

Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice

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In this article, the author posits that the principles of fundamental justice present tantalizing possibilities in the quest to use constitutional law to ameliorate the real conditions of disadvantage and subordination faced by women. As a way out of the stultified comparative analysis in equality cases and a section 7 analysis that has often been impervious to gendered relations of domination, she proposes a new use for the right to substantive equality represented in section 15(1) of the *Canadian Charter of Rights and Freedoms*: as a principle of fundamental justice. Using the examples of the 1988 decision in *R v Morgentaler*, [1988] 1 SCR 30 and subsequent abortion litigation and proposed legislation as a case study, she addresses the questions of the difference it would make to have substantive equality recognized as a principle of fundamental justice in granting women equal access to *Charter* rights. Without recognition of substantive equality as a principle of fundamental justice, state regulation and coercion of women through their reproductive capacity is normalized and made invisible, reducing justice to procedural fairness, and accommodating perceived physical and mental frailties, individual needs and personal morality. Further, women's unique subordination through forced pregnancy defies ready comparison under a section 15 equality analysis. Incorporating substantive equality would mean an interpretation of "fundamental justice" based upon understandings of ethical social relations, self-determination and inclusion in community, conceptions that find support in the existing section 7 jurisprudence and would satisfy the test in *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 to be recognized as a "basic tenet of our legal system." This legal recognition would constitute an acknowledgement of what is most fundamental to women.

Dans cet article, l'auteure soutient que les principes de justice fondamentale présentent des possibilités tentantes dans le cadre de la quête visant à se servir du droit constitutionnel pour améliorer la condition sociale de désavantage et de subordination des femmes. À titre de solution pour s'écarter de l'analyse comparée, figée, des causes en matière d'égalité et d'une analyse de l'article 7 souvent imperméable aux relations de domination fondées sur le genre, elle propose un nouvel usage pour le droit à l'égalité réelle garanti par le paragraphe 15(1) de la *Charte canadienne des droits et libertés* : soit en tant que principe de justice fondamentale. À l'aide d'exemples comme la décision de 1988 dans l'affaire *R c Morgentaler*, [1988] 1 RCS 30, les litiges subséquents concernant la question de l'avortement et les projets de lois afférents prises comme études de cas, elle explore la différence qu'entraînerait la reconnaissance de l'égalité réelle comme principe de justice fondamentale en octroyant aux femmes un accès égal aux droits garantis par la *Charte*. En l'absence d'une telle reconnaissance, la réglementation et la coercition exercées par l'État sur les femmes par le truchement de leur capacité de reproduction sont normalisées et occultées, réduisant ainsi la justice à une simple équité procédurale et accommodant leurs prétendues fragilités physiques et mentales, besoins individuels et moralité personnelle et l'unique subordination des femmes par le biais de d'une grossesse imposée défie toute comparaison en vertu de l'article 15. Intégrer l'égalité réelle donnerait lieu à une interprétation de la « justice fondamentale » fondée sur la compréhension des relations sociales éthiques, de l'autodétermination et de l'inclusion dans la communauté, des conceptions qui sont étayées par la jurisprudence existante entourant l'article 7 et satisferaient le critère dégagé par l'arrêt *Renvoi sur la Motor Vehicle Act (C-B)*, [1985] 2 RCS 486, reconnu comme étant l'un des « préceptes fondamentaux de notre système juridique ». Ce constat juridique constituerait une reconnaissance de ce qui est réellement fondamental pour les femmes.

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Equality is the common bond which runs through our world idea of justice. It represents everything that is noble in a nation and it brings out the best in its people—respect, tolerance, fair play and a willingness to accommodate differences.¹

I. INTRODUCTION

As a feminist, I find that the principles of fundamental justice referenced in section 7 of the *Canadian Charter of Rights and Freedoms*² present a conundrum. On the one hand, they have been used to deny equal space for sexually assaulted women in the Supreme Court of Canada's section 7 landscape. In these cases, concerning the constitutionality of restrictions on past sexual history evidence, cross-examination and third-party record production, women have had their rights reduced to a quasi-constitutional privacy interest or an equality backdrop in the analysis of the principles of fundamental justice, whereas the historically venerated rights of the accused to cross-examine and to receive a fair trial are perceived as critical. As Margaret Denike has commented, justice in these cases has been firmly "embroiled in a tradition of liberalism that thinks of power reductivity in terms of a singular, 'dyadic' relation between the individual and the state."³

What fundamental justice has meant for women in sexual assault cases, therefore, is that even when statutory protections for sexual assault complainants

1 Catherine Fraser, "Judicial independence, impartiality and equality: A Canadian perspective" (Address delivered in Harare, Zimbabwe, 27 April 1998), [unpublished], cited in The Honourable Madame Justice Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality, and Justice" (2001) 10:1 *Journal of Social Distress and the Homeless* 87 at 100.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 7 reads: "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."

3 Margaret Denike, "Sexual Violence and 'Fundamental Justice': On the Failure of Equality Reforms to Criminal Proceedings" (2000) 20:3 *Canadian Woman Studies* 151 at 152.

are upheld: restrictions will be interpreted narrowly; relevance broadly construed; women's *Charter* rights given only cursory consideration under the notion of prejudice; rape myths presented as historical remnants rather than part of contemporary social narratives regarding women's sexuality; the fallacy that judicial discretion and direction can cleanse proceedings from discriminatory beliefs upheld; and full answer and defence used as a trump.⁴ With the downplaying of equality, power relations are reversed—without justification, women are clothed with the power of the state and males accused of sexual assault are constructed as oppressed. The actual context of *what happened to whom* and the social relations of power are lost in the abstract competition of rights and interests.

On the other hand, the principles of fundamental justice present tantalizing possibilities in the quest to use constitutional law to ameliorate the real conditions of disadvantage and subordination faced by women. Radha Jhappan suggests the pronouncement in *Reference re Section 94(2) of the Motor Vehicles Act*⁵ that the principles reflect not only procedural safeguards, but *substantive justice* (expressed as the “basic tenets of our legal system”⁶), is a way out of the stultified comparative analysis in equality cases⁷ that has stymied previous attempts to ensure the full social and

4 Feminist critique abounds with respect to the Supreme Court of Canada's sexual assault decisions concerning the use of past sexual history evidence, cross-examination of complainants and third-party record production in *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193; *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235; and *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478; as well as lower courts' application of subsequent legislative modifications found constitutional in *R v Darrach*, 2000 SCC 46, [2000] 2 SCR 443 and *R v Mills*, [1999] 3 SCR 668, 75 Atla LR (3d) 1 [*Mills*]. See e.g. Elizabeth A Sheehy, “Feminist Argumentation before the Supreme Court of Canada in *R v Seaboyer*; *R v Gayme*: The Sound of One Hand Clapping” (1991) 18 *Melbourne UL Rev* 450; Diana Majury, “*Seaboyer* and *Gayme*: A Study In Equality” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 268; Katharine D Kelly, “‘You must be crazy if you think you were raped’: Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials” (1997) 9:1 *CJWL* 178; Steve Coughlan, “Complainants' Records After *Mills*: Same As It Ever Was” (2000) 33 *CR* (5th) 300; Karen Busby, “Not a Victim Until a Conviction is Entered: Sexual Violence Prosecutions and Legal ‘Truth’” in Elizabeth Comack, ed, *Locating Law: Race/Gender/Class Connections*, 2d ed (Halifax: Fernwood Press, 2006) 258; Lise Gotell, “The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship” in Dorothy E Chunn, Susan B Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) 127; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22 *CJWL* 397.

5 [1985] 2 SCR 486, 24 DLR (4th) 536 [*Re BC Motor Vehicles Act* cited to SCR].

6 *Ibid* at 503.

7 See Diana Majury, “Equality Kapped; Media Unleashed” (2009) 27 *Windsor YB Access Just* 1 for a recent article that explains equality law's current state of unhelpful disarray. See also *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*] and *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], citing contemporary critiques of the Court's approach which turned the equality test into a set of rigid requirements, including proof of a violation of human dignity, demonstrated through a set of four contextual elements, and the existence of a mirror comparator group with whom the claimant's treatment can be compared. Ironically, as Majury points out, while the Court in *Kapp* served notice that the old formulaic approach to equality cases would no longer be applied, it also stirred up the muddy bottom of equality jurisprudence to the potential detriment of systemic substantive equality claims; a murkiness to which *Withler* has, arguably, also contributed.

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political participation of women through progressive *Charter* litigation.⁸ She states that, “[g]iven the myriad problems with the concept both theoretically and practically, it seems that women who aspire to equality with men lack ambition. In my view, we should aim higher: for justice.”⁹

Others, such as me, are unwilling to give up on equality, and, in fact, cannot fathom justice without substantive equality. Substantive equality refers to a conception of equality that is an “affirmation” of difference, rather than dismissing its significance or negating it entirely as in formal equality.¹⁰ In Diana Majury’s words:

Substantive equality recognizes that in order to further equality, policies and practices need to respond to historically and socially based differences. Substantive equality looks to the effects of a practice or policy to determine its equality impact, recognizing that in order to be treated equally, dominant and subordinated groups may need to be treated differently.¹¹

In the first case concerning section 15, *Andrews*, equality was described in relational terms, guaranteeing against the evil of oppression.¹² The majority exhorted courts to focus on “the impact of the law on the individual or the group concerned” and to ensure “equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.”¹³ This substantive equality approach to section 15 was recently reaffirmed in *Kapp* as “a template which subsequent decisions have enriched but never abandoned.”¹⁴ Further, as the Court reminded us in *Eldridge v British Columbia (Attorney General)*, the purpose of the right is not only to prevent discrimination, but is also to “ameliorate the position of

8 Radha Jhappan, “The Equality Pit or the Rehabilitation of Justice?” in Radha Jhappan, ed, *Women’s Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 175.

9 *Ibid* at 218-19.

10 See Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22:2 Dal LJ 5 where she describes substantive equality using this “affirmation” principle. This is not a criticism of formal equality; indeed, one can think of many different fora where such an articulation has meant meaningful and positive social transformation: see e.g. *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 where the common law opposite sex requirement for marriage was struck down. It is simply that formal equality is an inadequate vessel to contain a concept meant to ensure fully “the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration” (*Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 171, 56 DLR (4th) 1, McIntyre J [*Andrews*]).

11 Diana Majury, “The *Charter*, Equality Rights, and Women: Equivocation and Celebration” (2002) 40:4 Osgoode Hall LJ 297 at 305 [Majury, “Equivocation and Celebration”].

12 *Andrews*, *supra* note 10 at 35. Even though the recent case of *Withler*, *supra* note 7, raises concerns about the Court adding further complexity and ambiguity to equality law, one salutary aspect of the decision is that it downplays rigid comparisons between two discrete groups and arguably reinforces the notion of section 15 addressing social relations writ large.

13 *Ibid* at 165.

14 *Kapp*, *supra* note 7 at para 14.

groups within Canadian society who have suffered disadvantage by exclusion from mainstream society¹⁵ While one may debate the value of the enrichments the Court has provided in the years subsequent to *Andrews*, the more recent jurisprudence now invites us to go back to these first principles in examining substantive equality. This right is “inherently about change,” a rectification of group wrongs or, in other words, “a direct assault on the status quo.”¹⁶

Even theorists who do not identify as feminists appear to accept that justice and equality are inextricably linked. For example, Luc Tremblay¹⁷ indicates that the fundamental underpinnings of law are that it is formally just (roughly conforming to the notion of formal equality in which the law consistently and coherently treats likes alike), materially just (adhering to a substantive notion of justice that conforms to fundamental moral values of the law) and equitable (the notion of individualized justice, by which he means looking at the real circumstances of the affected group to see if the effect of the law is inequitable—reminiscent of the sensitivity to context required in the substantive equality analysis under section 15 of the *Charter*).¹⁸ If one accepts, therefore, a connection between fundamental justice and equality, the following questions arise in the context of constitutional litigation. In cases examining a deprivation of women’s right to liberty or security of the person, what difference would it make to have substantive equality recognized as a principle of fundamental justice? Can this be advanced in a principled manner? In turn, can substantive equality help realize the promise of *Re BC Motor Vehicles Act* by propelling more searching inquiries into the substance of laws through the principles of fundamental justice? Finally, what would this give us that we have not been able to obtain from either right alone?

