
Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle*

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Chantal Daigle's ordeal before the courts in the summer of 1989 culminated in the Supreme Court of Canada decision of *Tremblay v. Daigle*. This decision, along with the Court's prior decisions in *Morgentaler* and *Borowski*, has forced politicians to address the abortion issue.

The author argues that the exclusion of women in framing the terms and the vocabulary of the abortion debate predetermines its outcome. She believes that courts must recognize the power relations at play and address the lack of democracy for women. Courts must not only encourage women to speak, but must also encourage the speech of women.

The author urges the Court to state unequivocally that fetuses have no constitutional rights. She argues that such a decision is necessary to bring women into the public debate and is consistent with the principles of constitutional adjudication.

La décision de la Cour suprême dans *Tremblay c. Daigle* marqua la fin d'un été de peines et d'angoisse pour Chantal Daigle. Cette décision se range aux côtés de *Morgentaler* et *Borowski* et force nos représentants politiques à adresser la question de l'avortement.

L'auteur soutient que l'issue du débat sur l'avortement a été déterminée d'avance car les femmes n'ont pas choisi ses termes, ni le langage dans lequel il se déroulera. Les tribunaux doivent, selon elle, reconnaître les forces en jeu et tenir compte du manque de démocratie pour et par les femmes. Ils doivent non seulement encourager les femmes à s'exprimer, mais surtout encourager l'expression des femmes.

L'auteur affirme que la Cour doit prendre position et déclarer clairement qu'un fœtus n'a pas de droit constitutionnel. Elle soutient qu'une telle déclaration est conforme aux principes de droit constitutionnel et est nécessaire pour permettre aux femmes de prendre part au débat sur l'avortement.

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Synopsis

- I. The Undemocratic Context of Abortion Regulation
- II. Silences and the Dominant Discourse
- III. The *Daigle* Decision: Toward Democratic Adjudication
- IV. Democracy and Power

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Women have had the power of *naming* stolen from us. We have not been free to use our own power to name ourselves, the world, or God. The old naming was not the product of dialogue — a fact inadvertently omitted in the Genesis story of Adam's naming the animals and the woman. Women are now realizing that the universal imposing of names by men has been false because partial... It would be a mistake to imagine that the new speech of women can be equated simply with women speaking men's words. What is happening is that women are really *hearing* *ourselves* and each other, and out of this supportive hearing emerge *new words*.¹

...the courts are and will remain allies of Canadian democracy, strengthening any weaknesses of democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation in our society.²

I. The Undemocratic Context of Abortion Regulation

Democracy begins with talking. Democratic talking requires listening, too — talking with, not talking to — and a discourse that not only allows all to speak but has been equally created by everyone. The ordeal of Chantal Daigle in the summer of 1989 provokes questions about democracy's meanings in the context of women's silences and men's speech. Historically and generally, the practise of democracy has been gendered, men talking to each other and telling women what to do. Women have not been able until recently to participate legally and directly in the democratic process.³ The institutions of formal dem-

¹Mary Daly, *Beyond God The Father* (Boston: Beacon Press, 1973) at 8 (emphasis in the original).

²*R. v. Holmes*, [1988] 1 S.C.R. 914 at 932, Dickson C.J.C., 50 D.L.R. (4th) 680.

³Women (more precisely, mostly propertied European-Canadian women) were first granted the right to vote and hold office in Manitoba on January 28, 1916, with enfranchisement at the federal level occurring on May 24, 1918, and in the last province, Quebec, on April 25, 1940. See

ocratic practise, all of which were implicated in Jean-Guy Tremblay's attempt to stop Chantal Daigle from having an abortion, remain heavily dominated by men.⁴ How ironic that the institution which allowed her to decide for herself whether to have an abortion, the Supreme Court of Canada, has the highest percentage of women of any branch of the state — one third of the judges are women — yet is the pinnacle of a branch of government often regarded by conventional constitutional wisdom as anti-democratic in theory and practise.⁵ Women's exclusion and lack of voice within democratic practise seems particularly unjust and dictatorial with respect to abortion laws. Not only do restrictions on abortion affect women far more than men; the debate about the regulation of abortion is a debate about the role, status and value of women, about the meaning of women's lives and our freedom to determine the course of our own lives.⁶ Yet the Canadian democratic system, a legislative, executive and judicial triumvirate, continues to deny women equal participation, no longer by formal exclusion but through the highly effective means of economic disadvantage, socialization, electoral structures and party politics.⁷ Contemporary

Catharine Cleverdon, *The Woman Suffrage Movement in Canada*, 1st ed. (Toronto: University of Toronto Press, 1950).

⁴In 1988, thirty-nine women were elected to the House of Commons, comprising a mere 13.2 percent of the members. Twenty-seven women had been elected in 1984, constituting 9.6 percent of the House. At this rate, the percentage of women members will only reflect women's percentage in the population in the year 2050. In July, 1989, the Quebec National Assembly had 17 women members, comprising 13.9 percent of the members. In 1986, less than 5 percent of Canadian judges were women. See Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 165-166.

⁵See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

⁶Frances Olsen, "Unraveling Compromise" (1989) 103 Harv. L. Rev. 105; Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), especially 158-191. The debate is as much between women as between women and men, as illustrated by the rise of anti-abortion, anti-feminist, women's groups. See Karen Dubinsky, *Lament For a "Patriarchy Lost"?: Anti-Feminism, Anti-Abortion and R.E.A.L. Women In Canada* (Ottawa: CRIAW/ICREF, 1985).

⁷Sylvia Bashevkin, *Toeing the Lines: Women and Party Politics in English Canada* (Toronto: University of Toronto Press, 1985). Barry Kay et al., "Feminist Consciousness and the Canadian Electorate: A Review of National Election Studies 1965-1984" (1988) 8(2) *Women and Politics* 1, conclude that the participation of women, but not men, in traditional political activities (e.g. elections and party politics) is adversely affected by the presence of children and that overall participation rates have not been affected by a rise in feminist consciousness, thus indicating the existence of systemic barriers to women's participation. Active involvement with political parties, especially the party in power, remains an influence on judicial appointments: *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 1985) at 56-57. Countries with a high involvement of women in formal political structures, such as Norway's record-breaking participation (over 30 percent women at all levels and 44 percent of Cabinet in 1987) have relatively open, participatory electoral systems that constitute

Canadian practise provides a specific example of Carole Pateman's condemnation that, for women, "democracy has never existed: women have never been and still are not admitted as full and equal members and citizens in any country known as a 'democracy'."⁸

Democratic practise, *i.e.*, the operation of democratic mechanisms by the men who comprise the state, was intricately incriminated in Daigle's⁹ ordeal by either acts or omissions. The efforts of Tremblay, the ex-boyfriend and potential father, to stop Daigle from having an abortion met with the approval and support of the Quebec courts. Even though judges in Manitoba and Ontario¹⁰ had rejected similar claims by men, Tremblay found judges willing to ensure that a man could exercise control over a woman's body.¹¹ Only the Supreme Court of Canada refused to use its coercive power against Daigle. Its judgment restores but does not, however, proclaim her freedom, focusing instead on the failure of the legislative assembly to grant the specific rights asserted by Tremblay.¹² The Quebec National Assembly did nothing to help Daigle,¹³ nor did the executive

an important ingredient of increased participation. See Jill Bystydzienski, "Women in Politics in Norway" (1988) 8 (3/4) *Women and Politics* 73.

⁸Carole Pateman, "Feminism and Democracy" in G. Duncan, ed., *Democratic Theory and Practise* (Cambridge: Cambridge University Press, 1983) at 204.

⁹Hereinafter, Chantal Daigle will be referred to by her surname, to accord her the same respect given to judges, scholars and politicians whose surnames are traditionally used in legal journals.

¹⁰*Diamond v. Hirsch* (6 July 1989), (Man. Q.B.) [unreported] 3, Hirschfield J. ("a human being, that is, the Respondent, has an absolute right, subject to criminal sanctions, to the control of her body."); *Murphy v. Dodd* (11 July 1989), Toronto 1566/89 (Ont. S.C.). An injunction granted by O'Driscoll J. was set aside by Gray J. because of insufficient notice to Barbara Dodd. This case was the first of the irate boyfriend cases; Dodd had her abortion then rejoined Murphy and began campaigning against abortion, to the distress of her family and friends who considered her to be under the control of Murphy. "Dodd Regrets Decision, Becomes Anti-Abortionist" *The [Saskatoon] Star-Phoenix* (19 July 1989) 1; Kirk Makin, "Dodd Feels Insulted, Denies Manipulation by Anti-Abortionists"; Kirk Makin, "Woman's Perplexing About-Face Causes Shock, Happiness" *The [Toronto] Globe and Mail* (20 July 1989) 4.

¹¹Mr. Justice Richard of the Quebec Superior Court granted a provisional injunction on July 7, 1989, without providing reasons and without notice to Daigle, who learnt of the injunction on her way to Sherbrooke, Quebec, for an abortion. On the application of Tremblay, Mr. Justice Viens of the Quebec Superior Court upheld the interlocutory injunction on July 17: *Tremblay v. Daigle*, [1989] R.J.Q. 1980. The Quebec Court of Appeal heard Daigle's appeal on July 20 and rendered judgment on July 26, 1989: *Tremblay v. Daigle* (1989), 59 D.L.R. (4th) 609, [1989] R.J.Q. 1735. Mr. Justices LeBel, Nichols and Bernier dismissed the appeal, while Mr. Justice Chouinard and Madame Justice Tourigny, one of two women on the Quebec Court of Appeal and the first woman to be in a position of exercising state power in the spate of litigation in three provinces, would have allowed the appeal.

¹²*Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Daigle* cited to S.C.R.]. The Court heard and granted the leave application on August 1, 1989, and the entire Court heard and allowed the appeal unanimously on August 8, 1989, releasing its reasons on November 16, 1989.

¹³Neither *The [Montreal] Gazette* nor *The [Toronto] Globe and Mail* record any statement by a Minister of the Quebec National Assembly voicing support for Daigle or Canadian women gen-

branch of the provincial government. The Attorney General of Quebec intervened before the Supreme Court to argue for the province's legislative jurisdiction over certain aspects of abortion, refusing to assert or accept Daigle's freedom.¹⁴ Neither did the Attorney General of Canada argue for women's freedom in its intervention before the court. Its argument for allowing the appeal was jurisdictional, that Parliament possessed the power to regulate women's decisions about abortion without interference from the provinces.¹⁵ A momentous litigation from the perspective of Canadian women was cast by the executive branch of government as a commonplace federal-provincial fight over legislative power. The federal government also bowed to some public pressure generated by the litigation (or opportunistically used the pressure as a justification) to introduce legislation recriminalizing abortion, directly exerting again Parliamentary control over women's reproductive decisions.¹⁶

erally. The government had ample opportunity, between the time of the injunction and the decision of the Supreme Court, to indicate its position and take action. It could have introduced a law clearly stating that a foetus has no status nor legal rights until birth, and retroactively apply the amendment to cover Daigle's situation. It did not. A call by the leader of the Opposition, Jacques Parizeau, to reconvene the National Assembly and amend the province's law to allow for unrestricted access to abortion up to the point of viability, was met with silence from the government: Alexander Norris, "Parizeau Wants Quebec to Pass Own Abortion Law" *The [Montreal] Gazette* (28 July 1989) 7.

¹⁴See *Mémoire du Procureur Général du Québec* (on file with the author).

¹⁵See *Factum of the Attorney General of Canada* (on file with the author).

¹⁶During the summer of 1989, many people called for new federal criminal legislation as a means of ending injunction applications. See, e.g., Jeffrey Simpson, "A Policy on Abortion" *The [Toronto] Globe and Mail* (20 July 1989) 6; William Johnson, "Need for Abortion Law Becoming More Apparent" *The [Saskatoon] Star-Phoenix* (20 July 1989) 4; John Yorston, "Editorials Call For Federal Abortion Law" *The [Montreal] Gazette* (21 July 1989) 3. Overlooked was the fact that injunction applications can only be stopped by a clear *court* ruling that foetal and potential fathers' rights constitute a violation of women's constitutional rights. If new criminal legislation was passed, its effectiveness in stopping injunctions against women would be dependent on judicial determinations of the law's conformity with the *Charter*. As pointed out by several commentators, new federal criminal law would invite further litigation, not stop it. See, e.g., Don McGillivray, "Ex-Boyfriends not Evoking Sympathy" *The [Saskatoon] Star-Phoenix* (14 July 1989) 4. The Minister of Justice's initial hints after the first injunction application that the government would still avoid recriminalization were quickly superseded by a governmental commitment to criminal legislation: "New Abortion Law Needed to Fill Legislative Void: PM" *The [Saskatoon] Star-Phoenix* (21 July 1989) 1; Susan Delacourt, "Abortion Law May be Needed For Stability, McDougall Hints" *The [Toronto] Globe and Mail* (25 July 1989) 3.

