferring on the individual the autonomy and power of "decision-making in matters of fundamental importance".[235]

Unlike her colleagues, she was the first and only Justice at that time who abandoned the strictly narrow discourse of medicalization, approaching the issue of abortion from wider contextual, humanist and in particular gender-equality perspectives, placing the individual woman and her decision within a wider continuum. Her decision is one of the rarest feminist-based reasonings in this story of abortion in Canada, focusing on the individual woman and, thus, corresponds with the

[228] See: the *Morgentaler Decision*, *supra* note 115 at 63, para 35.
[229] *Ibid*.
[230] *Ibid* at 163, para 224.
[231] *Ibid* at 161, para 221.
[232] *Ibid* at 164, para 227.
[233] *Ibid*.
[234] *Ibid* at 166, para 230.
[235] *Ibid* at 171, para 240. See also: *ibid* at 166, para 230.

critical legal pluralist approach taken in this thesis, focusing on the individual herself as a site of law/s-making.

She broadens the scope and rationale of the decision to have an abortion, arguing that "[i]t is not just a medical decision",[236] but one that also involves "profound social and ethical" aspects.[237] Approached from and embedded in a larger context, such a decision is understood as one that will have deep socioeconomic and psychological impact on the pregnant woman.[238] The woman involved and her decision cannot be approached from an atomist, male and gender-blind perspective, since that would eliminate the larger historical context of gender and sex discrimination in which both are embedded, and which is necessary for understanding the 'particularities' of her decision.[239]

Justice Wilson holds that the right of women to decide to have an abortion is guaranteed by the right to liberty, and argues that *section 251* expropriates the woman from her right to personal autonomy of decision-making. It prevents her from exercising her right to liberty, deciding on a private matter that is clearly hers to decide, and grants the power of decision-making into the hand of doctors.[240] *Section 251*, she asserts, prevents a woman from controlling her reproduction, denying her right of control to decide whether or not to reproduce, and placing the control over reproduction at the hand of the state.[241] This, she holds, is more than violating a woman's right to liberty, denying her power and autonomy of decision-making. It is, she argues, "a direct interference with her physical "person" as well."[242] In a strong passage, taking a profound feminist critique perspective, she criticizes *section 251* for its objectification of women, treating them "as

[236] *Ibid* at 171, para 241.
[237] *Ibid*.
[238] *Ibid*.
[239] *Ibid* at 171, para 242.
[240] *Ibid* at 172, para 243.
[241] *Ibid* at 173, para 245.
[242] *Ibid*.

a means to an end",[243] as a vessel to carry pregnancies, a tool, and as "a passive recipient of decision[s] made by others",[244] about her, about her body, and about "whether her body is to be used to nurture a new life."[245] She concluded that *section 251* violated a woman's right to security of the person.[246]

Further, she criticized the state's intervention into spheres that are essentially within the realms of women's autonomy to choose and decide. She held that such an intervention, carrying with it a criminal sanction of imprisonment of women exercising their right to decide without the approval of the state, amounts "not only to endors[ing] *but also to enforc[ing],* on pain of a further loss of liberty through actual imprisonment, *one conscientiously-held view at the expense of another."*[247] It is the denial, she further held, of women's "essential humanity".[248] Such a violation, having the magnitude of depriving women of their own humanity, treating them as vessels, as means to an end, does not comply with the principles of fundamental justice.[249] In examining whether *section 251* could be justified as a "reasonable limit" under *section 1* of the Charter, something interesting happens. Justice Bertha Wilson 'allows' the fetus to 'step in', using a relatively medicalized discourse. Taking a woman's right to decide, she holds, "at *all* stages of her pregnancy",[250] is more than a mere "limitation on it".[251] It is, she concludes, "a complete denial of the woman's constitutionally protected right under s. 7."[252]

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[243] *Ibid*.
[244] *Ibid*.
[245] *Ibid*.
[246] *Ibid*.
[247] *Ibid* at 179, para 253.
[248] *Ibid*. Justice Bertha Wilson quotes Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982).
[249] See: the *Morgentaler Decision*, *supra* note 115 at 179, para 253.
[250] *Ibid* at 183, para 261. Emphasis in original.
[251] *Ibid*.
[252] *Ibid*.

However, it is hard to reconcile this right to decide *'at all stages',* with the limitation she seems to draw on these same stages. She held, and this is where she departs from feminist discourse, that such a right is an absolute and conclusive right only *at the early stages* of the pregnancy.[253] Like Justice Beetz, she asserted that the main legislative objective of *section 251* was the protection of the fetus, an objective that she found to be "perfectly valid".[254] Whilst at early stages a woman can exercise her right to choose and decide to have an abortion, at later stages of pregnancy, however, when human life supposedly begins, the objective of protecting the fetus does override and takes precedent over the woman's right decide for herself. [255]

Ironically, it seems that we are back to where we started the discussion of abortion – that is, to the discussion of where life begins. If in the past it was based on the theological doctrine of sanctity of life, according to which life begins at the moment of ensoulment of the body, mostly understood as the moment of 'quickening', now it is based on a medical discourse according to which the fetus is potential life at the second trimester of the pregnancy.

Failing to "address the question of whether women had reproductive rights",[256] the Court did not just refuse to acknowledge women's autonomy and control over their bodies.[257] It did more than that. The Court went further, juxtaposing women and fetuses in an oppositional binary relation of conflicting and competing rights, placing women's rights over their bodies in competition with and opposition to an alleged fetus' right to life.[258] Refusing to settle the matter, the Court held that it is not a legal question, but rather a political one, that should be settled by the legislature.[259] Indeed, as pointed out by Jane Jenson, the Supreme Court, echoing the Charter's reinforcement of

[253] *Ibid* at 183, para 260.
[254] *Ibid* at 181, para 256.
[255] *Ibid* at 183, para 260. See also: *Ibid* at 181, para 257.
[256] See: Jane Jenson, "Getting to Morgentaler", *supra* note 195 at 16.
[257] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 121.
[258] See: Jane Jenson, "Getting to Morgentaler", *supra* note 195 at 16.
[259] See: Janine Brodie, Shelley Gavigan & Jane Jenson, "Chapter 1", *supra* note 198 at 12. See also: Jane Jenson, "Getting to Morgentaler", *supra* note 195 at 16.

the rhetoric of individual and collective rights, did start to deploy a rights-based language in approaching and reinterpreting the abortion issue.[260] However, at the same time, the Court preserved and further reproduced the language of medicalization, "by continuing to insist that it was dealing with a medical matter".[261]

Although aggrieved communities may win cases, either in court, culminating in a historic ruling, or in Parliament, with the enactment of a new law, the underlying rhetoric and foundational ethos of the institution that created the injustices in the first instance may not change. In such circumstances, the rulings or legislative acts are merely symbolic and declarative. In other words, winning a case in court, or mobilizing the enactment of a new law, does not necessarily mean that there will be a change to the deep and core meta-foundations of the discourse that a particular case was aimed at challenging and eliminating. Such is the case of abortion in Canada. The underlying rhetoric of medicalization has remained intact.

III Abortion Rhetoric After Morgentaler

The use of medical rhetoric in *Morgentaler* and in particular the "unequivocal commitment of all the Supreme Court judges to 'foetal interests' or state's interests in the foetus[262] is connected to the legislative and adjudicative attempts to limit and even re-criminalize abortions since *Morgentaler*. In Shelley Gavigan's words, it:

> was less than facilitative of women's access to abortion. The court had simply struck down one form of legal prohibition. […][263] The cynicism and mean-spiritedness of assorted conservative governments and their commitment to erosion of even the modest social programs in place, meant that the legal victory of Morgentaler was just that, and no more.[264]

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[260] *Ibid*.
[261] *Ibid* at 17.
[262] See: Shelley Gavigan, "Beyond Morgentaler", *supra* note 116 at 127.
[263] *Ibid* at 141.
[264] *Ibid* at 145.

Writing about the importance of language and rhetoric in the context of abortion, focusing on women's speech, agency and activism, and their relevance for a well functioning democracy, Donna Greschner argues that the legal discourse regarding abortion has remained androcentric. It discards and "fails to reflect women's experiences, erases our presence and causes pain in our lives."[265] She explains that one of the reasons why the public debate over abortions has been dominated by a male-centred language and rhetoric is that women's own experiences, nomoi, narratives and voices, "the only voices of the experience - have not framed nor even participated in the debate."[266]

Women, Donna Greschner further explains, were forbidden from publicly speaking about their "experiences of sexuality and reproduction, central aspects of our lives that have been contemptuously, erroneously and tragically dismissed or misrepresented by the linguists of patriarchy."[267] Men have not only been the dominant participants in the debate, they have also owned a preliminary privilege and monopoly – a linguistic control over the creation of the language of the debate itself. In fact, she further writes, "[a]lmost all of the vast writings on abortion have been authored by men."[268] Women, she explains, were excluded from taking part in the abortion debate, and did not possess any control over the creation of "the language of the debate in the first place".[269]

Indeed, she continues, there are women who have recently started to speak publicly about their abortion experiences,[270] but the words and language they use in order to define and articulate what is their unique experience as women "are not ones [they] have created."[271] In an effort to correct

[265] See: Donna Greschner, "Abortion and Democracy for Women", *supra* note 193 at 641.
[266] *Ibid* at 643.
[267] *Ibid* at 641-642.
[268] *Ibid* at 642.
[269] *Ibid* at 641.
[270] *Ibid* at 642.
[271] *Ibid*.

the discriminatory mechanisms that have confined women to the private sphere, preventing them from accessing the public realm, they are, ironically using the same words and the same underlying rhetoric used for oppressing them as women in the first place. These words that have been created by men are the product of male dominance over both the private and public realms of life, and are the means to entrench, preserve and further reproduce their dominance over these realms. In the context of abortion, women are using the words that have been used to mobilize both the criminalization, decriminalization and legalization of abortion, excluding them from participating in either of these processes.

