

## **Abortion in New Brunswick**

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# PRESENT AND PAST/PRÉSENT ET PASSÉ

## Abortion in New Brunswick

“ABORTION CLINICS IN MAINE SEE ‘SPIKE’ in New Brunswick clients.” This CBC News headline, posted online on 7 October 2014, seemed to suggest that the politics of abortion provision in New Brunswick had suddenly changed.<sup>1</sup> When the Morgentaler clinic in Fredericton officially closed its doors in July of that year, hundreds of women were indeed left scrambling, forced to travel to Maine or even Montreal to access abortion care. Yet in many ways the situation had reinforced the status quo rather than marking a departure from it. Abortions have often been difficult to obtain in New Brunswick since the 19th century, with the provincial government strictly regulating the procedure. New Brunswick women have arguably faced the most burdensome abortion restrictions in Canada. How did this situation come about? What is the future of abortion rights in New Brunswick?

This essay will address these questions by emphasizing the distinctive history of abortion in New Brunswick instead of offering a national overview of abortion care and access. New Brunswick’s shifting abortion policies have diverged from those of the rest of the country. In what follows, I describe three historical instances when the provincial regulations appear to have changed in a drastic fashion, both to analyze them in depth and avoid constructing a chronological narrative about the progressive liberalization of Canadian abortion laws. I begin in 1810, when New Brunswick “led the way” by passing the first abortion restrictions in what would become Canada. The statute duplicated the British Malicious Shooting or Stabbing Act of 1803, which covered a range of offenses while making it a crime to procure a miscarriage. Although the motivations for importing the anti-abortion sections of this act are difficult to discern, the legislation effectively instituted a long tradition of restrictive abortion regulations in New Brunswick. My second historical moment is much later, occurring in 1985, when New Brunswick Premier Richard Hatfield’s Progressive Conservative government passed Bill 92 with unusual haste, making it illegal for abortions to be performed outside of hospitals. This legislation was created to prevent the abortion rights advocate Dr. Henry Morgentaler from opening a freestanding abortion clinic in New Brunswick. Even though Bill 92 was deemed unconstitutional in 1994, it shaped an image of the province – whether correctly or not – as officially and doggedly anti-abortion. The third significant policy transformation happened recently. After the Morgentaler Clinic in Fredericton, which had opened in 1994, was closed in 2014, the newly elected Liberal government led by Premier Brian Gallant amended Regulation 84-20. Since 1989 this regulation had required New Brunswick women to have two doctors decide that an abortion was “medically necessary” before the procedure could be carried out by a specialist in a certified hospital. As of January 2015 women no longer need

1 “Abortion Clinics in Maine see ‘Spike’ in New Brunswick Clients,” *CBC News*, 7 October 2014, <http://www.cbc.ca/news/canada/new-brunswick/abortion-clinics-in-maine-see-spike-in-new-brunswick-clients-1.2789090>.

permission from two doctors or access to a specialist, but other restrictions still stand. Women can obtain funded abortions in only a few hospitals and not in doctors' offices or free-standing clinics, which are permissible venues in other regions of Canada. Despite the recent change to Regulation 84-20, New Brunswick women continue to receive limited abortion care within the province. This longstanding and in many ways unique situation is not adequately explained simply by reference to anti-abortion or pro-choice factions. The wider political struggle over reproductive rights in New Brunswick is bound up with the changing status of physicians, deep-seated anxieties about women's autonomy, and constructions of provincial identity.

My understanding of the history of abortion in New Brunswick is based on multiple forms of knowledge. I am an historian of visual culture, specializing in the representation of bodies, illness, health, and childbirth in early modern Europe (1550-1750). I have also published on recent forms of abortion rights activism, the cultural production of pregnancy, and changing nature of fetal imagery.<sup>2</sup> This scholarship was and remains connected to my engagement with contemporary campaigns for reproductive justice. As a graduate student at the University of Rochester in 1992, for example, I helped others to surround abortion clinics in Buffalo, New York, defending the buildings from aggressive protestors. After moving to Fredericton, New Brunswick, in 1996, I joined several groups, including one called Birth Matters, which promoted the training and employment of midwives. I also volunteered as an escort at the Morgentaler Clinic, walking women and their families past protestors and into the abortion facility every Tuesday morning for over seven years. The following essay is thus based on traditional modes of historical inquiry as well as first-hand experience, approaches to research that are mutually informing.

Many other scholars have undertaken relevant work on the history of abortion in Canada and the United States, including sociological studies of anti-abortion and pro-choice lobbying, the representation of abortion in the media, and the visual depiction of fetuses.<sup>3</sup> This material informs my general comprehension of

2 Lianne McTavish, "Virtual Activism and the Pro-Choice Movement in Canada," *Canadian Woman Studies/les cahiers de la femme* (special issue on Canadian Feminism in Action) 25, no. 3/4 (Summer/Fall 2006), 21-27, and updated and reprinted in *Women in a Globalizing World: Equality, Development, Peace, and Diversity*, ed. Angela Miles (Toronto: Inanna Publications, 2013), 491-99; Lianne McTavish, "Embryos in the Early Modern and Modern Periods: A Visual Dialogue," in *The Healthy Embryo*, ed. Jeff Nisker et. al. (Cambridge: Cambridge University Press, 2010), 97-115; Lianne McTavish, "Birth and Death in the Renaissance," in *A Cultural History of the Human Body*, vol. 3, ed. Linda Kalof and William Bynum (Oxford: Berg, 2010), 15-36; Lianne McTavish, "Practices of Looking and the Medical Humanities: Imagining the Unborn in France, 1550-1800," *Journal of Medical Humanities* 31, no. 1 (March 2010), 11-26; Lianne McTavish, "Blame and Vindication in the Early Modern Birthing Room," *Medical History* 50, no. 4 (October 2006), 447-64; Lianne McTavish, "Reproduction and Regulation in Early Modern Europe," in *The Routledge History of Sex and the Body in the West, 1500 to the Present*, ed. Sarah Toulalan and Kate Fisher (New York: Routledge, 2013), 351-71.

3 See, for example, Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (Boston: Northeastern University Press, 1990); Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (Berkeley: University of California Press, 1998); Lynn M. Morgan and Meredith W. Michaels, eds., *Fetal*

contemporary abortion rights, but in this essay I highlight the distinctive history of abortion legislation in New Brunswick in part to intervene in the standard discussions of abortion rights in New Brunswick and the rest of Canada. Daily newspapers and online sites regularly frame the issue in terms of the recent past, citing the 1988 Supreme Court of Canada's decision to strike down the existing abortion law as a crucial and definitive turning point.<sup>4</sup> In contrast, my discussion features the 19th-century abortion laws in New Brunswick to provide a broader picture of both continuity and change in the regulation of abortion. This approach shows that while assumptions about motherhood as women's biological destiny and social duty have persisted from the past into the present, the definition of abortion changed radically within the legislation if not necessarily among laypeople. During the 19th century, efforts to redefine and regulate abortion were ongoing but not exclusively, or even primarily, informed by arguments about fetal rights. I follow other scholars by considering the important historical role played by medical authorities in shaping the legal structures surrounding abortion.<sup>5</sup> This reminder of how the professional goals of physicians helped to portray abortion as a medical procedure in need of careful management undermines the representation of fetal rights as the crux of the so-called "abortion wars."<sup>6</sup> My interest in the specificity of New Brunswick's legislation furthermore contributes to an established body of research designed to question the idea that there is a singular and equitably applied abortion law in Canada.<sup>7</sup> Various researchers have indicated how the provision and experience of abortion differ in each province, but I am additionally concerned with

*Subjects, Feminist Positions* (Philadelphia: University of Pennsylvania Press, 1999); Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago: University of Chicago Press, 2011); Heather Latimer, *Reproductive Acts: Sexual Politics in North American Fiction and Film* (Montreal and Kingston: McGill-Queen's University Press, 2013); and Shannon Stettner, "'We are Forced to Declare War': Linkages between the 1970 Abortion Caravan and Women's Anti-Vietnam War Activism," *Histoire sociale / Social history* 46, no. 92 (2013): 423-41.

4 See, for example, "New Brunswick Abortion Restriction Lifted by Premier Brian Gallant," *CBC News*, 26 November 2014, <http://www.cbc.ca/news/canada/new-brunswick/new-brunswick-abortion-restriction-lifted-by-premier-brian-gallant-1>, and Tracy Glynn, "Abortion Restriction in New Brunswick Lifted but Access Still a Problem," *Rabble.ca*, 28 November 2014, <http://rabble.ca/news/2014/11/abortion-restriction-new-brunswick-lifted-access-still-problem>.

5 See, for example, James Mohr, *Abortion in America: The Origins and Evolution of National Policy* (New York: Oxford University Press, 1978) and Wendy Mitchinson, *The Nature of their Bodies: Women and their Doctors in Victorian Canada* (Toronto: University of Toronto Press, 1991).

6 Though fetal rights remain important to anti-abortion rhetoric, those lobbying against abortion now strategically focus on the supposed health risks of abortion, framing their position as "pro-woman." See Paul Saurette and Kelly Gordon, "Arguing Abortion: The New Anti-Abortion Discourse in Canada," *Canadian Journal of Political Science* 46, no. 1 (March 2013): 157-85.

