Better Never Than Late, But Why?: The Contradictory Relationship Between Law and Abortion

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Of What Difference?
Reflections on the Judgment
and Abortion in Canada Today

SYMPOSIUM

Toronto, Ontario
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Co-hosted by
the National Abortion Federation
and the Faculty of Law, University of Toronto
On January 25, 2008, in Toronto, Ontario, the Faculty of Law, University of Toronto (U of T) and the National Abortion Federation (NAF) co-hosted an interdisciplinary symposium to celebrate the 20-year anniversary of Regina v. Morgentaler, the Supreme Court case in which the criminal law on abortion in Canada was held unconstitutional.

The symposium brought together more than 100 participants, from legal scholars, abortion providers and journalists to representatives from government and women’s advocacy organizations. Examining abortion from a variety of perspectives, participants addressed the significance of the event and the difference the R. v. Morgentaler judgment has since made to women, providers and the politics of abortion in Canada.

This reader, prepared in collaboration with the Women’s Health Research Institute, is a compilation of the day’s presentations at this commemorative legal conference.
I am honoured to have been invited to be a panelist in such distinguished company at this important event. I am particularly attracted to the invitation in the title of the Symposium to reflect upon the 1988 decision of the Supreme Court of Canada in *R. v. Morgentaler*. In reflecting upon the case, its significance and legacy, I want to talk about the importance of history, the contradictory nature of law and the enduring importance of ideology.

I take this liberty of insisting upon the importance of historical experience and perspective and I do so because I am of the view that it is due entirely to my historical, as opposed to current, engagement with the critically important issues of abortion and law that I have been honoured with this invitation.

Reflections on the Importance of History

I was reminded recently of the importance of history and how quickly something “becomes” history by my own lapse in precision: I asked my research assistant to pull the Supreme Court’s Morgentaler decision for me, which she dutifully did: the Supreme Court’s *R v Morgentaler* 1993 decision. Of course, this was my fault—I had not been clear enough. But it then occurred to me that my smart feminist research assistant may not have known there had been other, indeed, a few other, Morgentaler decisions. To my feminist colleagues in the academy I ask, are we confident that we are teaching this generation of law students about this decision and its importance? One has to hope that they are not relying on the mainstream media for their introduction—or misinformation—about the Morgentaler case? Clearly this Symposium is an important event, intended as it is to re-insert abortion and reproductive rights on our collective agendas.

I was speaking last week about today’s Symposium to a friend who graduated from Law School in 1989. She said her time at law school was marked by preoccupation with the issue of abortion law and that for her and women law students of her generation, the 1988 Morgentaler decision was a defining moment of victory. I remember it so well, and so personally.

On the early evening of January 28, 1988, almost two weeks after our daughter’s first birthday celebration, we had bundled her into her stroller and joined hundreds of kindred spirits in a spontaneous rally in front of the then still standing Morgentaler clinic on Harbord Street in Toronto to celebrate the decision of the Supreme Court historic decision. Women, abortion and law had become the issue around which I politicized when I embraced feminism in my twenties, to the great chagrin of my Irish Roman Catholic father and my French Roman Catholic mother who was a maternity ward nurse. For the next twenty years my political and academic work focused on abortion. As a law student in a seminar on Advanced Administrative Law, I tried to research the processes and practices of therapeutic abortion committees in Saskatchewan hospitals. This proved to be difficult research, as it was nigh unto impossible to find any working...
committees. Like many Canadian feminists of my class and generation, I marched in countless International Women’s Day and pro-choice demonstrations. Who can forget how cold our feet got in those frosty March 8 marches on Women’s Day before the arrival of global warming? We marched and carried signs that demanded the state get its laws off our bodies, repeal abortion law and drop the charges, again and again and again.

I studied the legal history and context of the criminalization of English abortion law, the genesis of the statutory prohibition in 1803, the demise of the relevance of quickening and the ousting of the jury of matrons, and the extension of the criminal law’s scope over the entire period of pregnancy.\(^\text{29}\) I studied the issue of the criminal liability of the non-pregnant woman attempting the self-induce a miscarriage of a non-existing pregnancy which took me into the snakes and ladders of the law of impossible attempts. But, there was not much ‘action’ in the criminal cases—one encountered abortion in criminal legal history principally in homicide, where a woman had died, and her lover, friend, doctor, midwife was prosecuted for willful murder.