In moving for second reading of Bill C-43¹⁷ on November 7, 1989, the Minister of Justice explained that recriminalization was necessary in order to give women the entitlement to have abortions¹⁸, conveniently forgetting a basic principle of our free and democratic society that a person is free and entitled to do anything not specifically prohibited by law. Or was the message from Parliament that only men enjoy this basic presupposition of freedom and that women exercise freedom only with the permission of men?

In short, the predominant stance of democratic institutions was that 'Father knows best', an attitude and position that continues to be foisted upon women. Parliament's proposed legislation, another strategic attempt at de-politicization of abortion restrictions,¹⁹ is deeply paternalistic. Every woman is prohibited

¹⁷Bill C-43, *An Act Respecting Abortion*, 2d Sess., 34th Parl., 1989. It adds two new sections to the *Criminal Code*:

287. (1) Every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened.

(2) For the purposes of this section, "health" includes, for greater certainty, physical, mental and psychological health;

"medical practitioner", in respect of an abortion induced in a province, means a person who is entitled to practise medicine under the laws of that province; "opinion" means an opinion formed using generally accepted standards of the medical profession.

(3) For the purposes of this section and section 288, inducing an abortion does not include using a drug, device or other means on a female person that is likely to prevent implantation of a fertilized ovum.

288. Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to induce an abortion on a female person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. (emphasis in original)

¹⁸Canada, Debates of the House of Commons at 5640 (7 Nov. 1989). "However, the events of this past summer illustrated a clear need for a national position on the issue of entitlement to abortion...only by using the criminal law power, however, can the federal government ensure a national approach to the issue of entitlement of abortion...What we can do, and what we are doing, is proposing legislation which will establish a national standard for entitlement to abortion in Canada." (emphasis added). In the same breath, the Minister acknowledged that the federal government could not prevent applications for civil injunctions and that such applications had been possible under the old criminal law.

¹⁹'De-politicization' redefines abortion decisions as technical matters requiring the judgment of experts, specifically as health issues to be decided by medical doctors. Joni Lovenduski & Joyce Outshoorn, "Introduction" in J. Lovenduski and J. Outshoorn, eds, *The New Politics of Abortion* (London: Sage, 1986) 1 at 2. This strategy passes responsibility for political decisions, i.e. the continued control of women, to another group. Although the first prohibitions in North America against abortion were generated by the powerful medical associations (see Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* (Boston: Northeastern University Press, 1984) at 78-84, doctors are now more reluctant to exercise legal decision-making power, in part because of fear of prosecution. The largest doctors's associ-

from having an abortion unless a doctor consents to the abortion by deciding that a woman's life or health would be threatened without it. With the added power to define health according to their professional standards, doctors will remain one of the gatekeepers of women's autonomy.²⁰ Having passed second reading and with Cabinet committed to its support, Bill C-43 seems fairly certain of passage.²¹ Violations of Bill C-43 will be enforced by prosecutors, bureaucrats and judges who will be mostly, if not almost overwhelmingly, men. Many provincial legislative assemblies and governments will continue their efforts to restrict women's access to abortion services, such as Nova Scotia's concerted efforts to close down Dr. Morgentaler's clinic.²² In addition, legisla-

tion in Canada, the Canadian Medical Association, is opposed to any recriminalization of abortion. "Abortion Law Would Force Women To Lie, CMA Says" *The [Toronto] Globe and Mail* (7 February 1990) 9.

²⁰Bill C-43, *supra*, note 17. No woman, at any moment after implantation, is able to decide for herself whether to terminate a pregnancy. That only the opinion of one doctor is required does not detract from the fact that women are not recognized as moral agents with the capacity to make decisions, but must still have their decisions approved or vetoed by someone else. That the definition of health is broad does not obviate the fact that a male-dominated profession will define it, not women.

²¹However, predictions are difficult; in February, 1990, it was estimated that 151 Members were opposed to the legislation and 138 were in favour, a figure which led the Minister of Justice, Kim Campbell, to warn that if Bill C-43 failed, no new legislation could be expected: Deborah Wilson, "If Federal Abortion Bill Defeated, New Law 'Unlikely', Minister Says" *The [Toronto] Globe and Mail* (28 February 1990) 1. If Cabinet solidarity is imposed, as expected, for the first time in recent history government legislation on abortion will not be subject to a completely free vote by government members. The free vote, a favourite strategy concerning abortion legislation in western countries, has usually ensured the continuation or passage of repressive regulation. See Lovenduski & Outshoorn, *supra*, note 19 at 4. The notable Canadian exception was the free vote in July, 1988, which resulted in the continuation of decriminalization. Merely having a free vote defines abortion as an essentially moral issue, which it is not, except from a religious perspective, rather than as a political issue requiring party solidarity. It permits elected representatives to justify voting against their constituents' wishes because of their individual consciences. Individual members become the subject of lobbying efforts in which the anti-abortion forces have the financial upper-hand. In the free vote held on July 28, 1988, almost half (105 of 223 voting members) voted for an amendment outlawing virtually all abortions, an anti-abortion faction far out of proportion to the segment of the Canadian population that holds such views. Only the voting bloc of women parliamentarians prevented the passage of the amendment.

²²After the decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.], all provinces except Quebec and Ontario sought to restrict women's access to abortion services. For a discussion of the decision and the immediate governmental reactions, see Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 536-549. In 1989, Nova Scotia passed the *Medical Services Act*, S.N.S. 1989, c.9, the regulations of which require that abortions be performed only in provincially approved hospitals (even though a similar restriction had been struck down by all majority judgments in *Morgentaler*) in an attempt to stop Dr Morgentaler from operating a clinic in Nova Scotia. That Nova Scotia's action is motivated more by a desire to stop abortions rather than a concern with private clinics is shown by its rejection of Dr Morgentaler's offer to sell the clinic to the province and disbelief of his statistics

tors may attempt to prohibit or restrict abortions by demarcating either a 'foetus' or 'unborn child' within a pregnant woman and giving it statutory rights superior to its mother's rights. The courts will almost certainly be asked to settle the issue of the constitutional status of the foetus²³ and the constitutionality of any new federal and provincial legislation.

The continuing political regulation of abortion by itself raises questions about the legitimacy of democratic practise. The regulation of reproduction will affect women far more than men²⁴; the experiences of pregnancy, abortion and birth are ones for which men have no analogy²⁵; and women's decisions about whether to continue a pregnancy or have an abortion are significant in our lives.²⁶ Yet the voices of women remain muted and anomalous within the forums of democracy. Democratic practises permit the enactment of legislation with profound impact upon a subordinate group, women, while excluding us from equal participation in the legislative, administrative and judicial processes. How democratic is a system which reduces women to another lobby group

showing that large numbers of women travel to Montreal for abortions. Kevin Cox, "Morgentaler to Appeal N.S. Abortion Injunction" *The [Toronto] Globe and Mail* (14 November 1989) 9.

Abortion restrictions provide a perfect example of Sandra Burt's conclusion, in examining the quest for women's equality, that "the most significant structural characteristic of the political system is the division of powers between the federal and provincial levels." Sandra Burt, "Legislators, Women and Public Policy" in Sandra Burt, Lorraine Code & Lindsay Dorney, eds, *Changing Patterns: Women in Canada* (Toronto: McClelland and Stewart, 1988) 129 at 153. Victories won at one level of government can be neutralized or thwarted by another level. See Ian Urquhart, "Federalism, Ideology, and *Charter* Review: Alberta's Response to Morgentaler" (1989) 4 C.J.L.Soc. 157.

²³An application for an injunction against a woman based solely on s.7 of the *Charter* has already been attempted, unsuccessfully: Peter Moon, "Judge Denies Man Bid to Halt Abortion" *The [Toronto] Globe and Mail* (14 February 1989) 3.

²⁴It is not necessarily the case that laws regulating reproduction must affect women far more than men, but historically all of the laws have been aimed at women, not men, because, as Francis Olsen eloquently argues, women's lives have not been valued as much as men's lives. "[One] means to reduce abortion would be for the state to outlaw the act of impregnating women who do not wish to become pregnant. States could require a man to obtain informed consent from a woman before he risked impregnating her, and could consider whether to impose a mandatory waiting period before such consent would become effective. This approach would seem no less practical than banning abortions except for the male domination of our society." Olsen, *supra*, note 6 at 130.

²⁵"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." *Morgentaler, supra*, note 22 at 171, Wilson J.

²⁶"This decision is one that will have profound psychological, economic and social consequences for the pregnant woman...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." *Ibid.*, Wilson J.

attempting to exert influence on democratic institutions from the outside?²⁷ Can it be claimed that laws have legitimacy for women when women's experiences and interests do not form the basis of the laws? If legitimacy is derived from consent and acceptance, where is the legitimacy for and from women when we protest the law and defy it, if possible, whenever disobedience is necessary for self-determination?

But there is a further democratic objection to the continued regulation of abortion by male-dominated institutions that cannot be cured by simply requiring that all institutions have a fifty percent female membership.²⁸ Women have not only been excluded from full participation in the debates about the regulation of abortion, we did not create the language of the debate in the first place. The public discourse on pregnancy, abortion and birth has been primarily created by men. It fails to reflect women's experiences, erases our presence and causes pain in our lives. Lucinda Finley's description of the linguists of law fits perfectly and specifically the makers and enforcers of abortion laws, and perfectly and more generally the originators and monopolists of the public language on reproduction:

Throughout the history of Anglo-American jurisprudence, the primary linguists of law have almost exclusively been men — white, educated, economically privileged men. Men have shaped it, they have defined it, they have interpreted it and given it meaning consistent with their understandings of the world and of people "other" than them.²⁹

Women have not been allowed to speak in public about our experiences of sexuality and reproduction, central aspects of our lives that have been contemptuously, erroneously and tragically dismissed or misrepresented by the linguists of

²⁷Lobbying efforts to decriminalize abortion or at the least reduce the inequities of s.251 of the *Criminal Code*, which included the abortion rights caravan in 1970, were uniformly unsuccessful from the time s.251 was enacted in 1969 until its invalidation by the Supreme Court in 1988; Anne Collins, *The Big Evasion: Abortion, The Issue That Won't Go Away* (Toronto: Lester & Orpen Dennys, 1985) at 23, concluded that "the House of Commons has never been the place in which the law it made could be challenged."

²⁸The significance of such a change, however, must not be discounted. Even with the low number of women representatives, their impact can be measured. On July 28, 1988, the House of Commons held a free vote on a tri-partite motion introduced by the Conservative government in an attempt to legislate again on abortion. All twenty-three women from the three political parties (six women were absent) banded together to defeat the anti-abortion motion. If seven had voted differently, the motion would have carried. However, solidarity on the impending vote on Bill C-43 is not anticipated because of the anti-feminism of several new women members. See Charlotte Gray, "The New F-Word" *Saturday Night* (April, 1989) 17 at 20.