7 See, for example, Christabelle Sethna and Marion Doull, "Spatial Disparities and Travel to Freestanding Abortion Clinics in Canada," *Women's Studies International Forum* 38 (May-June 2013): 52-62; Wendy V. Norman et al., "Barriers to Rural Induced Abortion Services in Canada: Findings of the British Columbia Abortion Providers Survey (BCAPS)," *PLOS ONE* 8, no. 6 (28 June 2013), 1-7, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0067023>; and Joanne H. Wright, "What the New Liberal Government Should Know About 'Reproductive Freedom and Justice in New Brunswick'," *Journal of New Brunswick Studies / Revue d'études sur le Nouveau-Brunswick* 5 (2014): 15-18.

how abortion has been used to make arguments about provincial identity. When those opposed to abortion rights assert that the inhabitants of New Brunswick are overwhelmingly against the procedure, they delegitimize the voices of pro-choice citizens by portraying them as outsiders. Such efforts to produce an image of New Brunswick in relation to abortion rights (or a lack thereof) indicate that a range of political, social, and cultural issues are in play whenever the topic of abortion is addressed.

My emphasis on the history of legal structures nevertheless risks erasing women from the picture, since women themselves had very little to do with their creation. This is at odds with efforts to highlight women's voices and experiences in much feminist scholarship as well as my earlier writing about abortion in New Brunswick and elsewhere.<sup>8</sup> Rosalind Petchesky has, for example, cautioned against overestimating the impact of legislation on women's lives: "The remarkable thing is not that those in power have attempted to control population by controlling the fertility of women but that they have been so unsuccessful."<sup>9</sup> Legal structures admittedly form only part of the context within which women make reproductive decisions.<sup>10</sup> Yet I contend that paying close attention to the complex history of abortion legislation in New Brunswick can unsettle the current discourse, shed light on the development of past as well as future reproductive policies in the province, and encourage more informed discussions of abortion and its history.

### **Redefining abortion in the 19th century**

The government of New Brunswick passed many abortion statutes during the 19th century starting in 1810 with the importation of the British Malicious Shooting or Stabbing Act, also known as Lord Ellenborough's Act. Lord Ellenborough, Chief Justice of the King's Bench when the act was passed in 1803, was committed to criminal law based on capital punishment. His act created ten new capital felonies, and made it illegal "to willfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's subjects, any deadly poison, or other noxious and destructive substance or thing, with intent such his Majesty's subject or subjects thereby to murder, or thereby to cause and procure the miscarriage of any woman, then being quick with child."<sup>11</sup> Although the reference to miscarriage – the terms miscarriage and abortion were conflated at the time – seems tacked on to the crime of poisoning as an afterthought, it marked a significant change in the law by criminalizing abortion. Legal scholars argue that Lord Ellenborough was not particularly concerned with pregnancy or abortion per se, but

8 Lianne McTavish, "The Cultural Production of Pregnancy: Bodies and Embodiment at a New Brunswick Abortion Clinic," *Topia: Canadian Journal of Cultural Studies* 20 (Fall 2008): 23-42, and Lianne McTavish, "Maternity in the Early Modern World," in *Women and Gender in the Early Modern World*, ed. Allyson Poska (Aldershot, UK: Ashgate, 2013), 173-93.

9 Petchesky, *Abortion and Woman's Choice*, 26.

10 John Keown, in his *Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge: Cambridge University Press, 1988), focuses on legislation without referring to women or broader cultural structures, offering a partial and unsatisfying account of abortion in 19th-century England.

11 Keown, "The First Statutory Prohibition of Abortion: Lord Ellenborough's Act 1803," *Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982*, 3-25.

simply wished to bolster criminal sanctions in general by extending an already ponderous legal system in his omnibus crime bill.<sup>12</sup> The motivations of the New Brunswick legislators are more elusive, for only the anti-abortion parts of the British bill were included in the act of 1810 without reference to other felonies. Yet no public outcry about the issue of abortion preceded its passage; nor was there any recorded debate of it amongst politicians.<sup>13</sup>

The introduction of abortion regulations into British North America nevertheless invented a new crime, simultaneously reinforcing and undermining established understandings of pregnancy.<sup>14</sup> On one hand, the act specified that causing or procuring a miscarriage was punishable by death only if the woman was “quick with child.” Quickening referred to the perception of fetal movement by the pregnant woman, something that typically occurred during the fourth month of gestation.<sup>15</sup> This physical experience was linked with the gradual ensoulment of fetuses, a philosophical argument that originated during classical antiquity and continued into the Middle Ages and early modern period and which made abortion an ecclesiastical rather than criminal offence in most jurisdictions.<sup>16</sup> Even the medieval Catholic Church distinguished between formed and unformed embryos and fetuses, though, according to John T. Noonan, it consistently promulgated against early abortions from the fourth century onward.<sup>17</sup> Carefully researched case studies indicate, however, that beliefs about abortion were far from straightforward and could not be mandated by religious authorities. John Christopoulos argues that in Counter-Reformation Italy, for example, Catholic leaders were alarmed that abortion seemed to be both commonplace and socially acceptable, but they failed to diminish and punish its practice.<sup>18</sup> This complex history of abortion underpins the New Brunswick act of 1810, which reconfirmed established understandings of fetal development by implying that an enlivened fetus was imbued with a soul and was thus more worthy of protection than an embryo or unformed fetus.<sup>19</sup>

The act diverged from historical practice, on the other hand, by explicitly criminalizing abortions that occurred before quickening with sentences that were severe but fell far short of capital punishment, including fines, public or private

12 Mohr, *Abortion in America*, 23-4.

13 Constance Backhouse, “Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada,” *Windsor Yearbook of Access to Justice* 3 (1983): 68.

14 Backhouse, in “Involuntary Motherhood,” 68, indicates that while almost identical legislation was passed in Prince Edward Island in 1836, no other parts of Canada passed abortion regulations between 1800 and 1840.

15 For a definition of quickening, see Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn*, trans. Lee Hoinacki (Cambridge, MA: Harvard University Press, 1993), 79-82.

16 John Christopoulos, “Abortion and the Confessional in Counter-Reformation Italy,” *Renaissance Quarterly* 65, no. 2 (Summer 2012): 443-84, esp. n116.

17 John T. Noonan, “Abortion and the Catholic Church: A Summary History,” *Natural Law Forum*, Paper 126 (1967): 85-131.

18 Christopoulos, “Abortion and the Confessional in Counter-Reformation Italy.”

19 See G.R. Dunstan, *The Human Embryo: Aristotle and the Arabic and European Traditions* (Exeter: University of Exeter Press, 1990).

whipping, imprisonment for up to two years, and being set upon the pillory.<sup>20</sup> The act of 1810 reshaped the legal concept of abortion by extending the practice into the early stages of pregnancy and removing women's embodied experience from the definition of pregnancy. According to Barbara Duden, early modern women were authorized to name and announce publicly their pregnant condition when they felt movement inside their bodies.<sup>21</sup> Before such a declaration, pregnancy was uncertain and practically impossible to diagnose. A cessation of the menses and swelling belly did not necessarily indicate pregnancy; they could be caused by any number of illnesses, as well as stagnation of the blood, or the retention of wind.<sup>22</sup> A "stoppage" of menstrual flow, in any case, was always cause for concern because the womb collected and expelled impurities from the entire body, making it far more than a location in which conception could occur. A woman who had not menstruated for several months might legitimately procure treatments to cleanse her womb.<sup>23</sup> From a modern point of view, historical recipes designed to "bring on the menses" were methods of early abortion.<sup>24</sup> The term "abortion" is, however, misplaced in this context. Carla Spivack and other scholars insist that early modern people viewed as minimal and unworthy of discussion the distinction between encouraging menstrual bleeding and causing a miscarriage before any signs of quickening.<sup>25</sup>

Lord Ellenborough's act and its reiteration in New Brunswick also took issue with traditional approaches to fertility control, potentially attempting both to rename and criminalize women's health practices. All the same, the act apparently had little effect, suggesting that the motivations of those who pursued abortion were more compelling than the threat of legal punishment. Angus McLaren's work on the history of contraception and abortion in Canada reveals that early modern reproductive rituals were virtually unchanged during the 19th century. According to him, "Women remained true to the traditional idea that until the mother felt the foetus 'quicken' it was permissible to take whatever measures necessary to make herself 'regular'." The combination of herbal remedies meant to promote menstruation with such commonplace forms of birth control as continence, coitus interruptus, and delayed marriage contributed to a significant decline in fertility rates during the second half of the 19th century throughout Canada, including rural New Brunswick. Abortionists continued to make relatively open offers of help to women "in trouble," while so-

20 An Act for making further provisions to prevent the destroying and murdering of Bastard Children, and for the further prevention of the malicious using of means to procure the miscarriage of women, Anno 50 Georgii III, *The Acts of the General Assembly of His Majesty's Province of New-Brunswick* (Fredericton, NB: George K. Lugin, 1817), 50-2.

21 Duden, *Disembodying Women*, 82.

22 Cathy McClive, "The Hidden Truths of the Belly: The Uncertainties of Pregnancy in Early Modern Europe," *Social History of Medicine* 15, no. 2 (2002): 209-27.

23 Barbara Duden, *The Woman Beneath the Skin: A Doctor's Patients in Eighteenth-Century Germany*, trans. Thomas Dunlap (Cambridge, MA: Harvard University Press, 1991).