Donna Greschner focuses on the case of Chantal Daigle, where the Supreme Court of Canada held that the fetus was not a 'human being' under the Quebec Charter nor under civil or common law, and that a man had no "potential father's rights"[272] in the fetus, and had no "right to veto a woman's decisions in respect of the foetus she is carrying."[273] She shows how the prevailing language of the Chantal Daigle case, from her ex-boyfriend, prosecutor, Quebec Courts, and the Attorneys General of both Quebec and Canada has remained male-centred, focusing on procedural and jurisdictional reasoning rather than on her reproductive freedom.[274] The decision according to her might have restored Chantal Daigle's freedom, but did not proclaim it.[275]

Similarly, Joanna Erdman, writing about the denial and/or restriction of public funding for private abortion clinics in Canada, shows how decriminalization was not a triumph of women's rights to equality and dignity over discrimination. She focuses on funding cases, in particular *Jane Doe v. Manitoba*,[276] concerning two women who had to to seek abortions at a private clinic after being

[272] See: *Tremblay v. Daigle,* [1989] 2 SCR 530 at 572 para 78, 62 DLR (4th) 634, 102 N.R. 81, 11 C.H.R.R. D/165, 27 QAC. 81, J.E. 89-1530, EYB 1989-67833.
[273] *Ibid* at para 79. For an interesting gender-critique and discussion on this case and its implications on women, see: Donna Greschner, "Abortion and Democracy for Women", *supra* note 193.
[274] *Ibid* at 636-637.
[275] *Ibid* at 636. See also Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 125-127.
[276] *Jane Doe et al. v. The Government of Manitoba,* [2004] MBQB 285 (CanLII); [2004] 248 D.L.R. (4th) 547 (Can.); [2006] 5 WWR 460; 189 Man R (2d) 284 [*Jane Doe Deciosion*].

informed of the considerable time they had to wait, six to eight weeks and four to six weeks respectively, before receiving publicly funded abortion services at a hospital.[277] They decided to challenge the constitutionality of provisional schemes and regulations refusing to cover clinic abortions under public health insurance plan.[278]

Judge Oliphant of the Court of Queen's Bench ruled in their favour, holding that the exclusion of private abortion clinics from public funding, obliging women to wait violates the rights guaranteed by section 7 of the Charter[279]; and is a violation of women's rights to equality guaranteed by section 15 of the Charter.[280]

Discussing the legal reasoning and rhetoric of the Court, Joanna Erdman explains that Justice Oliphant adopted a liberty-based approach, conceptualizing rights from an individualist perspective.[281] This approach, she argues, is limited and individualistic, since it conceals the social contexts in which women operate, obscures the collective dimensions of women's discrimination, and subsequently prevents us from understanding the magnitude of the larger implications and effects of these discriminatory practices.[282] It conceals the possible complex and interrelated dimensions associated with a decision of a woman to terminate her pregnancy, such as trauma, fear, grief, relief and shame.[283] She offers instead an alternative approach for deciding funding cases, "based on the self-respect and self-worth--the social dignity--of equal community membership".[284] This model, based on the premise of full and egalitarian membership in society, can reinforce and enhance the equality of women. It is sensitive to their unique contexts, special

[277] See: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1101-1102.
[278] *Ibid* at 1101,1103. See also Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 130.
[279] See: *Jane Doe Deciosion*, *supra* note 276 at para 78.
[280] *Ibid* at 79. See also: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1098.
[281] *Ibid* at 1155.
[282] *Ibid* at 1128.
[283] *Ibid*, quoting Eileen Fegan, "'Subjects' of Regulation/Resistance?", *supra* note 192 at 246.
[284] See: Joanna Erdman, "In the Back Alleys of Health Care", *supra* note 116 at 1100.

voices and nomoi, narratives and experiences and, thus, can empower women and enhance their sense of self-worth and self-respect.

According to Rachael Johnston, when commenting on caselaw subsequent to *Morgentaler*, including *Chantal Daigle* and *Jane Doe*, women "were required to construct themselves as victims, rather than empowered actors, to justify state recognition of their rights to abortion services."[285] The rhetoric of necessity depicts women as vulnerable victims, needing protection. It stems from the same patriarchal and medical discourse that underlined both criminalization and legalization of abortion, and which now lies at the basis of the right to abortion, perceiving women as objects to be regulated and controlled. It depicts women only as passive and helpless women, motivated by the need to save themselves and/or their families.[286] The use of this rhetoric by RJ advocates obliges women to be in 'real' need, to be desperate in order to have an abortion, and, thus, ironically entraps them in the same oppressive discursive trap that feminists resist.

Approaching women through the prism of necessity is marked by and entrenches a discourse of victimhood. It does not challenge the medical discourse that has been the engine behind both the crusade against abortions and the campaigns for decriminalization and legalization. Since the underlying rhetoric has remained intact, women, then, still need to prove that they are "victims of circumstances beyond their control."[287] Resembling the criteria set by the Therapeutic Abortions Reform of 1969, such circumstances, referred to by Janine Brodie as "'hard cases'",[288] are for

[285] See: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 134.
[286] Taking a cultural feminist perspective, one can argue here that they are motivated by what Carol Gilligan called ethics of care, that is wishing to save one's life and/or family, and not by what is largely perceived as the male politics of justice. On this: Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).
[287] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 4.
[288] See: Janine Brodie, "Choice and No Choice in the House" in Janine Brodie, Shelley A M Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 57 at 61 [Janine Brodie, "Choice and No Choice in the House"].

example "rape, incest, the woman's health, and fetal deformity".[289] Such cases, casting women "in terms of victim",[290] are more likely to draw public support and sympathy.[291]

"'[S]oft cases'",[292] on the other hand, will likely be condemned, since they involve women who just do not wish to be mothers, and wish to terminate their pregnancies for 'less heroic' reasons, grounded instead in "socioeconomic and life-style factors",[293] and based on notions of women's decision-making and self-determination.[294] Grounding the reason for abortion on the discourse of necessity confines women's rights to control their body into an 'appropriateness' expected from women as mothers only. It thus falls, again, into the same contested patriarchal discourse, rendering women's 'right to choose' a merely symbolic one. As Judith Jarvis Thomson eloquently writes:

> But although they do grant it [the right to choose], [....] they do not take seriously what is done in granting it. I suggest the same thing will reappear even more clearly *when we turn away from cases in which the mother's life is at stake,* and attend, [....], t*o the vastly more common cases in which a woman wants an abortion for some less weighty reason than preserving her own life.*[295]

It is important to clarify here the critique of the discourse of necessity surrounding abortion. When I challenge the discourse of necessity, this thesis does not suggest that these women are not desperate or that they do not face desperate situations. They do. What is objected to is the oversimplification of their acts and of their necessity. The thesis questions the way necessity is approached and interpreted as *a)* the synonym of helplessness and passivity, and as the opposite of agency and resistance, and *b)* in turn, as the only way to receive legitimacy and support for

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[289] *Ibid*; See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 38.
[290] See: Janine Brodie, "Choice and No Choice in the House", *supra* note 288 at 61.
[291] *Ibid*.
[292] *Ibid*.
[293] *Ibid*.
[294] *Ibid*.
[295] See: Judith Jarvis Thomson, "A Defense of Abortion" (1971) 1 Phil & Pub Aff 47 at 54. Emphasis added.

abortion, approaching women as helpless victims, and dictating only several "hard cases"[296] that can qualify as legitimate 'necessary' abortions.[297]

Approaching these women through a narrow prism of necessity portrays them as women who are desperate enough to break the law in order to save themselves and/or their families but who do do not act according to larger principles of justice and equality. It obscures the collective and political aspects entailed in their 'personal' acts of desperation, and prevents us from understanding the political aspects of decision-making. This discourse of necessity, then, renders their acts merely reactionary, as acts forced upon them with the intent to solve an immediate personal problem, rather than acts reflective of their deep belief in the injustice of the law, and preceded by deep processes of decision-making.

Approaching abortions critically, illuminating a discourse of rights, particularly the rights to equality and dignity, would enable us to broaden our approach to necessity and desperation beyond the 'hard cases', and interpret them instead as sites of agency and resistance. A discourse of rights, not of necessity, illuminates these women's self-empowerment and strength, obliging the Courts to express and feel more than sympathy but rather a deep understanding of their rights and their nomoi.

To summarize, the reality of women's reproductive freedom in 2019 Canada is a reality of women who are excluded from participating in the formation of their own rights, affecting their lives and bodies. It is a reality where they may experience many obstacles in exercising their rights, and where doctors and federal and provincial officials are the 'gatekeepers' of their rights to dignity and equality.

Women, then, were excluded from participating in formulating the state legal language of abortion. Even when heard, they were not listened to. Their voices were discarded from the one 'official'

[296] See: Janine Brodie, "Choice and No Choice in the House", *supra* note 288 at 61.
[297] *Ibid*; See also: Rachael Johnstone, *The Politics of Abortion*, *supra* note 116 at 38.

story of abortion rights activism and legalization – the story told by male doctors advancing their interests and agendas, in which Dr. Morgentaler was the main actor. This is not the story of women. Jane Jenson sharply summarizes this point:

> *it is possible to recount the history of abortion politics in Canada without making much reference to the actions of the women's movement;* state actions regulating the termination of pregnancy have been constituted by a variety of other actors. The effect was overwhelming enough for one pro-choice activist to declare in 1981 that '*abortion is the forgotten issue in women's movement in Canada'*.[298]

Nevertheless, having said that women's movement involvement and discourse was discarded does not suggest that there were no women involved. Women did participate. It is the 'ordinary' women that must receive attention- women 'needing' and having abortions, before and after legalization- in order to focus on their acts as legitimate sites of lawmaking.

