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## Beyond Morgentaler: The Legal Regulation of Reproduction

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*Chapter*

# 4

*Morgentaler*

and Beyond:

Abortion,

Reproduction,

and the

Courts

*Shelley A.M. Gavigan*

## *Feminism, Law, and the State*

Throughout the 1970s and 1980s, the Canadian feminist pro-choice movement identified the state and especially the law as its principal adversaries, calling for decriminalization of abortion and demanding that the state 'keep its laws off women's bodies'. Parliament never acceded, and ultimately it was left to litigation in the courts, in particular criminal prosecution and a Charter challenge, to determine the status of the Canadian abortion law. The celebrated *Morgentaler* victory in the Supreme Court of Canada led to a partial realignment of feminist posture *vis-a-vis* the law, however. The critique of the legal system became more selective: juries were applauded, the Supreme Court became preferred over certain provincial Courts of Appeal (notably those of Ontario and Quebec), and the call for 'No New Law' was amended to 'No New Criminal Law'. As astute students of Canadian politics, Canadian feminists and pro-choice activists alike realized that decriminalization alone did not guarantee women's access to abortion. While the Criminal Code continued to be resisted, the Canada Health Act, the bedrock of Canada's medicare system, came to be seen as having a different legal complexion. Thus, feminists in Canada developed a more refined appreciation of the distinction and relationship between coercive and other forms of law.

This chapter examines the legal legacy of the *Morgentaler* decision, and the challenges it poses for feminist analysis of and engagement with law. The Supreme Court's decision, profound as it was, did not create a right to abortion for Canadian women, nor did it offer any resolution of the abortion issue. While feminists were galvanized to resist any new law, the problem of how to *ensure* women's access to medically insured abortions loomed larger than ever before. Several provincial governments were equally moved to restrict both doctors and women, while the medical profession likewise resisted any new criminal law which might put its members at risk of either criminal prosecution or harassment.

Several of these protagonists found themselves in curious positions in their relationship to the law. While Henry Morgentaler continued to be prosecuted by the Crown in Nova Scotia, he himself applied to the Court when the New Brunswick government refused to pay his fees for abortion services rendered to New Brunswick

women at his Montreal clinic. While the Right to Life movement continued to press for new foetal rights and men's rights, several of its supporters, participants in Operation Rescue (characterized by one author as 'Operation Oppress You')<sup>2</sup> found themselves on the other side of the law, prosecuted and convicted for their defiance of court orders to stay away from abortion clinics.<sup>3</sup> It is my argument that no groups found themselves in a more contradictory position *vis-a-vis* Canadian law and the Canadian state than did feminists and their allies who found themselves enjoying an unprecedented series of legal victories.

The implications of a feminist turn to law to challenge power and to create new rights claims have been carefully and critically interrogated by left and feminist scholars alike.<sup>4</sup> British feminist Carol Smart, noting that 'it is almost as hard to be against rights as it is to be against virtue',<sup>5</sup> urges feminists to be wary of the appeal of the rhetoric and legal practice of 'rights'. Smart argues that feminists have ceded too much to law at the expense of more important alternative extra-legal strategies, and they now find themselves in a difficult contradiction: 'the appeal to law on the basis of basic rights was no less than an appeal to the state to re-order power relations.'<sup>6</sup> Whether in the areas of sexual assault, child custody or reproductive freedoms, Smart argues that law transforms feminism's claims and issues, and imposes new and superior redefinitions; and it is 'this power to define [that] is part of the power of law . . .'.<sup>7</sup> She urges feminists to 'discourage a resort to law as if it holds the key to unlock women's oppression', to 'de-centre law wherever this is feasible' and thereby to resist 'the move towards more law and the creeping hegemony of the legal order'.<sup>6</sup>

Yet, Smart draws back from analysing the state as a site of women's subordination and feminist struggle. While she illuminates the uneven and refracted relation of law to women and argues against imprecise and simplistic conceptual frameworks such as 'power as commodity', 'law as tool', it is clear that she also regards 'the state' as analytically vacuous and anachronistic: 'a concept like the state is so imprecise and misleadingly implies a monolithic unity of interests and regimes. . .'.<sup>9</sup>

The cogency as well as the limits of Carol Smart's argument have begun to be illustrated in the Canadian context as feminists

grapple with the weaknesses, perhaps even false promise, of the Charter of Rights and Freedoms.<sup>10</sup> Judy Fudge argues that by advancing women's equality claims through Charter litigation, feminists have neglected both the nature of the state's contribution to the maintenance of women's subordination and the significance of the particular form of the public/private split entrenched in the Charter. She illustrates that the inequalities and despotism of the private sphere remain beyond the scrutiny of the Charter, irrespective of whether one's concept of the private realm includes the family as well as the market. She cites, for example, the state's legislatively expressed commitment to the primacy of 'private' responsibility for spousal or child support, which is nothing less than a commitment to state-enforced patriarchal relations. In the same way some feminists do, the state wants men to be responsible for children, to be accountable, and most importantly, to pay. But, in her view, '[i]t is impossible to regard a [judicial] decision that reinforces women's economic dependency upon men by privatizing the obligation for support as a progressive victory.'<sup>11</sup>

This chapter illustrates that a concern with the law-state relation is still appropriate, indeed imperative. Smart reminds us that the state is often asserted to be, and less often illustrated as, a leviathan-like source of power, for men or capital or both. Rather than ignoring it because of these analytic problems, however, it is still better to insist upon an analysis of the law-state relation. This is particularly so in the Canadian context because the abortion issue cannot be understood as separate *from* the state, its form, its division of powers,<sup>12</sup> its social policies and coercive practices, and the law, both legislative and adjudicative.

To detach the law from the state is effectively to participate in efforts to depoliticize the former. Indeed, as this book argues, the medicalization of abortion, the use of criminal prosecution and the courts, the 'free vote' in Parliament, have all been aspects of the state's strategy to depoliticize both abortion struggles and abortion law. Feminists must both recognize this strategy and work with conceptual tools that allow it to be exposed and thereby analyzed. The specificity of both state and law need to be acknowledged. Thus, without collapsing law into the state, or the state into law, it is necessary to examine each in relation to the other.

Even ostensibly private disputes, such as those involving the

women and men in the abortion injunction cases,<sup>13</sup> illustrate the importance of the posture and action of the state *vis-a-vis* abortion. Such cases demonstrate how recriminalization explicitly defines the interest of the Canadian state in abortion and, implicitly, defines an interest of men who, regarding themselves sufficiently affected, attempt to intervene to ensure compliance with the law.<sup>14</sup> Beyond the issue of criminalization are state decisions about whether or not to provide medicare funds for 'non-therapeutic' abortions,<sup>15</sup> to permit the establishment of free-standing abortion clinics,<sup>16</sup> and otherwise to create conditions of meaningful access.<sup>17</sup> The resolution of the abortion issue is more likely to be determined by political struggle than by legal right. In this the role played by the state is of central importance.