24 John M. Riddle, *Contraception and Abortion from the Ancient World to the Renaissance* (Cambridge, MA: Harvard University Press, 1992) and Riddle, *Eve's Herbs: A History of Contraception and Abortion in the West* (Cambridge, MA: Harvard University Press, 1997).

25 Carla Spivack "To 'Bring Down the Flowers': The Cultural Context of Abortion Law in Early Modern England," *William and Mary Journal of Women and the Law* 14, no. 1 (2007): 123. See also Helen King, *Hippocrates' Woman: Reading the Female Body in Ancient Greece* (London: Routledge, 1998), 144-5.

called abortifacients were sold. A pill known as the “female regulator,” for example, was advertised in major North American newspapers, without provoking a public outcry.<sup>26</sup> Nor did the continued efforts of women to “bring on the menses” attract much attention from law enforcement. Few if any convictions resulted from the act of 1810. In her study of the legal history of abortion in Canada, Constance Backhouse notes that no abortion trials were held in New Brunswick between 1800 and 1840 though she also calls for more thorough archival research on this topic.<sup>27</sup>

Why, then, was anti-abortion legislation imported into New Brunswick in 1810? And why were so-called early abortions included in the act? Such questions are challenging given the lack of recorded legal debate, historical documentation, and research related directly to abortion in 19th-century New Brunswick. This topic requires intensive work in the archives by future students and scholars, but even that would be insufficient because of the private nature of reproductive practices as well as the relative invisibility of “abortion” before quickening. This situation is not unique to New Brunswick. A certain degree of speculation is involved in most histories of 19th-century abortion in the western world, in part because such basic categories as abortion, pregnancy, women, and the fetus have changed drastically since then and differ according to culture and region.<sup>28</sup> A broader and more thematic approach is therefore undertaken below, with the proviso that the institution of anti-abortion regulations into New Brunswick was not driven by singular or clearly stated reasons.

It may be that the act of 1810 simply repeated the British law, without careful consideration of its parameters or enforcement. The numerous revisions of the act by New Brunswick politicians suggest that it was both imperfectly formulated and ineffective. The penalty for a pre-quickened abortion was lowered, for example, to a maximum of two years in 1829. The quickening distinction was abolished altogether in 1842, according to Backhouse, in part because of the evidentiary challenges it entailed. Then in 1843 the reference to capital punishment was removed, replaced with a maximum sentence of 14 years in prison.<sup>29</sup> The continual changes to the abortion law in New Brunswick frame it as an incomplete process, rather than a carefully organized campaign with obvious targets or goals.

According to James Mohr, Lord Ellenborough had included early “abortions” as lesser offences in his act of 1803 simply to justify advocating capital punishment for

26 Angus McLaren and Arlene Tigar McLaren, *The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada, 1880-1980* (Toronto: McClelland and Stewart, 1986), 38, 10-11, 33. See also Tracy Penny Light, “Shifting Interests: The Medical Discourse on Abortion in English Canada, 1850-1969” (PhD diss., University of Waterloo, 2003).

27 Backhouse, “Involuntary Motherhood,” 69.

28 Some legal scholars speculate that the lack of convictions indicates that abortion was not widely practiced during the 19th century, likely because of the shame associated with the act or the sheer danger of early methods. See, for instance, Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham, NC: Carolina Academic Press, 2006). Historians of birth control and abortion as well as other legal scholars do not find these claims convincing. See, for example, Shelley Gavigan, “On ‘Bringing on the Menses’: The Criminal Liability of Women and the Therapeutic Exception on Canadian Abortion Law,” *Canadian Journal of Women and Law* 279 (1985-1986): 284.

29 Backhouse, “Involuntary Motherhood,” 68, 70.



the termination of “quicken” fetuses as part of his overall crack down on crime.<sup>30</sup> Yet the New Brunswick act of 1810 was framed rather differently as, instead of combating an apparent crime wave, it was coupled with laws regarding infanticide. Entitled “An Act for making further provisions to prevent the destroying and murdering of Bastard Children, and for the further prevention of the malicious using of means to procure the miscarriage of women,” the legislation of 1810 began by insisting that any woman who killed an illegitimate newborn child was to be tried as a murderer and if found guilty would be sentenced to death. It further specified that a woman would spend two years in prison if she was found guilty of hiding the body of her illegitimate baby to conceal its birth, even if she was ultimately acquitted of its murder.<sup>31</sup> The new abortion regulations followed directly from this discussion, implying a link between unwed pregnancy, secrecy, shame, and abortion. This connection lent a moralizing tone to the legislation, positioning the act of 1810 as a social good that would prevent or at least punish the destructive tendencies of desperate, sexually active, single women from the point of conception until childbirth and beyond. Fertility rates, at the same time, were declining amongst older, married, and middle class women, suggesting that they too were “cleansing” their wombs and/or procuring the miscarriages of “legitimate” pregnancies in addition to using the birth control methods mentioned above.<sup>32</sup> Some scholars insist that increasing anxiety about the declining birth rates of these middle class women fueled fears of racial degeneration, encouraging the development of anti-abortion legislation in British North America and the United States during the early 20th century. Others find this explanation inadequate, noting that fertility rates had long been diminishing and were not closely aligned with the legal efforts to control abortion.<sup>33</sup>

Infanticide and abortion were indeed commonplace – and apparently far from secret – in New Brunswick, at least according to the early 19th-century correspondence between Roman Catholic missionaries in Caraquet and their bishops.<sup>34</sup> Scholars including Backhouse find evidence of both practices throughout British North America during the 19th century, another tradition stemming from the early modern period if not earlier.<sup>35</sup> At the same time, Etienne Van de Walle argues that secret deliveries, child abandonment, and infanticide were more important

30 Mohr, *Abortion in America*, 23.

31 An Act for making further provisions to prevent the destroying and murdering of Bastard Children, 50-2. Lord Ellenborough’s Act of 1803 was also related to legal concerns with illegitimacy and infanticide, for it replaced the 1624 Act to Prevent the Destroying and Murdering of Bastard Children.

32 McLaren and McLaren, *The Bedroom and the State*, 11-13.

33 For this debate, see McLaren and McLaren, *The Bedroom and the State*, 11; Mitchinson, *Nature of their Bodies*, 127; and Estelle Freedman, *No Turning Back: The History of Feminism and the Future of Women* (New York and Toronto: Random House, 2002), 233.

34 Cited in Elspeth Tulloch, *We, the Undersigned: A Historical Overview of New Brunswick Women’s Political and Legal Status, 1784-1984* (Moncton, NB: New Brunswick Advisory Council on the Status of Women, 1985), 80.

35 Constance Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada,” *University of Toronto Law Journal* 34 (1984): 447-78. See also Kristen Johnson Kramer, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: University of British Columbia Press, 2005).

forms of early birth control than abortion.<sup>36</sup> Infanticide was especially challenging to prosecute, resulting in few convictions because it was practically impossible to prove that a child had not been stillborn and since juries tended to sympathize with the plight of single, abandoned, or otherwise desperate women.<sup>37</sup> The act of 1810 included a two-year sentence for concealment precisely because juries were unlikely to find women guilty of murder, regardless of the evidence. Along similar lines, even after the penalty for procuring an abortion in New Brunswick was lowered to a maximum of 14 years in prison in 1843 few individuals were charged or found guilty of this crime.<sup>38</sup>

One major difference between New Brunswick's infanticide and abortion laws is that women were exclusively charged with the former, and rarely for the latter, at least at first. The act of 1810 specified that any persons who "willfully, maliciously, and unlawfully" administered a substance intended to procure the miscarriage of a woman would be criminally liable, without specifying that the pregnant woman was herself engaging in criminal activity. In fact, any charges would be laid against other individuals – the woman's husband, lover, or physician – until the act was changed in 1849 to include the woman who had requested an abortion. After that, the circle continued to widen: by 1864 anyone who had assisted with an abortion by supplying "poisons, noxious things or instruments" faced a maximum penalty of two years in prison.<sup>39</sup> This new legislation further specified that the charges were valid even if the woman was not actually pregnant, bypassing the elimination of the quickening distinction to render women's embodied experience irrelevant to the legal process. This alteration completely transformed the act of 1810. After 1864 abortion was defined in relation to the deeds of individuals, without reference to pregnancy. While removing the evidentiary difficulties of determining pregnancy (an ongoing problem during the 19th century), it also erased women's bodies from the legal definition of abortion and removed any implied concern with protecting the fetus.

The alteration of New Brunswick's abortion laws throughout the 19th century – repeated changes expanded the list of possible criminals, diminished the severity of punishment, and expunged any allusion to female embodiment – can be explored with reference to arguments about 19th-century abortion law in the United States and British North America. In both jurisdictions, regular male physicians who had trained in British or American medical schools spoke loudly and publicly against what they considered "quack" abortion providers lacking similar credentials. Despite bringing about a gradual shift in the public perception of abortion, these physicians were arguably less concerned with abortion itself than with limiting and controlling the domain of medical practice.<sup>40</sup> In his study of the criminalization of abortion in the

36 Etienne van de Walle, "'Marvellous Secrets': Birth Control in European Short Fiction, 1150-1650," *Population Studies* 54 (2000): 321-30.

