THE ABORTION ISSUE: AN OVERVIEW*

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The author surveys the abortion laws, illustrating the difficulties that societies of the Western World have had in dealing with the issue. There is a special emphasis on Canada's laws and Dr. Morgentaler's recent cases.

I. INTRODUCTION

Fifteen years after the Criminal Code of Canada was amended to exempt from prosecution in limited circumstances doctors who induce or attempt to induce the miscarriage of a pregnant woman, the abortion issue is still hotly debated within the Canadian community and the courts are being asked increasingly to resolve it in favour of one or another "side".

Despite legal scholars' warnings that "abortion is at once a moral, legal, sociological, philosophical, demographic and psychological problem, not readily amenable to one-dimensional thinking",[1] public opinion is rapidly and vociferously polarizing around two opposing moral positions.[2]

> Arguments in favour of abortion centre on the right of the mother to self-determination and to privacy and control over life and body. Concession to this view necessitates the conceptualization, legally and morally, of the unborn foetus (embryo) as part of the mother herself; a non-entity. Arguments against abortion centre on the recognition of a separate foetal (embryonic) existence, within but apart from the mother: a living entity, up to, during and after birth.

II. ARENAS FOR DEBATE: MORAL AND RELIGIOUS

In his major work on abortion, *Abortion: Law, Choice and Morality*,[3] Daniel Callahan states that a belief in the sacredness of human life exists in all cultures. Canadian writer K.W. Cheung describes it as a "universal tenet that sanctity of life is of the highest value."[4] Few would disagree with that general statement yet few participants in the abortion debate can agree upon what constitutes human life deserving of the full protection of the law.[5] Scientific research affirms that a foetus is genetically distinct from its host parent from conception; common sense dictates that the viability of its existence outside the womb does not occur until much later in the pregnancy. Yet, as Cheung formulates the problem, "[t]he issue involves not only the highly contentious question: 'what is life?', but also the relative importance of two lives — that of the pregnant

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1. D. Callahan, *Abortion: Law, Choice and Morality* (1970) 1.
2. K.W. Cheung, *Essays on Abortion* (1977) 1. Throughout this essay the term "foetus" will be used to indicate human life from conception to birth, although technical terms delineating stages of pregnancy "conceptus, embryo, zygote, and foetus" are used in scientific literature.
3. *Supra* n. 1 at 207-208.
4. *Supra* n. 2 at 2.
5. For a full discussion of this issue see E. Keyserlingk, *The sanctity of life and the quality of life* (Law Reform Commission of Canada, 1982) 1.

mother — and that of the unborn child."[6] Cheung finds that there is general agreement that a fertilised egg is "life".[7] "The dissension," he states, "arises when one talks of the quality of the life — i.e. is it merely 'a bit of vegetating matter'[8] or is it a 'human person with all the rights of a human person from conception?'"[9] The question necessarily involves deciding whether abortion under any circumstances is acceptable to Canadian morality as embodied by the criminal law, and if so, when. If a foetus is found to have all the rights of a human person from conception, then there can be no consideration of the relative worth of the foetal versus maternal life. This is because constitutional guarantees of "life"[10] (assuming, for the moment that they are substantive rights) would grant to the foetus full rights to be born unassailable by the woman whose body was its host, whether it is able to live independently outside the mother's body (viability) or not. If a foetus is found to be, however, an entity subordinate to its mother, the question would then become: "at what point may an abortion be performed?" Cheung states that:[11]

> even the most fanatical advocate of liberal abortion . . . concedes that after a certain point in the pregnancy no abortion should be performed . . . This fact indicates consideration for the foetus either because at a certain point it has acquired human, and therefore inviolate, qualities; or more likely because it has become dangerous to the mother to be aborted after that time.

The morality of abortion, therefore, depends upon many variables.

Daniel Callahan states that abortion morality is dependent upon whether a foetus is a human being, whether there is a primacy of maternal rights over foetal rights, and if there is, at what stage of a pregnancy, for what reasons and under what circumstances an abortion may be effected. Callahan says that although conflicts of values are necessary in a pluralistic society, the current emotional and subjective rhetoric over the abortion question is serving only to confuse the issues which must be resolved.[12] "By reducing the problem to a level of crude polemics, people are invited to emote rather than to think[;] where subtlety and discrimination are called for, a bludgeon is used."[13] Placing the abortion debate in context, Daniel Callahan discusses the problems inherent in the issue when it is reduced to a level of crude emotionalism by saying:[14]

> [A] major objection worth leveling at a rigidly restrictive moral code on abortion is that it is prone to hold that an absolute prohibition of induced abortion is a logical entailment of an affirmation of the "sanctity of life". The logical route leading to this prohibition is that the "sanctity of life" means and can only mean under all circumstances that bodily life is to be preserved, which in turn is taken to entail a prohibition of taking of fetal life. No room is left in this deductive chain, for a recognition of other demands

6. *Supra* n. 2 at 2.
7. H.B. Munson, "Abortion in Modern Times: Thoughts and Comments" in Cheung, *Essays on Abortion, supra* n. 2 at 2.
8. *Id.*
9. "Ethical and Religious Directives for Catholic Hospitals" (2nd ed. rev., 1957) in Cheung, *Essays on Abortion, supra* n. 2 at 2.
10. Canadian Charter of Rights and Freedoms, Constitution Act, 1982 [en. by Canada Act, 1982 (Eng.) C.111], referred to as the Charter.
11. *Supra* n. 2 at 3.
12. *Supra* n. 1 at 207-208.
13. *Id.*
14. *Id.* at 338-339.

> of the principle [which is that the principle of sanctity of life demands consideration of all lives]. An analogous objection can be leveled at those abortion-on-request arguments which hold that a woman's right to self-determination entails her corresponding right to be the sole judge of whether she ought to bear a child once conceived. In this instance, one aspect only of the principle of the "sanctity of life" is considered to the exclusion of all others. In both instances it becomes unnecessary (which it should not) . . . to seek a just adjudication of conflicting claims. The bitterest abortion arguments arise precisely when each side presses the claims of one rule to the exclusion of all others.

Callahan's words are nowhere more applicable than to the religious nature of the abortion debate. The issue as characterised by many who hold strong views against abortion is one of morality as they define it versus immorality of others' views; right versus wrong; Christian versus secular humanist; life versus murder. Opponents of abortion include many who are of the Christian faith whose beliefs are that all human life is sacred and that destruction of a foetus at any stage of the pregnancy is an act of murder. One example of rhetoric employed in the religious sector is found in a 1976 volume entitled *The Right to Birth*[15] and published through the Anglican Book Centre in Toronto.[16]

> The talk about rights by those who work for abortion on demand has a sinister tone to it, because in it is implied a view of human beings which destroys any reason why any of us should have rights. What will be demanded next: the denial of the rights of the aged, the mentally retarded and the insane, the denial of the rights of the less economically privileged who cannot defend themselves? Our system of legal and political rights is the crown of our heritage, and it is being undermined. The denial of any right to existence for the foetus has already been declared officially in the United States. Are we going to let it happen in Canada and open the gates to all the consequences of tyranny which will follow?

The absolutist position taken by many Canadians against abortion and based upon religious conviction, is historically quite new. Within the Roman Catholic church there was no punishment before 1869 under Canon law for destruction of a foetus before "quickening" (the point at which the foetal movement within her body is felt by the mother — usually at about five months gestation). It was widely believed that the soul did not enter the child until that time.[17] Earlier Aristotelian influences on the church also saw the existence of the belief that a male foetus was ensouled at 40 days and a female at 80 days.[18] In 1140 A.D., for example, Gratian's *Decretum* (ecclesiastical legislation) said that "He is not a murderer who brings about abortion before the soul is in the body."[19] Although his writings were contradicted substantially by later Catholic scholars, it is clear that within the Catholic church there was for centuries a clear distinction made between the formed and unformed foetus, with canonical penalties for abortion varying according to the "stage" of foetal life.[20] "The period 1450-1750 A.D. saw a number of attempts to strike a balance between the life of the early conceptus and the life of the woman."[21] By 1869, however, all distinctions between a formed and un-

15. *The Right to Birth* (E. Fairweather and I. Gentles, ed. 1976).
16. S. and G. Grant, "Abortion and Rights" (1976) *The Right to Birth, supra* n. 15 at 3. These views do not reflect official Anglican doctrine.
17. *Supra* n. 2 at 35; *supra* n. 1 at 410-411.
18. *Id.*
19. *Supra* n. 1 at 411.
20. *Id.* at 412.
21. *Id.* at 413.

formed foetus were condemned and stringent anti-abortion canonical codes made abortion punishable by excommunication of all parties to it.[22] The Roman Catholic church entered the twentieth century affirming that "[t]he lives of both are equally sacred and no one, not even public authority can ever have the right to destroy them."[23] Somewhat inconsistently, however, the church does permit two exceptions to the position that foetal death constitutes human murder. Where a tubal pregnancy or cancer of the uterus in the woman is present, the foetus may be aborted only if the woman would otherwise die.[24] It is difficult to reconcile this apparent justification for abortion to save the mother's life with the church's position that no one else is entitled to take personal circumstances into account in a determination of whether or not a woman is to carry her child to term — "not even public authority".[25]

There are Canadians of other faiths who also believe that destruction of a foetus is destruction of a human soul, and therefore murder of a human being. Relying upon evidence of the diversity of religious opinion presented in the most recent case in the Dr. Morgentaler abortion saga, *The Queen* v. *Morgentaler et al*, Parker A.C.J.H.C. stated:[26]

> Dr. Hutchinson, a professor of comparative religious studies at the University of Toronto, gave evidence about the position of some of the major religious groups in Canada on the issue of abortion. He testified that all of the major denominations agree that abortion is a deeply religious and moral issue. He analyzed their position in terms of "foetus-centered" and "women-centered" religions. He placed the Roman Catholic, Presbyterian, Christian Reformed and Baptist churches in the first group; Reform Judaism, the Anglican and United churches in the second.

