
Foetal Rights and the Regulation of Abortion

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In this article, the author discusses the legal status of the foetus in the wake of the Supreme Court of Canada decision in *Tremblay v. Daigle*. She examines the Court's finding that the foetus has no rights in the civil or common law and exposes the resulting difficulties with the assertion of foetal rights under the *Charter*. By drawing upon factums submitted by the parties and by anti-abortion intervenors in *Daigle* and *Borowski v. Canada (A.G.)*, the author analyzes the scientific and moral claims propounded by opponents of abortion in support of foetal rights but finds them insufficient to establish a normative argument for the recognition of such rights under the *Charter*.

The determination of foetal rights under the *Charter* would require the courts to answer the preliminary question of to whom *Charter* rights apply. The author examines the intent-based and purposive approaches to *Charter* interpretation to ascertain which approach would be better suited to a determination of the foetus' status under the *Charter*. She doubts that either approach would lead the courts to find that the foetus has rights under the *Charter* because there is no evidence of such an intention on the part of the legislature at the time of enactment of the *Charter*, and because a finding of foetal rights would substantially restrict the rights of women.

L'auteure étudie le statut juridique du fœtus à la lumière de l'affaire *Tremblay c. Daigle*. Elle analyse d'abord un des aspects de la décision de la Cour suprême du Canada selon lequel le fœtus n'a aucun droit autant en droit civil qu'en *common law*. Elle fait ensuite ressortir les difficultés que présente le fait de soutenir que la *Charte* confère des droits au fœtus. En faisant appel aux mémoires que les parties et les intervenants opposés à l'avortement ont soumis lors des affaires *Daigle* et *Borowski c. Canada (P.G.)*, l'auteure démontre que leurs arguments moraux et scientifiques ne suffisent pas à établir une norme selon laquelle on pourrait baser la reconnaissance des droits en faveur du fœtus en vertu de la *Charte*.

Déterminer les droits du fœtus sous l'empire de la *Charte* exige que les tribunaux décident d'abord à qui la *Charte* s'applique. L'auteure étudie donc les théories d'interprétation de la *Charte* fondées sur l'intention du législateur et sur les fins qu'il poursuit pour déterminer laquelle est la plus apte à faire découvrir le statut du fœtus selon la *Charte*. L'auteure doute que l'une ou l'autre de ces théories permette aux tribunaux de reconnaître des droits au fœtus en vertu de la *Charte*, car rien ne semble indiquer que telle était l'intention du législateur à l'époque de la promulgation de la *Charte* et que, de toute façon, une telle interprétation porterait significativement atteinte aux droits des femmes.

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Synopsis

Introduction

- I. The Status of the Foetus after *Daigle***
 - A. An Overview of Tremblay v. Daigle*
 - B. The Decision of the Supreme Court of Canada*
 - 1. Foetal Rights under the Civil and Common Law
 - 2. The Status of the Foetus under the Quebec *Charter*
- II. Anti-Abortion Arguments in Favour of Foetal Rights**
 - A. The Scientific Claims*
 - B. The Moral Claims*
- III. Assessing the Arguments after *Daigle***
 - A. Anti-Abortion Arguments and Legal Understandings of Personhood*
 - B. Answering the Question: The Possible Approaches*
 - 1. An Intent-Based Approach to Foetal Personhood
 - 2. A Purposive Approach to Foetal Rights

Conclusion

* * *

Introduction

In the summer of 1989, three Canadian men sought injunctions to prevent their pregnant former girlfriends from obtaining abortions. In *Murphy v. Dodd*,¹ the Ontario Supreme Court granted an injunction restraining twenty-two year old Barbara Dodd from seeking an abortion, and enjoining all hospitals and doctors within the province of Ontario from performing the abortion. The injunction was vacated a week later on procedural grounds,² and Ms Dodd obtained an abortion later that day.³ Two days after the injunction in *Murphy v. Dodd* was

¹(4 July 1989), (Ont. S.C.) [unreported].

²Mr. Justice Gibson Gray found two bases for setting aside the injunction. First, Ms Dodd had received insufficient notice to allow her to respond to the proceedings. Second, Mr. Justice Gray found that the injunction had been granted on the basis of fraud on the court. In a sworn affidavit Mr. Murphy had intimated that he was clearly the "father" and therefore "entitled" to bring the application, even though he knew that Ms Dodd had been having sexual relations with another man. Mr. Murphy also swore that he had conferred with Ms Dodd's gynecologist who was of the opinion that a "third abortion could represent a serious risk to [Ms Dodd's] life" while "a pregnancy did not constitute such a risk to her" (Motion Record, Affidavit of Gregory Murphy at 4). Ms Dodd produced an affidavit from her doctor who swore that the alleged conversation never took place.

³Ms Dodd later regretted her decision and became active in the anti-abortion movement. See K.

granted, a Winnipeg man, Steven Diamond, brought a similar application.⁴ The Manitoba court dismissed his application.⁵ A month later, in the most notorious of the three proceedings, Jean-Guy Tremblay successfully obtained an injunction preventing twenty-one year old Chantal Daigle, who was then eighteen weeks pregnant, from obtaining an abortion.⁶ The injunction was sustained by the Quebec Court of Appeal.⁷ The Supreme Court of Canada, on summer recess, held an emergency sitting and unanimously vacated the injunction.⁸ By the time the Supreme Court of Canada heard the case, the injunction restraining Ms Daigle had been valid for four and a half weeks.

In support of the applications, counsel for the applicants argued that an abortion would violate the rights of the foetus. Although the arguments varied in the three cases, counsel for the men tried to prevent the abortions by persuading the court that a foetus is a person who has rights under the *Canadian Charter of Rights and Freedoms*,⁹ at common law and under provisions of the civil law of Quebec. Central to all three applications was the premise that a foetus is a legal person whose rights outweigh those of the pregnant woman.

In vacating the injunction against Ms Daigle, the Supreme Court of Canada rejected two of the arguments that figured prominently in the applications: the notion that a foetus has rights at common law and that foetal rights exist within the civil law of Quebec. The Court declined, however, to consider the third argument made in the applications, that the foetus has rights under the *Charter*. The Court held that the status of the foetus under the *Charter* was not in issue because the case was between two private parties and did not involve government action.

In this paper, I explore the issue of foetal rights under the *Charter*. The status of the foetus under the *Charter* remains an important legal and political issue, one that has profound implications for women. The significance of this issue stems in part from the link between foetal rights and the abortion debate. If the courts accept the view that the foetus has rights under the *Charter*, any

Makin, "Woman's About-Face Causes Cheers, Shock but Perplexes Public" *The [Toronto] Globe and Mail* (20 July 1989) A14.

⁴*Diamond v. Hirsch* (6 July 1989), (Man. Q.B.) [unreported].

⁵Judge Hirschfield rejected the applicant's argument that an eight-week old foetus is a human being. He held that the "overwhelming consideration" was that Ms Hirsch had an absolute right, subject to criminal sanctions, to control her body; a right which she was exercising in deciding to terminate her pregnancy (*ibid.*).

⁶*Tremblay v. Daigle* (7 July 1989), (Que. Sup. Ct.) [unreported]. When the injunction expired ten days later, Jean-Guy Tremblay obtained an interlocutory injunction effective for the duration of Ms Daigle's pregnancy ([1989] R.J.Q. 1980 (Sup. Ct.)).

⁷[1989] R.J.Q. 1735, 59 D.L.R. (4th) 609 (C.A.).

⁸The case was heard on August 8, 1989 and the Court rendered its decision to reverse the Court of Appeal that day, with written reasons to follow. The reasons were released on November 16, 1989 ([1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Daigle* cited to S.C.R.]). Ms Daigle would have been almost twenty-three weeks pregnant at the time the Supreme Court of Canada rendered its decision had she not obtained an abortion in the United States a week earlier. By undergoing the procedure, Ms Daigle risked being held in contempt of court.

⁹Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

law permitting abortion would be open to challenge on the ground that it infringed the foetus' "right to life" guaranteed by section 7 of the *Charter*. While one cannot be certain that the recognition of foetal rights would render abortion unconstitutional in all circumstances, constitutional rights for the foetus would give those who oppose abortion a powerful tool with which to challenge any abortion law Parliament may decide to enact.