2.3. Women AND Abortion: A Critical Approach to Abortion

The official story of abortion is construed from a positivist perspective, emphasizing instrumentalism and institutionalism. The focus is on women's movements and organizations, rather than on individual women. Approached this way, women's involvement was regarded as marginal and relatively passive. What is interesting here is that, similar to Ashkenazi feminist scholarship discussed above in the context of Mizrahi affirmative squatters, Canadian feminist scholarship has also fallen in the organizational 'trap', characterizing both legal positivism and several critical approaches, such as legal pluralism.[299] In their efforts to explain women's agency and involvement in the struggle for legalization of abortion, some feminist scholars have focused exclusively on the role played by women's organizations, and have overlooked the participatory role played by individual women in general and particularly women having abortions.

[298] See: Jane Jenson, "Getting to Morgentaler", *supra* note 195 at 43.
[299] See: *Chapter 4*.

Some feminist scholars, shifting the focus from state law and its formal 'agents' to society itself, have challenged the argument that women's involvement was marginal. They urge us to remember that "[a]lthough Morgentaler's name stands out in history […] he was far from alone in his struggles."[300] In what follows I rely heavily on the work of Shannon Stettner. Shannon Stettner explains that although women were subject to a "discursive erasure",[301] muting their voices "in historical accounts of the period",[302] women did speak up and "took an active part in the debates surrounding the need for abortion law reform."[303] What was missing, she continues, was "the will to hear them."[304] And, yet, in providing examples demonstrating how women participated in the struggle, women's participation, agency and activism in abortion are channeled and approached through institutional, organizational and instrumentalist lenses, thus reinforcing positivist rhetoric. It is quite rare, she writes, to hear women's own abortion experiences told by the women themselves.[305]

Indeed, there have been few publications bringing to the fore the stories of individual women who had abortion, and/or who have helped other women to get one. However, in these accounts, women's stories are instrumental. The book *No Choice: Canadian Women Tell their Stories of Illegal Abortion,* published by the Childbirth by Choice Trust, is a good example. The stories in this book, mostly prior to legalization, focus on and are aimed at showing the magnitude of fear, shame and guilt that women have experienced, and the horrific obstacles they had to go through before, during and after abortion.[306] Some scholars argue that since they describe women's

[300] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 49.
[301] *Ibid* at 4.
[302] *Ibid.*
[303] *Ibid*.
[304] *Ibid*.
[305] *Ibid* at 3, 5.
[306] See: Childbirth by Choice Trust, *No Choice*, *supra* note 113.

experiences before the decriminalization of abortion,[307] these "often harrowing tales"[308] reveal narratives that "tend to share much with disturbing tales of "back alley" abortions".[309] Following Shannon Stettner, they tend to portray women as helpless victims,[310] emphasizing the rhetoric of necessity, and hardly "reveal the thought processes behind women's decisions".[311] They are therefore "easily perceived as having little contemporary relevance",[312] rarely "describ[ing] situations to which women today can easily relate."[313]

In contrast, some accounts bring more contemporaneous stories of women's experience with abortion.[314] Striving to normalize abortion,[315] these contemporaneous stories focus on breaking with the silence, *secrecy,* shame and stigma surrounding abortion. They depart from the notion of victimhood and helplessness usually held to characterize the stories prior to legalization.[316] They therefore bring the stories of 'strong' and relatively *politically* aware women who *publicly* speak about their own experience. Nevertheless, striving to break with stigma and shame, these 'modern' accounts fall into the positivist understanding of lawmaking, reinforcing some of the definitional elements of civil disobedience, such as openness and political awareness.

These stories, whether prior to or after legalization, are indeed very important for reminding us the importance of the fight for legalization of abortion.[317] They bring to the fore women's abortion experiences, revealing the narratives and voices of women that have been thus far appropriated by men. Nevertheless, both of these approaches tend to oversimplify women's abortion experiences,

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[307] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 5.
[308] *Ibid* at 4.
[309] *Ibid* at 5.
[310] *Ibid* at 4.
[311] *Ibid*.
[312] *Ibid*.
[313] *Ibid*.
[314] The collection *One Kind Word* is a good example. See: Martha Solomon & Kathryn Palmateer, *One Kind Word*, *supra* note 139.
[315] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 4.
[316] *Ibid*.
[317] *Ibid*.

approaching women from and locating them in two extremes, either as victims needing help or as 'heroic', politically aware women willing to speak openly. They are not focused on the agency and role played by women who had abortions or its lawmaking potential – they jurisgenerate in the course of abortion. This organizational approach overlooks the participatory role of the particular individual woman having abortion in shaping and reshaping legal meanings, negotiating and bargaining her competing vision/s and understanding/s of the law, any law, and of herself, in the process.

When one takes an instrumental and organizational standpoint, women's involvement seems relatively small. What did exist was channelled through and appropriated by Dr. Moegentaler, and was eventually ignored. A critical perspective, however, would reveal and show that women have always resisted and created legal meanings and knowledge about abortion from the standpoint of their bodies. If we take a critical legal pluralist approach we shift the focus from state law to society to the individual herself, and to her legal language and discourse. This approach recognizes a woman's evolutionary and processual capacity to change and transform,[318] allowing her "to produce legal knowledge and to fashion the very structures of law that contribute to constituting [her] legal subjectivity."[319] The emphasis is on her voice and agency, acknowledging her active role in producing legal knowledge.

The individual woman is engaged in dialogic relations with the world. Her relations to law, any law, are not instrumental and hierarchical as a 'law recipient'. She is not just a passive "law abiding",[320] but rather is "law inventing"[321]. The individual woman's role in creating legal knowledge is central, and she is, following Martha-Marie Kleinhans and Roderick Macdonald,

[318] See: Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 CLJS 25 at 38 [Martha-Marie Kleinhans & Roderick Macdonald, "What is a Critical Legal Pluralism?"].
[319] *Ibid*.
[320] *Ibid* at 39.
[321] *Ibid*.

both the subject and object of legal knowledge.[322] She is engaged in a process of "narrative imagination",[323] narrating a genealogy of histories, of the past, present and future, writing and rewriting, written and rewritten by, her story, her legal story and discourses that she generates, and the stories of the legal discourses inside and around her. She is her own legal institution. Her interaction with the world is characterized by a reciprocal evolutionary and constructivist relationship,[324] with others in and outside her 'immediate' world. Her relations with the law, any law, is not intermediate, mediated by either state officials and/or "identified community spokespersons".[325] The emphasis here is on individual legal knowledge, narration, myth, and imagination.

As we have seen, in the context of abortion, a narrow interpretation of abortion, viewing it through a one-dimensional lens from the standpoint of state law, portrays women's engagement with it only as destitute and desperate women. Taking a decontextualizing approach, these women are not perceived as participants in the creation of legal meanings, and their acts are understood as isolated, non-processual, separate, and distinct acts devoid of context.[326]

However, as in the case of Mizrahi women squatters radicalizing the way we think about law/s,[327] we can instead focus on the women themselves, particularly women having abortion, and on their internal working and operation. These women are able to 'speak' and create legal meanings, and to engage in jurisgenesis throughout the entire process of terminating their pregnancies. These women speak through, in and with their wombs, and create their own vision of the law. Their law/s. As in the case of squatting, their 'private' and allegedly not-politically-motivated acts of desperation and necessity, are embedded in, and reveal, a wider political context of gender

[322] *Ibid*.
[323] *Ibid* at 43.
[324] *Ibid* at 46.
[325] *Ibid*.
[326] Ronen Shamir, "Suspended in Space", *supra* note 9 at 233, 234.
[327] See *Section 1* above.

inequality, invoking larger principles of equality and justice, and are aimed at correcting these past and lingering injustices. Approached and interpreted this way, their acts are political ones, bearing collective features of resistance to injustices. They resist and seek to correct with their bodies the inequalities and injustices that have created and further perpetuate their socio-legal inferiority, allowing the state and its agents to control their reproductive freedom, and to decide on their fate. Their stories are not instrumental to the effort to break the silence surrounding abortions. They are important stories, legal scripts in and of themselves, revealing the agency and activism of individual women, even when their involvement is not in the open, but rather in secrecy and silence, whether ashamed or not, whether feeling guilty or not. Even then, these women resist. Their relations with the law, any law, are not mediated by state state officials or non-state agents[328] such as Dr. Morgentaler. These women do not need to join him on his struggles in order to participate in the process of lawmaking. *They are the site of struggle.* They create laws and legal meanings – even if never discovered, and even if never culminating in state legal proceedings. They mobilize change and are the voice of change. *They are the site of change.*

Eileen Fegan, writing about the importance of women's negotiations and decision-making processes in the context of abortions, urges feminists to better listen to women's stories, even to those of grief and trauma.[329] Resembling the larger conceptual thread-questions of *"who-how-what-where",* questioning the location of state law vis-à-vis societies and individuals, she wishes to "disrupt[] feminists' as well as law's complacency about *what* we know and *how* we know it".[330] She argues that the 'real world' – that, is women's lives, nomoi, stories and "everyday lived

[328] See: Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism", *supra* note 318 at 46.
[329] See: Eileen Fegan, "'Subjects' of Regulation/Resistance?", *supra* note 192 at 262, 266.
[330] *Ibid* at 243. Emphasis added.

experiences"[331] – usually discarded "by judicial decisions, legislation or even just by the way 'Law' is set up",[332] should be included, instead, in the making of law and in the study of theory.[333] As the discussion illustrates, contextual and critical approaches are important for explaining socio-legal phenomena and women's experiences and agency in particular. They offer us different tools and methods to approach socio-legal phenomena, ones referred to in *Chapter 4* as *observation* of and *attentiveness* to everything that happens in daily life, focusing on the events, even the small ones, of real life. These tools enable us to discover the 'radical diversity', richness, width, breadth, and depth – each a world in and of itself – entailed in women's acts and agency.