In the rest of the article that follows, I will address these questions specifically as they relate to the issue of abortion and discuss *R v Morgentaler*¹⁹ as a case in point. While *Morgentaler* was a “win” for women, I will demonstrate the negative

15 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at 674, 151 DLR (4th) 577 [*Eldridge*], citing *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 66, 142 DLR (4th) 385. I leave aside the issue of whether the Court has intended to depart from this principle in recent judgments, in which it purports to assign section 15(1) the role of “preventing discriminatory distinctions” (*Kapp*, *supra* note 7 at para 16) and section 15(2) the role of “permitting governments to improve the situation of members of disadvantaged groups that have suffered discrimination in the past,” *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 39-40, [2011] 2 SCR 670 [emphasis in the original].

16 Rosalie Silberman Abella, “Diversity in Rights Theory: Untangling the Difference between Civil and Human Rights” (1998) 7 NJCL 255 at 259.

17 Luc B Tremblay, *The Rule of Law, Justice, and Interpretation* (Montreal: McGill-Queen’s University Press, 1997).

18 See my analysis of Tremblay’s work to this effect in Kerri A Froc, “Is the Rule of Law the Golden Rule? Accessing ‘Justice’ for Canada’s Poor” (2009) 87:2 Can Bar Rev 459 at 486-87.

19 [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* cited to SCR].

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implications for women in subsequent provincial legislative responses and proposed *Criminal Code* amendments, resulting from the Court's failure to address substantive equality within the analysis of the principles of fundamental justice. I will then go on to discuss the possibility of recognizing substantive equality as a principle of fundamental justice and discuss how that may be applied to future section 7 cases involving women.

II. *MORGENTALER* AND THE AUTONOMOUS PREGNANCY

The issue in *Morgentaler* was the constitutionality of legislation that restricted lawful abortions to those women who received a certificate from a therapeutic abortion committee of three physicians (excluding the doctor who would perform the abortion) from an accredited or approved hospital stating that continuing the pregnancy would endanger their life or health. The law limited access to abortions, caused significant delays for women accessing abortion services and, in many cases, required women to travel out-of-province or possibly out-of-country. The claim was that these restrictions violated women's right to liberty and security of the person under section 7, and their right to equality under sections 15 and 28.

The decision split four ways with decisions by Dickson CJC (as he then was) striking down the law (Lamer J concurring), Wilson J striking down the law, Beetz J striking down the law (Estey J concurring) and McIntyre J in dissent (La Forest J concurring) upholding the law. The decisions striking down the law were made exclusively on the basis of section 7.²⁰ The majority judgments of the male judges were grounded in the right to security of the person, though on different bases, while the judgment of Wilson J was grounded in women's liberty interests. Interpreting section 7 rights in the absence of substantive equality meant that women's interests in liberty and security of the person were abstracted to the point that they aligned with the traditional section 7 interests of men regarding the inviolability of their bodies and minds. This analysis robbed the Court of its ability to fully grasp the extent of the harm caused to women *as women* by criminalizing abortion. This continued in the fundamental justice analysis. It did not investigate the affront to dignity caused by state-forced pregnancies and the transference of women's ability to control their reproduction to men and "male" institutions, like the therapeutic abortion committees and Parliament. It also did not consider how criminalizing abortion would intensify the socio-economic subordination of women, and particular groups of women who are

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See *ibid* at 45 (Dickson CJC stated, "[d]uring oral submissions, however, it became apparent that the primary focus of the case was upon the section 7 argument," and it was unnecessary to address the "other *Charter* arguments" because of the Court's decision on section 7).

already constrained in their choices, to carry healthy children to term.²¹ As a result of this hyper-individualized analysis, the systemic impact of state and male interference with women's bodies upon their equality is obscured, and the notion of the foetus as another individual whose interests must be balanced by the state, is legitimized.

In the decision penned by Dickson CJC, he repeatedly emphasized that despite the need for a "purposive" analysis,²² a narrow approach to section 7 was required because it would not be "appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation"²³ and "no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy ..."²⁴ Dickson CJC then narrowed his task even further: if he found a violation of the right to (a) life, (b) liberty or (c) security of the person, he would not consider the existence of other violations before determining whether the infringement accorded with the principles of fundamental justice. He noted that this was possible because each portion of section 7 has "independent significance."²⁵

Thus, stripped of most of the context that would assist in interpreting the law's implications for women, Dickson CJC grounded his analysis upon abstract common law principles proscribing interference with one's body by others.²⁶ In this abstraction, women seeking abortions were implicitly compared to male subjects of criminal investigation, whose section 7 security of the person cases were cited by Dickson CJC, on the basis that their circumstances and those in the case at bar all related to "[s]tate interference with bodily integrity and serious state-

21 These constraints include vulnerability to poverty and lack of access to health care. In these circumstances, women may make reasonable assessments that a pregnancy would be a risk to their health, and to the health of their families once their children are born. A study of 30-year trends in US abortion rates found that while overall rates of abortion are falling, those who obtain abortions are increasingly likely to be women over 20, racialized women, and women who already have a child (Stanley K Henshaw & Kathryn Kost, *Trends in the Characteristics of Women Obtaining Abortions, 1974 to 2004* (New York: Guttmacher Institute, 2008), online: Guttmacher Institute <<http://www.guttmacher.org/pubs/2008/09/23/TrendsWomenAbortions-wTables.pdf>>). In Canada, a 2004 Statistics Canada report indicated that abortion was declining in every age group except women 40 and over, with the greatest decline occurring for women in their twenties. (Dawn Fowler, "Abortion in Canada Today: Who, What, Where?" (Paper delivered at the 20th Anniversary of *Regina v Morgentaler*: Of What Difference? Reflections on the Judgment and Abortion in Canada Today, delivered at the Faculty of Law, University of Toronto, 25 January 2008), 16 at 17). Almost 60 percent of women receiving abortions in the US were poor, which is up from 50 percent in 1994 (Rachel K Jones, Jacqueline E Darroch & Stanley K Henshaw, "Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001" (2002) 34:4 *Perspectives on Sexual and Reproductive Health* 226).

22 *Morgentaler*, *supra* note 19 at 52.

23 *Ibid* at 51.

24 *Ibid* at 46. See also *ibid* at 53.

25 *Ibid* at 52.

26 *Ibid* at 53.

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imposed psychological stress ... in the criminal law context.”²⁷ By the strength of this comparison, pregnant women seeking to terminate their pregnancies met the requirements for section 7 protection because the removal of decision-making power “threaten[ed] women in a physical sense,”²⁸ the stress and worry while waiting for the decision interfered with women’s psychological integrity, and the delay arising out of the mechanics of the therapeutic abortion committee process exacerbated the harm to both physical and psychological integrity.

The material effects of the law upon women’s lives was further removed from the analysis by the determination of Dickson CJC that whether the violation accords with fundamental justice would be based on the law’s process, not its substance; the Court did not wish to wade into the dangerous waters of public policy.²⁹ Accordingly, in order to complete his analysis of whether the criminal provision accorded with the principles of fundamental justice, he imagined a “hypothetical woman” (devoid of all identity markers except for gender and pregnancy),³⁰ who may find the defence provided by the section illusory. This is so because of the restrictions upon hospital accreditation and the membership of therapeutic abortion committees, and the fact that “health” lacked sufficient clarity for the committee to apply a coherent standard. Hence, she would not be assured of obtaining the benefit of the defence because of the manner in which “health” is interpreted by a particular local hospital, or she may have the burden of “travel[ling] long distances from home to obtain an abortion ...”³¹ The defence, therefore, was “practically illusory.”³²

27 *Ibid* at 56. See *R v Cadellu* (1982), 40 OR (2d) 128, 146 DLR (3d) 629 (H Ct J), cited in *Morgentaler*, *supra* note 19 at 54 (Ontario Parole Board did not provide a former inmate in a provincial correctional facility with the opportunity to be present at a hearing where his parole was revoked upon being charged with breaking and entering and another related offence); *R v Mills*, [1986] 1 SCR 863, 26 CCC (3d) 481, cited in *Morgentaler*, *supra* note 19 at 55 (a man charged with robbery was subject to a 10-month delay in trial due to the Crown’s negligent inaction); and *R v Therens*, [1985] 1 SCR 613, 18 CCC (3d) 481, cited in *Morgentaler*, *supra* note 19 at 55 (the accused was not advised of the right to counsel when asked to provide a breath sample after he drove his vehicle into a tree). My point is not that the Court was wrong to cite precedents relating to men—particularly in 1988 when few section 7 cases had been decided—nor is it that the issues in these other cases are not important. It is that the due process cases involving men who have either been convicted or charged with serious offences are being aligned with the circumstances of pregnant women seeking abortions without any recognition that there *are* different gender and power relations at play in these cases and this ought to be explored in delineating the contours of section 7.

28 *Morgentaler*, *supra* note 19 at 56.

29 *Ibid* at 53. The Court’s stated aversion for “tread[ing] the fine line between substantive review and the adjudication of public policy” (*ibid*) now rings hollow in the face of its subsequent decisions on the content of controversial laws. See e.g. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*] (cuthanasia); *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 (legislation reneging on pay equity); *Chaoulli v Québec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 (private health care insurance). Much like the Court’s flexibility in the assessment of facts, this “unpredictability of approach,” in fact, masks the exercise of judicial power (Danielle Pinard, “Institutional Boundaries and Judicial Review—Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence” (2004) 25 Sup Ct L Rev (2d) 213 at 215).

30 *Morgentaler*, *supra* note 19 at 70.

31 *Ibid* at 71.

32 *Ibid* at 70.

With respect to section 1, Dickson CJC expressly refused to “evaluate or assess ‘foetal rights’ as an independent constitutional value.”³³ Nevertheless, he defined the purpose of section 251 as balancing the “priorities and aspirations of pregnant women” and the government’s interest in protecting the foetus.³⁴ Thus, despite the fact that the Chief Justice purportedly refused to be drawn into this fraught issue, he ascribed weight to foetal interests in the constitutional analysis: this was “a valid government objective,”³⁵ with the lives and health of women a somewhat lesser “major factor.”³⁶ In the end, however, the labyrinthine therapeutic abortion committee process was the determining factor for Dickson CJC in concluding that the provision could not be saved under section 1.

Of all the self-imposed restrictions on the analysis, the one relegating the analysis of the *Criminal Code* section’s relationship with the principles of fundamental justice to purely procedural matters is the most difficult to understand from a purely legal standpoint (though clearly, one may see it as an attempt to forestall future accusations of judicial activism, which still arose subsequent to the judgment).³⁷ *Re BC Motor Vehicles Act*³⁸ emphasized the danger in setting up a dichotomy between procedural and substantive fundamental justice, which:

creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap

The task of the Court is not to choose between substantive or procedural content per se but to secure for persons “the full benefit of the *Charter*’s protection.”³⁹

Together, the procedural and substantive aspects of fundamental justice constituted “essential elements of a system for the administration of justice which is founded upon a belief in ‘the dignity and worth of the human person’ (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App III) and on ‘the rule of law’ (preamble to the *Charter*).”⁴⁰ In *Morgentaler*, Dickson CJC acknowledged this aspect of *Re BC Motor Vehicles Act*, but dismissed it as irrelevant because the case before him could be adjudicated firmly within the boundaries of the procedural aspect of section 7.⁴¹

33 *Ibid* at 74.

