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Gwen C. Mathewson†

In January, 1988, the Supreme Court of Canada declared unconstitutional section 251 of the Criminal Code,¹ which limited women’s access to abortions. Since the ruling, R. v Morgentaler,² no new federal criminal law has replaced section 251.³ If in the future Parliament legislates with respect to abortion, Morgentaler will be its guide.

Section 251 required that any woman seeking an abortion would first have to obtain the written approval of an accredited hospital’s “therapeutic abortion committee.”⁴ This committee,

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¹ Criminal Code, RSC 1970, ch C-34, § 251.
⁴ The relevant parts of the statute provided:
251. (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 ....
(4) Subsections (1) and (2) do not apply to
(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
consisting of at least three doctors, would have to certify that continuation of the pregnancy would, or would be likely to, endanger the woman's life or health. Failure to obtain the approval of this committee was an indictable offense, punishable by up to two years imprisonment for the woman obtaining the abortion and life imprisonment for the doctor performing it.

The five justices in the majority (two dissented) held that section 251 violated section 7 of the Canadian Charter of Rights and Freedoms by depriving women of their right to "security of the person" by means not "in accordance with the principles of fundamental justice." One justice in the majority determined additionally that the statute infringed the "liberty" guarantee of section 7, which she interpreted to assure to all individuals "a degree of personal autonomy over important decisions intimately affecting their private lives." The Court held that the Charter's first section, which allows Charter rights infringements which can be "demonstrably justified in a free and democratic society," did not resuscitate the statute.

The majority of the Court agreed to a resolution of the case that was quite narrow: The criminal statute at issue deprived women of the right to security of the person because it established procedures (designed to verify a woman's need for an abortion) which delayed women's medically necessary abortions and further

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(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

d) has caused a copy of such certificate to be given to the qualified medical practitioner . . . .

Canada has a nine-member Supreme Court. Only seven, however, sat on the panel which heard Morgentaler.

Constitution Act, 1982 (Schedule B to Canada Act 1982 (U.K.)), § 7, states:

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.

Section 7 thus guarantees "life, liberty and security of the person" with a qualifier on this guarantee that deprivations of these shall be made only in accordance with the principles of "fundamental justice." See Reference re s. 94(2) of the Motor Vehicles Act (B.C.), 2 SCR 486 (1985). Compare this to the protection of the Due Process Clause of the United States Constitution.

Morgentaler, 62 CR 3d at 107 (Wilson concurring).

Section 1 provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

See Morgentaler, 62 CR 3d at 15. For the application of section 1, see R. v Oakes, 1 SCR 103 (1986) (interpreting "reasonable limit" and justification in "free and democratic society").
endangered women’s health. Only three of the five justices in the majority suggested that any statute would deprive a woman of the security of her person if it forced her to carry a fetus to term whenever the pregnancy did not threaten her life or health. Only one of the justices determined that section 251 abridged women’s liberty, also guaranteed by section 7; and none of the justices considered the challenge to section 251 grounded in Charter sections 15 and 28, which guarantee equal protection, benefit, and rights to men and women under the law.9 It is thus unclear whether and how future abortion legislation can avoid the constitutional infirmities of section 251, and whether other Charter provisions may independently limit the scope of future abortion legislation.

The Morgentaler majority issued three opinions, each with a different set of reasons in support of the shared conclusion. Because future legislation subject to constitutional challenge will need the support of a majority of the Court, Parliament will be wise to address the concerns of each of the three opinions from the majority.10 Foreseeing the evolution of Canadian abortion legislation is thus complicated both by the absence of a single majority opinion (which might guide Parliament in developing constitutional legislation) and because the Morgentaler Court did not reach several of the issues presented to it.

To provide a framework in which the American reader can analyze Morgentaler, the first section of this comment briefly discusses the Charter of Rights and Freedoms, on which Morgentaler is based. The second section examines the specifics of the Morgentaler opinions. The third section analyzes possible judicial approaches to future Canadian abortion legislation.

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* Section 15, clause 1 provides:
Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.


Section 28 provides:
Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.


10 The composition of the Supreme Court of Canada has changed considerably since the Morgentaler decision. Justice Beetz, who authored one of the majority opinions, Justice Estey, who concurred in the judgment, and Justices McIntyre and LeDain, who dissented, have resigned from the Court. They have been replaced by Justices Sopinka, Gonthier, Cory and McLachlin. See Jim Brown, Judge Choices Applauded, Victoria (B.C.) Times-Colonist A-5 (Jan 28, 1989).
I. THE CHARTER OF RIGHTS AND FREEDOMS

Before 1982, Canadian individual rights were not constitutionally protected. In that year the British Parliament passed the Canada Act of 1982, relinquishing British control over the constitutional governance of Canada. The Act contained the Constitution Act, 1982, whose most significant feature is the Charter of Rights and Freedoms. The Charter, like the United States Bill of Rights, gives individual rights constitutional status. Still in its infancy, constitutionalism in Canada

| Footnote 11 | The individual rights of Canadians were protected only by statutes: the Canadian Bill of Rights, passed by Parliament in 1960; and provincial human rights codes, which protect individual liberties and equality rights. |
|---------------------------------------------------------------|
| The Canadian Bill of Rights (Stats Canada 1960, ch 44) had little substantive impact on the scope of individual rights in Canada. Because the Bill of Rights was passed as an ordinary statute, the rights it enumerated were not constitutionally protected. While the Supreme Court held that the Bill of Rights made inoperative inconsistent federal statutes, in only one case did the Court invalidate a statute under the Bill. The Queen v Drybones, 1 SCR 282 (1970) (invalidating statute making it an offense for an Indian to be intoxicated outside a reservation). Robert A. Sedler, Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms, 59 Notre Dame L Rev 1191, 1193 n 7 (1984). Generally, the Court construed the protections of the Bill of Rights very narrowly. See, for example, Attorney General of Canada v Lavell SCR 1394 (1974) (upholding a section of the Indian Act which disenfranchised Indian women, but not Indian men, who married non-Indians); Bliss v Attorney General of Canada, 1 SCR 183 (1979) (upholding a law limiting unemployment insurance for pregnant women). |
| The Canada Act was passed as an amendment to the Constitution Act, 1867, which could only be amended by the United Kingdom Parliament upon “address” by the Parliament of Canada. Sedler, Constitutional Protection of Individual Rights in Canada at 1193-94 n 8. |
| As in the United States since the passage of the Fourteenth Amendment, the Charter extends to actions of the provincial and federal governments: Section 32 applies the Charter “to the Parliament and government of Canada in respect of all matters within the authority of Parliament” and “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.” Canadian Charter of Rights and Freedoms, § 32. The Constitution Act, 1982, and the Constitution Act, 1867, together form the “supreme law” of Canada. |
| Canada initially rejected unrestricted legislative supremacy when it adopted a federal |
differs from constitutionalism in the United States. According to
structure fundamentally unlike the traditional unitary structure of the United Kingdom. Gibson, *Law of the Charter* at 6. With the passage of the British North America Act of 1867—now referred to as the Constitution Act, 1867—Canada became a federal state, with powers allocated between the federal government and the provinces. The constitutional structure suggested the need for judicial review of legislative actions to supervise the distribution of powers between the federal and provincial authorities. Id. But it did not contain limitations on the exercise of power within each level of government. It provided the courts with little authority to override otherwise valid governmental actions which interfered with individual rights. Sedler, *Constitutional Protection of Individual Rights* at 1193 (cited in note 11). Only a handful of rights were regarded as particularly important, and were considered within the Court's powers to protect. These included the right to elect the federal House of Commons every five years, the right to an annual session of Parliament, life tenure for superior court judges, the rights of supporters of denominational schools, the right to use the French language in the Canadian Parliament and in Quebec and Manitoba. Gibson, *Law of the Charter* at 6-7.

