Special Section: International Voices

Abortion in Canada

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Canada is one of the few countries in the world—China is another—that has decriminalized abortion. In Canada, there are no legislative or judicial restrictions whatsoever on abortion: When, where, and under what circumstances abortions can be performed are all unregulated. In sharp contrast, abortion is generally illegal in South American and predominantly Catholic countries, as well as in African and Muslim countries. And the countries that do allow legal abortions, including most in Europe along with America, Australia, and Russia, typically permit it only up to a certain time or make it subject to circumstances such as risk to the woman.[1] In what follows we will first explain how Canada came to decriminalize abortion and then go on to assess that position from an ethical point of view.

Canadian Law

Canada is a federation where the powers to make laws in various areas were divided under the British North America Act of 1867 between the provincial governments and the federal government. Under this division, the federal government has exclusive jurisdiction over criminal law in Canada, and provincial governments generally have the right to pass laws in regard to healthcare.

Until 1969, abortion was a criminal act in Canada. In that year an exception was provided by amending Section 251 of the Criminal Code to permit abortions if they were performed in an accredited or approved hospital and approved by a three-physician therapeutic abortion committee from that hospital as necessary to protect the woman's life or health. If an abortion was carried out without such approval, the woman was liable for imprisonment for 2 years, and the person carrying it out for imprisonment for life.

A challenge to Section 251 was heard by the Supreme Court of Canada in 1988 in the case of *Regina v. Morgentaler*.[2] The majority of the judges found that section to be in violation of Section 7 of the Canadian Charter of Rights on the ground that it infringed a woman's right to "life, liberty and the security of a person." In particular, it interfered with the "security of a person" because, as the Chief Justice put it: "At the most basic physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations." To this, Madame Justice Wilson added that it interfered with a woman's right to liberty, given that it prevented her from making her own choices, as well as her right to freedom of conscience, given that the choice in question is a moral one.

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The Court held that such an infringement would be acceptable if "the principles of fundamental justice" were followed. But here they were not, for those principles require that criminal defenses to crimes not be illusory or almost illusory, and in the case of abortion they were. Abortions could only be done in an "accredited or approved hospital." But many hospitals were neither, and many of those that were did not perform abortions. The Court cited the Badgely Report,[3] which found that out of 1,348 civilian hospitals in Canada in 1976, only 559 met the requirements of Section 251, and only 271 (20% of all the hospitals) had a therapeutic abortion committee.

The Court did, however, say that the state can take a legitimate interest in the fetus, and that protecting it would be "a perfectly valid legislative objective." But, it insisted, that is a matter for an elected Parliament, not the appointed courts, to decide. This invitation to rewrite Section 251 was accepted by the House of Commons in 1989, and after acrimonious debate, legislation was proposed that again made abortion permissible only for therapeutic reasons, but which widened the grounds to include the psychological health of the woman and only required the approval of one doctor. This passed the House of Commons by a vote of 140 to 131. Before it could become law, however, it had to pass the Senate, and the Senate—ironically, an appointed body—refused to pass it. The vote was an unprecedented tie—43 to 43—and under Senate rules, that meant defeat. The government of the day then announced that it would not introduce any further abortion legislation, a decision followed by subsequent governments.

The Supreme Court in *Morgentaler* did not rule on whether the fetus had rights. In the next decade it considered that question in regard to the Quebec Civil Code, the Quebec Charter of Human Rights and Freedoms (the Quebec Charter), the common law as it applied in the other provinces, and the criminal law of Canada.