The latter three religions have seen a need for compromise between conflicting rights and have attempted to formulate responses to the issue which balance the rights of the mother, the foetus and the state. The United Church of Canada, Canada's largest Protestant denomination, supported the 1969 legal reforms on the basis of the "accruing value of fetal life"[27] and its lesser value compared to the mother's life and health. Health, within the United Church, includes both physical and mental health of the pregnant woman. As Dr. Hutchinson describes the church's position, the decision "to have an abortion is a matter of informed conscience for the woman in consultation with her religious adviser and her physician."[28]

As mentioned in the testimony of Dr. Hutchinson, above, Reform Judaism has accepted the legitimacy of abortion. The approach of the Jewish faith is, however, diverse and depends upon the orthodoxy of a given sect. But even Orthodox positions interpret the *Talmud* as approving of abortion where it is necessary to save the life and health of the

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22. *Id.*
23. *Id.* at 414 per Pope Pius XI (1930).
24. *Supra* n. 2 at 4. See the discussion of the concept of "innocence" of life removed when malignancy occurs, thereby justifying "killing" it.
25. Pope Pius XI (1930), *supra* n. 23. See also Cheung's discussion on this point.
26. (Unreported), 20 July 1984, Ont. S.C. at 86-87.
27. A. deValk, *Morality and Law in Canadian Politics* (1974) 20. Father deValk is a Roman Catholic priest and anti-abortion activist.
28. *The Queen* v. *Morgentaler et al*, (unreported), 20 July 1984 (Ont. S.C.) at 87. Hereafter referred to as *Morgentaler* (1984).

pregnant woman.[29] A statement of the more conservative position issued by the Association of Orthodox Jewish Scientists of America in 1971 read:[30]

> Jewish law permits abortion only when a potentially lethal deterioration in the mother's health might ensue if pregnancy is allowed to proceed to term. Jewish law prohibits abortion when its sole justification is to prevent the birth of a physically deformed or mentally retarded child. Abortion "on demand" purely for the convenience of the mother or even of society is strictly prohibited and morally repugnant.

This clear statement of the Orthodox position leaves room for abortion where the pregnant woman's health is threatened; an interesting question is whether it would sanction abortion in the face of suicide threats as "potentially lethal deterioration in the mother's health."[31]

In *Essays on Abortion*, K.W. Cheung cites a statement made by the Grand Mufti of Jordan (Islamic church) at a Planned Parenthood Conference in 1964 to the effect that "it is permissible to take medicine to procure abortion so long as the embryo is unformed in human shape . . . The period of the unformed state was given as 120 days."[32] In other Islamic states, laws range from total prohibition, to abortion on request for women with more than five children, to abortion for medical reasons only.[33] In Iran, for instance, until the revolutionary government took power, abortions were approved and government-sponsored non-hospital clinics operated in the community.[34] There seems to be little consistency in the Islamic approach to the question of abortion.

There is, therefore, no concensus about the question of abortion among religions, only a generalized agreement that "life has sanctity", but no agreement as to what life is, when it begins, what characteristics determine "humanity", and whether there are differing values attached to maternal and foetal lives. As long as the issue continues to be debated in polarized, polemical terms legislators will have good and valid reasons not to attempt to choose between the two positions. As long as there is no societal consensus there can be no valid democratic choice on the question. Daniel Callahan, himself a Roman Catholic, ponders the religious variable. Although stressing that the first priority of society must be to preserve life, he still opposes the current demands for a "highly restrictive legal system"[35] as tending to "multiply dangerous illegal abortions".[36] He states that:[37]

> . . . those who help sustain such restrictions bear some responsibility for this at times murderous consequence [high maternal death rate through illegal abortion]. Those who would bring a permissive system into public acceptance would, for their part, bear some responsibility for the abortions which would then take place. One way or the other, then, what is of concern to one faction should be of concern to the other factions.

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29. Rabbi Dr. Immanuel Jakobovits, "Jewish Views on Abortion" *Abortion, Society and the Law* (D. Walburt, J.D. Butler ed., 1973) 103.
30. *Id.* at 118; quotation from 12 Intercom (New York), no. 1 (March 1971) at 4.
31. *Supra* n. 2 at 5.
32. *Id.*
33. C. Tietze, *Abortion: A World Review, 1983* (1983) 14.
34. *Id.*
35. *Supra* n. 1 at 15.
36. *Id.*
37. *Id.*

It is submitted that from the religious standpoint the abortion question will only be resolved if Canada's religions engage in dialogue about abortion with a view to compromise. In light of the emotional nature of the issue, that is unlikely to occur in the near future and the legislatures and the courts will continue to be caught in the middle of an explosive moral and religious debate. Both will be looking for consensus; the courts will be looking for deeply-seated societal values to decide this "hard case",[38] and legislators will be looking for signs of democratic compromise in their vocally pluralistic Canadian constituency. Their tasks are unenviable.

III. CAUGHT IN THE MIDDLE: THE LAW

Canadian abortion law is derived from the British common law. Until 1803 secular laws proscribing abortion were nearly unknown to the common law because "ecclesiastical courts exercised a separate criminal jurisdiction over religious and moral matters".[39] "Abortion [after quickening] was regarded primarily as an ecclesiastical offence, the crime consisting in denying the prospect of eternal life to the soul of the unborn, and so, unbaptised, child."[40] As previously discussed, the Roman Catholic church had for centuries considered that the foetus "became animated with a rational soul only after the quickening of the child in the mother's womb."[41] The Church of England did not differ from this position, and the common law approach was that abortion even after quickening was a mere misdemeanor which could be neutralized by the common law defence of necessity.[42]

In 1803, two years after the first English census of 1801, and after a decade of wars which had reduced available manpower for Britain's armies and for her factories of the Industrial Revolution, the first anti-abortion statute was passed in England.[43] W.W. Watters in his book, *Compulsory Parenthood*, hypothesizes that the anti-abortion statute, Lord Ellenborough's Act, 43 Geo. III c. 58, was a pro-natalist measure introduced for purely demographic and economic reasons.[44] What is more notable about the statute, however, is that it maintained the distinction between a foetus which had quickened and one which had not. The abortion of a foetus which had quickened was a capital crime while abortion of a foetus before that stage was a misdemeanor subject to lesser penalties.[45] In 1837 the distinction between quickened and non-quickened was dropped (apparently without reason) from the statute and did not

38. See R. Dworkin *Taking Rights Seriously* (1977) 1 and note that Parker A.C.J.H.C. in *Morgentaler* (1984) uses deeply rooted societal values to define the rights under freedom of religion guarantees in the Charter — is this a practical application of Dworkin's theory?

39. *Supra* n. 2 at 20.

40. *Id.* at 35.

41. *Id.*

42. R. Cook and B. Dickens "A Survey of Abortion Laws in Commonwealth Countries" *Abortion Laws in the Commonwealth* (ed. Commonwealth Secretariat, 1977) 7.

43. W. Watters, *Compulsory Parenthood* (1976) 67.

44. *Id.* at 64.

45. *Supra* n. 42.

reappear in the law from which Canada derived its abortion law, the Offences Against the Person Act.[46] This prohibitory statute also added as a defendant the woman undergoing an abortion.[47] The British Act was imported almost *verbatim* into Canadian law in the Offences Against the Person Act, ss. 303, 304.[48] These anti-abortion sections "evolved through a number of Canadian Criminal Codes — 1892, 1902, 1907, etc., up to 1954,"[49] and except for one major exception (to be discussed *infra*) remained unchanged in wording between 1892 and 1969. The prohibitory sections made no provision for abortion to save the life of the mother. Sections 237 and 238 of the Criminal Code of Canada, S.C. 1953-54, c.51[50] were the last designations of the anti-abortion statutes prior to the 1969 amendments.[51]

In 1929 Britain passed the Infant Life Preservation Act, which prohibited the "destruction of a child capable of being born alive" (deemed to be 28 weeks)[52] but accepted the "destruction of such a child in good faith for the purpose only of preserving the life of the mother".[53] For the first time there was Commonwealth statute law which arguably placed foetal life in a subordinate position to maternal life. Canada enacted a similar provision in 1954.[54] Cheung, in his discussion of this section of the Code, states that it is clear from the legislative history and the lack of jurisprudence on the section that it was not considered to be a section which would permit therapeutic abortion, but rather was enacted to allow the destruction of a child in the act of birth only, where the mother's death was imminent without the child's destruction.[55] The 1969 amendments [to be discussed *infra*] made it clear that "everyone who causes the death, *in the act of birth*, of any child . . ."[56] would not be

46. *Id.*, 1861 (U.K.), 24 & 25 Vic., c. 100.