Dependent on each woman's own circumstances, particular and collective, women's agency is not static. Rather it is relative,[334] diverse, dynamic, dialectic, and dialogic. In line with Ehrlich's 'living law', it is continuously changing and evolving,[335] and borrowing from Teubner it is responsive and reflexive to other normative orders.[336] This, in turn, will "encourage[] a more reflexive, responsive and responsible understanding of the concepts of identity, 'self' and agency".[337]

This discourse, accommodating women's diversity and difference, entails the acceptance of the possibility,[338] and this is a very important point Eileen Fegan makes, that women could exercise their agency in conflict with what other feminists consider as "empowered" or "resistant".[339] A woman, she argues, may have a different understanding of herself, agency and activism, depending

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[331] *Ibid*.
[332] *Ibid*.
[333] *Ibid*.
[334] *Ibid* at 263-264.
[335] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, *supra* note 5.
[336] See: Gunther Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17:2 Law & Soc'y Rev 239. See also: Gunther Teubner, "The Two Faces of Janus", *supra* note 4 at 1448, 1451, 1460. See also: Emmanuel Melissaris, "The More the Merrier?", *supra* note 6 at 62.
[337] See: Eileen Fegan, "'Subjects' of Regulation/Resistance?", *supra* note 192 at 265.
[338] *Ibid*.
[339] *Ibid*.

on her own context/s, such as her identity and community/group affiliations. Each social reality entails different experiences and challenges to women, and depending on each woman's own social world and context, she further argues, "[w]hat might seem innocuous in one social reality may be a profound challenge to accepted models of femininity in another."[340]

Agency, she writes, is understood "as a conversation between and among women",[341] in which each woman is approached and "considered in *her own* social context,"[342] and where complex questions are contextualized.[343] Understanding agency this way, subjectively, as a contextual dialogic process between women, experienced differently depending on each woman's social world, allows "a recognition of the many processes of women's subjective empowerment."[344]

Women could even act in ways that on their face seem to conform with, further perpetuate "and recreate what have long been identified as 'patriarchal' value systems, attracting implicit claims of 'false consciousness'".[345] As recalled from Saira Shah's documentary "Beneath the Veil", despite the risk of being imprisoned, some Afghan women insisted on painting their nails and faces. Again, what might have seemed trivial for other women around the world, and even as a sign of complying with patriarchy, items such as makeup and nail polish had different meanings for these women. For them, it was not compliance with male patriarchy, but rather *"a form of resistance"*[346]. It was their way of holding *"on to their dignity"*.[347] Approaching women's agency from this vantage point allows us to better listen to these women, better understanding their stories and acts. It allows us to better approach and explain women's acts of abortion and affirmative

[340] *Ibid* at 264.
[341] *Ibid* at 264-265.
[342] *Ibid* at 264. Emphasis in original.
[343] *Ibid* at 265.
[344] *Ibid*.
[345] *Ibid*.
[346] See: Saira Shah, "Beneath the Veil: The Taliban's Harsh Rule of Afghanistan" (2001), online: <https://topdocumentaryfilms.com/dispatches-beneath-the-veil/> (Last visited: 30.8.2018).
[347] *Ibid.*

squatting, deconstructing their acts as more than mere acts of necessity and despair, but rather as acts of agency and resistance to patriarchy.

Women could have enjoyed an unfettered right to abortion, without needing to confront so many obstacles at present in exercising what is supposed to be their legal right to abortion had it been framed differently, acknowledging women's unique experiences and voices. These obstacles, impeding with the right to abortion, are the product of failure to listen to these women on the part of the state and its agents – whether doctors and/or women movements joining them. Women would not have needed to end where this journey has begun, in the back-alleys or in their homes self-inducing, confined again to secrecy and shame instead of celebrating their public right, if the state listened to their stories in the first place, challenging its own gender bias and entrenched rhetoric of necessity. By juridifying[348] to use Teubner's word, and adopting the translation of intermediate intervening agents, such as Dr. Morgentaler, the discourse distorted these women's voice and language.[349] Donna Greschner wrote that "[t]he essential first step toward the understanding and unfolding of a women's language, concepts, theories and morality, is to hear every woman's story."[350] Freedom and equality, she argues, cannot be achieved, "unless we listen very, very carefully to what women are saying, unless we begin with a phenomenology of women's lives."[351]

It is here where women's stories of their abortions come into play.

2.3.1 Women's Stories of Abortion

As noted above, there are very few published collections of Canadian women's stories of abortion.[352] This section focuses in particular on the women's stories included in the book "No

[348] See: Gunther Teubner, "The Two Faces of Janus", *supra* note 4 at 1455.
[349] *Ibid*.
[350] See: Donna Greschner, "Abortion and Democracy for Women", *supra* note 193 at 647.
[351] *Ibid*.
[352] See: Shannon Stettner, *Without Apology*, *supra* note 126 at 5.

Choice". The stories in this book, as are most stories of women prior to legalization, are considered to be stories of necessity and despair. They are not approached as stories revealing women's agency and activism. Instead of regarding these stories as mere manifestations of necessity and destitution, trivializing their depth and width, this section offers a different approach, one that would reveal their "legal DNA"[353] and jurigenerative nature, interpreting them as acts of resistance and lawmaking.

These are women who were willing "to pay exorbitant prices for a procedure",[354] and go through tremendous pain, agony, humiliation and even death than to remain pregnant and give birth. For them "[t]he fear of being pregnant outweighed the fear of dying."[355] They were therefore willing to take the risk of dying.[356] Billi, for example, said that she "would have done anything to terminate this pregnancy, regardless of how dangerous or stupid it would have been."[357] Similarly, Gail declared that she "would rather take a chance of death than continue this pregnancy".[358]

"Their need was extreme",[359] willing to die than to remain pregnant, and it was this need that was thought to have motivated them to terminate their pregnancies. Whilst this willingness is perceived as "speak[ing] to the desperation of these women",[360] it can be interpreted as an expression of agency, self-determination and self-empowerment. Their willingness to die and not to have a baby is an expression of strength, even within a context of despair and necessity.

In the stories, it is possible to hear the self-empowering, redeeming, mobilizing, and politicizing impact the decision and act of abortion had on these women. The story of Natalie discussed above

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[353] See: Robert Cover, The Supreme Court, 1982 Term- Forward: Nomos and Narrative" (1983) 97 Harv L Rev 4 at 15, 46.
[354] See: Childbirth by Choice Trust, *No Choice*, *supra* note 113 at 24.
[355] *Ibid* at 25.
[356] *Ibid*.
[357] *Ibid* at 21.
[358] *Ibid* at 25.
[359] *Ibid*.
[360] *Ibid* at 24.

is a good illustration. As discussed in *Chapter 5*, the key element in her story is the concept of 'decision-making'. Having an abortion had a profound impact on Natalie, affecting her life, enabling her to make and take a decision and act upon it, marking a significant transitional 'turning point' moment into adulthood. The decision to abort, and further acting upon it, were acts of self-determination and autonomy.[361] They were her medium and platform to participate in a political and democratic process of decision-making. Read this way, abortion for Natalie was not just a desperate act based on a personal necessity. It was a political and politicizing act, a mile-stone moment, signifying the moment of realization, acknowledgement, and appropriation of her right of control over her body, herself, her life, and her right to make decisions regarding herself.

Another example is the story of Katherine, whose story is told by her daughter. Katherine was a married woman raising two young boys in rural Alberta in 1909 when she discovered she was pregnant again.[362] She took extreme measures to terminate her pregnancy. In desperation, as she told her daughter, "she went out to the fields and guided the plough, pulled by two oxen, until she had so strained herself that she miscarried or aborted herself".[363] Her daughter describes her mother's abortion as a "sheer necessity".[364]

It is interesting that when describing her desperation to her daughter, Katherine said that she had no fear of dying.[365] Instead of approaching her willingness to die solely as a sign of desperation, as an outcome of 'sheer necessity', it can be approached as a sign of agency. The willingness to take action, let alone to die, which is not a light decision in and of itself, is nevertheless a decision motivated by a strong self-determination and strength. It does not stand in opposition to the obvious necessity and desperation that this woman has felt and experienced.

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[361] On this point see: Donna Greschner, "Abortion and Democracy for Women", *supra* note 193.
[362] See: Katherine in Childbirth by Choice Trust, *No Choice*, *supra* note 113 at 47-48.
[363] *Ibid* at 47.
[364] *Ibid*.
[365] *Ibid*.

Taking a positivist approach, it locates yet again women's experiences into two extremes of agency and heroism versus desperation and necessity of helpless victims. However, taking a critical approach, agency is in the everyday, and in the 'ordinary', even in desperation and even in the will to die. Understood this way, desperation is not the opposite of agency, but rather is another facet of the multilayered, complex and dialectical processes of activism. Accordingly, there is no one state of mind of agency or one way to take an action. Women can express agency in a multilayered and multitude of ways. A woman can be desperate and active. One does not exclude the other, but rather complements it.

The story of Rita is a good example. Rita, originally from England, got married in 1941, and became pregnant shortly after. Being alone, with her husband away in the army, she felt that she was not ready "financially and emotionally"[366] to have a baby. Nevertheless, since she could not find someone to help her with an abortion, she had to carry on with the pregnancy. She gave birth alone, away from family and friends.[367] When her child was 3 months old, already experiencing loneliness and desperation,[368] she discovered she was pregnant again.[369] She "wanted to commit suicide".[370] "I really mean it",[371] she said, "I really did".[372] And yet, for her, wanting to die did not mean that she was passive and devoid of strength. Explaining in her own words the correlation between desperation, wanting to die and empowerment, she says "I didn't want to live. I couldn't face it. And I don't think I was weak".[373] Taking action, she went through a lot of pain and fear in order to abort. Experiencing pain and desperation, and wanting to die did not prevent her agency. They were part of it.

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[366] Rita, *ibid* at 69.
[367] *Ibid*.
[368] *Ibid* at 70.
[369] *Ibid*.
[370] *Ibid*.
[371] *Ibid*.
[372] *Ibid*.
[373] *Ibid*.