On July 7, 1989, Chantel Daigle's ex-boyfriend, Guy Tremblay, obtained an injunction from the Quebec Supreme Court prohibiting Ms. Daigle from having an abortion on the basis that the fetus was entitled to protection under Quebec law. The decision was upheld by the Quebec Court of Appeal on July 20, and a further appeal was heard by all the members of the Supreme Court of Canada on August 8.[4] During that hearing, the Court was told that Ms. Daigle had already obtained an abortion, but given the importance of the issue, the Court nevertheless continued the hearing and at the end immediately invalidated the injunction. In addition to an unanimous finding that neither the Quebec Civil Code nor the Quebec Charter provided for fetal legal rights, the Court found that in the common law provinces there was no fetal right until birth. In referring to various Anglo-Canadian court decisions, the Court said: "These courts have consistently reached the conclusion that to enjoy rights, a fetus must be born alive." The Supreme Court of Canada further clarified what is meant by "born alive" in a subsequent case,[5] holding that to be a human being deserving of legal protection, the child had to be in a "living state" when it had "completely proceeded" out of "the body of its mother."

In all, the Supreme Court of Canada has consistently refused to ascribe rights to the fetus or to sanction interference with women in matters relating to the fetus. Parts of these judgments in the landmark abortion cases of *Morgentaler* and *Daigle* read in substance and tone like feminist tracts, as do passages of that Court's judgments on related matters. For example, the Supreme Court of

Canada refused to permit forced obstetrical intervention to prevent a woman from endangering her fetus.[6] After considering the difficulties in legalizing the right to interfere with a woman's autonomy based on lifestyle choices, the Court went on to say: "The difficulties multiply when the lifestyle in question is that of a pregnant woman whose liberty is intractably and inescapably bound to her unborn child." Likewise, the Supreme Court of Canada held that children have no right to sue their mothers for injuries received during pregnancy, commenting: "The imposition by courts of tort liability on mothers for prenatal negligence would restrict a pregnant woman's activities, reduce her autonomy to make decisions concerning her health and have a negative impact upon her employment opportunities. It would have a profound effect upon every woman who is pregnant or merely contemplating pregnancy and upon Canadian society in general."[7]

Ethical Reflections

Canada's legal position on abortion thus originated not from any societal decision, but from the courts striking down attempts to interfere with the liberty of women. The longer Parliament does not step in and fill the legal vacuum, however, the more that position becomes societally chosen. The question is whether it is well chosen. We will now sketch why we think it is.

It is hard to deny that a woman has some kind of right to control her body. But it is not clear what kind of right that is. If it is absolute, the question of the morality of abortion is settled, and Canada has exactly the proper legal position. On the other hand, if a woman's right to control her body is only a prima facie right, the morality and consequent legality of abortion will be settled by whether there is any consideration sufficient to cancel or restrict that right.

The most natural and common place to look for such a consideration is in the rights-status of the fetus. If the fetus has a full right to life, abortion will be permissible only in those circumstances in which an innocent full-fledged human being can be killed, that is, very seldom, and a woman's right to control her body would not generally if ever prevail in such a conflict. If it has a partial right, abortions will be permissible or not, depending on the strength of that right and the reason a woman has for wanting an abortion. Can either of these views be defended?

There are only four possible positions one can hold on the rights-status of the fetus: (1) The fetus lacks a right to life up to some point in its development—what point is a matter of dispute among those who hold this view—but gains a full right at that point (the middle theory); (2) a right to life begins to phase in at some point of fetal development, starting as a weak right and growing in strength as the fetus develops (the gradualist theory); (3) the fetus has a full right to life from the point of conception onward (the conservative theory); (4) the fetus does not have any right to life at any time in its development (the liberal theory).[8]

All these theories are beset by well-known difficulties. The middle theory is faced with the problem that, because there is no sharp discontinuity anywhere in fetal development, any point at which the line is drawn will be arbitrary. The gradualist theory has the same problem of when to start ascribing a right, and also the problem of giving operational significance to the development of that

right, that is, identifying at what stages what reasons are necessary and sufficient to justify abortion. Conservatives are charged with being committed to opposing contraception and celibacy, for the only thing that could make it wrong to kill the zygote is that we thereby prevent a full-fledged human being from coming into existence, and those practices do the same. And liberals are accused of having to endorse infanticide, for there is nothing that a late-term fetus lacks that a newborn infant has.[9]