²⁹Lucinda Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 *Notre Dame L. Rev.* 886 at 892.

patriarchy.³⁰ When we have talked, men have not listened.³¹ Almost all of the vast writings on abortion have been authored by men.³² Only recently have women recounted publicly our experiences of abortion,³³ and the words we use are not ones we have created. Perhaps part of the reason why the public debate

³⁰Women have indisputably spoken very little in conventional democratic forums. I mean 'public' in the broader, everyday sense of the word, as any communication which is not designated by the speaker as secret, to be shared with a special audience. Women's lives have been marked, to use Adrienne Rich's famous term, by lies, secrets and silence. In this paper the focus is on abortion but silence is a deafening, pervasive feature of women's lives. See Robin West, "Feminism, Critical Social Theory and Law" (1989) U.Chi. Legal Forum 59 at 65-78. Until very recently, women did not talk about their experiences of sexual violence and most women still do not, particularly not in public. Jeffrey Moussaieff Masson, *A Dark Science: Women, Sexuality and Psychiatry in the Nineteenth Century* (New York: Farrar, Straus & Giroux, 1986), could not find one account of sexual abuse by a woman published in the nineteenth century. The extent of discussion among women of their reproductive experiences is difficult to assess, since men recorded history, not women. In the late 1930s, women in the interior of British Columbia did discuss their birth control problems with each other. See Mary F. Bishop, "Vivian Dowding: Birth Control Activist 1892- " in Veronica Strong-Boag & Anita Clair Fellman, eds, *Rethinking Canada: The Promise of Women's History* (Toronto: Coop Clark Pitman, 1986) 200 at 204. In the 1950s, doctors advised women not to talk about their sexual lives with other women, for fear that such conversation would increase the divorce rate. See Wendy Mitchinson, "The Medical Treatment of Women" in Sandra Burt, Lorraine Code & Lindsay Dorney, eds, *supra*, note 22 at 250. Until 1969, any sale or advertisement of birth control information or devices, including abortion, was a criminal offence, a prohibition which likely deterred much conversation about reproduction and which continues today for abortion. See the *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.

³¹A pervasive social phenomenon is sometimes best illustrated by example: On May 12, 1982, many male Members of the House of Commons laughed when Margaret Mitchell raised the problem of wife battering as a widespread and serious reality for Canadian women. Canada, Debates of the House of Commons (12 May 1982) at 17734. For a general description of the gendered patterns of speech and the network of laws that have silenced or devalued women's speech, see Lucie E. White, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 Buff. L. Rev. 1 at 6-19. But perhaps the only citation necessary here is Sigmund Freud, who heard women's complaints about sexual abuse but did not listen, refusing to believe they were true and inventing a theory that labelled the female victims as ill. See Jeffrey Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (New York: Farrar, Straus & Giroux, 1984).

³²Beryl Lief Benderly, *Thinking About Abortion* (Garden City: Dial Press, 1984) at 64: "Great forests have been felled to permit authors — usually men — to debate the morality of abortion, but hardly a sapling sacrificed to record what women have actually undergone." Benderly's statement that the debaters of abortion morality have been "usually men" is, I would submit based on my reading, only close to accuracy within the past few years; before that, the debaters of the morality of abortion were overwhelmingly men.

³³See, e.g., Ellen Messer & Kathryn May, *Back Rooms: Voices From the Illegal Abortion Era* (New York: St. Martin's Press, 1988); Canada, *Report of the Committee on the Operation of the Abortion Law* (Ottawa: Supply & Services, 1977) at 177-203 (Chair: R. Badgley); Linda B. Francke, *The Ambivalence of Abortion* (New York: Random House, 1978); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); Amicus Brief for the National Abortion Rights Action League, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

about abortion appears intractable is because women's voices — the only voices of the experience — have not framed nor even participated in the debate. The significance of women having an equal role in creating the lexicon cannot be underestimated. Increasing the participation of women in the creation of the discourse, adding the formerly excluded voices, will cause the creation of new words and new ways of thinking. As the women in the novel *Native Tongue*³⁴ discovered, talking in a new language creates a new reality.

Silence has not been golden nor should it be a posture of democracy. Whatever the other injustices of the silencing of women — and they include the thousands of women who die each year around the world from patriarchy's laws on abortion — the creation of the discourse by men puts into question the results of the democratic process. If what goes into a democratic process is biased against women, so too is what comes out. If representatives and officials only work with concepts and words that have been fashioned by men, from men's perspectives, no real equality or democracy is possible for women. In short, it is not good enough to tell women that they can sing along with men, even form half the chorus, if men still pick the tunes and determine what counts as music in the first place.

The unequal participation by women in the creation of the public lexicon is not merely an issue of political legitimacy but also a legal one. In constitutional adjudication, the courts must be concerned about and consider arguments that address and mitigate the relative lack of democracy for women. The Supreme Court has stated several times that the very purpose of the *Charter* is to make Canadian society free and democratic, and that the interpretation of the substantive rights and freedoms, as well as s. 1, must be guided by the values and principles essential for a free and democratic society.³⁵ Chief Justice Dickson makes this clear in *R. v. Oakes*.

Inclusion of these words [a free and democratic society] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a

³⁴Suzette Haden Elgin, *Native Tongue* (New York: Daw, 1984).

³⁵"Free and democratic society" are the last words of the first section of the *Charter*: "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".

limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.³⁶

For the Chief Justice, democracy as a concept and aspiration is more than a particular process of government. As C.B. MacPherson states, "Democracy is now seen, by those who want it and by those who have it...and want more of it, as a kind of society — a whole complex of relations between individuals — rather than simply a system of government."³⁷ The democratic process is a means of implementing the deeper principle of democracy: self-determination. Autonomy is not a virtue in opposition to democracy but is the foundation of the democratic system, as recognized by Dickson C.J.C. in *R. v. Big M Drug Mart*:

It should 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.³⁸

It is no accident that Justice Wilson, in her path-breaking judgment in *Morgentaler*, quotes these statements by Chief Justice Dickson on the substantive meaning of democracy.³⁹ Her judgment is a gentle rebuke to those who call themselves democrats while denying women the autonomy that forms the well-spring of democracy.⁴⁰

³⁶[1986] 1 S.C.R. 103 at 136, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200.

³⁷C.B. Macpherson, *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973) at 51.

³⁸*R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 346, 3 W.W.R. 481, 18 D.L.R. (4th) 321, Dickson, C.J.C. The court ought not to be quickly pegged as committed, by these comments, to particular political or economic theories. Autonomy is not the exclusive aspiration or property of liberal democracies, nor does it require capitalism. For arguments from a socialist perspective in favour of greater degrees of democracy, *principally because more democracy leads to more freedom*, and a conclusion that socialism is necessary for advancing democracy and hence freedom, see Frank Cunningham, *Democratic Theory and Socialism* (Cambridge: Cambridge University Press, 1987). Capitalism may be the antithesis of any democratic system which seeks to secure personal liberty and render the exercise of power over people socially accountable (see Samuel Bowles and Herbert Gintis, *Democracy and Capitalism* (New York: Basic Books, 1986)), at least corporate capitalism (see Robert Dahl, *A Preface to Economic Democracy* (Berkeley: University of California Press, 1985)). I leave to another day the issue of the extent to which an alternate conception of democracy, one which stresses the democratic process as a means of achieving the good character of the populace or a vision of a good society devoid of freedom, also underlies the *Charter*. That s. 1 reads "free and democratic society" may indicate that democracy is not to be equated with autonomy and equality. Be that as it may, every conception of democracy raises the issue of who has created the discourse in which the conception is expressed.

³⁹*Supra*, note 22 at 165-166.

⁴⁰Her emphasis that human dignity and autonomy are essential elements of democracy provides a sharp contrast to the judgment of McIntyre J. in *Morgentaler*, *supra*, note 22. In holding that women's security or liberty were not violated by s.251, he asserts that the court must confine itself to values that are clearly found and expressed in the *Charter*. He raises the fear of "Lochnering" and the inappropriateness of judicial excursions into the legislature's territory of policy-making.

The court has also emphasized the importance of freedom of expression to democracy. "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression".⁴¹ Who is talking in the democratic process determines the substantive result of the process and, as importantly, the substantive vision of democracy used to design the process in the first place. What the courts, and academic commentators who advocate a democracy-enhancing role for them,⁴² have not yet recognized is the importance of the question prior to who is talking; who have been the primary inventors of the language of the talk?

It is this question which I want to highlight. If democracy is for women too, as it must surely be, then not only must women be able to participate directly and fully in all branches of government, but our speech must be nourished. Women must not only enter the debates but participate equally in the formulation of the debates' vocabulary and morphology. The Chief Justice promised in *Holmes* that "the courts are and will remain allies of Canadian democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation."⁴³ Taking this promise seriously will involve correcting the gender imbalance in the creation of the discourse.

These goals are not abstract but appear sharply before the courts in litigation involving abortion. The Supreme Court in *Tremblay v. Daigle* did not answer the question of whether or not a foetus is included within the term 'everyone' in s.7 of the *Charter*, and has a right to life that limits women's rights.⁴⁴ The question provides a specific context for a consideration of democracy arguments. Arguments against any recognition of foetal rights have been and will be

For the court to interpret s.7 as protecting women's autonomy or security is considered, by McIntyre J., to be an undemocratic move.

⁴¹*Edmonton Journal v. A.G. Alta* (21 December 1989), File no. 20608 (S.C.C.) Cory J. at 5.

⁴²For example, it is not mentioned by Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987) (judicial review should be conducted to protect existing opportunities and open new avenues for democratic debate) or by David Beatty in his elegant book, *Putting The Charter to Work: Designing A Constitutional Labour Code* (Kingston, Ont.: McGill-Queen's University Press, 1987) (principle of equal self-determination mandates, *inter alia*, workplace democracy).

⁴³*Supra*, note 2.

⁴⁴S. 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The argument that a foetus is a separate person with a right to life that is violated by abortion laws was rejected by the Saskatchewan courts in *Borowski v. A.G. Can.* (1983), [1984] 1 W.W.R. 15, 29 Sask. R. 16, 4 D.L.R. (4th) 112 (Sask. Q.B.); [1987] 4 W.W.R. 385, 56 Sask. R. 129, 39 D.L.R. (4th) 731 (Sask. C.A.), but was not addressed by the Supreme Court because the case was moot: *Borowski v. A.G. Can.*, [1989] 1 S.C.R. 343, 57 D.L.R. (4th) 231.

made on the basis of women's autonomy and equality.⁴⁵ Women can also make arguments grounded in democratic principles; arguments to increase the degree of democracy for women are specifications of the requirements of equality and autonomy, the praxis of the ideal of liberation. One important step toward the attainment of more effective participation for women in public discourse would be for the court to state unequivocally that fetuses have no constitutional rights.

The full explication of democratic principles in the *Charter*, and interpretive arguments grounded in redressing women's exclusion from democratic discourse, is beyond the scope of any one paper. The task of honouring the pledge of *Holmes* is the continuing project of the *Charter*. My goal is to map out the contours of a democratic argument in the specific context of foetal rights and the *Daigle* decision. One can point to the approaches that must be developed, the histories, herstories and current realities of women's subordination that must be taken into account, if the courts are to encourage the speech of women essential for our participation and equality.

Part II will discuss the male dominance of the discourse of reproduction, to show why recognizing foetal rights would skew the emerging speech by women in a biased, masculine manner, and will also sketch briefly women's emerging discourse on reproduction, reasoning and rights.

Part III will analyze the Supreme Court of Canada decision in *Daigle* to assess the extent to which it is a step toward fulfilling the promise of *Holmes*. From women's perspectives, no ground has been lost, since the court concluded without qualification that neither foetal rights nor potential fathers' rights exist in current legislation or precedent. What is as important in the long run is what the court did not say or do. I argue that the goal of fostering women's speech, of letting women speak for ourselves in a language we create, will be helped by an adjudicative method that is empathic and cognizant of power relations; moreover the goal can be grounded in long-established principles of constitutional adjudication.

II. Silences and the Dominant Discourse

some/men
 have no language that doesn't hurt
 a language that doesn't reduce what's whole
 to some part of nothing
 — Ntozake Shange⁴⁶

⁴⁵Catherine Tolton, "Medicolegal Implications of Constitutional Status for the Unborn: "Ambulatory Chalices" or "Priorities and Aspirations" (1988) 47 U.T. Fac. L. Rev. 1; *Factum of the Women's Legal Education and Action Fund, Borowski v. A.G. Can* (on file with author).

⁴⁶*A Daughter's Geography* (New York: St. Martin's Press, 1983) at 37.

