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JUDICIAL REASONING ABOUT PREGNANCY AND CHOICE

Chris Kaposy and Jocelyn Downie***

Concern – The Threat of New Restrictive Abortion Legislation

Women in Canada are at risk of abortion becoming increasingly difficult to access. In its landmark 1988 ruling, *R. v. Morgentaler*,¹ the Supreme Court of Canada struck down the prohibition of abortion in section 251 of the *Criminal Code* on the grounds that it violated a section of the *Charter of Rights and Freedoms* which guarantees, among other things, “security of the person”.² However, all of the justices who ruled that section 251 was unconstitutional nonetheless claimed that protecting the fetus is a valid objective of federal legislation, leaving open the possibility that a different and carefully crafted law against abortion might be constitutional.³ Abortion opponents organized in response to the decision, and in 1990, an attempt was made to re-criminalize abortion. This attempt, Bill C-43, came very close to succeeding.⁴

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1 *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [*Morgentaler* (1988) cited to S.C.R.].

2 *Canadian Charter of Rights and Freedoms*, s.7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. We will examine the court’s reasoning in more detail below in the section entitled “Comfort”.

3 *Morgentaler* (1988), *supra*. note 1 at paras. 56 (Dickson C.J. & Lamer J.), 164 (Beetz & Estey J.J.), 256 (Wilson J.).

4 Bill C-43 was passed by the House of Commons in a free vote by a nine vote margin, but was then defeated in a free vote in the Senate due to a tie (43 for, 43 against). According to Senate rules, a tie vote defeats the Bill. This outcome was unusual since the Senate rarely uses its formal power to defeat bills. Bill C-43, *An Act Respecting Abortion*, 2nd Sess., 34th Parl., 1991 (defeated on Third Reading, 31 January 1991).

However, it did fail and no new *Criminal Code* provisions on abortion have been introduced since.

Nonetheless, the Conservative Party of Canada currently forms the federal government. They are a minority government but they have their eyes on forming a majority. A majority Conservative government would have the motive and means to introduce legislation recriminalizing abortion. As evidence of motive within the ranks of the Conservative Party, there was a Bill before parliament during the most recent sitting of the House [Bill C-484]. This Bill would have made it a crime to kill a fetus during the commission of a violent act against its mother.⁵ Introduced by a Conservative back-bencher, this Bill was an obvious attempt to introduce fetal rights into the *Criminal Code* with an eye toward the re-criminalization of abortion. In light of the possibility of the reintroduction of criminal law legislation against abortion, an important question for women is whether Canadian courts would find a newly-written restrictive abortion law to violate the *Charter of Rights and Freedoms*.

In seeking to answer this question, we were keen to find out whether there are any arguments already present in judicial reasoning about choice in reproduction, or about a woman's entitlement to make certain choices, that could be used to beat back the threat of the re-criminalization of abortion. We also wanted to determine whether there are ways of interpreting the concept of reproductive choice that can be found in judicial reasoning that are damaging to the interests of women. For these reasons, we embarked upon a systematic review of how the concept of choice has been used in Canadian judicial reasoning about reproduction since *Morgentaler* (1988). Specifically, we sought to find out how judges think about the relationship between pregnancy and choice.

Contexts

Using the search functionality of the legal database Quicklaw we attempted to identify all Canadian cases since 1988 in which a judge in his or her written ruling reflected in some fashion on whether a woman had made a choice to get pregnant, continue a pregnancy, or end a pregnancy, or, framed differently, to have an abortion, or not have an abortion. We identified and

5 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 (died on the order paper on September 7, 2008 with the call of the October 2008 election).

carefully reviewed approximately 200 relevant cases. The following is an illustrative sampling of the widely varying legal contexts in which the concept of choice in regard to pregnancy or abortion played a part in the judge's deliberation.

Tort Law

In torts cases, there are numerous instances in which a defendant argued that due to a doctor's negligence, she was denied the option of terminating a pregnancy. In *Krangle (Guardian ad litem of) v. Brisco*⁶ the mother of a child with Down Syndrome alleged that her doctor neglected to offer prenatal testing, and thus she was denied the choice of terminating her pregnancy. She claimed that she would have had an abortion had she known the fetus had Down Syndrome. The judge ruled in the mother's favour. In *Mickle v. Salvation Army Grace Hospital Windsor Ontario*,⁷ the parents of a child born with birth defects (CHILD syndrome) sued the hospital for "wrongful birth," claiming that the fetal defects should have been noticed during an ultrasound. In a wrongful birth case, a plaintiff alleges that she would have had an abortion if she had had access to medical information denied her by a physician's alleged negligence – usually the information in question concerns fetal genetic anomaly or health risks posed to the fetus by maternal health conditions. In *Mickle* the judge dismissed the action, in part because he determined that a reasonable woman in the mother's circumstances would not have chosen abortion, even given knowledge about the fetus's physical anomalies. In both *Mickle* and *Krangle*, the question of whether a woman would have chosen an abortion, and the allegation that being denied the choice constituted a tort, were deemed relevant details for the judges' reasoning.⁸

6 *Krangle (Guardian as litem of) v. Brisco* (1997), 154 D.L.R. (4th) 707, [1997] B.C.J. No. 2740 (B.C.S.C.). The matter was eventually appealed to the Supreme Court of Canada on the issue of the amount of compensation due to the plaintiff after an appeals court increased the compensation. The Supreme Court of Canada restored the trial judge's decision. *Krangle (Guardian as litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205.

7 *Mickle v. Salvation Army Grace Hospital Windsor Ontario* (1998), 166 D.L.R. (4th) 743, [1998] O.J. No. 4683 (Ct.J. (Gen. Div.)).

8 Another such case was appealed to the Supreme Court of Canada: *Arndt v. Smith*, [1997] 2 S.C.R. 539, [1997] S.C.J. No. 65.

In a different kind of case, *Sit v. British Columbia's Women's Hospital*,⁹ a woman sued the hospital in which she had an abortion, claiming that the abortion was performed against her will. The plaintiff alleged that hospital staff concealed the details of the consent form she signed and that she was unaware that the procedure she was undergoing was an abortion procedure. The hospital argued that the woman was fully aware of what was happening and that information on the consent form was not withheld. The judge ruled that an investigation of the consent and examination procedures prior to the actual abortion revealed sufficient and convincing evidence that the woman had chosen the abortion of her own free will and was aware of what was happening. In this case, the judge had to decide whether the plaintiff's behaviour and interaction with hospital staff could be interpreted as an informed choice to undergo an abortion.