An analysis of this role and the nature of the law-state relation is aided by the concept of ideology, which illuminates the contradictory nature of law. Understanding the significance of law as a site of ideological struggle permits a reconciliation of the contradictory experiences and assessments of pro-life and pro-choice legal challenges. Therefore, this chapter proceeds from the proposition that law within Western capitalism is principally, but not exclusively, an ideological form.<sup>18</sup> It sets normative standards and informs, shapes, and constrains the content of collective and conventional thinking about social structure and the possibilities and necessity for change, and it is simultaneously informed by these conventional ideas and beliefs about social relations.<sup>19</sup> Not simply nor even accurately characterized as a 'reflection' of society, or its 'hammer', the law (including its agents-lawyers, legislators, and judges) is both a product of and reproducer of the existing social order.<sup>20</sup>

Conceptualizing law and ideology assists us in analysing the current abortion debates, as well as demonstrating the extent to which the law is a site of struggle. The sections which follow describe the ways in which the pro-life movement has made claims with increasing authority that 'abortion is murder' when this is not, and has never been, the definition provided in Canadian criminal law. They also describe how the startlingly novel claim that the foetus is a person has gained popular currency, notwithstanding the consistent position in law that a live birth is a prerequisite for personhood. Ideologies become dominant not necessarily through law, and indeed occasionally in opposition to law, but emergent as well as

dominant ideologies may nonetheless be imported or incorporated into law. Interestingly, the strongest weapon in the anti-choice rights arsenal in Canada has not yet proven to be a legal one.

After reviewing the *Morgentaler* decision in detail, we will examine related litigation, including the pro-choice and pro-life cases, the fathers' rights cases, and cases involving the provincial clawbacks of *Morgentaler* and medicare. Notwithstanding the many legal defeats experienced by anti-choice advocates, and the recent spate of legal victories achieved by pro-choice advocates, the *extra-legal* cultural struggle that is currently being waged may prove to be the decisive one.<sup>21</sup> To argue that both the law and the state are sites of struggle ought not to lead to the position that they are inevitable, necessary, or exclusive sites; the legal victories are never conclusive. In other words, while the law cannot be ignored, it should not mesmerize those endeavouring to achieve social change.

### *From Victory to Defeat to Victory: Morgentaler in the Courts*

Although there was unevenness in levels of feminist activity in the years following the 1969 amendments to the Criminal Code, Canadian feminist and pro-choice activists consistently identified the inequality created by the abortion law and called for decriminalization.<sup>22</sup> They voted with their feet in the streets, in hundreds of demonstrations and several blustery March 8 International Women's Day marches. The cold feet really belonged, however, to male elected representatives in Parliament. For all their lobbying efforts, political activity, careful analyses and documented inequality, Canadian women met the stony intransigence of a federal government ostensibly committed to equality in its legislation, yet lacking the political will to move on this important issue.

In the early 1980s, the women's movement paid increasing attention to the abortion issue. Feminists were frustrated by their failed efforts to have abortion decriminalized, and were foiled in their attempts to work within the existing law.<sup>23</sup> Activists in English Canada looked to the successful free-standing clinic experience in Quebec and decided to extend the Quebec experiment to other communities, specifically Winnipeg and Toronto. In Toronto, the Committee for the Establishment of Abortion Clinics was formed by feminist and pro-choice activists. The Committee sought and

received the support of Henry Morgentaler and two other doctors, and the Morgentaler Clinic on Harbord Street in Toronto was opened. A public campaign was launched, and the challenge to the federal law was explicit and direct.

As in the 1970s in Quebec, a raid on a Morgentaler clinic resulted in criminal charges. And, once again, following a prolonged but unsuccessful pretrial motion to quash the indictments against them,<sup>24</sup> Dr Morgentaler and his two colleagues, Ors Leslie Smoling and Robert Scott, were acquitted by yet another jury. Once again, at the hands of a Court of Appeal, the verdict was set aside; a new trial was ordered.<sup>25</sup> The Ontario Court of Appeal was not moved by defence arguments that the *Charter of Rights* had altered in a significant way the fabric of the law. In fact, the Court of Appeal comforted itself with the knowledge that abortion had long been a criminal offence and offered this analysis of the right to life, liberty, and security of the person under section 7 of the *Charter*:

Some rights have their basis in common law or statute law. Some are so deeply rooted in our traditions and way of life as to be fundamental and could be classified as part of life, liberty and security of the person. The right to choose one's partner in marriage, and the decision whether or not to have children, would fall in this category . . .

We agree with Parker A.C.J.H.C. in the court below that, bearing in mind the statutory prohibition against abortion in Canada which has existed for 100 years, it could not be said that there is a right to procure an abortion so deeply rooted in our traditions and way of life as to be fundamental.<sup>26</sup>

The Ontario Court of Appeal also held that Dr Morgentaler's understanding of the law relating to the defence of necessity was 'misconceived'. The Court, clearly offended by the doctors' scrupulous advance preparation to rely upon this defence, held:

Taking the most favourable view of the evidence for the defence, the respondents were dissatisfied with the present law relating to abortions in Canada.<sup>27</sup>

It was left to Morgentaler to proceed with an appeal to the Supreme Court of Canada and to argue in that court that the abortion



provisions of the Criminal Code violated the Canadian Charter of Rights and Freedoms, in particular section 7, which provides:

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.

Although the named appellants before the Supreme Court were Drs Morgentaler, Smoling and Scott, the case was argued in the name of women whose access to abortion, including therapeutic abortion, was inhibited by the operation of the provisions of section 251. Clearly, the voluminous evidence led at trial by the doctors convinced the majority of the Court that the procedure enunciated in section 251 was, in the words of the Chief Justice, 'manifestly unfair'.<sup>28</sup> While Justice McIntyre in dissent insisted that any problems identified with the abortion law were caused by 'external' forces, specifically 'a general demand for abortion irrespective of the provisions of section 251',<sup>29</sup> Dickson held that 'many of the most serious problems with . . . section 251 are created by the procedural and administrative requirements established in the law'.<sup>30</sup> Although the heart of Dickson's judgment centred upon the 'manifest unfairness' of the procedures, the lack of any definition of health, and the inherent delays in the 1969 amendments, his judgment had some unequivocal resonances for women:

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.<sup>31</sup>

Despite this apparently strong criticism of compulsory pregnancy, it is important to remember that Dickson would have upheld the legislation had its procedures complied with the principles of fundamental justice; the fact of criminalization *per se* was not rejected. Beyond this, Dickson, as all members of the Court, contemplated that state protection of 'foetal interests' 'might well be deserving of court protection'<sup>32</sup> under section 1 of the Charter which: ' . . . guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

In other words, provided that restrictive abortion legislation contained a standard or procedure that was fair and not arbitrary, Dickson might well uphold it in the name of state protection of the foetus.