Women have always struggled to find a voice of our own but our discourse has been muted, incomplete and certainly not public. The language used by legal linguists to conceptualize and control sexuality, pregnancy, abortion and birth, has been heavily influenced by two powerful and male-dominated institutions: organized religion and the medical profession.⁴⁷ Their language, not women's experiences, has framed the laws about women's bodies. The essential first step toward the understanding and unfolding of a women's language, concepts, theories and morality, is to hear every woman's story. We will not achieve freedom and equality unless we listen very, very carefully to what women are saying, unless we begin with a phenomenology of women's lives. No one can say how women will talk about conception, pregnancy, abortion and birth once we are allowed to speak freely, to converse with each other and with men about the meaning of our lives. Our stories will be different, in part because of the oppressions that have cut into women on the basis of race and class. But our bodies, with their shared biological characteristics and processes such as menstruation, provide a common foundation of experiences and knowledge. Our bodies have been the primary site of our oppression and have been ignored within moral traditions based on religious thinking⁴⁸; yet they will provide the basis of our language and our liberation. As Adrienne Rich implores us to do, "thinking through the body" will cause new meanings and "thinking itself will be transformed".⁴⁹

A few examples will illustrate the misogyny and partiality of the dominant discourse. Consider first the word 'reproduction'. It derives from the word 'production', which implies a mechanical process. Production describes the making of commodities. The metaphor of production is the dominant medical metaphor to describe the process of menstruation, pregnancy and birth: women are the machines that must produce a perfect product, a healthy baby.⁵⁰ Just as machines

⁴⁷The two institutions often worked closely together, as with the witch hunts conducted by church leaders which were aimed at killing all of the women healers and wise women in communities. See Barbara Ehrenreich & Deirdre English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (Garden City, N.Y.: Doubleday, 1978) at 33-39.

⁴⁸Beverly Wildung Harrison, *Making the Connections: Essays in Feminist Social Ethics* (Boston: Beacon Press, 1985) at 129-130. ("I want to stress, then, that we have no moral tradition in Christianity that starts with body-space, or body-right, as a basic condition of moral relations. (Judaism is far better in this regard, for it acknowledges that we all have a moral right to be concerned for our life and our survival.) Hence, many Christian ethicists simply do not get the point when we speak of women's right to bodily integrity. They blithely denounce such reasons as women's disguised self-indulgence or hysterical rhetoric.")

⁴⁹Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (New York: W.W. Norton, 1976) at 284-286.

⁵⁰Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (New York: Harper & Row, 1985); and see the insightful study of the contrast between women's experiences and medical understanding by Emily Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press, 1987).

are separate from their products, so too are women separate from their 'products', children. Doctors, not women, 'deliver' the product and improve its quality. Mothers, like machines, have no control over what they produce but are programmed by managers and technicians.⁵¹ The medical model of production overlaps and supports the notion that birth is a 'natural' event. Women menstruate, become pregnant and give birth because that is what their bodies are designed for; women themselves are simply living through a biological process into which they have no input. The political purpose of such a depiction is plain: "[T]he tradition of describing birth as a natural event has served the normative purpose of discounting the value of women's experiences and activities."⁵²

The label of 'reproduction' adds insult to injury for it implies that the product is mass-produced in the same way as copies of papers are reproduced on Xerox machines, with all copies being identical. No word could be more inappropriate to describe the process by which a unique woman creates another unique individual. The language used in artistic endeavour — creation, imagination, originality — that recognizes each painting or book as unique and requiring mental effort/physical labour, is far more appropriate than the language of commodities. What if the term 'reproduction' was replaced with 'creation' or 'human creation'? This would emphasize another meaning of the word 'pregnancy' — "imaginative, inventive".⁵³ Would this not help us remember constantly that all women and men are born of women, that all exist of/within⁵⁴ a woman for months, that all life is impossible without the work of women? The word 'creation' is used in the Biblical myth of a supreme male God creating the planet and the species, but the derogatory term 'production' is used to refer to what women do. The closest word is procreation, which is heavily laden with religious connotation and retains the root of production. Maybe we need a new word altogether, a word like 'freation'. The 'f' signifies female, the rhyme to creation connotes the work and imagination involved, and the first syllable, 'fre', reminds every speaker that the action/process should only be done under conditions of freedom.

Consider next the language used to describe the unity of egg and sperm. The vocabulary of ontology — of being and existence — has no word that adequately expresses the phenomenon of emerging life of/within a woman. The terms 'zygote, embryo, foetus' are not women's words, they are the labels of

⁵¹And hence the physician's inability or refusal to listen to women patients, for machines of course do not need to be consulted. See Sue Fisher, *In the Patient's Best Interests: Women and the Politics of Medical Decisions* (New Brunswick, N.J.: Rutgers University Press, 1986).

⁵²Virginia Held, "Birth and Death" (1989) 99 *Ethics* 362.

⁵³*The Concise Oxford English Dictionary*, 6th ed. (Oxford: Oxford University Press, 1976) at 872.

⁵⁴I say "of/within" because no preposition expresses the feeling of pregnancy, what women have called "me/not me."

science and its production model. The root of foetus is 'fe', meaning 'to produce'. Many women have appropriated the terms for at least two reasons: as a foil against the morally-charged terms popularized by the anti-abortion movement of 'unborn child, baby', with their premise of discrete and isolated human beings; and because the three science terms at least acknowledge that a process is taking place. Moreover, medical terminology is chosen by default because no women's language exists. Women judging the metaphors and concepts of language to see what fits with their experiences find an ontological omission or void. Marie Ashe reveals the depth of the chasm: "Even to speak of the pre-birth period as one of mother-child "interdependence" does not begin to do justice to the experiential reality of pregnancy as a state of being that is neither unitary nor dual, exactly; a state to which we can apply no number known to us. Pregnancy discloses the truth of paradox."⁵⁵

One old and influential ontological model, but so anomalous as to be comprehensible only by faith, may at first glance seem analogous; on closer examination however, it epitomizes the patriarchal core of Western religious thought. The Holy Trinity posits three persons in one: God the Father, God the Son and God the Holy Spirit. The three persons are *in* one, just as the model behind calling a foetus a 'person' from conception is that of one separate person inside another, with the mother as a mere container. The three persons of the Holy Trinity are male persons and have been posited by men, perhaps explaining why faith, not experience, is essential for comprehension. The role of the mother is obliterated in the same way as the anti-abortion rhetoric and imagery erases the mother.⁵⁶ Patriarchy, through both religion and medicine, took pregnancy and subverted the process into a model of separate persons within one person, imposing its way of thinking about human life on women. Unsurprisingly, the foetus is visualized as a miniature man, more precisely of late as a male astronaut inside a uterine spaceship.⁵⁷

A phenomenological account of pregnancy should make us wary of adopting anything other than processual language. Women use processual language to describe their experience: "'My period is late'; 'I am pregnant'; 'I am going to have a baby'."⁵⁸ When a pregnancy is wanted, a woman may use the words of 'baby and child' at an earlier stage and tells her family and friends that she is going to have a baby. She says she is going to have a baby, she doesn't say that she already has a baby, thus reflecting in her language the process of

⁵⁵Marie Ashe, "Law-Language of Maternity: Discourse Holding Nature in Contempt" (1988) 22 *New Eng. L. Rev.* 521 at 551.

⁵⁶Rosalind Pollack Petchesky, "Fetal Images: The Power of Visual Culture in the Politics of Reproduction" (1987) 13 *Feminist Studies* 263.

⁵⁷For a cogent analysis, see Zoe Sofia, "Exterminating Fetuses: Abortion, Disarmament, and Sexo-Semiotics of Extraterrestrialism" (1984) 14 *Diacritics* 47.

⁵⁸Benderly, *supra*, note 32 at 5.

her body. The vernacular of the anti-abortionists does not recognize the process of the woman's body. Calling a foetus a child from the moment of conception submerges the woman and the absolute necessity of a woman's body for progression through the stages of foetal development. The label ignores altogether the reality that pregnancy is a process of a woman's body, not something which simply happens *inside* a woman's uterus like a pacemaker working inside a woman's heart.

The different language which women use to describe their experiences, depending on whether they are happy or sad about the pregnancy, and the stage of pregnancy they are in, point to fundamental problems with traditional structures of thought. The contextualization of how a woman thinks/feels/acts about a pregnancy depending on her circumstances (for a woman may be very upset about one pregnancy but very happy about another) is a rich contrast to the objective, universalizing, absolutist reasoning that constitutes the methodology of the anti-abortionists. Their argument that the product of conception has an absolute right to life, an absolute right to use the mother's body, does not permit any attention to the context of the mother's emotions/experiences. Indeed, it does not even permit recognition of the existence of a mother.⁵⁹ It is a single-focus, abstract and alienating form of reasoning — alienating in the classic sense of separating a person from what she is doing, for the woman is divided into parts, her foetus removed from the rest of her mind/body. The reasoning is deeply religious, even when cast in non-religious terminology, for it posits absolute, intrinsically wrong actions that must be proscribed by rules because of human weakness and immorality.⁶⁰ Our tendency to sin once cast out of the Garden of Eden (because of Eve's folly) can only be controlled by absolute Commandments.

⁵⁹In many of the books which I have read that support the Right-to-Life position, women are either barely mentioned or denigrated. For example, in John Powell, *Abortion: The Silent Holocaust* (Allen, Texas: Argus Communications, 1981), the word 'woman' does not even appear in the first third of the book except in a summary of *Roe v. Wade*. John T. Noonan Jr, *A Private Choice: Abortion in America in the Seventies* (New York: Free Press, 1979) expunges women by referring to us almost exclusively as "the gravida" (a Latin term meaning 'pregnant one') or "the carrier."

⁶⁰Luker, *supra*, note 6 at 158-191; Harrison, *supra*, note 48 at 115-134; Randall Lake, "The Metaethical Framework of Anti-Abortion Rhetoric" (1986) 11 *Signs* 478. The religious grounding of the suppositions of anti-abortion arguments (and laws) supports Wilson's analysis in *Morgentaler*, *supra*, note 22 at 174-180, that to force a woman to carry a foetus to term is a violation of s.2 (a) of the *Charter*, freedom of conscience and religion; not because, as she argues, the decision is a moral one and protected by freedom of conscience (for it is too early to tell if women will primarily cast their decision as moral ones once free of subordination) but because freedom of religion protects freedom not to have a religion and in this context not to have one's life determined by religious modes of thinking.

The use of absolute rules corresponds and connects to the 'Big Dichotomies'⁶¹ which characterize Western thought, such as mind/body, reason/emotion, public/private. Women's reproductive experiences uncover the falsity of dichotomies. How women think about their bodies during pregnancy, for instance, is very much influenced by how they feel about being pregnant.⁶² The practise of mothering involves thinking that unifies intellectual and emotional fields.⁶³ As Colleen Sheppard has suggested, we need a word to signify thinking/feeling that transcends the reason/emotion categories.⁶⁴ Dichotomies mask the truth that life is about ambivalences and compromises, more hours of dusk and sunrise than the seconds of high noon and midnight. Absolute rules are grounded in dichotomous thinking, for they signify that something is either right or wrong, with nothing in between.

Perhaps the pervasiveness and danger of dichotomous thinking is best revealed by a fundamental one, the person/thing dichotomy.⁶⁵ The pro-life movement argues that either the foetus is seen as a person with full moral status or it is a thing like a chair or table.⁶⁶ Since it is not a chair, it must be a person. As with other dichotomies, the first category is good but the second is bad, like

⁶¹The term first popularized by Alice A. Jardine, *Gynesis: Configurations of Woman and Modernity* (Ithaca, N.Y.: Cornell University Press, 1985) at 71.

⁶²See Robin West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1 at 29-32; Finley, *supra*, note 29 at 900-901:

If a pregnancy is wanted, many women may feel an ecstatic connected wholeness with the wonder of their growing body. The developing fetus is not just part of her; it is her and part of a seamless web. Whatever is done to or for it, is done *to* her, not just through her. If the pregnancy is unwanted, conflict with an opposed autonomous rights holder still does not encapsulate what many women feel. The feelings may be of terrifying annihilation, of invasion by and surrender of self to the pregnancy — not of a fight against a separate being. After terminating an unwanted pregnancy, a woman does not feel as though she has vanquished an enemy, but as if she has been given herself back. Overwhelming relief, a sense of autonomy restored — but sometimes a sense of part of herself lost as well.

⁶³Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (Boston: Beacon Press, 1989) (maternal thinking is a unity of reflection, judgment and emotion).