Foetal rights are in fact closely tied to the anti-abortion movement. Opponents of abortion have fastened on the idea that the foetus has legal rights and, in particular, on the belief that the foetus has a right to life. According to the argument advanced by the anti-abortion movement, when there is a conflict between the foetus' right to life and a woman's desire to end her pregnancy, the foetus' rights trump any claim the woman may have to seek an abortion except, perhaps, when the woman's own life is threatened by continuing the pregnancy.¹⁰ Because judicial recognition of foetal rights could potentially prohibit legal abortion, the attempt to secure such recognition has, until recently, dominated the anti-abortion movement's legal agenda. Foetal rights under the *Charter* have been perceived as especially useful in this regard, as they offer the potential of prohibiting abortion on a nation-wide scale.¹¹

The significance of foetal rights is not, however, limited to the abortion arena. The acceptance of foetal rights under the *Charter* will also influence how we conceptualize pregnancy, how we perceive pregnant women, and how we perceive the role of the State in regulating pregnancy. Pregnancy will become a contest of competing rights, the rights of the woman in actual or potential conflict with those of the foetus. A pregnant woman will cease to be an autonomous whole, but instead will be regarded as two legal persons. Recognizing foetal rights under the *Charter* will also have implications for the status of the foetus under other statutes. Once the foetus is a person for *Charter* purposes, it becomes easy to argue that other legislation which uses the term "person" or "child" must apply to the foetus to conform to the *Charter*. For example, child protection legislation which authorizes the State to take charge of children deemed in need of protection has generally been interpreted to apply once a child has been born. If a foetus is deemed to be a person under the *Charter*, it

¹⁰Many anti-abortion groups resist the claim that abortion may be necessary to preserve a woman's life or health on the basis that pregnancy itself can never threaten a woman's life or health and thus that abortion is never medically necessary. For example, in *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 [hereinafter *Borowski* cited to S.C.R.], Realistic Equal and Active for Life Women ("R.E.A.L. Women") made the following submission:

There is NO MEDICAL REQUIREMENT for an abortion. In cases of ectopic pregnancy and cancer of the cervix medical procedures required to preserve the life of the woman may result in the death of the child. The lack of intent to destroy the child excludes these procedures from the term abortion [emphasis in original] (Factum of the Intervenor R.E.A.L. Women of Canada in *Borowski* at 13 [hereinafter Factum of R.E.A.L. Women in *Borowski*]).

¹¹In what may be the most notorious anti-abortion case in Canada, anti-abortion crusader Joe Borowski attempted to have the portions of the former abortion law which permitted therapeutic abortions struck down as infringing the *Charter* rights of the foetus. Borowski's challenge was unsuccessful as the Supreme Court of Canada dismissed his case on the grounds of mootness. See *Borowski, ibid.*

will be possible to argue that child protection legislation must apply to a foetus and must allow the State to apprehend a foetus if its "mother's" conduct puts its well-being at risk.¹² Foetal rights could also lay the groundwork for criminal prosecution of women whose conduct during pregnancy endangered the foetus and for forcing women to undergo caesarean sections and other forms of medical treatment in the interests of the foetus. The potential impact of foetal rights under the *Charter* for the abortion debate, and for the regulation of pregnancy more broadly, renders the issue an important one for consideration.

This paper is divided into three parts. In Part I, I provide a brief overview of the decision of the Supreme Court of Canada in *Daigle*, and of its implications for the claim that a foetus has *Charter* rights. In Part II, I examine the arguments that opponents of abortion have made in support of foetal rights in *Borowski* and *Daigle*, the two foetal rights cases which have reached the Supreme Court of Canada.¹³ Drawing upon the factums submitted by the parties and anti-abortion intervenors, I argue that opponents of abortion have relied on three arguments: that science establishes an objective, non-normative definition of human personhood which includes the foetus; that it is morally wrong to deny the legal status of personhood to anyone who is biologically human; and that the foetus has already been recognized as a person in both the common and civil law. In Part III, I assess these arguments in light of *Daigle*. I conclude by urging the courts to look to feminist scholarship which is beginning to generate new ways of thinking about pregnancy that focus on the woman who is in the process of creating life. Two caveats are in order. I will be using the terms "foetal rights" and "foetal personhood" interchangeably to refer to the claim that a foetus has legal rights. In the abortion context, the argument that a foetus is a "person" or a "human being" has become virtually synonymous with the claim that a foetus has rights. Since rights under the *Charter* apply to legal persons and all natural persons within Canada have *Charter* rights, anti-abortion arguments in support of foetal rights have proceeded on the basis that if the foetus is a person, it must have *Charter* rights. The concept of foetal personhood, however, encompasses more than the claim that a foetus has rights under the *Char-*

¹²This argument has already been attempted in *Re Baby R* (1987), 9 R.F.L. (3d) 415 (B.C. Prov. Ct. (Fam. Div.)), rev'd (1988), 15 R.F.L. (3d) 225, 55 D.L.R. (4th) 69 (B.C.S.C.). In that case, a woman in labour refused to consent to a caesarean section. The medical evidence indicated that unless a caesarean were performed, the baby would die or would be seriously or permanently injured. The hospital contacted a social worker who apprehended the child and informed the attending physician he "was to do what was required medically for the child" but that the social worker was not consenting to any medical procedure to be performed on the woman. In the interim, the woman consented to the caesarean section and the procedure was performed. After the birth, the Superintendent of the Family and Child Service brought an application for permanent guardianship of the child based on the prenatal apprehension. The British Columbia Provincial Court granted the application and held that the apprehension was entirely proper. On appeal, the British Columbia Supreme Court reversed the decision, holding that a foetus is not a "child" under the *Family and Child Service Act*, S.B.C. 1980, c. 11, and thus cannot be apprehended as a child in need of protection.

¹³The Supreme Court also considered the status of the foetus in *R. v. Sullivan*, [1991] 1 S.C.R. 489, 3 C.R. (4th) 277 [hereinafter *Sullivan*]. This case differs from *Borowski* and *Daigle* because it was not brought in the context of abortion. A decision that the foetus was a person for the purposes of the *Criminal Code* would have had implications for the abortion debate.

ter. Claims that a foetus is a person have arisen outside of the abortion context, including determining whether a foetus can be apprehended under child welfare legislation as a child in need of protection,¹⁴ and whether a foetus that dies during birth is viewed by the criminal law as a human being.¹⁵ Although these assertions of foetal personhood are related to arguments made in the abortion context, I will not be addressing them in any depth here. Second, throughout this paper I will be describing pregnancy in the terms used in the factums, which is to say that I will be referring to the foetus as if it can be discussed, and its status analyzed, separately from the pregnant woman. I have used this language because it is in these terms that the arguments I seek to explore are made. I do not wish to be read as adopting this language nor the underlying vision of pregnancy the language reflects.

I. The Status of the Foetus after *Daigle*

A. An Overview of *Tremblay v. Daigle*

The facts in *Tremblay v. Daigle* are by now notorious and therefore can be canvassed briefly. Chantal Daigle became pregnant during a brief relationship with Jean-Guy Tremblay. The relationship between the two quickly deteriorated. According to Ms Daigle, Mr. Tremblay became dominant, jealous, possessive and physically abusive.¹⁶ There were frequent quarrels. On July 3rd, after a particularly abusive episode in which the police were called, Ms Daigle left Mr. Tremblay. The next day, Ms Daigle, who was eighteen weeks pregnant, began making arrangements for an abortion. When Mr. Tremblay learned of Ms Daigle's intention to terminate her pregnancy, he brought an *ex parte* application for an injunction. The application was successful and Ms Daigle was informed of the injunction against her on July 8th, 1989.

Tremblay's claim for an injunction was based on an assertion of foetal rights and on Tremblay's own right as "father" of the foetus to prevent the destruction of his "child".¹⁷ Tremblay claimed that the foetus had a right to life which outweighed any interest Chantal Daigle had in obtaining an abortion. He argued that the right to life arose from three different areas of law: the *Civil Code of Lower Canada*, Quebec's *Charter of Human Rights and Freedoms*¹⁸ and the *Canadian Charter of Rights and Freedoms*. Each of these arguments merits closer examination. Tremblay's contention that the civil law of Quebec

¹⁴*Re Baby R*, *supra* note 12. See also *Re Superintendent of Family & Child Services for British Columbia v. M.(B.)*, [1982] 4 W.W.R. 272, 135 D.L.R. (3d) 330 (B.C.S.C.); *Re Children's Aid Society of Belleville (City of) v. T.(L.) (No. 2)* (1987), 59 O.R. (2d) 204, 7 R.F.L. (3d) 191 (Prov. Ct. (Fam. Div.)); *Re Children's Aid Society of Kenora (District of) v. L.(J.)* (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct. (Fam. Div.)). While these claims can arise independent of a declaration of foetal rights under the *Charter*, *Charter* rights for the foetus give them a greater likelihood of success.