In 1949 the Canadian Supreme Court replaced the British Privy Council as Canada's court of last resort, which prompted several landmark rulings on civil liberties in the 1950's. Id at 8. See, for example, *Switzman v Ebling*, SCR 285, 307 (1957). The rationales supporting judicial protection of individual rights were gradually abandoned during the 1960s and 70s. Gibson, *Law of the Charter* at 11.

Since the passage of the Charter, courts have reviewed legislation affecting the constitutional rights of individuals. The Canadian Constitution, like the United States Constitution, has a "supremacy clause" which implies that laws may be tested for compliance with the Constitution. See Constitution Act, 1982, § 52. It has been accepted as implicit in section 52 that the judiciary is the arbiter of constitutionality. See *Law Society of Upper Canada v Skapinker*, 1 SCR 357, 365-67 (1984); *Re B.C. Motor Vehicles Act*, 2 SCR 486 (1985). It seems that the Court's power of review has not been disputed in Canada largely because the American tradition of review is a strong one. See *Skapinker*, 1 SCR at 367-68.

Thus the judiciary will determine the course of constitutionalism in Canada. Some commentators argue, however, that the Canadian tradition of judicial restraint will persist. Although the Charter gives the Court significant new authority, it is argued, the Court will move slowly in developing constitutional doctrine. The Charter's relatively specific provisions may give the Court less interpretive freedom in Canada than its American counterpart has in the United States. See Sedler, *Constitutional Protection of Individual Rights* at 1228-29.

The balance of authority between the legislative and judicial branches of Canadian government, structurally different from that in the U.S. model, will affect the Court's willingness to be an "active" interpreter of the Charter in a way that is still uncertain. The Charter contains an "override" provision by which Parliament or a provincial legislature may, by express intent, pass laws which operate in spite of any infringement of Charter freedoms: Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.


The history of section 33 suggests that it should be interpreted as limiting judicial authority, though there is still disagreement on this point. One commentator argues, for example, that the override provision is a safety net which should allay the Court's fears of judicial overreaching. Gibson, *Law of the Charter* at 48. It is unlikely, however, that the Court will read section 33 as license to exercise overtly political judgment. *Morgentaler* itself demonstrates that the Court, following the tradition of restraint, is unwilling to challenge Parliament to employ section 33 to circumvent a Charter interpretation.
one commentator:

In comparing the Charter with the U.S. Constitution, therefore, one is, to some extent, comparing apples with oranges—the comparison being between a bare Canadian text, at the beginning of its life, and an elaborate and complex system that has been intricately worked out over the years by U.S. courts. Moreover, the text of the Canadian Charter, like that of the U.S. Constitution, is quite general in nature; it, too, will undoubtedly undergo a process of repeated judicial interpretation before the answers to many fundamental questions begin to emerge. When we “compare” today’s Charter with U.S. constitutional rights, therefore, we will often more accurately not be “comparing” at all, but rather speculating on what the Charter may come to mean, while using the resolution of similar issues under the U.S. Constitution as a point of reference and, where it seems appropriate, as a guide.  

In interpreting Charter provisions, Canadian courts will likely refer to the American example, at least with respect to those constitutional rights which the two systems share. To the American observer, however, it is differences rather than similarities that should take center stage when the constitutional status of abortion is at issue.

The principal constitutional provision on which Morgentaler is based, section 7 of the Charter, resembles the guarantee in the U.S. Fourteenth Amendment that the government shall not “deprive any person of life, liberty, or property, without due process of law.” It is, however, distinctively unlike the Due Process Clause

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17 For example, shortly after the Charter was passed, Chief Justice Dickson urged provincial court judges to study the American experience in order to learn not only from the “positive points but also from the errors which have been made.” Chief Justice Dickson, Judging in the Eighties, 33 CR 3d 371, 372 (1983). He subsequently incorporated American Fourth Amendment jurisprudence, including the warrant requirement, into Canadian law through section 8 of the Charter (which guarantees freedom from unreasonable search or seizure)—even though section 8 includes no explicit warrant requirement. Hunter v Southam, Inc., 11 DLR (4th) 641 (1984). Not all judges, however, share Chief Justice Dickson’s enthusiasm for American Law. One judge has suggested that “[t]he decisions of [American] courts may be persuasive references in some case[s] ... but it is important that we seek to develop our own model in response to present cases ... rather than adopting the law another country forges in response to past events.” R. v Carter, 39 OR 2d 439, 441 (1982) (CA) (Brooke, JA).
18 US Const, Amend XIV, § 1.
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.\(^9\)

The protection of "security of the person" is obviously not equivalent to the protection of "property."\(^{20}\) And "fundamental justice," which may appear to approximate "due process," must be interpreted in its own light independent of any "due process" shadow.\(^{21}\)

Section 15 of the Charter is similar to the second portion of the Fourteenth Amendment, the guarantee of "equal protection of the laws." Section 15 is more detailed and presumably more pro-

\(^{19}\) Constitution Act, 1982 (Schedule B to Canada Act 1982 (U.K.)), § 7.


\(^{21}\) The history of the Charter in its early stages reveals a conscious attempt by the Charter's drafters to break free from American influence. The words "due process," used in the Canadian Bill of Rights, were replaced by "fundamental justice." The stated reason for the change was a desire to avoid U.S. interpretations of due process, particularly substantive due process which, at its worst, "gave judges leeway to substitute their socio-economic views for those of the legislatures." Gibson, _The Law of the Charter_ at 32 n 175 (cited in note 15), citing Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, 28th Parliament, 4th Session 19 (1972).

This is not to suggest, however, that "fundamental justice" is solely procedural in content, although this point has been debated in the early commentary on section 7 interpretation. The distinction between "substantive" and "procedural" fundamental justice, as one author has explained, "imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution." Neil Finkelstein, 2 _Laskin's Canadian Constitutional Law_, 1185-86 (Carswell, 5th ed 1986). The argument for a narrow construction of section 7 grows from a long-standing concern that otherwise the Court will "question the wisdom of enactments," _Amax Potash Ltd. v Saskatchewan_, 2 SCR 576, 590 (1977), and adjudicate upon the merits of public policy. But, as Finkelstein argues, the passage of the Charter legislatively extended the scope of constitutional adjudication, while establishing the necessary checks and balances which should allow courts to consider matters without concern that they are overstepping their authority:

[The U.S.] Constitution, it must be remembered, has no section 52 [declaring the constitution "supreme" in Canada] nor has it the internal checks and balances of sections 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the [substantive/procedural] dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

Finkelstein, _Canadian Constitutional Law_ at 1186.
tective of individual rights than the U.S. version, however:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Charter also has a provision guaranteeing sexual equality, section 28, for which the U.S. can boast no equivalent:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The Morgentaler appellants claimed infringement of their rights guaranteed in sections 15 and 28, as well as section 7. The Court, however, addressed only the claims arising under section 7. The other claims remain potentially significant to the future course of the abortion debate.