⁶⁴N. Colleen Sheppard, "'A Way of Strength': Caring and Relations of Equality" (1990) at 1 (paper presented at the Faculty of Law, University of Victoria, March 1990, on file with author).

⁶⁵I say 'person/thing' and not the approximate formulation of 'subject/object' even though it is often used to divide those who are doing from those who are having things done to them. The phrase 'subject/object', although it nicely captures the symbiosis of language and reality (for it also appears in grammar texts on parsing sentences), is too removed from living, breathing women and men who are persons. Moreover, the word 'subject' has another connotation, that of someone ruled by a monarch (as in the Oscar Wilde quip, "the Queen is not a subject"), implying precisely the opposite of the hierarchy in the phrase: subjects rule, objects are ruled upon.

⁶⁶For example, the dichotomy was starkly put in the *Daigle* litigation in the *Factum of the Intervenor R.E.A.L. Women of Canada* at 3: "[Either] women conceive and bear children whose lives have inherent dignity which is recognized from the moment of conception or they conceive and bear entities disposable like property prior to birth."

reason/emotion and mind/body. The dichotomy of person/thing is often broken down into one of two sub-categories. The opposite of persons can be cast in at least two ways, as machines or animals. The person/machine dichotomy labels the foetus as a person and its mother as the machine, the ambulatory incubator that must be managed to deliver its product. The dichotomy perfectly reflects the medical model of life-creation as production. The person/animal dichotomy again labels the foetus as the person, its mother as engaging in natural, that is, animalistic acts of carrying and dropping her offspring.⁶⁷ Since one part of a dichotomy can only exist with its opposite, when the anti-abortionists call a foetus a person, they are calling its mother a thing, a vessel, incubator, carrier. Things do not even need to be acknowledged; hence their visual imagery which rubs out the mother.⁶⁸ "The binarist logic of masculinist thought is stumped by contextual relations like that of the fetus to the woman's body, and on the subject of reproduction, it still employs an Aristotelian model which accords *all* of the transformative, generative power to males and reduces females to mere nurturant vessels for male seeds."⁶⁹

The masculine language and concept that permeates and has especial significance in legal discourse on creation is rights. The traditional, male-stream formulation of rights is that of trumps attaching to separate individuals. A person is separate from and independent of all others, possessing rights as a means of stopping others from infringing upon his space, his autonomy, his freedom to do what he wants. Visualizing the foetus as a miniature man fits perfectly and circularly with the ascription of rights to the foetus: if the foetus is a separate man, he must have rights, and if a foetus has rights he must be a separate man. Either way, the foetus has rights that always override, or must at least be balanced against, the conflicting rights of mothers.

The notion of separate individuals that underlies the conventional concept of rights is not the way women generally think about themselves⁷⁰ and is utterly inappropriate as a description of a woman who is pregnant. The mother is creating the foetus, with her mind and her entire body involved in the labour. The foetus requires her labour in order to develop; it is neither separate nor independent. To talk about autonomy of the foetus, which is necessary to give the foetus rights, is nonsensical speech because foetal autonomy can exist only as part of a woman's freedom. For the law to ascribe rights to the foetus which must then be balanced against a woman's rights is also a completely inaccurate

⁶⁷Held, *supra*, note 52.

⁶⁸Petchewsky, *supra*, note 56; Sofia, *supra*, note 57.

⁶⁹Sofia, *ibid.* at 55.

⁷⁰West, *supra*, note 62. (The separation thesis of human nature underlies masculinist legal theory, while the connection thesis underlies feminist legal theory). The ovarian work is, of course, Gilligan, *supra*, note 33, which has helped birth a rich literature on the differences between women's and men's sense of self and moral development.

depiction of how women think about being pregnant and how they decide whether to continue the pregnancy or have an abortion. I have yet to read any description of a woman facing an unwanted pregnancy who used the cold calculus of competing rights as her method of decision-making. As many feminists have pointed out, women think more in terms of caring rather than in terms of competing rights. Their decision-making strategies are more contextualized and relational, concerned with the well-being of the people they love and the responsibilities they labour under.⁷¹ A caring approach does not mean that women will always be concerned with maintaining relationships and accordingly will never have abortions. For one thing, pregnancy is a relationship a woman has with herself, and caring for herself may necessitate an abortion. As well, pregnant women care for others, their children and other loved ones. Decisions about what is best for the children, and the child that will be born if the pregnancy is continued, may also lead a woman to conclude that an abortion is the best option. Moreover, for caring not to degenerate into victimization and passivity, it must always include the possibility of severance of relationships.

Women have begun a reconceptualization of rights discourse to reflect better our experiences and identities as women. The notion of autonomy must be rethought,⁷² as must the intentionality and deliberateness that underscore and animate autonomy. "How might the plot of human subjectivity be reconceived...if pregnancy rather than autonomy is what raises the question of deliberateness?"⁷³ If women's equality means anything, or if we are ever to achieve it, the very definition of rights must not continue to be done by men.

Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is at issue in this case is one such right and is properly perceived as an integral part of modern women's struggle to assert *her* dignity and worth as a human being.⁷⁴

These words and perspective of Madame Justice Wilson in *Morgentaler* apply with equal cogency to the interpretation of all *Charter* words and with particular relevancy to the ordeal of Chantal Daigle.

⁷¹See Ruddick, *supra*, note 63; Gilligan, *supra*, note 33.

⁷²Such as the path-breaking work by Jennifer Nedelsky, "Reconceiving Autonomy" (1989) 1 *Yale J. of Law and Feminism* 7.

⁷³Barbara Johnson, "Apostrophe, Animation and Abortion" (1986) 16 *Diacritics* 29 at 33.

⁷⁴*Morgentaler*, *supra*, note 22 at 172. In her non-judicial writings, Madame Justice Wilson has also emphasized the need to incorporate women's perspectives within legal principles and the legal process. Not only do some areas of substantive law show a distinctly male perspective, the adversarial process is a more typically male method of dispute resolution which inhibits attention to the context of the case and prevents judges from doing what they must attempt to do — "enter into the skin of the litigant". See Madame Justice Bertha Wilson, "Will Women Judges Really make A Difference?", The Fourth Annual Barbara Betcherman Memorial Lecture, Osgoode Hall Law School, York University, Feb. 8, 1990.

In summary, even this brief and superficial foray into the silences of women, and the masculinity of language and concepts surrounding reproduction, illustrates the partiality of discourse. It is profoundly anti-democratic to impose a discourse upon members of a subordinated group, a discourse which is not their own, and then tell them they must achieve equality within that discourse. The language of foetal rights, with its dichotomies, absolutes and abstractions, will stymie, thwart and regress women's emerging discourse and will have real, physical and psychological consequences for women.

To reply that foetuses should also have voices, and that the concept of foetal rights permits a foetus to be heard, is to miss the depths of patriarchal bias in discourse. Even to say that a foetus is independent with its own voice is to accept one traditional, religious, medical viewpoint of women. Moreover, the very best person to speak for the foetus is its mother, for the two are inseparable. We do not allow whites to speak for blacks, even if the whites think that they know what is best for blacks. In the same way, we must not let anyone speak for women, for that is what speaking for the foetus is about: *speaking for the foetus off/within a woman is to speak for the woman*. The argument also ignores the historical, current and pervasive reality that women have been speaking for and protecting foetuses for a very long time. It is not the case that foetuses do not have a voice; it is simply that their voices — mothers' voices — are ones that patriarchy does not want to hear.

III. The *Daigle* Decision: Toward Democratic Adjudication

The litigation over Chantal Daigle's decision to have an abortion brings to the surface the question of women's power over discourse, the realities shaped by discourse (our bodies and lives), and the institutions of democracy that sanction discursive and physical coercion. What must be analysed is the extent to which the judgment moves toward fulfilling the promise of *Holmes*.

Chantal Daigle's story is both typical yet exceptional. Like many women, she found herself in a relationship with a domineering and abusive man. When she became pregnant after reluctantly acceding to his request to go off the pill, his abuse escalated, a common pattern with violent men.⁷⁵ She left him and did not want any further involvement with him.⁷⁶ She did not want his child, nor did

⁷⁵Pregnant women have an usually high risk of being abused: Kathleen Waits, "The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions" (1985) 60 Wash. L. Rev. 267 at 287, n.102. Tremblay did not see himself as a violent man, stating he never hit her "hard enough to leave marks...We had disagreements, maybe I pushed her around a bit...that's normal for any couple." André Picard, "If Daigle Does Give Birth, Ex-lover Wants the Baby, but not Father's Duties" *The [Toronto] Globe and Mail* (26 July 1989) 1-2.

⁷⁶Contrary to popular opinion, women who suffer violence from their spouses try frequently and often unsuccessfully to leave. Most women call the police, consult lawyers and rely on friends for emotional and financial support; when they manage to get away, their former spouses often track

she wish to have a child at the present time: "I want to provide for a child in a serene stable family environment in which there is no violence".⁷⁷ Unfortunately he discovered her plans to have an abortion and went to court to stop her, a move Daigle saw as an attempt "to maintain his control over me".⁷⁸ At this point, her story becomes exceptional, yet it is still every woman's story of resistance. Trying to free herself from the domination of one man, she also had to free herself from the Quebec courts and from other pressure brought to bear upon her to continue the pregnancy.⁷⁹ Her courage, strength and determination to make her own decisions about her life shone through the barrage of media attention in the summer of 1989. Women followed every move of Tremblay and the courts, anguished with her, talked amongst ourselves late at night about the pain and horror she must be feeling, concurred with each other that she should ignore the court injunction, and participated in some of the largest pro-choice demonstrations ever held in Canada as a sign of our support.⁸⁰ We imagined ourselves in her position; her ordeal was one of our nightmares made real.

Tremblay's ability to obtain the injunction, have it upheld by another judge and further upheld by the Quebec Court of Appeal, severely tested our newfound, still shaky faith in the responsiveness of the judiciary to women's concerns and to our equality. In 1989, two earlier applications by ex-boyfriends to prevent women from having abortions had been dismissed by the courts, one in Manitoba, summarily, as a violation of a woman's rights and the other in Ontario, albeit only after the judge of first instance had granted the boyfriend's request for a veto.⁸¹ But here stood a provincial court system which, with the

them down to inflict more violence and sometimes death. See Ann Jones, *Women Who Kill* (New York: Fawcett Crest, 1980) at 314-320. ("If researchers were not quite so intent upon assigning the pathological behaviour to the women, they might see that the more telling question is not "Why do the women stay?" but "Why don't the men let them go?" at 318).

⁷⁷Daigle's affidavit, setting out her reasons for seeking an abortion: *Daigle, supra*, note 12 at 537.

⁷⁸*Ibid.* Daigle's assessment was confirmed by Tremblay's statements to the press. He did not wish to raise the child himself; at one point he said he would ask his father to raise it because "I don't have time right now": André Picard, *supra*, note 75. After winning in the Quebec Court of Appeal, he stated that "I'm going to raise the baby and I'm going to raise it with her, with my wife." "Tremblay Proclaims Work Successful in Abortion Case" *The [Saskatoon] Star-Phoenix* (19 July 1989) 16.

⁷⁹"Woman Offered \$25,000 to Carry Fetus to Full Term" *The [Saskatoon] Star-Phoenix* (13 July 1989) 6.

⁸⁰In Montreal, over seven thousand women and men demonstrated on July 27, 1989, to protest the Court of Appeal decision, and similar demonstrations were held across Canada. Elizabeth Thompson & Tu Thanh Ha, "7,000 Stage Pro-Choice Rally in Montreal" *The [Montreal] Gazette* (28 July 1989) 1. Men participated in the demonstrations and were outraged by the injunction, proving again that just as some women accept patriarchy, some men reject it. "'Well-Known' Men Back Daigle" *The [Saskatoon] Star-Phoenix* (5 August 1989) 14.