Family Law

Whether a woman made a choice with regard to her reproduction is occasionally a matter of judicial interest in family law cases. In one example, *Children's Aid Society of the Region of Peel v. S.*,¹⁰ the parents of a fourteen year-old contested their daughter's decision to have an abortion. The regional Children's Aid Society sought custody of the adolescent in order to enable her to have an abortion. Custody was granted since the fourteen year-old was found to have made a competent informed choice to terminate her pregnancy and the Children's Aid Society was found to be acting in her best interests.

In another case, *Children's Aid Society of London and Middlesex v. K.L.*¹¹ the regional Children's Aid Society sought custody of a child who had been born to a woman abused by her partner. In this case, the judge claimed the woman demonstrated maturity and the ability to care for her child, and so gave custody of the child to the mother, subject to supervision by Children's Aid. Nonetheless, the judge imputed to the mother "irresponsibility from the family planning standpoint in allowing herself to become pregnant time

9 *Sit v. British Columbia's Women's Hospital*, 2000 BCSC 1407, [2000] B.C.J. No. 1911 (S.C.).

10 *Children's Aid Society of the Region of Peel v. S.* (1991), 34 R.F.L. (3d) 157, [1991] O.J. No. 1388 (Ct.J. (Prov. Div.)).

11 *Children's Aid Society of London and Middlesex v. K.L.*, [2001] O.J. No. 2295 (Sup. Ct.J.) (Q.L.).

after time,"¹² even though it was clear her partner was abusive and that she may not have had much control over her own reproductive behaviour.

There are also a number of cases in which a father argued that he should not have to pay child support because he had wanted the woman he had impregnated to have an abortion, but she had decided instead to continue the pregnancy. One such case is *Boca v. Mendel*.¹³ In *Boca*, the judge ruled that a mother's choice not to have an abortion did not absolve the father of responsibility for child support. Two other such cases are *Buschow v. Jors* and *Chang v. Castillo*.¹⁴

Criminal Law

The reproductive choices made by women are often a factor that informs judicial reasoning in criminal law cases. In the case of *R. v. C.A.* a judge refused a defendant access to the counseling and medical records of his teenage step-daughter, whom he was accused of sexually assaulting.¹⁵ This case is relevant to the issue of reproductive choice because the records in question included some pertaining to a previous abortion. The judge denied the request in part because making such records available could discourage victims of sexual assault from obtaining treatment. A decision granting the defendant access to the victim's medical records would have, in effect, attached a troubling negative consequence to the victim's previous decision to have an abortion.

Injunctions

In the years following *Morgentaler* (1988), courts began testing the implications of the ruling, and applicants began testing the willingness of the courts to place restrictions on a woman's rights with respect to abortion. In several cases, including the influential Supreme Court decision *Tremblay v. Daigle*,¹⁶ but also cases such as *Diamond v. Hirsch*,¹⁷ *Murphy v. Dodd*,¹⁸

12 *Ibid.* at para. 64.

13 *Boca v. Mendel* (1989), 20 R.F.L. (3d) 421,, [1989] O.J. No 930 (Prov. Ct. (Fam. Div.)).

14 *Buschow v. Jors* (1994), 118 Sask. R. 306, [1994] S.J. No. 136 (Q.B.); *Chang v. Castillo*, 2002 BCSC 1296, [2002] B.C.J. No. 2019 (S.C.).

15 *R. v. C.A.*, 2005 ABQB 154, [2005] A.J. No. 475 (Q.B.).

16 *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, [1989] S.C.J. No. 79.

17 *Diamond v. Hirsch*, [1989] M.J. No. 377 (Q.B.).

18 *Murphy v. Dodd*, (1989), 70 O.R. (2d) 681, [1989] O.J. No. 1587 (H.C.J.).

and *D.D. v. V.F.*,¹⁹ men sought injunctions to prohibit women from aborting fetuses they had participated in conceiving. In each case, these applications failed, although the trial judge initially granted an interlocutory injunction in *Tremblay*, and then the Quebec Court of Appeal court upheld it, before it was overturned at the Supreme Court of Canada.

In a different kind of case, *Ontario (Attorney General) v. Dieleman*, the provincial government of Ontario won an injunction prohibiting anti-abortion protest activity within 160 feet of abortion clinics.²⁰ The judge in this ruling recognized that anti-abortion picketing was intimidating to women who had decided to terminate their pregnancies, and that “[t]he conduct of protesters, the physical arrangements outside the clinics and the limited alternatives open to women seeking abortion services, hold these patients captive to unwanted and potentially harmful communications.”²¹ According to the judge, the women subject to these protests were “trapped,” targeted, vulnerable, and they experienced the infringement of their freedom not to receive protest messages.²² These observations support the view that reproductive choice requires the removal of gross impediments such as intimidating protest activity for it to be a meaningful option for many women.

Abortion Funding

Since *Morgentaler* (1988), the issue of whether provinces must cover the entire cost of abortion services under the public health care system has been subject to litigation. Many provinces have sought to avoid paying for abortions, often refusing payment in full for abortions performed in private clinics rather than in hospitals. In the case of *Jane Doe 1 v. Manitoba*, a judge ruled in a summary judgment that the province of Manitoba’s *Health Services Insurance Act*, which denied funding to abortions performed in private clinics, violated various sections of the *Charter of Rights and Freedoms*.²³ The plaintiffs argued that there was a significant delay in obtaining abortions in hospitals (which were covered by the *Health Services Insurance Act*) and so sought the procedure at private clinics. The judge agreed that forcing women to wait

19 *D.D. v. V.F.*, 2001 BCSC 1419, [2001] B.C.J. No. 2331 (B.C.S.C.).

20 *Ontario (Attorney General) v. Dieleman* (1994), 20 O.R. (3d) 229, [1994] O.J. No. 1864 (Ct. (Gen. Div.)).(Q.L.) [*Dieleman* cited to O.J.].

21 *Ibid.* at para. 178.