¹⁵*Sullivan*, *supra* note 13.

¹⁶*Daigle*, *supra* note 8 at 536.

¹⁷The Supreme Court of Canada forcefully rejected the idea of "father's" rights, holding that there was nothing in Quebec law that could support the existence of a man's right to veto a woman's decision to have an abortion (*Daigle*, *ibid.* at 572).

¹⁸R.S.Q. c. C-12 [hereinafter *Quebec Charter*].

regards the foetus as a full legal person rested on his interpretation of several articles in the *Civil Code* which explicitly refer to the foetus¹⁹ and on the case of *Montreal Tramways v. Léveillé*,²⁰ decided under article 1053 of the *Code*.²¹ Tremblay relied specifically on several articles of the *Code*²² which set out rules concerning the transmission of inheritances and gifts. These articles provide that a foetus is capable of inheriting property and of receiving gifts so long as the foetus is subsequently born alive and viable. These provisions parallel the common law property rules which also allow a foetus to inherit and to receive gifts, subject to the condition that the foetus be born viable.²³ Tremblay also relied on articles 338 and 345 which have no explicit counterpart in the common law. Article 338 provides for the appointment of a person known as a "curator"²⁴ to act on behalf of judicially emancipated minors and of "children conceived but not yet born." According to article 345, the role of a curator to a foetus is to act on behalf of the foetus

whenever [its] interests require it; [the curator] has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.

The effect of articles 338 and 345 is to ensure that any property a foetus may receive by way of inheritance or gift is protected until the foetus is born. Tremblay interpreted these provisions as demonstrating that the civil law recognized the foetus to be a person. He reached this conclusion based on the argument that the civil law would not have protected the property interests of the foetus if the foetus were not a person. Based on the above, Tremblay asserted that the foetus, like all other persons, had a right to life recognized by the civil law.

Tremblay alleged that the 1933 decision in *Montreal Tramways* provided judicial support for his argument that the civil law viewed the foetus as a person. In that case, the Supreme Court of Canada held that a child could sue under article 1053 of the *Civil Code* for damages resulting from prenatal injuries. The plaintiff had been born with clubfeet which her parents claimed had been caused by injuries the mother had sustained in a tramway accident when she was six months pregnant. The parents sued the tramway company, which countered that the claim disclosed no cause of action since the injuries had occurred when the child was a foetus. A foetus, the company argued, had no legal existence at civil law and therefore had no standing to sue under article 1053. The Supreme Court rejected this argument, holding that once a child has been born alive and in a viable state, the child will be deemed to have had a legal existence at the time

¹⁹This article was written, and the cases discussed were decided, prior to the enactment of the *Civil Code of Quebec*, which replaced the *Civil Code of Lower Canada*.

²⁰[1933] S.C.R. 456, [1933] 4 D.L.R. 337 [hereinafter *Montreal Tramways*].

²¹Art. 1053 C.C.L.C. provides:

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

²²Arts. 608, 771, 838, 945 C.C.L.C.

²³See *infra* note 32 and accompanying text.

²⁴Within the common law, the concept that comes closest to a curator is the notion of guardianship.

of a prenatal accident so as to be able to assert a claim for damages. Tremblay contended that this decision constituted clear evidence of the recognition of foetal personhood within the civil law since the Supreme Court would not have allowed a foetus to sue under article 1053 had it not viewed the foetus as a person.

Similar to his argument based on the *Civil Code*, Tremblay's assertion of foetal rights under the Quebec *Charter* revolved around the interpretation of specific statutory provisions. Tremblay argued that the Quebec *Charter* regarded the foetus as a human being and that the first two provisions protected the foetus' right to life. Section 1 of the Quebec *Charter* provides that "[e]very human being has a right to life, and to personal security, inviolability and freedom." Section 2 grants a right of assistance to "every human being whose life is in peril." It also imposes on all persons a duty to rescue any human being whose life is in peril.²⁵ Using a simple linguistic approach to interpretation, Tremblay argued that the term "human being" included the foetus since the foetus is a "being" which is "human" in a biological sense.²⁶ Tremblay drew support for this interpretation from the language used in other sections of the Quebec *Charter*. Aside from the preamble and the first two provisions, all of the provisions under the heading "Fundamental Freedoms and Rights" referred to rights-holders as "persons". The difference in terminology was significant, Tremblay argued, indicating that "human being" was intended to connote more than "person". Thus, Tremblay argued that in enacting the Quebec *Charter*, the legislature intended to protect the life of the foetus, and intended to impose upon Quebecers a duty to rescue the foetus, a duty which he was fulfilling in seeking an injunction against Chantal Daigle.

Finally, Tremblay claimed that a foetus is protected by the right to life, liberty and security of the person in section 7 of the *Canadian Charter of Rights and Freedoms*. Tremblay devoted few submissions to this argument, contending simply that a large and liberal interpretation of the term "everyone" in section 7 would include the foetus. Tremblay acknowledged that pregnant women also have rights under section 7 of the *Charter* and seemed to contemplate the possibility that the right to life of the foetus might conflict with a woman's right to security of the person and to liberty when the woman wished to have an abortion. However, he argued that in most pregnancies no conflict would arise because women's rights would not come into play. According to Tremblay, denying a woman access to an abortion would only infringe her rights under section 7 if continued pregnancy threatened her life or health. Absent such a

²⁵Section 2 states:

Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

²⁶Tremblay's exact submission is as follows:

Sans recourir aux dictionnaires, il est aisé de dire que «Être» c'est exister et si le foetus n'existait pas, nous ne serions pas devant cette honorable Cour. «Humain» est dérivé de l'homme, de la race de l'*homo sapiens*. Quel autre qualificatif pourrions-nous donner à l'être qui est dans le sein de sa mère? (Factum of the Respondent in *Daigle* at 8).

threat, forcing a woman to continue a pregnancy would not violate her rights and thus no conflict with the foetus' right to life would occur. No conflict arose in Chantal Daigle's case as Ms Daigle's reasons for seeking an abortion were unrelated to preserving her life or physical health.

B. *The Decision of the Supreme Court of Canada*

In a judgment which has tremendous implications for the existence of foetal rights in Canadian law, the Supreme Court of Canada unanimously rejected Tremblay's arguments for foetal rights under the *Civil Code* and the *Quebec Charter*. In addition, the Supreme Court declared that the common law does not recognize foetal rights even though an analysis of the common law was not necessary to resolve the appeal since the case was argued on the basis of Quebec law and the *Canadian Charter*.²⁷ The Court declined, however, to consider Tremblay's arguments for foetal rights under the *Canadian Charter* based on its decision in *RWDSU v. Dolphin Delivery*,²⁸ which held that the *Charter* does not apply to disputes between private persons.²⁹

From the vantage point of assessing future foetal rights claims, *Daigle* is significant in two respects. First, the decision that a foetus does not have rights in the common and the civil law is a clear pronouncement on the status of the foetus and constitutes an unequivocal rejection of what, as I will discuss in the following section, has been a central argument in support of foetal rights under the *Charter* — that the common and civil law recognize foetal rights. Second, in disposing of the argument that a foetus has rights under the *Quebec Charter*, the Supreme Court sketched out an interpretive approach which has ramifications for any future claim that a foetus has rights under a particular statute or under the *Canadian Charter*. Since, for my purposes, the decision pertaining to the common law and civil law is significant more for its result than its reasoning, I will deal with this aspect only briefly. I will devote more attention to the court's reasoning with respect to the *Quebec Charter*.

1. Foetal Rights under the Civil and Common Law

The Court's rejection of foetal rights in the civil law was based on its observation that the rule in *Montreal Tramways* and all of the foetal interests within the *Civil Code* are contingent on the foetus being born alive and viable. According to the Court, this requirement negated any claim that a foetus has rights *qua* foetus but rather supported the view that the interests contemplated by the *Code* are for the benefit of living children. This interpretation, the Court

²⁷The Court stated it had decided to examine the common law position to prevent women in common law provinces from being subjected to the same ordeal as Ms Daigle (*Daigle, supra* note 8 at 565).