⁸¹*Diamond v. Hirsch; Murphy v. Dodd, supra*, note 10.

exception of two appeal court judges in dissent, seemed impervious and disrespectful of Daigle's personhood, disdainful of her reasons for seeking an abortion and willing to endorse and enforce Tremblay's exercise of power against her.⁸²

Our hopes rested with the Supreme Court. After the *Morgentaler* decision which struck down iniquitous abortion laws against which women had been fighting for years, we began to believe that maybe the judicial branch of government was becoming somewhat more attuned to women's interests and experiences. The Supreme Court had also recently ruled that sexual harassment was sex discrimination and had finally overturned the notorious *Bliss* decision, holding that pregnancy discrimination was sex discrimination.⁸³ Moreover, it had recently received its third woman judge, Beverly McLachlin. The court did not disappoint us in terms of the result. Although it was told during argument that Daigle had had an abortion a few days earlier, it decided to continue to hear the appeal in order to clarify the position of women. From the bench, after hearing arguments, the judges unanimously announced the lifting of the injunction, with reasons to follow.

Tremblay argued that under Quebec law a foetus has a right to life and a potential father has a right of veto over a woman's decision to have an abortion. Because both alleged rights would be denied if Daigle had an abortion, an injunction against her was the appropriate remedy to protect the rights. In reasons issued in the name of the court and not attributed to any one judge, Tremblay's arguments were dismissed. Injunctions only protect substantive

⁸²In the Quebec Court of Appeal, the three majority judges all considered her reasons for wanting an abortion and found them unacceptable. As Olsen points out, *supra*, note 6 at 123, n.82, the exercise of examining a woman's reasons for wanting to terminate a pregnancy is based on the assumption that women naturally have babies and that their choice not to procreate requires explanation. In the Quebec Court of Appeal, *supra*, note 11 at 613, Bernier J.A. explicitly articulates his reliance on this assumption: "Pregnancy is not in itself an infringement of the physical integrity of a woman, an interference with her body, but a function which is a fundamental part of her nature. The rule of nature is that a pregnancy must be carried to term." Bernier J.A. considered Daigle to be relying only on her decision to break off her living arrangements with Tremblay, a reason he found to be insufficient. Nichols J.A. did not look at her reasons but used his own standard: the pregnancy was desired, the life and health of the mother were not in danger and the child was normal. For LeBel J.A., Daigle wanted to have an abortion because of her split with her companion of several months and her apprehension of unspecified psychological troubles; needless to say, he also found his articulation of her reasons to be inadequate grounds for an abortion.

⁸³*Brooks v. Can. Safeway Ltd*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 (discrimination on the basis of pregnancy is sex discrimination, overruling *Bliss v. A.G. Can.*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417); *Janzen v. Platy Enterprises Ltd*, [1989] 1 S.C.R. 1252, 95 N.R. 81 (sexual harassment is sex discrimination). Both cases involved bringing the interpretation of a provincial human rights statute in line with clear legislative developments across the country. The Court was not initiating change but preventing the Manitoba Court of Appeal, from whose decision both cases were on appeal, from stopping change. Even so, the different tenor of *Bliss* and *Brooks* is remarkable.

rights and neither the right to life of the foetus nor the potential father's rights could be found in Quebec legislation.

The Quebec *Charter of Human Rights and Freedoms* provides that every human being has a right to life and a right to assistance when its life is in peril.⁸⁴ Tremblay argued that the term 'human being' was linguistically capable of including a foetus. The court dismissed a dictionary approach to statutory interpretation: "A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under s.1."⁸⁵ What was important was the intention of the Quebec National Assembly. The Quebec *Charter* as a whole failed to display any clear intention on the part of its drafters to consider the status of the foetus and such intention could not be inferred from ambiguous language. Tremblay also argued that the Quebec *Civil Code* recognized the foetus as a juridical person. The court rejected the argument, stating that the articles of the *Code* treat a foetus as a person only when necessary to protect its interests after it has been born. Tremblay's argument that he had rights as the father — in the court's terminology, as the potential father — was dismissed as being without jurisprudential basis. The court could find no court decision nor any Quebec legislation to support the assertion of potential father's rights.

Although the court held that a foetus was not a person within the meaning of the Quebec *Charter*, it refused to rule on the question of whether a foetus was within the term 'everyone' in s.7 of the *Canadian Charter of Rights and Freedoms*. The *Canadian Charter* only applies if state action is impugned and Tremblay could point to no 'law' of any sort that was infringing someone's rights.

The result of the appeal can only be applauded, for the court lifted the injunction and tried to put a stop to similar applications across the country. The judgment maintained the legal position of women as it existed before the flurry of injunction applications in the summer of 1989. But to what extent does the judgment improve the position of women and move toward fulfilling the promise of *Holmes*? Several positive steps are contained in the reasoning. First, the court is empathic toward Daigle's plight and accords her the dignity of not assessing her actions, either her reasons for having an abortion or the fact that she did not wait for its ruling to take action. Second, it recognizes that the question of foetal personhood is a normative one, not to be settled by the genetic and biological factors that constitute the mainstay of anti-abortion arguments. Third, in several comments about rights asserted by Tremblay as the father, the court suggests that women and men are not in identical positions regarding reproduction. All three aspects advance self-determination for women.

⁸⁴R.S.Q. 1977, c.C-12, ss 1-2.

⁸⁵*Supra*, note 12 at 553.

The judgment, however, is not unproblematic. The first puzzling feature is the overall generality and abstraction in which it is couched. This generality is in place of fuller empathy toward Daigle; the empathy shown toward her and women is too thin, omitting any delineation of the consequences to women and the political purposes of the concept of foetal rights. It is indisputable that empathy toward Daigle is required. The court was faced with litigation (a woman being forced to continue a pregnancy by court order) that none of the judges had encountered before and a circumstance (an unwanted pregnancy) that six of the judges could biologically never experience. The case is perfectly suited for, indeed demands, the exercise of empathic sensibilities to understand the consequences of a legal decision on the person most affected by the ruling, Daigle. If the court is to be an ally of democracy, it must comprehend, not merely hear, the voices of those who are in court, who have traditionally not been listened to in democratic forums.⁸⁶ Accordingly, empathy for the 'Other' must be an integral aspect of adjudication if the court is to deliver on its promise to provide an effective voice and remedy to those excluded from the democratic process. The 'Other', the member of a group lacking linguistic and legal power, was Daigle. Empathic adjudication does not invariably necessitate equal empathy for both parties. To say that an equal amount of empathy must be bestowed on everyone is another attempt to impose formal equality on people who are in fundamentally unequal positions in an unequal society, a device which can perpetuate inequalities. Moreover, in this case the Supreme Court of Canada was faced with a situation where the lower courts (except for the dissents) had been exclusively empathic toward Tremblay and the foetus as an entity separate from Daigle, unwilling to hear Daigle's voice at all.⁸⁷ Empathy toward Daigle had to offset what had been an almost automatic identification with the foetus and Tremblay.

On a couple of pages, but slipped almost into the margins, appear empathy and sensitivity toward Daigle's plight of being dragged into the courts and ordered to continue a pregnancy against her will. Less than three pages, at the beginning of the judgment, contain what the court calls 'facts and procedural history', consisting of the affidavits of the parties and a doctor and a summary by the court of the abuse she suffered and the process she was dragged

⁸⁶For a general discussion of the role of empathy in constitutional cases, see Lynn N. Henderson, "Legality and Empathy" (1987) 85 Mich. L. Rev. 1574; for discussion of the aspects of emotion that improve judging, see Martha L. Minow & Elizabeth V. Spelman, "Passion For Justice" (1988) 10 Card. L. Rev. 37.

⁸⁷Henderson, *ibid.* at 1620-1638, concludes that the American judges, in *Roe v. Wade*, 410 U.S. 113 (1973) and in their subsequent decisions on abortion, were far more empathic toward fetuses than toward women, and that it has been the lack of empathy toward women from the beginning that has rendered *Roe* so vulnerable. The fate of *Roe* shows the potential dangers of winning a result by inappropriate methodology.

through.⁸⁸ Later, in stating why it would deal with the question of the statutory rights of the foetus, the court's language displays empathy with women and with Daigle.

Second, if this question is not addressed then, assuming one of the appellant's other two arguments is accepted, it will remain unclear whether another woman in the position of Ms. Daigle could be placed in a similar *predicament* through the use of a different legal procedure. In order to try to ensure that *another woman is not put through the ordeal such as that experienced by Ms. Daigle* it is important for this Court to give the guidance it can.⁸⁹

After rejecting the argument that a foetus has rights before birth under the Quebec *Civil Code*, the court considered the legal status of a foetus in the other provinces in order "to avoid the repetition of the appellant's experience in the common law provinces."⁹⁰ The language hints at empathy with Daigle's trial by judge and media: the negative descriptions of "predicament" and "ordeal" are used, with the court viewing the experience of being taken to court as so negative that it must not be replicated for other women. But other than these comments, the judgment is in formalistic tones even though unlike the earlier two decisions involving abortion regulation, an individual woman was before the court.⁹¹

The generality and abstraction likely arise in part from how the court framed the question. For the court, the issue was "the validity of an interlocutory injunction prohibiting Chantal Daigle from having an abortion."⁹² With respect to the primary statute relied upon by Tremblay, the Quebec *Charter*, the issue was "the legal question of whether the Quebec legislature has accorded the foetus personhood".⁹³ The questions could have been framed more precisely and in a way which was immediately attuned to their importance for women; for example, 'can a woman be forced by court order to continue a pregnancy against her wishes, and can a legislative assembly grant rights to foetuses which require women to continue pregnancies against their wishes?'⁹⁴ The court likely framed

⁸⁸*Supra*, note 12 at 535-538.

⁸⁹*Ibid.* at 550, emphasis added.

⁹⁰*Ibid.* at 565.

⁹¹Unlike the situation in *Morgentaler*, *supra*, note 22, or in *Borowski*, *supra*, note 44.

⁹²*Daigle*, *supra*, note 12 at 535.

⁹³*Ibid.* at 552.

⁹⁴The importance of framing the question for the direction of reasoning cannot be underestimated. In *Morgentaler*, *supra*, note 22 at 161, Justice Wilson sets out the issue in a manner which highlights the importance of the case to women: "At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled to carry the foetus to term." In contrast, McIntyre J., *ibid.* at 138, begins his dissent by stating that the task of the Court is "to measure the content of s. 251 against the *Charter*", an abstract formulation which leads him to conclude that since a general right to an abortion cannot be found in the words of s.7, s. 251 does not violate the *Charter*.

the questions as it did in order to avoid the broader debates about foetal personhood.

The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person... Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.⁹⁵

The recognition by the court that the question of foetal rights is a normative one, which is also true of potential father's rights, is a welcome step. It would have been a larger step had the court directly considered more of the general context of the debate. For what the court fails to address, other than implicitly through its comments on the "ordeal", are the consequences for women of bestowing constitutional or statutory rights to foetuses or potential fathers. Foetal rights are discussed without any attention to the context in which they would operate if recognized: the specific, material and immediate context of an individual woman's body and the general pervasive context of the subordination of women. The court does see the inseparability of the woman and her foetus: "A foetus would appear to be a paradigmatic example of a being whose alleged rights would be inseparable from the rights of others, and in particular, from the rights of the woman carrying the foetus."⁹⁶ Yet the court does not set out the negative ramifications for women of enforcing a concept of foetal rights. A more empathic approach would likely have led the court to openly consider the impact on women of the concept of foetal and potential father's rights.

Connected to this failure to consider consequences for women is the second troubling aspect of the judgment, the court's use of legislative intention and precedent to decide the case. The reliance on legislative intention to dismiss the argument based on the Quebec *Charter* fits uneasily with the purposive method of interpretation for human rights statutes consistently adopted by the court in the past few years. In *Ont. Human Rights Commission v. Simpsons-Sears, McIntyre J.* for a unanimous court stated the general approach:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment...and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but

⁹⁵*Supra*, note 12 at 552-553.

⁹⁶*Ibid.* at 554.

certainly more than the ordinary — and it is for the courts to seek out its purpose and give it effect.⁹⁷

A line of cases has developed which applies the purposive method of interpretation to human rights legislation.⁹⁸ Yet the court does not even mention *Simpsons-Sears* or its progeny, relying instead on the discredited, narrower language of legislative intention. The purposive approach to the Quebec *Charter* would have led as easily to lifting the injunction against *Daigle*. Women are indisputably protected by all human rights legislation and a dominant purpose of the legislation is to end the historic subordination of women. Interpreting 'human being' in the Quebec *Charter* as including the foetus would not help but, rather, positively hinder the attainment of equality for women and, accordingly, would not be consistent with the purposes of the statute.⁹⁹ Yet rather than assessing the assertion of foetal rights from the perspective of adopting the purposive method and ending the inequality of women, the court is remarkably formalistic, parading precedents and engaging in statutory interpretation as if the legislation before it was an ordinary statute and the litigation a run-of-the-mill commercial case.