One of the recurring themes in many of the stories is the notion of isolation and loneliness associated with abortion. Several women recount how they felt isolated and alone throughout the entire process, before, during and after their abortions. Katherine's daughter, for example, said that now that abortions are legal, her mother "would not have been so isolated".[374] What is important here is that it was this isolation and vulnerability, the physical, mental and sexual abuse committed by the abortionists they had to refer to, that disempowered these women, and not the decision to terminate with the pregnancies. For example, for Penny, Rita,[375] Pat,[376] Lila[377] and Joan,[378] it was the abortion process, the humiliation, disrespect, secrecy, isolation, health risks and complications and the fear of criminal charges that were weakening and traumatic for them and not the decision to abort.

Penny, for example, had two abortions, one in 1959, at the age of 25, after she was raped by a man she dated casually,[379] and the second in 1961. In a powerful passage, revealing a woman whose acts are political, summarizing the correlation between the abortion process and the trauma and disempowerment of the women involved, she tells us that her "pain around abortion, is not in the decision, but in the degrading, frightening and high-risk process which was required to implement the decision".[380] Similarly, for Pat, "the stress engendered by the secrecy, illegality, fear of the law, and implicit negative judgements made these experiences traumatic".[381] For Leila, as well, a woman who had two abortions, one in 1929, and the other in 1936, it was the process that was excruciating and traumatic. As she aptly put it: "God, I was frightened. I had to find somebody

[374] *Ibid* at 47-48.
[375] Rita, *ibid* at 30, 69-72.
[376] Pat, *ibid* at 30.
[377] Lila, *ibid* at 30-31; 52-57.
[378] Joan, *ibid* at 31; 65-68.
[379] Penny, *ibid* at 134-135.
[380] *Ibid* at 136.
[381] Pat, *ibid* at 30.

who wouldn't kill me".[382] The trauma, she further says, that "one is supposed to suffer after an abortion […] is all induced by other people."[383] Rita explains that despite the pain and anguish she had suffered,[384] she "was the happiest person".[385] The only thing she would have changed would be the circumstances under which she had the abortion.[386] She had no regrets and "*never* felt guilt".[387]

In fact many of the women felt joy and relief rather than guilt. Sheila, for example, a married woman, already the mother of two children, boy and a girl, discovered in 1930, during the Depression, that she was pregnant again. Satisfied with having only two children, and experiencing financial problems she decided on having an abortion. Taking action, deciding "to deal with it [her]self",[388] she "made a *decision*"[389] on her own. For her having an abortion was a story of triumph and success. "Contrary to propaganda",[390] she tells us, she "*was not sad, but triumphant,* for [she] *succeeded* in what [she] had attempted. Had no trouble recovering from this, a bit weak. No regrets".[391]

Amanda's story is told by her daughter. She had an abortion in 1937 in Vancouver. Her daughter starts her story by saying "I lost my mother because of the abortion laws".[392] At the age of forty-one, already having two kids, and after losing their home farm during the Depression, she discovered that she was pregnant again. She found an abortionist "who botched her and left her with infections and constant pain".[393] After three months of pain and agony, she committed

[382] Leila, *ibid* at 55.
[383] *Ibid* at 53.
[384] Rita, *ibid* at 71.
[385] *Ibid*.
[386] Ibid.
[387] *Ibid*. Emphasis in original.
[388] Sheila, *ibid* at 56.
[389] *Ibid*.
[390] *Ibid* at 57.
[391] *Ibid* at 57. Emphasis added.
[392] Amanda, *ibid* at 58.
[393] *Ibid*.

suicide, drinking cockroach powder. She died in the hospital after seven or ten agonizing days.[394] Striving to break the 'causal' connection between abortion, suicide, weakness and guilt, her daughter urges us, despite these horrific circumstances, not to interpret her mother's story "that out of guilt of having an abortion she committed suicide."[395] Rather, it was "the condition she was left in [that] brought on the depression leading to the suicide".[396]

Verna had three abortions. The first in 1950 after graduating university and starting her new job. The second one was in 1957 when she was married, having already 3 children. Having to raise three little children and confronting some family problems, she decided that she could not care for another baby. She went to see the abortionist she knew from her first abortion, however, in what can be interpreted as an example of agency, she decided, remembering that he had drinking problems, not to enter his home. She decided instead to abort on her own. Following the directions of her sister who had performed an abortion on herself, she successfully aborted the fetus. She repeated that again in 1958. She knew that performing an abortion on herself "was playing with death".[397] And yet, as she clearly states: "Something had to be done".[398] Having an abortion had a profound impact on her, changing the course of her life. As she beautifully put it:

> I felt tremendous *elation,* knowing that I had done *the correct thing.* I felt *very positive* about *my life* and about *the world around me.* The meaning of life became *richer,* and as the days went by I became increasingly aware that I had followed *the correct course* for me and the father.[399]

Andrea, originally from England, had three abortions in undisclosed times after World War II, both in England and Canada. She married a Canadian soldier and had a baby son with him. Shortly

[394] *Ibid*.
[395] *Ibid* at 58.
[396] *Ibid* at 59.
[397] Verna, *ibid* at 94.
[398] *Ibid*.
[399] *Ibid* at 92. Emphasis added.

after he returned back to Canada, she discovered she was pregnant again. Thinking that he has deserted her and their son, she decided to have an abortion. She decided to perform it herself. When she "was half way through it",[400] her husband contacted her, and she stopped the procedure. Her baby son was born with a medical condition, being a blue baby. When she shared with a doctor that she has attempted to perform an abortion, he blamed her for causing her son's illness.[401] In a powerful passage, breaking the linkage between abortion and trauma, she explains that it was the doctor's remark that was traumatic for her, and not the decision itself, "condemning [her] to a lifetime of desperation and despair, always at the back of [her] mind, because [her] son died at five months".[402]

Approaching these women's acts critically, illuminating a discourse of rights, particularly the rights to equality and dignity, enables us not only to interpret their acts as political acts of agency and resistance, but also allows us to approach and interpret necessity and desperation themselves as sites of agency and resistance. These women do not need a judicial decision or an act of Parliament to legalize abortions. They have been legalizing abortions with their bodies. The act of abortion is an act of lawmaking, a process consisting of several stages, starting from the early stages of thinking of it, making a decision, contemplation, deliberations and acting upon and aborting.

Abortion is their resistance and redemption. Taking a broader and critical approach to resistance, one that defies rigid definitions based on oppositional binaries, resistance is dialectic, processual and evolving. It is a living language. It is not the absence of obedience or the presence of political heroism and bravery. As recalled, Natalie was forced to obey, and "to do what [she] was told",[403] and on its face, taking a positivist approach, one that does not focus on the context in which

[400] Andrea, *ibid* at 73.
[401] *Ibid* at 74.
[402] *Ibid*.
[403] Natalie, *ibid* at 108.

situations and acts are located and from which they stem, she did. However, following critical approaches to law, defying abstract generalities and focusing instead on the concrete and particular,[404] resistance is in the particulars, in the small and most mundane details, in the everyday, in the covert and hidden. One such example is the decision to stay and endure humiliation, so that they could complete their mission of terminating what they considered as a threat to their lives, even at the expense of risking and even losing their lives.

Paying attention to these stories as narratives of agency moves us from the small scale map to the concrete archaeological details, and allows us to discover, instead its internal richness, width, breadth, and depth, each a world in and of itself. Instead of generalizing abortions, cataloging women's abortion stories into categories of public heroism and political activism as the only manifestations of agency, we focus on the particular woman and on each and every detail in her story, her womb, her pain and suffering, her desperation and necessity, her joy and triumph. Resistance is where she is. Even in a tiny room in a back-alley. Between her legs, in her blood. In her pain. In her triumph. They are intertwined and interrelated. Coming together, they cannot be separate. Her lawbreaking is her laws-making. She becomes an actor, and participant, and creator of law/s relevant to her life.

3. Synthesis of Squatting and Abortion: The Discovery of Motherland

Like the women of RAWA who 'manipulate' the oppressive nature of the burqa, and various other political groups around the world who reverse the means used for their oppression to their own advantage, the women of this thesis use the same mechanisms that have been employed against them: that is, land and property and their bodies. These same mechanisms of oppression, land/property and the body, are now the sites for resistance and the means to address against social

[404] See *Chapter 4*.

injustices. Borrowing again from Peñalver and Katyal, they have become *"both the object and the subject of their disobedience* - the instrumental tool upon which the protest was based…"[405]

Mizrahi affirmative squatters and women having abortions resist unjust laws with, in and through their bodies. In both cases the body becomes a strong tool,[406] a 'weapon of the weak'[407], to break the law. Mizrahi affirmative squatters squat with the bodies. They use their bodies *externally,* as an external site, and enter into public houses. They 'penetrate' and enter the public house *with* their bodies. Women having abortions use their bodies *internally,* as an internal site, resisting with and from inside their wombs. They 'penetrate' and enter *into* their bodies. It is interesting to note here the reverse interplay between land and body. Women having abortions resist the invasion and trespass of the state into their bodies, by 'invading' and 'trespassing' into their own bodies. They appropriate their bodies, their property, and claim ownership over them. Appropriating what they have been dispossessed of, Mizrahi affirmative squatters also claim ownership over the property they were denied, and resist Israeli discrimination by trespassing and 'invading' into its sacred property.