47. *Id.*

48. *Supra* n. 2 at 22; 1869, 32 & 33 Vic., c. 20.

49. *Id.*

50. *Id.* at 22.

51. Criminal Code of Canada, S.C. 1953-54, c. 51, ss. 237, 238.

237.(1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

(a) the administration of a drug or other noxious thing,

(b) the use of an instrument, and

(c) manipulation of any kind.

238. Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years.

52. Infant Life Preservation Act, 1929, 19 & 20 Geo. V., c. 34.

53. *Id.*

54. Child Destruction Section, Criminal Code of Canada, S.C. 1953-54, c. 51, s. 209; now s. 221.

55. *Supra* n. 2 at 27.

56. Criminal Code of Canada, S.C. 1968-69, c. 38, s. 209.

liable to prosecution. Thus Canada's abortion laws until 1969 remained completely prohibitory, with one possible exception which gave rise to the quasi-legal performance of abortions by Canadian doctors.[57]

This exception arose out of the landmark English case *Rex* v. *Bourne*.[58] Decided in 1938, the issue was whether or not a 14 year old rape victim's abortion was against the criminal law. MacNaghton J., construing the words of the British statute from which Canada derived its abortion law, held that "an abortion is not an unlawful abortion when performed by a doctor to preserve, in his judgment, the health of the mother — in this case, the mental health".[59] He declared that s. 58, the prohibitory section, was subject to an implied primacy of maternal life and health over foetal life similar to that contained in the Infant Life Preservation Act of 1929.[60] Cheung describes this decision as a landmark because of its emphasis on "health". Because health was a medical and not a legal question, British physicians were given an "effective legal license" to decide whether or not to abort.[61] Between 1938 and 1954 the wording of the comparable Canadian statute was the same as the British one, but no case law came before Canadian courts on point. The *Bourne* decision remained in Canada a precedent only in theory. An amendment to s. 237[62] of the Criminal Code in 1954 dropped from that section the word "unlawfully" upon which the *Bourne* decision had turned. This, according to J.J. Lederman, writing in 1963, apparently removed the *Bourne* necessity defence from Canadian law.[63] Between 1954 and 1969 there was no relevant case law but according to Department of Justice commentary notes on the Trudeau Omnibus Bill of 1969, *Rex* v. *Bourne* had never been applicable to Canada.[64]

In spite of jurisprudential thought about the *Bourne* decision, the medical profession relied upon it, and abortion became somewhat more available for "health" reasons as defined by doctors operating in an unlitigated "quasi-legal system".[65] Hospitals defined their own regulations and in some, "abortion review committees" were established in order to protect and review the decisions of individual physicians. There were "no recorded prosecutions of established hospitals or physicians who performed 'therapeutic' abortions under the pre-1969 'quasi-legal' system",[66] but in 1963, no longer content to exist in legal limbo on the abortion question, the Canadian Medical Association set in motion the wheels of change. It sought from the government of the day clarification of doctors' legal status with respect to abortion.[67] Legislative changes

57. *Supra* n. 2 at 27.
58. [1939] 1 K.B. 687; (1938) 3 All E.R. 615.
59. *Id.*; also see the discussion in Cheung, *Essays on Abortion*, *supra* n. 2 at 23.
60. *Id.*
61. *Id.*
62. *Id.* at 24; now s. 251.
63. J.J. Lederman, "Therapeutic abortion and the Canadian Criminal Code", (1963) 6 *Crim L.Q.* 36.
64. *Supra* n. 2 at 24.
65. *Id.* at 25.
66. *Id.*
67. A. deValk, *Morality and Law in Canadian Politics*, *supra* n. 27 at 16.

were similarly requested because, as one spokesman put it, "I and my colleagues have been breaking the law for a long time."[68] Until the 1969 amendments, the physicians' "protection [had been] in fact the absence of enforcement of the law."[69] Thus, on the eve of the passage of the 1969 amendments to the Criminal Code of Canada an untried common law "necessity" defence was all that a physician had available to raise as a defence if prosecuted for performing an abortion. The changes to the law were not intended to grant to women the right to an abortion; they were merely passed in order to protect doctors from prosecution for performing abortions which were, in the physicians' judgement, necessary to save the lives or health of the women. The *ad hoc* system of "abortion review committees" and regional regulations which varied from city to city and province to province were granted legitimacy by the 1969 Act, yet no hospital was under an obligation to perform abortions, and the formerly subjective and inconsistent body of "health" definitions under the *ad hoc* system was legitimized and left to the medical profession to refine. In asking for legislative intervention, the profession wanted it understood that the recommended changes were not "to encourage 'wide' liberalization [of abortion procedures, but] rather to make them legal and to provide . . . better precautionary standards for the protection of both the public and the profession."[70]

The Canadian Bar Association was the first body to receive the medical profession's recommended changes for study. Passage by the Criminal Justice sub-committee of the C.B.A. set the stage for a storm of controversy over the proposed amendments to the Criminal Code. Father Alphonse deValk in *Morality and Law in Canadian Politics* describes the interplay of moral, religious, medical and legal factors at the C.B.A. Annual Meeting in August, 1967.[71]

> The arguments for and against never met on common ground. The division between pros and cons was not one between those who found different answers to the same question; rather it was a division between people who had answers to different questions. Insisting that their own questions were the more important and legitimate fones, overriding consideration of any others, they found themselves in opposing positions. Those who favoured the resolution were interested only in asking: What is to be done about illegal abortions here and now? On the other hand, those who opposed the resolution wanted first an answer to the question: Is abortion moral or immoral? Is it good or bad for society? . . . those who wanted an answer first to the more general question proved to be mostly "conservative" or "fundamentalist" in religion. Accustomed to consider matters in light of basic (religious) principles, they refused to discuss *illegal* abortions separate from the question of abortion as such.

The proposed measures passed through the Canadian Bar Association and were added to the 1969 Omnibus Bill along with changes to the Divorce Act, laws decriminalizing the dissemination of birth control information, and laws removing homosexuality from the Criminal Code.[72]

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68. *Id.*, per (1967) 97 *Canadian Medical Association Journal* 1233.
69. *Supra* n. 2 at 25.
70. A. deValk, *Morality and Law in Canadian Politics*, *supra* n. 27 at 18, per the "Report of the Special Committee on Therapeutic Abortions and Sterilizations" (1965) 1.
71. *Supra* n. 27 at 23.
72. *Id.*

IV. 1969 — THE REFORM THAT HARDLY WAS

Section 237 of the Criminal Code, 1969 (now s. 251) exempted from prosecution a physician performing an abortion in "an accredited or approved hospital if a board of three doctors decide[d] that the continuation of pregnancy [would] endanger the life or health of the pregnant woman."[73] As such it was not a radical or liberalizing amendment; it merely made legal that which had been illegal, or quasi-legal. The new law obliged no hospital to establish an abortion committee and, more importantly, failed to define "health" for criminal purposes. Women seeking abortions had no say in the decision, nor a right to appear before the committees deciding their personal futures. The legality of an abortion under the new law continued to be predicated upon where a woman lived, the religious nature of her community (and of the committees hearing her case), the definition of "health" used by hospitals in her region, and her economic status and ability to "hospital shop" across the nation.[74] One author was prompted to refer to Canada's 1969 amendments as "the reform that hardly was".[75]

V. PROSECUTION AND CHALLENGES: THE AMENDED CRIMINAL CODE 1969 - 1984

Doctor Henry Morgentaler, past President of the Humanist Association of Canada, has since 1970 been deeply involved in the Canadian abortion issue.[76] His challenge of s. 251 of the Criminal Code led to several years of prosecution and, some would say, persecution,[77] within the Canadian justice system with an ultimate result that the common law defence of necessity arising out of the *Bourne* decision was held by the Supreme Court of Canada to be available in principle for abortions performed outside of the strict terms of s. 251. His appearance before the courts during the early and mid-1970s also led the Federal Government to strike a committee to study the operation of Canada's abortion laws.[78] The findings of the Badgley Report and their use by the learned Justices in the most recent Morgentaler case (1984) will be discussed *infra*.

