

# POWER AND PROCREATION: STATE INTERFERENCE IN PREGNANCY

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*This article considers whether the state can substitute its decisions for those of a woman with respect to her conduct during pregnancy or delivery of her child by means of court orders, criminal prosecutions or duties of care. The author argues that woman's choices during pregnancy should never be overridden by the state since to do so is to fall prey to the misconceptions that fetuses are legal persons, that women's interests are in conflict with those of their fetuses, that doctors are infallible and, most importantly, that coercive state intervention can actually succeed in protecting fetuses from harm. The author contends that the Canadian Charter of Rights and Freedoms safeguards women's dominion over their bodies, regardless of whether or not they are pregnant. Furthermore, state intervention during pregnancy is not an effective way to prevent tragedies befalling fetuses and their mothers. Rather, what is required is a systematic approach that will ensure women are able to safeguard their own health in a manner which correspondingly ensures that of their fetuses. In anticipation of such a systematic approach courts must refuse to sanction state interference in pregnancy.*

*L'auteure de cet article examine si l'État peut substituer ses décisions à celles d'une femme, en ce qui a trait à la conduite de celle-ci pendant la grossesse et l'accouchement, en utilisant des ordonnances et des poursuites criminelles ou en imposant des obligations de soins. L'auteure maintient que les décisions de l'État ne devraient jamais l'emporter sur les choix des femmes pendant la grossesse, puisqu'une telle suprématie de l'État signifierait qu'on cède à des idées fausses, c'est-à-dire que les foetus sont des personnes, que les intérêts des femmes sont en conflit avec ceux de leur foetus, que les médecins sont infallibles, et le plus grave, que l'intervention de l'État peut réellement réussir à protéger les foetus contre les préjudices. L'auteure soutient que la Charte canadienne des droits et libertés préserve le pouvoir des femmes sur leur propre corps, qu'elles soient enceintes ou non. Elle ajoute que l'intervention de l'État pendant la grossesse n'est pas un moyen efficace pour prévenir les événements malheureux qui touchent les foetus et leur mère. Il faut plutôt une approche systématique qui fera en sorte que les femmes puissent protéger leur santé tout en protégeant celle de leur foetus. En attendant qu'une telle approche systématique soit adoptée, les tribunaux doivent refuser de sanctionner l'intervention de l'État en matière de grossesse.*

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Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

— Madame Justice Bertha Wilson<sup>1</sup>

## I. INTRODUCTION

Over the past several years Canadian courts have had to deal with a number of issues involving the control of women's reproductive rights. In its most recent effort at clarifying the nature of these rights, the Supreme Court of Canada struck down the abortion provisions of the *Criminal Code*<sup>2</sup> in *R. v. Morgentaler*,<sup>3</sup> then went on to declare that women could not be prevented from having abortions by use of injunctions in *Tremblay v. Daigle*.<sup>4</sup> Yet, other issues that go to the heart of women's reproductive autonomy remain for the Court to address. Among these is whether third parties can intervene in decisions made by a woman respecting her pregnancy. Can the state,<sup>5</sup> whether by means of, for example, court orders, the criminal law or duties of care, make decisions for women (and thereby override the decisions made by women themselves) with regard to their behaviour during pregnancy or the delivery of their children, and can it punish women if they choose not to abide by the decisions it makes?

In this paper I will argue that the state should never be entitled to interfere with women's decisions about their pregnancies. While I will focus especially on the issue of forced cesarean sections, because I suspect that this is the next important danger to reproductive freedom that Canadian women will face, my analysis applies equally to all instances of interference. While state "protection" of fetuses appears benevolent, when it is coercive it can have no effect but to disempower women and further subject them to arbitrary control by patriarchal power. Such control is a constraint on women's liberty and equality, rights that are protected by the *Charter*.<sup>6</sup>

In my discussion of this issue I will elaborate the assumptions which underlie state intervention. These assumptions all lead to the conclusion that women's reproduction should be controlled by the state in order to safeguard the next generation's right to be born safely and healthy. I will argue that all of the underlying assumptions are erroneous and moreover, that the fundamental (and admittedly laudable) goal of

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<sup>1</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 at 487 [hereinafter *Morgentaler* cited to D.L.R.].

<sup>2</sup> R.S.C. 1970, c. C-34, ss 25ff.

<sup>3</sup> *Supra*, note 1.

<sup>4</sup> [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Daigle* cited to S.C.R.].

<sup>5</sup> I use the term "state" in a very broad sense to mean not only legislation but also court orders and court-enforced duties of care.

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

helping more fetuses to come to term and be born healthy will not be furthered, and will indeed be hampered, by coercive state intervention.<sup>7</sup>

## II. THE NEW LOCUS OF STATE CONTROL

I will be discussing three ways in which the state may intervene in pregnancy decisions. The first is what I will call forced obstetrical intervention.<sup>8</sup> The most common example of this is a court-ordered cesarean section on medical evidence that absent such intervention, damage likely would be caused to the fetus. The court order is applied for by child welfare authorities invoking provincial child welfare legislation<sup>9</sup> that offers protection to a child in danger. The court is asked to define a fetus as a "child" for the purposes of the act, and then to "apprehend" the "child" while still *in utero*. The child welfare authority then becomes guardian of the fetus and can consent to medical treatment on its behalf. While reported decisions involving forced cesareans are rare in Canada,<sup>10</sup> they are increasingly common in the United States.<sup>11</sup>

<sup>7</sup> This does not mean, however, that I reject non-coercive state implication in reproductive decision-making. Any state intervention which succeeds in *broadening* women's available choices (e.g. voluntary preventative re-assignment as opposed to barring women from taking jobs in industries which hold potential reproductive health hazards) would fall outside the kind of interference that is a constraint on women's liberty and equality. This broadening is probably beyond the remedial power of the courts and would require legislative action, however *see Schachter v. R.*, [1990] 2 F.C. 129 (C.A.) which may suggest that courts will create positive remedies in the context of breaches of equality rights. Nevertheless some authors are skeptical, *see, e.g., J. Baken, Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)* (1991) 70 CAN. BAR REV. 307.

<sup>8</sup> *See I. Grant, Forced Obstetrical Intervention: A Charter Analysis* (1989) 39 U.T.L.J. 217 [hereinafter *Grant*].

<sup>9</sup> *E.g., Youth Protection Act*, R.S.Q., c. P-34.1; *Child and Family Services Act*, S.O. 1984, c. 55; *Family and Child Service Act*, S.B.C. 1980, c. 11.

<sup>10</sup> I was only able to find one instance: *Re R.* (1987), 9 R.F.L. (3d) 415 (B.C. Prov. Ct), *rev'd (sub nom. "Re Baby R.")* (1988), 53 D.L.R. (4th) 69, 15 R.F.L. (3d) 225 (B.C.S.C.) [hereinafter *Re "Baby R."* cited to R.F.L.]. In *Re Children's Aid Society of City of Belleville, Hastings County and T.* (1987), 59 O.R. (2d) 204, (sub nom. *C.A.S., Belleville v. T.(L.)*) 7 R.F.L. (3d) 191 (Prov. Ct) [hereinafter *City of Belleville and T.* cited to O.R.] the apprehension was sought so that the pregnant woman could be made to stay in hospital for her delivery. However, other cases have determined that a child was in need of protection while *in utero* for the purpose of deciding that, once born, it should be made a ward of the state: *Re Children's Aid Society for the District of Kenora and J.L.* (1981), 135 D.L.R. (3d) 249 (Ont. Prov. Ct); *J.M. v. Superintendent of Family and Child Service* (1983), 35 R.F.L. (2d) 364 (B.C.C.A.), *aff'g (sub nom. Re Superintendent of Child and Family Service and McDonald)* (1982), 135 D.L.R. (3d) 330, (sub nom. *Superintendent of Child and Family Service v. M.(B.) and O.(D.)*), 28 R.F.L. (2d) 278 (B.C.S.C.) [hereinafter *Re Superintendent of Child and Family Service and McDonald*]. *But see generally Joe v. Y.T.* (1986), 5 B.C.L.R. (2d) 267, 1 Y.R. 169 (Y.T.S.C.) [hereinafter *Joe*].

<sup>11</sup> *See Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy* (1990) 103 HARV. L. REV. 1325 [hereinafter *Rethinking*].

The second way in which the state has intervened in pregnancies is by using criminal law to apprehend and punish substance abusing women. This tactic has not yet been used in Canada, but has become a pressing concern in the United States.<sup>12</sup> In one example a Florida woman was charged with procuring drugs for a minor. The "minor" was her fetus, and technically, the trafficking occurred in the moments after birth, before the umbilical cord had been cut.<sup>13</sup> Pursuant to the statute, directed at drug dealers, the woman could have received a jail term of 30 years. Instead, she received probation, but among its terms was her submission to random drug testing for one year and, in addition, the requirement that she follow a supervised prenatal program during all her future pregnancies.<sup>14</sup>

The third way in which women's pregnancies may be interfered with is by imposing a duty of care on pregnant women. This mechanism uses existing tort and delict to find a duty of care vis-à-vis the fetus, or alternatively, suggests legislating statutory duties of care.<sup>15</sup> This does not seem to have yet occurred in either Canada or the United States, but has been argued doctrinally,<sup>16</sup> and seems to be a threat in the foreseeable future, given a climate in which courts may be disposed to find fetal rights.

### III. UNDERLYING ASSUMPTIONS

The goal of intervening on behalf of fetuses reflects four underlying assumptions about women, reproduction, fetuses and the role of the state. These assumptions are that: fetuses are persons and thus have rights which can be enforced; pregnant women's interests are in conflict with those of their fetuses therefore women must be controlled in order to prevent harm to fetuses; doctors are in a better position to make decisions

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<sup>12</sup> It should be noted that drug abuse among pregnant women is a serious problem in the United States. It is estimated that 375,000 babies may be harmed by drug abuse in the U.S. each year, while in New York births to drug-abusing women have increased by 3000% over the past ten years. *See ibid.* at 1325 nn. 1 & 2.

<sup>13</sup> *State v. Johnson*, No. E89-890-CFA (Fla. Cir. Ct 1989), cited in D.E. Roberts, *Drug-Addicted Women who Have Babies* (April 1990) *Trial* 56. *See also ibid.* at 1329-30.

<sup>14</sup> *See Rethinking, ibid.*

<sup>15</sup> One such proposal is a general crime of causing fetal harm or destruction, proposed by the Law Reform Commission of Canada in its Working Paper *Crimes Against the Foetus*: see Law Reform Commission of Canada, *Crimes Against the Foetus* (Working Paper 58) by A. Linden *et al.* (Ottawa: Law Reform Commission of Canada, 1989) [hereinafter *Crimes Against the Foetus*]. For criticism of the Working Paper, see S. Noonan, *Protection of the Foetus: Denial of the Woman* (1989-90) 3 C.J.W.L. 667 [hereinafter *Noonan*].