When I turned to social history and women’s history, I found a different story. Indeed, it was in the course of this research that I learned my most profound political and intellectual lessons: to appreciate the importance of women’s agency and self-determination, and the ways in which in the abortion context they had defied the law and medical men: I found the voices of women who said to doctors, “Nonsense, doctor, there is no life yet…” and “Doctor, I do not believe it is a crime.”\(^\text{30}\)

The historical record of coercive and restrictive abortion law in the Anglo-Canadian context is filled with relatively few criminal prosecutions and far more expression of women’s resistance. One need think no further in our recent history than of an ordinary young woman, Chantal Daigle, thrust unwillingly into the national news in 1989 when her former boyfriend attempted to prevent her from terminating her pregnancy—neither the first nor last man to attempt to do so, neither the first nor last man to fail in the Canadian courts.\(^\text{31}\)

During that summer, under the watchful eyes of an entire nation, Daigle resisted her former boyfriend, the Canadian anti-choice movement, the courts, among others. Daigle reminded us that “women’s individual and collective struggles for choice and self-determination may have been constrained, but have never been wholly confined nor determined by the legal and judicial processes.”\(^\text{32}\)

The Contradictory Nature of Law

It was also in this work into the social and legal history of abortion that I began to develop an understanding of the contradictory nature of law, including criminal law, and what I later characterized as the “fragile, incomplete and contradictory” nature of legal victories,\(^\text{33}\) including the decision we are invited to reflect upon today. As but one illustration,

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\(^\text{33}\) Ibid.
the 1969 introduction of the therapeutic exception in the Canadian criminal code had at least one surely unintended consequence; in casting abortion as a medical matter, the law inhibited husbands who went to court—prior to 1988—to attempt to prevent their wives from terminating their pregnancies.34 This is one small instance, in my view, of the law not only mediating but inhibiting patriarchal relations. In many ways, the legal history of abortion taught me most of what I ever learned about women, law and the state, about law and patriarchal relations, and law’s contribution to social change.

But back to the evening in January twenty years ago—as we left the rally on Harbord Street and walked back to our car, we encountered a small, disgruntled, venomous group of anti-choice women. Looking at the baby in the stroller, they hurled an epithet at us, one that embodied all the contradiction and hatefulness of their self-proclaimed pro-life stance: “Why didn’t you abort that one?” I had never doubted their commitment to life was confined to the invisible and unborn, but in that moment I came to appreciate that their hatred and disrespect for women extended to living and breathing children.

The historic Morgentaler decision was but the first of many legal defeats their movement would experience in Canadian courts. But, the experience of the last twenty years suggests their defeats at the hands of the law have not been fatal. As I have suggested elsewhere, it takes more than “feeble law reform and litigation” to defeat patriarchal institutions, practices and relations.

I am happy to leave close analysis of the Supreme Court decision to the Constitutional scholars. Suffice it to observe that as a feminist activist and veteran of marches, all-candidates meetings, campaigns, days of action, struggles to get the sisters in the early days of National Association of Women and the Law to take a pro-choice position—I hope I will be indulged for saying simply that after years of struggle—reading Chief Justice Dickson’s and Madam Justice Wilson’s words made one a bit lightheaded:

_Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of her security of the person._35

Theoretically, I take the view that law is a social form in and through which social relations are mediated and expressed. But with respect to abortion, I look outside the law to civil society. I do acknowledge legal abortions tend to be safer than illegal abortions. And so I am not agnostic about the efficacy of legality and its importance as a foundation for safety and access—it is most assuredly a necessary but insufficient precondition.

In the area of abortion, Canadian women have experienced many legal victories in Canadian courts, some by the skin of their teeth, some at the hands of judges who are more grudging than others, with dissents that give cause for alarm.

The Importance of Ideology

It is now axiomatic to observe the Supreme Court’s 1988 decision resolved some questions but left many more dangling—tantalizing and inviting to the opponents of women’s right to choose. For instance, the precise nature and expression of what all judges of the Supreme Court characterized as the “state’s interest in the foetus” remained to be elaborated and tested.

34 E.g. Medhurst, supra note 7.

35 Morgentaler (1988), supra note 4 at 408.
Long-time anti-choice renegade, Joe Borowski, had been granted standing by the Supreme Court in 1981 to bring an action challenging the validity of the therapeutic abortion amendments to the Criminal Code in the name of foetal legal personhood.\(^{36}\) He lost the foot race with Morgentaler to the Supreme Court, and by the time he reached the Court, the abortion section of the Code had been struck down, and his appeal was dismissed as moot.\(^{37}\)

Still, the discourse of the ‘unborn child’ began to appear in the judgments, and is now ubiquitous, even as the Courts resisted the claims advanced in favour of foetal legal personhood and so-called father’s rights.\(^{38}\) Having lost the legal fight in the context of criminal law and access to abortion, anti-choice advocates looked to other legal forms, such as child welfare, to advance their cause. In 1996, they found what they surely believed to be the poster child for foetal rights in the pregnancy of a poor pregnant woman addicted to glue, who had lost three children to child welfare apprehension, and who refused to stop and refused treatment.\(^{39}\)

The child welfare agency sought a declaration that the superior court’s inherent parens patriae jurisdiction over children extended to “unborn children.” And they lost, taking comfort from a dissent by Justice Major that my Children and the Law students thought was right on.