34 *Ibid*.

35 *Ibid* at 75.

36 *Ibid*. See *ibid* at 76 (Dickson CJC states, “[s]tate protection of foetal interests may well be deserving of constitutional recognition under s. 1”).

37 See Beverley Baines, “Abortion Judicial Activism and Constitutional Crossroads” (2004) 53 UNBLJ 157.

38 *Re BC Motor Vehicles Act*, *supra* note 5 at 486.

39 *Ibid* at 498-99.

40 *Ibid* at 503.

41 *Morgentaler*, *supra* note 19 at 53.

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Without considering the substantive content of fundamental justice, the right to security of the person is, as Lamer J feared in *Re BC Motor Vehicles Act*, rather emaciated.⁴² The ruling of Dickson CJC suggests that women's security of the person may be overborne, so long as determinations are made by a group or individual to which women have reasonable access, with due dispatch. There is no impediment to these determinations being based on public policy reasons that are not clearly articulated and possibly discriminatory.⁴³ Violating the right to life, liberty and security of the person for reasons that are the antithesis of law and justice cannot be considered in accordance with the rule of law, even if a clear and formally fair process is followed.⁴⁴ Simply because the violation of the right is found not to be in accordance with the procedural elements of fundamental justice, a court cannot be absolved from considering the substantive elements. Otherwise, the very right that is being protected is trivialized, and the courts do not provide sufficient guidance to the legislators. In *Morgentaler*, the unanswered question was whether interference with women's ability to choose to have an abortion is so offensive to section 7 that it could not accord with fundamental justice in any circumstance, or only where substantial delay and difficulty in obtaining the procedure results from the law.⁴⁵

The judgment of Beetz J was also abstract and process-oriented, but focused upon the narrower contention that security of the person under section 7 "must include a right of access to medical treatment for a condition *representing a danger to life or health* without fear of criminal sanction."⁴⁶ However, because of the state's interest in the foetus, Beetz J accepted that limits upon women's section 7 rights are necessary to verify that this risk to life or health is legitimate. As he wrote, "Parliament is justified in requiring a reliable, independent and medically sound opinion as to the 'life or health' of the pregnant woman in order to protect the state interest in the foetus"⁴⁷

42 *Supra* note 5 at 502-03.

43 Even amongst the concurring judgments in the case, there is ambiguity as to whether the purpose of section 251 was to protect the foetus or to balance the interests of the pregnant woman and the foetus. The discriminatory messages being sent by denying medical service to pregnant women include: women are selfish (and therefore do not consider their unborn children's needs), women seek abortions for trivial reasons and women cannot be counted on to make reasonable decisions in consultation with their doctor.

44 See Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, translated by Deborah Lucas Schneider (Cambridge: Harvard University Press, 1991) at xvii, regarding whether "a law [has] to be compatible with basic moral conceptions in order to be truly law," citing HLA Hart, "Positivism and the Separation of Law and Morals," (1958) 71:4 Harvard L Rev 593 and Lon L Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," (1958) 71:4 Harvard L Rev 630. The focus of Müller's book is the courts in Nazi Germany that continued to operate in accordance with a superficially neutral and purportedly "legal" process, though the "laws" themselves, as well as their application, aided in mass genocide.

45 See e.g. *Morgentaler*, *supra* note 19 at 73 where Dickson CJC pointed out that a substantive evaluation of the requirements of fundamental justice might have the result of "leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice."

46 *Ibid* at 81 [emphasis added].

47 *Ibid* at 35.

His contention was implicitly based upon a number of gendered assumptions for which no proof was provided. He tacitly accepted that women may seek abortions for frivolous or selfish reasons, *and* that they may deceive their doctors into performing unnecessary procedures, as this is the only possible justification for requiring an additional independent opinion showing medical risk.⁴⁸ He further accepted that state intervention is necessary to resolve the purported conflict between women's selfish desires to terminate pregnancies in the absence of medical risk and foetal interests. The tone he adopted in making these determinations is one of woman-blaming; he stated the section "seek[s] to make therapeutic abortions lawful and available but also to ensure that the *excuse of therapy will not be abused* and that lawful abortions be safe."⁴⁹ With reasoning reminiscent of *Bliss v Canada (Attorney General)*,⁵⁰ he stated that enforced pregnancy (maintained by the state through the potential of criminal sanction), in itself, does not violate security of the person: "[t]he state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health."⁵¹

In the end, Beetz J agreed, at least with respect to those legitimately fearing for their lives or health due to a pregnancy, that the experience of women seeking abortions could be sufficiently generalized so as to include them as part of the group entitled to section 7 protection:

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person.⁵²

Accordingly, he found that the delay caused by section 251's *particular* system of independent oversight through therapeutic abortion committees was traumatic, potentially dangerous and violated women's physical and psychological security in a manner contrary to the principles of fundamental justice. However, he did not attribute any physical or psychological trauma, in and of itself, to having an unwanted pregnancy that a woman is unable to terminate due to the threat of criminal charges.

48 See *ibid* at 112 where Beetz J notes, again without proof, that the physician of the woman seeking the abortion cannot be objective: "The practicing physician is, however, properly excluded from the body giving the independent opinion."

49 *Ibid* at 88 [emphasis added].

50 [1979] 1 SCR 183, 92 DLR (3d) 417 [cited to SCR]. The apocryphal passage finding that unemployment insurance provisions that denied certain benefits to pregnant women did not constitute sex discrimination under the *Bill of Rights* states at 190: "these provisions form an integral part of a legislative scheme enacted for valid federal objectives and they are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature." This finding was overturned, *inter alia*, on the basis of subsequent section 15 jurisprudence in *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

51 *Morgentaler*, *supra* note 19 at 90. Similar reasoning was also employed by McIntyre J in dissent.

52 *Ibid*.

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Despite the fact that equality is not mentioned within his fundamental justice analysis, Beetz J did recognize that the boundaries on abortion access might be drawn more broadly if section 251 was evaluated from the perspective of another right; namely, that of liberty.⁵³ However, he said that security of the person was sufficient to dispose of the case. The analysis of Beetz J, like that of Dickson CJC, provided no rationale for preferring the security analysis over the liberty interest, and does not contemplate that excluding consideration of this and other rights might diminish the significance and importance of the rights violation.

The problems with truncating the fundamental justice analysis arguably spilled over into the Court's consideration of section 1. Beetz J differed from Dickson CJC in that he found that the protection of the foetus was the primary objective of the law. In doing so, he uncritically appealed to the history of this "*important and distinct interest*"⁵⁴ that "always has been, a valid objective in Canadian criminal law,"⁵⁵ and characterized the health of pregnant women as an "ancillary"⁵⁶ objective. Nevertheless, he found some of the restrictions in section 251, such as the requirement for the therapeutic abortion committee to be at a different hospital than the one where the abortion would be performed, unnecessary to achieve the primary objective and undermined women's health through delay. Accordingly, these features failed the "rational connection" leg of the *Oakes* test.⁵⁷

The view of Wilson J was that the other two decisions, which found the legislation unconstitutional, neglected the logically prior issue; namely, whether *any* constraints on obtaining or performing an abortion would comport with section 7.⁵⁸ In so arguing, she hinted that a broader interpretation of the principles of fundamental justice may be required, but in relation to an integrative approach to the rights encompassed in the section:

If either the right to liberty or the right to security of the person *or a combination of both* confers on the pregnant woman the right to decide for herself (with the guidance of her physician) whether or not to have an abortion, then we have to examine the legislative scheme not only from the point of view of fundamental justice in the procedural sense but in the substantive sense as well.⁵⁹

53 *Ibid* at 113-14.

54 *Ibid* at 112 [emphasis added].

55 *Ibid* at 124. Given the law's historic co-optation of concepts from the health care field to increase its coercive power over women, the reliance of Beetz J upon the tradition and history of state interest in foetal viability and preservation to add legitimacy to its criminalization of abortion is problematic, to say the least: see Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) regarding the interaction of medical knowledge regarding the viability of the foetus with the criminalization of abortion.

56 *Morgentaler*, *supra* note 19 at 122.

57 *R v Oakes*, [1986] 1 SCR 103 at 112, 26 DLR (4th) 200 [*Oakes*].

58 *Morgentaler*, *supra* note 19 at 161-62.

59 *Ibid* at 163 [emphasis added].

The decision of Wilson J relied heavily on the classical liberal conception of liberty, with its emphasis on the individual and the entitlement to be free from state interference:

An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the [individual's] values, goals and aspirations...subordinated to those of the collectivity.... The *Charter* reflects this reality.... [T]he rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.⁶⁰

Some have suggested that her description of an individual—as not being “a totally independent entity disconnected from the society in which he or she lives”⁶¹—injects a feminist appreciation of interconnectivity into section 7 that is absent from classical liberal theory.⁶² However, this is not entirely accurate. The liberal notion of the social contract presupposes a connection to the community and the compromises that an autonomous individual must make within that social structure in order to maximize self-interest.⁶³ Further support that Wilson J is not deviating from the classical liberal sense of liberty is her repeated emphasis on the primacy of the individual within the *Charter*⁶⁴ and his or her entitlement to self-expression and self-actualization, which recognized that “the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these

60 *Ibid* at 164.

61 *Ibid*.

62 Hester Lessard, “Relationship, Particularity, and Change: Reflections on *R. v. Morgentaler* and Feminist Approaches to Liberty” (1991) 36:2 McGill LJ 263 at 269.

63 See Jean-Jacques Rousseau, *On the Social Contract, Discourse on the Origin of Inequality, Discourse on Political Economy*, translated by Donald A Cress (Indianapolis: Hackett Publishing Company, 1983) at 24. Rousseau’s notion of the social contract is that individuals in society agree to be bound by rules, such as laws, constraining their behaviour because these common constraints maximize autonomy for all: “Finally, in giving himself to all, each person gives himself to no one. And since there is no associate over whom he does not acquire the same right that he would grant others over himself, he gains the equivalent of everything he loses, along with a greater amount of force to preserve what he has.” Thus, while liberalism might inherently be suspicious of social interconnectivity due to the potential of autonomy being curtailed through others’ self-maximizing behavior, it is wrong to say that this philosophy ignores its existence. See also Roberto Mangabeira Unger, “Liberal Political Theory” in Allan C Hutchinson, ed, *Critical Legal Studies* (Totowa: Rowman & Littlefield Publishers, 1989) 15 at 18, in relation to “prescriptive rules” or laws.

64 See especially *Morgentaler*, *supra* note 19 at 165 citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346, (1985) 60 AR 161, which refers to the centrality of individual conscience and judgment as the “*sine qua non* of the political tradition underlying the *Charter*,” like the primacy of the First Amendment in US constitutional tradition. See also *Morgentaler*, *supra* note 19 at 166 citing *R v Jones*, [1986] 2 SCR 284 at 318-19, 31 DLR (4th) 569, referring to John Stuart Mill for the proposition of liberty being the freedom to pursue “our own good in our own way ... so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.”