<sup>16</sup> *See in particular* E.W. Keyserlingk's arguments in *The Unborn Child's Right to Prenatal Care (Part I)* (1982) 3 HEALTH L. CAN. 10 [hereinafter *Part I*]; *The Unborn Child's Right to Prenatal Care (Part II)* (1982) 3 HEALTH L. CAN. 31 [hereinafter *Part II*]; *Clarifying the Right to Prenatal Care: A Reply to a Response* (1983) 4 HEALTH L. CAN. 35 [hereinafter *Clarifying*]. Keyserlingk would impose a legal duty to provide prenatal care on pregnant women from the moment of conception: *see Clarifying, supra* at 38 n. 2.

with respect to pregnancy and birth than are women, therefore when in doubt, courts should defer to medical expertise; and fetal life will be saved or improved if the state intervenes.

#### A. *Fetal Personhood/Fetal Rights*

Fetal personhood is as much about political rhetoric<sup>17</sup> as it is about legal entitlement. On the level of rhetoric, calling a fetus a person provokes emotional responses that allow other words, such as "murderer", to be applied to women who damage or destroy their fetuses.

Recent developments in technology that allow us to see the fetus, to give it medical treatment outside the womb and then to replace it, and to care for younger premature babies, all contribute to the perception of the fetus as a tiny, yet strangely independent being, who at the same time is in need of protection.<sup>18</sup> This perception, and the political purposes to which it can be put, were clearly demonstrated in expert evidence presented at trial in the *Borowski* case.<sup>19</sup> When one of the plaintiff's medical experts was asked if the umbilical cord was in fact "the great connection between the mother and the baby",<sup>20</sup> the answer given was:

No. Sir. The umbilical cord simply connects the baby to *its own organ*, granted, *an extracorporeal organ*....The cord connects the baby, *not to its mother*, but to *its own organ, the placenta*."<sup>21</sup> [emphasis added]

Thus, an expert was able to convey the false impression that the fetus is an entity entirely independent of the woman — technically, not connected to her even *in utero* — an impression that reinforces the image that the fetus is an independent person. This imagery is bolstered by the language used in naming the fetus. While in *Borowski* the fetus was

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<sup>17</sup> For an interesting discussion of the role of rhetoric in social change in the context of abortion see C.M. Condit, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* (Chicago: University of Illinois Press, 1990). See also B. Danet, 'Baby' or 'Fetus'? : *Language and the Construction of Reality in a Manslaughter Trial* (1980) 32 SEMIOTICA 187.

<sup>18</sup> See C. Overall, *Mother/Fetus/State Conflicts* (1989) 9 HEALTH L. CAN. 101 at 102 [hereinafter *Overall*]. See also R.P. Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction* (1987) 13 FEMINIST STUDIES 263.

<sup>19</sup> *Borowski v. A.G. Canada* (1987), 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385 (Sask. C.A.), *aff'd* (1983), 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15 (Sask. Q.B.). Following *Morgentaler*, *supra*, note 1, the Supreme Court of Canada held the question of whether or not the fetus was a human being to be moot: (1989), 57 D.L.R. (4th) 231, [1989] 3 W.W.R. 97 (S.C.C.) [hereinafter *Borowski*].

<sup>20</sup> Reproduced in K.M. McCourt & D.J. Love, *Abortion and s. 7 of the Charter: Proposing a Constitutionally Valid Foetal Protection Law* (1989) 18 MAN. L.J. 365 at 368.

<sup>21</sup> *Ibid.*

called the "baby",<sup>22</sup> it is also often called "the unborn child"<sup>23</sup> by those who seek to give it the status of personhood.

Yet the rhetorical device is ineffectual in solving the real problems. Christine Overall points out that the fact that a fetus is alive and human does not mean that it is morally equivalent to a two-year-old child.<sup>24</sup> Catherine Tolton develops Overall's point further. She explains that the biological argument for fetal personhood is premised on the simplistic belief that by proving the existence of an independent form of life one has established that it is a *legal* person with the same legal rights as a fully developed human being.<sup>25</sup> However, legal personhood is a policy question that necessitates the balancing of various social interests at stake; science can not give us the answer.<sup>26</sup>

While the "fetus as person" rhetoric persists, the fetus has not been granted legal personhood. In private law contexts the fetus is deemed to have rights retroactively only once it has been viably born.<sup>27</sup> In public law contexts the fetus has not been accorded legal personality with one notable exception: *R. v. Marsh*.<sup>28</sup> In that case, an unlicensed doctor participated in a home birth in which the baby was stillborn having died of a brain haemorrhage because of trauma suffered before and during birth. Marsh was charged with criminal negligence causing death to a person under the then section 203 of the *Criminal Code*.<sup>29</sup> While the defence sought a dismissal on the grounds that a fetus born dead is not a person according to the *Criminal Code*, the judge held that according to the "normal understanding of *mankind*"<sup>30</sup> a "person" includes a full-term fetus. He went on to say:

The essential nature of the organism, that is, the fetus, is not changed by the fact of birth, and to hold that prebirth criminal negligence causing

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<sup>22</sup> *Ibid.*

<sup>23</sup> W.W. Watters *et al.*, *Response to Edward Keyserlingk's Article: The Unborn Child's Right to Prenatal Care* (1983) 4 HEALTH L. CAN. 32 at 34 [hereinafter *Watters*], makes the point that, "[w]e do not call a seed an ungerminated flower nor an acorn an unsprouted oak tree; why would we call a fetus an 'unborn child'?" Donna Greschner points out that the language in which we speak about pregnancy, reproduction and abortion is a male language, so women may not have the linguistic capacity to describe a truly woman-centred view of pregnancy, the fetus or abortion. She thus advocates development of a new vocabulary, and a willingness to hear women speak their experience: see D. Greschner, *Abortion and Democracy for Women: A Critique of Tremblay v. Daigle* (1990) 35 MCGILL L.J. 633 [hereinafter *Greschner*].

<sup>24</sup> See Overall, *supra*, note 18.

<sup>25</sup> C. Tolton, *Medicolegal Implications of Constitutional Status for the Unborn: "Ambulatory Chalices" or "Priorities and Aspirations"* (1988) 47 U.T. FAC. L. REV. 1 at 5 [hereinafter *Tolton*].

<sup>26</sup> *Ibid.* at 10-11.

<sup>27</sup> See *ibid.* at 14ff.

<sup>28</sup> (1979), 31 C.R. (3d) 363, 2 C.C.C. (3d) 1 (B.C. Co. Ct) [hereinafter *Marsh* cited to C.R.].

<sup>29</sup> R.S.C. 1985, c. C-46, s. 220.

<sup>30</sup> *Marsh*, *supra*, note 28 at 371.

death of a fetus immediately after birth is an indictable offence, while similar negligence causing death immediately before delivery is not criminal, is not a conclusion that accords well with the concept that the state has a duty to protect unborn children and to preserve their opportunities to be born and to enjoy the rights and obligations normally incident to the status of human kind.<sup>31</sup>

The judge did not provide any references to support his contention that the state has a duty to protect unborn life.

While the British Columbia Court of Appeal has held that *Marsh* was decided in error,<sup>32</sup> it seems that it still is a dangerous precedent that could be capitalized on when useful.<sup>33</sup>

However, in other cases in which courts have been asked to explicitly address the question of fetal personhood they have refused to grant the fetus the status of a legal person.<sup>34</sup> This was the holding in the often cited English case *Paton v. British Pregnancy Advisory Service Trustees*,<sup>35</sup> and in the Canadian cases of *Borowski*,<sup>36</sup> *Dehler v. Ottawa Civic Hospital*,<sup>37</sup> *Medhurst v. Medhurst*,<sup>38</sup> and most recently *Sullivan*.

In *Sullivan* two midwives attended to a home birth. Once the head of the fetus had emerged from the woman, contractions stopped and they were unable to deliver the rest of the baby. The delivery was finally completed at a hospital, but attempts to resuscitate the baby proved unsuccessful. The midwives were charged with criminal negligence causing death to a person and convicted by the British Columbia Supreme Court on the authority of *Marsh*.<sup>39</sup> The British Columbia Court of Appeal reversed the decision, holding that a child not completely born is not a person, basing itself *inter alia* on the decisions in *Borowski* and

<sup>31</sup> *Ibid.* at 372.

<sup>32</sup> *R. v. Sullivan* (1988), 31 B.C.L.R. (2d) 145 at 160, 65 C.R. (3d) 256 at 271 (C.A.) *rev'g* (1986), 55 C.R. (3d) 48, 31 C.C.C. (3d) 62 (B.C.S.C.) [hereinafter *Sullivan*].

<sup>33</sup> For example in *Crimes Against the Foetus*, *Marsh* is mentioned more than once as the source for an argument that the fetus is a legal person, subject only to the Supreme Court of Canada finding otherwise: *see supra*, note 15 at 19 n. 44, 21 n. 49, 25 n. 63 – which it seemingly has done in upholding the decision of the British Columbia Court of Appeal in *Sullivan*. *See R. v. Sullivan*, [1991] 1 S.C.R. 489.

<sup>34</sup> *But see Joe, supra*, note 10.

<sup>35</sup> [1979] Q.B. 276, (*sub nom. Paton v. Trustees of BPAS*) [1978] 2 ALL E.R. 987 [hereinafter cited to Q.B.]. *See especially supra* at 279:

The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country....and is, indeed, the basis of decisions in those countries where the law is founded on the common law....

<sup>36</sup> *See supra*, note 19.

<sup>37</sup> (1979), 25 O.R. (2d) 748, 101 D.L.R. (3d) 686 (H.C.). A declaration was sought that a fetus was a person so that an injunction could be obtained on behalf of all fetuses who could be aborted in the defendant hospital.

<sup>38</sup> (1984), 46 O.R. (2d) 263, 9 D.L.R. (4th) 252 (H.C.). In this case a husband sought to restrain his wife from having an abortion by way of an injunction *qua* the fetus' tutor.

<sup>39</sup> *Supra*, note 32.



*Morgentaler*.<sup>40</sup> The Supreme Court of Canada upheld the Court of Appeal's decision.<sup>41</sup>

However, even if the fetus were a legal person, would this lead to the inevitable conclusion that the state is justified in intervening in pregnancy? The answer is unequivocally no. Even if the fetus were a legal person, it does not follow that it has a right to use its mother's body.<sup>42</sup> For what this would amount to is a type of enslavement of one person to another, while there exists no such entitlement in our law.<sup>43</sup> To allow such enslavement of women to fetuses would be wrong simply because slavery is wrong. As Overall puts it:

Fetuses are the only group of entities that have been given legal entitlement to the medical use of the bodies of adult persons. If we are not willing to authorize compulsory blood "donations" or organ "donations" to save the lives of dying persons, then we should not be willing to tolerate compulsory fetal surgery or cesarean sections.<sup>44</sup>

Thus the underlying assumption of fetal personhood is flawed in several ways. It assumes that a "scientific" definition of the fetus deeming it to be a person will entail legal personhood. It further assumes that if legal personality is attributed to fetuses they would have a right to the use of their mothers' bodies that would entail the corollary right to forced obstetrical intervention, duties of care, etc.

The assumption of fetal personhood is erroneous, but it also shows how this analysis is artificial, as it attempts to separate fetal and maternal interests in an unnatural way based on the second of the underlying assumptions.