22 *Ibid.*

23 *Jane Doe 1 v. Manitoba*, 2004 MBQB 285, 248 D.L.R. (4th) 547 (Q.B.).

for an abortion in the public system violated *Charter* guarantees of liberty and security of the person. This judgment was overturned on appeal in 2005 when it was held that a summary judgment was insufficient to resolve the complex issues of the case.²⁴ The case has not yet gone back for trial.²⁵

The case of *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)* also upheld a province's decision to refuse public funding for abortions performed in clinics.²⁶ Recently, however, in the class action *Association pour l'accès à l'avortement v. Québec (Procureur général)* the province of Quebec was ordered to refund women who were required to pay additional fees for abortion services.²⁷ In these cases judges were asked to rule on the legality of provincial funding policies which could inhibit a woman's choice to have an abortion by making them pay for the procedure.

Forced Obstetrical Treatment and Confinement of Pregnant Women

The most famous Canadian case involving efforts by the state to detain a woman against her will in order to protect the perceived health interests of her fetus is *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*²⁸ That case was an appeal to the Supreme Court of Canada against a court order to detain a pregnant aboriginal woman addicted to solvents against her will in a health care centre in order to force her to undergo detoxification. The Manitoba Court of Appeal struck down the order and the Supreme Court of Canada ultimately ruled that the *parens patriae* jurisdiction could not be used in relation to a fetus because such jurisdiction is used to protect the interests of children (and other vulnerable individuals), and an unborn fetus cannot be considered a child. We examine further aspects of this case later in this paper.

24 *Jane Doe 1 v. Manitoba*, 2005 MBCA 109, 260 D.L.R. (4th) 149 (C.A.).

25 See Joanna Erdman's excellent analysis of *Jane Doe 1 v. Manitoba* and her case that public funding for abortion is required by the *Charter's* s.15(1) guarantee of equality rights, in Joanna N. Erdman, "In The Back Alleys of Health Care: Abortion, Equality, and Community in Canada" (2007) 56 Emory L.J. 1093.

26 *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)* (1996), 144 Nfld. & P.E.I.R. 263, 139 D.L.R. (4th) 603 (S.C. (A.D.)) [*Morgentaler* (1996)].

27 *Association pour l'accès à l'avortement c. Québec (Procureur général)*, 2006 QCCS 4694, [2006] R.J.Q. 1938.

28 *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925, 152 D.L.R. (4th) 193 [*Winnipeg Child and Family Services* cited to S.C.R.].

Two other cases are similar: *New Brunswick (Minister of Health and Community Services) v. N.H. (Litigation guardian of)* and *A. (in utero) (Re)*.²⁹ In each of these cases the judge declined to impose an order restricting the behaviour of a pregnant woman in order to protect the supposed interests of her fetus.

Tax Law

In the Supreme Court of Canada case *Symes v. Canada*,³⁰ a woman argued that child-care expenses should be tax deductible as business expenses. The judgment of the majority recognized that the choice to bear a child is not a choice women can usually make without being influenced by social and financial factors (such as the ability to pay for child care and return to work). The decision to bear a child cannot be regarded as a "personal choice" similar to other choices of personal consumption that result in expenses that are not tax deductible. The judgment stated that:

The appellant and her husband freely chose to have children ... However, it would be wrong to be misled by this factual pattern. Pregnancy and childbirth decisions are associated with a host of competing ethical, legal, religious, and socioeconomic influences, and to conclude that the decision to have children should – in tax terms – be characterized as an entirely personal choice, is to ignore these influences altogether. While it might be factually correct to regard this particular appellant's decision to have children as a personal choice, I suggest it is more appropriate to disregard any element of personal consumption which might be associated with it.³¹

Nonetheless, the court ruled that child-care expenses were not deductible as business expenses.

29 *New Brunswick (Minister of Health and Community Services) v. N.H. (Litigation guardian of)* (1996), 224 N.B.R. (2d) 80, [1996] N.B.J. No. 660 (Q.B. (Fam. Div.)); *A. (in utero) (Re)* (1990), 75 O.R. (2d) 82, 72 D.L.R. (4th) 722 (Unified Fam.Ct.).

30 *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 (Q.L.) (*Symes* cited to S.C.R.).

31 *Ibid.* at para. 78.

Conclusion

The foregoing examples illustrate many of the varied ways in which reproductive choice can emerge as an issue that judges have to contemplate. Judges may have to determine whether a woman actually chose to have an abortion performed on her (e.g., *Sit*), or they may have to decide whether a woman (or a reasonable woman) *would have* had an abortion given her circumstances (*Krangle, Mickle*). Judges are asked whether a negative consequence of some sort can or should attach to a woman's reproductive choice (e.g., losing the entitlement to child support in *Boca*, restricting the woman's autonomy in *D.F.G.*, allowing other people to access the woman's medical records in the future in *R. v. C.A.*). Finally, the courts must also decide who or what may justifiably inhibit or overrule a woman's reproductive choices (e.g., the former partner in *Tremblay*, anti-abortion protesters in *Dieleman*, provincial funding policies in *Jane Doe 1* and *Morgentaler* (1996), or the adolescent woman's parents in *Children's Aid Society of the Region of Peel*).

Comfort – The Potential Use of Justice Wilson's Liberty Argument Against Re-criminalization

As explained above, the criminal law on abortion was struck down in *Morgentaler* (1988) because it violated section 7 of the *Canadian Charter of Rights and Freedoms*.³² Five of the seven justices ruled in *Morgentaler* (1988) that the law against abortion violated section 7 because it violated the right to security of the person in particular, and they also decided that this violation did not accord with the principles of fundamental justice. They also ruled that the law could not be saved by section 1 of the *Charter*. The abortion law's violation of s.7 was viewed as not demonstrably justified in a free and democratic society.³³

The law in 1988 allowed abortion only in cases in which a committee of doctors (called a "therapeutic abortion committee") at a hospital ruled that continuing the pregnancy would endanger the life or health of the woman. One key piece of evidence showing that the law violated the right to security of the person was that these committees introduced an element of delay

32 *Charter, supra* note 2. Section 7 provided that "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."

33 *Ibid.*

in accessing an abortion, a procedure that becomes more risky the later it is performed.³⁴ The majority thus used a harm-based rather than a choice-based analysis.

In addition to the agreement of the five justices on the law's violation of the right to security of the person, one justice, also argued that the law violated the right to liberty contained in section 7. All of the other justices who ruled against the law declined to examine whether the law violated the right to liberty and focused narrowly on the right to security of the person, the violation of which was deemed sufficient to strike down the law.³⁵ Justice Wilson alone argued that "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives. The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does."³⁶

Even though Justice Wilson's liberty argument was not advanced by the rest of the court, our review of the role of the concept of choice in Canadian jurisprudence reveals that her argument has nonetheless been very influential. This influence is apparent in a number of ways. For example, Justice Wilson's argument is often cited and used to support legal rulings on reproductive choice in other areas of the law. Furthermore, there are instances in which Justice Wilson's argument on the right to liberty is taken to be representative of the *Morgentaler* (1988) ruling as a whole, rather than just an argument advanced by a single judge. Justice Wilson's argument has also been influential in the wider judicial discussion of how to interpret the right to liberty in section 7 of the *Charter*.