Madam Justice Wilson's judgement focused less on procedural unfairness which might be remedied. Unlike her brothers on the bench, Wilson rested her decision on the right to liberty within section 7, and insisted that the right to individual liberty is 'inextricably tied to the concept of human dignity',<sup>33</sup> which for Wilson included the right to make fundamental personal decisions within a sphere of personal autonomy:

The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being (emphasis in original).<sup>34</sup>

Wilson also held that a woman's security of the person was violated by section 251. In particular, the requirement of a therapeutic abortion committee meant that:

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?<sup>35</sup>

Wilson's 'sphere of personal autonomy' did not involve an atomized libertarianism. She situated her individual 'woman' within her context<sup>36</sup> while insisting that within this social or collective context, the individual (pregnant woman) had to be able to make decisions which might well defy the imaginative capacities of (non-pregnant) men. Nonetheless, Wilson too contemplated that, as in *Roe v Wade*, a woman's right of access to abortion was not to be absolute:

At some point the legitimate state interests in the protection of health, proper medical standards, and pre-natal life would justify its qualification.<sup>37</sup>

For Wilson, section 1 of the Charter would authorize 'reasonable limits to be put upon the woman's right'.<sup>38</sup>

In the early stages the woman's autonomy would be absolute;

her decision, reached in consultation with her physician not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. The precise point in the development of the foetus at which the state's interest in its protection becomes 'compelling' I leave to the informed judgement of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.<sup>39</sup>

As for the rest of the bench, both Beetz J. (writing with the majority) and McIntyre J. (in dissent) held that protection of the foetus was the primary purpose of the abortion legislation; Beetz found the procedural problems in section 251 fatal. McIntyre, the only judge to use the language of the pro-life movement, would have upheld the legislation designed to protect the interests of the unborn child:

There has always been a clear recognition of a public interest in the protection of the unborn and there has been no indication of any general acceptance of the concept of abortion at will in our society.

In the end, section 251 was struck down.

Although few people anticipated complete success with the Charter challenge, it is clear in retrospect that it was an all-or-nothing proposition. In an oddly dialectical way, the seed for this successful assault on the abortion section had been sown in Justice Dickson's own analysis of it as 'a comprehensive code . . . , unitary and complete within itself in his 1976 judgement which upheld Dr Morgentaler's conviction in the first round.<sup>41</sup>

The result was, of course, an historic decision in which the Supreme Court of Canada struck down in its entirety section 251. It marked the culmination of two decades of hard-fought feminist struggle in which the legal victories had been few and the political victories even fewer.<sup>42</sup> However, *it* quickly became clear that this, like many victories, particularly legal victories, was fragile, incomplete and contradictory. The victory was fragile because the federal government, though bruised, attempted for two years to recriminalize abortion. Threats, and in some cases action; by

provincial governments responsible for hospitals, to refuse or limit funding for abortions in the absence of a therapeutic exception in the Criminal Code further attested to the fragility.<sup>43</sup> It was an incomplete victory because the unequivocal commitment of all the Supreme Court judges to 'foetal interests' or the 'state's interest in the foetus' invited Parliament to limit women's access to abortion (and indeed other medical procedures) in the later stages of pregnancy and opened the door to other legislative proposals, which purported to cater to a 'specific' foetal interest, if not full legal personality.<sup>44</sup>

Finally, the victory was also contradictory in that the Court reinforced the notion that abortion is a medical matter. Contradictions abound in this maintenance of a medicalized conception of abortion. On the one hand, Canadian feminists and pro-choice activists have articulated a long-standing critique of the implications of denoting of abortion as a medical or therapeutic matter.<sup>45</sup> Yet, on the other hand, in very important and paradoxical ways the continued denotation of abortion as a *health* matter has been significant in the Canadian context. Health care in Canada has come to be regarded as a social right, enshrined in a comprehensive and fully funded health care system based upon principles of accessibility and universality.<sup>46</sup> In the years following the Supreme Court's decision, the issue of women's right of access to health care has fuelled the pro-choice movement. Indeed, the fragility of women's access to abortion has helped to illustrate the more general fragility of medicare in Canada.

By focusing on these contradictions we can better understand the situation Canadian women face. Obviously, the language of the Morgentaler judgements of the majority was a ringing restatement of an *individual* right to life, liberty, and security of the person and is thus consistent with the emphasis on abortion as a private and individual matter.<sup>47</sup> While this reflects the language of lawyers and judges, it has *not* been the characterization of Canadian pro-choice and feminist activists, who have consistently framed abortion as an issue of equality and access. Access to abortion by Canadian women should not be as vulnerable to the kind of legislative and judicial erosion as in the United States, where the US Supreme Court began to undermine *Roe v Wade*<sup>48</sup> in a series of decisions which upheld federal provisions restricting the expenditure of

Medicaid funds for all but medically necessary abortions, thereby and thereafter depriving poor American women access to medically insured abortions.<sup>50</sup> In 1989, the US Supreme Court upheld Missouri legislation which prohibited publicly funded health-care centres and public employees from providing abortion services.<sup>51</sup> The Canadian political and social context is different in an important respect by virtue of the comprehensive public health-care system. And so in Canada we are in the rather paradoxical position of now having to insist that abortion is a health-care matter, in order to ensure equal access and availability of publicly funded abortions.

### *Right to life versus the Law*

The 1969 abortion law was also assailed by the right to life movement who insisted that even the limited therapeutic provisions of the Criminal Code went too far. The thrust of their campaign, legal and otherwise, has been to limit women's access to legal abortion, to advocate striking down the therapeutic abortion provisions, to construct and advance new rights for men (*qua* husbands and fathers) and for the foetus, and to threaten and harass everyone involved in the delivery of abortion services. These challenges to Canadian abortion law are as important as the pro-choice challenges have been.

One important early extra-legal tactic of the right to life movement was to exert constant, concerted pressure on hospitals to dismantle their Therapeutic Abortion Committees. Paradoxically, a hospital's decision to dismantle its committee (often after a struggle for control of the composition of the hospital board) sometimes became a source of tension between hospital boards and doctors. Doctors were able to force the reinstatement of abortion committees by refusing to sit on other hospital committees. The outcome in at least one such case, however, was the appointment by a hospital board of a new committee with 'conservative' views on abortion.<sup>52</sup> Moreover, during a doctors' strike in Ontario in the fall of 1986 (provoked by the prohibition of extra-billing in the medicare system) one of the first services affected was the Therapeutic Abortion Committee.<sup>53</sup> This experience again demonstrated the political nature of the therapeutic abortion process and the tenuous

status of women's access to legal abortion.

The most tenacious legal challenge undertaken by the anti-choice movement was to be found in the *Borowski* case. In 1981, the Supreme Court of Canada granted standing to long-time pro-life activist Joseph Borowski to bring an action challenging the validity of the therapeutic abortion amendments to the Criminal Code. Speaking for the majority of the Supreme Court, Martland J. held that Borowski did not have to establish that he was directly affected by the abortion legislation in order to bring his legal challenge because he met a second test: 'he has a genuine interest as a citizen in the validity of the legislation and . . . there is no other reasonable manner in which the issue may be brought before the court.'<sup>54</sup> With the entrenchment of the *Charter of Rights*, Borowski amended his action to argue that the therapeutic abortion amendments were unconstitutional under sections 7 and 15, violating a foetus' right to life and equality.