Using the body as a site of both oppression and resistance is at the heart of 'body politics'. 'Body politics' refers to the mechanisms, technologies, techniques, and "practices and policies",[408] used by socio-political powers,[409] whether public and/or private, institutional and/or intimate,[410] to regulate, discipline, control, monitor and surveil the human body.[411] The power and authority to

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[405] See: Eduardo Peñalver & Sonia Katyal, "Property Outlaws", *supra* note 105 at 1104-1105. Emphasis added.
[406] See: Barbara Katz Rothman, "Afterward" in Cris Bobel & Samantha Kwan, eds, *Embodied Resistance: Challenging the Norms, Breaking the rules* (Nashville: Vanderbilt University Press, 2011) 225 at 226 [Cris Bobel & Samantha Kwan, *Embodied Resistance*].
[407] See: James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven, CT & London: Yale University Press, 1985).
[408] See: JRank Encyclopedia. "Body Politics, Feminism and Racial" Online: JRank Encyclopedia <http://encyclopedia.jrank.org/articles/pages/6016/Body-Politics.html> [JRank Encyclopedia, "Body Politics, Feminism and Racial"] Last visited: 30.8.2018.
[409] *Ibid*.
[410] *Ibid*.
[411] *Ibid*.

regulate the body and monitor the population[412] is what Michel Foucault termed as bio-power.[413] Taking the theoretical gaze from "theories of power which focus on the domination of one group by another,"[414] bio-power concentrates instead on the everyday manifestations of these powers. Decentralized and *localized,* "com[ing] from below",[415] power "comes from everywhere",[416] and is therefore found *everywhere,*[417] in the everyday life. It is exerted *everyday* over the individual body, resulting in her subjectification,[418] socially constructing her everyday body and self. Put it simply, bio-power is "the administration of bodies and the calculated management of life."[419] Through the use of several disciplinary institutions such as prisons, schools, army, police, and hospitals, every aspect of the everyday life is administered and calculated, such as health, education, welfare, migration, housing, birth and reproduction.

The control of the lives of Mizrahi Jews, encompassing every aspect of their lives, manifested for example, in education, employment and housing is an example of bio-power. Public housing has become the means for regulation, surveillance and eventually discipline of Mizrahis. Similarly, the regulation of abortion and reproduction, whether legalized or not, located within the larger context of misogynist control and objectification of women's bodies, and, resulting in "the normative construction of the gendered body",[420] is also embedded in body politics.[421] Body politics involves reducing and confining women to their bodies as inferior Others, appropriating not only their

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[412] See: Michel Foucault, *The History of Sexuality Volume 1: An Introduction,* translated by Robert Hurley (New York: Pantheon Books, 1978) at 140 [Michel Foucault, *The History of Sexuality Volume 1*].
[413] *Ibid* at 139 onward.
[414] See: Jen Pylypa, Power and Bodily Practice: Applying the Work of Foucault to an Anthropology of the Body" (1998) 13 Arizona Anthropologist 21 at 21.
[415] See: Michel Foucault, *The History of Sexuality* Volum, *supra* note 412 at 194.
[416] *Ibid* at 93.
[417] *Ibid*.
[418] See: Michel Foucault, *The History of Sexuality* Volum, *supra* note 412. See also: Hubert Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (New York & London: Routledge, 2013).
[419] *Ibid* at 140.
[420] See: Wendy Harcourt, *Body Politics* in Nancy A. Naples, ed, *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies,*1st ed (John Wiley & Sons, 2016) 1 at 1 [Wendy Harcourt, *Body Politics*].
[421] See: JRank Encyclopedia, "Body Politics, Feminism and Racial", *supra* note 408.

bodies and control over them, but also appropriating the control over the ways to approach, interpret and construct the body's meaning, experience, function, role and image. Approaching women solely through the prism of motherhood and their roles as wives, and depriving them of the right to decide whether to have children or terminate their possible pregnancies is another manifestation of bio-power.[422] Following Foucault's assertion that "[w]here there is power, there is resistance",[423] body politics is also marked by protest and resistance with, in and through the body to the same practices and powers exerted on the body. The body, then, becomes a political site of resistance and struggle of people seeking to "claim control over their own biological, social, and cultural "bodily" experiences."[424]

Mizrahi affirmative squatters and women having abortions resist and break with the calculated powers that have been administering and managing their lives and bodies. Taking critical approaches, their resistance and the legal meanings they create, like the powers that oppress them, are everywhere, and in the everyday life. In the concrete, particular and smallest details. It is local. This notion of localizing lawmaking is what Clifford Geertz referred to as 'local knowledge'.[425] As noted, Geertz argues that law is not an abstract and placeless concept, devoid of and detached from place and geography, but, rather one that is local and contextualized.[426] Similar to Robert Cover's nomos and narratives, focusing on the creation of hermeneutics and legal meanings in the society itself, local knowledge are "ideas of some local depth",[427] that are produced in and by society itself. As further discussed above, one of the key elements in local knowledge is "legal sensibility",[428] whereby the law is localized and sensitive to and derived from its social

[422] *Ibid*.
[423] Michel Foucault, *The History of Sexuality* Volum, *supra* note 412 at 95.
[424] See: Wendy Harcourt, *Body Politics*, *supra* note 420 at 1.
[425] See: Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167-234 [Clifford Geertz, *Local Knowledge*].
[426] *Ibid*.
[427] *Ibid* 187.
[428] *Ibid* at 175.

surroundings. It is a processual understanding of the law that reinforces "the processes of self-knowledge, self-perception, self-understanding"[429] and self-formation. In contrast to positivist objectification and abstractionism, it illuminates the law's personification, individuation, and, borrowing from Foucault, subjectification.[430] It is the process of becoming wo/men or masters of learning.[431] It shifts the gaze from a mere focus on behavior to the understanding of the law, and to their interrelations; from a mere submission to the power of the state, and mere acting upon its law and compliance with it, to learning it, "to the knowing of it",[432] or in Martha-Marie Kleinhans and Roderick Macdonald's words, from 'law-abiding' to 'law-inventing'. Their knowledge is *embodied.* This kind of knowledge, produced in, through and with the body, is what body studies scholars would refer to as *embodied knowledge.*[433]

Using the body as a site of resistance, taking an "oppositional action or nonaction",[434] defying the oppressive powers that operate on one's body, and creating counter embodied local knowledge

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[429] *Ibid* at 181.

[430] See: Michel Foucault, "Technologies of the self" in Luther H. Martin, Huck Gutman & Patrick H. Hutton, eds, *Technologies of the self. A seminar with Michel Foucault* (Amherst: The University of Massachusetts Press, 1988) 16. Michel Foucault, "The Ethic of Care for the Self as a Practice of Freedom" in James Bernauer & David Rasmussen, eds, *The final Foucault* (Cambridge, MA: MIT Press, 1988) 1.

[431] See: Clifford Geertz, *Local Knowledge*, *supra* note 425 at 200, 204.

[432] *Ibid* at 201.

[433] For further discussion see: Colin Peile, "Emotional Knowledge: Implications for Critical Practice" (1998) 25 Journal of Sociology & Social Welfare 39 at 43-47; Mark Johnson "Knowing Through the Body" (1991) 4:1 Philosophical Psychology 3 at 3, 6; Lennon, Kathleen. "Feminist Perspectives on the Body" in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), online: <https://plato.stanford.edu/entries/feminist-body/> [Kathleen Lennon, "Feminist Perspectives on the Body"]. (Last visited: 30.8.2018). For further feminist scholarship and discussion on the subject of embodiment, see: Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essays*, (New York: Oxford University Press, 2005); Simone de Beauvoir, *The Second Sex,* translated by HM Parshley, ed (New York: Alfred A Knopf, 1953); Judith Butler, *Bodies that Matter: On the Discursive Limits of Sex*, (London: Routledge, 1993); Bryan S Turner, *The Body and Society: Exploration in Social Theory,* 2d ed (Thousand Oaks, CA: Sage Publications, 1996); Chris Schilling, *The Body and Social Theory* (London: Sage, 1993); Jennifer Poudrier & Janice Kennedy, "Embodiment and the Meaning of the "Healthy Body": An Exploration of First Nations Women's Perspectives of Healthy Body Weight and Body Image" (2008) 4:1 Journal of Aboriginal Health 15 at 22; They refer to: Judith Lorber & Lisa Jean Moore, *Gendered bodies: Feminist perspectives.* (New York: Oxford University Press, 2007).

[434] See: Chris Bobel & Samantha Kwan, "Introduction" in Cris Bobel & Samantha Kwan, *Embodied Resistance*, *supra* note 406 at 2. The authors have borrowed the term "oppositional action" from Jocelyn A. Hollander & Rachel L. Einwohner, "Conceptualizing Resistance" (2004) 19:4 Sociological Forum 533 at 544.

produced in the course of resistance, has been recently referred to as *'embodied resistance'*.[435] It focuses on "the ways in which bodies 'speak back' to structures of power and how the body itself is risked or sacrificed in order to draw attention to the insecurities individuals endure."[436]

Similar to the concept of agency discussed above in the context of abortion cases, resistance is not one-dimensional, but rather "is multifaceted".[437] Resistance, write Chris Bobel and Samantha Kwan, "is not an either-or story".[438] It is complex, and each action can embody "elements of both resistance and accommodation".[439] Whilst women's bodies "have been the primary site of our oppression,"[440] it is also these same bodies who will become the sites of redemption and revival.[441] Challenging oppositional dichotomies, drawing distinctions between male-female, mind-body, political-personal,[442] public-private and "passive-agentic",[443] the body then is understood as a site of both oppression and accommodation,[444] and resistance and opposition.[445] For example, as seen above with the women of RAWA and several of the women in the abortion cases such as Rita, their actions are "not an either-or story",[446] but rather reveal "a complex interplay of resistance and accommodation".[447] They are "at once rule-bound and wonderfully inventive agents of social

[435] For fascinating discussion of 'embodied resistance', see: Cris Bobel & Samantha Kwan, *Embodied Resistance*, *supra* note 406. It is a collection of various articles discussing diverse examples of resistance in and through the body, such as female-to-male transgenders in South Korea, Belly dancing mothers, Anorexia as a choice (pro-anas), vegetarianism, mothers and breastfeeding as transgression to name only a few.
[436] See: Rosemary E. Shinko, "Theorizing Embodied Resistance Practices in International Relations", online <https://www.sussex.ac.uk/webteam/gateway/file.php?name=theorizing-embodied-resistance-practices-in-international-relationsedited.pdf&site=12> Last visited: 30.8.2018.
[437] See: Cris Bobel & Samantha Kwan, *Embodied Resistance*, *supra* note 406 at 2.
[438] *Ibid*.
[439] *Ibid*.
[440] See: Donna Greschner, "Abortion and Democracy for Women", *supra* note 193 at 647. See also: Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (New York: W.W. Norton, 1976) at 284-286 [Adrienne Rich, *Of Woman Born*].
[441] See Donna Greschner, "Abortion and Democracy for Women", *supra* note 193 at 647.
[442] See: Kathleen Lennon, "Feminist Perspectives on the Body", *supra* note 433.
[443] See: Cris Bobel & Samantha Kwan, *Embodied Resistance*, *supra* note 406 at 2.
[444] *Ibid*.
[445] *Ibid*.
[446] *Ibid*.
[447] *Ibid*.

change."[448] Women's bodies then are interwoven into this interplay of oppression and liberation creating a gospel of change.