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choices to any one conception of the good life.”⁶⁵ Not surprisingly, therefore, Wilson J firmly placed her construction of liberty within the liberal tradition as granting “the individual a degree of autonomy in making decisions of fundamental personal importance.”⁶⁶

However, it is undeniable that the judgement of Wilson J is more nuanced than the other two majority judgments and is ground-breaking for her attempt to gender section 7 rights. She recognized that a woman’s decision to terminate a pregnancy has no comparison to any decision that a man would face, and that a man’s response to this difficult issue will inevitably reflect the fact that “he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.”⁶⁷

She also recognized that, historically, civil rights have not been about women’s rights, and that “women’s needs and aspirations are only now being translated into protected rights.”⁶⁸ Accordingly, when liberty is viewed as an aspect of human dignity and worth, the right to reproduce or not is “properly perceived as an integral part of modern woman’s struggle” to assert equal access to these entitlements.⁶⁹ She found that section 251 violates women’s right to liberty because it puts these fundamental decisions in the hands of a committee.⁷⁰

Wilson J, like Dickson CJC, relied upon the historical protection against forcible medical treatment by the state to find that the provision also violated the right to security of the person. Unlike his judgment, she did not find that the flaw in the scheme boiled down to the procedure nor did she focus exclusively upon the impact when women are denied “their own priorities and aspirations”⁷¹ Her conceptual frame was larger. She directly pointed to the interference in women’s basic humanity caused by the state when it coerces them to carry pregnancies to term:

She is truly being treated as a means—a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?⁷²

With respect to fundamental justice, she agreed that the section does not comport with procedural fairness, but she also found that the violation of funda-

65 *Morgentaler*, *supra* note 19 at 166.

66 *Ibid.*

67 *Ibid* at 171.

68 *Ibid* at 172.

69 *Ibid.*

70 *Ibid.*

71 *Ibid* at 63.

72 *Ibid* at 173. See also *ibid* at 179 for the reference by Wilson J to the treatment of others as a means to an end as a denial of their “essential humanity.”

mental justice is due to its interference with women's section 2(a) rights to freedom of conscience and religion, as abortion is "essentially a moral decision . . .".⁷³ She cited the approach in *R v Lyons*⁷⁴ that "the rights enshrined in the *Charter* should not be read in isolation."⁷⁵ In accordance with this reasoning, she found that deprivation of a section 7 right that also violated another *Charter* right would not be consonant with fundamental justice.

However, in the section 1 analysis, Wilson J appeared to revert to the conflicting rights paradigm of Dickson CJC and Beetz J, arguing that protection of the foetus was a valid legislative objective and agreeing that "some statutory control may be appropriate."⁷⁶ She found that an appropriate level of control might be determined by a "developmental view of the foetus . . . [which] supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages."⁷⁷ Section 251 made no such distinction and because it adopted an excessively restrictive approach through all stages, it could not be justified under section 1.

In sum, albeit to varying degrees, all of the majority judgments found a violation of section 7 because of their identification of women's circumstances as those abstract interests historically known to law—namely male interests in the inviolability of the body and access to medical care. However, in the judgments penned by Dickson CJC and Beetz J, they are able to carry the analogy only to the extent of finding a *prima facie* violation of the right (and McIntyre J, in dissent, implicitly rejected this analogy *in toto*).⁷⁸ This analogy is stretched to the breaking point when considering the undeniably unique biological circumstances of pregnancy and the history of coercive state control over women's reproductive capacity.⁷⁹ In circumstances where state regulation over pregnancy is normalized and regularized by appealing to notions of procedural fairness, the incongruence of permitting control over women's bodies with liberal notions of the inviolability of the male body is made invisible within the principles of fundamental justice.

73 *Ibid* at 175-76.

74 *R v Lyons*, [1987] 2 SCR 309, (1988) 82 NSR (2d) 271.

75 *Morgentaler*, *supra* note 19 at 175.

76 *Ibid* at 181.

77 *Ibid* at 183.

78 See *ibid* at 148 for the pronouncement of McIntyre J: "I would conclude, that save for the provisions of the *Criminal Code*, which permit abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including s. 7, creates no further right."

79 For women identified as white, this took the form of ensuring their availability as vessels to produce legitimate offspring; with respect to racialized and indigenous women, the motivation was to limit their reproductive capacity as a means of ensuring the existence of Canada as a white, colonized nation. See *infra* note 89 and Karen Stote, "The Coercive Sterilization of Aboriginal Women in Canada" 36:3 *American Indian Culture and Research Journal* [forthcoming in 2012]. See also Sanda Rodgers, "Misconceptions: Equality and Reproductive Autonomy in the Supreme Court of Canada" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis, 2006) 271 at 272-75 for a comprehensive (and perhaps, exhaustive) list of how the state perpetuates women's subordination through their reproductive capacity.

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Wilson J's analysis accords greater protection for women but arguably only through her ability to align more closely women's interests to historically based understandings of dignity, autonomy and privacy as negative rights that protect against state intrusion. Further, by bringing women's section 2(a) rights into the analysis, she is able to breathe life into the formalistic procedural approach to fundamental justice that the two other judgments construct. Nevertheless, without the focus on historical context and social relations that would be supplied by substantive equality, her judgment and the other judgments striking down the law rely on an individualized analysis, focussing on women's *reactions* to the state imposed process and whether the resulting harm rises to the level of a section 7 violation. The systemic oppression of women through their reproductive capacity is not the question to consider, but rather how frail bodies, needs and personal morality ought to be accommodated.⁸⁰ All judges readily accepted the need for some state oversight in order to ensure that women and their doctors take foetal interests into account. This normalization of state regulation of women's reproductive capacity would have been challenged had a substantive equality analysis been undertaken within the fundamental justice analysis. The decision of Wilson J, by introducing the premise that other rights may be considered within the principles of fundamental justice, suggests this possibility but, in the end, falls short of truly incorporating a substantive equality analysis, leading to a stunted version of section 7 rights for women.⁸¹

It is not a new assertion that the structure of the majority and concurring decisions left much to be desired in terms of proscribing future state or male interference with women's choices to carry their pregnancies to term. For instance, Shelley Gavigan directly connects the manner in which the *Morgentaler* decision was structured to abortion funding restrictions and she maintains the Court's "unequivocal commitment ... to 'foetal interests' or the 'state's interest in the foetus'" provided encouragement for abortion limitations beyond the federal sphere.⁸²

80 See Lessard, *supra* note 62 at 268 where the author expresses this (at least with respect to the judgments relying upon security of the person) as "comfortably accord[ing] with cultural constructions of women as passively enmeshed in the biological and emotional imperatives of their bodies." She further notes at 269 that Wilson J "only partially succeeds in reconciling a responsiveness to women's particularity with the abstract calculations of rights discourse ... [and] struggles to take account of the inadequacy of that [classical liberal] vision as a description of social relations."

81 But see Chris Kaposy & Jocelyn Downic, "Judicial Reasoning about Pregnancy and Choice" (2008) 16 Health LJ 281. Kaposy & Downic maintain that the influence of the liberty analysis of Wilson J has eclipsed the majority's security of the person framework in subsequent decisions on reproductive freedom. It is for this reason that I believe we must look critically at the decision of Wilson J, in addition to lauding the positive aspects of her decision.

82 Shelley AM Gavigan, "Morgentaler and Beyond: Abortion, Reproduction, and the Courts" in Janine Brodie, Shelley AM Gavigan & Jane Jenson, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 117 at 126-27. See also Rodgers, *supra* note 79 at 278.

Most Canadian feminist theorists writing about the issue suggest that these problems may have been avoided if the decision addressed section 15.⁸³ However, I maintain that simply adding a section 15 analysis would not necessarily have resulted in a more satisfactory decision. Arguably, there were some benefits to Wilson J analyzing the case purely on the basis of section 7, namely that it avoided the impossible: the direct comparison to men that would be required under section 15.⁸⁴ Following from the Supreme Court's subsequent section 15 decisions regarding the need for mirror comparators whose composition is derived from the impugned legislation and the legislator's intent, one can readily imagine judicial acceptance of an unhelpful mirror comparator in the constitutional challenge of the criminal prohibition of abortion: a person with a physical condition, other than an unwanted pregnancy, seeking treatment that the state has a significant interest in restricting to those legitimately entitled to obtain it on the basis of a threat to life and health.⁸⁵

One could strain to show that this comparator group is treated differently in that the state always has a significant economic interest in only funding medical treatments that are helpful to life and health, yet it does not criminalize other persons seeking treatment for reasons it deems not sufficiently connected to health and life.⁸⁶ However, this interest does not have the same *gravitas* as the state's

83 See Baines, *supra* note 37 at 179. Most of the scholars cited by Baines are not clear whether they are asserting that the decision should have been based purely upon section 15, or that a section 15 analysis should have been attempted in addition to a section 7 analysis. However, none appear to advocate for substantive equality as a principle of fundamental justice.

84 See Majury "Equivocation and Celebration," *supra* note 11.

85 In *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657, the parents of autistic children claimed that the British Columbia government's refusal to fund a particularly successful form of autism therapy for children constituted discrimination on the basis of disability. The government's rationale for the distinction—the newness of the treatment—is embedded within the Supreme Court of Canada's near incomprehensible description of the appropriate comparator at para 55: "[A] non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required." Not surprisingly, the Court indicated, at para 58, that there was "no evidence" as to how the government responded to requests for treatment by the comparator group, and therefore the claimants could not show discrimination. See Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 Windsor YB Access Just 111 at 132, where the authors criticize *Auton* for, among other things, "bring[ing] the government's justificatory language into the equality analysis" and its essentially formalist nature, "conceal[ing] the children—the claimants" by focussing exclusively on the treatment. Perhaps *Withler*, *supra* note 7 will even out some of the rough edges of the comparative analysis by abandoning the necessity for mirror comparators. However, I continue to question the Court's ability to recognize section 15(1) violations caused by oppression that has no equivalent in other groups and is so embedded within social relations so as to be almost considered natural, such as patriarchal state control over women's reproductive capacity.

86 See Jenny Morgan, "Foetal Imaginings: Searching for a Vocabulary in the Law and Politics of Reproduction" (2000) 12:2 CJWL 371. She maintains that comparing women seeking abortions with other patients seeking medical treatment is also dangerous in that it ignores the complexity inherent in the maternal-foetal relationship, thereby perpetuating the mythology of separation. The comparison could also be appropriated by governments who seek to enact funding restrictions for abortions outside hospitals claiming that it is a medical service like any other. Thus, they could assert that governments are entitled to administer such programs in accordance with governmental spending priorities.

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presumed legitimate moral imperative to protect the foetus that is replete throughout all of the *Morgentaler* decisions, whether they are the majority, concurring or dissenting opinions. Even without employing a strict mirror comparator, it would have been extremely difficult to compare women to others enjoying better treatment because no such group existed (at least, one whose circumstances would have been deemed sufficiently comparable in the eyes of the Court in light of the legislative purpose).⁸⁷ Thus, it may be overly optimistic to say that section 15 alone could accomplish what the section 7 analysis did not.

However, a substantive equality analysis under section 7 would have been more effective in forestalling future attempts to limit women's access. Such an approach would perhaps result in less insistence upon women aligning themselves with the (male) classical liberal subject⁸⁸ and instead ask what "liberty," "security" and "fundamental justice" mean for women as a group in particular places and times. None of the judgments contained in *Morgentaler* consider the unique oppression that befalls women who are forced into childrearing roles by the state, and the historic coercion of women by the state based upon their reproductivity that is embedded in

87 *Withler*, *supra* note 7 at para 59, acknowledges this criticism of mirror comparators, namely that the claim may fail if no one is like the claimant group for the purposes of comparison. Nevertheless, the decision emphasizes the continued salience of comparison under section 15 and the primacy of the legislature's perspective in conducting the comparative analysis. Therefore, it remains to be seen whether this acknowledgment will become more than a rhetorical flourish in cases that defy comparison.