#### B. *Women vs. Fetuses: Rights in Conflict*

The second assumption underlying state interference in pregnancy is that women's interests or rights are in conflict with those of their fetuses so that women need to be controlled in order to keep fetuses from harm.

This assumption displays both the conflicting notions that our society has about mothers and motherhood, and the inadequacy of rights discourse in describing the mother/fetus relationship.

<sup>40</sup> *Ibid.*

<sup>41</sup> *R. v. Sullivan*, *supra*, note 33 (S.C.C.).

<sup>42</sup> See *Grant supra*, note 8 at 221 and N.K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesiarians* (1986) 74 CALIF. L. REV. 1951 at 1952 n. 7 [hereinafter *Rhoden*].

<sup>43</sup> Recall the famous violinist example in J.J. Thompson, *A Defence of Abortion* in R.M. Dworkin, ed., *THE PHILOSOPHY OF LAW* (Toronto: Oxford University Press, 1982).

<sup>44</sup> *Supra*, note 18 at 102.

### 1. *Motherhood: Reverence and Fear*

In our society, the "mother" is an image that has an all important role. The mother is supposed to be giving, generous, loving and willing to forego her own pleasure and security. She is characterized by her tenderness, willingness to sacrifice, and total involvement with her child.<sup>45</sup> We have the same expectations of the pregnant woman, who is held to a higher moral standard than other members of society.<sup>46</sup> The mother is typically thought to be almost entirely responsible for her children's successes or failures. The "all-powerful" mother is both blamed and idealized; blamed for her failures and idealized for her potential. In our culture blaming the mother has been raised to an art form.<sup>47</sup> Yet, at the same time, motherhood is the essential definition of women in the patriarchal society, the successful validation of the functions of the woman's body.<sup>48</sup>

At the same time, women have the potential to control their reproductive functions, in contrast to the rest of their lives which are ruled by a male-dominated society. This fact gives rise to fear of the power of the woman's body in the reproductive setting:

Women's bodies have traditionally been regarded as dark and dangerous places, threatening to the men which use them sexually and even to the babies which emerge, not always intact, from them. The twin manifestations of this danger are female evil and female weakness. Now, however, the female body is seen as dangerous even to the embryo/fetus because the pregnant woman cannot be trusted not to abuse it, or to pass on defective genes to it, or even kill it, let alone to protect it from environmental harm and give birth to it safely.<sup>49</sup>

This ambivalence about motherhood, and correspondingly pregnancy, is played out in taking control of reproduction out of the hands of women and reproduction's mechanization. Donna Greschner sees this notion in the very word "reproduction":

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<sup>45</sup> See S.R. Suleiman, *Writing and Motherhood* in S.N. Garner, C. Kahane & M. Springnether, eds, *THE (M)OTHER TONGUE* (Ithaca: Cornell University Press, 1985) 353 at 355, and N. Chodorow & S. Contratto, *The Fantasy of the Perfect Mother* in B. Thorne & M. Yalom, eds, *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* (New York: Longman, 1982) at 54-75 [hereinafter *Chodorow*].

<sup>46</sup> Rhoden, *supra*, note 42 at 1980-81.

<sup>47</sup> Witness the popular success of books such as N. Friday's *MY MOTHER / MY SELF: THE DAUGHTER'S SEARCH FOR IDENTITY* (New York: Delacorte Press, 1977) which tell daughters to blame their problems on their mothers. Such books encourage the myth of the perfect mother. See *Chodorow supra*, note 45 at 57.

<sup>48</sup> See N.M. Rosinsky, *Mothers and Daughters: Another Minority Group* in C.N. Davidson & E.M. Broner, eds, *THE LOST TRADITION: MOTHERS AND DAUGHTERS IN LITERATURE* (New York: Frederick Ungar Publishing Co., 1980) at 285.

<sup>49</sup> C. Overall, *'Pluck a Fetus from its Womb': A Critique of Current Attitudes Toward the Embryo/Fetus* (1986) 24 U.W.O.L. REV. 1 at 10.

It derives from the word "production", which implies a mechanical process. Production describes the making of commodities. The metaphor of production is the dominant medical metaphor to describe the process of menstruation, pregnancy and birth: women are the machines that must produce a perfect product, a healthy baby. Just as machines are separate from their products, so too are women separate from their "products", children.<sup>50</sup>

It is this notion of separation, a notion that is the answer to the dilemma of worship and terror of the mother, that leads us to pit fetal rights against maternal rights, that leads us to call pregnant women and their fetuses separate individuals with warring interests, and that leads us to a "conflict-of-rights-of-individuals" mode of argumentation that is both needless and unilluminating in this context.

## 2. *Rights vs. Connection*

"Rights talk" is virtually nonsensical in the context of state intervention in pregnancy. A competition of rights framework of discussion, when considering the interests of mother and fetus, does not reflect the reality of the pregnancy situation — mothers and fetuses are connected and have common, rather than competing, interests.

Examples of the use of the competing rights framework abound. One such example is one author's discussion of the necessity of protecting fetuses from substance-abusing mothers in which he posits that:

[T]he *inherent conflict* [is] between a woman's right to pursue a particular lifestyle which may include smoking, drinking and the use of illegal drugs such as cocaine, heroin and PCP and the fetus' right to be free from these damaging substances....In the case of maternal substance abuse, the right which collides with the state's interest in the life and well-being of a fetus is the pregnant mother's right to use alcohol, tobacco and drugs for physical and psychic pleasure.<sup>51</sup> [emphasis added]

Another example of the same phenomenon is the assumption that any refusal of forced intervention is anti-fetal. Thus four doctors reported that when a woman refuses surgical intervention recommended to save the fetus:

[I]t is probably that the patient hopes to be freed in this way of an undesired pregnancy....because it is an unplanned pregnancy, the woman is divorced or widowed, the pregnancy is an extramarital one, there are inheritance problems, etc.<sup>52</sup>

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<sup>50</sup> *Greschner, supra*, note 23 at 647-48.

<sup>51</sup> S.S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus* (1987) 60 S. CAL. L. REV. 1209 at 1219.

<sup>52</sup> Quoted in G.J. Annas, *Forced Cesiarians: The Most Unkindest Cut of All* (1982) 12 HASTINGS CENTER REPORT 16.

Thus an entirely self-interested mother whose hedonism conflicts with rights of the fetus is posited. This is a conception of pregnancy which fails to take women's experiences into account.<sup>53</sup>

In fact, women generally are not in conflict with their fetuses. Their fetuses are both "in" and "of" them and women both care about their fetuses and take seriously the decisions they make about them. Women, in general, do not frame their decisions about their fetuses in terms of a hierarchy of rights, but instead consider the needs of the fetus, and the needs of relevant others: *inter alia* the father, other family members and themselves.<sup>54</sup> For the most part, fundamental decisions with respect to the fetus are made within a framework of care and responsibility rather than rights and rules.<sup>55</sup>

In fact, the vast majority of women take any measures possible to safeguard their fetuses. Janet Gallagher notes:

Treatment refusals [by pregnant women]....are rare. Women have always put themselves at risk to bear children. In fact, pregnant and birthing women are altogether too compliant in their dealings with the medical profession and in their willingness to accept invasive procedures....[D]octors involved in early prenatal research speak of having to dissuade anxious women seeking new procedures.<sup>56</sup>

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<sup>53</sup> Noonan, *supra*, note 15 at 668-69 makes a similar argument about the portrayal of women in *Crimes Against the Foetus*, *supra*, note 15. She says that the image of women it sets forth is "a deliberate picture of irresponsible women who need to be controlled by the medical profession. One is left with the impression that it is this attitude, unfounded in reality, and unsupported by empirical evidence, which in fact motivates the desire for criminal reform." See also M.L. McConnell, *Capricious, Whimsical and Aborting Women: Abortion as a Medical Criminal Issue (Again)* (1989-1990) 3 C.J.W.L. 660. I do not mean to paint an idealized picture of pregnant women. Clearly some do act selfishly and without thought as to the impact of their actions or choices on their fetuses. However, I reject the blanket assumption that the majority of pregnant women are selfish hedonists.

<sup>54</sup> Carol Gilligan's work has been very influential in considering the way that women undertake moral reasoning. In the ground-breaking *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Cambridge: Harvard University Press, 1982) [hereinafter *Gilligan*], Gilligan highlights a thesis of connection and what she terms the "ethic of care". She formulates a hypothesis of a different voice which emphasizes a morality built on relationship. In studying decision making in the context of moral dilemmas she found that women analyzed the questions in terms of webs of relationships, taking into consideration consequences of actions and needs of people involved. At the same time, women seemed to reject decision-making on the basis of abstract hypotheticals. While Gilligan's work was not done in the context of legal reasoning, I think it gives valuable insight into ways women make decisions, and provides a counterpoint to the assumption that women decide uniquely from a rights perspective based on self-interest.

It should be noted, though, that Gilligan's work has been fairly controversial. Even within the feminist community its implications have been questioned. See, e.g., A.C. Scales, *The Emergence of Feminist Jurisprudence: An Essay* (1986) 95 YALE L.J. 1373 at 1381.

<sup>55</sup> Gilligan, *ibid.* at 73.

<sup>56</sup> J. Gallagher, *Pre-Natal Invasions & Interventions: What's Wrong With Fetal Rights* (1987) 10 HARV. WOMEN'S L.J. 9 at 13 [hereinafter *Gallagher*].

In a similar vein Rhoden quotes an obstetrician who performs innovative fetal surgery saying that most of the women he sees, "would cut off their heads to save their babies."<sup>57</sup>

The rights-based approach also ignores the fact that women are *literally* connected to their fetuses. Ruth Hubbard points this out:

It makes no sense, biologically or socially, to pit fetal and maternal "rights" against one another. Indeed, legal "rights" do not offer a proper framework for assessing the situation of a pregnant woman and her fetus. As long as they are connected, nothing can happen to one that does not affect the other....To argue "rights" of the fetus *versus* those of the mother ignores this organic unity and substitutes a false dichotomy, though one that is habitual in western mechanistic thought....As long as a fetus is attached to the pregnant woman, her body maintains its life and her body wall bars access to it.<sup>58</sup> [emphasis in original]

Similarly, Marie Ashe writes:

Even to speak of the pre-birth period as one of mother-child "interdependence" does not begin to do justice to the experiential reality of pregnancy as a state of being that is neither unitary nor dual, exactly; a state to which we can apply no number known to us. Pregnancy discloses the truth of paradox.<sup>59</sup>

The result of this rights-based analysis has been an approach to fetal protection which undermines women, and treats them as immoral and irrational. As one author comments:

[S]tates' willingness to intervene in pregnancy and birthing and their reluctance to intervene in other family decisions are consistent in that both policies reinforce male power within the family. Because women and children traditionally have lacked power within the home, a general policy of nonintervention preserves and legitimates the unequal power structure of the patriarchal nuclear family. In contrast, women's physical position in pregnancy allows them to control this stage of the reproductive process. State intervention is necessary, therefore, to shift the balance of power away from women.<sup>60</sup>

The law needs to look at decisions made by pregnant women in a new light. Based on women's modes of decision-making, women's experience, and the physical reality of maternal/fetal connection the law must reconceptualize its interpretation of maternal/fetal relations based on principles of interdependence and responsibility. Women must be

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<sup>57</sup> Rhoden, *supra*, note 42 at 1959.