37 Backhouse, "Desperate Women and Compassionate Courts." For the longstanding difficulty in prosecuting infanticide cases, see Mark Jackson, ed., *Infanticide: Historical Perspectives on Child Murder and Concealment, 1150-2000* (Burlington, VT: Ashgate, 2002).

38 Backhouse, in "Involuntary Motherhood," 82, notes that less than half a dozen abortion cases were tried during the 19th century.

39 Backhouse, "Involuntary Motherhood," 70, 73, 84, 75.

40 Backhouse, "Involuntary Motherhood," 76-82, and Gavigan, "On 'Bringing on the Menses'," 295.

United States, Mohr concludes that ambitious physicians led the way in denouncing the termination of pregnancies to pursue their own professional interests.<sup>41</sup> Backhouse finds the same pattern of behaviour in the Canadian context, with male physicians defending fetal life, denouncing “untrained” competitors, and embracing the ethical mandates of the Hippocratic Oath, which they mistakenly believed prohibited physicians from performing abortions, in order to create a distinct professional identity.<sup>42</sup> Although few records exist to document the participation of New Brunswick physicians in such anti-abortion activity, Peter J. Mitham argues that the regular doctors in the province, particularly those living in urban Saint John, were determined to organize and regulate the medical profession and relied on legislation to achieve both a monopoly over medical practice and the creation of the Medical Faculty of New Brunswick in 1859.<sup>43</sup> Even if New Brunswick physicians were not directly involved in anti-abortion lobbying, the act of 1810 and its subsequent transformations occurred within the context of the professionalizing efforts of other physicians and could have benefited local doctors by inhibiting competitors.

In addition to so-called “quack” abortionists, those who threatened male medical authority included both pregnant women and female medical practitioners. Wendy Mitchinson argues that 19th-century Canadian doctors were angered by the idea that women rather than physicians should decide whether or not life was present in the womb.<sup>44</sup> These men encouraged changes that removed embodied authority from women and placed it exclusively in the hands of “experts,” something that gradually occurred in the New Brunswick legislation when it eliminated the need to determine the stage or even presence of pregnancy. At the same time, the reference to “unlawful” procedures in the act of 1810 and its successors implied that there might be cases in which abortion could be lawful. Physicians were understandably nervous about being charged with a crime when providing their female patients with an intervention that could be construed as an abortion even if it was in fact a “lawful” abortion. During the first half of the 20th century, legal challenges in Britain and the United States eventually led to the recognition of the necessity for abortion when pregnancy resulted from rape or when the life of the pregnant woman was threatened.<sup>45</sup> Physicians helped to make decisions in these cases, displacing the matrons, nurses, and midwives who had for centuries performed examinations and testified about pregnancy and birth in a range of legal situations.<sup>46</sup> Mitchinson and

41 Mohr, *Abortion in America*, 86-118.

42 Thomas Rütten, “Receptions of the Hippocratic Oath in the Renaissance: The Prohibition of Abortion as a Case Study in Reception,” *Journal of the History of Medicine and Allied Sciences* 51, no. 4 (1996): 456-83. See also my position paper for the Abortion Rights Coalition of Canada: “Abortion and the Hippocratic Oath,” <http://www.arcc-cdac.ca/postionpapers/71-Abortion-Hippocratic-Oath.PDF> position paper #71.

43 Peter J. Mitham, “For ‘The Honor and Dignity of the Profession’: Organized Medicine in Colonial New Brunswick, 1783-1860,” *Canadian Bulletin of Medical History* 13 (1966): 83-108.

44 Mitchinson, *Nature of their Bodies*, 23-4.

45 Gavigan, “On ‘Bringing on the Menses’,” 303-10.

46 For the history of this longstanding practice, see Richard L. Petrelli, “The Regulation of French Midwifery during the Ancien Régime,” *Journal of the History of Medicine* 27 (1971): 276-92, and Jacques Gélis, *La sage-femme ou le médecin: une nouvelle conception de la vie* (Paris: Fayard, 1988), 40-55.

others conclude that 19th-century physicians denounced abortion and reinforced gender distinctions to justify their own professional and economic interests.<sup>47</sup>

Taking issue with such claims, Michael Thomson contends that Canadian physicians should not be singled out in this fashion and blamed for the importation of restrictive abortion laws. These men, he argues, were influenced by a broader culture in which women's emancipation was feared.<sup>48</sup> When male physicians opposed abortion and promoted the idea that motherhood was women's greatest calling, they echoed broader social mores that justified and even sanitized female sexuality by linking it with maternity.<sup>49</sup> Physicians were genuinely concerned with the health and safety of women, according to Thomson, and they supported the criminalization of abortion to protect vulnerable women from unsafe practitioners, albeit while responding to fears of increasing immigration, the rise of feminism, and shifting understandings of marriage.<sup>50</sup> Shelley Gavigan and Elspeth Tulloch agree that one of the primary reasons for introducing abortion legislation into New Brunswick was the dangerous nature of uncontrolled abortion at that time.<sup>51</sup> Yet in the end, a lack of specific data about the number of abortions, abortionists, successful operations, and deaths resulting from abortion makes it difficult to evaluate any of these hypotheses or to consider whether or not, and even to what extent, they directly impacted provincial politicians.

No matter what spurred its creation and development, New Brunswick's anti-abortion legislation was influential. It was the primary source used to address abortion in 1869, when the criminal law was consolidated federally. All of the features found in New Brunswick's act of 1864 were duplicated in Canadian law, though the penalties were altered. When Canada's first Criminal Code went into effect in 1892, it remained illegal for a physician to procure a miscarriage and for a woman to induce her own abortion; each would receive a maximum punishment of seven years in prison, penalties in line with the English legal system. By then the dissemination of information about birth control, and the sale, advertising, and distribution of contraceptive devices, were also prohibited, probably inspired by the American Comstock Law of 1873.<sup>52</sup> These policies remained in place for much of the 20th century, though they were challenged by feminists.<sup>53</sup> Physicians also

47 Mitchinson, *Nature of their Bodies*, 23-4.

48 Michael Thomson, "Woman, Medicine and Abortion in the Nineteenth Century," *Feminist Legal Studies* 3, no. 2 (1995): 159-83.

49 Mitchinson, *Nature of their Bodies*, 102-3.

50 Thomson, "Woman, Medicine and Abortion in the Nineteenth Century," 168-72.

51 Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion," *Journal of Legal History* 5, no. 1 (1984): 23; Elspeth Tulloch, *We, the Undersigned*, 81.

52 Gavigan, "On 'Bringing on the Menses'," 294. The Comstock Law was a federal act passed by the United States Congress in 1873 to suppress the trade in and circulation of "obscene literature and articles of immoral use," including erotica, contraceptives, abortifacients, sex toys, and any literature related to those items. For a recent discussion of this law, see Christine M. Hassenstab, *Body Law and the Body of Law: A Comparative Study of Social Norm Inclusion in Norwegian and American Laws* (Warsaw and Berlin: De Gruyter Open, 2014).

53 For feminist pro-choice activism see, for example, Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin, 2005) and Christabelle Sethna and Steve Hewitt, "Clandestine Operations: The Vancouver Women's Caucus, the Abortion Caravan, and the RCMP," *Canadian Historical Review* 90, no. 3 (September 2009): 463-95.

lobbied for change, in part because they were concerned with the legal status of therapeutic abortions provided in cases of emergency, incest, and rape.<sup>54</sup> Penny Light, in her study of medical discourse in English Canada, argues that doctors railed against illegal abortion in the middle of the 20th century for different reasons, seeking both to blame others for high maternal mortality rates and to protect those women who required safe procedures.<sup>55</sup> Nineteenth-century New Brunswick politicians had played a major role in shaping the restrictive reproductive policies that these physicians and others claimed endangered women. During the second half of the 20th century, however, the provincial government of New Brunswick diverged from national structures and refused to follow federal mandates about abortion provision.

### **Resisting abortion in the 1970s and 1980s**

In 1985 the New Brunswick government passed Bill 92, An Act to Amend an Act Respecting the New Brunswick Medical Society and the College of Physicians and Surgeons of New Brunswick, making it illegal for anyone to perform abortions outside of accredited hospitals. This legislation was hastily created after Richard Hatfield, then premier of New Brunswick, received a letter from Dr. Henry Morgentaler asking for assistance in setting up a cost-effective, free-standing abortion clinic in New Brunswick. According to the thorough archival research of Katrina Ackerman, Hatfield had taken a deliberately neutral stance on the issue of abortion until he learned of Morgentaler's plan. The premier then adopted an overtly anti-abortion position, passing Bill 92 with the assistance of the New Brunswick Medical Society and the College of Physicians and Surgeons of New Brunswick. Their shared goal was to stop Dr. Morgentaler, an "outsider" from Quebec, from opening a private clinic that could challenge and undermine the province's control of abortion provision. Although Ackerman shows that the Hatfield government drafted Bill 92 before consulting with medical authorities, it could not have moved forward without the participation of the provincial physicians in leadership positions.<sup>56</sup> During the 20th century New Brunswick physicians were overtly involved in political decisions about abortion, deciding who received legal operations and who did not.