A. CANADIAN BILL OF RIGHTS

Because of the complexity of the Morgentaler saga this paper will make use of a summary and chronology of events during the early Morgentaler years. The work was prepared by a leading Commonwealth authority on the abortion question, Law Professor Bernard Dickens, of the University of Toronto.[79] Professor Dickens, in the *Osgoode Hall Law Journal* writes that "the Morgentaler case reveals such a wealth of legally significant issues, great and small, that the isolation of only certain of them

73. Criminal Code of Canada, R.S.C. 1970, c. C-34, s. 251.

74. *Report of the Committee on the Operation of the Abortion Law* (Minister of Supply and Services 1977). Hereafter referred to as the "Badgley Report".

75. E. Pelrine, *Abortion in Canada* (1971 Adrienne Clarkson ed.) 29.

76. B. Dickens, "The Morgentaler Case" (1976) 14 *Osgoode Hall L.J.* 229.

77. *Id.* at 243.

78. *Id.* at 241.

79. *Id.* at 242.

may fail to do justice to the case . . .''[80]. For the purposes of this paper, however, the discussion must be confined to the *Bill of Rights* challenges made by Dr. Morgentaler before the Supreme Court of Canada in 1975, and *infra* to the constitutional arguments before the Ontario Supreme Court in 1984. The writer regrets the necessary omission of most of the criminal law issues raised before the courts by Dr. Morgentaler but believes that the future of this debate before the Supreme Court of Canada will rest upon constitutional grounds. It is that area, therefore, that the remainder of this discussion will emphasize.

Professor Dickens' summary of the grounds of appeal before the Supreme Court of Canada in 1975 is as follows:[81, 82, 83]

a. s. 251 is invalid as an encroachment on provincial legislative power regarding hospitals and regulation of the profession and practise of medicine;

b. sections 1(a) and (b) of the Canadian *Bill of Rights*, derived from the United States Constitution, import into Canadian law United State's decisional law giving effect to the United States Constitution, notably the decisions in *Roe* v. *Wade* and *Doe* v. *Bolton*.

[s.1(a) is the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; s. 1(b) is the right of the individual to equality before the law and the protection of the law]

c. under section 1(a) of the Bill of Rights, women have a right of privacy including at least a qualified right to pregnancy termination, especially in the first trimester;

d. s. 251 infringes section 1(a) of the Bill of Rights regarding protection of security of the person by due process of law because the standard in s. 251(4) is so vague, so uncertain and so subjective among different physicians and therapeutic abortion committees as to deny due process of law;

e. there is further denial of due process in failure to provide adequate procedural safeguards in s. 251 whereby an applicant may appear, with counsel if she wishes, before a therapeutic abortion committee;

f. since there is a right to abortion under certain conditions without risking criminal penalty, there is a right to a fair hearing thereon in accordance with the principals of fundamental justice established by section 2(e) of the *Bill of Rights*;

g. equality before the law and to the protection of the law under section 1(b) are denied because s. 251(4) in permitting but not compelling the establishment of therapeutic abortion committees, operates unequally in respect of women in rural areas, women in areas where no such committees have been established and women whose economic status prevents them going to areas where such committees exist, and creates inequality because the vague standard set leads inevitably to varying interpretations and applications;

h. due process under section 1(a) is also denied for absence of review of therapeutic abortion committees, having regard to grounds d. and e. *supra*, and the absence of reasons for their decisions; the failure to require reasons is itself a denial of due process of law;

. . .

j. even if the *Bill of Rights* is merely an aid to interpretation, it supports resort to s. 45 as a defence to a charge under s. 251 (submitted by [intervenant]'s counsel);

. . .

p. it was for the jury to say whether the circumstances of the abortion constituted an emergency giving rise to a necessity such that s. 251(4) could not be employed;

q. the Quebec Court of Appeal [could] not substitute a conviction for a jury's acquittal, or, if it [could], it was not appropriate to do so in this case.

80. *Id.*

81. *Id.* at 236, referring to *Morgentaler* v. *The Queen* (1975) 53 D.L.R. (3d) 161 (S.C.C.). Hereafter referred to as *Morgentaler* (1975).

82. *Roe* v. *Wade* (1973) 410 U.S. 113 (U.S. Sup. Ct.).

83. *Doe* v. *Bolton* (1973) 410 U.S. 179 (U.S. Sup. Ct.).

The decision of the Supreme Court of Canada in the case is as important for what it did not decide as for what it did decide. The Court, in a split decision, stressed that Canada's law on abortion, section 251 of the Criminal Code, was an exculpatory provision which imparted no rights to women to have an abortion. It made clear that the ultimate resolution of the abortion conflict belonged within the political realm. Deciding the case on narrow, legal grounds the majority speaking through Dickson J. (as he then was) made it clear that s. 251 of the Code was no more than a provision designed to exempt from prosecution doctors who perform abortions in the limited circumstances enumerated in the Criminal Code. Finding the law to be criminal in nature, despite the fact that it exempted from penalty rather than imposed penalty, the Court found it to be validly enacted criminal legislation. With respect to the arguments made by Dr. Morgentaler that the section gave substantive rights to abortion to women, Dickson J. speaking for the majority opened his judgement with a passage which emphasized that the Court would not decide that controverial issue. He commenced:[84]

> It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous debate on abortion which has been going on in this country between, at the two extremes, (i) those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere, and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of a human life and tantamount to murder. The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

The Court decided the appeal on the narrow legal issues at sub-para j., p. and q., above, holding that the "Good Samaritan" defence under s. 45 of the Criminal Code[85] was not available to a charge under s. 251. The more important decision to the abortion debate, however, was the Court's finding that the necessity common law defence arising out of the *Bourne* decision was available to a charge of performing an abortion outside the strict terms of s. 251, although the Court found that Dr. Morgentaler's circumstances provided no evidence to leave the defence to a jury. The most provocative decision, however, was that a jury's acquittal could be overturned on appeal and a conviction substituted. The important result of the majority decision, therefore, was to bring the necessity defence into Canadian abortion law under the provisions of section 7 of

84. *Morgentaler* (1975) at 202.

85. Criminal Code of Canada, R.S.C. 1970, c. C-34, s. 45:

> 45. Every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if
>
> (a) the operation is performed with reasonable care and skill, and
>
> (b) it is reasonable to perform the opeation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

the Criminal Code[86] and set the stage for its acceptance in practise, as well as in principle.

The late Chief Justice Laskin's dissent in the case addressed the Bill of Rights arguments which had not been addressed by the majority.[87] On the argument based on section 1(b) of the Bill of Rights[88] Laskin C.J.C. agreed with the majority that ss. 251(4) and (5) "do not involve any issue of deprivation of a right which may require an opportunity to be heard with or without counsel. Nothing is being taken away under ss. 251(4) and (5); they simply permit a person to make conduct lawful which would otherwise be unlawful."[89] Dismissing the section 1(b) arguments that the inequitable application of the abortion law violated guarantees of "due process" under the *Bill of Rights*, Laskin C.J.C. continued:[90]

> Both the prohibition in s. 251 and its relieving terms are general in their application; and in qualifying the prohibition against the intentional procurement of a miscarriage by a requirement of certification of likely danger to life or health by a medical practitioner and interposing the safeguards of a medical screening committee and performance of the abortion in an accredited or approved hospital, Parliament has made a judgement which does not admit of any interference by the Courts . . . Any unevenness in the administration of the relieving provisions is for Parliament to correct and not for the Courts to monitor as being a denial of equality before the law and protection of the law.

The arguments under s. 1(a) addressed by Laskin C.J.C. alone also failed. The argument was that because American constitutional

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86. Criminal Code of Canada, R.S.C. 1970 c. C-34, s. 7:

    7(1) The provisions of this Act apply throughout Canada except

    (a) in the Northwest Territories, in so far as they are inconsistent with the Northwest Territories Act, and

    (b) in the Yukon Territory, in so far as they are inconsistent with the Yukon Act.

    (2) The criminal law of England that was in force in a province immediately before the 1st day of April 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

    (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

87. This point is of especial significance since the passage of the Charter of Rights and the arrival before the courts of strong abortion cases based upon constitutionally entrenched rights. The fact that the majority in *Morgentaler* (1975) did not disagree with Laskin C.J.C.'s comments on *Bill of Rights* issues has been taken in subsequent Charter cases to mean acceptance of his remarks by the majority, thus making his comments a majority decision on the points discussed by him. See *infra*, *Morgentaler* (1984).

88. *Bill of Rights*, s. 1:

    1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

    (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

    (b) the right of the individual to equality before the law and the protection of the law;

    (c) freedom of religion;

    (d) freedom of speech;

    (e) freedom of assembly and association; and

    (f) freedom of the press.

89. *Morgentaler* (1975) at 172 per Laskin C.J.C. (dissenting on another point, but see *supra* n. 87).