<sup>58</sup> R. Hubbard, *Legal and Policy Implications of Recent Advances in Prenatal Diagnosis and Fetal Therapy* (1981-1982) 7 WOMEN'S RTS. L. REP. 201 at 215-16.

<sup>59</sup> M. Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt* (1988) 22 NEW ENGL. L. REV. 521 at 551.

<sup>60</sup> *Rethinking, supra*, note 11 at 1337.

treated as responsible moral decision-makers,<sup>61</sup> rather than as fetal incubators.<sup>62</sup> Fetuses should have voices, but this voice is that of the mother, not of the state. Donna Greschner points this out:

To reply that fetuses should have voices, and that the concept of foetal rights permits a foetus to be heard, is to miss the depths of patriarchal bias in discourse. Even to say that a foetus is independent with its own voice is to accept one traditional, religious, medical viewpoint of women. Moreover, the very best person to speak for the foetus is its mother, for the two are inseparable. We do not allow whites to speak for blacks, even if the whites think that they know what is best for blacks. In the same way we must not let anyone speak for women, for that is what speaking for the foetus is about: *speaking for the foetus off/within a woman is to speak for the woman*. The argument also ignores the historical, current and pervasive reality that women have been speaking for and protecting fetuses for a very long time. It is not the case that fetuses do not have a voice; it is simply that their voices — mother's voices — are ones that patriarchy does not want to hear.<sup>63</sup> [emphasis in original]

While the results of a rights-based approach are counterproductive, that does not mean that the actual language of rights must be abandoned. Both critical legal studies and feminist legal theory have criticized "rights" discourse as being incoherent as well as presupposing and reinforcing notions of individuals as autonomous and disconnected from others rather than connected to others and to society in general.<sup>64</sup> However, this is not the time to abandon rights in favour of, for example, communitarian visions. Canadian women have only just begun to profit from the rights that are set out in the *Charter*. To abandon them as a tool for social change would be to give up something women have fought hard to secure. Rights can instead be used as a way of struggling against established patterns of power and authority. However, as the preceding discussion shows, positing *conflicts* of rights between mother and fetus is inconsistent with women's experience and reality. Women's rights in fact conflict with those of the state and the medical profession, as each seeks to invade her body to the supposed benefit of the fetus.

Thus the second underlying assumption, that women are in conflict with their fetuses and need to be controlled, is also illegitimate in its portrayal of women and the conclusions to which it leads.

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<sup>61</sup> C. MacKinnon argues that women should be able to make life or death decisions in *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion* (1983) 18 RADICAL AMERICA 23 at 24 [hereinafter MacKinnon].

<sup>62</sup> The metaphors for what women are turned into by the rights approach abound. Watters and others talk about "incubators" (*supra*, note 23), Tolton talks about "ambulatory chalices" (*supra*, note 25), and Overall and others talk about "containers" (Overall, *supra*, note 18, and *Rethinking*, note 11).

<sup>63</sup> Greschner, *supra*, note 23 at 654.

<sup>64</sup> See M. Minow, *Interpreting Rights: An Essay for Robert Cover* (1987) 96 YALE L.J. 1860 at 1861. See also F. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis* (1984) 63 TEXAS L. REV. 387.

### C. *Doctors as Neutral Arbiters of Fetal Needs*

The third underlying assumption of state interference in pregnancy is that doctors are in a better position than women to make decisions with respect to fetal health, and that therefore, courts (and *of course* women) should defer to medical opinions.

This is the traditional stance that has been taken with respect to women's reproduction. Control over abortion is a classic example of the way the medical profession has usurped women's control over fundamental reproductive choice, and the way the state has insured that power over these reproductive decisions lies in the hands of doctors, until relatively recently a male-dominated profession.<sup>65</sup> The abortion provisions struck down by the Supreme Court in *Morgentaler* put the decision to have an abortion in the hands of a therapeutic abortion committee, composed of medical professionals.<sup>66</sup> Bill C-43, the proposed abortion legislation that was defeated in the Senate,<sup>67</sup> once again would have placed the abortion decision firmly in the hands of doctors.<sup>68</sup>

The result of having doctors make those decisions fundamental to women's reproductive freedom is that women's control over their own bodies is removed, thus reinforcing the vision of women as persons

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<sup>65</sup> For a general historical survey of abortion law see S.A.M. Gavigan, *On "Bringing on the Menses": The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law* (1986) 1 C.J.W.L. 279 and C.B. Backhouse, *Involuntary Motherhood: Abortion, Birth Control and Law in Nineteenth Century Canada* (1983) 3 WINDSOR Y.B. ACCESS JUST. 61.

It is of interest that the "medical arts" were traditionally practised by women until the middle 13th Century when the Catholic Church became dominant in Europe. At this time the Church, frustrated *inter alia* by the fact that midwives or "wise women" eased the pain of child-bearing, which was supposed to be women's punishment for Eve's original sin, declared that only those who had been to universities could practice medicine. Since women were not allowed to attend university they were no longer able to continue their traditional role as healers. Those who continued to do so were burned as witches: see National Film Board of Canada, "The Burning Times".

<sup>66</sup> S. 251 (4)(a) set out the so-called "therapeutic exception". S. 251(6) defined "therapeutic abortion committee" as a "Committee, comprised of not less than three members each of whom is a qualified medical practitioner....".

<sup>67</sup> Bill C-43, *An Act Respecting Abortion*, 2nd Sess., 34th Parl., 1991 (defeated on Third Reading 31 January 1991).

<sup>68</sup> Bill C-43, *An Act Respecting Abortion*, *ibid.* The new s. 287(1) would have read:

Every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened.

deserving of less than full autonomy.<sup>69</sup> At the same time it simply treats women as means to an end, as producers of babies whose own rights/bodies may be compromised to meet state objectives.

It also puts women at the mercy of a medical profession that is skeptical of alternative pregnancy and birthing techniques and treats pregnancy and birth as a medical condition rather than a natural part of women's lives. Finally, the assumption that doctors make better decisions than women in instances of obstetrical intervention and treatment is not necessarily true. The medical profession is far from infallible itself, as the discussion below will show.

#### D. *State Intervention = Protection of Fetal Lives*

The final assumption that underlies state intervention in women's pregnancies, and the most important one, is that by intervening the state will actually be saving or at least improving fetal lives. The corollary of this assumption is that the state will improve the lives of children by preventing them being born with defects which surgical intervention cures. Respect for maternal duties of care keeps fetuses from being exposed to harmful substances or conditions; drug abuse prosecutions keep women from substance abuse when pregnant. Even if women as a group (and individual women who suffer trauma at the hands of state actors) are harmed by this intervention, at least someone, namely the fetus, benefits.

As with the other assumptions, I argue that this one is fallacious. Fetuses are not protected by state intervention both because doctors do not have all the answers, and frequently make errors to be on the safe side, and because women who feel that they might be violating a duty vis-à-vis their fetuses (e.g. who seek alternative delivery techniques, or who are substance abusers) will simply not seek pre-natal care, once doctors are turned into "fetus police".

##### 1. *The Fallible Profession*

The medical profession makes mistakes. But the courts, faced with difficult decisions respecting forced obstetrical intervention, have sided with medical opinion. However, with so much riding on a decision, it makes no sense for a court to simply take a doctor's word over a competent woman's refusal of treatment. When unnecessary interventions are ordered, a woman's bodily integrity, liberty, autonomy and security of the person are compromised to no one's benefit.

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<sup>69</sup> Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of 'Fetal Abuse'* (1988) 101 HARV. L. REV. 994 at 1010 [hereinafter *Maternal Rights*].



Pregnancy and birth have become increasingly "medicalized". The number of cesarean section births rose from 5% of deliveries in 1970 to 16.5% in 1980.<sup>70</sup> Women are also subject to more episiotomies than ever before.<sup>71</sup> Medical procedures such as cesarean sections greatly increase the risks of childbirth,<sup>72</sup> yet are part of current medical practice. At the same time some studies have found that up to 50% of all cesarean section deliveries are unnecessary.<sup>73</sup> Very advanced techniques of fetal monitoring can be invaluable if the fetus is in distress, but are notorious for their false positives.<sup>74</sup> Thus doctors are more and more likely to encourage women to accept medical treatment based on the technology that they have at their disposal. While this technology can be of assistance in many births, it should not be forced on women who do not consent to it.

Often the dire consequences that doctors predict will not ensue if the prescribed medical treatment is not followed. For example, in one case, a pregnant woman in labour was diagnosed as having placenta previa, a condition in which the placenta blocks the birth canal involving great danger to both mother and child if a vaginal birth is attempted. When the woman refused to undergo a cesarean section a court order was obtained, but she promptly went into hiding. She subsequently had a normal vaginal delivery.<sup>75</sup>

Indeed, history has given us several examples of medical treatments during pregnancy that have proved to have ranged in effect from inconsequential and simply unnecessary, to dire. The most serious examples include, prescribing DES to women to prevent miscarriages (resulting in a high incidence of cancer in their teenaged daughters), excessive use of forceps during pregnancy (resulting in injury to both mother and child), "twilight sleep" (general anaesthesia during delivery resulting in transmission of unnecessary drugs to the fetus), and prescriptions of thalidomide to reduce nausea (resulting in devastating birth defects).<sup>76</sup> Contemplate what an example of a fetal abuse case might have looked like 25 years ago:

Janet M., a diabetic, refused her DES treatment, prescribed as especially important in the prevention of miscarriage among diabetics. Further, although she was eleven pounds overweight at the time of conception, she refused to limit her weight gain over the course of pregnancy to under thirteen pounds. She compounded the problem by not taking the

<sup>70</sup> Statistics from the United States cited in *Rhoden*, *supra*, note 42 at 1958.

<sup>71</sup> An episiotomy is the incision of the vulval opening during childbirth. The medicalization of birth was the reason that Mrs. Sullivan sought a home birth with midwives rather than a hospital birth with her obstetrician: *supra*, note 32.

<sup>72</sup> *Rhoden*, *supra*, note 42 at 1958.

<sup>73</sup> *Supra*, note 8 at 243.

<sup>74</sup> *Rhoden*, *supra*, note 42 at 1956-57.

<sup>75</sup> *Jefferson v. Griffin Spalding County Hospital Authority* 247 Ga. 86, 274 S.E.2d 457 (Ga. 1981), discussed in *Rhoden*, *ibid.* at 1959-60.