Consider the following examples of the ways in which Justice Wilson's argument has been influential. In the criminal case *R. v. Demers*, the defendant challenged the constitutionality of British Columbia's *Access to Abortion Services Act* under which he was arrested for violating by protesting outside an abortion clinic.³⁷ The defendant argued that fetuses were themselves entitled to protection under section 7 of the *Charter* and thus that the *Act* needed to be struck down. The judge cited Justice Wilson's argument about the

34 See *Morgentaler* (1988), *supra* note 1 at paras. 25-33.

35 *Ibid.* at paras. 11, 137.

36 *Ibid.* at paras. 240-41.

37 *R. v. Demers* (1999), 176 D.L.R. (4th) 741, [1999] B.C.J. No. 1818 (S.C.) (QL) [*Demers* cited to B.C.J.].

autonomy rights of pregnant women in support of his argument that even if fetuses were entitled to section 7 protections, those rights would have to be balanced against the rights of women under section 7, and such a balancing act could only be performed by the legislature, not by the courts.³⁸

The case (mentioned above) of *New Brunswick (Minister of Health and Community Services) v. N.H. (Litigation guardian of)* concerned an application by the provincial Minister of Health for a supervisory order over a fetus.³⁹ The province of New Brunswick's *Family Services Act* defined the fetus as a child, so the Minister argued for supervision of the fetus as though it were a child. In suggesting that the *Family Services Act* was deficient, the judge in this case made reference to Justice Wilson's argument that a woman's right to autonomy early in pregnancy ought to be absolute.⁴⁰ According to the judge, the *Act* did not make a distinction between early pregnancy, when a woman's autonomy ought to be absolute, and late pregnancy, when (as Justice Wilson argued) the state's interest in protecting the fetus becomes more compelling.

Making reference to *Morgentaler* (1988), the ruling in *British Columbia Civil Liberties Assn. v. British Columbia (Attorney General)* stated that "our highest Court seems to have declared that in some circumstances a pregnant woman is constitutionally entitled to terminate a pregnancy as part of her right to liberty and to the security of her person."⁴¹ This statement attributes Justice Wilson's view that the abortion law violated a woman's right to liberty to the whole court.

A similar attribution can also be found in *Ontario (Attorney General) v. Dieleman*, where it was claimed that *Morgentaler* (1988) validated "a woman's right to make a decision concerning abortion without governmental

38 *Ibid.* at para. 88. In another example, Justice Wilson's argument was cited favourably in *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)* (1995), 126 Nfld. & P.E.I.R. 240, [1995] P.E.I.J. No. 20 at para. 68 (S.C. (T.D.)) (QL) [*Morgentaler* 1995 cited to P.E.I.J.].

39 *New Brunswick (Minister of Health and Community Services) v. N.H. (Litigation guardian of)* (1996), 224 N.B.R. (2d) 80, [1996] N.B.J. No. 660 (Q.B. (Fam. Div.)) (QL) [*N.H.* cited to N.B.J.].

40 *Ibid.* at para. 62.

41 *British Columbia Civil Liberties Assn. v. British Columbia (Attorney General)* (1988), 49 D.L.R. (4th) 493, [1988] B.C.J. No. 373 at para. 5 (S.C.) (QL) [*Civil Liberties* cited to B.C.J.].

intrusion."⁴² This claim in *Dieleman* described the outcome of the *Morgentaler* (1988) as a vindication of a liberty right to abortion, rather than a right to security of the person. Furthermore, the ruling in *Corp. of Canadian Civil Liberties Assn. v. Canada (Attorney General)* made reference to Justice Wilson's discussion of the right to liberty as encompassing the right to make fundamental personal choices without state interference, and did not attribute this view to Justice Wilson alone, but to the ruling in *Morgentaler* (1988) as a whole.⁴³ These attributions of Justice Wilson's views to the whole court are erroneous, and most other cases that mention Wilson J.'s argument acknowledge that her views were not shared by the whole court. However, these citations and the invocation of Justice Wilson's argument in other decisions concerning reproduction nonetheless show that her depiction of the abortion law as violating the right to liberty has become an appealing part of the narrative for some concerning the grounds for striking down the abortion law in *Morgentaler* (1988).

Justice Wilson's argument about the right to liberty has also appeared in civil liability cases involving pregnancy. In the Supreme Court of Canada case, *Dobson (Litigation Guardian of) v. Dobson*, Justice McLachlin (as she then was) claimed in a concurring opinion that allowing legal action against pregnant women for behaviour that might be detrimental to the health of a fetus has the potential to jeopardize a woman's fundamental right to make decisions in her own interests.⁴⁴ She cited Justice Wilson's views on liberty in

42 *Dieleman*, *supra* note 20 at para. 199.

43 *Corp. of Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1992), 8 O.R. (3d) 289, [1992] O.J. No. 566 at para. 121 (Ct. (Gen. Div.)) (QL) [*Canadian Civil Liberties* cited to O.J.]. The judge in this case said that the applicant depicted the ruling in *Morgentaler* (1988) this way, but then the judge did nothing to suggest that this interpretation was false or misleading. It is thus unclear whether the judge believed that Justice Wilson's liberty argument is representative of the ruling as a whole. Nonetheless, the citation of Justice Wilson's views in this way contributes to the (mistaken) perception that the abortion law was struck down in 1988 because it violated a woman's section 7 right to liberty.