He was unsuccessful at trial.<sup>55</sup> Moreover, in the spring of 1987, the Saskatchewan Court of Appeal dismissed his appeal, holding that a foetus is not an 'everyone' entitled to the protection of section 7 or section 15 of the Charter.<sup>56</sup> Because the *Morgentaler* appeal was heard by the Supreme Court before the *Borowski* appeal, the decision in the former sealed the fate of the latter. Once the legislation he undertook to challenge had been struck down by the Supreme Court in *Morgentaler*, Mr Borowski's own appeal to the Supreme Court was dismissed as moot.<sup>57</sup>

The legal argument advanced by Borowski and others for foetal personhood goes thus: Protective mechanisms available to the unborn which crystallize at birth are already recognized by law. There is no logical reason why legal personality and the rights which flow therefrom should not be concomitant in time.<sup>58</sup> The medical and health needs of a foetus are analogous to and continuous of those of a child; thus, the child and the foetus should be considered juridical persons in the same sense and for the same reasons.<sup>59</sup> While any 'right to property' thus far afforded to the foetus is and has been a contingent right<sup>60</sup>-contingent on live birth—this requirement is regarded as anachronistic.<sup>61</sup> Indeed, Joe Borowski's counsel insisted he was arguing the new 'Persons Case'—a reference to the *Persons* case of 1930 which extended women's political rights.<sup>62</sup>

## *Foetal Personhood: The Ideology of Foetal Rights*

Feminists across a range of disciplines<sup>63</sup> have noted the many and contradictory ways that the new visibility of the foetus has rendered pregnant women invisible, likened them to 'ambulatory chalices'<sup>64</sup> or flower pots<» and, less benignly, seen them as the principal adversaries of the foetus. Advocates of legal recognition of foetal personhood such as the American legal academic John Robertson<sup>66</sup> and Canadian law reform consultant Edward Keyserlingk<sup>67</sup> have turned their minds to a whole panoply of forms and degrees of maternal misconduct. In his assertion that 'mothers are arguably those with the most serious and extensive duties and obligations toward the unborn, and therefore the likeliest class of defendant',<sup>68</sup> Keyserlingk clearly regards pregnant women as the likeliest adversaries and perpetrators of 'foetal neglect'.

The current characterization of hostility and antagonism between pregnant women and fetuses is one which has been carefully constructed. In right-to-life legal arguments and factums, in literature (legal and otherwise) and films, the pregnant woman is increasingly put in the position of adversary to her own pregnancy either by presenting a 'hostile environment' for foetal development or by actively refusing medically proposed intervention.<sup>69</sup> Clearly, upon closer analysis, the conflict is not one between maternal and foetal rights,<sup>70</sup> but rather between women and self-appointed curators of the foetus or guardians of 'foetal interests'.

The ubiquitous presence of the foetus in the abortion debate is of rather recent provenance; the earlier medical and legal literature and case law having focused on the sexual immorality which gave rise to abortion rather than the value of embryonic life.<sup>71</sup> Now it seems, the foetus itself has become the apparent target of the engagement, our culture having 'discovered' what women have long known: babies do not come from hospitals; they are 'with us' throughout 'their' pregnancy. Moreover, prior to its birth the foetus is already the new kid on the block. Foetal personhood advocates emphasize the 'biological' unity of the 'pre-born' and 'born'<sup>72</sup> and de-emphasize the biological unity of woman and foetus.

Feminists both acknowledge the fundamental unity of woman and foetus and insist that the relationship is not 'symmetrical'.<sup>73</sup> Indeed, feminist insistence upon pregnancy as a 'relationship'<sup>74</sup>

between a pregnant woman and a foetus is as significant as the insight that this relationship is neither symmetrical nor inherently antagonistic. Feminists are thus currently engaged in a concerted struggle to resist the emerging if not yet prevailing image of pregnant women as menacing vessels, an image offensive to the integrity and moral agency of pregnant women. But feminists have also had to contend with the new invisibility of pregnant women in this campaign; witness Edward Keyserlingk:

*In most respects but one, the transfer from the protections of the womb to the protection of the crib and nursery, there is unbroken continuity between the unborn and the child. (emphasis added)*<sup>75</sup>

Has the law similarly been rendered invisible, an empty vessel or an enemy alien, by the various contestants? Certainly, advocates for the recognition of legal personhood for the foetus have reason to feel that they have received a chilly reception in Canadian courts. In the *Sullivan and LeMay* case,<sup>76</sup> involving two lay midwives who had been charged with criminal negligence in the death of the foetus during delivery, the Court restated the axiomatic position that prior to live birth, the foetus is not a human being for the purpose of the Criminal Code. In the father's rights' cases of *Daigle v Tremblay*<sup>71</sup> and *Murphy v Dodd*<sup>18</sup> both 'potential fathers' and foetuses ultimately had to yield to the rights of the women.

While acknowledging the Canadian legal victories which have given rise to pro-life chagrin, feminist advocates and scholars need to be attentive to the various ways in which the foetal personhood campaign has been waged extra-legally, that is, culturally and politically. Here the ideological dimensions of the matter are particularly striking. Despite the claim that the foetus is the named object of their attention, it is clear that the real objects of the foetal personhood campaign are *women*.<sup>79</sup> Foetal personhood has implications for all women; all pregnant women experience some form of surveillance, but it is the poor who are most vulnerable to the 'pregnancy police'.<sup>80</sup>

The new foetal imagery is not one-dimensional, however. Indeed, two powerful if contradictory images of the foetus have emerged as part of what Rosalind Petchesky has characterized as a strategy to make foetal personhood a self-fulfilling prophecy by making the foetus a public presence in a visually oriented culture:<sup>81</sup> the tiny,



helpless, and innocent unborn child and the active, virtually autonomous foetus trapped in its mother's womb, begrudgingly serving a nine-month sentence of confinement. Petchesky argues that our collective understanding of the foetus has been in large measure constructed by the visual images presented and insisted upon by pro-life advocates.

The potential cultural and political successes of the foetal rights movement, then, 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.

A window on this issue presents itself in part in the child welfare cases in Canada and the forced obstetrical treatment cases<sup>82</sup> in the United States. A small but significant body of case law to date reveals<sup>83</sup> some judicial sympathy for the proposition that for the purposes of child-welfare legislation, a child is deemed to include the unborn.<sup>84</sup> In both Canada and the United States it is clear that the women who are feeling the coercive edge of foetal attraction are poor women, women on welfare who have a 'history' with either welfare or child welfare authorities or both. Poor women, homeless women, and mentally ill women have supplanted the 'lewd' women who vexed previous generations of lawmakers and law enforcers. And the net will widen if Edward Keyserlingk's view—that those who pose the greatest threat to fetuses are their pregnant mothers—prevails.