Finally, the Charter section on which future abortion regulation will likely depend is section 1, which can salvage a legislative provision that infringes any other section of the Charter if the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom." Legislation advancing a legitimate state objective may thus deny a guaranteed Charter freedom if the deleterious effects of the denial are not so severe that they render the legislation unjustifiable.

II. THE MORGENTALER DECISION

The Morgentaler appellants had set up a clinic to provide abortions to women who had not obtained the certificate of approval from a therapeutic abortion committee immunizing them from prosecution under section 251. The doctors made public

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22 Canadian Charter of Rights and Freedoms, 1982, § 15. The Supreme Court of Canada appears to be interpreting section 15 to require more than simply that similarly situated people be treated similarly. In Andrews v Law Society of British Columbia, 1 SCR 141 (1989), the Supreme Court of Canada adopted a test that required both differential treatment and discriminatory impact before a violation of section 15 would be found. See also R. v Edward's Books and Arts Ltd., 2 SCR 713 (1986). For a detailed discussion of section 15, see pp 275-79.


26 Criminal Code, RSC 1970, ch C-34, § 251(4).
statements questioning the wisdom of the Canadian abortion laws and asserting that a woman has a right to choose whether or not an abortion is appropriate in her individual circumstances.\textsuperscript{27} The three physicians were initially acquitted by a jury, but their acquittals were set aside on appeal. When the case reached the Supreme Court, the physicians challenged section 251 under several different Charter guarantees.

The Court did not find any sweeping "right to choose," nor did it address most of the constitutional claims the appellants raised.\textsuperscript{28} Instead, it focused on the claim that section 251 infringed the right not to be deprived of "life, liberty and security of the person... except in accordance with the principles of fundamental justice."\textsuperscript{29} Each member of the majority determined that the statute did in fact violate women's section 7 rights, though for different reasons.

Chief Justice Dickson (with Justice Lamer concurring) struck down the statute because it threatened women's physical and psychological security by denying them the authority to elect a potentially beneficial, even necessary, medical procedure; and because it threatened women with criminal prosecution under a charge for which the statutorily created defense was so difficult to establish that it was "practically illusory,"\textsuperscript{30} even to those women who would qualify for its protection.

According to the Chief Justice, section 251 placed unnecessary bureaucratic and legal barriers between women and their medically necessary abortions, thereby inflicting physical risk and emotional stress in violation of section 7:

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

\textsuperscript{27} Morgentaler, 62 CR 3d at 2. The questions presented to the Supreme Court were whether section 251 infringed or denied the rights and freedoms guaranteed by Charter sections 2(a) (freedom of conscience and religion), 7 (life, liberty and security of the person), 12 (protection from cruel and unusual punishment), 15 (equality and equal protection and benefit of law), 27 (preservation of multicultural heritage) and 28 (equality of rights to both sexes); and if there was any such infringement, whether it was justified by section 1, which allows limitations on Charter freedoms "as can be demonstrably justified in a free and democratic society." While the appeal invoked each of the above Charter sections, the Court considered only the section 7 claim.

\textsuperscript{28} Because he was able to resolve the case under section 7, Chief Justice Dickson expressly refrained from commenting on the merits of the appellants' other Charter arguments. Morgentaler, 62 CR 3d at 12.

\textsuperscript{29} Canadian Charter of Rights and Freedoms, s. 7.

\textsuperscript{30} Morgentaler, 62 CR 3d at 31.
be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of not knowing whether an abortion will be granted inflicts emotional stress...31

The Chief Justice considered the procedural requirements for establishing a defense to a charge under section 251 cumbersome; the evidence showed that those who legally obtained abortions did so only after significant delay.32 Legal abortions under the statute consequently were performed relatively late in pregnancy with increased probability of complications and risk, therefore, to security of the person.33

The Chief Justice interpreted broadly the scope of the “security of the person” guarantee. Grounding his analysis in the common law principle that “the human body ought to be protected from interference by others,” and underscoring the Canadian “respect for individual integrity,” he had no trouble concluding that “[f]orcing a woman, by threat of criminal sanction, to carry a foetus to term...is a profound interference with a woman's body and thus a violation of security of the person.”34 Dickson refrained from holding, however, that such “profound interference” will always violate section 7. The key to his invalidation of section 251 was the “fundamental justice” clause's requirement of procedural fairness.35

31 Morgentaler, 62 CR 3d at 20.
32 The Court noted evidence of both the delay imposed by the procedural requirements of section 251(4) and the consequent increased health risk of the abortion. See Morgentaler, 62 CR 3d at 21-22 (citing the reports of two publicly established commissions: Report of the Committee on the Operation of the Abortion Law (the “Badgley Report”) (1977) and Report on Therapeutic Abortion Services in Ontario (the “Powell Report”) (1987)).
33 Dickson discussed at length the details of the evidence of physical risk and psychological stress resulting from the delays caused by section 251. Because different medical techniques are employed at different stages of pregnancy, “the implications of any delay...are potentially devastating.” Morgentaler, 62 CR 3d at 22. Dickson found that the procedural inadequacy of the statute violated the right to security of the person, regardless of whether the delay was the purposeful result of the mandated procedure itself or the effect of an inefficient administrative mechanism. He cited Big M Drug Mart Ltd., 1 SCR at 331, for the proposition that “...both purpose and effect are relevant in determining constitutional-ity; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.” Morgentaler, 62 CR 3d at 25.
34 Id at 21.
35 Dickson noted that in the early academic commentary on section 7 one of the questions raised was whether “principles of fundamental justice” enable the courts to review the substance of legislation—that is, whether the phrase calls for inquiry into substance as well as procedure. Morgentaler, 62 CR 3d at 17 n 32. This of course is the same issue faced in
The statute's infringement of section 7 rights violated the principles of fundamental justice because its administrative structures (for example, the "therapeutic abortion committee") and procedures (for the determination that continuation of the pregnancy would "endanger the life or health" of the woman) in many circumstances operated to deny women, who would otherwise prima facie qualify, the defense to criminal liability specified in section 251(4). For example, a woman who wished to apply for a therapeutic abortion certificate may have lived in an area of Canada where there was no access to legal abortion because no nearby hospital had four doctors, the treatment capabilities of nearby hospitals did not satisfy the requirements for "accredited" or "approved" hospitals, or the local hospital's abortion committee defined "health" in such a way that hers was not endangered. Drawing on a "basic tenet of the Canadian legal system" Dickson found it unacceptable that a legal defense might never be available.
to those for whom it was designed: "[W]hen Parliament creates a
defense to a criminal charge, the defense should not be illusory or
so difficult to attain as to be practically illusory."\(^3\)

Finally, Chief Justice Dickson ruled that the violation of sec-
tion 7 rights was not a "reasonable limit" under section 1. He ad-
mitted that the objective of balancing the interests of the pregnant
woman against the state's interest in protecting the fetus may be
of sufficient importance to warrant infringement of a right pro-
tected by the Charter. However, section 251 sought this objective
through arbitrary and unfair procedures, and therefore could not
be "demonstrably justified."\(^4\)

Justice Beetz's reading of section 7 (with Justice Estey concur-
ing) was narrower than that of Chief Justice Dickson. Like the
Chief Justice, he emphasized that the procedural requirements of
section 251 significantly delayed the access of pregnant women to
medical treatment, resulting in an additional danger to health and
thereby depriving them of security of the person. And, like the
Chief Justice, he concluded that the deprivation did not accord
with the principles of fundamental justice because the procedural
requirements were "manifestly unfair in that they are unnecessary
in respect of Parliament's objectives . . . and that they result in
additional risks to the health of pregnant women."\(^5\)

In contrast to the Chief Justice, Justice Beetz applied the "se-
curity of the person" guarantee to actual physical risk only; he did
not place psychological hardship within section 7's reach. "Security
of the person," according to Justice Beetz, simply establishes a
right of access to medical treatment of a condition dangerous to
one's life or health.\(^6\) That right is violated if the threat of criminal

\(^3\) Id. The analysis of the statute's non-compliance with "fundamental justice" was sim-
ilar to that which established the deprivation of "security of the person": Many women
whom Parliament would not subject to criminal liability would nevertheless be forced by the
practical unavailability of the defense to risk liability or to suffer the physical risks of preg-
nancy and childbirth.