44 *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at para. 85, 174 D.L.R. (4th) 1 (QL) [*Dobson* cited to S.C.R.]. This ruling recognized that protecting the autonomy rights of pregnant women requires that courts be reluctant to impose on them a duty of care towards their fetuses. It is worth noting as well that Justice McLachlin's reasoning about the autonomy rights of pregnant women was substantially the same as Justice Cory's (who was writing on

Morgentaler (1988) in order to support her argument that the right to make decisions for oneself in pregnancy warrants protection.⁴⁵ The subsequent civil liability case *Preston v. Chow*⁴⁶ then cited Justice McLachlin's reasons in *Dobson* on the negative consequences for the autonomy rights of women of imposing on pregnant women a duty of care toward their fetuses.⁴⁷

One further example of the appeal of Justice Wilson's liberty argument in *Morgentaler* (1988) is that the argument has been taken up by judges in efforts to interpret the scope and application of the *Charter's* section 7 right to liberty. In the cases *R.B. v. Children's Aid Society of Metropolitan Toronto* and *Godbout v. Longueuil (City)*, Justice La Forest cited Justice Wilson's reasoning in *Morgentaler* (1988) as a precedent supporting his view that the right to autonomy in section 7 protects decisions that have fundamental personal importance and that are crucial for one's dignity and independence.⁴⁸ Justice Wilson's views from *Morgentaler* (1988) on how the right to liberty ought

behalf of Lamer C.J. and L'Heureux-Dubé, Gonthier, Iacobucci and Binnie JJ.). McLachlin J. wrote that "I agree with Cory J. ... and unconditionally endorse his analysis and disposition of this appeal. I wish merely to add observations about the constitutional values underpinning the autonomy interest of pregnant women and the difficulty with using tort principles to restrict that interest" (at para. 83). However, unlike McLachlin J., Justice Cory's judgment in *Dobson* did not cite Justice Wilson's liberty argument from *Morgentaler* (1988).

45 *Ibid.* at para. 85.

46 *Preston v. Chow*, 2001 MBQB 34, [2001] M.J. No. 75 at para. 22 (QL) [*Preston* cited to M.J.].

47 A further case dealing with civil liability in pregnancy, *Paxton v. Ramji*, [2006] O.J. No. 1179, 2006 CanLII 9312 (Sup. Ct. J.) (QL) and 2008 ONCA 697, [2008] O.J. No. 3964 (QL) cited *Dobson* on the negative policy implications for a woman's autonomy rights of ruling that a child can sue his/her mother for injuries sustained *in utero*. However, both levels of court in *Paxton* made reference to Cory J.'s judgment and did not refer specifically to McLachlin J.'s Wilson-influenced argument on this issue in *Dobson*.

48 *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, [1994] S.C.J. No. 24 at para. 80 (QL) [R.S. cited to S.C.J.]; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, [1997] S.C.J. No. 95 at paras. 65-66 (QL) [*Godbout* cited to S.C.J.]. Though Justice La Forest agreed with Justice Wilson's depiction of the right to liberty, he dissented in *Morgentaler* (1988) and did not view the abortion law as violating section 7. In comparison, he thought that the law under review in *Godbout*, which required employees of a city to live within its boundaries, *did* violate the right to liberty protected in section 7.

to be interpreted have also been cited in *Blencoe v. British Columbia (Human Rights Commission)*,⁴⁹ *Rodriguez v. British Columbia (Attorney General)*,⁵⁰ *R. v. Malmo-Levine; R. v. Caine*,⁵¹ and *R. v. Parker*.⁵²

The view that the criminalization of abortion was a violation of *Charter*-protected liberty rights of women in their efforts to make reproductive choices, and not just a violation of their security of the person, has sedimented into diverse areas of Canadian law through the citation and endorsement of Justice Wilson's argument from *Morgentaler* (1988). This development is encouraging because it signals the embrace of a broader liberty-based justification for the rejection of criminal prohibitions against abortion. Of course, in countering any future legislation against abortion, it could legitimately be argued that such legislation would threaten *both* liberty and security of the person. Social science evidence demonstrating the fact that poor abortion access infringes security of the person could be marshalled in support of such an argument, just as this kind of evidence was used in *Morgentaler* (1988). We discuss some of this evidence in the following section. However, any future legislation criminalizing abortion would likely be crafted by those hostile to abortion rights to circumvent the *Charter* violation of security of the person identified when the law was struck down in 1988. In particular, future legislation would likely be constructed to avoid the element of delay in procuring medically necessary abortions, since the presence of this kind of delay was a persuasive form of evidence that the old abortion law was a threat to a pregnant woman's security of the person. However, it would be more difficult to craft a criminal prohibition that does not infringe the section 7 right to liberty. Even if it were carefully constructed to avoid violating other rights, any criminal law prohibiting abortion would violate the right to liberty. Justice Wilson herself asserted this point in her s.1 analysis when considering whether amending the *Criminal Code* section on abortion could save the law. She noted that "even if the section were to be amended to remedy the purely procedural defects in the legislative scheme referred to by

49 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] S.C.J. No. 43 at para. 50 (QL) [*Blencoe* cited to S.C.J.].

50 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, [1993] S.C.J. No. 94 at paras. 135-36 (QL) [*Rodriguez* cited to S.C.J.].

51 *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] S.C.J. No. 79 at para. 85 (QL) [*Malmo-Levine* cited to S.C.J.].

52 *R. v. Parker* (2000), 49 O.R. (3d) 481, [2000] O.J. No. 2787 at para. 88 (C.A.) (QL) [*Parker* cited to O.J.].

the Chief Justice and Beetz J. [i.e., those procedures that presented a delay in accessing abortion] it would, in my opinion, still not be constitutionally valid".⁵³ Since Justice Wilson's liberty argument has been embraced in various ways by the courts, it thus stands as an argument that may well be used by the courts to strike down any future criminal law prohibiting abortion.⁵⁴

Caution – The Danger of a Decontextualized Conception of Choice

Less encouraging are several instances which we found in our study of judicial reasoning where judges appeared unaware of restrictions on the exercise of choice in reproduction – as though choice is guaranteed as long as the state does not prohibit abortion through the criminal law. As a number of feminists have pointed out, just because the state is precluded from intruding on a sphere of activity considered "private," this does not mean that women necessarily have autonomous control in that sphere.⁵⁵ Other forces of oppression are present in the nominally private sphere and these forces are given free reign when the state steps back from regulation.

As an example of the way that the exercise of reproductive choice can be impeded in the "private" sphere, consider that the percentage of general hospitals in Canada offering abortion services declined from 35% in 1986 to 17.8% in 2003 and then to 15.9% in 2006, signaling a decrease in the overall number of general hospitals providing abortion.⁵⁶ Some of this decline

53 See *Morgentaler* (1988), *supra* note 1 at para. 261.

54 Of course it would be open to the federal government to invoke the notwithstanding clause in the *Charter* (See *Charter*, *supra* note 2 at s. 33). However, as that would be a purely political (as opposed to legal) decision, we do not discuss it here beyond noting that it would be highly unlikely that any federal government would actually invoke this clause to rescue a restrictive abortion law found to be contrary to the *Charter* by the Supreme Court of Canada. The political calculus simply would not support such a move – for now at least.