Why did the court do this? If it had adopted a purposive interpretation, or directly considered the consequences to women of declaring that foetuses are within human rights legislation, it would have had to face squarely the political significance of the concept of foetal rights. Placed in an historical context, the concept of foetal rights is revealed clearly as a method of controlling women. It is a purely political device designed to allow other people, mostly men and usually legislators, doctors or husbands, to exercise power over women. The English Court of Appeal recognized this purpose when it was asked to extend

⁹⁷[1985] 2 S.C.R. 536 at 547, a judgment building on *Ins. Corp. of B.C. v. Heerspink*, [1982] 2 S.C.R. 145, 43 N.R. 168, Lamer J., and the unanimous judgment in *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, 6 W.W.R. 166, 21 D.L.R. (4th) 1.

⁹⁸*C.N.R. Co. v. Can. (Can. Human Rights Comm.)*, [1987] 1 S.C.R. 1114, 76 N.R. 161, 40 D.L.R. (4th) 193; *Robichaud v. Can. (Treasury Bd)*, [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577; *Brossard (Town of) v. Que. (Comm. des droits de la personne)*, [1988] 2 S.C.R. 279; *Brooks v. Can. Safeway Ltd*, *supra* note 83; *Janzen v. Platy Enterprises Ltd*, *supra*, note 83.

⁹⁹*Brooks*, *ibid.* at 1238, provides a very close analogy. Dickson C.J.C., writing for a unanimous court, stated that to view the respondent's plan as not discriminating on the basis of pregnancy "goes against one of the purposes of anti-discrimination legislation. This purpose...is the removal of unfair disadvantages which have been imposed on individuals or groups in society....a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation."

In the same way, in the *Daigle* case, to create foetal rights would not remove the unfair disadvantages suffered by women, but exacerbate them; the concept of foetal rights would sanction one of the most significant ways in which women have been disadvantaged, *i.e.* the control of our reproductive decisions and actions during pregnancy.

its wardship jurisdiction to foetuses. "[T]he only purpose of extending the jurisdiction to include a foetus is to enable the mother's actions to be controlled."¹⁰⁰ The idea of foetal rights and personhood only entered political discourse when women began to achieve some control over our lives, when we gained a measure of freedom from the rule of fathers and husbands, when we could exercise some self-determination. With the rise of the women's movement has come, as a counter-attack, the concept of foetal personhood to guarantee women's traditional role in the patriarchal family.¹⁰¹ Abortion restrictions can no longer be overtly justified in order to ensure that women fulfil the function of mothers subject to the control of men. Hence laws are rhetorically justified as necessary to protect the foetus.¹⁰² Consider, for instance, that while all advocates of foetal rights state that someone must represent and speak for the foetus, they refuse to allow the mother to be that representative, proving the point that foetal rights are a method of controlling, not empowering or valuing, the women who create, nurture and deliver foetuses. Foetal personhood is the latest weapon in the battle to deny women's personhood (I choose the military metaphors deliberately), a relationship understood by the theologian Beverly Wildung Harrison:

First, the historical struggle for women's personhood is far from won, owing chiefly to the opposition of organized religious groups to full equality for women. Those who proclaim that a zygote at the moment of conception is a person worthy of citizenship continue to deny full social and political rights to women...To equate a biologic process with full normative humanity is crass biologic reductionism,

¹⁰⁰*In re F. (in utero)*, [1988] 2 W.L.R. 1288 (C.A.) at 1306, Balcombe J. Pregnant women have been assaulted and imprisoned under the banner of protecting their foetuses. See Isabel Grant, "Forced Obstetrical Intervention: A Charter Analysis" (1989) 39 U.T.L.J. 217.

¹⁰¹Rosalind Pollack Petchesky, "Antiabortion, Antifeminism and the Rise of the New Right" (1981) 7 *Feminist Studies* 206; Dubinsky, *supra*, note 6 at 31 ("R.E.A.L. Women...oppose no-fault divorce, universal free child care, enforced affirmative action, equal pay for work of equal value, and prostitution... They support all policies which uphold the Judeo Christian view of traditional marriage and the family"). Reading these and other academic studies of the rise of what one commentator has called the "cult of foetal personhood" did not prove the thesis as forcefully to me as reading some volumes of the leading anti-abortion journal from the United States, the *Human Life Review*. A recent issue contains articles which condemn feminists in words so hateful they left me shaking (Frank Zepezauer, "The Masks of Feminism" (1988) 14 *Human Life Rev.* 28); denounce human rights for gays and lesbians and describe them as perverted and incapable of lasting love, in words that refuelled my shaking (Michael Levin, "Abortion, Homosexuality and Feminism" (1988) 14 *Human Life Rev.* 35; Joseph Sobran, "Voting Your Vice" (1988) 14 *Human Life Rev.* 16; Ellen Wilson Fielding, "Love and Marriage" (1988) 14 *Human Life Rev.* 70); and bemoan the rise of no-fault divorce, cohabitation and sexual activity outside marriage, and single motherhood, at which point I put aside the remaining three issues of volume 14 (Carl Anderson, "The Supreme Court and the Economics of the Family" (1988) 14 *Human Life Rev.* 44; Bryce Christensen, "The Costly Retreat From Marriage" (1988) 14 *Human Life Rev.* 62). All this and an attack on newspapers, too (Marvin Olasky, "Pulpits For Abortion" (1988) 14 *Human Life Rev.* 77).

¹⁰²Walter Dellinger & Gene B. Sperling, "Abortion and the Supreme Court: The Retreat from *Roe v. Wade*" (1989) 138 *U. Penn. L. Rev.* 83 at 109-111.

and such reductionism is never practised in religious ethics except where women's lives and well-being are involved.¹⁰³

At one point the court does recognize that the question of personhood for the foetus is political: "Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature."¹⁰⁴ The political nature and uses of foetal rights is of course shared by every set of rights — women assert and use rights to end male domination — but the court has skirted acknowledging the political basis of rights except for language rights.¹⁰⁵ The court is troubled by any explicit awareness of the political origins and context of rights; hence its comments, oft-repeated in the early days of *Charter* litigation, that it decides legal not political questions, that it does not question the wisdom of laws or the merits of public policy because such political questions are for other branches of government.¹⁰⁶ Separating rights from politics allows the court to see itself as protecting interests that are beyond politics. In this case, the application of the purposive method, with its necessary inquiry into the purposes of foetal rights, would have required an admission by the court that it was refereeing a power struggle hiding behind the language of rights. Tremblay was using the concept of rights to control a member of a group, women, that the legislation clearly did protect.

The aspiration expressed in *Holmes*, that the courts be allies of democracy by giving a voice and a remedy to those excluded from democratic participation, seems to render the court's unease with political issues misguided.¹⁰⁷ Indeed, taking *Holmes* seriously compels the court to consider the entire political context in order to know who has been excluded, silenced and ignored in the democratic process generally; and to examine the impugned legislation with a view to determining the interpretations, if any, which promote the participation of

¹⁰³Harrison, *supra*, note 48 at 127. She also argues strenuously, *ibid.*, at 120-121, against the view of Christian history as always having opposed abortion and asserting an absolute value in foetal life: "Christians opposed abortion strongly only when Christianity was closely identified with imperial state policy or when theologians were inveighing against women and any sexuality except that expressed in the reluctant service of procreation. The Holy Crusade quality of present teaching on abortion is quite new in Christianity and is related to cultural shifts that are requiring the Christian tradition to choose sides in the present ideological struggle under pressure to rethink its entire attitude toward women and sexuality."

¹⁰⁴Daigle, *supra*, note 12 at 553.

¹⁰⁵MacDonald v. Montreal [City of], [1986] 1 S.C.R. 460 at 500, 27 D.L.R. (4th) 321, 67 N.R. 1, Beetz J ("Language rights...are based on a political compromise rather than on principle"); Société des Acadiens du N.-B. Inc. v. Assn of Parents for Fairness in Education, [1986] 1 S.C.R. 549 at 578, 177 A.P.R. 271, 27 D.L.R. (4th) 406, Beetz J. ("Language rights...remain nonetheless founded on political compromise").

¹⁰⁶See Patrick J. Monahan & Andrew Petter, "Developments in Constitutional Law: the 1985-86 Term" (1987) 9 Sup. Ct L. Rev. 69 at 70-78 and 83-87.

¹⁰⁷Perhaps this is one reason for relative absence or mutedness of such claims from 1986 onwards; see Andrew J. Petter & Patrick J. Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 Sup. Ct L. Rev. 61 at 68.

groups who have been shut out and disadvantaged. In other words, the court will not know who to help, whose ally to be, if it does not examine distributions of power, as it did in *Brooks*, if it does not cut beneath the rhetoric of rights to uncover the power struggles. For instance, determining the merits of a general claim of 'father's rights' in abortion decisions is aided by a broader contextual analysis of power relations. Men assert rights as fathers against the backdrop of the general subordination of women in society, as a means of ensuring their continued control over women and children. The court's terminology of "potential father's rights" represents one step forward, for it implicitly appreciates that a man's contribution of sperm in the act of conception does not make him a father in the same way as the woman becomes a mother with her physical labour and nurturance of the fertilized egg from the moment of conception.¹⁰⁸ As in *Brooks*, the court perceives the asymmetrical position of women and men in the process of reproduction; what is necessary as well is a clear articulation of the asymmetrical position of women and men within society.

The lack of a direct engagement with the political purposes of either foetal or fathers' rights constitutes a failure to develop an adjudicative method that will realize effective democratic participation by women. Moreover, the method the court relied on in place of a contextual, political analysis to dismiss Tremblay's claim, that of legislative intention, may have consequences that bode ill for women. The court leaves it open to any legislative assembly to state explicitly that foetuses are to be accorded personhood, rights or other forms of legal protection superior to that of their mothers. By throwing the issue of foetal recognition back to the legislatures, inviting repressive legislation and further litigation, the court leaves women at the mercy of legislatures dominated by patriarchal views.¹⁰⁹ The court could have increased certainty in the lives of

¹⁰⁸Forgetting that pregnancy involves the psychological, physical, emotional and intellectual energy of women was an error made by Bernier J.A. in the Quebec Court of Appeal, *supra*, note 11 at 613: "[The father's] legal interest is based on the very fact of conception which both the father and the mother were the cause. It is as much his child as it is the mother's, neither more, neither less." It is also a common error of fathers' rights advocates, even those who also support generally women's right to autonomy. For example, George Harris, "Fathers and Fetuses" (1986) 96 *Ethics* 594, argues that fathers (men who contribute their sperm) have an autonomy interest in "their" foetuses that may outweigh the autonomy interests of mothers (women who are pregnant). He ignores almost completely the work done by pregnant women, nor does he explain why the contribution of sperm makes the foetus "his".

¹⁰⁹Such laws are increasingly common in the United States, such as the Missouri statute at issue in *Webster v. Reproductive Health Services*, 109 S. Ct 3040 (1989), which declared in its preamble that the life of every human being begins at conception, that unborn children have protectable interests in life, health and well-being, and that all state laws must be interpreted to give unborn children the same rights as other persons. Every provision of the statute, save for one, then imposed restrictions on women's ability to obtain abortions, all of which were upheld by a plurality of the court. In Canada, Parliament has thus far declined the invitation by the Law Reform Commission of Canada to pass proposed legislation which imputes legal personhood to the foetus and criminalizes conduct of pregnant women while, like the Missouri statute, not banning all abortions: see

women by recognizing that foetal rights are about controlling women and by refusing to give the device judicial legitimacy.