Thus, although abortion is never far from its agenda, it is fair to observe that the foetal rights movement tackles more than abortion. In the United States, in the aftermath of the significant yet modest pro-choice victory in *Roe v Wade*, the strategy has been to work within and against the letter of *Roe*. While for some, the insistence that life begins at conception obviously means that there can be no compromise with *Roe*, for others the short-term concession of the first trimester to pregnant women has enabled them to declare 'open season' on the second and the third. The argument is that once a pregnant woman has foregone her option for an early, legal abortion, her rights as a citizen diminish increasingly in favour of

her obligations (and, they argue, her legally enforceable duty) to her foetus. In John Robertson's words, although a woman is under 'no obligation to invite the fetus- in or to allow it to remain, once she has done these things, she assumes obligations to the fetus that limit her freedom over her body'.<sup>85</sup> Secondly, they are supremely confident that medical science will soon render the foetus viable at increasingly earlier points in pregnancy and, that as a result, the parameters for women to exercise their right to early abortion will be increasingly narrowed.<sup>86</sup> Thus, in the US, right to life advocates have worked both within and against the letter of the *Roe* judgement. As Janet Gallagher has argued:

This attempt to use *Roe* as a legal weapon against pregnant women—to claim it as justification for detention, criminal charges of 'abuse', drastic restraints on liberty, and even unconsented-to surgical invasion—stands the decision on its head, and not merely in terms of the right to abortion. *Roe v Wade* may have its flaws, but granting open season on pregnant women after viability is not one of them.<sup>87</sup>

### *Paternal Legal Claims: The Abortion Injunction Cases*

In this section, I revisit some ground recently well travelled by activists, courts and academics:<sup>88</sup> the fathers' rights claims in the area of abortion. Reviewing the various judicial victories achieved by women against the seeming odds of law and patriarchy illustrates that the right of women to abortion unencumbered by the interference of men is one which principally and paradoxically has been acknowledged by the law alone. In other words, a woman's right to autonomy and self-determination in her fertility control is still a contentious claim within a society committed to the idealized (patriarchal) nuclear family.

Given the great importance placed on the issue of fathers' rights by groups opposing the liberalization of abortion law, it is not surprising that the issue of husbands' and fathers' rights in the matter of abortion has been raised in Canada. Indeed, after Marc Lepine murdered fourteen women at the Ecole Polytechnique in Montreal in December 1989 and injured a dozen more in his anti-feminist rampage, a spokeswoman for REAL Women of Canada

opined that he 'just might have been a man whose child had been aborted by a feminist'.<sup>89</sup>

There is of course some irony in the concern that anti-choice groups express on behalf of men who have 'lost their rights' in the context of legal abortion. Although there has never been an express requirement for a husband's consent in abortion law or medical procedure, they have not ever really been left out in the cold.<sup>90</sup> Notwithstanding the absence of any legislative requirement for either spousal or parental consent in the old abortion provisions, the Badgley Report found that in practice Therapeutic Abortion Committees across Canada operated with diverse consent requirements relating both to the age of the woman and to the father. More than two-thirds (68%) of the hospitals surveyed by the Committee required the consent of the husband. A few hospitals required the consent of a husband from whom the woman was separated or divorced and the consent of the father where the woman had never been married.<sup>91</sup>

Despite these practices, under the previous therapeutic provisions of the Criminal Code, Canadian courts had held that a husband had neither a right to be consulted nor a right of veto in the matter of his wife's application for a therapeutic abortion.<sup>92</sup> They have been, however, more loath than courts in other jurisdictions<sup>93</sup> to rule these men completely out of court. In two early reported cases, Canadian courts adopted the reasoning of an English court in *Paton v Trustees of B.P.A.S.*,<sup>94</sup> in which a husband applied unsuccessfully for an injunction to prevent his wife from proceeding with an abortion approved in accordance with the English abortion legislation. In 1981, the British Columbia Supreme Court dealt with an application by a husband for an injunction to restrain his wife and the Campbell River and District Hospital from proceeding with her therapeutic abortion.<sup>95</sup> The BC court held that the facts were virtually identical to those in the *Paton* case and similarly held that the therapeutic abortion provisions of the Criminal Code could not accommodate a husband's 'veto'.

Three years later, an Ontario Court was faced with a similar, highly publicized application.<sup>96</sup> Alexander Medhurst commenced the action on his behalf and that of his unborn child for an injunction to restrain his wife, her doctor, and the hospital from proceeding with an abortion. Although he was initially successful, the

court ultimately held that as an unborn child is not a person, there was no legal entity for whom the husband could be appointed guardian. Although both husbands were unsuccessful in their legal challenges, a close reading of these two early cases reveals judicial angst about abortion, along with considerable sympathy for the position of the applicant husbands.

The insistence by the women's movement that men take children and child care seriously has contributed to the now prevalent assumption that men as fathers actually do much more than they once did. As Carol Smart has illustrated in her work, the *image* of new fathers, especially with babies (as opposed to children) now informs popular culture.<sup>97</sup> Thus it seems inevitable that we should have witnessed an apparent surge in men's interest in 'their pregnancies' and 'their' unborn children and, for some, their struggles for custody before birth. Another twist to the law's relation to and regulation of women resurfaced in the aftermath of the Supreme Court's decision in *Morgentaler*. Men (supported by the pro-life movement) once again began to litigate to prevent women from terminating pregnancy. To the women's movement's clarion call that 'This uterus is not government property', these 'post-Morgentaler' men responded: 'No, it's mine.' To them, abortion was not a women's issue; it was their issue about their 'issue'.

The apparent legal vacuum created by the Supreme Court's decision in 1988 spurred some men to litigious direct action. Consistent with the pre-Morgentaler cases,<sup>98</sup> in all but one of these cases the men were successful initially. Judges who were confronted with the application, usually ex parte, were persuaded to issue the interim order.<sup>99</sup> The respondent woman had to apply to a different judge of the same court to set aside the initial ex parte restraining order.<sup>100</sup> When she lost again, as Chantal Daigle did in the Quebec Court of Appeal; she had then to appeal to the Supreme Court of Canada.<sup>101</sup>

Only Justice Hirschfield of the Manitoba Court of Queen's Bench of his own initiative (as the woman was not represented by counsel before him) was unequivocal in recognizing the woman's right to choose, although the importance of his caveat should not be lost:

It is apparent to me that when the Respondent decided she was going to terminate the pregnancy she was exercising a freedom of choice which she has the right to exercise. And,

that she was exercising the control over her body which she has the right to exercise. . . . [the] overwhelming consideration from my point of view is the fact that a human being, that is the Respondent has an absolute right, subject to criminal sanctions, to the control of her body. There is no criminal sanction against her exercising that right, in my opinion, *as the law stands today, and until changed, she is entitled to do so.* (emphasis added)IO'Z

In the end, in the post-Morgentaler cases, none of the injunctions stood. The women won in court; the men lost.