55 See, for example, Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) at 187.

56 For the 1986 data, see Raymond Tatalovich, *The Politics of Abortion in the United States and Canada: A Comparative Study*. (Armonk, N.Y.: M.E. Sharpe, 1997) at 211. For the 2003 data, see Canadian Abortion Rights Action League, *Protecting Abortion Rights in Canada* (Ottawa, Ont: CARAL, 2003) at 13. For the 2006 data, see Jessica Shaw, *Reality Check: A Close Look at Accessing Abortion Services in Canadian Hospitals* (Ottawa, ON: Canadians for Choice, 2006) at 1. One way of

has been attributed to the amalgamation of Catholic hospitals with secular hospitals, and the subsequent deferral to Catholic orthodoxy on abortion in the amalgamated institutions.⁵⁷ Governments allow these barriers to be set up when they fail to intervene and prevent the erosion of access to reproductive health services.

In our study of judicial reasoning, we found a number of instances in which comments made by judges suggest that they were unaware of impediments to the exercise of reproductive choice, or that they believed that since abortion is legal, all women are free to choose abortion. As an example, consider a remark by the judge in the case *P.S.E. v. B.A.B.*,⁵⁸ which was a ruling on the custody of a child. The child's mother sought sole custody. The child's father alleged that the mother "expressed the idea" of having an abortion when pregnant with the child.⁵⁹ In noting that the woman disputed this interpretation, the judge claimed that "[i]n my view, the fact of birth and the existence of the new life should be taken as a clear denial of an intent to abort".⁶⁰ The judge decided that whether a parent wanted to have an abortion is immaterial in determining who should have custody of the resulting child. The remark, however, is a telling example of a judge's failure to recognize that there are non-criminal-law impediments to the exercise of reproductive choice. The birth of a child may coexist with the intent to abort. If a woman is prevented from accessing abortion because of funding barriers, inability to travel to distant abortion providers, or other impediments, then the birth of a baby may occur *in spite of* an intent to abort. Such barriers to abortion access are present in Canada. We have already mentioned the diminishing number of hospitals that provide the service, but other barriers exist as well, such as the efforts by the provinces of New Brunswick and

compensating for this decline in hospital abortion care would be to introduce the wider use of medication abortion. However, at present, mifepristone, the most commonly-used abortion drug in the world is not approved for use in Canada. For a discussion of the reasons for this drug's lack of approval, and the promise it could hold for improving abortion access, see Joanna N. Erdman, Amy Grenon, and Leigh Harrison-Wilson, "Medication Abortion in Canada: A Right-to-Health Perspective" (2008) 98 *American Journal of Public Health* 1764.

57 Canadian Abortion Rights Action League, *ibid.* at 61.

58 *P.S.E. v. B.A.B.*, [1994] Y.J. No. 153 (S.C.) (QL).

59 *Ibid.* at para. 8.

60 *Ibid.*

Prince Edward Island to deny funding for abortion services through the publicly-funded health care system.⁶¹

A further example of this lack of awareness of barriers to the exercise of choice even in the absence of criminal prohibitions can be found in *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)*.⁶² In this ruling, the judge declared that “this application does not decide whether Island women will, or may, obtain legal abortions. Many now exercise that choice. Permission is not in issue.”⁶³ The judge appears to have accepted the government’s position that the “proceeding is confined to the issue of whether abortion will be paid for, there being no regulation in existence that denies a woman the choice of whether to obtain an abortion”.⁶⁴ This argument makes a distinction between exercising the choice to obtain an abortion, and having that abortion paid for. However, this distinction is deeply problematic since the inability to pay for abortion, and the province’s refusal to cover the procedure, will certainly have an effect on the whether a woman will be able to exercise choice. As noted above, Prince Edward Island has no abortion providers, and a woman may have to travel over 400 km to reach the nearest center providing abortion. In situations in which a woman must incur the costs of travel to access an abortion, take time off work or school and overcome the difficulty of coming up with excuses for her absence, the fact that she must additionally pay for the abortion out of pocket could work in concert with these other barriers to deny the choice to terminate. The judge’s remarks in this case thus exhibit a striking lack of awareness of the barriers that impede reproductive choice.⁶⁵

61 New Brunswick refuses to fund abortions provided outside of hospitals in free-standing abortion clinics, and refuses to provide abortions altogether in public hospitals unless women gain the approval of two physicians that terminating their pregnancy is medically necessary. Prince Edward Island has no abortion providers and refuses to pay for women to seek abortion out of province unless the termination is approved by a doctor as medically necessary, the doctor asks the Department of Health and Social Services to cover the procedure, and the abortion is performed in a single designated hospital in Halifax, Nova Scotia, to which the doctor must refer the patient.

62 *Morgentaler* 1995, *supra* note 38.

63 *Ibid.* at para. 15.

64 *Ibid.* at para. 6.

65 Interestingly, this ruling struck down the law that limited payment for abortion. The case was then overturned on appeal in *Morgentaler* (1996), *supra* note 26.

The exercise of reproductive choice requires more than the decriminalization of abortion. This is not to say, however, that we are interpreting the *Morgentaler* (1988) decision as supporting a positive right to abortion – including the right to public funding for abortion services – as opposed to a negative right to non-intervention by the state. Justice Wilson’s liberty argument used the language of negative liberty to make a case for the right to choose abortion.⁶⁶ Though we believe other grounds can be given for the positive right to the public funding of abortion services in the Canadian health care system,⁶⁷ we have not followed through on this argument here. We are thus not making a case for a *Charter*-based positive liberty right to abortion. Our point here is more modest: though Justice Wilson’s negative liberty argument could help prevent the re-criminalization of abortion, judges should not assume that continued decriminalization means women are automatically able to exercise reproductive choice. We are making a plea for the courts to be aware of the various impediments that continue to inhibit reproductive choice even though abortion is decriminalized in Canada.