In 1992, I wrote,

\begin{quote}
The potential cultural and political successes of the foetal rights movement… lie in its ability to both capture the imagination and tap the anxiety of people who are receptive to the notion that pregnant women are capable of extreme acts of selfishness and irresponsibility. The foetus is presented as helpless and vulnerable, the most innocent of innocent victims. Again, what is striking is that this campaign has been so successful without significant support in Canadian law for its fundamental underlying premise: that the foetus is a person with legal rights.\(^{40}\)
\end{quote}

But, as Rosalind Pollack Petchesky argued with prescience in the American context,\(^{41}\) the legalization of abortion contributed to the ascendance of an aggressive anti-abortion movement, one that has continued to organize in the churches and religious schools. Their discourse of the unborn child has become a dominant ideology of our time. Their ability to present all pregnant women as risky, possibly irresponsible, always potentially hostile to their own pregnancies, has in my view become pervasive and I believe socially shared. So, rather than speak of maternal mortality, or of women’s inherent dignity, or of the complexity of the abortion decision, never not a complex decision, never an easy choice,\(^{42}\) or of sexual coercion, they assert only a chorus of the unborn child in a self-impregnated woman.

\(^{36}\) Borowski v. Minister of Justice of Canada and Minister of Finance of Canada (1982), 39 N.R. 331 (S.C.C.).


\(^{38}\) e.g. R. v. Sullivan, [1991] 1 S.C.R. 489; see also Daigle v Tremblay, Murphy v Dodd, supra note 7.


\(^{40}\) Gavigan, supra note 8 at 132.

\(^{41}\) Rosalind Pollack Petchesky Abortion and a Woman’s Choice: The State, Sexuality and Reproductive Freedom (Boston: Northeastern University Press, 1985).

\(^{42}\) See Wilson J. in Morgentaler (1988), supra note 2 at para 242: The decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just
The law is implicated in the ideology of the unborn child, but it seems to me that some of its currency and legitimacy derives from its opposition to the law—as a form that needs to be protected, and the law is not doing that. I take the view that ideologies become dominant not necessarily through law and occasionally in opposition to law, but emergent as well as dominant ideologies may nonetheless be imported or incorporated into law. When I last wrote about abortion fifteen years ago (hence my commitment to an historical perspective today), I wrote that the strongest weapon in the arsenal of the anti-choice movement had not yet proven to be a legal one—and I continue to hold that view.

I am mindful that the Symposium’s dedicated organizer, Dawn Fowler, would have liked me to discuss the dilemma of the dearth of availability of late trimester abortions in Canada—and this I have not done. But I do want to make the point that ideologues like David Frum attempt to cultivate in the national imagination that late trimester abortions are a ubiquitous menace, a direct legacy from Madam Justice Wilson’s courageous reminder of the limits of men to be able to respond—‘even imaginatively’—to something so out of his personal experience. It is difficult to discern even a kernel of truth in David Frum’s construction of the crisis— for the world is truly upside down through his lens. The image of the scourge of late trimester abortion could not be further from the truth, and yet it is asserted as truth.

Increasingly, I believe we must situate the struggle of Canadian women within the broader context of women around the world who are struggling under adverse conditions to deal with unintended pregnancies. A recent study by Gilda Sedgh and her colleagues, published in Lancet, found that 48 per cent of all abortions worldwide were unsafe and that 97 per cent of all unsafe abortions were in developing countries—so many of the world’s women have access only to unsafe abortions, if they have access at all. I am neither a Constitutional Law nor International Law scholar. Currently I am interested in legal history of criminal law, but I know something of the historic struggle of women to control their fertility against the odds of men, medicine the state, the law and religion. Is it at all surprising that women have always had to resist and challenge their relegation to social invisibility as moral agents? But feminists have long known that there are no easy victories, certainly not in the area of reproductive health, and we have the expertise in this area, in this room, starting with the person sitting next to me.

I do struggle with how to engage with the dominant ideology of the unborn child. But there are some lessons that can be drawn from historical reflection. For me, it is important to remember the most meaningful victories, especially those derived from law, need to be extended and experienced outside the four corners of the courtrooms, and celebrated beyond feminist circles, especially feminist legal

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45 Gilda Sedgh, et al., “Induced Abortion: Estimated Rates and Trends Worldwide” (2007) 370 Lancet 1338 at 1342 (www.thelancet.com). Unsafe abortions are defined as “ Abortions done either by people lacking the necessary skills or in any environment that does not conform to minimum or medical standards, or both. These include (a) abortions in countries where the law is restrictive and (b) abortions that do not meet legal requirements in countries where the law is not restrictive” (at 1339).
circles. For twenty years prior, leading up to the Morgentaler decision, women activists and their allies made abortion a public, political issue in Canada, starting with the Abortion Caravan in 1969. Dr. Morgentaler lent his name, his professional reputation, his career and indeed his life to the support of this important campaign. But it was never just about the law. It was about and for Canadian women.

In closing, my last thought is this—if we acknowledge the current ascendant discourse is one of the unborn child, then we as feminists and supporters of choice for women must re-insert the women in the social vernacular, and start again from the premise that the pregnant woman and the unborn child speak with one voice, and that voice is hers.