Abortion remained a crime in 1985, but it could be legally provided if a Therapeutic Abortion Committee (TAC), consisting of at least three physicians, certified that a woman's life or health was endangered by continuing a pregnancy. Physicians had been openly allowed to exempt certain abortions from the Criminal Code of Canada since 1969, when Prime Minister Pierre Elliott Trudeau introduced Bill C-150 to amend the criminal law. In New Brunswick, the Department of Health insisted that any hospital wishing to set up a TAC – hospitals were not legally obliged to consider requests for abortion or provide abortions – was required to have

54 Much has been written about the Bourne case, which involved a British physician performing an abortion on a young girl who had been raped. See, for example, C. M. da Costa, "The King versus Aleck Bourne," *Medical Journal of Australia* 191, no. 4 (17 August 2009): 230-1.

55 Light, "Shifting Interests," 57-98.

56 Katrina R. Ackerman, "'Not in the Atlantic Provinces': The Abortion Debate in New Brunswick, 1980-1987," *Acadiensis* XLI, no. 1 (Winter/Spring 2012): 77, 94.

obstetrical beds, an operating theatre, and a medical audit committee. During the 1970s, 16 of the province's 37 general hospitals did not meet these requirements. By 1976, eight of the remaining 21 hospitals had TACs, but only five provided abortions. In 1987 four New Brunswick hospitals (in Fredericton, Oromocto, Saint John, and Moncton) offered abortion services, with the Moncton Hospital performing two-thirds of the procedures.<sup>57</sup>

Despite these limitations, the TAC system had increased the number of legal abortions done in New Brunswick during the 1970s.<sup>58</sup> According to Dr. Robert Caddick, only 146 abortions had been performed in New Brunswick during 1971, including 5 or 6 in Fredericton and Saint John; the rest were performed by him in Moncton.<sup>59</sup> Most of the women were young, single, childless, and had not had a previous abortion.<sup>60</sup> In 1974 there were 440 abortions reported in New Brunswick, with 55.2 per cent of them done on an in-patient hospital basis and 75 per cent in the community in which the woman lived.<sup>61</sup> During the 1980s this number declined – only 267 legal abortions were done in 1984 – and Ackerman found that 299 mostly young and single New Brunswick women were denied funded abortions between 1982 and 1986.<sup>62</sup>

In 1977 the Committee on the Operation of the Abortion Law, a three-member committee appointed in 1975 by the federal government and headed by Professor Robin Badgley, published the results of a thorough study – compiling abortion statistics, undertaking hospital visits, contacting physicians, and conducting surveys – designed to determine whether or not the TAC system was functioning effectively and equitably across Canada. Despite indicating that the number of deaths resulting from self-induced abortions had dropped significantly, the 1977 “Badgley Report” largely condemned the new system for failing to provide accessible abortion services outside of major urban centres, creating lengthy delays with its approval process, and charging illegal user fees to women. The Badgley researchers concluded that “the procedures set out for the operation of Abortion Law are not working equitably across Canada” in part because the intent of Bill C-150 was not clear and its terms not fully defined. Provincial health organizations were thus able to institute requirements that restricted the number of hospitals able to offer abortions while individual TAC members could require a husband's consent and/or define women's health in narrow terms, excluding mental health or socio-economic considerations if they wished, all of which happened in some hospitals in New Brunswick. Women in the Maritimes had less than half the access to abortion as women in central or western Canada, especially if they lived in the rural areas of either New Brunswick or Prince Edward Island. According to the report, “On an

57 Robin F. Badgley, *Report of the Committee on the Operation of the Abortion Law* (Ottawa: Minister of Supplies and Services Canada, 1977), 93, 111, and Dr. Robert Caddick, “Therapeutic Abortion Study” (unpublished, 1972). I thank Dr. Caddick for sharing his study of the abortions done in New Brunswick from 1971-2 with me. For the 1980s statistics, see Ackerman, ““Not in the Atlantic Provinces’,” 96.

58 Badgley, *Report of the Committee on the Operation of the Abortion Law*, 113.

59 Personal communication with Dr. Robert Caddick via e-mail, 4 April 2015.

60 Caddick, “Therapeutic Abortion Study.”

61 Badgley, *Report of the Committee on the Operation of the Abortion Law*, 113.

62 Ackerman, ““Not in the Atlantic Provinces’,” 96-8.

average about two-thirds of the people living in the Maritimes (with the exception of Nova Scotia) did not have an eligible hospital in the community where they lived.” Abortion-providing hospitals in the Maritimes furthermore had residency requirements that favoured the populations living within a 60-mile radius, which is why women in only four communities accounted for 71.8 per cent of the in-patient abortions done in 1975. To restrict the number of abortions these hospitals had quotas, claiming that they would otherwise be “overrun” by abortion-seeking women. Women in the Maritimes reported giving fake addresses to circumvent these regulations or obtaining abortions in the United States, usually in Maine (156 Canadian women had abortions there in 1974) or New York. The Badgley research team, in addition to speaking with women unable to acquire a funded abortion in Canada, contacted American abortion clinics to confirm that there was a continuing “exodus” of women travelling to the United States, where abortion had been legal since the *Roe v. Wade* decision in 1973.<sup>63</sup> Many New Brunswick women had travelled to New England, New York, and probably the United Kingdom for abortions before Bill C-150 was passed in 1969, and they continued to do so long afterwards.

Did the low number of legal abortions done in New Brunswick – in 1971 the abortion rate was 20 per cent of that in the rest of Canada and in 1974 it was less than one-third of that in Quebec – indicate widely held anti-abortion sentiments in the province?<sup>64</sup> The opinions of the “average” New Brunswicker are difficult to determine since most records, including letters to the editor or members of Parliament, feature the voices of those who held passionate views either for or against legal abortion. The Badgley Report did not address this particular question, but it did survey physicians across Canada and some 47.7 per cent of those who chose to respond held “pro-life” views about fetal protection. The general population, in contrast, tended to be uninformed about the status of abortion in Canada, not realizing that abortions certified by a TAC were legal.<sup>65</sup> This data was revealed by Monica Boyd and Deirdre Gillieson in their analysis of the six Gallup polls about abortion conducted in Canada between 1965 and 1974. The scholars admit that the polls are unreliable because the questions about abortion changed from poll to poll and were flawed in their construction. All the same, they found that 34.1 per cent of the people polled in the Maritimes claimed that abortion was both illegal and too easy to access – a result that may reflect either the continuing prevalence of illegal abortions and abortions acquired abroad or a general belief that abortion should be severely restricted. Boyd and Gillieson also discovered some differences in opinion related to age and level of education – people with higher levels of formal education tended to be pro-choice – but concluded that most people

63 Badgley, *Report of the Committee on the Operation of the Abortion Law*, 3-16, 17-39, 57, 64-6, 78-9, 108, 161, 240, 261.

64 Badgley, *Report of the Committee on the Operation of the Abortion Law*, 58, and Caddick, “Therapeutic Abortion Study.”

65 Badgley, *Report of the Committee on the Operation of the Abortion Law*, 58, 127, 218-21, 66. More than half of the respondents who had had abortions did not realize that the procedure was legal, and many doctors did not comprehend the details and deadlines of the law.

adopted a “middle of the road” position, arguing that abortion should be allowed but that the decision should not rest exclusively with the pregnant woman herself.<sup>66</sup>

Ackerman’s research on abortion during the 1980s nevertheless suggests that many New Brunswickers held anti-abortion views. She argues that Premier Hatfield ultimately promoted anti-abortion policies because he faced increasing pressure from anti-abortion lobbyists in the province, especially the large fundamentalist Protestant and Roman Catholic populations.<sup>67</sup> She claims, drawing on letters sent to government officials and published editorials as well as letters to the editor, that these lobbyists were more persuasive and influential than were pro-choice voices, which included private individuals, members of Planned Parenthood New Brunswick, and representatives of the New Brunswick Advisory Council on the Status of Women. Anti-abortion protesting temporarily halted, for example, the provision of abortions at the Moncton Hospital in 1982, after the five gynecologists on its TAC were targeted and relentlessly harassed. The physician who performed most of the abortions in New Brunswick, Dr. Robert Caddick, had requested a six-month moratorium on abortion services at the Moncton hospital. Abortion-seeking women were redirected to other hospitals, though some also travelled to Maine and New York for the procedure. His tactic ultimately elicited support for the resumption of services from the medical staff at the hospital and some members of the community. In response, those opposed to legal abortion published in a local newspaper the names of 33,000 New Brunswickers who were against the continuation of abortion services at the Moncton hospital.<sup>68</sup> The Committee for the Retention of Abortion Rights had formed to collect signatures in favour of the reinstatement of services, and such care finally resumed in December 1982.<sup>69</sup> This incident certainly reveals the strength of the anti-abortion movement, but also demonstrates that pro-choice forces could organize and counter-act anti-abortion lobbying at critical junctures.

During the 1980s those opposed to legal abortion insisted that a refusal to provide “abortion on demand” in New Brunswick was in keeping with traditional regional values. Their identification of provincial distinctiveness with strict abortion laws had a historical basis in the anti-abortion legislation that was pioneered and developed by New Brunswick politicians during the 19th century. Although the reasons for creating the early regulations remain uncertain, the arguments against abortion were widely publicized during the second half of the 20th century. Sometimes anti-abortionists made their case on moral or religious grounds, as a defense of fetal life, but they also articulated a resistance to abortion in terms of a broader image of the province, asserting that the economic future of New Brunswick required local women to have babies.<sup>70</sup> Anti-abortion activists implied that fertile women should be legally

66 Monica Boyd and Deirdre Gillieson, “Canadian Attitudes on Abortion: Results of the Gallup Polls,” *Canadian Studies in Population* 2 (1975): 57, 60.