\(^4\) Id at 35.

\(^5\) Id at 40 (emphasis in original).

\(^6\) Beetz's inference is based in part on section 251(4) itself. He explains:
That abortions are recognized as lawful by Parliament based on a specific stan-
der under its ordinary laws is important, I think, to a proper understanding of
the existence of a right of access to abortion founded on rights guaranteed by s. 7
of the Charter. The constitutional right does not have its source in the Criminal
Code, but, in my view, the content of the standard in s. 251(4) that Parliament
recognized in the Criminal Law Amendment Act, 1969, was for all intents and
purposes entrenched at least as a minimum in 1982, when a distinct right in s. 7
became part of Canadian constitutional law.

Id at 45. Justice Beetz's use of legislation to find the content of a Charter right is reminis-
sanction precludes a woman from obtaining timely medical treatment, or forces her to choose between committing a crime, and receiving inadequate treatment or no treatment at all.\textsuperscript{43}

Justice Beetz agreed with the Chief Justice that the deprivation of timely medical treatment could not be justified under section 1, since "rules unnecessary in respect of the primary and ancillary objectives [protection of the fetus and the woman, respectively] which they are designed to serve . . . cannot be rationally connected to these objectives under section 1 of the Charter."\textsuperscript{44}

Of the five justices in the majority, Justice Wilson pursued the most ambitious analysis. In contrast to the other justices, she began by tackling what she deemed the primary issue: Can Parliament constitutionally compel a woman to carry a fetus to term against her will? While the other justices rested their conclusions on the denial of fundamental justice by the procedural apparatus of section 251, Justice Wilson reasoned that grounding the analysis in consideration of procedure was useless, "purely academic,"\textsuperscript{45} if restrictions on access to abortion cannot constitutionally be imposed at all. Her examination of women's rights under the Charter was consequently more thorough; she was less reluctant than the other justices in the majority to examine issues beyond those minimally necessary to strike down section 251.\textsuperscript{46}

cent of the "frozen concepts" approach used to interpret the Canadian Bill of Rights. That approach would construe Charter provisions in light of legislation in force when the Charter was adopted; it necessarily lends itself to narrow construction. Berend Hovius, The Morgentaler Decision: Parliament's Options, 3 Canadian Family L Q 137, 147 (1988).

\textsuperscript{43} Justice Beetz wrote:

Where the continued pregnancy does constitute a danger to life or health, the pregnant woman faces a choice: (1) she can endeavor to follow the s. 251(4) procedure, which, as we shall see, creates an additional medical risk, given its inherent delays and the possibility that the danger will not be recognized by the state-imposed therapeutic abortion committee; or (2) she can secure medical treatment without respecting s. 251(4) and subject herself to criminal sanction under s. 251(2).

\textit{Morgentaler, 62 CR 3d at 47.}

\textsuperscript{44} Id at 40. The in-hospital requirement was not justified in all cases, id at 67; the requirement that the therapeutic abortion committee come from an accredited hospital served no practical purpose related to the objectives of the statute, id at 68; and the exclusion from abortion committees of any physician who performs abortions was "exorbitant," id at 69.

\textsuperscript{45} \textit{Morgentaler, 62 CR 3d at 100.}

\textsuperscript{46} This is not to suggest that Justice Wilson analyzed more than was at issue in the case. On the contrary: Wilson agreed with the Chief Justice that the task of the Court was not "to delineate the full content of the right to life, liberty and security of the person." \textit{Morgentaler, 62 CR 3d at 100. However, she was reluctant to restrict her analysis to the consideration of how the procedural requirements of section 251 threatened women's physi-
Justice Wilson agreed with Chief Justice Dickson that the threat to physical and psychological security posed by section 251 violated a woman’s security of her person. Yet she alone found in the guarantee of “liberty” a “right to make fundamental personal decisions without interference from the state.” For Justice Wilson, the choice of whether to continue or discontinue a pregnancy is a highly personal one, appropriately retained by the woman:

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

Wilson emphasized that the circumstances surrounding an unwanted pregnancy may be complex and varied; the decision whether the pregnancy should be carried to term is necessarily highly subjective, and should be made by the pregnant woman, for whom the economic, social, medical, psychological and ethical concerns are most profound.

Unlike the other justices, Wilson reasoned that because unwanted pregnancy is an experience of women, removing from women the authority to exercise moral choice with respect to pregnancy is peculiar and difficult, if not impossible, to justify:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma, not just because it is
outside the realm of his personal experience (although this is of course the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma . . . .

Justice Wilson held that to remove from women the authority to respond to the dilemma of unwanted pregnancy violated both liberty and security of the person without affording the fundamental justice guaranteed by section 7. To Justice Wilson, the flaw in section 251 was "much deeper" than described by the other justices in the majority: By stripping women of the power to exercise moral choice, the state denied women the opportunity for self-determination, an opportunity which is fundamental to democracy and to constitutional governance. Forcing a woman to carry a fetus to term against her will, contrary to her evaluation of her economic and social circumstances into which she would give birth, is to treat a woman merely as a means to an end, thereby denying her autonomy in decision making and directly interfering with her physical "person." Such a use of women, Justice Wilson reasoned, runs against the grain of democratic values and is impermissible.

Justice Wilson's analysis of fundamental justice extended further than that of Justices Dickson and Beetz. In giving substantive content to the principles of fundamental justice, she determined recourse may be had to other rights guaranteed by the Charter: A statute which violates the section 7 guarantees of security of the person and (or) liberty cannot be said to provide fundamental justice if it violates another Charter provision. Reasoning that the decision whether to carry a pregnancy to term is essentially a moral choice, Justice Wilson concluded that section 251's limitation of women's decision-making authority violated Charter section 2(a), which protects freedom of conscience and religion. Because the restrictions on women's moral choices with respect to pregnancy offended section 2(a), those restrictions did not comport

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50 Id at 107-08.
51 Id at 109.
52 Id.
53 Id.
54 Morgentaler, 62 CR 3d at 110 ("[t]he question, therefore, is whether the deprivation of the s. 7 right is in accordance not only with procedural fairness . . . but also with the fundamental rights and freedoms laid down elsewhere in the Charter").
55 Id at 111. Section 2(a) provides: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion . . . ."
with the principles of fundamental justice.  