<sup>76</sup> S.A. Tateishi, *Apprehending the Fetus En Ventre Sa Mere: A Study in Judicial Slight of Hand* (1989) 53 SASK. L. REV. 113 at 135.

diuretics prescribed, and twice refusing to show up for scheduled x-rays, citing a distrust of medications and radiation. Her irrational refusal to comply with her doctor's advice, plus her unwillingness or inability to limit her weight gain, indicate fetal abuse.<sup>77</sup>

## 2. *Policing and Prosecution: More Harm than Good*

Lying behind all forms of state intervention in pregnancy is the fundamental misconception that harmful behaviour is anti-fetal behaviour. In fact, the kind of behaviour that is harmful to the fetus inside a woman is harmful to the woman herself. This behaviour is either self-destructive or beyond a woman's control. Edward Keyserlingk maintains that one of the duties of care that a woman must observe is to nourish the fetus.<sup>78</sup> But the way that the fetus gets its nutrition is through the mother. Women do not choose or want to be malnourished.

Other duties of care proposed include preventing fetal exposure to harmful substances.<sup>79</sup> However, women are most often not responsible for the harmful substances that they expose themselves to, nor are they able to control their exposure. Thus, Overall points out that imposing duties of care on the mother is a failure to impose liability where the responsibility for the danger lies:

[T]he pregnant woman herself....is treated as being the primary danger to her fetus, since it is she who exposes it to reproductive dangers in the workplace and elsewhere. Such an approach indicates no awareness that one's exposure to teratogenic environments may not be within one's power; it is difficult to control the purity of the air we breathe or the water we drink. Moreover, employees have little or no power over reproductive hazards in the workplace.<sup>80</sup>

Of course, the answer is not to prevent fertile women from working in environments in which they will be exposed to teratogens, although this has sometimes been the approach taken. It is the approach that a United States Court of Appeals has sanctioned but which was subsequently overturned by the United States Supreme Court.<sup>81</sup> It has been estimated that excluding women from jobs in which exposure to harmful materials would potentially harm a fetus would mean excluding fertile women from 15 to 20 million industrial jobs in the United States.<sup>82</sup> Tolton notes:

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<sup>77</sup> Quoted in *Grant*, *supra*, note 8 at 244.

<sup>78</sup> *Part I*, *supra*, note 16 at 12.

<sup>79</sup> *See ibid.*

<sup>80</sup> *Supra*, note 49 at 10.

<sup>81</sup> *International Union, U.A.W. v. Johnson Controls, Inc.* 886 F.2d 871, *rev'd* 111 S. Ct 1196 (1991) [hereinafter *Johnson Controls*], *inter alia* on the grounds of sex discrimination. Also worth noting is the fact that fetal health is effected by exposure to toxins by *male* workers as well, but no efforts have been made to "safeguard" men in work atmospheres dangerous to their reproductive health.

<sup>82</sup> K. Moss, *Substance Abuse During Pregnancy* (1990) 13 HARV. WOMEN'S L.J. 278 at 289 [hereinafter *Moss*], based on evidence from *Johnson Controls*.

[T]he vast majority of women would choose not to be exposed to any potential harm to their reproductive capacities, but economic realities may effectively compel their detrimental exposure to harmful substances. The solution does not lie in excluding women from significant portions of the job market, but rather in government increasing safety measures through regulations that create incentives for employers to eliminate such hazards from the workplace.<sup>83</sup>

Similarly, women do not abuse drugs out of a lack of care for their fetuses. Drug abusing pregnant women, like other drug abusers, are addicts. People do not want to be drug addicts. In addition, a product of addiction is the inability to control in-take of the substance being abused. Threats of prosecutions do not inhibit people who are addicted from procuring and ingesting the substance to which they are addicted. As Kary Moss notes:

Addiction typically involves loss of control over use of the drug and continued involvement with the drug even when there are serious consequences. Thus, to treat pregnant addicts as indifferent and deliberate participants is to misunderstand the addiction process.<sup>84</sup>

Furthermore, pregnant addicts have even fewer treatment options than other drug abusers since most treatment programs do not accept pregnant women for treatment.<sup>85</sup>

Treating pregnant substance abusers as fetal abusers ignores the range of conditions that contribute to problems like drug addiction and lack of nutrition, such as limited quality pre-natal care, lack of food for impoverished women, and lack of treatment for substance abusers.

In addition, much of the harm that is done to a fetus by improper maternal nutrition, substance abuse, or exposure to teratogens takes place very early in the pregnancy. Thus it will often have occurred even before the pregnant woman realized that she was pregnant. While Keyserlingk advocates a maternal duty from the moment of conception,<sup>86</sup> there is clearly no benefit to the fetus if the harm has been done before the woman even has a chance to remedy her behaviour, assuming it is within her powers to do so.<sup>87</sup>

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<sup>83</sup> *Supra*, note 25 at 33.

<sup>84</sup> *Moss, supra*, note 82 at 287.

<sup>85</sup> *See ibid.* at 286-87. While I do not have any statistics in the Canadian context, in New York City of 78 drug programs, 54% refuse service to all pregnant addicts, an additional 13% refuse treatment to pregnant addicts on Medicaid, and 20% more refuse to treat pregnant Medicaid recipients addicted to crack cocaine. Therefore a pregnant Medicaid recipient addicted to crack would have access only to 13% of New York drug treatment programs: *see Rethinking, supra*, note 11 at 1325.

<sup>86</sup> *Clarifying, supra*, note 16.

<sup>87</sup> In *Re Superintendent of Family and Child Service and McDonald, supra*, note 10, the pregnant woman had been a heroin addict from the age of 12. At the time of the proceedings she was in a methadone treatment program. By the time she consulted a doctor it was too late to go off the methadone without injuring the fetus. Yet the County Court judge held that the child had been in need of protection before its birth.

Yet another problem is the “slippery slope” argument — who will decide what behaviour on the part of a pregnant woman would be actionable, and where would it stop? Grant lists among the things that are potentially harmful to a fetus, alcohol, caffeine, cigarettes, non-prescription drugs, strenuous exercise, hazardous occupations, residing at high altitudes, and sexual intercourse late in pregnancy.<sup>88</sup>

Finally, and most seriously, turning doctors into informers will only keep women from getting adequate pre-natal care. In Canada our pre-natal care problem is substantially less than that of the United States because of socialized medical care. But in both countries the consequences of making doctors responsible for “turning in” pregnant women would be catastrophic. Mutation of the doctor’s role in this manner would destroy the doctor/patient relationship and would result in the loss of the only possible mechanism for helping fetuses — helping their mothers get adequate care.<sup>89</sup> Evidence already exists that pregnant heroin addicts avoid doctors so as to minimize the risk of detection and prosecution.<sup>90</sup> Putting more women in this position will only result in greater risks to fetuses, and possibly even higher abortion rates.

Thus the fourth underlying assumption is perhaps the one most devastatingly untrue. Rather than aiding fetuses, state intervention will likely result in greater fetal harm and mortality.

#### E. *Conclusion: Underlying Misconceptions*

Thus all four assumptions underlying coercive state intervention in women’s pregnancies are undermined. Fetuses have not and should not be accorded legal personhood, but even if they are that does not solve the problem of whether that gives them a right to use their mothers’ bodies, and have those bodies maintained in a precise manner as dictated by law. Secondly, women do not make decisions about their fetuses in a purely self-interested way, nor do they weigh their rights against those of the fetus in their decisions. For the most part, women make decisions during their pregnancies on the basis of their honest beliefs in the best interests of those immediately affected by the decision. Finally, while doctors are not always in the best position to make decisions with respect to pregnancy and delivery due to the increased medicalization of pregnancy and the fallibility of medicine, any measures which will allow state intervention in pregnancies will prevent women from seeking

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<sup>88</sup> *Supra*, note 8 at 242.

<sup>89</sup> See Tolton, *supra*, note 25 at 50-51; *Maternal Rights*, *supra*, note 69 at 1010-11; *Watters*, *supra*, note 23 at 32-33; *Gallagher*, *supra*, note 56 at 53. *Moss*, *supra*, note 82 at 288 quotes Lynn Paltrow of the A.C.L.U. Reproductive Freedom Project:

Prosecutors say they’re doing this to encourage women to get help.... But what they’re really doing is contributing to the problem, and making it less likely that women will feel safe enough to seek help.

<sup>90</sup> *Gallagher*, *ibid.* at 10-11.

doctors' care during their pregnancies. This is for fear that their confidences will be broken, and that any perceived irregularities in behaviour will be reported either to child welfare authorities (resulting in possible apprehension of the fetus while *in utero* or once born) or the police (resulting in criminal prosecution, potential incarceration and loss of the child).

The fallacy of the fourth assumption should be enough, from a utilitarian perspective, to prevent the state from intervening in pregnancy. However, the state must also allow women to make fundamental decisions about their bodies because not to do so is a violation of their rights to liberty, security of the person and equality safeguarded by the *Charter*. It is those rights that will be discussed in the next part of this paper.<sup>91</sup>

#### IV. THE *CHARTER* AND THE PREGNANT WOMAN'S DOMINION OVER HER BODY

In this brief section I will provide an outline of the *Charter*-protected rights violated by state intervention in pregnancy with particular emphasis on forced obstetrical intervention. These arguments are based on sections 7, 2(a), and 15 of the *Charter*.<sup>92</sup>

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<sup>91</sup> Before going on to these, though, I will say a word about private law remedies. Based on the law of tort a patient who is treated absent consent has a right of action in battery. Similarly, in the civil law, the inviolability of the person is protected by art. 19 of the *Civil Code*. While I do not propose to discuss these arguments, it is clear that a competent woman, who does not consent to treatment, would have a cause of action in battery for any treatment to her fetus, since her own body mediates any treatment that can be done *in utero*. See *Grant, supra*, note 6. The common law right to inviolability of the person will be further discussed in the context of the *Charter* protection of security of the person, *infra*.

<sup>92</sup> It should be noted that the *Charter* may not be applicable to all instances of interference in pregnancy. The Supreme Court held in *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273 [hereinafter *Dolphin Delivery*], that the *Charter* does not apply to actions between private parties. Clearly instances of criminal prosecution are within the reach of the *Charter*. Likewise, forced obstetrical interventions which are achieved through the means of an *in utero* apprehension by a child welfare authority would probably be subject to the *Charter* (see e.g., *Re "Baby R."*, *supra*, note 10). However, duties of care, enforceable by an action by the fetus (taken by its tutor or guardian) or the child once born, would probably not be subject to the *Charter*. However, the reach of the *Charter* into private affairs of citizens is not entirely settled.

Hester Lessard argues in *Relationship, Particularity and Change: Reflections on R. v. Morgentaler and Feminist Approaches to Liberty* (1991) 36 MCGILL L.J. 263 that *Dolphin Delivery* makes invisible to courts things that are clear instances of state control of women's reproduction. Once invisible to the courts such control is impervious to *Charter* adjudication, leaving women affected without relief. Her example of this is *Daigle, supra*, note 4.

It should be noted that the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 and likewise other provincial human rights legislation, can be invoked absent the exercise of state action.

The irony in this enterprise is that in most cases of forced obstetrical intervention the pregnant woman is unable to make any defence. Proceedings under child protection legislation are most often *ex parte*. Decisions in forced obstetrical intervention cases are often made in emergency situations in the space of minutes or, at the most, hours, and in most cases the right to appeal is illusory, as once a court order is granted the treatment is effected and the point of law moot. A perfect example of this is the American case of Angela C.