90. *Id.* at 176.

guarantees of "due process" under their *Bill of Rights* have been construed to grant a substantive right of "privacy" protecting a woman's abortion decision, the *Canadian Bill of Rights'* guarantees of "security of the person" should similarly found substantive rights to abortion for Canadian women. Invoking the words of the Supreme Court of Canada in *Curr*,[91] Laskin C.J.C. dismissed the argument. He held that Canada's *Bill of Rights* guaranteed only that federal legislation would not deny fairness in procedure, and imparted no substantive rights to Canadian people. Stressing that it is not the function of Canadian courts in a Parliamentary system to examine the wisdom of legislation, he said:[92]

> This Court indicated in the *Curr* case how foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review was any interference by a Court with the substantive content of legislation.

Thus the *Bill of Rights* arguments in *Morgentaler* (1975) failed and s. 251 was upheld as valid criminal law legislation. Dr. Morgentaler was tried in Quebec for additional breaches of s. 251 and by using the *Bourne* necessity defence was acquitted, for the second time, by a Quebec jury in 1976, thereby ensuring that the necessity defence was brought into Canadian law in precedent as well as in principle.[93] An important amendment to s. 613 of the Criminal Code removed from appellate courts the right to substitute for a jury acquittal a conviction and allowed, instead, only the ordering of a new trial.[94] On a re-trial after his second jury acquittal, the third Quebec jury also acquitted him on the successfully raised necessity defence.[95]

The next challenge to s. 251 of the Criminal Code under the *Bill of Rights* came from a lawyer with strong anti-abortion convictions. David Dehler sought an injunction to prevent abortions being performed at the Ottawa Civic Hospital[96] as "the representative of those unborn persons or that class of unborn persons whose lives may be terminated by abortion in the defendant's hospitals".[97] The plaintiff Dehler argued that an "unborn person is a human being from the moment of conception, or shortly thereafter, and that abortions are killing innocent human beings without due process of the law and the benefit of equality before the law and full protection of the law",[98] under section 1(b) of the *Bill of Rights*. "The class of unborn persons whose lives may be terminated . . .", asserted the plaintiff, "are entitled . . . to life supportive procedures, not death dealing techniques, and to life, liberty and the security of their persons and the right not to be deprived of them except by due process of

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91. *Curr* v. *The Queen* (1972) 26 D.L.R. (3d) 603.
92. *Morgentaler* (1975) at 173. This statement has, however, been cast into doubt since the passage of the Charter as an entrenched constitutional document.
93. *Supra* n. 77, and *supra* n. 82 at 241. This was reinforced by the jury acquittal in November, 1984 of Dr. Morgentaler in Toronto. This case is, however, under appeal as at publication and will not be discussed further in this paper.
94. Criminal Code of Canada, R.S.C. 1970 c. C-34, s. 613 as am S.C. 1974-75-76, c. 93, s. 75 adding s. 613(4)(ii).
95. *Supra* n. 76, and n. 92 at 241.
96. *Dehler* v. *Ottawa Civic Hospital* (1979) 101 D.L.R. (3d) 686.
97. *Id.* at 687 per Robins J. reviewing the pleadings.
98. *Id.* at 688.

law"[99] in accordance with section 1(a) of the *Bill of Rights*. The plaintiff Dehler attempted to distinguish *Morgentaler* (1975) by arguing that "the unborn are in fact human beings".[100] Robins J. held that despite the existence at common law of a contingent foetal personality,[101] that personality is only given legal effect if the foetus' rights vest through the act of it subsequently being born alive and becoming a "human being" in law. Therefore, Robins J. held that there is no "right to life" known to the law for foetuses and the argument failed. The learned Justice made an interesting point, however, with respect to the plaintiff's arguments under the *Bill of Rights* by saying:[102]

> But I would not expect that the Supreme Court in considering the issues it did in *Morgentaler* would have reached a conclusion favourable to abortion in specified circumstances if the necessary consequence was the termination of lives of "persons" or "individuals" recognized by law and entitled to the protection of the law and the *Bill of Rights*, nor would I expect it would have been silent on the subject.

The question of status, or standing to sue, of unborn children whose existence may be terminated by abortion was examined at length in *Dehler*. Robins J. found that:[103]

> If the unborn cannot individually maintain the action, they cannot maintain it collectively, nor can it be maintained as a class action on their behalf.
>
> . . .
>
> While there can be no doubt that the law has long recognized foetal life and has accorded the foetus various rights, those rights have always been held contingent upon a legal personality being acquired by the foetus upon its subsequent birth alive . . .
>
> Since the law does not regard an unborn child as an independent legal entity prior to birth, it is not recognized as having the rights the plaintiff asserts on its behalf or the status to maintain an action.

The application for the injunction was accordingly dismissed for lack of standing on the part of the plaintiff. Significantly leave to appeal to both the Ontario Court of Appeal[104] and the Supreme Court of Canada[105] was refused.

The standing issue was soon before the courts again in *Minister of Justice of Canada et al* v. *Borowski* [106] as those committed to the anti-abortion position took another approach in seeking to have section 251(3) (4) and (5) declared inoperative by reason of section 1(a) of the *Bill of Rights*. The decision of the Supreme Court of Canada that Joseph Borowski had "standing" to challenge s. 251 dramatically widened the availability of the courts to private citizens seeking to impugn legislation with which they personally disagreed, and despite the fact that it could never apply personally to them. The Supreme Court felt that where there was no other reasonable and effective manner in which the issue might be brought before the courts, and if all other available avenues had been ex-

99. *Id.*

100. *Id.* at 694.

101. *Id.* at 695. See also K. Weiler and K. Catton "The unborn child in Canadian law" (1976) 14 *Osgoode Hall L.J.* 643.

102. *Id.* at 694.

103. *Id.*

104. (1980) 117 D.L.R. (3d) 512.

105. Leave to Appeal to SCC refused. (1981) 1 S.C.R. viii.

106. (1981) 130 D.L.R. (3d) 588.

hausted, then a private citizen could be granted standing to challenge legislation.[107]

B. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Between the time that Joseph Borowski received standing to challenge Canada's abortion laws and the commencement of his action in the Court of Queen's Bench in Saskatchewan, the Constitution Act, 1982[108] with an entrenched Charter of Rights similar to the former *Bill of Rights*, but taking priority over all other legislation, became the supreme law of Canada. Joseph Borowski's action became the first test of the validity of Canada's abortion laws under the Charter. The decision, handed down 13 October 1983,[109] followed the reasoning in *Morgentaler* (1975) and *Dehler* on the challenge by Borowski under the still-in-force *Bill of Rights* and upheld the validity of the legislation. Matheson J. dealt only cursorily with several arguments based upon ss. 12, 14 and 15 of the Charter of Rights, and ultimately decided the issue on s. 7.

> 7. 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.

The s. 7 arguments were the same as those made in *Dehler*: the foetus is a human person from conception; it therefore falls within the term "everyone" and is guaranteed a "right to life" under the Charter; s. 251 of the Criminal Code deprives foetuses of this substantive right to life; and the section is, therefore, of no force and effect by virtue of s. 52 of the Constitution Act, 1982.

> 52(1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Matheson J. dealt with these arguments in the same manner as had Robins J. in *Dehler* by finding that there "is no existing basis in law which justifies a conclusion that foetuses are legal persons, and therefore within the scope of the term 'everyone' utilized in the Charter".[110] More importantly for the future of the abortion issue before the courts, was Matheson J.'s reiteration that, in spite of the existence of the Charter, "it is the prerogative of Parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons".[111] This decision is consistent with other post-Charter decisions which have held that s. 7 offers not substantive rights, but rather guarantees of procedural fairness in the operation of whatever substantive rights Parliament chooses to create and is, therefore, to be construed similarly to the *Bill of Rights*, sections 1(a) and (b).[112] If the *Borowski* decision and its *ratio decidendi* is upheld

107. *Id.* at 589. Relying upon this section, Parker A.C.J.H.C. in *Morgentaler* (1984) also found that the applicants in that case had standing to challenge the constitutionality of abortion legislation despite the fact that they could never undergo an abortion.

108. *Borowski* v. *The A.G. for Canada; The Minister of Finance for Canada* [1984] 1 W.W.R. 15.

109. *Id.*

110. *Id.* at 36.