To refuse to characterize these legal victories in the abortion struggle as defeats does not absolve one from the requisite analysis of the nature of the victories and their manifest fragility and weakness. Nor is it to deny the fact that they often do not feel like victories, even where the ex parte restraining orders are lifted, enabling the woman to proceed unencumbered by legal sanction. It is also important to acknowledge the lack of legal determinacy in these cases; for instance, in a number of the injunction cases in both Canada and the United States, the woman proceeded to have an abortion, notwithstanding the fact that the case was still before the court.<sup>103</sup> In one case where a British woman survived the judicial ordeal with her legal rights intact, she elected not to have the abortion and gave the baby to the man, who in turn gave the child to his mother to raise.<sup>104</sup> And of course, in Canada in the summer of 1989, the spectacular conversion by Barbara Dodd to the Right to Life Movement made news for weeks. Ms Dodd's attempt to obtain an abortion was initially thwarted by her boyfriend, who may or may not have been the 'father', and his lawyer, Angela Costigan. The pro-choice movement championed Dodd's cause, and she was eventually able to proceed with the abortion. Almost immediately following her successful struggle to resist her boyfriend and proceed with her abortion, she recanted, and made the cover of *Macleans*.<sup>105</sup> Legal victories clearly are not to be taken for real victories.

One reason these legal victories often *feel* like defeats is the clear empathy expressed in many of the cases for the men, especially the husbands, especially by the male judiciary.<sup>106</sup> In the early Ontario case, *ifedhurst*, Mr Justice Reid was clearly moved by the husband's plight:

The husband has a direct interest in the issue of the compliance with the [criminal] law which, in my view, entitles him to bring this application on his own behalf, and his lack of any right to withhold his consent or to be consulted does not deprive him of the right to resort to this court to assert or protect that interest. *I cannot think of anyone more entitled to the court's protection of that interest than a husband. . . . [I]t is difficult to think of anyone who could have an interest equal to that of a husband in the pregnancy of his wife.*<sup>107</sup> (emphasis added)

Reid J.'s holding permitted the husband to apply immediately to review the Therapeutic Abortion Committee's decision in the matter of his wife's application for a therapeutic abortion, and although he 'lost' in that round as well,<sup>108</sup> he had been empowered by the judicial assertion of a husband's inherent interest and virtual 'natural right' in respect of his wife's pregnancy. This was so notwithstanding the fact of their marital separation, and the husband's clear attempt to force his wife back into the marriage. The legal form of the substantive law as it then was inhibited the husband's power. But the generosity of Canadian courts toward the granting of standing to men in the matter of abortion,<sup>109</sup> including in the injunction cases under the Criminal Code, makes it clear that any recriminalization of abortion will invite and facilitate procedural harassment of women seeking abortions and doctors prepared to perform them.

Not only have men *qua* men been somewhat inhibited by law; so too have some American judges who find they 'must, with reluctance' accept that '[t]he [US] Supreme Court has made it crystal clear that a pregnant woman, without the permission or consent or advice from anyone else' has a right to an abortion in the first trimester, while noting that '(m)any individuals who specialize in religion or ethical concerns are appalled by the Supreme Court decisions'.<sup>110</sup> In the course of his reported judgement in *Medhurst*, Reid J. also insisted:

It is not possible to approach this matter without personal convictions—I am personally appalled at the prospect of abortion—or to be left unmoved by the emotion and anxiety that suffuse this issue.<sup>111</sup>

In light of his views 'at the prospect of abortion', one imagines that Mrs Medhurst was relieved that the criminal law inhibited not only her husband but also the Bench. One doubts that it was *her* 'emotion and anxiety' that moved the judge in his remarks.

Not every man who lost in court received condolences from the bench. The fact of allegations of violence contributing to the separation (Mr Paton) and/or abortion (Mr Tremblay) was noted (without comment) by the tribunals/bench. The men who were trying to hold marriages together (Medhurst, Anderson, Whalley) were regarded as sincere men in tragic circumstances. Significantly, the failure to conform to the ideal of the sincere family man was fatal to at least one American man's claim.<sup>112</sup> John Doe commenced an action in Indiana to prevent Jane Smith from proceeding to terminate her 10-12 week pregnancy. He managed to get himself before a justice of the US Supreme Court within two weeks. Jane Smith had become pregnant toward the end of their two-month relationship during which time he had been separated from his wife of six months, by whom he also had a child. He had since reconciled with his wife. Significantly also for Justice Stevens, John Doe had been 'sporadically employed at low paying jobs for the last eighteen months'.<sup>113</sup>

Following an earlier decision of the US Supreme Court in *Planned Parenthood v Danforth*,<sup>114</sup> Stevens J. noted that in order to 'require a mother to carry a child to term against her wishes, the father must demonstrate clear and compelling reasons justifying such actions.'<sup>us</sup> Here, *inter alia*, the plaintiff 'has showed substantial instability in his mental and romantic life. Based upon the plaintiff's romantic patterns over the last eight months, it would be impossible for the Court to predict the stability of his family unit at the time of birth.'<sup>116</sup> Therefore, John Doe's claim was held to provide a 'particularly weak basis for invoking the extraordinary judicial relief sought'.<sup>117</sup> Had John Doe been a stable family man with a good and steady income, Justice Stevens, it seems, might have been persuaded to rule differently.

The risk of relying on the characterization of the 'facts' of men presumably 'suffused by emotion and anxiety' (and indeed their equally suffused lawyers) in their quests to prevent their estranged wives or girlfriends from obtaining legal abortions has been illustrated in the 1989 Ontario case *Murphy v Dodd*.<sup>118</sup> Angela Costigan,

counsel for the applicant boyfriend, had served the court documents herself upon Barbara Dodd on Friday afternoon before the July long weekend; the return date was the Tuesday morning immediately following the holiday Monday. On Tuesday, the presiding Judge noted in the endorsement of his order:

The time is 10:40 a.m.; counsel for the Applicant advises me that she has had indirect communication with the Respondent Dodd; neither Respondent appears nor does Dodd intend to appear by counsel. No one is here to represent the hospital.<sup>119</sup>

In his affidavit in support of the application, Gregory Murphy deposed that he was the father of the Respondent's unborn child, that her doctor had said that an abortion would endanger her health, and that he was from an 'intellectually superior' family.<sup>120</sup> In the subsequent application by Ms Dodd to set aside the initial order, Gregory Murphy's conduct (and by implication his counsel) was characterized by her counsel as amounting to a fraud upon the court. In her affidavit, Ms Dodd deposed that another man might well have been responsible for the pregnancy (this was corroborated in an affidavit by the other man), and that this had been 'the only issue connected with her pregnancy that [she and Murphy] fought about'.<sup>121</sup> In their affidavits, both she and her doctor denied that he had said that the abortion would endanger her health. And finally, Ms Dodd, supported by expert evidence on her own intellectual ability and comprehension of the spoken word (she had a 90% hearing loss), was able to demonstrate that Murphy's lawyer (in her *direct* communication during service of the documents) had not explained the nature of the documents served. As a result, the *ex parte* order restraining Barbara Dodd from proceeding with the abortion was set aside, having been obtained by a fraud upon the court, fraud held to be related to material issues.<sup>122</sup>