²⁸[1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

²⁹The Court explained its decision to avoid the *Charter* question in the following terms:

As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position of Ms Daigle could be clarified. It would, however, be quite a different matter to explore further legal issues which need not be examined in order to achieve that objective (*Daigle, supra* note 8 at 571).

noted, was consistent with the well established "fiction of the civil law" that a foetus, which is not a legal person, will be deemed to have legal status when necessary to protect the interests of a living child.

The Court noted that all of the property rights provisions (articles 608, 771, 838 and 2543) explicitly provide that the foetus' ability to receive property is subject to the condition that it be born alive and viable. Under all of these provisions, if the condition of live birth is not satisfied, the foetus' property interests disappear as if the foetus had never existed.³⁰ This rule constitutes a clear difference between the civil law's treatment of the foetus and of legal persons. When a person dies, his or her property is dealt with according to the terms of that person's will, or if there is no will, according to statutorily dictated rules of succession. In contrast, a foetus which has received property is unable to transmit property to its heirs in the event it is not born alive and viable. The Court held that the articles dealing with the appointment of a curator also fail to establish the existence of foetal rights in the civil law since they merely provide a mechanism through which the property interests of the foetus can be protected but do not create additional rights or interests. The Court arrived at this interpretation of articles 338 and 345 in spite of the fact that the wording of article 345 of the *Code* suggests that the curator's responsibility may encompass more than the administration of property gifted to the foetus. The Court noted that even though article 345 states that the curator is to "act whenever [the foetus'] interests require it," there did not appear to be any cases in which courts have permitted a curator to assert non-economic interests on behalf of the foetus.³¹

The Court used the same reasoning to conclude that the common law does not recognize foetal rights. Like the civil law, the common law permits recovery in tort for prenatal injuries and enables a foetus to inherit property, provided in both cases that the foetus is born alive and viable.³² In rare instances the foetus has also been the subject of awards of custody³³ and of child support,³⁴ also on the condition that these awards take effect upon the birth of a viable child. As it had under the civil law, the requirement of live birth proved fatal to the claim that the foetus has rights at common law since it refuted any argument that the law grants unconditional recognition to the foetus. This conclusion, the Court noted, was consistent with most common law decisions in Canada, as well as decisions from other common law jurisdictions.³⁵

³⁰*Daigle, ibid.* at 560-61.

³¹*Daigle, ibid.* at 557.

³²The common law has allowed testators to bequeath property to "persons conceived and not yet born". In the event that the testator died before the birth of a beneficiary, the property would be held for the beneficiary until the beneficiary was born alive and viable. If the beneficiary was not born alive, or was born alive but died shortly after birth, the property reverted to the testator's estate. See *Earl of Bedford's Case* (1587), 7 Co. Rep. 7b, 77 E.R. 421 (K.B.); *Thellusson v. Woodford* (1805), 11 Ves. Jun. 112, 32 E.R. 1030 (Ch.); *Elliot v. Lord Joicey*, [1935] A.C. 209 (H.L.).

³³*K. v. K.* (1933), 41 Man. R. 504, [1933] 3 W.W.R. 351 (K.B.).

³⁴The Alberta Supreme Court held in *Solowan v. Solowan*, [1953] 8 W.W.R. 288 that when a woman is pregnant at the time of divorce or separation, the courts may make an order for child support to take effect upon birth.

³⁵See *Dehler v. Ottawa Civic Hospital* (1979), 25 O.R. (2d) 748, 101 D.L.R. (3d) 686 (H.C.J.),

2. The Status of the Foetus under the Quebec Charter

The Court began its consideration of the status of the foetus under the Quebec Charter with a discussion of the nature of the question it was being asked to resolve. In the Court's view, determining whether the term "human being" in the Quebec Charter included a foetus was a legal matter involving the interpretation of specific legislative provisions. As a legal matter, the Court was being called upon to consider whether, in enacting the Charter, Quebec's National Assembly intended to grant rights to the foetus. It was not being asked to determine whether the foetus is a human being in the biological or metaphysical sense, nor was it required to do so. This understanding emerges clearly from the following passage:

In examining this argument [that the term "human being" includes a foetus] it should be emphasized at the outset that the argument must be viewed in the context of the legislation in question. *The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather to answer the legal question of whether the Quebec legislature has accorded the foetus personhood.* 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 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.³⁶

Having defined the nature of its task, the Court indicated that a legal approach to resolving the status of the foetus would "begin with an examination of the text of the Quebec Charter before turning to a consideration of other sources which may be relevant in interpreting the Quebec Charter."³⁷ The text of the Charter, the Court noted, contained no suggestion of an intention to view the foetus as a human being:

In our view, the Quebec Charter, considered as a whole, does not display any clear intention on the part of its framers to consider the status of the foetus. This is most evident in the fact that the Charter lacks any definition of "human being" or "person".³⁸

In the Court's view, the absence of any intention to deal with the foetus was itself a reason for holding that a foetus does not have Charter rights.³⁹ With

aff'd (1980), 29 O.R. (2d) 677, 117 D.L.R. (3d) 512 (C.A.); *Medhurst v. Medhurst* (1984), 46 O.R. (2d) 263, 9 D.L.R. (4th) 252 (H.C.J.); *Borowski v. Canada (A.G.)* (1983), 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15 (Sask. Q.B.), aff'd (1987), 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385 (Sask. C.A.) [hereinafter *Borowski* cited to D.L.R.]; *Paton v. British Pregnancy Advisory Service Trustees*, [1979] Q.B. 276; *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408 (Eur. Comm. H.R.); *Queensland (A.G.) v. T.* (1983), 46 A.L.J. 275 (H.C.J.); *Roe v. Wade*, 410 U.S. 113 (1973) [hereinafter *Roe*].

³⁶*Daigle*, *supra* note 8 at 552-53 [emphasis added].

³⁷*Ibid.* at 553.

³⁸*Ibid.* at 555.

³⁹The Court stated:

For her part, [Ms Daigle] argues that this lack of an intention to deal with a foetus' status is, in itself, a strong reason for not finding foetal rights under the Charter. There

respect to other interpretive sources, the Court held that the most important background source for interpreting the Quebec *Charter* is the civil law of Quebec as set out in its *Civil Code*.⁴⁰ The Court proceeded on the assumption that in the absence of evidence to the contrary, it would be reasonable to presume that the foetus had the same status within the *Charter* as it had within the civil law. In light of its conclusion that the civil law did not regard the foetus as having independent legal status and its conclusion that the Quebec *Charter* revealed no intention to consider the foetus, the Court held that "it would be wrong to interpret the vague provisions of the Quebec *Charter* as conferring legal personhood upon the foetus."⁴¹

In the course of outlining this approach, the Court dealt with Tremblay's arguments that a foetus is a human being, both of which stemmed from a textual analysis of the *Charter*. Considering first Tremblay's submission that the term "human being", by definition, includes a foetus, since the foetus is a "being" which is "human", the Court held that the meaning of the term "human being" in the Quebec *Charter* could not be resolved using a linguistic 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 [of the Quebec *Charter*]. *What is required are substantive legal reasons which support a conclusion that the term "human being" has such and such a meaning.* If the answer were as simple as the respondent contends, the question would not be before the Court nor would it be the subject of such intense debate in our society generally. The meaning of the term "human being" is a highly controversial issue to say the least, and it cannot be settled by linguistic fiat.⁴²

In addition, the Court held that linguistic arguments, like arguments based on science or metaphysics, could not resolve the legal status of the foetus because they were incapable of generating a legal response:

A purely linguistic argument suffers from the same flaw as a purely scientific argument: it attempts to settle a legal debate by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being".⁴³

Second, the Court rejected Tremblay's textual claim based on the differing use of the terms "human being" and "person", holding that it could discern no clear logic to the differing use of the two terms. Were any distinction between the two to be drawn, the Court held that the most plausible interpretation was that the term "human being" was intended to exclude corporations, recognized in law as artificial persons, from asserting rights under the first two provisions of the *Charter*. Thus, neither of Tremblay's arguments persuaded the Court that in enacting the *Charter*, the Quebec legislature had intended to depart from the ordinary legal understanding of the term "human being".

The Court's approach to the Quebec *Charter* is salient in two respects. The first is the insight that determining the status of the foetus under the *Charter* was

is force in this argument. One can ask why the Quebec legislature, if it had intended to accord a foetus the right to life, would have left the protection of this right in such an uncertain state (*ibid.*).

⁴⁰*Ibid.* at 556.

⁴¹*Ibid.* at 570.

⁴²*Ibid.* at 553 [emphasis added].