111. *Id.*

112. *R.* v. *Holman* (1982) 28 C.R. (3d) 378; *R.* v. *Campagna* (1982) 70 C.C.C. (2d) 236; *Re Jamieson and The Queen* (1982) 70 C.C.C. (2d) 430; but see *contra Ref. Re Section 94 of the Motor Vehicles Act*, (1983) 147 D.L.R. (3d) 539. (On appeal).

on appeal,[113] the abortion debate will return to an exclusively political forum.[114]

VI. COMPARATIVE JURISDICTIONS

A. DOES THE UNITED STATES' MODEL APPLY TO THE CHARTER?

The "due process" arguments made in *Morgentaler* (1975) and disucssed, *supra*, arise out of the abortion privacy doctrine laid down in the landmark American cases of *Roe* v. *Wade*,[115] and *Doe* v. *Bolton*,[116] in 1973. The United States Supreme Court held in those cases that the issue of when life begins (and therefore, the legal status of the foetus) is not for the courts to decide, but that under American Constitutional guarantees of "due process" women have a "fundamental right of 'privacy', derived from substantive due process, [which] protect[s] the abortion decision of pregnant women".[117] It was the development of this limited constitutional right to abortion under "substantive due process" guarantees that

113. It is possible that different reasoning will be used by the Saskatchewan Court of Appeal, regardless of its decision. This Court recently adopted a rights-based approach to legal rights in the controversial Charter case, *R.* v. *Therens* (1983) 33 C.R. (3d) 204. Thus, the finding on the evidence by Matheson J. at the trial level that "foetal life . . . is an existence separate and apart from the pregnant woman, even although the foetal life may not be maintainable, during the early stages of pregnancy, independently of the pregnant woman" may leave a rights-based Appellate Court with no choice but to address the legal rights of the foetus under the Charter of Rights. Note that the rights-based approach has been upheld by the Supreme Court of Canada in *R.* v. *Therens* unreported, 23 May 1985.

114. I, however, doubt that the courts will escape so easily resolving the unanswered question of what the legal status of a foetus is. Following Matheson J.'s approach to the abortion controversy was Associate Chief Justice of the Ontario Supreme Court in the 1984 *Morgentaler* motion to quash criminal conspiracy charges against himself and others as being unconstitutional. Justice Parker's statement at page 93 of the decision (on the question of the scope of freedom of religion) that "the proper forum for debate by religious groups on issues of this nature is the political one" followed the other court's tradition of restraint by not too quickly declaring that substantive rights extend to the abortion issue.

Parker A.C.J.H.C., unlike Matheson J., however, did not take a fixed non-interventionist approach to the "social values adopted by Parliament". Instead he hypothesized a test for substantive content of legal rights under s. 7 of the Charter.

> "In my opinion, a determination of the rights encompassed by section 7 should begin by an inquiry into the legal rights Canadians have at common law or by statute. If the claimed right is not protected by our system of positive law, the inquiry should then consider if it is so 'deeply rooted in the conscience and traditions of our country as to be ranked as fundamental' per Cardozo J. in *Palko* v. *Conneticut* 302 U.S. 319 (1937) at 325 . . . In order to determine whether a woman has any legal right to choose whether or not to terminate her pregnancy, it may be useful to follow the principle articulated by the Alberta Court of Appeal in *Southam* and review the history of the abortion laws in Canada. [Parker A.C.J.H.C. reviewed the history of abortion] . . . Abortion, then, at any stage of the pregnancy has been prohibited in Canada for well over one hundred years. That a person procuring an abortion or the pregnant woman herself may rely upon the defence of necessity or be immune from prosecution by receipt of a certificate from a committee does not derogate from the fact that no unfettered legal right to an abortion can be found in our law, nor can it be said that a right to an abortion can be found in our law, nor can it be said that a right to an abortion is deeply rooted in the traditions or conscience of this country. For these reasons I cannot find a right to an abortion in s. 7 of the Charter." *Supra* n. 28 at 80.

115. *Supra* n. 82.

116. *Supra* n. 83.

117. In L.D. Wardle, *The Abortion Privacy Doctrine* (1981) xi.

Dr. Morgentaler sought to use to import into Canadian Bill of Rights' "due process" guarantees. The rejection of such a substantive meaning to Canadian due process meant rejection of "rights to abortion" for women and the affirmation that the Canadian parliamentary system of judicial review is limited to procedural matters. Under the Charter, however, it is still open to debate the philosophical approach which the Supreme Court of Canada will take on the question. Thus far *Borowski* and *Morgentaler* (1984) decisions point in two different directions.[118]

The "bold judicial legislation" in the United States Supreme Court cases of *Roe* v. *Wade* and *Doe* v. *Bolton* established a first trimester "zone of privacy" during which a woman, in conjunction with her physician, has the right to decide upon abortion.[119] In the second trimester the "State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."[120] In the third trimester "the state in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary in appropriate medical judgement, for the preservation of the life or health of the mother."[121] The United States Supreme Court also dealt with an argument put forward by the State of Texas that a foetus has a constitutionally protected right to life. The "Court perceived a 'wide divergence of thinking' among theologians, philosophers and doctors about when life begins".[122] It therefore held that "[i]n view of all this, we do not agree that, by adopting only one theory of life, Texas may override the rights of the pregnant woman that are at stake."[123] The Court, as did the courts in *Dehler* and *Borowski* in Canada, based its decision on the fact that "the unborn have never been recognized in the law as persons in the whole sense".[124] If Canada's appeal courts are consistent with *Bill of Rights* decisions, there will never be in Canada an act of bold judicial in-

118. See *Supra* n. 110 - 114. Also note Mr. Justice Parker's *obiter dicta* statement that some elements of a right to privacy might by protected by s. 7 of the Charter. "The decision to marry and to have children might be granted constitutional protection because they are considered deeply rooted in our traditions . . ." *Supra* n. 28 at 82.

119. *Supra* n. 117 at 3.

120. *Id.* at 4.

121. *Id.* at 4.

122. *Id.* at 2.

123. *Roe* v. *Wade*, *supra* n. 82 at 162.

124. *Id.*

terventionism like *Roe* v. *Wade* and *Doe* v. *Bolton*.[125] Substantive rights will come from legislation.

B. UNITED KINGDOM — EUROPEAN COMMISSION OF HUMAN RIGHTS

The United Kingdom took the legislative step to enact substantive rights to abortion in 1967 with the enactment of The Abortion Act, 1967.[126] The Act "establishes specific indications and locations for the procedure and a routine method of medical approval" of abortions which women may have on request.[127] Included in the indications for abortion are socio-economic grounds. While in Canada, provinces and individual hospitals may set up requirements for individuals to consent to the abortion (e.g. husband, parent), in England "no provisions exist for making a husband's or biological father's consent a pre-condition for lawful abortion".[128] In the 1980 landmark case of *Paton* v. *United Kingdom*,[129] before the European Commission of Human Rights, the Commission ruled, on an application by a husband for an injunction to stop his wife from having an abortion, that:[130]

> . . . the Commission, having regard to the right of the pregnant woman, does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant.

The question of the right to withhold consent, of course, arises out of legislation with no provision for consent, and is for that reason not relevant to Canada, but the Commission's comments about the legal rights of the foetus are particularly germane to the current Canadian debate.

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125. This is, as previously discussed at note 114, most uncertain. As Parker A.C.J.H.C. emphasized throughout his judgment in *Morgentaler* (1984) there is no concensus regarding abortion in Canada and therefore no single deeply rooted conviction within contemporary Canadian society that a court could reasonably ground substantive rights in. On just two issues dealt with by the learned Justice, s. 2 (religion), and s. 7 (security of the person), he left a clear message that rights and freedoms must be grounded in fundamental tenets of society. On the question of whether denial of abortion to women whose faith permits them is violative of their freedom of conscience and religion, he found that unless a fundamental tenet of the religion is breached by the law under attack, those who hold strong visions of a correct religious morality in Canada should find their outlet for expression in the political arena. On the s. 7 question of whether a right to privacy within the section exists for a woman's abortion decision (see discussion *supra*), his refusal to find a right to abortion where both secular and sectarian communities are deeply divided was a prudent and restrained course. If higher courts uphold his hypothesis that legal rights arise out of common-law, no consistent or homogenous Canadian beliefs within the larger pluralistic society, it will be highly unlikely that the abortion question will be resolved by the Courts. However, a 1985 Globe and Mail poll, published in the June 15th and 17th editions, indicates support for the present law. This appears to be a strong indicator of social concensus. Seventy-eight per cent of Canadians polled supported abortions where approved by a therapeutic abortion committee. Fifty-three per cent agreed with a woman's unlimited choice. Despite the large volume of anti-abortion protests, the number of Canadians protesting is considerably lower than the media attention would appear to indicate. Forty-one per cent of Canadians polled disapproved of abortion on demand, while only sixteen per cent of Canadians polled disapproved of abortions approved by abortion committees.

126. The Abortion Act, 1967 (U.K.), c. 87.

127. *Abortion Laws in the Commonwealth*, *supra* n. 42 at 6.

128. *Id.* at 11.

129. (1980) 3 E.H.R.R. 408.

130. *Id.* at 417.