Regarding impediments to abortion access outside the criminal law context, I do not deny the validity of the perspectives of other scholars who argue, "[d]iscriminatory delivery of medically necessary health services needed only by women is clear sex discrimination," see Sanda Rodgers, "Abortion Denied: Bearing the Limits of Law" in Colleen M Flood, ed, *Just Medicare: What's In, What's Out, How We Decide* (Toronto: University of Toronto Press, 2006) 107 at 121. See also Martha Jackman, "Health Care and Equality: Is there a Cure?" (2007) 15 Health LJ 87 [Jackman, "Health-care and Equality"]; and Joanna N Erdman, "In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada" (2007) 56 Emory LJ 1093 [Erdman, "Abortion, Equality, and Community in Canada"]. My point is that when dealing with treatment that is uniquely experienced by women, comparison that is tightly focused on legislative objectives would likely fail to reveal this discrimination. Further, with the decriminalization of abortion, Kaposy & Downie, *supra* note 81 at 295 note the tendency in judicial reasoning to assume that "choice is guaranteed as long as the state does not prohibit abortion through the criminal law." I worry about how this tendency would interact with the well-documented phenomenon of the court treating "choice" as if it is coextensive with equality for the purposes of section 15. See e.g. Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in Law, 2002" (2002) 20 Sup Ct L Rev (2d) 93 at 96 and Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 209.

88 A "holistic individualism," which James Olchowy suggests could be developed through "an expansive reading" of section 7 and section 15 of the *Charter*, would recognize that forcing subordinated groups to take on the characteristics of the dominant is itself a denial of autonomy: see James R Olchowy, "Inside McClung J.A.'s 'Closet' in *Vriend v. Alberta*: The Indignity of Misrecognition, the Tool of Oppressive Privacy, and an Ideology of Equality" (1999) 37:3 Alta L Rev 648 at 669. The author borrows the term "holistic individualism" from Charles Taylor, *Philosophical Arguments* (Cambridge: Harvard University Press, 1995).

the very history of abortion regulation.⁸⁹ It is not the case that this is simply another incursion by the state into the personal autonomy and physical and psychological integrity of those who happen to be women; this incursion takes a particular form *because* of the gender of the affected persons. Diana Majury points out other lacunae in *Morgentaler* resulting from the failure to include an equality analysis: the lack of discussion of the constraints on liberty imposed by access problems, particularly for poor and low-income women, or abortions forced upon young women, racialized women, women with disabilities and poor women.⁹⁰ In essence, the exercise of true liberty and autonomy must be based on equality,⁹¹ the absence of which is fundamentally unjust.

The failure to consider substantive equality as integral to fundamental justice—that is, to see the state's attempt to regulate women's reproduction as the further entrenchment of their patriarchal subordination—has been the poison in the chalice of the *Morgentaler* decision. While some may argue that the equality value was embedded in the majority's sensitive discussion of women's section 7 rights in *Morgentaler*, the failure to analyze it as a substantive fundamental justice principle has meant that judicial examination of women's *Charter* rights vis-à-vis abortion is virtually nil outside the criminal context. Thus, the extent to which the state is able to limit access to abortion apart from criminalization, whether by omission in failing to ensure the availability of abortion, or commission in the denial of funding, is still undecided.⁹² Further, the emphasis on fitting pregnant women into the liberal version of autonomy has permitted courts to imagine the foetus as potentially having its *own* individualized interests, separate and oppositional from that of pregnant women.⁹³

89 See Lorraine Eisenstat Weinrib, "The *Morgentaler* Judgment: Constitutional Rights, Legislative Intention, and Institutional Design" (1992) 42:1 UTLJ 22 at 53 and Sanda Rodgers, "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy*, 2d ed (Markham: Butterworths Canada, 2002) 331 at 331-32. These authors report how abortion legislation was motivated by the desire to give the male medical profession exclusive control over abortion, and to ensure that white, middle class women fulfilled their childbearing "obligations," while other women, such as poor, aboriginal and racialized women were coerced into limiting their reproductive capacity.

90 Majury, "Equivocation and Celebration," *supra* note 11 at 318.

91 Gwen Brodsky, *The Transformation of Canadian Equality Rights Law* (Doctor of Jurisprudence Dissertation, York University, Graduate Program in Law, 1999) [unpublished].

92 See Erdman, "Abortion, Equality, and Community in Canada," *supra* note 87 at 1094. The author describes how decriminalization immediately led to provinces imposing restrictions on women's access to abortion.

93 See Morgan, *supra* note 86 at 382; Erin Nelson, "Reconceiving Pregnancy: Expressive Choice and Legal Reasoning" (2004) 49:3 McGill LJ 593 at 612. Both Morgan and Nelson note a more nuanced approach is that adopted by LEAF in its intervention in *R v Sullivan*, [1991] 1 SCR 489, 63 CCC (3d) 97, a case concerning criminal negligence charges brought against two midwives for causing the death of a foetus. In its factum, LEAF advocated for recognition of the foetus as "in and of the woman," emphasizing both the fact that the foetus is contained in the body of the woman and also their unique interconnection, such that the foetus cannot be viewed either as a separate entity or as "just another body part." Morgan states that a nuanced approach would recognize the moral decisions associated with deciding whether to carry a pregnancy to term but also that a woman "must have the ultimate responsibility to make the decision about her own medical treatment" See Morgan, *supra* note 86 at 385.

The various “abortion” cases since the 1988 *Morgentaler* decision bear out this critique. For instance, in *Tremblay v Daigle*,⁹⁴ where the Supreme Court overturned a lower court injunction sought by a woman’s abusive boyfriend⁹⁵ prohibiting her from obtaining an abortion, equality is not mentioned at all. The Court declined the invitation by interveners to address the potential conflict of an injunction with women’s section 7 rights as per *Morgentaler* and instead focused on the abstract determination of the status of the foetus. The Court found that the foetus has no legal existence under the Québec *Charter of Human Rights and Freedoms* and the *Civil Code* as a matter of statutory interpretation or under the common law by examining foetal property and tort rights as a “legal fiction” dependent upon live birth to be operative. The Court appeared solicitous about the need to forestall future use of the legal process in similar circumstances by *individual* men. It therefore addressed the question of men’s rights broadly, pronouncing that there is no legal basis for the claimed rights of a potential father in a foetus.⁹⁶ The Court, however, was not similarly disposed to prevent *state* use of power to limit access to abortion or to sanction its failure to protect pregnant women from abuse by men via the court system. While it is true that the *Charter* cannot apply directly to court decisions,⁹⁷ the fact that the Court did not even see fit to pronounce on the issue of whether courts ought to consider women’s constitutional rights in granting injunctions constraining decisions over their bodies and personal lives, particularly where the applicant alleged his own *Charter* violation, is surprising.

The only place *Charter* rights are explicitly discussed in *Daigle* was with respect to the application of section 7 to the foetus. Similar to the abstract reliance upon the legal principle of “mootness” to side-step this question in *Borowski*,⁹⁸ the

94 [1989] 2 SCR 530, 62 DLR (4th) 634 [*Daigle*].

95 The pattern of abuse in the relationship is obscured in the judgment by abstract references to the fact that the relationship “deteriorated” and that Daigle “alleges” physical abuse, referring only to two specific incidents where he pushed her down, and another where he grabbed her throat: see *ibid* at 536. More details about the repetitive nature of Tremblay’s abuse over their 5-month relationship are provided in the judgment relating to his dangerous offender hearing: *R v Tremblay*, 2000 ABQB 551, [2001] 2 WWR 722. He was instead designated a “long term offender” and was required to report his relationships with women to his parole supervisor: *R v Tremblay*, 2008 ONCA 24 at para 9, 89 OR (3d) 48. In the most recent application to have him designated a dangerous offender for his serial abuse of women, the judge dismissed the application on the basis that he did not meet the dangerous offender criteria for all women but only for those with whom he cohabits: *R v Tremblay*, 2010 ONSC 486 at para 143.

96 *Daigle*, *supra* note 94 at 572.

97 See *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

98 *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231. In *Borowski*, the issue of whether provisions of the *Criminal Code* permitting abortions approved by therapeutic abortion committees violated a foetus’s section 7 and section 15 rights was found to be moot as a result of *Morgentaler*, invalidating the entirety of section 251. The Court protested that the striking down of section 251 meant that it would be required to answer the constitutional question “at large” (*ibid* at 364). It stated: “The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do” (*ibid* at 365). It further noted that “[i]n a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7” (*ibid* at 364).

Court refused to decide whether the foetus had *Charter* rights on the basis that it should avoid “any unnecessary constitutional pronouncement”⁹⁹ in the absence of state action. The disappearance of equality from the issue of abortion thus disengaged the Court from the systemic questions of how Jean-Guy Tremblay was allowed to continue his abusive control over his girlfriend through court processes without Chantal Daigle being able to call upon any assistance from the state to prevent such action. It left open the issue of whether the state, either by empowering fathers or stepping into their shoes as a type of foetal guardian,¹⁰⁰ has the power to control women’s reproductive choices by invoking foetal interests as constitutionally and legally significant.¹⁰¹

The 1993 *Morgentaler* decision concerned the constitutionality of Nova Scotia regulations restricting the performance of abortions to hospitals and denying medical services insurance coverage for abortions performed outside of hospitals.¹⁰² Therefore, state action was clearly at issue. Nevertheless, women’s *Charter* rights were no more apparent here than in *Daigle*. The Court, again, reiterated the entitlement of the federal government to restrict abortion based on foetal interests, underscoring that promoting the life and health of women was only an ancillary objective. It further stated that provinces were permitted to legislate in the area so long as the legislation is “solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as health, hospitals, the practice of medicine and health care policy.”¹⁰³

The Court found, however, that this was an attempt to legislate in the criminal area by restricting access to abortions, as demonstrated by the regulations replicating the wording of the defunct *Criminal Code* section 251 and coming as it did after Doctor Morgentaler’s announcement of a freestanding abortion clinic. Sopinka J, for the Court, picked up on the language of Wilson J in the 1988 *Morgentaler* decision and pronounced that abortion was a moral issue, “one of the classic ends of the criminal

99 *Daigle*, *supra* note 94 at 571.

100 This point is made by Lessard, *supra* note 62 at 297: “In addition, nothing in the judgment prevents future legislative action to create fetal or parental rights No doubt confronted with a clear legislative articulation of fetal or paternal rights, the courts would find it harder to evade the issue; s. 7 of the *Charter* would be clearly implicated by the state action of the legislature. However, one may ask why the linkage between the state and Tremblay so clearly perceived and stated by Daigle is so invisible to the Court?”

101 This issue was side-stepped again in *Winnipeg Child and Family Services (Northwest Area) v G (DF)*, [1997] 3 SCR 925, a case where the state sought a court order to detain a pregnant aboriginal mother addicted to glue sniffing for treatment until the birth of her child. The Court based its decision on the abstract notion of whether the *parens patriae* jurisdiction permitted it to make such an order, almost completely devoid of any critical gender and race analysis and without considering the section 7 and section 15 implications of the case. This was despite the exhortations by various interveners in the case to address the *Charter*. Again, the failures of the 1988 *Morgentaler* decision to address this head on and, in particular, conduct a historical analysis of the state’s control of women’s reproductive capacity, especially with respect to particularly vulnerable groups of women, means that this issue will be litigated and re-litigated.

102 *R v Morgentaler*, [1993] 3 SCR 463, 125 NSR (2d) 81.

103 *Ibid* at 493-94.

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law,¹⁰⁴ omitting to mention that this was said in the context of *women's rights* to determine personal morality. Thus, the case served to solidify the state's interest in legislating on abortion and to move the issue from one primarily concerning women's rights to one of morals (federal) or provision of health care (provincial). Accordingly, entitlement to legislate restrictions on access is again, like the 1988 *Morgentaler* decision, presumed. This is notwithstanding that the particular piece of legislation was invalidated because of the particular wording and timing chosen by the provincial legislators.