⁴³*Ibid.* at 553-54.

a legal task which is normatively different from classifying the foetus in other disciplines. Although the Court did not expound at length on the nature of this difference, some indication of the Court's thinking can be gleaned from its discussion of the inadequacy of science, philosophy or linguistics as sources for resolving the status of the foetus within the Quebec *Charter*. In the Court's view, biological classifications of the foetus could not settle the foetus' legal status since personhood has a different meaning in law and in science. Normative considerations relating to the assignment of rights and responsibilities are central to the legal meaning of personhood, but these concerns do not enter into a science-based approach which classifies the foetus according to its internal norms. Analyses rooted in linguistics are deficient for similar reasons: they do not entail consideration of the normative aspects of the legal designation of personhood.

The Court's reasons for rejecting philosophical discourses on the moral status of the foetus are less clear. However, building upon the Court's analysis of the deficiencies of scientific understandings of personhood, it is possible to speculate as to the reasons. There are two obvious possibilities. First, legal obligations frequently diverge from moral obligations. We may, for example, have a moral duty to rescue a person in distress, but the common law imposes no general duty to rescue.⁴⁴ Even if the foetus were to have the moral status of a person, it does not necessarily follow that the foetus should be viewed as a person for legal purposes. The second reason stems from the Court's understanding of the nature of the question it was being asked to address. The question of foetal status under the Quebec *Charter* is not whether the foetus could be considered to be a human being in a philosophical or moral sense, but rather whether the legislature intended the foetus to be the beneficiary of rights contained in the Quebec *Charter*. This is not a question to which philosophy can provide an answer, but instead is one which must be answered by the more mundane approach of determining whether the Quebec National Assembly had in fact conferred rights on the foetus.

Also salient is the Court's description of what a legal approach would entail. The Court was clearly of the view that a legal analysis of foetal status must be firmly rooted in the context of the specific legislation alleged to grant foetal rights. The first step in any such analysis is to scrutinize the text of the legislation in question to determine whether a foetus is included within the terms used in the statute. However, use of the generic terms "human being" or "person" will not establish that the legislation applies to the foetus since, according to their accepted meaning within the common law and civil law, these terms do not encompass the foetus. There must, instead, be some clear indication that a foetus is to be considered a person, such as a definitional section that specifies that the word "person" is to include a foetus or that a foetus is to be included within the statute's provisions.

The Court contemplated a further step in the analysis: an examination of other sources which may assist in interpreting the statute in question. In *Daigle*,

⁴⁴Common law does impose a duty to rescue in certain situations. See *Crocker v. Sundance Northwest Resorts*, [1988] 1 S.C.R. 1186, 51 D.L.R. (4th) 321.

the Court turned to the civil law on the principle that the status of the foetus in the legal system which had spawned the legislation should inform the interpretation of the words used in the statute. However, now that the Court has ruled that the foetus is neither a person nor a human being within the common or civil law, recourse to these background understandings will no longer be necessary. While the Court did not discuss what other sources, if any, it might inspect, another potentially relevant source is the debates occurring in the legislature at the time the statute was enacted. On traditional principles of statutory interpretation, these debates may be seen to yield evidence of the legislature's intent in enacting the legislation. However, the presence within these debates of an intention to include the foetus will not be determinative if the legislation itself fails to exhibit any explicit intention to protect the foetus.⁴⁵ The absence of any such intention, however, may be taken as additional evidence that the legislature did not intend to protect the foetus. In *Sullivan*,⁴⁶ a case involving the foetus' status in the *Criminal Code* heard shortly after *Daigle* was decided, the Supreme Court did in fact use legislative debates in this way.

In *Sullivan*, two midwives were charged with criminal negligence causing the death of a person and criminal negligence causing bodily harm, following the death of a foetus during a birth they were assisting. The Court was asked to decide whether a foetus in the process of birth could be considered a person under the *Criminal Code*. Unlike most other statutes, the *Criminal Code* contains a provision defining the point at which a foetus becomes a human being. Section 223 provides that a foetus becomes a human being "when it has completely proceeded, in a living state, from the body of its mother" whether or not it has breathed, has an independent circulation or the navel string is attached. The inclusion of a definition of human being within the *Code* did not, however, entirely resolve the issue in *Sullivan* because the offence of criminal negligence causing death in section 220 refers to causing death of a "person", rather than of a "human being". The Court, therefore, had to determine whether the meaning of the term "person" within the *Criminal Code* was the same as the meaning of "human being".

To answer this question, the Court turned to the discussion in the House of Commons committee when the criminal negligence provisions were first being introduced into the *Criminal Code*. The proceedings revealed that the committee did not address the fact that the criminal negligence provisions used the term "person" rather than the term "human being". The Court also noted that prior to the revision of the *Code* in 1954, the homicide provisions had used "human being" and "person" interchangeably and surmised from this that the *Code* saw no difference between the terms. Based on these considerations, the Court held that the introduction of the criminal negligence provisions in 1954 was not intended to alter the definition of the term "person", and that "person" was to be interpreted as being synonymous with "human being" as defined in section

⁴⁵Since *Daigle* has made it clear that terms such as "person", "human being" and "child" do not include the foetus, an intention in debates to include the foetus will not be sufficient to override the settled meaning of these terms.

⁴⁶*Supra* note 13.

223.⁴⁷ This analysis suggests that, considered in concert with the absence of an explicit reference within legislation that the foetus is to be covered by its provisions, the absence of an intention to include the foetus in the legislative debates will be significant. A legal analysis will focus on interpreting a piece of legislation in light of the words used in the statute, the legislative intent, and the background knowledge that the terms "person" and "human being" do not include a foetus under the common or civil law. Unless the statute clearly includes the foetus within its terms, there will be no basis to conclude that a foetus has rights.

There are compelling reasons to support this approach when dealing with claims that a foetus is a person within a particular statute. Even before *Daigle* clarified the status of the foetus within the common law and the civil law, it was generally understood within both legal systems that a foetus was not a legal person. All existing legislation has been enacted on the basis of this understanding. For a court to hold that a general term such as "person", "human being", "child" or "everyone" is to include a foetus when this result was never contemplated by the legislature would be in many cases to alter fundamentally the substance of the legislation. For example, the nature of child protection legislation changes dramatically if one accepts that a foetus can be deemed a child in need of protection and can therefore be apprehended by the State. It is one thing to say that a child can be taken into state care when this involves removing a child from his or her home for a few days. It is, however, quite another thing to say that a foetus can be apprehended by the State when this requires either the forced removal of the foetus from the body of the pregnant woman, or the forcible taking of the woman into custody for the purpose of protecting the foetus. Whatever one thinks of the merits of allowing the State to restrain a pregnant woman in the interests of the foetus, it can hardly be said that such measures were contemplated by the legislature in enacting existing child protection legislation, much less endorsed. Arguably, if a change of such magnitude is to occur, it is the legislature rather than the courts which should make it, since the legislative process is better equipped to hear submissions from women and other groups who will be affected. It would, of course, remain for the courts to decide whether any such legislative change violated women's rights under the *Charter*.

There is little doubt that the *Daigle* approach will be used in subsequent cases asserting foetal personhood under a statute. The Supreme Court of Canada has already utilized the approach in *Sullivan*. However, the impact of *Daigle* on the claim that a foetus has rights under the *Canadian Charter of Rights and Freedoms* is not quite as clear. *Charter* interpretation differs from the interpretation of statutes in several respects, particularly in the Court's willingness under the *Charter* to adopt a large and liberal approach and to minimize the value of parliamentary intent as a source of authority.⁴⁸ However, the differences

⁴⁷The Saskatchewan Court of Appeal also considered legislative intent in *Borowski*, *supra* note 35 at 752-53, in the context of determining whether the *Canadian Charter* accorded rights to the foetus. After noting that legislative history carries little weight in *Charter* interpretation, Madame Justice Gerwing examined the debates in the Senate and House of Commons which indicated that there was no intention to change the status of the foetus.

⁴⁸*Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161; *R. v. Big*

between the *Charter* and statutes notwithstanding, there is no reason to suspect that the framework laid out in *Daigle* and reiterated in *Sullivan* will be abandoned completely. Just as the existence of foetal rights within a piece of legislation is a legal issue, the question of whether a foetus has rights under the *Charter* is also a legal issue. The Court will be required to use legal methods of reasoning to resolve the question. What remains to be seen is whether there is greater scope for scientific evidence of foetal development or for philosophical arguments on the foetus' moral standing to inform the status of the foetus in the *Charter* context. This question will be discussed at greater length in Part III.