Justice Wilson agreed that protection of the fetus at the later stages of pregnancy is a legitimate legislative objective, and that some statutory limits upon the woman's right of abortion might be appropriate. Section 251, however, took the decision away from the woman at all stages of her pregnancy. It completely denied the woman her section 7 rights, and was therefore not sufficiently tailored to the legislative objective to be resuscitated by section 1.

III. After Morgentaler

Morgentaler far from settled the question of what provisions of the Charter sustain and protect a woman's right to an abortion. Its only clear message to Parliament, which likely will restrict again the availability of abortions, is that any new legislation must avoid the procedural infirmities of section 251. If Parliament is able to fashion legislation that is procedurally satisfactory (that imposes minimal hardship on women seeking abortions, and that ensures that abortions are readily available to all women who qualify), then a court reviewing the constitutionality of that legislation will focus on one or all of the following: whether “security of the person” includes freedom from threat of physical harm (that is, whether psychological harm is cognizable); the degree to which restraints on a woman’s decision-making authority with respect to a personal, moral dilemma constrict her liberty; the content of substantive fundamental justice; and, most importantly, the significance for the abortion question of Charter sections 15 and 28, which guarantee equal protection, benefit, and rights under the law. The three majority opinions of Morgentaler neither preclude nor limit the application of any of these Charter guarantees to the protection of women’s abortion rights. Finally, the reviewing

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56 Id at 114.
57 Id at 115. Wilson adopts the trimester approach of Roe v Wade to deal with conflicting values—a model which history has proven inadequate. See City of Akron v Akron Center for Reproductive Health, 462 US 416, 452-75 (1983) (O'Connor dissenting) (arguing that if there is a state interest in protecting potential human life, then that interest exists throughout the pregnancy).
58 Morgentaler, 62 CR 3d at 116-17.
59 Drafting new legislation does not appear to be a priority of Prime Minister Brian Mulroney's Conservative government. Yet as anti-abortion activism escalates in the wake of Morgentaler, the government is under increasing pressure to propose legislation. Justice Minister Doug Lewis, who would draft the legislation, is on record as supporting a woman's right to an abortion. Canadian Abortion Debate Rages as Government Avoids Fray, The Reuter Library Report (BC Cycle) (March 14, 1989).
60 Although the composition of the Court has changed dramatically since Morgentaler
court will consider whether each infringement of women’s Charter rights can be “demonstrably justified” under section 1.

This part of the comment deals with the relevant Charter section individually not only for clarity, but also because courts have emphasized that each Charter section must be kept analytically distinct, primarily so that burdens of proof can be appropriately allocated. It is for the individual to establish that his or her Charter right has been infringed and for the state to justify the infringement under section 1.61 To ensure that this allocation remains equitable, the Supreme Court recently held that the threshold for finding a violation of a Charter right cannot be so low that constitutional analysis always focuses on section 1, with the result being that the state too often is required to justify its action. Such a result, the Supreme Court said in Law Society of British Columbia v Andrews,62 would make the Charter provisions themselves devoid of content.

Of course if legislation violates more than one guaranteed right, that legislation is less likely a “reasonable limit . . . [which] can be demonstrably justified in a free and democratic society.”63 According to Chief Justice Dickson, and echoed by Justice Beetz in his Morgentaler opinion:

The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.64

Therefore if legislation violates more than one provision of the Charter, then the state carries a proportionately greater burden of justification under section 1.

A. Security of the Person, Liberty and Fundamental Justice

In legislating on abortion post-Morgentaler, Parliament’s first goal is procedural fairness: Both “security of the person” and “fundamental justice” require, at a minimum, that legislation operate in a fair and non-arbitrary fashion. The administrative procedures

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61 Andrews, 1 SCR at 178.
62 1 SCR 141. In Andrews the Court considered only section 15; the Court’s analysis, however, is applicable to other Charter provisions.
64 Oakes, 1 SCR at 140, discussed by Justice Beetz in Morgentaler, 62 CR 3d at 70.
set up to allow women to establish a valid defense to any future regulation of abortion by criminal statute must be minimal, or at least not so complex or poorly administered that they create significant delay or uneven application of the law. Both Chief Justice Dickson and Justice Beetz surveyed in detail the evidence of unavailability and delays of abortions, and the consequences of those delays caused by the section 251(4) procedures. This emphasis on practical effects of the statute confirms that future legislation will likewise stand or fall depending on its effects, rather than merely its objectives. In this light, Dickson's directive that "if Parliament acts, it must do so properly" means that Parliament, if it chooses to legislate, must not only derive from Morgentaler's guidelines a permissible objective, it must fashion legislation that places as few administrative obstacles as possible between women and their necessary abortions.

Because the three majority opinions differed, Parliament lacks clear instruction about what will constitute procedurally adequate legislation. It remains uncertain, for example, whether Parliament is justified in requiring that a doctor or team of doctors certify that an abortion is necessary to the preservation of the woman's life or health. Justice Beetz said in Morgentaler that Parliament is so justified, despite some consequential delay of a woman's abortion. Chief Justice Dickson would likely evaluate such a requirement according to the strengths and weaknesses of its administration, most importantly the length of the actual delay. In addition, if the legislation requires a medical opinion Justice Dickson would expect that the doctor or doctors be given adequate guidelines to judge in a fair and non-arbitrary fashion whether a woman is in need of a therapeutic abortion. In section 251(4), "health" was nowhere defined. Justice Dickson found the phrase "would or would be likely to endanger her life or health" too vague, resulting in uneven application of the law. The notion of "endangerment to life or health" would have to be shaped into a workable standard.

The majority's agreement that section 251 violated "security of the person" because of its procedural defects leaves open the

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66 Morgentaler, 62 CR 3d at 27-33, 47-58.
67 Id at 33.
68 While the procedural mechanism of section 251 did not accord with the principles of fundamental justice, Parliament is not precluded "from adopting another system, free of the failings of s. 251(4), in order to ascertain that the life or health of the pregnant woman is in danger, by way of a reliable, independent and medically sound opinion." Id at 61.
69 Chief Justice Dickson's analysis would not end here, however. See pp 259-62.
70 Morgentaler, 62 CR 3d at 29.
question of whether procedurally adequate legislation will still violate section 7. After Morgentaler, abortion legislation which actually places pregnant women in physical danger (as did section 251) will almost certainly be found to violate "security of the person." But if abortion legislation is sufficiently tailored to its objective, and written so that its administration is efficient and even—and there is no security of the person violation on fundamentally procedural grounds—will a court hold that security of the person is nonetheless jeopardized?

Chief Justice Dickson and Justice Wilson construed security of the person broadly, suggesting that almost any abortion regulation will face section 7 barriers. Their opinions offer support for a future judicial interpretation of security of the person which recognizes a right to freedom from injuries less tangible than actual physical harms. To Chief Justice Dickson, the uneven and inefficient application of section 251 imposed upon women not only physical danger but also emotional hardship, each of which was an independent element of the security of the person breach. According to this view, threat of physical harm (which existed throughout the period of delay and uncertainty about whether an abortion would be granted under section 251(4)) as well as actual physical harm were cognizable under section 7. Dickson maintained that section 7 protects psychological as well as physical security:

"[S]ecurity of the person is not restricted to physical integrity; rather, it encompasses protection against . . . stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction." 70

Justice Wilson, likewise, defined security of the person as protecting "both the physical and psychological integrity of the individual." 71

If a reviewing court adopts the Dickson-Wilson interpretation of section 7, then almost any abortion regulation will violate security of the person because legislation which makes abortions available only in certain circumstances will necessarily extract a psychological and emotional toll from each woman whose evaluation of

70 Id at 19, quoting Mills v R., 1 SCR 863, 919-20, 52 CR 3d 1 (1986) (describing security of the person in the context of section 11(b), which governs proceedings in criminal and penal matters).