Thus, 20 years after the 1988 *Morgentaler* decision, the question of whether the provinces can validly restrict abortion access remains in dispute. In *Morgentaler v Prince Edward Island (Minister of Health and Social Services)*,¹⁰⁵ regulations limiting funding of abortions to those deemed by a bureaucratic agency to be medically required and performed in a hospital were upheld, with no constitutional issue being raised. Other regulations and a policy have been struck down on the basis of the vices of the empowering legislation,¹⁰⁶ and fees that the Québec government permitted to be charged for private clinic abortions was found to be contrary to statute.¹⁰⁷ More recent litigation has raised women's *Charter* rights more directly. *Jane Doe 1 v Manitoba*¹⁰⁸ involved a challenge to provincial funding for abortions performed in hospitals only, on the basis that this violated women's sections 2(a), 7 and 15 *Charter* rights. The Manitoba Court of Appeal upheld the dismissal of the government's summary judgment claim, but reversed the trial judge's decision granting damages upon summary judgment to the claimants. It found that the *Charter* issues were too complex to be decided solely on the basis of the claimants' affidavit evidence about delays associated with scheduling an abortion at a hospital.¹⁰⁹ This case appears to be ongoing,¹¹⁰ though the regulation was subsequently changed. As well, another constitutional challenge to provincial legislation restricting funding to those abortions

104 *Ibid* at 504-05.

105 (1996), 144 Nfld & PEIR 263, 139 DLR (4th) 603.

106 *Sec BC Civil Liberties Assn v BC (AG)* (1988), 24 BCLR (2d) 189, 49 DLR (4th) 493; *Lexogest Inc et al v Manitoba (Attorney General) et al* (1993), 85 Man R (2d) 8, 101 DLR (4th) 523; *Morgentaler v New Brunswick (Attorney General) et al*, [1990] 98 NBR (2d) 45, (1989) 38 Admin LR 280.

107 In *Association Pour L'accès à L'avortement c Procureur général du Québec*, 2006 QCCS 4694, [2006] RJQ 1938, the Québec Superior Court found in favour of female class action claimants who were required to pay additional fees for private clinic abortion services. Despite the same being contrary to *Loi sur l'assurance maladie*, LRQ, c A-29, the government of Québec permitted the private clinics to charge fees, as the public system did not have the resources to provide the legally required level of service (abortion without cost to women in all regions in Québec) and the private clinics required these fees to provide the services. The court did not accept the government's argument that these fees were for "ancillary" services, such as counselling. Thus, it found the government responsible for the contravention of the law and ordered these fees refunded.

108 *Jane Doe et al v Manitoba*, 2004 MBQB 285, 189 Man R (2d) 284, rev'g in part 2005 MBCA 109, 195 Man R (2d) 309, leave to appeal to SCC refused, 212 Man R (2d) 319, 352 NR 198. Erdman, "Abortion, Equality, and Community in Canada," *supra* note 87 conducts a thoughtful analysis of the lower court's somewhat abbreviated *Charter* decision.

109 In contrast, the trial judge's impression was that the effects of delay stated by Dickson CJC in *Morgentaler*, *supra* note 19 at para 66 were "so powerfully conclusive that they are beyond dispute."

110 See the class proceeding certification on July 31, 2008: *Jane Doe 1 v Manitoba*, 2008 MBQB 217, 232 Man R (2d) 157.

performed in hospitals was launched in New Brunswick in 2003,¹¹¹ but has not yet come to a resolution. In June 2011, a human rights complaint was launched by a doctor in that province on the basis that “the province’s abortion laws hinder her ability to care for patients with unwanted pregnancies and discriminate against her based on sex.”¹¹²

Access to abortion remains extremely limited. Only 15.9 percent of Canadian hospitals provide abortion services, creating lengthy wait times, and have imposed gestational limits and other restrictions on access to abortion.¹¹³ Sanda Rodgers provides a bleak, province-by-province breakdown of the current situation:

Prince Edward Island provides no abortions. New Brunswick and Saskatchewan fund hospital abortions but provide no funding to clinics. Quebec and Nova Scotia provide hospital abortions but only partial funding to clinics. Alberta, British Columbia, Ontario, Manitoba and Newfoundland fund hospital and clinic based abortions. In general, hospital wait times are approximately 6 weeks. The Morgentaler Clinic in Ottawa had a 6 week wait time in the fall of 2007. This is clearly too long.

Despite Morgentaler, all the barriers previously documented remain and hospital access has actually decreased.¹¹⁴

Nevertheless, it was thought that the *Morgentaler* decision *did* appear to at least settle the issue in the criminal context. In 1991, a new government-sponsored abortion bill was defeated in the Senate,¹¹⁵ and no government has since attempted to introduce legislation. Even in this arena, however, *Morgentaler* has not allayed ever-new attempts to hinder access to abortion, though the aim of many of the bills is now said to be women’s “protection.”

From 2006 to 2008, under the Conservative minority government, four abortion bills were introduced with one, Bill C-484, the *Unborn Victims of Crime Act*,¹¹⁶

111 See *Morgentaler v New Brunswick*, 2008 NBQB 258, 336 NBR (2d) 121, aff’d 2009 NBCA 26, 344 NBR (2d) 22, granting Doctor Morgentaler standing to make the constitutional challenge.

112 Brett Bundale, “Doctor contends N.B. abortion laws are discriminatory,” *The [Fredericton] Daily Gleaner* (2 July 2011) A6. The article notes that representative human rights complaints are not possible and, therefore, the doctor is making the intriguing argument that it is *she* who is being discriminated against in the provision of services.

113 Jackman, “Health Care and Equality,” *supra* note 87 at 107-08, cited in Jessica Shaw, *Reality Check: A Close Look at Accessing Abortion Services in Canadian Hospitals* (Ottawa: Canadians for Choice, 2006) at 1.

114 Sanda Rodgers, “Law: Facilitating and Impeding Access,” (Paper delivered at the 20th Anniversary of *Regina v. Morgentaler*: Of What Difference? Reflections on the Judgment and Abortion in Canada Today, delivered at the Faculty of Law, University of Toronto, 25 January 2008), 25 at 26.

115 Bill C-43, *An Act Respecting Abortion*, 2nd Sess, 34th Parl, 1991.

116 Bill C-484, *An Act to amend the Criminal Code (injuring or causing the death of an unborn child while committing an offence)*, 2nd Sess, 39th Parl, 2007.

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proceeding to second reading.¹¹⁷ A private member's bill introduced by former MP Ken Epp in 2007, Bill C-484 would have permitted separate charges to be brought against anyone who "directly or indirectly, causes the death of a child during birth or at any stage of development before birth while committing or attempting to commit an offence against the mother"¹¹⁸ While purportedly intended to protect pregnant women from abuse,¹¹⁹ similar legislation in the United States has been found to be used overwhelmingly to criminalize pregnant women whose conduct is alleged to have caused harm to their children *in utero*.¹²⁰ The next Parliament saw the introduction of another private member's bill, Bill C-510, by MP Rod Bruinooge, head of the Parliamentary Pro-Life Caucus, which would create the criminal offence of coercing¹²¹ a woman to have an abortion (or attempt to do so).¹²² In February 2012, Stephen Woodworth, Conservative MP, introduced M-312, a motion to have a parliamentary committee examine whether the definition of "human being" in the *Criminal Code* homicide provision (section 223(1)) should be extended to foetuses.¹²³ Thus, the constitutional boundaries protecting women's decision-making over pregnancy continue to be pushed by anti-abortion Members of Parliament.

Given that some of these efforts invoke the subterfuge of protecting women from abuse or coercion, should any such amendment to criminal law be passed

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- 117 Karine Richer, *Abortion in Canada: Twenty Years After R. v. Morgentaler*, PRB 08-22E (Ottawa: Parliamentary Information and Research Service, 2008) at 20.
- 118 Bill C-484, *supra* note 116 at s 238.1(1).
- 119 See the description of Bill C-484 and the purported rationale in favour of it in Diana Backhouse & Manesha Deckha, "Shifting Rationales: The Waning Influence of Feminism on Canada's Embryo Research Restrictions" (2009) 21:2 CJWL 229 at 261-63.
- 120 See Ed Pilkington, "Outcry in America as pregnant women who lose babies face murder charges," *The Guardian* (24 June 2011), online: [The Guardian <http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges>](http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges). See also Lynn Paltrow, "Lessons from the U.S. Experience with Unborn Victims of Violence Laws," National Advocates for Pregnant Women, online: [Abortion Rights Coalition of Canada <http://www.arcc-cdac.ca/action/LessonsfromUS.pdf>](http://www.arcc-cdac.ca/action/LessonsfromUS.pdf). Details of the "fetal homicide laws" on the books in 38 states (as of November 2010) have been compiled by the National Conference of State Legislatures, online: <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx>. Bill C-484 excluded any "act or omission" by the "mother of the child," though as the Abortion Rights Coalition of Canada points out, "arrests of pregnant women have occurred even under state fetal homicide laws that make exemptions for the pregnant woman" and are used as authority to extend the reach of other penal laws concerning child endangerment or provision of drugs to a minor: see Abortion Rights Coalition of Canada, "Talking Points Against the 'Unborn Victims of Crime Act,'" (6 May 2008), online: [Abortion Rights Coalition of Canada <http://www.arcc-cdac.ca/action/unborn-victims-act.htm>](http://www.arcc-cdac.ca/action/unborn-victims-act.htm).
- 121 The definition of "coercion" in the Bill is as broad as the exceptions are narrow: "conduct that, directly or indirectly, causes a female person to consent to an abortion that she would otherwise have refused." Doctors are exempted if the medical intervention they discuss with the woman that may result in the death of the "child" is "necessary to avoid a serious threat to the female person's physical health."
- 122 Bill C-510, *An Act to amend the Criminal Code (coercion)*, 3rd Sess, 40th Parl, 2010. Bill C-510 died on the Order Paper when Parliament was dissolved prior to the May 2011 federal election.
- 123 Sheila Dabu Nonato, "Tory MP seeks rights for unborn children," *Ottawa Citizen* (7 February 2012), online: <http://www.ottawacitizen.com/news/Tory+seeks+rights+unborn+children/6112099/story.html>.

and end up before the courts on a constitutional challenge, it is less likely that the central principles enunciated by the Supreme Court in *Morgentaler* (effects of delay on women's psychological and physical integrity, their right to procedural fairness and self-determination under the principles of fundamental justice) would have the same resonance. True, a penal sanction would still engage the liberty interest even without the element of delay,¹²⁴ but to have enough persuasive force to cause a court to strike down such a law the analysis of fundamental justice must incorporate a robust understanding of the historical context of patriarchal state control of women's reproductive capacity, showing it to be a practice of substantive inequality.¹²⁵

III. POSSIBILITIES OF FUNDAMENTAL JUSTICE

Various theorists have also ascribed relational descriptions to justice. This seems to suggest a certain compatible framework for substantive equality under the concept of fundamental justice in section 7. James Olchowy has advanced the notion of justice as one that is based upon ethical social relations "that makes for an inclusive, helpful, non-coercive human community," which he maintains is embedded in the Supreme Court's decision in *Vriend v Alberta*.¹²⁶ Iris Marion Young has similarly advocated for an understanding of justice as dynamic and relating not simply to a distribution of social goods, but "the extent to which institutional conditions support people's ability to develop and exercise their capacities and express their experience, as well as their ability to participate in determining their actions and conditions of action."¹²⁷ Thus, to them, "injustice" is about "oppression and domination," and "justice" is about "thorough social and political democracy."¹²⁸ Incorporating substantive equality would mean an interpretation of "fundamental justice" based upon these understandings of social relations and inclusion in community—in other words, the antithesis of the "evil of oppression" that section 15 is intended to fight.¹²⁹

124 Kaposy & Downie, *supra* note 81 at 294. The authors make this point, but do not engage with the issue of if/how such a new penal provision could accord with fundamental justice. It may be possible to engage the issue of delay in relation to these measures as the logical consequence is likely to be a chill on the willingness of doctors to perform abortions. This would, however, need to be established on the evidence.