A 27-year-old pregnant woman dying of cancer, Angela C. decided, in consultation with her physician and her family, not to deliver her 26-week-old fetus by cesarean section. Hospital administrators commenced legal proceedings, and on the basis of the fact that Angela's cancer was terminal, and thus that her fetus had a greater chance of survival than she, a cesarean section was ordered. The Court of Appeals denied a motion for a 15-minute stay in order for lawyers to prepare arguments on Angela's behalf. Both Angela and the child died shortly after the procedure was performed, the cause of Angela's death being the trauma of having to undergo major surgery in her already weakened condition. While the Court of Appeals has since decided to vacate its earlier decision and to hear the case, the appeal mechanism is clearly of no help to any of the parties involved in Angela C.'s tragedy.<sup>93</sup>

#### A. Section 7

A section 7<sup>94</sup> analysis is two-pronged: one must first show that the individual's protected rights to life, liberty and security of the person have been abrogated, then that this abrogation is not in accordance with principles of fundamental justice. Forced fetal interventions violate both women's liberty and security of the person.

##### 1. Liberty

The primary ways in which women's right to liberty is violated in this instance is in forcing competent pregnant patients to undergo medical treatment without their consent<sup>95</sup> and in taking away women's right to make fundamental decisions with respect to their pregnancies. Wilson J.'s decision in *Morgentaler* provides an outline of a section 7 argument that will limit state interference in all pregnancy decisions, not only the

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<sup>93</sup> *Re A.C. 533* A.2d 611 (D.C. 1987), *var'd and reheating allowed* *In the Matter of A.C. 539* A.2d 203 (D.C. 1988). Discussed in *Grant, supra*, note 8 at 222-23.

<sup>94</sup> S. 7 states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

<sup>95</sup> While clearly this is a violation of liberty, it is moreover a violation of a woman's security of the person, and will be further discussed in that section, *infra*.

decision whether or not to terminate a pregnancy, which right was held to be constitutionally protected by Wilson J.

Madame Justice Wilson fleshed out the notion of liberty in *Morgentaler*, with a discussion of the right to freedom in decision-making on matters of fundamental personal importance. Of this she said:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely, that the *state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.*<sup>96</sup> [emphasis added]

She goes on to characterize an intrinsic part of the respect for human dignity as:

[T]he right to make fundamental personal decisions without interference from the state. This right is a *critical component of the right to liberty*....[T]his right, properly construed, grants the individual a degree of autonomy in making *decisions of fundamental personal importance.*<sup>97</sup> [emphasis added]

She then fleshes out this concept with the American privacy jurisprudence, which underlines the sanctity of the family, and privacy of decision-making within it.<sup>98</sup> While noting that this right is not absolute, she adopts the general framework of the American jurisprudence, finding that:

[T]he respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian Charter. Indeed, as Chief Justice [*sic*] pointed out in *R. v. Big M Drug Mart Ltd*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the Charter". I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual *a degree of personal autonomy over important decisions intimately affecting their private lives.*<sup>99</sup> [emphasis added]

There could scarcely be any decision which more intimately affects a woman's private life than how to conduct herself during her pregnancy and how to deliver her baby. Like the abortion decision, this decision is one of a fundamental and private nature. By acknowledging the

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<sup>96</sup> *Supra*, note 1 at 486.

<sup>97</sup> *Ibid.* at 486-87.

<sup>98</sup> Of course, privacy in the family cuts both ways for women since the marital home has often been the *locus* for violence to and subordination of women. See *infra*, note 126 and accompanying text. See also MacKinnon, *supra*, note 61.

<sup>99</sup> *Supra*, note 1 at 490.

importance of this decision the woman is brought back into the decision-making process, in contrast to the state intervention mechanism which only treats women as inconvenient barriers between the state and the fetus.<sup>100</sup>

Canadian cases have been reluctant to view instances of interfering in a woman's pregnancy as liberty issues. In *Re Children's Aid Society for the District of Kenora and J.L.*<sup>101</sup> the fetus was declared to have been a child in need of protection while *in utero* because of the mother's alcoholism. Nowhere in the case were the implications of such a decision on women's liberty interests considered. Striking in this judgment is how the woman's condition was extracted from the discussion of the baby (who had been born by the time of the proceedings). The judge held:

The evidence of Drs. Bevridge and Harlund establishes that, on the balance of probabilities, J.L., at birth, was suffering from fetal alcohol syndrome, which required medical treatment and further, that the fetal alcohol syndrome had been *wilfully inflicted upon J.L. by the mother, C.L.*, who *refused* to seek help for her alcohol problem despite the entreaties of Dr. Bevridge.

Accordingly, the child was a child in need of protection prior to birth.<sup>102</sup> [emphasis added]

However, the judge entirely ignored evidence that placed C.L.'s "refusal" to seek treatment in context. Among the considerations were the fact that she was indigent and that she was abused by her common law spouse, having been treated for various injuries including a broken nose.<sup>103</sup> None of these existing constraints on her ability to seek treatment or to control her self-destructive behaviour were examined by the judge.

Similarly, in *Re Superintendent of Family and Child Service and McDonald*<sup>104</sup> and *J.M. v. Superintendent of Family and Child Services*,<sup>105</sup> both of which involved the same mother and child, the finding that the child had been in need of protection prior to birth was not considered in the context of women's liberty interests. Once again, the realities of the mother's life that were important in understanding the constraints on her ability to properly care for herself during her pregnancy were not

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<sup>100</sup> See Rhoden, *supra*, note 42 at 1968.

<sup>101</sup> *Supra*, note 10.

<sup>102</sup> *Ibid.* at 252. It should be noted that C.L.'s behaviour seems to fit within the proposed crime of causing fetal harm or destruction. While the Law Reform Commission of Canada explicitly distinguishes between pregnant women and third parties (*supra*, note 15 at 52), by making third parties liable for negligent or reckless acts whereas the pregnant woman is only liable if she purposely causes harm or destruction to the fetus, courts are likely to term purposive actions by women that are constrained by the contexts of their lives including unequal position in society. See discussion of C.L., *infra*.

<sup>103</sup> *Ibid.* at 250-51, 253.

<sup>104</sup> *Supra*, note 10.

<sup>105</sup> *Supra*, note 10.



considered. These included the fact that she was a Native woman who had been a heroin addict since she was 12. In addition her own mother was a drug abuser and her half-brother died of a drug overdose.<sup>106</sup>

Another very similar case is *Re Children's Aid Society of the City of Belleville and T*<sup>107</sup> in which the fact that Linda, the pregnant woman, was indigent, and thus that she had slept in a parking lot, were considered as evidence in favour of a finding that her fetus was a child in need of protection. The Court rejected the argument that her problems might be economic in origin.<sup>108</sup> The Court then went on to confine Linda by use of mental health legislation that permitted her to be detained for observation.<sup>109</sup> The objective was to confine her until her baby was born. Even while making an order to forcibly detain Linda, the Court did not consider any peril to her liberty, or the dangers to liberty interests of women as a group of permitting such abuses of mental health law.<sup>110</sup>

In *Re R.*<sup>111</sup> one of the three Canadian cases that deal with an *in utero* apprehension, the Court explicitly refused to consider the woman in making its decision, thus rejecting all possibilities of considering her liberty interests:

*This is not a case of women's rights....It is clear that this child was in the process of being born and the intervention and redirection of its birth were required for its survival.*<sup>112</sup> [emphasis added]

However, in the appeal from *Re "Baby R"*,<sup>113</sup> the Court held that a "child" could not be defined to include a fetus under the British Columbia child welfare legislation. This is one of the rare cases in which a court explicitly alluded to women's liberty interests,<sup>114</sup> saying: "important issues of civil rights arise that include the rights of the mother

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<sup>106</sup> *Ibid.* at 367.

<sup>107</sup> *Supra*, note 10.

<sup>108</sup> *Ibid.* at 206.

<sup>109</sup> *Ibid.*

<sup>110</sup> In *Re "Baby R."* the doctor involved sought to have the pregnant woman examined by a psychiatrist to determine her mental state. To her credit, the psychiatrist refused to examine Mrs. R. since based on the description of the circumstances, i.e. a refusal to submit to cesarian section, she felt there was no reason to suspect that Mrs. R. was psychotic or that there were grounds for a committal. See L.E.A.F. intervenor's factum before the British Columbia Supreme Court in *Re "Baby R."* [hereinafter L.E.A.F.] at paras 8-9.

<sup>111</sup> *Supra*, note 10.

<sup>112</sup> *Ibid.* at 420.

<sup>113</sup> *Supra*, note 10.

<sup>114</sup> See also *Joe*, *supra*, note 8, in which s. 134(1) of the *Children's Act*, S.Y.T. 1984, c. 2 was considered. That section provided that if the director thought that a fetus was endangered by risk of suffering from fetal alcohol syndrome or other congenital injuries attributable to the pregnant woman ingesting intoxicating substances, the director could order the woman participate in counselling or supervision. Maddison J. held that this provision violated s. 7 because of its infringement of women's liberty interests, particularly because of the vagueness of the conditions in which women could be caught.

and the unborn child under the *Charter*,”<sup>115</sup> and at the same time acknowledging that a medical treatment of the fetus is a constraint on the mother: “there can be little question that the mother was not free to leave the hospital with the baby or without giving birth to the baby.”<sup>116</sup> It also pointed out the absurdity in ignoring the woman’s existence:

The superintendent was very careful to point out that, although they were apprehending the child and authorizing medical treatment, it was only medical treatment for the child and that they were not authorizing the doctor to perform any medical procedures on the mother. At the prebirth state it is hard to imagine how treatment could be given the child without invading the body of the mother.<sup>117</sup>

Finally the Court acknowledged the true consequences of ordering treatment for a fetus — control over the woman: “For the apprehension of a child to be effective there must be a measure of control over the body of the mother.”<sup>118</sup>

In his reasons, Macdonell J. cited the English case *Re F.*,<sup>119</sup> acknowledging that while the case was not binding it was extremely persuasive.

In *Re F.* a wardship order for a fetus was sought by child welfare authorities. The pregnant woman was indigent, had a history of mental problems, abused drugs, and had already had one child taken away from her. The authorities sought the wardship order so that they could make sure that she was in a hospital for the birth. At first instance the judge held that he had no jurisdiction to make a wardship order for a fetus, stating that:

as the law and practice at present stands, wardship can only apply to a living child. For it to apply to a child still within the body of the child’s mother, very serious considerations must arise with regard to the welfare of the mother....[T]here would be a repugnance on the part of a right thinking person in certain instances to think of applying the principle of paramountcy in favour of the child’s welfare at the expense of the welfare and interests of the mother. It is that factor above all, quite apart from what I think is indeed the legal situation, that has convinced me that there is no jurisdiction, and should be no jurisdiction, in respect of an unborn child.<sup>120</sup>

On appeal, the Court was even more explicit in its rejection of constraints on a pregnant woman’s liberty. It first acknowledged the existence of the mother, stating that “in the case of an unborn child the only orders to protect him or her which the court could make would be

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<sup>115</sup> *Supra*, note 10 at 233.