Mizrahi women squatters and women having abortions 'speak back' with, in and through their bodies, perhaps for the first time, to the powers that have condemned them to socio-legal inferiority and invisibility. They create with, in and through their bodies important liberating local knowledge and language that are legal. Land and bodies, wombs in particular, have both been appropriated and *nationalized* as both tools and purpose of oppression and entrenchment of socio-legal inequalities. Each has become the tool for entrenching control over the other. The body has been used in both cases as a tool, facilitating both territorial expansion and invasion to land, and control of women bodies and lives. As eloquently put by Adrienne Rich, "[t]he female body has been both territory and machine".[449] Similarily, land in Israel, and especially public housing has become the tool for controlling not only the land, but also the lives and bodies of Mizrahis, particularly Mizrahi women. These women, then, reversing the same mechanisms of oppression, *denationalize* their homes, wombs, bodies and lives.

They resist the monopolization of the power to speak by either state officials and/or non-state actors,[450] becoming these women's only voice. Monopolization of their voice prevents us from understanding these women's agency and their own voice, in their own voice, and their own notion of participation and of resistance. By their lawbreaking, however, these women 'take charge' of the role of who is speaking and for whom, and communicate their voice by themselves.

Their lawbreakings are acts of self-determination and autonomy, marking their participation in a political and democratic process of decision-making. These women were and still are excluded

[448] *Ibid*.
[449] See: Adrienne Rich, *Of Woman Born*, *supra* note 440 at 285.
[450] See: Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a Critical Legal Pluralism", *supra* note 318 at 46.

from the formal and official state narrative and history, discarding their voice. They have been prevented from fully participating as active participants, and not merely as passive and governed "law abiding"[451] subjects, in the decision-making process, making decisions affecting their lives. Donna Greschner as recalled wrote about the importance of language and rhetoric in the context of abortion, and focused on women's participation in the abortion debate, specifically their speech, agency and activism, and their relevance for a well functioning democracy.[452] She emphasized the importance of women's political participation, and focused on the significance of listening to women's voices and narratives.[453] This is why this thesis moves from institutional examples of political participation of women IN and through the state, to individual women's day-to-day agency and participation IN their homes and bodies. This thesis focuses on their homes and bodies as political and legal institutions and sites, where participation is practiced in, through and with them. As noted above, however, this is not to say that women's participation, or exclusion thereof, in the state political and legal realms is not important. These women's day-to-day political participation and lawmaking is interrelated to and has an impact on the democratic functioning of the state. Ignoring women's participation and lawmaking in, through and with their bodies will prevent women from full political and legal participation in the state, resulting in decisions like the *Morgentaler* case which, as discussed above only declared women's rights to bodily autonomy, but not proclaimed them.[454] In order for women to be heard IN the state, the state should not only start to listen to women, but also shift the reference point to these women themselves, listening to these women's laws and participation IN and from the point of view of their homes and bodies. Their lawbreaking can be interpreted as these women's way, and perhaps their only way, to be heard, their means of speaking, talking, challenging existing hegemonic language, and

[451] *Ibid* at 39.
[452] See: Donna Greschner, "Abortion and Democracy for Women", *supra* note193 at 634, 645-646.
[453] *Ibid* at 647.
[454] *Ibid* at 636.

jurisgenerating and lawmaking, their own nomoi. By lawbreaking, these women, especially ones belonging to minorities with intersecting identity based-affiliations, such as ethnicity and gender, having no other 'legitimate' state platform and means to speak, take action and re/gain control over their lives, their bodies and their homes, and decide, perhaps for the first time, as we have seen with Natalie's decision to have an abortion, what is the best for them. Whether heard or not by state formal institutions, they create their own language of democratic participation, participating in, with and through their own body. These women's own selves and bodies are, as written above, legal institutions in, through and with which they politically participate, exercising their right to decision-making. They not only break state law but also break with the traditional concept of democracy. They create a new and competing vision of democracy, where they are participants rather than outlaw transgressors.

They become active speakers, reversing the power-relations that have condemned them to socio-legal marginality. These women's acts of resistance bear profound internal and external jurisgenerative, evolutional and dialogic impacts not only on themselves and their families, but also on their entire 'external' societies. Entailing important dialogic dimensions, they elicit a public response and debate, albeit at times mostly negative. This, in turn, further enables the formation of a larger public mobilization and participation in challenging dialogic processes that are important for enhancing and further maintaining a well-functioning democracy. This popular-political dialogue is an important medium for generating challenges to the democratic institutions both legislative and adjudicative. The story of Chantal Daigle is a good example. Donna Greshcner argues that her story of resistance is the story of defiance of every woman.[455] Her lawbreaking, her

[455] *Ibid* at 655.

resistance and strength[456] elicited important public debate,[457] and she became the center of debate. She was the debate.[458]

Mizrahi women squatters have had a profound impact upon me. They have motivated me to further research their, indeed our, shared historical context of racism and discrimination, manifested in public housing policies, eventually obliging them to squat. Taking this contextual-based approach had, in turn, the communitarian effect of reinforcing solidarity and self-empowerment amongst women, as it places the individual woman who breaks the law within a collective and historical context of injustice. It is impossible to understate the reaction of my clients when I related to them that I consider the Israeli discriminatory land regime to be the basis for the actions they took. I felt that, for the first time in their lives, these women stopped viewing themselves only as poor and weak women, but rather as weakened women suffering from structural discrimination, causing, amongst others, their poverty. They began to politicize their legal and social inferiority, seeing themselves for the first time as part of a larger community. They have put themselves in context.

These women motivated my academic research, leading me eventually to study the stories of abortions in Canada, drawing dialogic alliances between groups of women who may seem racially and culturally estranged. Studying the Canadian stories of abortions, and learning about the deep and entrenched obstacles women have to confront nowadays in accessing abortion services can show us how important it is to approach Mizrahi women squatters differently, putting emphasis on their voices and narratives, rather than on the legalized and legalizing voices of state and non-state actors.

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[456] *Ibid*.
[457] *Ibid*.
[458] *Ibid*.

Chapter 7: An Invitation to Commence

"Woman must write her self [….] Woman must put herself into the text - as into the world and into history - by her own movement.[1] *[…] By writing her self, woman will return to the body which has been more than confiscated from her […]. Censor the body and you censor breath and speech at the same time. Write your self. Your body must be heard. Only then will the immense resources of the unconscious spring forth.*[2] *[…] Women must write through their bodies, they must invent the impregnable language that will wreck partitions, classes, and rhetorics, regulations and codes, they must submerge, cut through, get beyond the ultimate reverse-discourse, including the one that laughs at the very idea of pronouncing the word "silence," the one that, aiming for the impossible, stops short before the word "impossible" and writes it as "the end.""*[3]

This thesis is an invitation to commence, to start thinking about lawbreaking and laws-making as processes occurring everywhere, and anywhere, and by any, and everyone. This *chapter* then is not a conclusion, but rather a beginning of a new conversation and dialogue.

The purpose of this thesis is to offer a new understanding of lawbreaking, particularly when committed by women belonging to racially and/or ethnically oppressed minorities, and especially in cases that do not fall within the traditional criteria of civil disobedience. Shifting the focus from the big, 'meta' and 'heroic' stories of mass disobedience committed in public by politically motivated people, it suggests paying attention to the daily, 'small', private, and secret forms of 'everyday resistances' committed by women. These cases could be as intimate and covert as a woman putting makeup on her face under a burqa. Using the body as a site of defiance, the thesis particularly focused on two contexts in which it explored women's resistance and agency: a) Lawbreaking and resistance through land in Israel, namely squatting in public housing by Mizrahi women; and b) Resistance 'through the womb,' by women having abortions in Canada, pre-and post-*Morgentaler*.

[1] See: See: Hélène Cixous, "The Laugh of the Medusa", translated by Keith Cohen & Paula Cohen (1976) 1:4 Signs 875, at 875. Emphasis added.
[2] *Ibid* at 880. Emphasis added.
[3] *Ibid* at 886. Emphasis added.

Trying to explain these two cases, the thesis turned to the language offered by state law, namely that of civil disobedience. Based on the supremacy of the notion of the rule of law, state law is committed to preserving order, and as such cannot tolerate lawbreaking, unless it falls within the criteria of civil disobedience. However, as was further demonstrated, Mizrahi women squatters and women having abortions do not comply with the current definition of civil disobedience. They act covertly, in silence, alone. They seem not to be motivated by deep political convictions, and they strive to find solutions to their own 'private' problems, not appealing to the majority sense of justice. These two contexts of private forms of resistance are therefore regarded as mere crimes, and not as forms of legitimate civil disobedience.

I have argued that state law does not and cannot explain these acts of lawbreaking. Positivism oversimplifies these acts, trivializing their particularities and contexts, and, thus, misses the richness embedded in them, and their laws-making potential. Questioning this state law 'totalitarianism', de-monopolizing and decolonizing its hierarchical exclusivity as the sole standpoint, the thesis adopted critical approaches and offered different interpretations of these acts. The laws-making potential and character is revealed by looking at the *'small'* everyday happenings, grounded in critical and contextual approaches, and employing different tools and methods to approach socio-legal phenomena. These approaches, each from their unique perspectives, put real life at the center, placing it on an ongoing historical continuum that emphasizes the correlation between past and present, and reinforces the interconnectedness of everyday occurrences. As demonstrated above, these critical themes and ideas provide different ways to think about law as a language and process, enabling us to better understand the acts committed by the women of this thesis, offering us ways to turn the agency, voice and actions of people which are not commonly perceived as legal, into something that we can recognize as law.