71 Morgentaler, 62 CR 3d at 100 (emphasis added).
her need for an abortion (perhaps for reasons other than physical danger) does not match that of the state. Abortion restrictions per se will violate security of the person because they interfere, by definition, with women's physical and psychological autonomy.

Distinct from and in addition to its security of the person analysis, a court could hold that section 7's "liberty" guarantee protects a woman's right to an abortion; accordingly, even minimal legislative interference with a woman's decision would be held to abridge women's liberty and would violate section 7 unless the abridgement were fundamentally just. Justice Wilson's opinion in Morgentaler offers a road map for an analysis based on the section 7 right to liberty. Wilson's analysis began with the straightforward proposition that restrictions on abortion take decision-making power away from the woman. The right to make fundamental personal decisions lies at the heart of both the Charter's guarantee of liberty and the democratic political tradition itself; it is a value on which the Charter is predicated.72 To deny women that right is to deny them their place in a democratic society. Choosing whether to continue a pregnancy is not, Justice Wilson said, "just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person."73 Treating the decision solely as a medical one and entrusting it to (predominantly male) physicians, the state either denied that the decision is highly individualized and complex, or it refused to entrust women with the responsibility of moral choice, or both.

Parliament would be wise to recognize that the opinion of Chief Justice Dickson differs little from that of Justice Wilson with respect to the necessity under section 7 of respecting each woman's right to choose whether an abortion is appropriate in her individ-

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72 In support of this point Justice Wilson quoted an earlier opinion of Chief Justice Dickson:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental." They are the sine qua non of the political tradition underlying the Charter.


73 Morgentaler, 62 CR 3d at 107.
ual circumstances. Both Chief Justice Dickson and Justice Wilson derived from section 7 a right to choose: While Wilson did so explicitly in her analysis of liberty, Dickson did so implicitly in his analysis of security of the person by basing his finding of a security of the person violation on the problems (delay, uncertainty, inconsistency) created by the removal of decision-making authority from the woman.

The opinions differ in that, with respect to a woman's right to choose, Justice Wilson wrote with conviction while Justice Dickson did not, but this difference appears to arise less from different attitudes with respect to abortion than from different images of the judicial role in Charter interpretation. While Justice Wilson rigorously undertook the "new task" of applying the Charter and spoke directly to the "primary issue" of whether a woman can constitutionally be compelled to carry a fetus to term against her will, Chief Justice Dickson exercised a very common judicial conservatism grounded both in the tradition of Canadian judicial restraint, and in recognition of the sensitivity and potential explosiveness of the abortion issue: "[T]his Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate." Yet it is significant that at least with respect to "security of the person" Chief Justice Dickson was less cautious than his bow to judicial restraint might suggest. His recognition of the psychological and physical components of security of the person, combined with his sensitivity to the psychological and physical damage that may be inflicted by forcing a woman to

74 See note 46.
75 Morgentaler, 62 CR 3d at 100.
76 Id at 12. The Chief Justice's comment illuminates his perception of the role of the Court in Charter interpretation generally; it is best understood, however, as focused on the abortion issue. The public debate surrounding abortion is unlike that of any other issue of our time. Deferring to public debate in this context may be viewed as a strategic move. American critics of Roe have argued that by presuming to solve the abortion issue, the Roe Court disenfranchised part of the U.S. citizenry, caused the anti-abortion forces to mobilize and the public debate to escalate. See, for example, Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law 95-97 (Syracuse University Press, 1985).

Other Roe critics have argued that not only did the judicial determination of the scope of abortion rights heat up public debate, it cut off further developments in the legal analysis of the issue:

Because it was judicially created, the Roe v Wade right to abortion cut short the development of a legal view of abortion . . . the view of abortion as a right required by women's equality before the law.

Douglas G. Morris, Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany, 11 Hastings Int and Comp L Rev 159, 244 (1988). Chief Justice Dickson may be loathe to invite the U.S. experience to repeat itself in Canada.
carry a pregnancy to term suggest that any new legislation will undergo rigorous scrutiny.77

The analysis of whether new legislation violates the woman’s “liberty” interest, as asserted by Justice Wilson in Morgentaler, is likely to play only a peripheral role in a court’s deliberation over new abortion legislation. As discussed above, it will be possible for a court to delineate a right to choose without an analysis of the liberty guarantee in light of Dickson’s reference to “[f]orcing a woman . . . to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations”78 as an infringement of security of the person. An analysis of women’s deprivation of liberty may bolster a finding that legislation violates section 7, but because section 7 (including the fundamental justice clause) is to be read as one right, rather than several, the state’s burden of justification under section 1 will not be appreciably greater if both liberty and security of the person have been violated.79 Furthermore, for a court seeking to affirm women’s right to choose, it may be prudent to ground that affirmation in security of the person rather than liberty. The persistent narrowing in the United States of the right established in Roe v Wade,80 culminating in the recent decision in Webster v Reproductive Health Services,81 suggests that a liberty approach may be strategically unwise: It may be an invitation to history to repeat itself.82

A finding that restrictions on abortion infringe either “security of the person” or “liberty” triggers the inquiry into “fundamental justice.” As noted earlier,83 Justice Dickson refrained from stating whether an abortion restriction would always violate fundamental justice, although he acknowledged that fundamental justice is not merely procedural and does have a substantive content.84 Justice

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77 This is not to suggest that “rigorous scrutiny” requires an abandonment of judicial restraint. Rather, it requires a more thorough analysis of the harm threatened by restrictive abortion laws. Because Justice Wilson’s opinion is more sensitive to the threat to women, she necessarily reaches the primary issue of whether a pregnant women can constitutionally be compelled to carry a fetus to term.

78 Id at 21.

79 See pp 266-68.

80 410 US 113 (1973).

81 109 SCt 3040 (1989).

82 For a summary of pre-Webster abortion decisions in the United States, and for an example of efforts to restrict women’s abortion right, see Comment, Paternal Interests in the Abortion Decision: Does the Father Have A Say?, 1989 U Chi Legal F 377.

83 See pp 259-62.

84 In so refraining, he exhibited not an uncertainty about fundamental justice, but simply a reluctance to make a judicial determination on what was still an abstract question (the parameters of the substantive content of fundamental justice). Not until faced with legisla-
Wilson was more straightforward on the issue: No abortion legislation will satisfy fundamental justice.\textsuperscript{85}

The analysis of fundamental justice in each of the \textit{Morgentaler} majority opinions was closely related to the nature of the security of the person or liberty infringement found. In other words, in the Dickson and Beetz opinions, while the violation of security of the person was procedural, the defect in fundamental justice was procedural as well. In the Wilson opinion, the violation was substantive; the inquiry into fundamental justice was substantive too. Assuming that Parliament passes legislation that withstands scrutiny of its procedural fairness, and that the reviewing court nevertheless finds security of the person and (or) liberty infringements, the new legislation will undergo substantive fundamental justice review. The Court will be forced to address the questions “What does fundamental justice require?” and “Can there be fundamental justice when the state denies women autonomy and responsibility for difficult moral decisions of profound personal importance?”