<sup>116</sup> *Ibid.* at 233-34.

<sup>117</sup> *Ibid.* at 232.

<sup>118</sup> *Ibid.* at 237.

<sup>119</sup> *In re F. (in utero)*, [1988] 2 ALL E.R. 193, [1988] 2 W.L.R. 1288 (C.A.), *aff’d* [1988] 2 W.L.R. 1288 (Fam.) [hereinafter *Re F.* cited to W.L.R.].

<sup>120</sup> *Ibid.* at 1296, Hollings J.

with regard to the mother herself....All of these would be restrictive of the mother's liberty."<sup>121</sup> It then acknowledged the ineffectiveness of a conflict of rights approach in considerations of fetal and maternal welfare.<sup>122</sup> It also recognized the insurmountable difficulties in enforcement. May L.J. declared:

I cannot contemplate the court ordering that this should be done by force, nor indeed is it possible to consider with any equanimity that the court should seek to enforce an order by committal.<sup>123</sup>

Finally, in *Re F.* the Court highlighted the connection between the mother and fetus:

[S]ince an unborn child has, *ex hypothesi* [*sic*], no existence independent of its mother, the only purpose of extending the jurisdiction to include a foetus is to enable the mother's actions to be controlled.<sup>124</sup>

Staighon L.J. also stated that:

[T]he court cannot care for a child, or order that others should do so, until the child is born; *only the mother can*. The orders sought by the local authority are not by their nature such as the court can make in caring for the child, they are orders which seek directly to control the life of both mother and child.<sup>125</sup> [emphasis added]

Thus in *Morgentaler*, *Re "Baby R."* and the English case *Re F.*, we see the outlines of a liberty argument that would safeguard pregnant women from state intrusion. However, it is crucial that such an argument not be turned around so that it permits the state to abdicate its responsibility to provide services and help to women. It is essential that liberty and American privacy-type arguments not be used to subordinate

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<sup>121</sup> *Ibid.* at 1298, May L.J.

<sup>122</sup> *Ibid.* at 1301. May L.J. says that to allow wardship of an unborn child would be to "create conflict between the existing legal interests of the mother and those of the unborn child and....it is most undesirable that this should occur".

<sup>123</sup> *Ibid.* However, this is precisely what has happened. Gallagher provides the example of a Nigerian woman who refused to have a cesarean section. Her refusal was based *inter alia* on the fact that she had strong cultural beliefs that went against having the surgery, and the fact that once she returned to Nigeria she would not be able to get proper surgical care in future deliveries. Gallagher describes the level of force that was used to make the woman have the procedure (*supra*, note 56 at 10):

Confronted with the doctor's intentions, the woman and her husband became irate. The husband was asked to leave, refused, and was forcibly removed from the hospital by seven security officers. The woman became combative and was placed in full leathers, a term that refers to leather wrist and ankle cuffs that are attached to the four corners of a bed to prevent a patient from moving. Despite her restraints, the woman continued to scream for help and bit through her intravenous tubing in an attempt to get free.

<sup>124</sup> *Ibid.* at 1305.

<sup>125</sup> *Ibid.* at 1306.

women.<sup>126</sup> To ensure that our conception of liberty does not mandate such subjugation of women, Hester Lessard proposes a liberty analysis that takes into consideration relational morality and communitarian values, values that already have a historical role in Canadian constitutional law.<sup>127</sup> This understanding posits a notion of liberty that involves an individual's right to determine and maintain those relationships which lie at the heart of the process of self-understanding. Such a conception of liberty opens up the state action/inaction dichotomy, making withdrawal of state support in an area of constitutionally protected decision-making a constitutional issue because it impairs a constitutionally protected ability.

The physical confinement of a woman in order to force her to engage in conduct or submit to treatment for the benefit of her fetus is a clear deprivation of her liberty. Such actions both circumscribe women's control of their bodies and strip them of their decision-making ability.

## 2. *Security of the Person*

Forced obstetrical intervention, whether in the form of a forced cesarian-section or medical treatment of the fetus, is an obvious violation of the woman's security of the person. The right to bodily integrity, that of inviolability of the person, is one of the most sacred rights in our law. Historically, it has been interpreted widely:

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.... "The right to one's person may be said to be a right of complete immunity to be let alone."<sup>128</sup>

Recently it has, once again, been upheld as one of society's most important values.<sup>129</sup> It is so fundamental that medical treatment without

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<sup>126</sup> This has been the pattern in the United States. While *Roe v. Wade* 410 U.S. 113 (1974) gave women the right to abortion, subsequent cases allowed the state to withdraw funding for abortion and abortion services: see *Harris v. McRae* 448 U.S. 297 (1980) and *Maher v. Roe* 432 U.S. 464 (1977). The privacy doctrine did not acknowledge this as a violation of women's rights. See L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 1346ff. See also *MacKinnon*, *supra*, note 61.

<sup>127</sup> *Supra*, note 92.

<sup>128</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 at 251 (1891), quoting T.M. Cooley, *A Treatise on the Law of Torts*, 2d ed. (Chicago: Callaghan & Company, 1888) at 29, as quoted in *Grant*, *supra*, note 8 at 226.

<sup>129</sup> See *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, (*sub nom. Re Eve*) 31 D.L.R. (4th) 1.

consultation is a form of battery.<sup>130</sup> This same principle is protected by article 19 of the *Civil Code of Lower Canada*.<sup>131</sup> Therefore, non-consensual surgery on a woman, for the benefit of her fetus, is clearly a violation of this right of bodily integrity and physical security.

In *Morgentaler* five of the seven members of the Supreme Court who heard the case held that the section 251 limitations on the right to an abortion violated section 7's protection of security of the person. Madame Justice Wilson noted in her judgment that security of the person under the *Charter* protects both physical and psychological integrity and she said, "[s]tate enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity."<sup>132</sup> Chief Justice Dickson quoted Lamer J. in *Mills v. R.*<sup>133</sup> holding that security of the person also includes psychological trauma.<sup>134</sup> Lamer J., in that case, found that psychological trauma included "stigmatization....loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs and uncertainty as to outcome [and] sanction."<sup>135</sup> To a large extent the issue of bodily security raised in the abortion context is identical to that which is raised in the forced obstetrical intervention setting. In *Morgentaler* Wilson J. stated:

In essence, what [s. 251]....does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly treated as a means — a means to an end which she does not desire but over which she has no control....Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person?<sup>136</sup>

It should be noted that the right to bodily integrity has been consistently held by the courts to override the state's interest in protecting the life of a third party. Thus, courts have refused, correctly, to override an individual's refusal to donate blood, organs or bone marrow,

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<sup>130</sup> See *supra*, note 1 at 399, Dickson C.J.C. The fact that even successful medical treatment which is done without the patient's consent has been found to be a battery is not uncontroversial. See N. Siebrasse, *Malette v. Shulman: The Requirement of Consent in Medical Emergencies* (1989) 34 MCGILL L.J. 1080.

<sup>131</sup> Art. 19 provides: "The human person is inviolable. No one may cause harm to the person of another without his consent or without being authorized by law to do so".

<sup>132</sup> *Supra*, note 1 at 492.

<sup>133</sup> [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161 [hereinafter *Mills* cited to D.L.R.].

<sup>134</sup> *Supra*, note 1 at 400.

<sup>135</sup> *Supra*, note 132 at 219. Wilson J. also quotes this phrase, *supra*, note 1 at 492.

<sup>136</sup> *Ibid.* at 492.

even when this is certain to cause death to another individual. This has been the case even when the individual in need was a close family member. Grant submits the following hypothetical situation to illustrate the point:

Driver X causes an accident; his passenger Y is seriously injured, and X is left brain-dead. Y needs a transplant to survive, and X's organs are the only ones available. A note is found in X's wallet indicating that he is opposed to organ donation for moral or religious reasons, and X's family want [*sic*] his wishes to be respected. If we examine immediate outcomes only, we might conclude that the benefits to Y of the transplant outweigh the violation of X's wishes. Yet even though X is dead and the transplant would be of no risk to him, and even though X caused the accident, we respect X's wishes even after he is dead. This analogy illustrates a further important point. Whether X caused the accident (and thus Y's injuries) is not a legally relevant factor: our decision is based on respect for X's bodily integrity, not on whether the accident was X's fault. Regardless of who caused the accident, we would respect X's decision not to use his body for the benefit of another person. We would reach the same result even if X was Y's father.<sup>137</sup>

An example drawn from real life is *McFall v. Shimp*, an American case in which a bone marrow transplant was necessary to save the life of the defendant's cousin.<sup>138</sup> Although the Court found Shimp's refusal to make the donation morally reprehensible, it refused to grant a court order requiring it. The Court stated:

For a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.<sup>139</sup>

Rhoden notes that Shimp's refusal did in fact lead to McFall's death. He died two weeks after the case was filed.<sup>140</sup>

This situation is analogous to that of a pregnant woman. While we might disagree with her decision, and in certain instances find it morally reprehensible, we cannot force her to undergo surgical intervention in order to protect another life. It would be ironic indeed if a pregnant woman were forced to undergo a surgical procedure or endanger her life to save her fetus, when she could not be ordered to do the same to protect her living child.<sup>141</sup>

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<sup>137</sup> *Supra*, note 8 at 122.

<sup>138</sup> 10 P.A.D. & C.3d 90 (1978) [hereinafter *McFall*]. Discussed in *Rhoden, supra*, note 42 at 1977-78 and *Tolton, supra*, note 25 at 54.

<sup>139</sup> *McFall, ibid.* at 92.

<sup>140</sup> *Rhoden, supra*, note 42 at 1978 n. 157.

<sup>141</sup> See L.E.A.F., *supra*, note 106 at para. 15. See also *Grant, supra*, note 8 at 227.

### 3. Principles of Fundamental Justice

The final step in the section 7 analysis is to determine whether such violations of a person's liberty or security of the person were carried out in accordance with fundamental justice. This is a two-step approach. The analysis is first done from a procedural standpoint. If minimum procedural safeguards are violated then the issue is analyzed under section 1. However, if procedural standards are found to have been met, then the substantive contents of the principles of fundamental justice must be examined.<sup>142</sup>

In the context of forced obstetrical intervention, the procedural and substantive safeguards are practically non-existent.

The procedural safeguards are limited by the fact that the decisions are usually made in the setting of an "emergency". Often judges are brought down to the delivery room to make their decisions. Proceedings under child welfare statutes are often *ex parte* and women generally do not have an opportunity to obtain and inform a lawyer. Often the decisions themselves are made in a matter of minutes with no time given for adequate argumentation or deliberation.<sup>143</sup> There is no requirement for a warrant or that the child protection official have reasonable and probable grounds to support the belief that the child is in need of protection. The woman does not even have the right to be informed of the apprehension.<sup>144</sup> In these cases the right to appeal is often illusory<sup>145</sup> so the hurriedly made decision of the judge of first instance is the only one which counts. These procedural safeguards are entirely inadequate given what is at stake.