Two further examples illustrate the danger of failing to be aware of the limits of a decontextualized conception of choice. In these examples, judges have alleged in some way that women have made a choice either to continue a pregnancy or not to have an abortion, when the circumstances of the cases suggest that the women may not have made fully voluntary decisions. In both cases the alleged choices were then offered as a reason for ruling *against* the women. Consider first the ruling in the Quebec Court of Appeal in the case *Tremblay v. Daigle (Q.C.A.)*.⁶⁸ This ruling upheld a man’s interlocutory injunction prohibiting his former partner (Daigle) from having an abortion. Three of the five judges upheld the injunction, and each of the three claimed, in some way, that Daigle’s pregnancy was voluntary. Justice Bernier claimed that the couple “wished and planned for the birth.”⁶⁹ Justice Nichols stated that “it was a wanted pregnancy.”⁷⁰ Justice LeBel claimed that Daigle “voluntarily conceived” the fetus.⁷¹ The justices inferred the voluntariness

66 See especially *Morgentaler* (1988), *supra* note 1 at paras. 232-239.

67 For such an account, see Erdman, *supra* note 25.

68 *Tremblay v. Daigle*, [1989] R.J.Q. 1735, [1989] Q.J. No. 1200 (C.A.) (QL) [*Tremblay* cited to Q.J.].

69 *Ibid.* at para. 3.

70 *Ibid.* at para. 6.

71 *Ibid.* at para. 15.

of Daigle's pregnancy from her affidavit which stated that she reluctantly ceased using contraception at the insistence of her partner Tremblay.⁷²

However, it is clear from the ruling that Tremblay was abusive, and that the abuse led to Daigle's refusal to continue the relationship and the pregnancy. According to Daigle's affidavit, the abuse began when they started living together in February 1989.⁷³ It was not until the following month, March 1989, that Daigle found out she was pregnant.⁷⁴

Given the abusive nature of the relationship, it is at least questionable whether Daigle actually made an uncoerced choice to get pregnant and have a baby. As is often the case with abused women, the supposed choice to get pregnant might be better characterized as an attempt to accede to the demands of a violent partner, or as an attempt to avoid further violence.⁷⁵ Justices Bernier, Nichols and LeBel supported their contention that Daigle had no reasonable grounds for having an abortion by alleging that Daigle had "voluntarily" chosen pregnancy. On this view, it is not reasonable to terminate a pregnancy that you have voluntarily initiated. Justice Bernier argued that "[t]he law of nature is that pregnancy must be brought to term; the right to its voluntary interruption constitutes an exceptional right. To resort to it arbitrarily without reasonable grounds constitutes at any stage of pregnancy an abuse of that right".⁷⁶ In this ruling, the judges of the Quebec Appeals Court attached a negative consequence (injunction against abortion) to an abused woman's purported choice to become pregnant, even though because of the abuse it was not even clear that the woman made this choice voluntarily (or that it mattered if she did). Fortunately, the Supreme Court

72 *Ibid.* at para. 7.

73 This fact is mentioned in the ruling on the subsequent appeal to the Supreme Court of Canada. *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, [1989] S.C.J. No. 79 at para. 3 (QL) [*Tremblay* cited to S.C.J.]. It is also interesting to note here that Mr. Tremblay went on to be classified as a "long term offender" with a term of parole including "vous devez faire rapport de toutes relations que vous entamez avec les femmes à votre superviseur." See *R. v. Tremblay*, 2008 ONCA 24, [2008] O.J. No. 100 at para. 2 (QL) [*Tremblay* cited to O.J.].

74 *Supra* note 68 at para. 7.

75 For a similar argument, see Françoise Baylis, "Dissenting with the Dissent: *Winnipeg Child and Family Services (Northwest Area) v. G (D.F.)*" (1998) 36 *Alta Law Rev* 785 at 788.

76 *Supra* note 68 at para. 3.

of Canada later reversed this appeals court judgment.⁷⁷ In its unanimous judgment, the court did not mention the issue of whether Daigle's pregnancy was initiated voluntarily. The justices reversed the appeal on the grounds that the supposed rights of the fetus and the potential father – which were advanced as supporting the interlocutory injunction against Daigle's abortion – do not exist.

The second example is *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*⁷⁸ This case, introduced earlier, is a Supreme Court of Canada decision that an addicted woman could not be detained against her will in order to protect the health interests of her fetus. In a dissent to this ruling, Justice Major argued that Child and Family Services were entitled to have the woman (DFG) detained against her will. According to Justice Major, even though there is a right to terminate a pregnancy, once a woman has chosen not to have an abortion and to continue her pregnancy, she must be responsible for the fetus's well-being, and the state may justifiably act to ensure the fetus's health if the woman cannot or will not do so. This line of reasoning is premised on the idea that DFG chose to continue her pregnancy. Justice Major stated, for instance, that DFG "made the decision not to have an abortion. She chose to remain pregnant, deliver the child, and continue her substance abuse."⁷⁹ As with the *P.S.E.* case cited earlier, Justice Major took it as evident that since DFG remained pregnant, she had made a choice not to terminate the pregnancy. However, it is a mistaken assumption that women who continue to be pregnant must have rejected the abortion option.⁸⁰

Many social and psychological factors can effectively interfere with the exercise of this kind of choice. Besides *external* impediments to choice such as poverty, clinic fees (which existed in Manitoba until 2005)⁸¹ and wait-lists combined with gestational limits (both were and remain a problem in Manitoba),⁸² there are also *internal* factors that can interfere with the ability to make autonomous choices. These internal factors are grounded in a wom-

77 *Supra* note 73.

78 *Winnipeg Child and Family Services*, *supra* note 28.

79 *Ibid.* at para. 65.

80 See the analysis in Baylis, *supra* note 75 at 786-790.

81 The "Excluded Services Regulation" was amended in November 2005. See Man. Reg. 46/93, schedule H, § 2(28)(c). In 1997 in Winnipeg (where DFG lived) private abortion clinics charged a fee for their services because of the province's decision to exclude clinic abortions from public health insurance.

82 Jessica Shaw, *supra* note 56 at 21. Canadians for Choice, "Directory of Abortion

an's sense of self-worth, her perception of herself, and her understanding of what her options are.⁸³ Though having their source in one's desires and perceptions, such internal determinants of autonomous choice are constructed and influenced by one's interpersonal and political relationships. Our experience of patterns of oppression, privilege, love, hardship, contempt, abuse and so on, influence our sense of self-worth, our perception of the social world, and the values we hold. Accessing an abortion requires that one have the personal resources to manage contact with the health care system, and take personal control of one's life. Many features of DFG's life suggest that she may have passively acquiesced to a situation that she felt was out of her control, and consequently that she may not have made anything like an autonomous choice to continue her pregnancy.