In \textit{Morgentaler} only Justice Wilson addressed these questions. She held that there cannot be fundamental justice when the state action at issue violates not only security of the person or liberty, but also another Charter section (in this case, section 2(a) which protects freedom of conscience). The Charter of Rights and Freedoms articulates, at least in part, a vision of justice. Thus the judiciary cannot declare that there is fundamental justice when the Charter is violated. Although simple and clear, Justice Wilson's analysis of fundamental justice—rather, how the fundamental justice clause operates within section 7—is troubling. By defining the content of fundamental justice by reference to other Charter sections, Justice Wilson broke the rule that Charter sections should
remain analytically distinct.\textsuperscript{86}

To maintain analytical distinction, the focus of the fundamental justice inquiry must be on the precise statutory effect which infringes security of the person or liberty, rather than on that which infringes another Charter right, and on the interests of the harmed individual, not on the state’s justification for the action (which will be examined under section 1). Focusing on section 7 exclusively, the reviewing court should find that its inquiry into fundamental justice is uncomplicated. If legislation threatens a woman’s security of her person or abridges her liberty, the threat or abridgement will be fundamentally just only if the court deems the harm to the woman so insignificant that it is reluctant to find a constitutional violation.\textsuperscript{87} To find that abortion legislation satisfies fundamental justice will be to find that the restriction on access is inherently just, and poses no serious threat to women’s security or liberty. The section 7 problem will be erased. On the other hand, if the court recognizes that the section 7 issues are significant, then the state action cannot be fundamentally just. The court may not hold that fundamental justice has been satisfied, despite a conclusion that the harm to women is significant, on the grounds that the harm is justified by the need to protect a competing interest. Any such justification must take place under section 1, after the Court has held that section 7 has been violated.

It should not be necessary, therefore, for a court to adopt Justice Wilson’s approach to fundamental justice: It will likely find that section 7 has been violated without making reference to other Charter sections. Given Justice Wilson’s conclusion that “liberty” includes a “right to choose” and Chief Justice Dickson’s implication that security of the person also establishes such a right, it will be difficult for a court to hold that a deprivation of that right to choose is unsubstantial. It may be able to justify the deprivation under section 1, but it will not be able to declare it fundamentally, inherently just.

It seems clear that the web of abortion debate is so tangled because the justification for legislation is, to many, so compelling. That potential legislation might be justified does not mean, however, that it might not violate section 7.

\textsuperscript{86} See discussion of Andrews, 1 SCR 141, at pp 275-79.

\textsuperscript{87} An example of this type of case is R. v Beare, SCJ 92 (1987), in which the Court held that police fingerprinting of arrested individuals violated the security of their persons but was fundamentally just because it did not significantly contribute to the difficulties they already faced by virtue of having been arrested.
B. Equality

The *Morgentaler* Court did not attempt a comprehensive analysis of the abortion issue. None of the justices addressed the appellants' claim that section 251 breached the Charter's guarantees of gender equality. Yet sections 15 and 28 offer another anchor for the abortion right. Justice Wilson's opinion in *Morgentaler* strongly implied that a challenge to new legislation grounded in the equality sections would find some support on the Supreme Court. And, in early 1989, the Court issued a thorough and promising reading of section 15 in *Andrews.*

In *Andrews*, the Court confirmed that there is in section 15 a remedial component, one intended to ameliorate the historical disadvantage of disempowered classes. After *Andrews*, section 15 should not be construed as embracing principles of formal equality, according to which there is inequality only when similarly situated individuals are treated differently. Justice McIntyre, a dissenter in *Morgentaler* but author for the majority in *Andrews*, noted that "mere equality of application to similarly situated groups does not afford a realistic test for a violation of equality rights." Rather, in the Court's view, Section 15 approves of legislative schemes which promote the achievement of real equality for

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**1 SCR 141.**

The court stated:

The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings, equally deserving of concern, respect and consideration. It has a large remedial component . . . . It must be recognized as well that the promotion of equality under s.15 has a much more specific goal than mere elimination of distinctions.

Id at 171.

**90 The doctrine of formal equality defines discrimination as the unlike treatment of similarly situated individuals. See generally Wendy W. Williams, *Notes From A First Generation*, 1989 U Chi Legal F 99. Under the theory of formal equality, biological differences have been used as a justification for policies which perpetuate inequality; they have been used as a pretext for women's social and legal disadvantages.

The language of section 15 encourages a rethinking of formal equality. Yet, the Court did not do so until *Andrews*. Justice McIntyre, in dismissing as unworkable the formal equality standard, illustrated its deficiencies in the context of pregnancy. He pointed to *Bliss v Attorney General of Canada*, 1 SCR 183 (1979), in which a pregnant woman was denied benefits to which she would have been entitled but for her pregnancy. The Court in *Bliss* based its dismissal of her complaint on the grounds that "there was no discrimination on the basis of sex, since the class into which she fell . . . was that of pregnant persons, and within that class, all persons were treated equally." *Andrews*, 1 SCR at 167-68. Justice McIntyre also noted that *Bliss* antedated the Charter, suggesting that an analysis using the "pregnant persons" classification would be outmoded and inappropriate in the Charter regime.

**91 Id at 167.**
dissimilarly situated individuals, and disapproves of schemes that perpetuate historical disadvantage.

This interpretation of section 15 ideally suits the purpose of abortion rights advocates. To the extent that section 15 recognizes women as a historically disadvantaged group, and disapproves of legislation which perpetuates their disadvantage, laws restricting reproductive freedom are constitutionally suspect. In Morgentaler, Justice Wilson described the law's unequal treatment of women and men and the centrality of reproductive choice to a woman's dignity:

[T]he history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus . . . . [W]omen's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right, and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Thus, Justice Wilson acknowledged that women seek reproductive rights, including the right to choose whether to have an abortion, as part of an ongoing effort to establish autonomy and secure opportunities for self-determination. When a woman cannot choose whether to reproduce or not to reproduce, her "dignity and worth as a human being" are degraded and injured.

Section 15, designed to ensure that no class of persons is subjected to greater burdens or granted greater benefits from the state, may be construed to prohibit laws which inhibit women's exercise of reproductive choice. The injury inflicted by restrictive abortion legislation is a harm suffered only by women and not by

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**Note:**

92 The court recently affirmed the Charter's recognition of systemic discrimination and embrace of affirmative action. In Action Travail Des Femmes v Canadian National Railway, 1 SCR 1114 (1987), the Court ruled that a Human Rights tribunal established under the Canadian Human Rights Act, SC 1976-77, has the power to order an affirmative action program to remedy the effects of past discrimination against women. The judgment was sensitive to the dynamics and effects of systemic discrimination in the workplace.

93 Under an alternative reading of section 15, judges may interpret the reference to discrimination as meaning "any differentiation." See Sheilah Martin, Canada's Abortion Law and the Canadian Charter of Rights and Freedoms, 1 Can J Women and the L 339, 381 (1986). Under this view, there is no requirement that the law accommodate biological difference. A policy that is neutral on its face would withstand a section 15 challenge even if, because of biological difference, the harmful impact of the policy falls only on those of one sex.