II. Anti-Abortion Arguments in Favour of Foetal Rights

To gain firsthand knowledge of the arguments anti-abortion groups raise in support of the claim that a foetus has rights under the *Charter*, I examined factums submitted to the Supreme Court of Canada in *Borowski* and in *Daigle*, the two most significant foetal rights cases to date. Anti-abortion groups intervened in each of these cases to buttress the foetal rights arguments advanced by Borowski and Tremblay. Realistic Equal and Active for Life Women ("R.E.A.L. Women"), a group well-known for its anti-abortion views and for its promotion of the traditional family, intervened in both appeals. The Interfaith Coalition on the Rights and Wellbeing of Women and Children, a non-partisan, interdenominational organization representing a cross-section of Canada's religions, also intervened to support Borowski. Canadian Physicians for Life, L'association des médecins du Québec pour le respect de la vie, and Campaign Life Coalition intervened in *Daigle* to support Tremblay. Canadian Physicians for Life described itself as a non-profit charitable corporation with a membership of approximately one thousand physicians. L'association des médecins du Québec pour le respect de la vie characterized itself as a charitable organization of roughly three thousand physicians practising in Quebec. Campaign Life Coalition did not include a description in its factum. In addition to the factums in these two cases, I also examined most of the one hundred *amicus curiae* briefs filed at the United States Supreme Court in *Webster v. Reproductive Health Services*,⁴⁹ a case involving the constitutional validity of restrictions on abortion heard at about the same time as *Daigle*. These briefs proved insightful as a way of comparing foetal rights arguments made north and south of the border. They also revealed that the medical evidence anti-abortion groups in both Canada and the United States tout as determinative of the status of the foetus has been generated by a small number of anti-abortion experts who routinely testify in support of foetal rights.

An analysis of the factums reveals that opponents of abortion appeal to three sources of authority to support their claim of full legal personhood of the foetus. First, opponents of abortion have relied heavily on the argument that the

M Drug Mart, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.]; *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

⁴⁹109 S. Ct. 3040 (1989) [hereinafter *Webster*].

common law and the civil law have implicitly recognized foetal rights. Anti-abortionists viewed this as a powerful argument because of the principle that the *Charter* should be interpreted in light of rights that already exist within Canadian law.⁵⁰ If opponents of abortion had succeeded in establishing in *Daigle* that the common law and civil law did indeed view the foetus as having rights, the conclusion that a foetus has rights under the *Charter* would have been virtually automatic. However, in light of the Supreme Court's unequivocal rejection of these arguments in *Daigle*, I will not review them here.

Second, anti-abortion groups rely heavily on science. They contend that science establishes the foetus as genetically distinct from the pregnant woman from the moment of conception. Thus, from that point on, the foetus is a separate human person. Third, opponents of abortion buttress their scientific claims with moral or ethical arguments to the effect that anything that is biologically human must be recognized as a person. Anti-abortionists frequently draw an analogy between the contemporary resistance on the part of courts and pro-choice activists to view the foetus as a person and the historical refusal of the courts and society at large to recognize African-Americans and women as legal persons. The essence of these moral claims is that we should learn from history the error of failing to accord all human beings personhood. Of these three arguments, opponents of abortion have focused most of their energies on scientific descriptions of the foetus and on establishing the existence of foetal rights within the common and civil law. Using the factums of the anti-abortion parties and intervenors described above, I will provide a more complete picture of the two arguments that survive *Daigle*, the scientific and moral claims.⁵¹

A. *The Scientific Claims*

Arguments based on science form the cornerstone of the anti-abortion claim that a foetus is a person entitled to legal rights because they provide what appears to be an objective basis for arguing that a foetus is a distinct human life from the moment of conception.⁵² Opponents of abortion claim that science is uniquely situated to determine the status of the foetus since it is the only disci-

⁵⁰Revised Factum of the Appellant Joseph Borowski in *Borowski* at 14, para. 40 [hereinafter Factum of Borowski]. See also *Big M*, *supra* note 48.

⁵¹There are two less important anti-abortion arguments which I have chosen not to review. First, Borowski claimed that constitutional courts in Germany and Spain have granted the foetus a constitutional right to life. He argued that these decisions should be persuasive since they are consistent with the values that imbue Canadian society (Factum of Borowski, *ibid.* at 27-31, paras. 80-94). Second, Tremblay claimed that international instruments to which Canada is a signatory recognize foetal rights, and thus Canada is compelled to recognize foetal rights domestically (Factum of the Respondent in *Daigle* at 25-28). I have chosen not to review these arguments as neither appears to have been pursued forcefully, nor do they provide normative reasons for granting foetal rights.

⁵²Borowski underlined the importance of arguments based upon biology by referring to the failure of the United States Supreme Court in *Roe*, *supra* note 35, to conclude that a foetus was a person under the United States Constitution. Borowski argued that the Court's decision was based on faulty scientific evidence and suggested the Court might have come to the opposite conclusion had it had the benefit of the evidence on foetal development included in his factum (Factum of Borowski, *supra* note 50 at 27, para. 78).

pline capable of defining the beginning of human life.⁵³ In essence, anti-abortion arguments amount to a kind of biological reductionism that equates the question of the legal status of the foetus with the question of whether the foetus may be classified as a form of human life based on certain scientific variables. If the foetus is a form of human life, according to opponents of abortion it must be a legal person.

Anti-abortionists believe science establishes two irrefutable facts about the foetus. First and foremost, science provides conclusive proof that human life begins at conception and that most of what is unique about an individual is fixed at that point.⁵⁴ In his factum filed at the Supreme Court of Canada, Borowski described the significance of conception in the following terms:

Dr. Lejeune testified that upon fertilization, there are determined the nature and the unique genetic qualities of each of us as an individual human being. At that moment of fertilization, all things are fixed: the color of the eyes, the hair, the skin, the form of the nose and ears, the strength of the person and all characteristics.⁵⁵

Second, science demonstrates that from conception onwards, the foetus is, in physiological and genetic terms, a separate entity from the pregnant woman within whom it exists. Because of this distinctiveness, the foetus cannot be said to be a part of the pregnant woman, but must instead be recognized as an independent human being meriting its own legal protection. Borowski submitted:

That mother and *child en ventre sa mère*, each is a separate and distinct human being, appears obvious to us today, assisted as we are by modern science and the remarkable expansion of our knowledge of the unborn. Mother and child, each has

⁵³R.E.A.L. Women submitted that “[b]iological evidence is the only concrete evidence upon which we can conclude an entity is human and therefore worthy of special protection” (Factum of R.E.A.L. Women in *Borowski*, *supra* note 10 at 7, para. 29).

⁵⁴Some anti-abortionists emphasize the humanity of the foetus with reference to the scientific taxonomy used to classify different life forms. The point of this evidence is to show that the foetus is biologically human and does not belong to any other species. This argument is illustrated by the following interchange during Dr. Jerome LeJeune’s testimony before the United States Senate Subcommittee on Constitutional Amendments of the Committee on the Judiciary, 94th Cong., 1st Sess.:

From molecular genetics to comparative reproduction, nature has taught us that from its very beginning the “thing” we started with is a member of our kin. Being its own, human by nature, never a tumor, never an amoeba, fish or quadruped, it is the same human being from fecundation to death ...

Q: Now from the first time of fertilization or fecundation, Professor LeJeune, is it correct to say that the child is a human being and remains a human being right until his birth?

A: As far as I can understand the use of the English word, saying he is a human being is a correct definition.

Q: So, there is no stage of pregnancy later than fecundation at which he suddenly becomes a human being?

A: Oh, that is very obvious sir, because if you start with the egg of a chimpanzee, if you don’t look at the chromosomes, it is very much like, when it divides, the medilla [*sic*] of a human being. But everyone knows that a human being will never emerge from a chimpanzee being. We are at the very beginning either a chimp or a man and never can a chimp become a man or a man become a chimp (Brief of Paul Marx in *Webster* at 24-27).