The substantive safeguards are also inadequate. According to the *Motor Vehicle Reference* sections 8-14 of the *Charter* can be looked at to add content to the notion of fundamental justice.<sup>146</sup> In *Morgentaler* Wilson J. went further and said that substantive justice can be informed by all the other sections of the *Charter*.<sup>147</sup> In these circumstances other sections that can be looked to are 2(a) and 15.<sup>148</sup>

In these circumstances both sections are violated, and a state mechanism which violates these cannot be acting within the bounds of principles of fundamental justice.

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<sup>142</sup> See *Reference re s. 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [hereinafter *Motor Vehicle Reference* cited to S.C.R.].

<sup>143</sup> See *Rhoden*, *supra*, note 42 at 1952.

<sup>144</sup> L.E.A.F., *supra*, note 110 at para. 16ff. It appears that in *Re "Baby R."* Mrs. R. was not informed of the apprehension.

<sup>145</sup> Recall the *Angela C.* case discussed above. See *Grant*, *supra*, note 8 at 228 n. 60.

<sup>146</sup> *Supra*, note 140 at 503, Dickson C.J.C.

<sup>147</sup> *Supra*, note 1 at 493.

<sup>148</sup> S. 15 will be discussed *infra* in its own right.

In *Morgentaler* Madame Justice Wilson used section 2 in her analysis of fundamental justice.<sup>149</sup> She cited *R. v. Big M Drug Mart Ltd*<sup>150</sup> in which Dickson C.J.C. found that section 2(a) freedoms assert a "notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation."<sup>151</sup> Wilson J. extrapolated from this that section 2(a) protects not only religious freedom, but also secular morality declaring: "Certainly it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a)."<sup>152</sup> From this she drew the conclusion that legislation such as section 251 violates freedom of conscience and therefore cannot be in accordance with principles of fundamental justice.<sup>153</sup>

An identical analysis can be done in the case of state interference in women's pregnancies. The decision not to have surgical treatment to benefit the fetus, or not to submit to a cesarean section or other intrusive birthing techniques, is exactly the kind of decision that ought to be safeguarded by section 2. When a woman, based on her conscientiously held beliefs, decides not to submit to medical treatment, any state coercion cannot be in accordance with principles of fundamental justice.

## B. Section 15

Section 15 is the main provision in the *Charter* safeguarding equality.<sup>154</sup> In order to gauge whether there has been a violation of section 15 a two-pronged analysis must be undertaken. First, it must be determined if there has been unequal treatment, and if so, whether this different treatment creates discriminatory impact or harm.<sup>155</sup>

<sup>149</sup> Section 2 states:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression....

<sup>150</sup> [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to D.L.R.].

<sup>151</sup> *Ibid.* at 361.

<sup>152</sup> *Supra*, note 1 at 495.

<sup>153</sup> *Ibid.* at 497.

<sup>154</sup> S. 15 states:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>155</sup> See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1. See also N.C. Sheppard, *Recognition of the Disadvantaging of Women: The Promise of Andrews v. Law Society of British Columbia* (1989) 35 MCGILL L.J. 206.



It is clear that in imposing particular kinds of behaviour on women, any state interference in pregnancy is a violation of section 15. This is the case for all three kinds of state intervention that I have discussed. Forced obstetrical intervention coerces women, and in particular pregnant women,<sup>156</sup> to submit to non-consensual medical treatment when this is not asked of any other segment of society.<sup>157</sup> Using criminal sanctions to penalize drug abusing pregnant women would also be a violation of section 15 because it would impose prosecution under a more serious charge for pregnant women (trafficking) than it would for other drug users (simple possession). Even imposition of duties of care would be a violation of women's equality rights because it would impose sanctions on behaviour by pregnant women that would be perfectly legal in the case of other individuals.<sup>158</sup>

Furthermore, state intervention in pregnancy is submitted to overwhelmingly by poor women and women of racial and linguistic minorities. Statistical information is only available for the United States, but it indicates that of the pregnant women who were victims of forced obstetrical intervention, 81% were Black, Asian or Hispanic, 44% were unmarried, 24% had a non-English mother tongue and 100% were on public assistance.<sup>159</sup> In the Canadian context we have seen that several of the women were indigent and/or Native. Thus a further sub-group of women are disproportionately harmed by state intervention in pregnancy.<sup>160</sup>

State intervention in women's pregnancies is a violation of women's equality. As such it is both a breach of the *Charter* in its own right, and it is a violation of the principles of fundamental justice.

### C. Section 1

Of course a *Charter* analysis does not end there. The final step is to see if the impugned legislation can be upheld under section 1.<sup>161</sup> The burden is on the state to prove that legislation that otherwise violates

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<sup>156</sup> Note that according to *Brooks v. Canada Safeway Ltd*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, discriminating against a woman because she is pregnant is a violation of s. 15.

<sup>157</sup> Rhoden notes, *supra* note 42 at 1982, that an organ cannot be removed from a dead person's body without prior consent of the deceased or the family. Are women's bodies less worthy of respect than those of corpses?

<sup>158</sup> See discussion, *supra*, note 102.

<sup>159</sup> *Grant*, *supra*, note 8 at 232 n. 71.

<sup>160</sup> See L.E.A.F., *supra*, note 110 at para. 21ff.

<sup>161</sup> S. 1 states:

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

the *Charter* should be upheld as a reasonable limit.<sup>162</sup> Since this invasion of women's liberty, security of the person, freedom of conscience and equality rights does not achieve the end that it sets out to achieve, that is, the protection of fetal life, I do not think that it would satisfy the means/ends test required of section 1.<sup>163</sup>

## V. CONCLUSION. SETTING RESCUE FANTASIES ASIDE

Sometimes bad things happen. Not every bad thing, not every sad event, not every societal or personal tragedy can be averted. The state is not always in a position to make everything alright. While the state may have rescue-fantasies — genuine desires to safeguard from harm those persons it perceives to be in need at a particular moment — its desire to do what is best must be checked.<sup>164</sup>

Preventing harm to fetuses is a laudable goal. The problem is that the state, in using forced intervention in pregnancy, is going for the quick (and relatively cheap) fix. In addition, in so doing it is worsening the already subordinate position occupied by women in patriarchy. The way to help fetuses is conceptually simple — help women. By treating women as rational, moral decision-makers and as people worthy of state support (as the state seems to imply fetuses are) women and their children will be helped. By taking the quick route directly to the fetus (literally through the mother) the state ultimately helps no one and harms all women. By directing its powerful resources at making women's lives better, the state would not only help women and fetuses, but it would also help children. For in its myopic concentration on fetuses, children go by the wayside. What happens to the child apprehended *en ventre sa mere*? When a child is apprehended *in utero*, then taken away from its mother once born and put into an already over-burdened foster care

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<sup>162</sup> See *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200. The test set out in *Oakes* for a reasonable limit under s. 1 is that the objective the legislation is designed to achieve be pressing and substantial, and that the means chosen be proportional to the end. The three components of proportionality are: (1) that the measures be carefully designed to achieve the objective in question, that they be rationally connected to the end; (2) that the means impair as little as possible the right or freedom in question; and (3) that there be proportionality between the effects of the measures and the objective. For a very recent Supreme Court analysis of s. 1 issues see *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1.

<sup>163</sup> See discussion, above, "State Intervention = Protection of Fetal Lives." For a full analysis of the s. 1 arguments in the context of forced obstetrical intervention see *Grant*, *supra*, note 8 at 240-45.

<sup>164</sup> The notion of "rescue fantasies" is discussed in J. Goldstein, *Medical Case for the Child at Risk: On State Supervision of Parental Autonomy* (1977) 86 YALE L.J. 645. Thanks go to Janet Coplan for pointing out this turn of phrase.

system within which it may be shunted from home to home, who has been well-served?<sup>165</sup>

What follows are some suggestions for things that the state could do which would genuinely help women and their fetuses. They are for the most part expensive. In addition they are not necessarily the kinds of things that bring glory to any particular administration, nor do they benefit those who are the main focus of political life — they address the poor, the sick, racial minorities and women. But, they might actually achieve the state's stated goal of preserving fetal life.<sup>166</sup>

In order to address the needs of drug abusing women treatment programs must be set up and funded that treat pregnant women and that have adequate child-care facilities. Attending such treatment programs must not be perceived as evidence that a woman's children are in need of protection, but instead should be treated as an indication that a woman is taking her life into her own hands and trying to make herself the best mother she can be.

For all women, pre-natal health care must include not only basic medical care, but also free nutritious food, nutrition counselling for women who do not know how to properly feed themselves, and free information on pregnancy, pre-natal health, birth and caring for infants, so that women are able to make decisions based on all the information they need. The underlying assumption must be that women's decisions and choices will be respected.

At an even more fundamental level, societal conditions that cause individuals to do harm to themselves must be addressed. Women do not abuse drugs outside of a societal context in which there is a need to flee reality whatever the cost. Women do not want to be malnourished or to work in jobs where they are exposed to toxic substances. The societal conditions that put women, and consequently their fetuses, in danger must be addressed systematically.

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<sup>165</sup> Moss, *supra*, note 82 at 296 reports that the acute shortage of foster care in the United States means that some children have been placed in 35 foster homes before reaching the age of three. She concludes, "[w]hen foster care resources are scarce, removing a child from the mother's custody may not best serve the interests of the child." These sorts of observations about the limited state resources in child protection are notoriously unwelcome — witness the persecution of Judge Andrée Ruffo for the remarks she made and the actions she took to underscore the inadequacy of child protection in Quebec.

<sup>166</sup> The state premises its intervention on its interest in fetal life, which implies that life in our society is valued highly — which in a society so violent, which still debates the death penalty, which spends enormous amounts of money on the military apparatus, is a debatable proposition. In fact there is no evidence that fetal life is valued in our society. Frances Olsen, in *Unravelling Compromise* (1989) 103 HARVARD L. REV. 105 at 128-29, notes that "[f]etal life has value when people with power value it" and gives examples of how those with power value fetal life only when it is convenient to do. See also A. Hutchinson, "Not a Matter for the Courts: Canada's Abortion Policy Must be a Political Decision" *The [Toronto] Globe and Mail* (8 September 1988) A7.

This is all rather utopian. It is easier to make an individual woman submit to a medical procedure against her will than to solve society-wide problems. However, the former approach is painfully short-sighted. The damage done to women as a group, and thus the overall damage done to society, far outweighs the advantages of state intervention.

What should individual judges do when faced with these situations, knowing full-well that there is no support system for the women before them? They must resist the urge to be rescuers of babies. Rhoden acknowledges the difficulty of these decisions:

It is very tempting in the individual case for a judge to “come down on the side of life.” But....the judge who [does]....does so at a far higher cost than it initially appears. He forces burdens on the woman that no one else in society must ever bear. He imposes risks on her that are imposed on no one else. And he compromises the state’s integrity by acting coercively, albeit for a good cause.<sup>167</sup>

In denying the state the right to intervene “on behalf of fetuses” courts will be allowing tragedies to occur. These tragedies are individual and personal. They are tragic, but, sometimes bad things happen.

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<sup>167</sup> *Supra*, note 42 at 2029.