94 Morgentaler, 62 CR 3d at 108 (emphasis in original).
Not only is a woman's physical autonomy threatened (while a man's is not similarly or simultaneously burdened), but her opportunities in the social and economic sphere are limited because legal traditions and social norms have been slow to recognize the needs of pregnant women in the workplace and have allocated to women the primary responsibility for the care of children. If women could avoid unwanted pregnancy, if the moment of volition could be before conception in all circumstances, then an equal protection and benefit analysis under section 15 would make less sense. But women cannot always avoid unwanted pregnancy. The Court in *Andrews* and, to a lesser extent, in *Morgentaler*, demonstrated a willingness to consider the broader social context of inequality. Under a similarly broad perspective on the abortion issue, the Court might acknowledge that women have not had complete control over the reproductive uses of their bodies. There is a lack of control because there is coerced sex, and because fully safe and effective contraception has not been made readily available to all men and women. More deeply, as some feminists argue, there is social custom which subordinates the sexual needs of women to those of men, and which predicates a woman's social and economic well-being on her maintenance of relations with men. In this social context of sex inequality, restrictions on women's access to abortions may be held to impermissibly exacerbate women's

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86 There is no analogous situation for men. No tort law principle requires that a man sacrifice any part of himself for the benefit of another unless he chooses to do so. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on the Law of Torts*, § 56 (West, 5th ed 1984). Of course this rule that no person must be a "good Samaritan" lacks satisfactory moral foundation. Yet for equal protection purposes the rule is a useful demonstration of the law's disparate treatment of men and women. By imposing burdens of self-sacrifice on women while stridently refusing to impose such burdens on men, the law perpetuates inequality.

87 See, for example, Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U Chi Legal F 169.

The limitation is most severe for young women and poor women, whose pregnancies may cut short education or necessitate the sacrifice of jobs which do not adequately address the needs of child-rearing mothers.

88 For a more thorough analysis of sexual dominance, see Catharine A. MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987). MacKinnon and Andrea Dworkin have propagated the theory of sexual domination as the foundation of arguments for restricting production and distribution of pornography. While the U.S. courts have rejected such legislation as violative of the First Amendment, *American Booksellers Association v Hudnut*, 771 F2d 323 (7th Cir 1985), sum aff'd *Hudnut v American Booksellers Association*, 475 US 1001 (1986), the British Columbia Court of Appeal has demonstrated sympathy to domination theory as applied to obscenity. In *R v Red Hot Video Ltd.*, 45 CR 3d 36, 18 CCC 3d 1 (1985), the court upheld a prohibition of obscenity on the theory that material that degrades women tends to make men more tolerant of violence to women and encourages them to act in a callous and discriminatory way toward women.
disadvantage.

Future restrictions on a woman's reproductive freedom could also be seen by a court as imperiling the realization of the vision of equality contained in section 28. The interplay between sections 28, 15 and section 1 is unclear; new abortion legislation will offer a reviewing court the opportunity to clarify the relationship between these sections. Section 28 guarantees equality of rights between women and men "notwithstanding anything in this Charter," suggesting that equality rights take priority over other sections, including section 1. Thus when section 15 is violated because legislation denies women equal benefit of the law, justification under section 1 is unavailable. Put differently, this interpretation of section 28 renders a section 1 balancing moot because no state interest could justify a gender-specific violation of section 15. As applied to abortion, this construction of section 28 would invalidate all restrictions on abortion, under any circumstance. But as a matter of Charter interpretation, this approach seems drastic. It makes section 15 into a Charter anomaly by separating its jurisprudence from "that of the controlling standard under section 1."

Alternatively, the Court could employ section 28 as an interpretive overlay on section 1, injecting the equality principle of 28 into the section 1 balancing. Thus used, section 28 compels a higher level of justification for a gender-based infringement of a right than for other types of infringements. In the context of abortion, the more exacting section 1 inquiry would demand that the state produce a compelling (and not merely reasonable) justification for restricting women's reproductive freedom.

Ultimately, it seems that the constitutional analysis of future abortion legislation will hinge on the Court's reading of section 1. Legislation which violates section 7 or 15, or both, may still be permissible if it imposes only such "reasonable limits" on the exercise of the offended Charter rights "as can be demonstrably justified in a free and democratic society." In assessing whether an infringement is "justified," the Court has applied a "proportionality test" which balances the state's asserted interest with the individual's right under the Charter. It is not clear how substantial the

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99 Id.
100 Id at 216.
101 Andrews, 1 SCR at 183.
102 Id at 184. In Andrews, Justice McIntyre described the "proportionality" test as
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state's interest must be to justify an encroachment on a Charter right. Justice Wilson endorsed in Andrews a requirement that the state put forth a “pressing and substantial” interest in order to justify an infringement of section 15. In the same case, however, Justice McIntyre labeled this test too stringent, preferring a standard under which the state's interest must be merely “desirable.”

The state, if it defends restrictions on abortion in the future, will advance as a protectable interest the right of the fetus against infringements of its security of the person. This justification presupposes that a fetus is a “person” for purposes of the Charter. The Court did not reach this question in a recent case which posed it, Borowski v Canada, and may be reluctant to resolve the issue of fetal rights at this stage in the evolution of Charter jurisprudence. As it stands, the fetus has not been granted constitutional status.

If in the future the Court holds that the fetus is protected under the Charter, the state may still find it difficult to justify abortion restrictions held to violate multiple rights (sections 7 and 15) under a literal application of the Court's “proportionality test.” And if a reviewing court finds that challenged legislation infringes one right, the court can invoke the interpretive principle of section 28—that is, the government bears, as Justice Wilson put it, an “onerous burden” in justifying gender-based infringements of Charter rights.

Examining:

the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives.

Id.

Id at 153.

Id at 184.

39 DLR (4th) 731 (Sask CA, 1987). Borowski involved a challenge to the defenses under section 251 which made abortions legal in certain circumstances. It was alleged that any abortion, regardless of the risks pregnancy posed to maternal life or health, violated a fetal “right to life” and could not be justified. The appellate court of Saskatchewan held that a fetus was not a person within the meaning of the law. On appeal, the Supreme Court dismissed the case as moot in light of Morgentaler, which invalidated section 251 altogether.

Justice Wilson maintained in Andrews that “[g]iven that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.” Andrews, 1 SCR at 154.

It may help the Court to recognize that focusing on women's constitutional rights and freedoms need not severely threaten any state interest in the fetus. Both that interest and
CONCLUSION

The Court’s decision in Morgentaler raised more questions than it answered. While it concluded that undue procedural burdens imposed on a woman’s access to abortions are intolerable under the Charter, the Court merely hinted at a number of theories through which a substantive abortion right might be grounded in the Charter.

But the Charter, and language in both Morgentaler and Andrews, offers advocates of a woman’s right to choose reason for hope. The Court seems committed to a broad reading of the guarantee in section 7 of security of the person. Nevertheless, given the mandatory balancing of interests in section 1 and the susceptibility of privacy-like rights to state intrusion, the Court might find a more stable foundation for an abortion right in the Charter’s guarantees of gender equality. New legislation will likely offer the Court the unique opportunity not only to recognize abortion as an equality issue, but also to trigger the development of a jurisprudence on the relationship between the right of equality in section 15, the vision of equality in section 28, and the legitimate objectives of democratic government.