For one thing, DFG's life was characterized by multiple disadvantages that can keep one from feeling in control of one's life. She was from a minority group and may have experienced racism. The poverty she experienced could have contributed to a sense of powerlessness, a significant internal impediment to autonomy.⁸⁴ Most importantly, women with addictions to drugs or to solvents may not have the social or emotional resources needed to seek out the abortion option. It is also common for addicted people to have been subjected to physical or sexual abuse at some point in their lives, which can rob them of the self-esteem needed to confront difficult life choices.⁸⁵ DFG was clearly living in oppressed and disadvantaged circumstances marked by multiple internal and external impediments to autonomous choice, so it may well have been unfair for Justice Major to claim that she had chosen

Providers – Winnipeg, Manitoba", online: Canadians for Choice <<http://www.canadiansforchoice.ca/directory/mn.html>>.

83 The distinction between external and internal impediments to choice derives from Jocelyn Downie & Susan Sherwin, "A Feminist Exploration of Issues around Assisted Death" (1996) 15 *St Louis Univ Public Law Rev* 303 at 327-328. See also Jocelyn Downie & Jennifer Llewellyn, "Relational Theory and Health Law and Policy" *Health L. J.* (2008) Special Edition 193.

84 Karlyn J. Geis & Catherine E. Ross, "A New Look at Urban Alienation: The Effect of Neighborhood Disorder on Perceived Powerlessness" (1998) 61 *Social Psychology Quarterly* 232.

85 There is a lot of literature on the relationship between abuse and substance addiction. For one study on the effects of abuse, see J. McCauley *et al.*, "Clinical characteristics of women with a history of childhood abuse: unhealed wounds" (1997) 277 *JAMA: the journal of the American Medical Association* 1362.

to continue her pregnancy and that her choice justified the state's efforts to place her in detention.

In general, when judges attribute a reproductive choice to a woman, there is a danger they have failed to take into account the features of her life situation that might inhibit her autonomy. This danger is particularly acute when judges are inclined to rule against women because of their supposed reproductive choices – an inclination demonstrated by Justice Major in the *Winnipeg Child and Family Services* case, and by members of the Quebec Court of Appeal in the *Tremblay* case. According to Justice Major, the detention of DFG was justified, in part, because he claimed she had chosen to continue her pregnancy. According to the Quebec Court of Appeal, the injunction against Daigle's desired abortion was justified, in part, because she had voluntarily initiated the pregnancy. An awareness of possible practical, social and psychological restrictions on choice arising in women's particular contexts would make it more difficult for judges to punish women for their purported reproductive choices since such an awareness could make judges less inclined to assert (sometimes dubiously) that the woman in question had made a free and informed decision to initiate or continue a pregnancy.

The *Tremblay* case and the *D.F.G.* case were both ultimately resolved in favour of the pregnant defendants. The suspect reasoning of the Quebec Court of Appeal in *Tremblay* was over-turned by the Supreme Court of Canada, and Justice Major's invidious attributions of choice to DFG were rendered only in dissent. There is some comfort to be taken in the way that these cases were ultimately resolved. However, the favourable resolution of future cases involving reproduction is not guaranteed.

Revisiting Justice Wilson's liberty argument from *Morgentaler* (1988) for a moment, we can now see that the liberty argument can be a double-edged sword if care is not taken to avoid interpreting the concept of choice in very narrow decontextualized terms. On the one hand, the liberty argument offers the prospect of a justification for the continued decriminalization of abortion in the face of future attempts at re-criminalization – a justification that is broader and stronger than the argument that relies on the right to security of the person. However, if judges believe that women automatically have the ability to make reproductive choices as long as the criminal law is not prohibitive,⁸⁶ then they will be less able to see the hardship created by

86 As we have documented, some judges are apt to make this mistake. See the claim (cited earlier) in *Morgentaler v. Prince Edward Island (Minister of Health and*

other barriers to reproductive choice, or they may be more inclined to see autonomous choices being made in cases where the capacity for exercising autonomy has actually been restricted. As discussed earlier, the capacity to exercise autonomy can be limited in various ways: through external forces, such as a combination of poverty and clinic fees, or through internal forces, such as a diminished sense of self worth that results in an inhibited ability to make major life-decisions for oneself.

Because of the wide range of issues brought before the courts that require judges to deliberate on matters of reproductive choice – the sorts of issues we presented above in the section on “Contexts” dealing with family, criminal, and tort law, in cases involving injunctions, abortion funding cases, and forced intervention cases – a failure on the part of judges to recognize the circumstances that can inhibit reproductive choice could have a detrimental impact on the interests of many women caught up in the legal system.

Conclusion

Our analysis of the cases in which the concept of choice shows up in Canadian judicial reasoning leaves us with a mixture of optimism and pessimism about the future of the legal right to reproductive choice. As stated in the section headed “Concern” above, the landmark *Morgentaler* (1988) ruling decriminalizing abortion left open the possibility of the re-criminalization of abortion. *Morgentaler* (1988) only struck down the law against abortion as it was formulated at the time, and only because it caused potentially harmful delays.

However, our analysis of judicial reasoning in cases since 1988 shows a willingness of many judges to embrace Justice Wilson’s liberty argument from *Morgentaler* (1988). This argument could be used as a justification for striking down any future criminal law against abortion – a justification that has broader applicability than the argument used by the majority of the Supreme Court of Canada’s justices in 1988. This possibility may give some

Social Services), [1995] that the “proceeding is confined to the issue of whether abortion will be paid for, there being no regulation in existence that denies a woman the choice of whether to obtain an abortion”. *Supra* note 38 at para. 6. See as well the claim in *P.S.E. v. B.A.B.* that “the fact of birth and the existence of the new life should be taken as a clear denial of an intent to abort”. *Supra* note 58 at para. 8.

comfort to those who favour reproductive choice. We have accordingly documented the embrace of Justice Wilson's argument in the section headed "Comfort."

The use of the liberty argument brings some of its own dangers, which we have analyzed in the final section headed "Caution." In particular, we hope that the concept of choice in reproductive cases is not interpreted narrowly without an awareness of the barriers which exist in the public and private sphere, especially those experienced by women subject to oppressive circumstances. As we have seen, in certain cases, the supposition that a woman has made a particular reproductive choice – i.e., to continue a pregnancy – has been used by judges as a reason to rule against the woman. This is a danger that needs to be avoided and could be avoided if the concept of reproductive choice is understood with an awareness of the contextual realities of women's lives.⁸⁷

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