These are not, of course, decisive objections to the theories against which they are directed. Indeed, they just start the complicated series of objections and replies that characterizes the debate on the status of the fetus. But that series does not end with any clear victor, and this puts those who want to decriminalize abortion in a strong position. For the absence of a satisfactory defense of fetal rights undercuts the most powerful reason one could have to cancel or restrict a woman's right to control her body, and thus those who want a restrictive abortion policy must look to second-best considerations. Two stand out. First, one can try to exploit the absence of a clear proof of the liberal theory, and argue that either the fetus has a full right to life or it does not; we just cannot say which at this time. But, given the importance of not killing innocent beings with a full right to life, we should give it the benefit of the doubt and legislate as if it had such a right, that is, as if the conservative position were true.[10] Second, one can contend that if late-term abortions are allowed, there is a danger that this will lead to an unhealthy lowering of psychological barriers against killing and respect for life generally. Thus, we should legislate as if one of the middle theories were true.[11]

But it is not obvious that the mere possibility that controversial meta-ethical and moral views about the status of the fetus are true is sufficient to justify visiting certain and substantial hardship on women. And there is no firm evidence for the alleged callous-making effects of abortions. We are thus still left without any clear reason to restrict a woman's right to control her body in the matter of abortion. Absent this, one can either draw the conclusion that there should be no legal restrictions on abortion or appeal to nonrational considerations such as a free vote in Parliament or a public referendum to determine what restrictions should be put on it. Appeal to popular opinion, however, is very unattractive. It is repugnant, especially in a country that prides itself on freedom of religion and conscience, to let the religious or personal moral views of some, however numerous or vociferous, control the lives of others. Thus Canada's decriminalization of abortion seems exactly right.

Decriminalization, however, does not mean access, and although there is relatively good access to abortion in Canada, some nonlegal obstacles exist. Abortions in Canada are provided free of charge—like any other medically necessary service—in hospitals. But not all hospitals perform abortions, and there are often long waiting lists. Some provinces fund abortions in independent clinics. But not all do, and there are not enough clinics—especially in rural areas—to meet the demand.[12] Until these barriers to access are removed, there will remain a correctable inequality between men and women—indeed, between women—in matters of reproduction, and an iteration of the argument for decriminalizing abortion suggests they should be removed. Pro-choice groups urge they should be; pro-life groups say the opposite; and this battle is the current frontier of the abortion debate in Canada.

Notes

1. Department of Economic and Social Affairs Population Division. *Abortion Policies: A Global Review*. New York: United Nations; 2001.
2. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
3. Canada. Department of Justice. *Report of the Committee on the Operation of the Abortion Law*. Ottawa: Minister of Supply and Services Canada; 1977.
4. *Tremblay v. Daigle*, [1989] 2 S.C.R 530.
5. *R.* v. *Sullivan, Lemay*, [1991] 1 S.C.R 489.
6. *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.
7. *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753.
8. Classic papers on these positions are conveniently collected in Feinberg J, ed. *The Problem of Abortion*. Belmont, Calif.: Wadsworth; 1984.
9. A helpful review of criticisms is Glover J. *Causing Death and Saving Lives*. Harmondsworth Middlesex, England: Penguin Books, 1979;Ch. 9:119–28.
10. This view is advocated by Woods J. *Engineered Death: Abortion, Suicide, Euthanasia and Senecide*. Ottawa: University of Ottawa Press, 1978;Ch. 4, Sec. 5:57–60.
11. For a discussion, see Glover J. Matters of life and death. *New York Review of Books* 1985;32(9):19–23.
12. For other obstacles and details on these, see Arthur J. Abortion in Canada: History, law, and access. Available at: http://www.prochoiceactionnetwork-canada.org/Canada.html.