67 Ackerman, “‘Not in the Atlantic Provinces’,” 77-9.

68 Personal communication with Dr. Robert Caddick via e-mail, 4 April 2015. See also “Proclamation,” *Moncton Times*, 22 December 1982.

69 According to Katrina Ackerman, the Committee for the Retention of Abortion Rights was formed in June 1982 shortly after the decision to stop providing abortion care was announced. By December 1982 the committee had collected 2,000 signatures. See Ackerman, “‘Not in the Atlantic Provinces’,” 82-3.

70 Ackerman, “‘Not in the Atlantic Provinces’,” 88, 91-3.



obligated to provide New Brunswick with productive, tax-paying citizens. Their assumption that women had abortions for selfish reasons was based on a longstanding “cult of motherhood,” discussed by Penny Light and others, which held that maternity was the biological duty and destiny of women and provided women with more satisfaction and fulfillment than any other activity.<sup>71</sup> These beliefs resonated with the data collected in earlier Gallup polls, indicating that many Maritimers felt that women were unable to make reproductive decisions and should be subject to male religious, legal, or medical authorities. Such gendered beliefs, articulated in the 19th-century regulations, were apparently enforced by some New Brunswick physicians – ultimately not those at the Moncton Hospital – when they rejected women’s abortion applications, requiring the women either to give birth unwillingly or find another way to access abortion (likely by travelling to the United States).<sup>72</sup>

New Brunswick’s Bill 92 was deemed unconstitutional in 1994, during a period when abortion provision was under increasing scrutiny. In 1988 the Supreme Court of Canada had ruled in *R v. Morgentaler* to strike down Bill C-150 for infringing on the Charter of Rights and Freedoms by threatening women’s right to “life, liberty and security of person.”<sup>73</sup> Abortion was then officially removed from the Criminal Code and classified as a medical procedure to be regulated like any other under the Canada Health Act. Instituted in 1984, this act was based on five basic principles: health care within Canada would be publicly administered, comprehensive, universal, portable, and accessible.<sup>74</sup> Although this health policy was federally mandated, the delivery of health care was determined at the provincial level; this led to a number of conflicts between the federal and provincial governments in New Brunswick, especially when it came to abortion services.

### The current situation

To this day, New Brunswick politicians continue to revise the province’s abortion legislation. Part of yet another anti-abortion bill was amended in January 2015.

71 The cult of motherhood or “true womanhood” has received attention from many scholars. See, for example, Light, “Shifting Interests,” 33.

72 Caddick, “Therapeutic Abortion Study.” See also Beth Palmer, “‘Lonely, tragic, but legally necessary pilgrimages’: Transnational Abortion Travel in the 1970s,” *Canadian Historical Review* 92, no. 4 (December 2011): 637-64; Christabelle Sethna, “All Aboard? Canadian Women’s Abortion Tourism, 1960-1980,” in *Gender, Health and Popular Culture*, ed. Cheryl Krasnick Warsh (Waterloo, ON: Wilfrid Laurier University Press, 2011), 89-108; and Christabelle Sethna, Beth Palmer, Katrina Ackerman, and Nancy Janovicek, “Choice, Interrupted: Travel and Inequality of Access to Abortion Services since the 1960s,” *Labour/Le Travail* 71 (Spring 2013): 29-48.

73 This legal decision has been featured in much scholarly writing, and is usually highlighted as a turning point in the provision of legal abortion in Canada. See, for example, Mildred Morton, *The Morgentaler Judgment: How the Decisions Differ* (Ottawa: Library of Parliament, Research Branch, 1988). See also Drew Halfmann, “Interests in Contexts and Institutional Democracy: The Politics of Abortion Policy in Liberal Welfare States, 1950-2000” (PhD diss., New York University, 2001). For Canada in the 20th century, see Shannon Stettner, “‘He is Still Unwanted’: Women’s Assertions of Authority Over Abortion in Letters to the Royal Commission on the Status of Women in Canada,” *Canadian Bulletin of Medical History* 29 (2012): 151-71.

74 See Health Canada, Canada Health Act, <http://hc-sc.gc.ca/hcs-sss/medi-assur/cha-lcs/index-eng.php>.

Regulation 84-20 is an amendment to the Medical Services Payment Act of New Brunswick, first enacted by Frank McKenna's Liberal government in 1989. This latter bill essentially maintained the 1970s TAC system after it had been deemed both ineffective by the Badgley Report and unconstitutional by the Supreme Court of Canada. Additions to Regulation 84-20 required any New Brunswick woman seeking a funded abortion to obtain written approval from two doctors who had determined that an abortion was "medically necessary."<sup>75</sup> Abortion could then be provided exclusively by a gynecologist in one of the few New Brunswick hospitals offering the procedure. Because doctors at the four hospitals – by 2006 the number had dropped to two hospitals, one in Moncton and one in Bathurst – would not do terminations after 12 weeks of gestation, New Brunswick women, especially those without a family doctor, were often unable to secure the permissions and make an appointment in time.<sup>76</sup> These unhappily pregnant women then needed to find an alternative abortion provider or leave the country, continuing practices stemming from the period before abortion was decriminalized.

By 1994 many women in New Brunswick were, however, able to access abortion services for pregnancies between 6 and 16 weeks gestation at the Morgentaler Clinic in Fredericton. The abortion clinic was finally opened after Dr. Morgentaler launched a legal suit to have the New Brunswick Court of Queen's Bench abolish the New Brunswick government's prohibition of private clinics.<sup>77</sup> His challenge was successful, but the province refused to fund the abortions done at the Morgentaler Clinic. After the adverse ruling in 1994, the government quickly inserted a clause in the Medical Services Payment Act: "Notwithstanding any other provision of this Act, the medical services plan shall not provide payment for . . . entitled services furnished in a private hospital facility in the Province."<sup>78</sup> That is why thousands of New Brunswick women – in 2006 about 600 women travelled to Fredericton to have an abortion – had to be charged substantial fees for their abortions at the Morgentaler Clinic between 1994 until the clinic closed in 2014, payments that contradicted the ruling of the Supreme Court of Canada and the principles of the Canada Health Act.<sup>79</sup>

Other provincial governments had attempted to prevent Dr. Morgentaler from opening free-standing abortion clinics, but were not as relentless as the New

75 Lauren Strapagiel, "No telling when, or if, New Brunswick will repeal abortion restrictions," *O.Canada.com*, 7 September 2014, <http://o.canada.com/news/no-telling-when-or-if-new-brunswick-will-repeal-abortion-restrictions>. See also Alister Brown and Bill Sullivan, "Abortion in Canada," *Cambridge Quarterly of Healthcare Ethics* 3, (July 2005): 287-91, and Rachael Johnstone, "The Politics of Abortion in Canada After Morgentaler: Women's Rights as Citizenship Rights," (PhD diss., Queen's University, 2012).

76 Joyce Arthur, "Abortion in Canada: History, Law, and Access," *Pro-Choice Action Network*, <http://www.prochoiceactionnetwork.-canada.org/articles/canada.shtml>; Johnstone, "Politics of Abortion in Canada After Morgentaler," 191-5.

77 "Abortion Politics in New Brunswick," *Abortion Access in New Brunswick*, <http://www.abortionaccessnb.ca/#!new-brunswick-politics/c1s7l>.

78 Johnstone, "Politics of Abortion in Canada After Morgentaler," 90. See also Rachael Johnstone, "New Brunswick Shines a Light on the Fragile State of Women's Reproductive Rights," *Globe and Mail*, 16 April 2015, [www.theglobeandmail.com/globe-debate/new-brunswick-shines-a-light-on-the-fragile-state-of-womens-reproductive-rights/article18036986/](http://www.theglobeandmail.com/globe-debate/new-brunswick-shines-a-light-on-the-fragile-state-of-womens-reproductive-rights/article18036986/).

79 Personal communication with Judy Burwell, then director of the Morgentaler Clinic in Fredericton, 12 October 2008.

Brunswick government. In 1993, a similar anti-abortion law and payment act were struck down in Nova Scotia by the Supreme Court of Canada, which ruled that the legislation served no medical purpose.<sup>80</sup> The Manitoba government had also initially refused to finance abortions undertaken at the privately owned Morgentaler Clinic in Winnipeg. In July 2004 the clinic was purchased by a group of women who reorganized it as a not-for-profit institution and then launched a successful lawsuit obliging the government to cover the costs of all therapeutic abortions performed there.<sup>81</sup> The Alberta government finally agreed to fund abortion under a different set of circumstances. In 1995, the federal government ordered Alberta to pay for all medically necessary services performed in private clinics, withholding substantial transfer payments until the province was in compliance. Members of the provincial government had asked the Alberta Medical Association and the College of Physicians and Surgeons to define “medically required” as it related to abortion, but both bodies refused to produce restricting categories. During the 1990s almost all provincial governments resisted paying for abortion, particularly procedures done in private clinics, but were ultimately forced to do so after protracted negotiations, punitive measures, or definitive court cases. The only province that has never officially offered abortion services is Prince Edward Island. If granted a doctor’s referral, however, Island women can get funded abortions in hospitals outside of the province, and they usually go to the Victoria General Hospital in Halifax. Although Saskatchewan, the Northwest Territories, Nunavut, and Yellowknife lack private clinics, these provinces fund the abortions provided by hospitals in major cities and sometimes cover women’s travel expenses.<sup>82</sup>

The New Brunswick government’s refusal to fully fund abortion was continually challenged by both federal politicians and abortion rights activists, including members of the consistently pro-choice New Democratic Party. According to Rachael Johnstone, this situation denies New Brunswick women full citizenship rights and is at odds with situation of women living in Ontario and other provinces. The federal government began insisting that the New Brunswick government support abortion services in 2001, but never withheld transfer payments from New Brunswick for its violation of the Canada Health Act.<sup>83</sup> In April 2005, then Liberal federal health minister Ujjal Dosanjh started a dispute avoidance resolution process; New Brunswick’s Progressive Conservative Health Minister Elvy Robichaud declined participation, arguing that the province would not “bow to pressure” from

80 “Abortion Politics in New Brunswick,” *Abortion Access in New Brunswick*.