125 See Reva B Siegel, "The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument" (2008) 57:6 Duke LJ 1641 at 1649. The author notes the spread in the United States of "gender-based antiabortion" arguments over the past number of decades that "began to supplement or even supplant the constitutional argument '[a]bortion kills a baby' with a new claim '[a]bortion hurts women.'" This culminated in a 2007 US Supreme Court decision accepting some of these arguments as justification for restricting abortion: See *Gonzales v Carhart*, 550 US 124 (2007), 127 S Ct 1610 (2007). Without a contextualized, critical analysis of the claims that these sanctions are to protect women, one can see how similar arguments might gain traction in Canadian courts.

126 [1998] 1 SCR 493. See Olchowy, *supra* note 88 at 657.

127 Jhappan, *supra* note 8 at 200 (paraphrasing Young's theory).

128 *Ibid.*

129 *Andrews*, *supra* note 10 at 35.

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What is the doctrinal support for including such a notion of substantive equality within “fundamental justice?” A principle of fundamental justice, according to *Re BC Motor Vehicle Act*,¹³⁰ is a basic tenet of our legal system. Not only must such a principle be legal in nature, but there must be a consensus that the rule or principle is “fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.”¹³¹

Equality has been recognized as a “basic tenet of our legal system” in a number of ways, which includes but is not limited to section 15 of the *Charter*. The unwritten constitutional principle of democracy, including respect for communities, equality and social justice, has previously been recognized by the Supreme Court in the *Québec Secession Reference*.¹³² The majority in *Mills*¹³³ is careful to make a distinction between the values underlying a free and democratic society in section 1, including respect for the inherent dignity of the human person and commitment to social justice and equality, and what the majority sees as the narrower concerns of the principles of fundamental justice. Mark Carter, however, points out that it is a distinction that appears to be “entirely formal,” and in any event “it must be assumed that at least some of the values that underlie a free and democratic society are also tenets of our legal system.”¹³⁴ In *Mills*, the equality rights of girls and women are considered in finding *Criminal Code* limitations on production of complainants’ personal records in sexual assault cases consistent with fundamental justice. In Carter’s view, this satisfies what he sees as the “logical demands” of section 7; namely, that the principles appeal to human rights.¹³⁵

Recognition of substantive equality within fundamental justice also accords with the comment by Wilson J in her concurring decision in *Morgentaler*. Like her decision on the violation of liberty caused by state-coerced pregnancies, her concern with human dignity and relations of power continues on in her analysis of “fundamental justice.” She agreed with Dickson CJC that the section does not comport with procedural fairness, but locates the violation of fundamental justice also in its interference with another right: women’s section 2(a) right to freedom of conscience. Her finding, namely that a section 7 deprivation that also violates another *Charter* right would not be consonant with fundamental justice, is imbued with notions of equality:

130 *Re BC Motor Vehicles Act*, *supra* note 5 at 503.

131 *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at 574. See also *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*].

132 *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385.

133 *Mills*, *supra* note 4.

134 Mark Carter, “Fundamental Justice in Section 7 of the *Charter*: A Human Rights Interpretation” (2003) 52 UNBLJ 243 at 253. Carter does concede at a later point that democratic considerations, including utilitarianism (policy decisions benefiting the majority even at the expense of the few), would properly be exclusively within the purview of section 1, thereby creating a distinction between this justificatory section and fundamental justice under section 7.

135 *Ibid* at 255.

[F]or the state to take sides on the issue of abortion ... is to deny freedom of conscience to some, to treat them as means to an end, to deprive them ... of their "essential humanity." Can this comport with fundamental justice? Was Blackmun J. not correct when he said in *Thornburgh [v American College of Obstetricians and Gynecologists]*, 476 US 747, 106 S Ct 2169 (1986) at p. 2185:

A woman's right to make that choice freely is fundamental. Any other result ... would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.¹³⁶

Wilson J does not engage in a thorough section 2(a) analysis, or a section 15 analysis for that matter, but still finds the violation of freedom of conscience, and implicitly equality, as violations of fundamental justice. This aspect of the decision and her gendered analysis of liberty both support substantive equality as a principle of fundamental justice.

With respect to the second branch of the test (consensus on the fundamental nature of the principle for operation of the legal system), Hester Lessard argues that an interpretation of fundamental justice focused on community inclusion "flows from" the right to equality,¹³⁷ as well as Canada's constitutional history and the myriad of other rights in the *Charter*.¹³⁸ There is an abundance of cases wherein the Supreme Court describes the legal significance of equality as social inclusion, whether in terms of the effect of hate speech on target minority groups,¹³⁹ the historical disadvantage of common law couples¹⁴⁰ or voting rights for inmates.¹⁴¹ Further, this understanding of equality *has* been recognized as a principle of fundamental justice under section 7, at least when it came to interpreting the right to counsel. In the concurring decision of L'Heureux-Dubé J in *New Brunswick (Minister of Health and Community Services) v G(J)*¹⁴² ("G(J)"), she found that in considering the principles of fundamental justice:

136 *Morgentaler*, *supra* note 19 at 179-80.

137 Lessard, *supra* note 62 at 305.

138 *Ibid* at 287-88. Lessard named the debate over the Meech Lake Accord, section 33 (giving voice to regional communities), the language rights and denominational education rights first in the *Constitution Act, 1867* and then under sections 16-19 and 23 of the *Charter*, Aboriginal communities under section 35(1) of the *Constitution Act, 1982* and the Canadian community under section 36 of the *Constitution Act, 1982* as supporting this contention. Erdman, "Abortion, Equality, and Community in Canada," *supra* note 87 at 1099 similarly connects equality to community through an analysis of human dignity within section 15(1), and notes that a comprehensive, universal health care system is "the quintessential symbol of community."

139 See *R v Keegstra*, [1990] 3 SCR 697, (1991), 114 AR 288.

140 See *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693.

141 See *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519.

142 [1999] 3 SCR 46, 177 DLR (4th) 124 (the judgment of L'Heureux-Dubé was supported by Gonthier and McLachlin JJ).

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[I]t is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the *Constitution* responds to the realities and needs of all members of society.¹⁴³

Thus, L'Heureux-Dubé J explicitly mentioned social inclusion as lying at the heart of the determination. She noted that child protection proceedings have the potential of furthering social marginalization because women, particularly single mothers, were disproportionately affected by them, as were other disadvantaged groups.¹⁴⁴ These findings were not challenged by the majority. Thus, in *G(J)* it was accepted without question that equality, taking into account the disadvantaged position of women in child protection proceedings, should be considered in determining whether the principles of fundamental justice required counsel to be appointed.¹⁴⁵ Recently, MacPherson JA of the Ontario Court of Appeal relied on the above-noted passage from *G.(J.)* in his dissenting opinion in *Bedford*,¹⁴⁶ in which he maintained that the criminal prohibition against communication for the purpose of prostitution did not accord with fundamental justice:

The equality values underlying s. 15 of the *Charter* require careful consideration of the adverse effects of the provision on disadvantaged groups [P]ersons engaged in prostitution are overwhelmingly women. Many are aboriginal women. Some are members of lesbian and gay communities. Some are addicted to drugs and/or alcohol, both of which are forms of disability. Since gender, race, sexual orientation and disability are all enumerated or analogous grounds under s. 15 of the *Charter*, the s. 7 analysis must take into account that prostitutes often hail from these very groups

143 *Ibid* at para 115.

144 *Ibid* at para 113.

145 It is unfortunate that notwithstanding this progressive finding, L'Heureux-Dubé accepted the use of a case-by-case test advocated by the majority to determine whether a parent's lack of legal representation in a child protection hearing will violate fundamental justice; namely, a consideration of the seriousness of the interests at stake, the complexity of the proceedings and the characteristics of the parent affected. One questions why there is a need to burden an already vulnerable group with having to demonstrate that they fall within these criteria, particularly when "it is difficult to imagine that there are many cases" where they would not be met: see Mary Jane Mossman, "New Brunswick (*Minister of Health and Community Services*) v. G. (J.): Constitutional Requirements for Legal Representation in Child Protection Matters" (2000) 12:1 CJWL 490 at 503.

146 *Canada (Attorney General) v Bedford*, 2012 ONCA 186 (available on CanLII).

[P]rostitutes' pre-existing vulnerability exacerbates the security of the person infringement caused by the communicating provision. It is precisely those street prostitutes who are unable to go inside or to work with service providers who are most harmed when screening is forbidden.

The communicating provision chokes off self-protection options for prostitutes who are already at enormous risk.¹⁴⁷

The question then arises as to whether, even if there is some jurisprudential support for including substantive equality, the particular lens I am suggesting for the principle under section 7 would satisfy the third leg of the test (constituting a "manageable standard"). While the Supreme Court has previously ruled that a principle that is "highly contextual and subject to dispute"¹⁴⁸ would not, section 15 illuminates that context is a critical aspect in determining compliance with any constitutional standard. Examination of what is self-evident and can be assessed in the abstract, and what is controversial and requires context may itself reveal discriminatory notions of what is included in "common sense" versus the "controversial" claims of outsiders to the law. Asking whether a law contributes to community inclusion as encapsulated by the principle of substantive equality, or conversely "the maintenance of an underclass or a deprived position,"¹⁴⁹ cannot be considered to provide an unintelligible standard because it requires social context or might be controversial in application.

There are numerous conceptions of "justice." I suggest that these particular conceptions be used under one principle only; namely, substantive equality, leaving room for other conceptions to be applied flexibly as the need arises.¹⁵⁰

While section 15 could act as a "touchstone" for substantive equality as a principle of fundamental justice, that is not to say that it would require exactly the same comparative framework that has frustrated claimants under that section. In fact, Peter Hogg suggests the opposite: when equality is expressed as a "Charter value" under another right, "what are really equality claims can be remedied under other rights without the need to bother with listed and analogous grounds or human

147 *Ibid* at paras 356-59. While he purported to locate this argument under the principle of "gross disproportionality," rather than in service of a stand-alone substantive equality principle, it constitutes a powerful statement regarding the importance of an equality analysis within fundamental justice.

148 See *Canadian Foundation*, *supra* note 131 at para 11 (the best interests of the child is not a principle of fundamental justice). See also *Rodriguez*, *supra* note 29 (human dignity is not a principle of fundamental justice).

149 Catharine A MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979) at 117 (with respect to the test for discrimination). However, Radha Jhappan would likely agree with me that such a definition describes a slightly different concept than equality/discrimination under s 15, which is status-oriented and comparative. Instead, it more accurately defines "justice." See the previous discussion about the dynamic, relational conception of justice.

150 See Carter, *supra* note 136 at 244-45 for his argument for a contextual, open-ended understanding of fundamental justice based on Cass Sunstein's notion of "incompletely theorized agreements" as essential to "well-functioning constitutional orders."

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dignity, the two severe restrictions on the direct application of section 15.”¹⁵¹ With respect to section 7 specifically, he notes the breadth of the Supreme Court’s imagining of “fundamental justice” and asserts that there is “plenty of room for the equality value in this mansion”¹⁵²

In fact, the Court in *Kapp* has accepted that simply because a constitutional provision has a “confirmatory purpose” vis-à-vis section 15(1), this “does not preclude an independent role” for it.¹⁵³ In *British Columbia (Attorney General) v Christie*,¹⁵⁴ the Supreme Court denied an interpretation of a constitutional principle that it says would render a section of the *Charter* redundant. Thus, citing substantive equality as a principle of fundamental justice should not lead to a “mini-section 15” analysis within section 7. Fundamental justice is entirely consistent with the *Andrews* principles of dignity, full citizenship and of fighting the evils of oppression. However, the very notion of the principle, which emphasizes overall fairness, social relationships and values within Canadian society as a whole, possibly suggests a wider conceptual frame for equality within fundamental justice than that currently employed under section 15.