The Commission considered whether, under the European Convention on Human Rights, Article 2(1), "right to life" included the foetus within the body of a woman. It held that "everyone" in Article 2 did not include foetuses, and that "the life of the foetus is intimately connected with and cannot be regarded in isolation from the life of the pregnant woman."[131]

We may yet in Canada see a similar decision where the Criminal Code s. 251 abortion provisions are found to be, under s. 1 of the Charter, a reasonable limitation upon any "right to life" of a foetus, where the rights of an existing person to life and health would be affected adversely by the continuation of a pregnancy.[132] Where the European Commission of Human Rights was required to "imply" limitations upon rights, Canadian courts would have only to apply s. 1 of the Charter — a provision which, arguably, was designed to balance rights.[133]

C. WEST GERMANY — EUROPEAN COMMISSION OF HUMAN RIGHTS

West Germany's Federal Constitutional Court, like the Supreme Court of the United States, has engaged in bold judicial interventionism. Unlike the United States, however, it "legislated" in favour of foetal rights. When the West German legislature attempted to enact legislation allowing, in effect, abortion on request during the first 12 weeks of a pregnancy, the Court intervened and declared the legislation to be "void in so far as it allowed the interruption of pregnancy during the first 12 weeks without requiring any particular reason of necessity".[134] The Federal Constitutional Court found that "the life of the child developing in the mother's womb constitutes an independent legal interest" and the State had a "duty to protect the life of the child . . . even as against the mother", but that "a woman cannot be required to continue her pregnancy if its termination is necessary in order to avert danger to her life or of serious injury to her health."[135] The West German court, like the United States Supreme Court, placed a substantive judicial check upon the legislature's enactment — in effect it questioned the wisdom of the legislation and struck it down as being inconsistent with substantive rights in a foetus. The legislature shortly thereafter enacted legislation in conformance with the Court's ruling. This legislation is quite similar to Canada's s. 251 of the Criminal Code.

Before long there was a challenge to the new law on the grounds that it infringed a right under Article 8 of the European Convention on Human Rights to respect for one's private life.[136] The Commission upheld the

131. *Id.* at 415.

132. Parker A.C.J.H.C. found that he did not have to deal with this question in *Morgentaler* (1984) at 85. See *infra* n. 133.

133. Parker A.C.J.H.C. said on the s. 1 question: "Since I find that the words 'liberty and security of the person' do not contain the rights claimed, there is no need to discuss whether the applicants have been deprived of any right not in accordance with the principles of fundamental justice pursuant to s. 7 or whether the limit on the alleged right is 'demonstrably justified in a free and democratic society' pursuant to s. 1 of the Charter."

134. *Brüggemann and Scheuten* v. *Federal Republic of Germany* (1977) 3 E.H.R.R. 244.

135. *Id.* at 248.

136. *Id.* at 244.

German Federal Court's finding of a limited right in the foetus not to be aborted without reasons of necessity because there are "limits to the personal sphere"[137] of privacy and "the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or in close connection with other protected interests".[138] The Commission upheld the Federal Court's finding that pregnancy did not "pertain uniquely to the sphere of private life"[139] because private life is closely connected with a protected interest of the foetus. It was held, therefore, that "not every regulation of the termination of unwanted pregnancies constitutes an interference with the *right to respect* for the private life of the mother".[140] Such reasoning could conceivably find that, under Canadian law, a foetus' right to life is reasonably limited by the life and health of the mother; similarly a mother's right to the "security of her person" is reasonably limited by the right of her child not to be aborted without cause. The courts must first, however, find there to be rights, before they may find them reasonably limited within s. 1 of the Canadian Charter. As discussed, the *Morgentaler* and *Borowski* decisions denied the existence of these rights entirely.

VII. THE OPERATION OF CANADA'S ABORTION LAWS — THE BADGLEY REPORT

This paper's discussion of The Report on the Operation of the Abortion Law[141] must, for space reasons, deal only with the major findings of the report. This report, struck as a result of the 1970s *Morgentaler* cases, largely substantiated Dr. Morgentaler's allegations that the law's operation was both inconsistent and inequitable. The Committee found, however, that there was no consensus for major change in the law among Canadians.[142]

> Most Canadians were neither in favour of removing abortion from the Criminal Code nor of refusing therapeutic abortions under any circumstances. Their complaint was with the way the law was working.

The Committee blamed several factors for the inequitable state of affairs, the most important one being the failure by the provinces under their responsibility for hospitals under the B.N.A. Act s. 92(7) to apply consistent standards for abortion.

The Badgley Report stressed that the abortion law itself was not inequitable.[143]

> The 1969 amendment to the Abortion Law resulted in a sharp reduction in illegal abortions. In addition there was a substantial reduction in deaths resulting from attempted self-induced or other illegal abortions. Provincial regulations and the practises of hospitals and the medical profession rather than the Abortion Law itself have led to the inequities in its operation.

137. *Id.* at 252.

138. *Id.* at 253.

139. *Id.*

140. *Id.*

141. Badgley Report, *supra* n. 74.

142. *Id.* Summary Document (1977), Companion document to the main report. Note that the Globe and Mail poll at n. 125 indicates Canadians still feel this way.

143. *Id.* at 5.

Requirements set by Provincial authorities, which hospitals must meet before they are eligible to perform abortions, requirements set by hospitals themselves, requirements set by therapeutic abortion committees within hospitals, plus inconsistent interpretations of the definition of "health" from province to province,[144] make both the availability of abortion, and its legality in a given location, utterly unpredictable. The Badgley Report found that there are no detailed reviews by the provinces of the therapeutic abortion procedures, and that despite national health insurance many hospitals are extra-billing abortion patients, thus creating a financial disincentive to abortion for the less economically privileged. The Committee found that these charges "affected most of those women who were young, were less well educated or were newcomers to Canada."[145] The Report further stated:[146]

> [R]equirements set by provincial authorities were a major factor which made a sizeable number of general hospitals ineligible to establish therapeutic abortion committees. When these requirements were added to the established medical custom that therapeutic abortions are usually done by obstetrician-gynecologists, the number of hospitals *eligible* [not performing, just eligible] to do the abortion procedure was effectively reduced to two out of every five hospitals in the nation.

Two of the more important findings of the Badgley Report were related to prevention, and administration of Canada's abortion laws. The Committee's summary on those two points is reproduced below:[147]

> *Family Planning.* Canadians lack accurate information about contraception. In terms of the allocation of public effort and resources, family planning has been only modestly supported. More money is spent on paying for the treatment and care of women who have had induced abortions than on ways of seeking a reduction in the number of abortions and in providing more effective programs of family planning and sex education. Existing sex education courses in schools, the work of public health programs and the efforts of voluntary associations when considered together have had little impact on the population as a whole.
>
> *Special Treatment Centres.* There were fewer risks for patients at hospitals which had developed considerable specialization in doing therapeutic abortions. When this situation has occurred in the treatment of other health conditions in Canada it has on occasion resulted in the establishment of special treatment centres. This trend toward the specialization of abortion treatment has already partly evolved, although it has not been formally recognized by hospitals or provincial health authorities.

The Badgley Report leaves little doubt that reproductive issues in Canada need attention and that despite the existence of an equitable law in principle, it is in practise an inconsistent administrative nightmare. The answers to this problem rests with both the federal government which has yet to define "health" for the medical profession, and with the provinces which have abdicated responsibility for the equitable administration of justice, and of health care, within their jurisdictions. Provincial health authorities have it within their power under s. 251 of the Criminal Code to designate "approved" hospitals within provinces, therefore, the Badgley Report's "special treatment centres" could easily be established across Canada.

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144. See *Carruthers* v. *Lions Gate Hospital* (1984) 6 D.L.R. (4th) 57 (F.C.A.) at 63 where it was held that: "The regulation and control of hospitals is clearly a provincial matter. The general subject matter of the performing of abortions is also a provincial matter subject to any prohibitions of the criminal law."

145. Badgley Report, *supra* n. 142 at 7.

146. *Id.*

147. *Id.*

The Badgley Report was considered by the court, and accepted as truth,[148] in *Morgentaler* (1984). Mr. Justice Parker followed the interpretation of Laskin C.J.C. in *Morgentaler* (1975). Laskin C.J.C. had said:[149]

> Any unevenness in the administration of the relieving provisions [under s. 251, Criminal Code] is for Parliament to correct and not for the Courts to monitor as being a denial of equality before the law and the protection of the law.

Parker A.C.J.H.C. similarly refused to look beyond the face of the legislation in determining whether equality provisions under section 1(b) of the *Bill of Rights* had been breached. Relying upon *Morgentaler* (1975) and *R.* v. *Drybones*,[150] the learned Justice held that:[151]

> On its face, s. 251 does not discriminate among individuals or groups of individuals, and is therefore covered by the result in *Morgentaler* (1975) which found that s. 251 does not breach the Bill of Rights s. 1(b).

It is important to note that Mr. Justice Parker did find that there was credible evidence demonstrating the unevenness of application of the abortion law referred to in the Badgley Report:[152]

> If the evidence called regarding the application of s. 251 were admissible on this point, it would indicate that some pregnant women are being treated more harshly than others due to their geographical location either because they live outside Quebec, live in an area without access to a therapeutic abortion committee, or live in an area close to a committee that applies onerous standards. It would only prove that there was "unevenness in the administration of the relieving" provisions per Laskin C.J.C. at 464. As His Lordship concluded, this factor is "for parliament to correct and not for the courts to monitor as being a denial of equality before the lay and the protection of the law".