81 “Manitoba Must Pay for Private Clinic Abortions, Judge Rules,” CBC News, 24 December, 2004, <http://www.cbc.ca/story/canada/national/2004/12/24/abortion-041224>. See also Laura Eggerston, “Abortion Services in Canada: A Patchwork Quilt with Many Holes,” *Canadian Medical Association Journal*, 20 March 2001, <http://www.cmaj.ca/cgi/content/full/64/6/847/64C6>; Joanna N. Erdman, “In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada,” *Emory Law Journal* 56, no. 4 (2007): 1093-1156; and Jocelyn Downie and Carla Nassar, “Barriers to Access to Abortion Through a Legal Lens,” *Health Law Journal* 15 (2007): 143-75.

82 Arthur, “Abortion in Canada: History, Law, and Access.”

83 Johnstone, “Politics of Abortion in Canada After Morgentaler,” 195, 93; Campbell Morrison, “N. B. Opposition MPs Urge Minister to Enforce Canada Health Act,” *Daily Gleaner*, 20 May 2006.

the federal government.<sup>84</sup> Although the resolution process lost momentum with the 2006 election of a Conservative federal government, Dr. Morgentaler's lawsuit against the New Brunswick government, launched in 2002 to oblige the government to pay for the abortions done in his clinic, was ongoing. In this case, the provincial government similarly declined to negotiate with Dr. Morgentaler, adamantly insisting that abortion was indeed accessible in the two hospitals offering the procedure under Regulation 84-20.<sup>85</sup> The Morgentaler Clinic was by then providing over half of the legal abortions performed in New Brunswick, serving women who had been unable to access funded services. In response to the lawsuit, the New Brunswick government introduced a series of procedural delays that extended the case until Morgentaler's death in May 2013. The lawsuit was officially ended in April 2014, when Morgentaler's family was unable to continue funding the expensive court battle.<sup>86</sup> Local pro-choice advocates had been active throughout the entire process, collecting signatures on petitions calling for changes to Regulation 84-20 and the Medical Services Payment Act and periodically meeting with various health ministers. I was present during one of these meetings in 2006, when the minister was presented with many detailed letters from women who had paid for terminations at the Morgentaler Clinic after trying and failing to access funded hospital abortions. After the minister left the meeting, his staff indicated that the current abortion legislation would be changed only by a legal process. "Sue us," they baldly stated, implying that the government would lose the case, in keeping with the precedents set in other provinces.

In the end, Regulation 84-20 was challenged by circumstances that took place outside of a courtroom. In 2014, the directors of the Morgentaler Clinic in Fredericton decided to cease its operation for financial reasons. Although New Brunswick and some Prince Edward Island women had been charged fees of between \$600 to \$800 for their abortions, many women were unable to afford the cost. Because these women were never refused care, the clinic had always operated at a loss. When he was alive, Dr. Morgentaler had kept the clinic afloat by directing money (about \$10,000 annually) from his fully funded clinic in Toronto, a kind of underground transfer payment from Ontario to New Brunswick, while the women themselves bore the rest of the financial burden.<sup>87</sup> After his death, this situation could not continue because the clinic is now run by others who are not members of the Morgentaler family. When the Morgentaler Clinic in Fredericton closed, the reality of the

84 Johnstone, "New Brunswick Shines a Light on the Fragile State of Women's Reproductive Rights."

85 Shannon Hagerman, "Robichaud Says Abortion is Accessible," *Daily Gleaner*, 14 November 2002; Hagerman, "Policy Unchanged. Blaney Doesn't Believe Abortion Access Limited," *Daily Gleaner* 8 November 2002; Don Richardson, "N.B. Stands Firm on Abortion Policy," *Daily Gleaner* 30 January 2011.

86 Shannon Hagerman, "Abortion Lawsuit On," *Daily Gleaner*, 24 October, 2002; Kevin Bissett, "Abortion Lawsuit against N. B. Being Dropped: Morgentaler Clinic," *CTV News Atlantic*, 14 April 2014, <http://atlantic.ctvnews.ca/abortion-lawsuit-against-n-b-being-dropped-morgentaler-clinic-1.1777028>.

87 "Morgentaler Abortion Clinic in Fredericton to Close," *CBC News*, 14 April 2014, <http://www.cbc.ca/news/canada/new-brunswick/morgentaler-abortion-clinic-in-fredericton-to-close-1.2604535>, and Johnstone, "Politics of Abortion in Canada After Morgentaler," 194.

restricted access to abortion in New Brunswick's hospitals came back into the spotlight and received media attention; this included articles reporting that women were (once again) travelling abroad to access the procedure. As had happened in Moncton in 1982, the closure of the clinic providing most of the abortions in the province forced politicians and others to address a longstanding situation and renewed lobbying efforts both for and against funded abortion care. During the 2014 election campaign in New Brunswick, the Liberal leader Brian Gallant included abortion rights in his platform, promising to review and reform the situation – especially Regulation 84-20 – if elected premier.<sup>88</sup> Despite publicly taking up a pro-choice position Gallant was elected, challenging the vision of New Brunswick (and the majority of New Brunswickers) as being committed to resisting abortion.

When Gallant indicated his willingness to reconsider the provision of abortion in New Brunswick he broke with the policies of his predecessors, including the Liberal government that had created the restrictions in Regulation 84-20 in 1989. Whether Liberal or Conservative, the previous premiers of New Brunswick had been overtly against abortion rights or had at least refused to consider making abortion more accessible in the province. This position was increasingly linked to the identity of the province. The legal restriction of abortion that had been in place since the 19th century was openly pursued during the 1980s and beyond.<sup>89</sup> By refusing to engage in the conflict avoidance process with the federal government in 2005, Robichaud had framed New Brunswick's abortion legislation in terms of provincial independence – an unwillingness to bow to Ottawa. In May 2005 the editors of *The Daily Gleaner*, Fredericton's only daily newspaper, reinforced this interpretation, criticizing Ottawa for “flexing its muscles” by initiating the dispute resolution process. Even though the paper is owned by the Irving conglomerate, which has a virtual monopoly of print media in the province, the editors claimed to speak on behalf of the “little guy” in asking “Surely we [New Brunswickers] can make our own decision on this matter without interference from the feds?”<sup>90</sup> The irony of portraying the province as an oppressed minority because it might be forced to respect women's reproductive rights was never addressed. Reiterating arguments made during the 1980s, the image of New Brunswick as a small but defiant province was taken up by anti-abortion activists. In 2002 Peter Ryan, executive director of New Brunswick Right to Life, asserted that New Brunswick should “stand its ground” in the dispute between Ottawa and Fredericton, while noting that “New Brunswickers do not think that [abortion on demand] is health care.”<sup>91</sup> Such claims were nevertheless disputed by others in the province. In 2006 Allison Brewer, then leader of the provincial New Democratic Party, asserted that Regulation 84-20 made New Brunswick look “backwoods,” even though residents of the province were likely no more conservative than those living in other parts of Canada.<sup>92</sup> Université

88 Adam Huras, “Party Leaders State Their Abortion Access Positions,” *Times and Transcript*, 7 August 2014.

89 Tim Porter, “Funding for Clinics is Denied,” *Daily Gleaner*, 11 June 1999.

90 *Daily Gleaner*, “Editorial,” 7 May 2005.

91 “Abortion Panel Issue,” *Daily Gleaner*, 26 April 2002.

92 Stephen Llewellyn, “Abortion Policy Makes N. B. Look ‘Backwoods,’ Says NDP Leader,” *Daily Gleaner*, 24 May 2006; Stephen Llewellyn, “N. B. Says Funded Abortions Available; Concern – Some People Believe Access to Abortion is Too Limited in Province,” *Daily Gleaner*, 19 May 2006.

de Moncton law professor Michèle Caron announced in 2007 that if the health minister refused to reconsider the province's restrictive abortion regulations, she and others would initiate legal action.<sup>93</sup> The representation of New Brunswick as an "anti-abortion province" was dominant in the legislation, but always contested by activists and many New Brunswick women.