In the abortion injunction cases, many of the judges have accepted the men's self-descriptions as 'fathers' of the 'unborn' (infant plaintiff, child). In its judgement in *Tremblay v Daigle* the Supreme Court of Canada pointedly reminded Canadians that these men are more accurately characterized as 'potential fathers'.<sup>123</sup> However, the answer to the question 'what makes a man a father?' seems not to lend itself to such appeals to reason. The Supreme Court may proclaim this to the 'amens' of every feminist in the



country, and yet in the very real world there is fear that ideologically and culturally, the hearts and minds of many Canadians seem to be with the men, the 'fathers' who are losing to selfish women and their feminist allies.<sup>124</sup>

Feminist sociologist Barbara Katz Rothman<sup>125</sup> argues that North American society, and its legal system, have privileged biological paternity over social fathering, where pregnancy is seen as something a man 'does' to a woman, by planting 'his' seed in her, where she has 'his' children. Rothman urges a rethinking of fathering, one which de-emphasizes the 'genetic connection' and re-emphasizes the social relationship. I remain unconvinced that a man can 'forge' a relationship with a foetus, or that he can have his own 'experience' of abortion.<sup>126</sup> The foetus is intimately connected to and constructed within the woman's body; it can only be intimately connected to and constructed within the imagination of the man. Despite his early (and undeniably pivotal) contribution to a woman's pregnancy, it can never be his pregnancy. His relationship with the foetus, if there is to be one, is inevitably mediated by the pregnant woman, and increasingly as well by law.

The resistance we witness to the recent judicial pronouncements inhibiting men may illustrate what Michael Mandel has characterized as understandable resistance to the undemocratic nature of the 'judicial fiat'.<sup>127</sup> And yet, the champions of the resistance in this instance (for example, REAL Women of Canada) are themselves less than committed to the democratic process, much less the 'rule of law'. It is clear that they will continue to work in, against, and outside the law to restrict women's access to abortion.

The abortion injunction cases and anti-feminist response remind us of the urgency of Smart's challenge to take up alternative, extra-legal strategies to defend and extend women's reproductive freedom. Women may have won in court, but the real struggle continues, and real victories remain to be won.

### *Clawbacks: The Provinces Respond*

Perhaps the most striking response to the *Morgentaler* decision is to be found in the provincial governments' reactions to the spectre of decriminalized abortion in combination with the promise of Dr Morgentaler to establish clinics in every province. As others have

noted,<sup>128</sup> the Supreme Court's decision was less than facilitative of women's access to abortion. The Court had simply struck down one form of legal prohibition. The provincial governments of Quebec and Ontario indicated that they would continue to insure abortions under provincial medical insurance plans. However, several provinces quickly set to work erecting local barriers to access.

It is worth remembering that the 1969 reform had also been the subject of political agitation and legal challenge in some provincial legislatures prior to 1988. The nature of these early provincial initiatives, and their ultimate fate, both foreshadowed the post-Morgentaler activity and brought into sharp relief a tremendous contradiction. One concrete example will illustrate. In 1985, an anti-choice Conservative backbencher in the Saskatchewan legislature introduced a private member's bill that would have required a Therapeutic Abortion Committee to secure the 'informed consent' of the patient and spousal or parental consent.<sup>129</sup> In addition, the bill would have imposed a 48-hour waiting period after consent had been given before the procedure could be performed.<sup>130</sup> In a surprise move, the provincial cabinet referred the bill to the Court of Appeal following second reading. The Saskatchewan Court of Appeal ruled that the proposed legislation was *ultra vires* the province, as it was criminal law, and hence within federal jurisdiction.<sup>131</sup> Otherwise, the Conservative majority in the provincial legislature would have passed this bill, which at least temporarily would have become provincial law. This early Saskatchewan case foreshadowed the debate that ensued in the aftermath of the *Morgentaler* decision. It also illuminated an interesting paradox: the criminal denotation of abortion inhibited some forms of provincial restrictions.

Following the Supreme Court's decision in January 1988, no premier moved more quickly than did Bill Vander Zalm of British Columbia. Vander Zalm announced that BC would not pay the costs of abortions; although he pledged that nobody would be permitted to die, he insisted, 'rape and incest are not life threatening. . . . We will not be funding abortions.'<sup>132</sup> While Vander Zalm's brash, unilateral initiative did not withstand judicial scrutiny,<sup>133</sup> other provinces, like Alberta, worked more quietly to ensure that decriminalization did not mean liberalization.<sup>134</sup> Alberta had already experimented with 'de-insuring' certain medical services. In 1987, tubal ligation, mid-tubal reconstruction, vasectomy, and gastroplasty

procedures had been de-insured by the provincial government.<sup>135</sup> Following the *Morgentaler* decision, the Alberta Minister of Health announced that provincial health insurance would pay only for abortions approved by hospital therapeutic abortion committees.<sup>136</sup> The province subsequently modified its position and issued regulations which allowed an abortion to be insured if the doctor performing it had first secured a second opinion. Beyond this, Ian Urquhart suggests that the modest fee allowed under Alberta health insurance for therapeutic abortions has operated as a financial disincentive to abortion, and he concludes:

in the aftermath of *Morgentaler*, the Alberta government has used the province's health insurance program as a vehicle for preserving the essence of the situation existing prior to Court's decision. Tying health insurance coverage to the performance of abortions in approved hospitals only after a second opinion has been offered, as well as retaining the modest fee schedule, combine to restrict access to this procedure, especially for women of modest means.<sup>137</sup>

The fate of a similar initiative by the New Brunswick government is of interest. In the spring of 1989, Dr Morgentaler once again found himself in court; on this occasion he was a plaintiff, and the government of New Brunswick was the defendant. Morgentaler was trying to extract his fees from the New Brunswick medicare system for abortions performed on three New Brunswick women in his Montreal clinic in the spring of 1988. The provincial government had declined to reimburse him, citing provincial policy that had been issued following the Supreme Court's decision: New Brunswick defined an 'entitled service' as one for which two physicians had certified its medical necessity, and the procedure had to be performed by a specialist in an approved hospital.<sup>138</sup> These criteria applied to abortions performed outside the province of New Brunswick as well. As in the *BC Civil Liberties* case, the Court essentially found that the New Brunswick government had acted precipitously; the 'policy' had not been formally adopted as a regulation under the provincial legislation. As there was no statutory basis for the requirements that the province had attempted to impose, Dr Morgentaler obtained the court order he was seeking, a declaration that the policy of the government of New Brunswick

was invalid with respect to abortions performed outside the province of New Brunswick.<sup>139</sup> Despite the absence of a statutory basis for the policy, the court did not extend the declaration to abortions performed within New Brunswick. As a result of this decision, New Brunswick doctors and New Brunswick women unable to leave the province continued to be caught by the policy.