VIII. ADMINISTRATIVE LAW CHALLENGES

In *Carruthers et al* v. *Lions Gate Hospital* [153] there was an attempt to impeach the therapeutic abortion committee of the Lions Gate Hospital as exercising federally delegated powers under the criminal law without adherence to the principles of natural justice required of public bodies by virtue of *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*,[154] and without adherence to the principles of fundamental justice guaranteed by s. 7 of the Charter of Rights. The Federal Court of Appeal found that therapeutic abortion committees were not exercising powers granted to them under the Criminal Code, and were not, therefore, subject to its review. Significantly leave to appeal to the Supreme Court of Canada was refused.

Despite this precedent, Mr. Justice Parker in *Morgentaler* (1984) disputed such a finding, stating:[155]

> Given the consequences of the issuing or refusing to issue a certificate, I have some difficulty in reducing the commitee's powers to that of stating its opinion as the the likelihood of the continuation of the pregnancy endangering the applicant's life or

148. Although Parker A.C.J.H.C. questioned the weight he could assign to it.

149. *Morgentaler* (1975) *supra* n. 81 at 176.

150. (1970) 9 D.L.R. (3d) 473.

151. *Morgentaler* (1984) at 59.

152. *Id.* This is likely to be a key finding in a s. 15 challenge of the abortion law. Parker J.'s finding of uneven administration of the abortion law may force higher courts to address it now, where they were not previously required to under the 1975 *Morgentaler ratio.*

153. *Supra* n. 144. Leave to appeal to the S.C.C. refused.

154. [1979] 1 S.C.R. 311.

155. *Morgentaler* (1984) at 38.

> health. The decision of the committee has a very real effect on access to abortion for the pregnant female applicant, and the potential criminal liability of both the applicant and the physician who performs the operation.

Relying upon an Ontario case which found that the common law remedy of *certiorari* may have a residual role to play in challenging the decisions of therapeutic abortion committees on a case by case basis,[156] Justice Parker said:[157]

> Assuming for the moment that the committees are judicially reviewable, the principles of natural justice would be "annexed to the legislation, with a view to bringing statutory provisions into conformity with the common law requirements of justice" per Dickson J. in *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)* (1979) 106 D.L.R. (3d) 385 at 409.

Although Mr. Justice Parker found that the principles of natural justice did not apply to the applicants in the *Morgentaler* (1984) circumstances because he knew "of no authority which permits an administrative law challenge of a decision-making body on the ground that it has a duty to act fairly when no specific decision of that body is being impugned,"[158] he left the door open in *obiter dicta* to such administrative law challenges in the future.[159]

> The applicants cannot complain of a decision made by a committee because a request [for an abortion] was never made. If an application was made to a committee and rejected, it may be that the applicant could attempt to enforce the principles of natural justice through the use of prerogative remedies on a case by case basis. At that time, it could be argued that the principles of natural justice give rise to substantive review on the basis that the idea of fairness is not confined to procedure. [Regarding s. 7 and its guarantees of fundamental justice] . . . There is authority for the proposition that the principles of fundamental justice mean some kind of minimum safeguards requiring the ability to give full answer and defence: *Re Mason and The Queen* (1983) 43 O.R. (2d) 321 (H.C.J.) and *R.* v. *Langevin*, an unreported decision of the Ontario Court of Appeal, released Arpil 13, 1984.

Although discussion of the likelihood of future administrative law challenges is at this time speculative, there may yet be common law remedies available to address some of the current inequity in the operation of Canada's abortion law.

IX. GAPS IN THE LAW

The Badgley Report and the *Morgentaler* (1984) preliminary motion before Parker J. confirmed that Canada has serious difficulties with the administration of its abortion law. It remains as it was in its "quasi-legal" years, an entirely *ad hoc* law designed to protect those doctors who choose to do abortions. Without a definition of "health" and with provincial barriers to the operation of the law in a consistent manner firmly in place, the courts and the federal government face a rising tide of public opinion about the current law. The courts have resisted resolving what is often viewed as a political question on behalf of legislators; those in the political forum are subject to many opposing views, and those with fixed opinions are becoming increasingly vocal. Into this explosive situation comes a whole new host of moral issues as scientific technology blurs the

156. *Re Medhurst and Medhurst* (1984) 45 O.R. (2d) 575 (Ont. S.C. per Krever J.).

157. *Morgentaler* (1984) at 39.

158. *Id.*

159. *Id.*

distinction, already obscure, between contraception and abortion; between potential human beings and human beings. With the advent of many new birth technologies, pressure increases to define the foetus in law. This pressure is from some, a desire to protect human life from scientific experimentation; from others, it is a back door method to their goal of removing the already limited option of abortion from women entirely, regardless of circumstances or necessity.

The International Planned Parenthood Federation[160] and the Commonwealth Secretariat in London, England[161] have published important research findings indicating that serious problems in an overcrowded world may life ahead if "life begins at conception" for legal purposes.[162] There is a substantial body of opinion which holds that the I.U.D., or Intra-Uterine Device, prevents the implantation of a fertilised egg in the womb of the woman.[163] If this is abortion, the second most failsafe method of contraception after the birth control pill would be declared to be an abortifacient. Similarly, the recently developed "morning-after pills, the hormone prostglandins which prevent implantation of the fertilized egg, and the practise of menstrual regulation or vacuum aspiration would all come under close security as abortifacients because they straddle the boundary between contraception and abortion."[164] If a court or legislative decision were to find that life begins, for legal purposes, at conception, and abortion was thereby prohibited, a corollary of such a decision would be the removal from the marketplace of many of the most effective contraceptive measures known to science. The two issues are not, at the present stage of scientific knowledge, separable, prompting Dr. Embrey of Oxford, Nuffield Department of Obstetrics and Gynaecology to comment:[165]

> With the clouding of the previously accepted boundary between contraception and abortion, it becomes more and more illogical to take an entrenched conservative or liberal stance on one, and not also on the other.

It is submitted that the Badgley Report's observation that at present the Canadian government spends more money on abortions than on providing reproductive information, and that lack of information contributes to many pregnancies, and therefore abortions, is of particular importance in the grey area discussed above. A restrictive decision on abortion, when many sexually active Canadians have little knowledge about reproduction could make compulsory the continuation of many life and health-threatening pregnancies; the removal of reliable contraceptive measures would return Canada to the pre-1969 era of high maternal death rates from illegal abortions. Throughout history those who have felt the need for abortions have obtained them without, or within, the law. The 1969 changes to the Criminal Code resulted in a

160. J. Paxman, *Law and Planned Parenthood* (1980) 1.

161. *Abortion Laws in the Commonwealth, supra* n. 42.

162. "Recent United Nations estimates put the number of induced abortions each year as high as 55 million — 4½ interrupted pregnancies for every 10 live births." *Maclean's Magazine*, 19 November 1984, Ann Finlayson, at 54.

163. *Supra* n. 161 at 6.

164. *Id.* at 6, and see 6 - 11.

165. *Id.* at 12.

dramatic drop in maternal deaths from illicit abortion. Justice Parker in *Morgentaler* (1984) at page 44 found on the evidence that at present "the evidence indicates that the mortality rate associated with the abortion operation is now less than the mortality rate associated with bringing a pregnancy to term."[166] The legislatures and the courts must tread carefully in this area lest out of an excess of concern for the rights of one party, the other is trapped into desperate measures. The message of the *Morgentaler* jury must not be ignored. Necessity forms a part of the abortion issue. Additionally, the social welfare costs of caring for women whose health has been affected by "compulsory pregnancy", and for the unwanted children of the society must be considered. Already the numbers of single parents living in poverty is spoken of as a national tragedy[167] and in the province of Alberta, provincial social services is under intense criticism for its inability to maintain stability in the lives of unwanted children in its care.[168] The questions which must be answered before laws are passed are done a disservice by simplistic thinking and sentimentalism. Religious convictions are capable of being swayed from day to day; an unwanted child, or a mentally distraught woman have lives which they must live one day at a time. Arrogance of personal conviction should not blind one to the many interests at stake in the abortion debate.

X. WHITHER THE FUTURE?

To return to Daniel Callahan's warning, whatever special interest group succeeds in forcing legislative or judicial change upon the 52% of the population responsible for child-bearing, it must take heed of the consequences of its position and accept both moral and financial responsibility for the social results which follow. Liberal interpretation of the abortion law, and of women's rights to abortion under the Charter of Rights, will increase the numbers of Canadian pregnancies which will be legally terminated; restrictive interpretation of the abortion law will raise the number of existing lives which will be affected by unplanned for, and often unwanted, children, (not to mention the risks of illegal abortions). Short of banning sexual intercourse, which has not historically had much success, legislatures and courts will have to balance the many rights asserted on this issue. It is submitted that only time, careful jurisprudential analysis and objective balancing of interests of affected parties will lead to a resolution of this moral dilemma and social agony.

166. *Morgentaler* (1984) at 44.

167. *Macleans Magazine*, October 15, 1984.

168. "The Failure to state intervention: Why Richard Cardinal hanged himself". *Alberta Report*, October 15, 1984.