The Gallant government may have amended Regulation 84-20 in 2015, but it did not change the restriction on providing funded abortions only in selected hospitals. As of March 2015, funded abortions are provided only at the Georges-L.-Dumont University Hospital Centre in Moncton and the Bathurst Chaleur Regional Hospital. And although Horizon Health recently announced that abortion services will be expanded to the Moncton Hospital, which should increase the total number of funded abortions in the province, it will not be extending services to additional regions.<sup>94</sup> At the same time, abortion care has been resumed in the building that once housed the Morgentaler Clinic in Fredericton. In July 2014 a group called Reproductive Justice New Brunswick joined the Fredericton Youth Feminists to launch a crowd-funding campaign through FundRazr, quickly receiving over \$125,000 from over 1,500 donors to purchase the building and reopen it as Clinic 554.<sup>95</sup> This new general and sexual health clinic pledged to accept 600 patients, promoting an avowedly inclusive, anti-sexist, anti-racist, sex-positive, and feminist mandate. Among many other services, Clinic 554 provides "assessments, ongoing care and consultations for transgender, gender variant, and gender non-conforming children, youth and adults, including hormone initiations and injections."<sup>96</sup> The family practice also provides abortions for pregnancies up to 16 weeks gestation alongside other reproductive service such as prenatal care and contraceptive counselling. While many of these services are covered by Medicare, women still have to pay for the abortions done at Clinic 554 because the legislation that was created in 1994 to restrict funded abortions to hospitals remains in place. This legislation means that abortion-seeking women in New Brunswick are still subject to limitations not faced by women in other provinces or territories.

So far, the New Brunswick government has refused to further amend the Medical Services Payment Act of New Brunswick, citing a policy against funding all private

93 Jessie Robichaud, "Group Threatens to Sue Over Abortion Access," *Daily Gleaner*, 16 January 2007.

94 Kelly Grant, "Second Moncton Hospital Only New Site to Offer Abortions in N. B.," *Globe and Mail*, 24 February, 2014, <http://www.theglobeandmail.com/news/national/second-moncton-hospital-only-new-site-to-offer-abortions-in-nb/article23193068/>. See also Howard A. Palley, "Canadian Abortion Policy: National Policy and the Impact of Federalism and Political Implementation on Access to Services," *Publius: The Journal of Federalism* 36, no. 4 (2006): 565-86, and Sarah Boesveld, "Provincial Limitations on Abortion Make Maritimes Ground-Zero for Heated Cultural Battle," *National Post*, 30 April, 2014, <http://news.nationalpost.com/news/canada/provincial-limitations-on-abortion-make-maritimes-ground-zero-for-heated-cultural-battle>.

95 Lauren Strapagiel, "New Brunswick Pro-Choice Group Raises \$100,000 to Save Morgentaler Clinic," *O.Canada.com*, 16 July 2014, <http://o.canada.com/news/new-brunswick-pro-choice-group-raises-100000-to-save-morgentaler-clinic>. For the purposes of full disclosure, I should indicate that I donated \$100.00 to this effort.

96 "Clinic 554: Our Care," [http://clinic554.ca/Our\\_Care.html](http://clinic554.ca/Our_Care.html).

clinics and not just abortion clinics.<sup>97</sup> In December 2014 Health Minister Victor Boudreau warned that better abortion access would cost an additional \$500,000 per year, admitting that Medicare had previously paid for only 400 of the 1,000 or more abortions performed annually in New Brunswick.<sup>98</sup> The minister implied that financial considerations were paramount in the decision to fund only the abortions done in a few hospitals. The provincial government is, in effect, downloading a significant portion of the cost of abortion care to New Brunswick women, just as it has done in the past. Although this situation has been contested by abortion rights activists, the legislation will presumably remain in place until the provincial government is faced with yet another lawsuit to challenge it. The government's continued denial of women's right to abortion is able to withstand criticism in part because of the continued stigmatization of abortion, which is often associated with the careless or selfish behaviour of women; this is despite studies indicating that most abortion-seeking women were using birth control when they became pregnant and that they ultimately decide to obtain an abortion for any number of reasons, including their wish to finish school or care adequately for their current children.<sup>99</sup> The longstanding fear that women (especially young and single women) cannot make informed decisions, encoded in the New Brunswick's abortion legislation from the 19th century, lingers in the resistance to treating abortion like any other required medical procedure.

Although Clinic 554 is no longer an abortion clinic per se – it offers abortions as part of a broad and varied practice – it remains subject to anti-abortion protestors who carry signs and approach patients about to enter the building. The same three to five protestors, associated with the anti-abortion “Women's Care Centre” located next door to what is now Clinic 554, have been picketing against abortion and attempting to redirect people into their facility since 2000. I have written elsewhere about the performance of political identities (both for and against legal abortion) that regularly took place around the perimeter of the Morgentaler Clinic from 2000 until 2014, but this analysis will need to be updated now that more diverse patients are entering Clinic 554.<sup>100</sup> In New Brunswick, these anti-abortion protestors have adopted the American tactics that have been thoroughly addressed and analyzed by numerous scholars; the protestors regularly display, for instance, enlarged images of detached fetuses that erase any reference to the maternal body.<sup>101</sup> This removal of women from the picture echoes the development of New Brunswick's abortion

97 “Abortions Won't be Performed in Clinics: Victor Boudreau,” *CBC News*, 28 November 2014, <http://www.cbc.ca/news/canada/new-brunswick/abortions-won-t-be-performed-in-clinics-victor-boudreau-1.2853291>.

98 “Better Abortion Access Will Cost \$500K a Year, Minister Says,” *CBC News*, 19 December 2014, <http://www.cbc.ca/m/touch/canada/newbrunswick/story/1.2879965>.

99 See, for example, Lawrence B. Finer, Lori F. Frohworth, Lindsay A. Dauphinee, Susheela Singh, and Ann M. Moore, “Reasons U. S. Women Have Abortions: Quantitative and Qualitative Perspectives,” *Perspectives on Sexual and Reproductive Health* 37, no. 3 (2005): 110-18.

100 McTavish, “Cultural Production of Pregnancy.”

101 There is now a vast body of scholarship on anti-abortion rhetorical and visual tactics, but an early study is Rosalind Pollack Petchesky, “Foetal Images: The Power of Visual Culture in the Politics of Reproduction,” in *Reproductive Technologies: Gender, Motherhood and Medicine*, ed. Michelle Stanworth (Minneapolis: University of Minnesota Press, 1987), 57-80.

legislation, which expunged references to women's perception of fetal movement and experience of pregnancy. With the amendment of Regulation 84-20, women are becoming more visible – able to request a funded abortion without asking for permission. Only a certain number of these women, however, will actually receive one.

### **Conclusions**

This survey of New Brunswick's abortion regulations has revealed some key themes. The role of physicians as experts able to decide whether or not women could access legal abortions was strengthened during the 19th and 20th centuries, but was partly challenged when Regulation 84-20 was amended in 2015 to rescind the requirement that two doctors must give permission in order for women to acquire a funded abortion. While women have long struggled to be heard by provincial politicians, their voices have recently been highlighted by social media platforms. A vibrant feminist community is currently receiving media attention and supporting a progressive clinic, even as anti-abortion activists continue to lobby against funded, legal abortion by, among other things, holding protests at Clinic 554. This progressive clinic is the result of a grassroots effort, presenting a more diverse and left-leaning image of the province that is at odds with historical arguments that New Brunswick is a staunchly conservative and anti-abortion place that resists change. The future of reproductive rights in New Brunswick now looks bright, but in many ways women's access to funded abortion services remain limited. The debate will continue as activists insist that the Medical Payment Act be changed, while those against legal abortion strive to diminish access to the procedure.

This discussion of the history of abortion legislation in New Brunswick reveals a great deal of continuity, with New Brunswick women facing anti-abortion regulations not in effect in other parts of Canada. The longstanding opposition to abortion rights in New Brunswick has been inaccurately linked with traditional values that must be preserved in the face of outside forces rather than as stemming from laws created during the 19th century for multiple reasons, including the furthering of medical authority. A number of provincial governments have defiantly refused to make abortion more accessible, perhaps as a point of pride and distinction, but also for financial reasons. Financial motivations no doubt informed the earlier resistance to change, for any government that had rescinded the restrictive policies of New Brunswick would have admitted wrongdoing and potentially opened the provincial government to lawsuits launched by the women who had previously paid for abortions.<sup>102</sup> The result of these various forms of posturing is that New Brunswick women have long struggled to access funded abortion care, often leaving the province and even the country in order to obtain the procedure. The abortion legislation in the New Brunswick, at the same time, has been continually altered, suggesting that it remains a contested and unfinished issue that is constantly revisited. This essay is filled with references to new or amended

102 In August 2006, for example, a court judgement ordered the government of Quebec to refund 13 million dollars to the approximately 45,000 women who had paid some fees for their abortions in women's health centres and private clinics between 1999 and 2006. See Ann Carroll and Kevin Dougherty, "Province to Refund Abortions," *Montreal Gazette*, 19 August 2006, <http://www.canada.com/montrealgazette/news/story.html?id=e1708b6f-76f7-4595-b1a2-328807b72485&k=8421>.



legislation, court cases, and legal actions. My discussion reveals a cyclical return to the issue of abortion care in New Brunswick politics, with attention rising and falling as the restricted access to abortion becomes visible and then fades into the background once again. This debate continues to invoke passionate responses in New Brunswick because it is not simply about a medical procedure; the provision of abortion care invokes fundamental beliefs about the function of medical authorities, the proper role of women, and the identity of New Brunswick and New Brunswickers.

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