The court also maintains uncertainty for women by not dealing with the issue of whether a foetus has constitutional rights. This question had not been addressed in *Borowski*, for the court held that *Borowski's* appeal had been rendered moot by the *Morgentaler* decision.¹¹⁰ The court would not exercise its discretion to hear a moot case because the law would be rendered uncertain if an affirmative answer to the question of foetal rights was given in the abstract, without a factual context.¹¹¹ But although this litigation provided a factual context for the question of foetal rights, the court considered that a legislative context was missing. Tremblay had argued that the *Charter* provided an independent basis for the injunction because a foetus had the right to life under s.7. However, because he could not point to a "law" infringing anyone's rights, the ruling in *Dolphin Delivery* precluded any application of the *Charter*.¹¹²

The court could have considered the *Charter* question for the same reason as it examined the question of substantive rights under Quebec legislation, namely to give guidance and ensure that other women are not put through similar ordeals.¹¹³ A negative answer to the question of whether a foetus has constitutional personhood and rights would have gone a great way toward increasing certainty for women. In order to answer the question, the court could have said, after holding that neither the Quebec *Charter* nor the *Civil Code* protected foetuses, that it would assume the opposite and accordingly consider whether the legislation would be incompatible with the Canadian *Charter*. The court would have had to deal with the claim of constitutional rights for the foetus in

Law Reform Commission of Canada, *Crimes Against the Foetus* (Working Paper #58), 1989. The Commission's report can only be described as deeply misogynistic, for it either ignores women altogether as if foetuses existed without their mothers, or it depicts women in a condescending, patronizing and demeaning manner. Women are portrayed as capricious, whimsical creatures who are the prime enemy of their foetuses, rather than as the primary protectors of foetuses. The dominance of men in even this minor branch of government cannot go unnoticed. Four of the five commissioners were men, the project coordinator and the two principal consultants were men, and four of the eight non-principal consultants were also men. For a comprehensive and compelling critique of the report, see National Association of Women and the Law, *A Response to Crimes Against the Foetus, the Law Reform Commission of Canada's Working Paper #58* (Ottawa: NAWL's Working Group on Health and Reproductive Issues, November 1989).

¹¹⁰After the decision in *Morgentaler* struck down s. 251, the sole remaining question in *Borowski's* appeal was whether a foetus was a person within the term "everyone" in s.7. The question could not be separated from the rest of the moot appeal and hence no answer was given: *Borowski, supra*, note 44.

¹¹¹In *Borowski, ibid.*, Sopinka J., writing for a unanimous court, does not recognize that a negative answer to the question of foetal rights would have produced certainty for women's legal position.

¹¹²*Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 1 W.W.R. 577 [hereinafter *Dolphin Delivery*].

¹¹³*Daigle, supra*, note 12 at 551.

the context of the constitutional rights of women. Moreover, even if it was wise to avoid deciding a constitutional issue, it could have referred to women's *Charter* rights in examining the Quebec laws. Even where no *Charter* challenge is involved, statutes are to be interpreted so as to give preference to *Charter* values.¹¹⁴ The court's decision in *Daigle* is one that gives preference to the *Charter* values of the equality and autonomy of women, yet the court does not use the *Charter* to buttress its result.

Since the court again refused to rule on the question of the status of the foetus under the *Charter*, anti-abortion groups will likely initiate further litigation.¹¹⁵ For instance, they may challenge Bill C-43, once enacted, as a violation of the alleged rights of the foetus, on the basis that foetuses are within 'everyone' in s.7 and have a right to life that is infringed by abortion laws. What the court avoided in *Daigle*, examining the purpose of the concept of foetal rights, cannot be skirted in future cases on s.7.¹¹⁶ In defining the scope of s.7, as with any other *Charter* provision, the court must begin not merely from the standpoint of men but also from the standpoint of women.¹¹⁷ Taking women's equality seriously requires an interpretation of every word that is informed by the experiences, interests, aspirations and problems of women. Madame Justice Wilson's decision in *Morgentaler* is instructive in showing how to begin to incorporate women's experiences of historical subordination and their aspirations for equality within the meaning of a *Charter* right.¹¹⁸ For the court not to do so would violate a principle of adjudication — a democratic principle — that everyone must be equally heard in the process of establishing their rights and

¹¹⁴*Hills v. A.G. Can.*, [1988] 1 S.C.R. 513 at 558, 48 D.L.R. (4th) 193 at 227; *Dolphin Delivery*, *supra*, note 112.

¹¹⁵Litigation has already been attempted: *supra*, note 23.

¹¹⁶Reliance on intention is not possible because *Charter* methodology is not oriented toward the intentions of the framers but, since *R. v. Big M Drug Mart Ltd*, *supra*, note 38, toward the overall purposes of the provisions and the *Charter* as a whole. Purposes are determined by examining the historic and linguistic contexts. The context of the impugned legislation is also critical in assessing its purpose and, especially, its effects for constitutionality. Madame Justice Wilson's recent articulation of a comprehensive contextual approach to *Charter* interpretation in the *Edmonton Journal* case, *supra*, note 41, does not preclude a conclusive negative answer to the question of the constitutional status of the foetus; indeed a negative answer is required on consideration of the context of women's subordination.

¹¹⁷In other words, it cannot decide the question of foetal rights with no attention to women's experiences and interests, and only turn to women's interests and experiences in a second stage of balancing foetal rights against women's rights.

¹¹⁸*Supra*, note 22. Her judgment is only a beginning, however, as it reflects a controversial bounded view of individuals and insufficient analysis of the purported state interest in foetuses. See Hester Lessard, "Rethinking Liberty: Reproductive Rights and Section 7 of the Charter" (1989) (on file with author).

duties.¹¹⁹ Equality for women generally, and s.28 of the *Charter* specifically, demand no less.

Women have not yet fully and publicly articulated their experiences and the speech that has occurred has been under conditions of subordination.¹²⁰ Because men have talked far more than women, from positions of power, the court will not find a dictionary of women's words or an encyclopedia of women's knowledge from which to define s.7. But the court need not fall back upon men's language and concepts by default. The promise of *Holmes* is the promotion of the conditions of a truly equal discourse. Women are beginning to talk in public about their experiences of reproduction. For the Court to constitutionalize, and thus legitimate, the language of foetal rights will have an adverse impact upon the emerging discourse. It would be an anti-democratic move by the Court, skewing the language of constitutional law and politics even further toward a male-dominated view and controlling the discussion in a way antithetical to the free and full discourse that is part and parcel of democracy. Nor will women's speech be promoted by the court continuing its refusal to answer the question of constitutional rights for the foetus. Nothing a court does is neutral, including a refusal to answer a question; 'neutral' is a word that only accurately describes the gears of an automobile. Even refusing to answer the question gives credibility to the language of foetal rights and places the spectre of constant control and surveillance over women. The *Daigle* litigation itself is proof of the consequences to one woman of the court's earlier refusal to answer the question. The only way for the court to ensure that more women talk and more men listen, to correct the gender imbalance in conversation and government on the topic of reproduction, is to decide that fetuses have no constitutional rights. Moreover, it must be stressed again that the impact is not only at the level of discourse. Creating rights for fetuses would profoundly affect the lives of women, both individually and as a group, not only in terms of abortion decisions but throughout all stages of a pregnancy and for the remainder of their lives.

For the court to consider the relative lack of democracy for women, our unequal role in creating the lexicon spoken in democratic forums, is not a radical departure from accepted judicial doctrines. It is simply an extension, or different articulation, of concerns that courts have always had. To further democ-

¹¹⁹This principle underlies the rules of natural justice, enshrined within s.7 through the phrase 'principles of fundamental justice'. It would be odd if several parts of s.7 ('everyone', 'liberty', etc.) were interpreted in a manner that violates the rationale and deep principle of the second part of s.7, the principles of fundamental justice.

¹²⁰Conditions of inequality affect directly what is said, how it is said, and how listeners react. The powerful (men) speak differently than the powerless (women) from the time they are children. The ovarian work by Robin Lakoff remains instructive: Robin Lakoff, *Language and Woman's Place* (New York: Harper & Row, 1975).

racy for women by refusing to sanction constitutionally foetal rights can be formulated as a variant of the principle that courts will not hear abstract questions. The question of foetal rights will remain at an abstract level until women have said more, far more, and have talked in public about the meaning of reproduction in their lives. Foetal rights will remain abstract because the discourse will continue to be masculine discourse and as Madame Justice Wilson points out in *Morgentaler*, men can only abstract and objectify a woman's decision about whether or not to continue a pregnancy.¹²¹

The democracy argument is also a deeper version of the rationale for standing. For example, s. 24 of the *Charter* gives standing to those whose rights are affected personally.¹²² S.24 is a democratic provision — it states that those who challenge laws should be those who are affected by them. The rationale for such a rule is not only, or even primarily, judicial economy but is a democratic one: affected persons should be able to speak for themselves, to tell the courts how the impugned laws affect their lives. No one should be allowed to speak for them. Those who say they can speak for others show a profound disrespect for them. It was this rationale, that women be allowed to speak for ourselves, that, after all, was behind the movement toward extending the franchise to women.

The democracy argument can also be appropriately framed as one of ripeness. Only when women can speak as equals about reproduction under conditions of equality will the question of the constitutional rights of the foetus be ready for judicial determination. Women and men living in a truly equal society may decide to accord foetuses a measure of personhood from conception onwards; until that future time, when the dialect and silences of subordination have long been replaced with a common language, similar action will be premature. In the same way, the democracy argument is similar to the rationale behind the non-justiciability principles, *i.e.* a question not yet amenable to judicial resolution. However, unlike traditional standing, non-justiciability and ripeness arguments, where the court refuses to answer a question, the question of foetal rights should be answered in the negative by the court. A negative answer is the best means of promoting the necessary discourse by women.

IV. Democracy and Power

Democracy may begin with talking but it is about power; not only the physical and legal exercise of power but linguistic and ideological power.

¹²¹*Supra*, note 22 at 171.

¹²²S.24 states that everyone whose rights and freedoms are infringed or denied may apply to the court for an appropriate remedy. Public interest standing, an exception to the general rule of standing, requires a litigant to have a serious interest in the matter and that there be no other reasonable and effective method to test the constitutionality of the law: *Minister of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 130 D.L.R. (3d) 588.

“Whoever controls our languages has the greatest power of all.”¹²³ What must be examined is not only the discourse but who has produced it and who has been silenced. For women, silence, not speech, has been the major product of patriarchy. Daigle became the object of patriarchal power and fought back, but her struggle was not an unqualified victory for democracy for women. The Court missed an opportunity to promote the discourse necessary for women’s full participation in democracy. Parliament decided to speak again on abortion, from a position of power that translates its words into physical power and maintains the power of the medical profession over women’s lives.

An argument from democratic principles against giving rights to fetuses considers the broader context within which the question arises. It takes account of power inequalities and histories of subordination, placing constitutional questions in the broader societal context of patriarchal control. For the Court to fulfil the promise of *Holmes*, of helping to ensure a voice for those excluded, requires it to pay attention to who is exercising power in framing the discourse. It is this form of power that is the most insidious, the least visible, and the most consequential; the power to frame the very debate in such a way as to determine the outcome before most people speak and the votes are counted.¹²⁴

Because of the court’s power, any determination by it that fetuses have rights is not a mere contribution to the discourse. The court is not like women and men who participate in the debate, for adjudication is not solely conversation. A decision of the court that fetuses have rights will have a direct and immediate impact upon women’s lives. It would restrict abortions, impose conditions and cause torts to be committed on women who are pregnant. If the court wants to promote women’s equality and women’s voices, it will refuse to tilt the discourse even further against women and will answer the question of foetal rights in the negative.

When Barbara Dodd, after having an abortion, returned to Gregory Murphy and spoke out against abortions,¹²⁵ she described herself as his student. “He knows a lot of words and he teaches me about business, politicians and the world”.¹²⁶ It is time for women to create our own words, to teach ourselves about the world; only then will we stop speaking primarily in men’s dialect and achieve the ‘dream of a common language’ necessary for our self-determination.

¹²³James Boyd White, “Law and Literature: ‘No Manifesto’” (1988) 39 *Merc. L. Rev.* 739 at 747.

¹²⁴Steven Lukes, *Power: A Radical View* (London: Macmillan, 1974).

¹²⁵*Supra*, note 10.

¹²⁶Anne Walmsley, “A Change of Heart” *Maclean’s* (31 July 1989) 18.