⁵⁵Factum of Borowski, *supra* note 50 at 4, para. 11.

a different genetic makeup. Often they have different blood types, different sex and differently coloured skin and eyes. They are separate, distinct and unique human beings.⁵⁶

Anti-abortion arguments also make considerable use of scientifically-generated descriptions of foetal development, recounting when major bodily organs are formed,⁵⁷ when the heart begins to beat, when the foetus is able to react to pleasure or pain, and when the foetus begins to move within the pregnant woman's uterus. These descriptions serve two purposes. The first is to show that from a very early stage in pregnancy the foetus looks and "acts" like a baby. Borowski submitted:

At 56 days or 8 weeks (about the earliest time abortions are performed) the child is a fully functioning human being. All of his or her organs and body systems are in place. They only require maturation, a process that will continue for 13 or 14 years. At 8 weeks, the child's features are so clear that one can see even the creases on the child's open hand. The fingerprints are visible under a microscope. They are unique and will never change. The child is drinking his or her amniotic fluid. By 9 weeks, a child is very active and gracefully rolls around in its small domain. The child can make a fist and be seen sucking a thumb. All have graphically been portrayed on ultrasound.⁵⁸

Not only do these descriptions illustrate that a foetus looks increasingly like a baby as pregnancy progresses, they also operate on an emotional level to reinforce the similarities between infants, who are unquestionably legal persons, and the developing foetus.

Second, the accounts of foetal development allow opponents of abortion to emphasize that life is a continuum from conception to death, a notion which figures prominently in anti-abortion arguments.⁵⁹ Viewing life as a continuum beginning at conception allows opponents of abortion to emphasize the importance of prenatal development, and to claim it as the most significant developmental period of human life. Borowski, for example, submitted:

The first seven weeks [after conception] are the most crucial in the life of the child because it is then that all of the major systems of the body come into place.⁶⁰

Borowski reinforced the significance of this period of development by describing its magnitude in scientific terms:

Dr. Liley described the rapid development of the child from the first cell that comes into being upon fertilization. In a human's lifetime, there are 45 generations of cell divisions. These produce the 30,000,000,000 cells that go to make up every adult. Eight of these divisions will have occurred upon implantation of the fertilized ovum in the wall of the uterus. *30 divisions, or 2/3 of the 45 generations of cell divisions that encompass the total development of an individual's life will have taken place within 8 weeks after fertilization. 41 of the 45 divisions will have been completed before birth.* More than 90 percent of the development of the human

⁵⁶*Ibid.* at 9-10, para. 27.

⁵⁷See *e.g. ibid.* at 6-9, paras. 16-26.

⁵⁸*Ibid.* at 7, paras. 21-22.

⁵⁹See *e.g. ibid.* at 5, para. 14; Factum of the Intervenor Campaign Life Coalition in *Daigle* at 9, para. 16 [hereinafter Factum of Campaign Life in *Daigle*].

⁶⁰Factum of Borowski, *supra* note 50 at 6, para. 16.

adult is completed by birth. Dr. Liley summarized the significance of this growth as follows:

*In developmental terms we spend ninety per cent of our life in utero and indeed the die is very far cast as to the type of person we are going to be — physically, our intellectual capacities, and all manner of body functions ...*⁶¹

The significance of prenatal development leads anti-abortionists to conclude that life in this phase of human existence is worthy of protection.

The notion that life is a continual process beginning at conception and unfolding until death also allows opponents of abortion to claim that there is no rational basis for treating life in the womb differently from life after birth.⁶² The relevant point at which to begin to protect human life is conception since it is then that the process begins. Choosing a later point along this continuum as the time to commence legal protection is insupportable since any line drawn post-conception is simply an arbitrary demarcation in the developmental process. This argument allows anti-abortionists to reject other points as the moment when the foetus becomes a legal person. Two alternative points have frequently been suggested: viability⁶³ and birth.⁶⁴ The rationale for selecting viability is that once the foetus is capable of survival outside of the body of the pregnant woman, it should be entitled to independent legal protection. The justification for choosing birth is that it is the point at which the foetus is physically separate from the pregnant woman, and therefore the point at which it can be said to be a separate person in a full sense. Intervening in *Daigle*, Campaign Life Coalition rejected viability in the following way:

It is further respectfully submitted that any test for determination of "life" short of the moment of conception, such as the viability test will be an inaccurate and ambiguous standard which only serves to create artificial boundaries delineating the point at which an unborn child becomes sufficiently human to warrant the full protection of the law. As medical science advances the point at which an unborn child may survive external to the womb viability will closely approximate the

⁶¹*Ibid.* at 4-5, para. 13.

⁶²Borowski submitted:

Dr. Liley explained life to be a continuum from fertilization until death. In the earliest stages, life is measured in hours, then weeks, then months, then years and finally, in decades. At every stage, it is, and remains from beginning to end, the same life, by whatever name it may be described — whether a zygote, an embryo, a fetus, a baby, a child, an infant, a toddler, a teenager, an adult or a geriatric (*ibid.* at 14).

⁶³The United States Supreme Court in *Roe*, *supra* note 35 at 163-64, endorsed viability as the point at which the state interest in the foetus outweighs a woman's right to privacy:

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capacity of meaningful life outside the mother's womb ... If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 182-83, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler*] adopted a similar analysis, although she did not explicitly select viability as the point at which the State's interest in potential life is compelling. She proposed a developmental approach in which the State's interest in the foetus increases as pregnancy progresses and becomes compelling sometime in the second trimester. Foetal viability usually occurs around the end of the second trimester, sometime between the 24th and 28th weeks of pregnancy.

⁶⁴See *e.g.* Mary Anne Warren, "The Moral Significance of Birth" (1989) 4 *Hypatia* 46.

moment of conception. By so defining "life", humanity is reduced to a "purely physiological activity which in turn leads us to question the selection of one activity rather than another."⁶⁵

Birth is also argued to be an unhelpful standard since it fails to denote any true change in the nature of the foetus. Campaign Life Coalition submitted that newly born infants are no more independent than the foetus because, like the foetus, they are "completely and totally dependent on other human beings for [their] continued existence."⁶⁶ In addition, anti-abortionists assert that birth does not truly mark the moment of physical separation between the foetus and the pregnant woman since, in genetic terms, the two have been separate from conception.

The thrust of these claims is that it is now indisputable that a foetus is a separate human person from the moment of conception. Given our society's moral precepts, this scientific "truth" leads inexorably to the conclusion that the foetus must also be a legal person.

B. *The Moral Claims*

The moral claims anti-abortionists advance build on their scientific arguments for granting rights to the foetus. The essence of these claims is that biological humanity (as they claim science defines it) should be the sole determinant of legal personhood since any attempt to deny certain human beings the status of personhood is morally repugnant. Failing to equate biological humanity with legal personhood will result in grave injustice for groups whose lives are deemed less worthy, since it becomes possible to argue that some people are not entitled to the right to life based on an arbitrary understanding of personhood. Refusing to accord all human life legal personhood will also undermine the value of human life generally and weaken the moral and social fabric of society.⁶⁷

⁶⁵Factum of Campaign Life in *Daigle*, *supra* note 59 at 8-9, para. 14. Many medical experts dispute the claim that advances in medical technology will push the moment of foetal viability back to conception. See Brief of 167 Distinguished Scientists and Physicians Including 11 Nobel Laureates in *Webster* at 8-10 [hereinafter Brief of 167 Scientists in *Webster*]. These scientists submitted:

Assertions that viability has moved significantly earlier in fetal development are flatly contrary to the scientific evidence. Although advances in technology have improved the chances of survival for premature birth *within* the range of 24 to 28 weeks, the *outer limit* of viability at 24 weeks has not significantly changed. Moreover, there is no reason to believe that a change in this outer limit is either imminent or inevitable. ... The reason that viability has not advanced to a point significantly earlier than 24 weeks of gestation is that critical organs, particularly the lungs and kidneys, do not mature before that time. While a number of factors, such as immaturity of the immune system, contribute to the mortality rate for premature infants, the most important determinant of viability is lung development – specifically, the development of the air sacs through which gases are passed into and out of the blood stream ... Air sac development sufficient for gas exchange does not occur until at least 23 weeks after gestation or later.

⁶⁶Factum of Campaign Life in *Daigle*, *ibid.* at 9, para. 15.