What difference would this conceptualization of substantive equality as a principle of fundamental justice make? Assuming the particular state abortion restriction at issue would be found to violate women’s security of the person or liberty,¹⁵⁵ Lessard hypothesizes that considering its effects as a denial of the prin-

151 Peter W Hogg, “Equality as a Charter Value in Constitutional Interpretation” (2003) 20 Sup Ct L Rev (2d) 113 at 117. I take issue with the characterization of equality as a mere “value” rather than a “right,” particularly in the context of purported fair trial rights under section 7 that would potentially run counter to another’s equality (as in cases concerning sexual assault). Nevertheless, that debate need not be resolved here for the purposes of the argument I am making regarding women’s equal right to fundamental justice. Further, while it seems that human dignity has been removed as a separate hurdle for equality claimants, I maintain above that difficulties remain with the comparative analysis under s 15(1).

152 *Ibid* at 128.

153 *Kapp*, *supra* note 7 at para 38.

154 2007 SCC 21, [2007] 1 SCR 873.

155 Erdman, “Abortion, Equality, and Community in Canada,” *supra* note 87 raises serious questions about whether a lack of funding of abortion (i.e. funding only abortions performed in hospitals rather than in private clinics) would give rise to a sufficient nexus between state action and the harm to section 7 interests (lack of access to timely abortion services), given the Court’s reluctance to impose positive obligations under section 7, adverse jurisprudence from the United States wherein state denial of funding was found not to be the source of the restriction on access (but rather, “indigence”) and the test from *Chaouilli v Québec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 119 (requiring that practical barriers mean that “care outside the legislatively provided system is effectively prohibited”). Whether a similar de-contextualized analysis of the impact of funding restrictions is ultimately borne out in Canada, other types of abortion restrictions currently at play are legion. These include referral policies, physician approval policies, multiple visit requirements, parental consent requirements, gestational limits policies, and others: Jocelyn Downie & Carla Nassar, “Barriers to Access to Abortion Through a Legal Lens” (2007) 15 Health LJ 143. Whether a result of hospital policy (in which case, the *Charter* would apply by virtue of *Eldridge*, *supra* note 15) or provincial legislation or regulation, it is difficult to comprehend that all of these other requirements, with tenuous ties to funding exigencies, would not be seen for what they are: state impediments to timely abortion access of sufficient magnitude to engage section 7. This would be particularly so in provinces where no private clinics exist as an alternative to public health care, as in Saskatchewan, and therefore access is exclusively connected to hospital service.

ciple of community participation under fundamental justice would lay bare that “women’s historical experience of the use of reproductive roles to entrench and legitimate social and economic disadvantage undermines their participation in the ongoing process of communal redefinition.”¹⁵⁶ An abortion restriction having nothing to do with women’s well-being and everything to do with a naturalized entitlement to control women’s reproductivity, bolstered by stigmatizing gendered and racial stereotypes of women seeking funded abortions as promiscuous, selfish or irresponsible, and in the words of Wilson J a construction of women as a “means to an end”¹⁵⁷ rather than as members of our community with equal and full rights of citizenship, including self-determination, would meet the test of fundamental injustice. This is so whether this entitlement manifests as a paternalistic “concern” for women, a resurrection of the failed “father’s rights” argument from *Daigle* or protecting the rights of an individuated foetus. With respect to any *Criminal Code* amendments in particular, it is arguable that coercive state powers to monitor or intrude upon the lives of pregnant women and their relationships with health care providers, masquerading as a colourable concern for women’s well-being, would exacerbate the injustice of the violation. It removes women’s agency and lived reality from the centre of the analysis and replaces it with a paternalistic caricature.¹⁵⁸

Less hypothetically, *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*¹⁵⁹ provides an illustration of the application of substantive equality as a principle of fundamental justice, though not explicitly cited as such. There, the deliberate police decision not to warn women in a neighbourhood targeted by a serial rapist, and to use them essentially as bait, was found by an Ontario court to violate women’s security of the person. The police had identified the particular

156 Lessard, *supra* note 62 at 300-01. Lessard notes that it is not necessary under fundamental justice for there to be consensus on how the community is to be shaped vis-à-vis the particular interest at stake (here, reproductive rights) in order to apply this notion of community and relationship. Rather, the question under fundamental justice is whether the limitation of section 7 rights conforms to “the principle of participation and political efficacy” to take part in and be recognized as a full citizen of that community or instead be pushed to its margins.

157 *Morgentaler*, *supra* note 19 at 173.

158 The caricature of women as lacking agency to make their own decisions (being instead under the thrall of doctors and others who would “coerce” them to end their pregnancies) and as benefiting from state coercion over their bodies and pregnancies is an example of one of the “five faces of oppression” identified by Young; namely, “cultural imperialism.” See Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 60:

Cultural imperialism involves the paradox of experiencing oneself as invisible at the same time that one is marked out as different. The invisibility comes about when dominant groups fail to recognize the perspective embodied in their cultural expressions as a perspective. These dominant cultural expressions often simply have little place for the experience of other groups, at most only mentioning or referring to them in stereotyped or marginalized ways. This, then, is the injustice of cultural imperialism: that the oppressed group’s own experience and interpretation of social life finds little expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life.

159 (1998), 39 OR (3d) 487, 160 DLR (4th) 697 [*Doe*].

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neighbourhood and type of apartment buildings that the rapist was targeting, but refrained from warning women in the area because they believed women would become “hysterical,” and that the assailant would flee, thus compromising the investigation. The decision not to warn was also based on a belief that the rapes involved were “non-violent.” This fundamental misunderstanding, in turn, meant that there was a lack of urgency to the investigation, and the reactions of the women who had reported their sexual assault, whether too emotional or not emotional enough, were met with scepticism.

Before coming to the constitutional analysis, MacFarland J set the context, framing sex discrimination and sexual violence as overlapping and mutually reinforcing phenomena. She cited expert evidence that “sexual violence is a form of violence; it is an act of power and control rather than a sexual act.”¹⁶⁰ Further, she noted that this power and control not only operates for the benefit of the individual rapist, but systemically to benefit all men: women’s fear of sexual violence imposes constraints on their activities. Consequently, “sexual violence operates as a method of social control over women.”¹⁶¹ That the Toronto police identified the motive of rape as “sexual gratification” in over half of the randomly selected sexual assault cases in their own internal review was characterized by the Judge as an “unsettling” error.¹⁶² Their failure to cross reference reports of violence against women with those of sexual assault, which allowed the rapist to evade detection for a longer period of time, showed a lack of understanding “the fundamental—that sexual assault is not about sex, it is about violence and anger against women.”¹⁶³

Against this backdrop was the myriad of systemic deficiencies that MacFarland J found were endemic to the Toronto Police when investigating sexual assaults, starkly illustrating the violence done by law¹⁶⁴ to women’s experience of rape. These deficiencies ranged from discounting rape reports based on discriminatory rape myths to foot-dragging in investigation to inappropriate personnel being assigned to investigations to failing to follow up with internal recommendations for improvement—deficiencies Elizabeth Sheehy called “breathtaking

160 *Ibid* at 490.

161 *Ibid* at 491.

162 *Ibid* at 500.

163 *Ibid* at 513.

164 See Austin Sarat & Thomas R Kearns, “A Journey Through Forgetting: Toward a Jurisprudence of Violence” in Austin Sarat & Thomas R Kearns, eds, *The Fate of Law* (Ann Arbor: The University of Michigan Press, 1991) 209 at 236. The authors have made clear that law’s violence is not performed only by judges, but by other legal officials where “[l]egal decision making becomes, at least in theory, lockstep rule following, bureaucratic and conforming. On this account, the violence of the interpretive act is effaced.” The decision of MacFarland J shows how easily this violence of interpretation is revealed upon scratching the protocol and evidentiary rule-laden surface of rape investigation. One such example is a rape investigation where the police officer determined that a woman was lying about whether a rape had occurred because of the presence of an undisturbed potato chip bowl on her bed, indicating a lack of a struggle: see *ibid* at 521.

and, yet, ... completely ordinary in terms of everything we know about this aspect of policing in Canada.”¹⁶⁵

Further, the Court found that Jane Doe was denied the right to security of the person “by subjecting her to the very real risk of attack by a serial rapist—a risk of which they were aware but about which they quite deliberately failed to inform the plaintiff or any women living in the [area].”¹⁶⁶ Because of their reliance on “rape myths as well as sexist stereotypical reasoning” in the investigation, the police exercised their discretion in a “discriminatory and negligent way,”¹⁶⁷ and so their actions were not in accordance with fundamental justice. Thus, the Court recognized that limitations to liberty and security of the person that are inconsistent with women’s substantive equality are incompatible with fundamental justice. In doing so, the Judge refused to hyper-individualize the analysis by focussing on the claimant’s response to the sexual assault or the “aberrant” behaviour of the rapist.¹⁶⁸ Instead, she contextualized the police response within a system grounded in a discriminatory belief that women are prone to lie about sexual assault and that rape, without visible physical injury, is sex and not “real violence.” This belief marginalizes women who have experienced rape (and indeed all women) from full participation in the life of their communities with dignity and respect.

IV. CONCLUSION

The Supreme Court has recently begun to look at the test for substantive principles of fundamental justice more flexibly, in accordance with international human rights and equality norms. In the 2010 extradition case of *Németh v Canada (Justice)*,¹⁶⁹ the Court confirmed that where extradition is sought for the purpose of prosecuting or punishing an individual on the basis of race, sex, sexual orientation or another discriminatory ground under section 44(1)(b) of the *Extradition Act*, ordering surrender will be contrary to the principles of fundamental justice.

165 Elizabeth A Sheehy, “Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from *Jane Doe* to *Bonnie Mooney*” (2005) 17 CJWL 87 at 94.

166 *Doe*, *supra* note 161 at 521.

167 *Ibid* at 521-22.

168 In contrast, see *Mooney v British Columbia (Attorney General)*, 2004 BCCA 402, 25 CCLT (3d) 234, leave to appeal to SCC refused, [2005] 1 SCR xiii and Sheehy’s examination of the case, *supra* note 167. This was a “failure to protect” case involving a battered woman, where the Vancouver Rape Relief and Crisis Shelter intervened to advocate that the case be decided on the basis of Ms. Mooney’s right to life, liberty and security of the person, and to equality. While the *Charter* implications of the case were not considered by either the dissenting or majority decisions, the case exemplifies the hyper-individualized analysis of state response to violence against women, blaming the outcome on women’s choices and “unpredictable” male behaviour, rather than a discriminatory system of policing. This could have been the outcome in *Doe* without a judge who understood the interrelationship of male violence and patriarchal state oppression.

169 2010 SCC 56, [2010] 3 SCR 281.

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In the 2010 case of *Canada (Prime Minister) v Khadr*,¹⁷⁰ the Court found that the participation of Canada in interrogating a minor in unfair circumstances and in violation of Canada's international human rights obligations did not conform to fundamental justice. The "fundamental justice" aspect of these decisions are short and to the point. Discriminatory state action, unfairness and violation of international conventions almost seemed self-evident to the Court as violations of fundamental justice. It should be interpreted similarly for women. Canada's statements committing to substantive equality are replete on the international stage, including the commitment to alleviate women's subordination, described under Article 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women* as requiring states "in all fields, in particular in the political, social, economic and cultural fields, [to take] all appropriate measures, including legislation, to ensure the full development and advancement of women"¹⁷¹ This echoes Iris Marion Young's description of justice.

So, in response to Radha Jhappan's point, I do not think that women are aiming higher when we are seeking justice under section 7. We are simply seeking what is fundamental to us—substantive equality.

170 2010 SCC 3, [2010] 1 SCR 44.

171 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 18 (entered into force 3 September 1981) at 16. See also Article 3 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976; Article 41 entered into force 28 March 1979). See also Article 3 of the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), which requires state parties to undertake to "ensure the equal right of men and women to the enjoyment" of the rights contained in the document.

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