No government resisted the implications of Dr Morgentaler's Supreme Court victory more tenaciously than did John Buchanan's Conservative government in Nova Scotia. Just as the Nova Scotia government defied the Supreme Court ruling, so too did Dr Morgentaler defy in characteristic fashion the Nova Scotia legislation. In the spring of 1989, the provincial Minister of Health announced in the legislature that 'it is not the policy of this government to endorse or support in any way the provision of [abortion] services through free-standing clinics'<sup>140</sup> when he introduced the bill that would eventually become the Medical Services Act S.N.S., c.9 and regulations under it. The stated purpose of the Act set out in s. 2 was: 'to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotias [sic]'.<sup>141</sup>

A number of medical services were required under the Act to be performed in an approved hospital: arthroscopy, colonoscopy, upper gastro-intestinal endoscopy, abortion, lithotripsy, liposuction, nuclear medicine, installation or removal of intraocular lenses, and electromyography.<sup>142</sup> The Medical Services Act provided that there would be no reimbursement to any person who performed or received a designated medical service in contravention of the Act, and (S.6) that anyone who contravened the Act was guilty of an offence and liable upon summary conviction to a fine of not less than \$10,000.00 and not more than \$50,000.00.

Dr Morgentaler defied the Act and was charged after he performed abortions at his Halifax clinic. He was ordered by the Supreme Court of Nova Scotia not to perform abortions until the charges against him were heard.<sup>143</sup> Following his trial in the spring of 1990, the charges against him were dismissed by Provincial Court Judge Kennedy on the ground that the Nova Scotia legislation was really criminal law, and hence beyond the legislative jurisdiction of the province.<sup>144</sup>

The Crown's appeal to the Nova Scotia Court of Appeal was

unsuccessful. Freeman J.A. framed the question before the court:

The question is not whether Nova Scotia possesses legislative powers to pass a law in the form of the Medical Services Act. It clearly could have done so, even though it dealt with abortion. The question is whether the province properly used those powers and created a law within the provincial competence, or whether it improperly attempted to use federal powers to pass a law that, regardless of its form, is actually a criminal law. Only if it bears the unmistakable imprint of criminal law must it be struck down.<sup>145</sup>

It was Morgentaler's position that the Act and Regulation were an incursion by a province into the field of criminal law, that it was 'criminal law in the guise of hospital law'.<sup>146</sup> The Crown's position was the Act was 'about privatization'<sup>147</sup>—essentially an attempt by the Conservatives to defend medicare against the incursions of the private sector. Freeman agreed that, 'examined uncritically and within its own four corners', the Medical Services Act appeared to be no more than a piece of legislation dealing with provincial hospitals.<sup>148</sup> However, a more critical and contextual examination of the Act, its purpose and effect, its nature and character, led the majority of the Court of Appeal to conclude that it was, 'essentially identical to the Criminal Code provisions that had been struck down in *Morgentaler*'.<sup>149</sup> Despite the apparent breadth and neutrality of the provisions, the Court found that the real focus of the legislation was Henry Morgentaler and its primary thrust was to prohibit his abortion clinics. Even the fines provided in the Act had been 'tailored to the [provincial] Department of Health's estimate of his resources'.<sup>150</sup>

Once again Morgentaler had successfully challenged a piece of abortion legislation, this time 'defending' the federal criminal law power. The irony of this position, necessitated as it was by the claw-back of the province and the exigencies of litigation, should not be lost. Perhaps more than anything else, it illustrates the inevitable compromises that engagement with the legal process involves. The constraints imposed by the litigation and judicial processes lead to legal victories that are unreconcilable politically. The constraints go further, because the political imagination inevitably yields the pragmatism of the legal shrug: What else could be argued? How else could he win?

The indeterminacy of the *Morgentaler* decision was not inevitable. The Canadian feminist and pro-choice movement made history, but not under conditions of their own choosing. The cynicism and mean-spiritedness of assorted conservative governments, and their commitment to erosion of even the modest social programs in place, meant that the legal victory of *Morgentaler* was just that, and no more. The struggle for choice, for change, had to continue. Once again, Canadian women found they could claim 'no easy victories'.<sup>151</sup>

### *Conclusions*

The entrenchment of medical control of abortion has been identified as fundamentally implicated in ensuring the continued subordination of women.<sup>152</sup> For its part, the pro-life movement argues that there is no medical justification for abortion and is more than a little suspicious of what it sees as 'medical opportunists' who profit from a 'murderous industry' and who are in effect accomplices of women in abortion.<sup>153</sup> Thus the merits of medical determination are explicitly challenged by both feminists, who have identified the moral arbitration embedded in medical practice, and right-to-life advocates.

Although I have argued elsewhere that both the criminalization of abortion and the implications of the therapeutic exception had to be understood and challenged, I have also argued that the notion of abortion as a medical matter has facilitated the formal erosion of one form of patriarchal authority. The *Morgentaler* decision pushes this issue a bit further, because women have pointed to the spirit and letter of the Canada Health Act to legitimate demands for state-funded access to abortion as a health-care service. To be colloquial, it may be that we have been released for the moment from the 'criminal' frying pan only to be burned by the 'health-care' fire. Nevertheless, as we consider the litany of struggles to resist the recriminalization of abortion, it will continue to be critical for feminists, activists and academics together, to explore and expand the social right to health care envisioned by the early advocates of comprehensive health care.

An important, related question is whether all law is necessarily bad. Put another way, it is certainly critically important in my

view for feminists to resist *any* recriminalization of abortion at *any* stage of pregnancy. However, it is now worth considering whether a positive, affirmative right to abortion ought to be advocated, either by way of amendment to the federal Canada Health Act and/or provincial health legislation. The absence of criminal law did not guarantee *ipsofacto* a *right* of access to safe abortion, as the developments after January 1988 illustrate. Indeed, the tone and language of the Supreme Court judgements invited some of the ensuing provincial responses: to wit, 'if it's a private matter, we don't have to pay for it.' The creation of a positive, legally enforceable right through the health-care system might render more public, and perhaps more political, the legitimate rights and desires of Canadian women.

It is one of the great paradoxes in the Canadian context that the issue of women's reproductive freedom, including access to abortion, was long dominated by two men of opposing points of view: Henry Morgentaler and Joseph Borowski. Moreover, as Rosalind Petchesky has brilliantly illuminated, the image!) of the foetal personhood campaign attempts to render women invisible.<sup>154</sup> But women have not acquiesced to invisibility, as Chantal Daigle demonstrated in the summer of 1989 when she resisted her ex-lover, the pro-life movement, her Lawyer, and the courts. Chantal 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.

So too, the struggle for decriminalization and for safe, universally accessible abortion is both an individual and collective one. One is not possible without the other.