Taking in particular a critical legal pluralist approach, shifting and deepening the focus from state law to society to the individual herself, the thesis focused on women's jurisgenerative capacity to both transform state law, and/or create their own laws. Lawmaking and legal processes are demonopolized, so that the state is not the sole 'producer', and 'the turning point' in the creation of legal meanings. However, unlike other critical approaches to law, the thesis did not offer various interpretations to law and legal phenomena from within state law, offering the theoretical and analytical means for interpreting the meaning of women's voice and agency in, or about, the law. Rather, the thesis approached women's acts as law/s, as legal narratives in and of themselves, capable of creating legal meanings, and changing and altering the meaning of what we perceive as law. They could, but do not necessarily have to, culminate in change to state law. These, it is argued, are not external sites, usually referred to 'extra-legal', incidental or secondary to the concept of law, but are rather legal: laws in and of themselves.

The thesis shifted the gaze from the closed legal system, which perceived the women of this thesis as mere criminals, and their acts as transgressive acts, to these women themselves, considering them, instead, as viable participants in the process of lawmaking, and to the language/s, the legal meaning/s, the legal discourse/s produced and generated in the course of lawbreaking. The thesis turned the focus from legal knowledge produced and jurisgenerated by society to the individual herself, and more specifically to her body. It focused on her legal language and discourse, and on her role in creating and jurisgenerating legal meanings and laws. These women's bodies, then, become local sites and institutions of law and legal meanings. Mizrahi women squatters and women having abortions resist unjust laws with, in and through their bodies. They speak through lawbreaking, tell their story, and create their own vision of the law – their law. This is their way of communication.

Taking a critical approach then, the thesis showed how squatting by Mizrahi women is not a given situation of lack of homeownership as a result of 'objective' and 'neutral' causes, but rather a result of socially discriminatory structuring mechanisms directed against them by Ashkenazi establishment. The thesis demonstrated how it is located within a larger contextual continuum, and is a reflection of an historical process, starting back in the past with their parents and continuing right through their present. Their squatting, it is argued, is a response to the deprivation of equality. These women redefine property law, by redistributing the power and wealth that the first generation Mizrahis were denied, and taking what could and should have been theirs as second and third generation had property and wealth been distributed equally. Their lawbreaking is their means of distributive justice. The thesis, therefore, proposed to redefine '*trespassing'* by conceptualizing and employing a new description: *Affirmative Squatting.*

Similarly, in the case of abortions in Canada, the thesis demonstrated how women's engagement with and involvement in abortion is approached and interpreted institutionally and instrumentally, and only in reference to the processes of the struggle for legalization of abortion. The focus is on women's movement and organizations, rather than on individual women. Approached this way, it is argued, women's involvement was regarded as marginal and relatively passive. This organizational approach does not focus on the agency and role played by women who underwent abortions. By perceiving the process of lawmaking through the lenses of institutions, neglecting to emphasize the role of individuals in the process of creating legal knowledge/s and meanings, this approach misses the richness entailed in the acts of the particular individual woman having abortion. It overlooks the processes she engages in, processes that are in and of themselves legal, further generating legal meanings and knowledge. It ignores her participatory role in shaping and reshaping legal meanings, negotiating and bargaining her competing vision/s and understanding/s of the law, any law, and of herself, in the process. A narrow interpretation of abortion, then,

viewing it through a one-dimensional lens, from the standpoint of state law, portrays women as destitute and desperate. Taking a decontextualizing approach, these women are not perceived as participants in the creation of legal meanings.

The critical perspective this thesis has offered shows that women have always resisted and created legal meanings and knowledge about abortion from the stand point of their bodies. Following Robert Cover's notion of jurisgenesis, the thesis focused on these women's ability to 'speak' and create legal meanings, specifically on the language, stories, and norms that these women jurisgenerate throughout the entire process of terminating their pregnancies, prior, during and after abortion. Focusing on individual stories of abortions shows that these women speak through, in and with their wombs, tell their story and create their own vision of the law: their law/s. As in the case of squatting, they resist and seek to correct with their bodies the inequalities and injustices that have created and further perpetuate their socio-legal inferiority, allowing the state and its agents to control their reproductive freedom, and to decide on their fate.

The exclusion of women's voices, stories and experience of abortion has in turn manifested in deep and entrenched obstacles that Canadian women have to confront nowadays in accessing abortion services. That is, Canadian women, decades after *Morgentaler*, and especially women from discriminated against minorities, still face many institutional obstacles in exercising their reproductive rights and freedom. What is argued in this thesis is that Canadian women could have enjoyed an unfettered right to abortion, without needing to confront so many obstacles nowadays in exercising what is supposed to be their legal right to abortion, had it been framed differently, acknowledging women's unique experiences and voices. These obstacles, it is argued, impeding the right to abortion, are the product of the state and its agents, whether doctors and/or women's movements joining them, failing to listen to these women. Women would not have needed to end where the journey for legalization of abortion has begun, in the back alleys or in their homes self-

inducing, confined again to secrecy and shame instead of celebrating their public right, if the state listened to their stories in the first place, challenging its own gender bias and entrenched rhetoric of necessity.

Mizrahi affirmative squatters and women having abortion resist with their bodies the unjust mechanisms – discriminatory land regimes and gender inequality – that have created their special socio-legal inferiority within society, obliging them to break the law. These are acts of self-determination and autonomy, marking these women's participation in a political process of decision-making.

The thesis moved from 'mapping' to 'digging and narrating' in order to explore resistance and lawbreaking in the two contexts selected. *P*art One, entitled 'Mapping', mapped the formal legal space relevant for this thesis, framing its foundational, theoretical, and conceptual borders and limits. Consisting of three *chapters* it introduced the reader in *Chapter 1* to the language of the *'The Map',* namely that of civil disobedience, and to two concrete, specific and 'small' sites and maps of lawbreaking, in which the thesis explored women's resistance and agency, namely that of squatting in Israel (*Chapter* 2) and abortion in Canada (*Chapter 3*).

Part Two, entitled *'Digging and Narrating',* explored even further the concrete aspects of these two cases. It revisited the foundations of civil disobedience, informed by the exploration of the two contexts begun in *chapters 2* and *3*, and continued here. This part consisted of three *chapters*. The first (*Chapter 4*) offered several critical approaches to lawmaking that were necessary for re-reading these two contexts of lawbreaking as constructive laws-making. These approaches were the 'tools', the 'shovel' with which we could dig deeper in order to probe what was not seen at first on 'the map' of civil disobedience. The second (*Chapter 5*) discussed why the acts of squatting and abortion could not be encompassed by notions of civil disobedience as seen in *Chapter 1*. Here, I revisited the theory of civil disobedience, namely its features, roles, and assumptions about

law, lawbreaking and lawmaking. The third (*Chapter 6*) showed how the acts exemplified by the two cases could be approached differently, and could be redefined as acts of resistance, thereby revealing their jurisgenerative aspects.

Women lawbreakers, like nomads, represent chaos, rootlessness, obscurity and unpredictableness, thus threatening the law's scientific rationality. In order to safeguard the schematized mapped space, the law as the guardian in charge of surveillance of the state's (and its own) official story, concentrates in decontextualizing, isolating, dividing and separating[4] these chaotic narratives, treating history and reality "as a series of distinct moments", [5] and "not as an ongoing process."[6] These women have no distinct history with unbounded continuity.[7]

Contextualizing these women and their lawbreakings places them on an ongoing historical continuum that emphasizes the correlation between past and present. Women lawbreakers challenge and resist their inferior positioning in society and become "a trespasser, a lawbreaker."[8] This can lead to an extreme and violent legal response, eviction in the case of Mizrahi women squatters or criminalization and/or social denunciation in the case of abortions, that might even result, as aptly put by Ronen Shamir, "in the annihilation of the actions, movements, and histories of people who do not fit the frame."[9]

These women risk denunciation not only by the eviction from their homes, or by criminalizing them, but rather also by erasing their own narrative. They resist this further annihilation of their past and deconstruct the colonial and androcentric binary oppositions of 'we' versus 'they' in which they were entrapped. They demand instead connection over isolation, unbounded continuity

[4] See: Ronen Shamir, "Suspended in Space: Bedouins Under the Law of Israel" (1996) 30 Law & Soc'y Rev 231 at 233.
[5] *Ibid* at 234.
[6] *Ibid* at 233.
[7] *Ibid* at 234.
[8] *Ibid* at 237.
[9] *Ibid* at 235.

over separation, recognition over denial, legitimate backward context over backwardness, and revival over erasure. Following Ronen Shamir, they disobey their "freeze [in] time"[10] and their suspension in space and demand the allocation of their her-story in an unbounded contextual backward-inward-forward continuum. These women make history. Having no other language, their lawbreaking is their only way to communicate.

State law, looking for ways to restore order, eventually exiles and banishes these women not only from their homes, but also from the domain of legitimacy, and declares their acts to be a violation of the law. Their history is left outside. It does not correspond with women lawbreakers. It is not only the act of lawbreaking that is being excluded from the domains of legal legitimacy, and it is not only for the act of lawbreaking that they are condemned. Rather it is the lawbreakers themselves. It is their ethos, their narrative. It is their identity. It is not only what they do but who they are. Women lawbreakers have taught me that a house is more than a roof over one's head, and a body is more than a tool 'to house' oppressive patriarchal demands. They are past, present, and future. They are their means of restoring stolen memories and dignity. These women may silently break the law, but, their actions are loud and profound. These women create a language of change, and their bodies are their legal texts.

[10] *Ibid* at 252.

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2. Legislation

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2.2.1. Israeli Legislation

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2.2.2. English Legislation

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3. Jurisprudence

3.1. Domestic (Canadian) Jurisprudence

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3.2. Foreign Jurisprudence

3.2.1. Israeli Jurisprudence

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3.2.3. American Jurisprudence

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