⁶⁷See *e.g.* Factum of Campaign Life in *Daigle*, *ibid.* at paras. 29, 33, 34:

It is respectfully submitted that abortion on demand makes a statement about the society we want to have and to allow for an abortion, where there is no threat to the

Opponents of abortion use the historical treatment of African-Americans and women, both of whom have been denied legal personhood, to illustrate the moral danger of separating personhood from biological definitions of humanity.⁶⁸ Taking heed of past injustices, anti-abortionists contend that the refusal to recognize foetal personhood will result in the perpetration of injustice against society's vulnerable members, suggesting that it will be the aged and the disabled who will bear the brunt of abuse. R.E.A.L. Women presented these dangers in the following way:

Biological evidence is the only concrete evidence upon which we can conclude an entity is human and therefore worthy of special protection. If today the court can properly ignore the biological evidence when making determinations about the preborn, tomorrow it can do the same when making determinations about the aged or the disabled. Although one might enjoy less than perfect biological characteristics one's essence is no less human on that account.⁶⁹

Campaign Life Coalition made this same point in a more graphic way, arguing that a society which fails to grant rights to the foetus is one small step away from killing persons whose lives are viewed as having less merit:

It is respectfully submitted that the sanctioning of abortion suggests that some life is less deserving of protection than others. If the unborn child's rights are to be wholly subordinated to that of the mother, then it is respectfully submitted that other rights will be jeopardized as it becomes acceptable to take the lives of those that are less worthy. It is arguable that because it is expensive to sustain the lives of people about whom the medical opinion is that their lives are worthless, the temptation to dispose of this burden by killing them will be great. Disposing of such lives will be dressed up in humanitarian terms as an act of humanity and compassion.⁷⁰

According to Campaign Life, the failure to protect foetal life will mean

that the drastically handicapped should not be afforded the right to life. Before long, euthanasia will be legalized like abortion, like Family Planning, because all of these things are closely related. They are a slippery slope, one leading inexorably to the other.⁷¹

Based on these dire consequences, opponents of abortion assert that a failure to recognize foetal rights undermines the value of human life and constitutes a powerful indictment of the moral foundation of our society:

mother's life, reflects the value that we as Canadians are willing to ascribe to human life ... It is respectfully submitted that the question involved in the case at bar involves questions relating to the social fabric of our society and the kind of society to which we aspire ... It is respectfully submitted that the unborn child's right to life is fundamental to the preservation of the sanctity of life. Capricious abortion diminishes the sanctity ... of life in the areas of euthanasia and capital punishment.

⁶⁸In *Borowski*, R.E.A.L. Women submitted: "Civilized man at times has denied personhood and characterized persons as property. The *Dred Scott* decision found that Black people were property" (Factum of R.E.A.L. Women in *Borowski*, *supra* note 10 at 7-8, para. 30). Borowski made a similar submission:

In the past, narrow and technical interpretations of concepts that are universal have resulted in grave injustices. These may infect a society for generations. Blacks and women have been the innocent victims of such injustices (Factum of Borowski, *supra* note 50 at 14, para. 37).

⁶⁹Factum of R.E.A.L. Women in *Borowski*, *ibid.* at 7, para. 29.

⁷⁰Factum of Campaign Life in *Daigle*, *supra* note 59 at 14, para. 30.

⁷¹*Ibid.* at 14, para. 32.

The treatment accorded the weak, the disabled, the very old and the very young reflects the compassion and the sense of obligation of a society. A primitive society which possesses little knowledge of the nature of prenatal life, cannot be expected to accord to the unborn the care and concern that are bestowed upon children once they are born.

But a highly civilized country, enriched by scientific knowledge that is capable of seeing and understanding and caring for the unborn as fully as it nurtures its more mature members, can not [*sic*] go about the business of killing the unborn as a matter of convenience or of condoning that practice by claiming some higher freedom or some greater value that justifies tipping the scales of justice against the weak, the inarticulate, and the friendless.⁷²

III. Assessing the Arguments after *Daigle*

The implications of *Daigle* for anti-abortion arguments can be assessed on two levels. First, the decision strikes out one of the three arguments opponents of abortion have raised in support of foetal rights, that the foetus already has rights under the common and civil law. Only two arguments survive *Daigle*: that in biological and genetic terms the foetus is a distinct human person, and that it is morally reprehensible to fail to accord legal personhood to a biological "person". Thus, the most obvious effect of *Daigle* has been to reduce the anti-abortion argument into one based almost exclusively on the claim that personhood in the *Charter* should be equated with a definition of personhood drawn from biology. There are serious problems with this claim.

Second, the effect of *Daigle* is to subtly transform the question being asked and to render a legal approach to the question less apparent. Had the Court found that the foetus did have rights under the common or civil law, there would have been a clear legal foundation for the conclusion that a foetus has rights under the *Charter*. However, given the Court's rejection of foetal rights, the question of whether a foetus has rights under the *Charter* becomes one of asking whether the foetus — which the law has never regarded as a person with independent rights — has been granted that status under the *Charter*. In other words, the question becomes whether the *Charter* expands the legal definition of personhood to include a foetus. Rephrasing the issue in this way gives rise to a number of subsequent questions. How should the courts approach the task of deciding whether something that has never been considered to be a legal person, is a person under the *Charter*? What does a "legal" approach to a question of this sort involve? Although the Court dismissed scientific arguments as irrelevant to defining personhood within the Quebec *Charter*, is there greater scope for the courts to adopt scientific understandings of personhood under the Canadian *Charter*? To what extent can a court turn to scientific definitions of personhood or philosophical opinions on the moral status of the foetus yet remain within a legal framework?

A. *Anti-Abortion Arguments and Legal Understandings of Personhood*

The rejection in *Daigle* of the argument that a foetus has rights at common law and at civil law has reduced the anti-abortion position to the following two

⁷²Factum of Borowski, *supra* note 50 at 36, paras. 110-11.

claims. Science tells us that a foetus is a separate human being from the moment of conception because it is biologically human and genetically distinct from the pregnant woman. Based on this scientific classification, the moral precepts of our society dictate that the foetus be viewed as a person for legal purposes since depriving human beings of legal personhood is morally objectionable. Reduced to its essentials, the argument is that the foetus, as developing human life, should have the same moral and legal status as human life after birth. The reality that the foetus exists within a woman's body in a unique relationship that is entirely unlike any other period of human existence is immaterial.

This argument can be criticized on a number of grounds. First, it is based on a highly dubious view of science and of the ability of science to define the meaning of personhood. It incorrectly assumes that science has made significant contributions to our basic understanding of the nature of the foetus, and that the scientific method is capable of determining whether the foetus is a person. Second, by claiming that science can produce an objective definition of personhood, the argument attempts to circumvent the normative questions involved in determining whether a foetus is a person. Finally, the moral arguments opponents of abortion advance fall woefully short of providing the moral foundation required to establish that the foetus should have the same moral and legal status as life after birth.

The anti-abortion movement's heavy emphasis on scientific arguments is based largely on the belief that were it not for the accretions to our understanding of pregnancy science has yielded in recent years, we would not have a conclusive basis for asserting that a foetus is developing human life.⁷³ By making it possible to chart the course of foetal development, science has definitively established that, from the earliest stages, a foetus is a developing human being. The claim that science adds significantly to our understanding of the nature of the foetus is, however, highly questionable. While people may not have known the exact details of foetal development, they have known for a considerable period of time that pregnancy involves the creation of a new human being, and that this process begins with the union of a sperm and an ovum. Recent medical developments may have made it possible to describe foetal development with great accuracy, but it is not true to suggest that they have expanded our understanding of pregnancy by proving that the foetus, from conception, is developing human life. Contrary to what anti-abortionists would have us believe, we do not owe our basic knowledge of pregnancy to modern science. For this reason, the "scientifically derived" submissions opponents of abortion advance do not amount to astonishing revelations on the nature of the foetus but are largely unsurprising. Given the knowledge that pregnancy is the process of creating new life, it is not surprising that ultrasound technology demonstrates that a foetus looks increasingly like a baby as pregnancy progresses or that it has a different genetic make-up from the woman within whom it exists. Thus, while science may play a role in filling in the details of prenatal development, it can

⁷³See *e.g.* Borowski's claim that the Canadian Supreme Court should decline to follow the example of the United States Supreme Court in *Roe*, *supra* note 35, because of the new medical evidence he proffered (Factum of Borowski, *ibid.* at 27, para. 78).

hardly be said to add to our long-standing understanding of the foetus as early life.

Moreover, science is intrinsically incapable of providing guidance on the core issue raised by foetal rights, the legal status developing life should have. Advocates of foetal rights believe that science can answer this question because it provides an uncontested definition of human personhood. This argument rests on two closely related assumptions: that there are objective, scientifically mandated criteria which can determine whether the foetus is a person, and that personhood is fundamentally a scientific rather than a normative matter. Neither of these assumptions stands up to critical scrutiny.

The belief in scientifically derived criteria to define personhood is central to the anti-abortion argument. According to the argument, science has isolated three verifiable features which define whether something is a human person: whether it is classified as human in biological terms; whether it possesses its own genetic makeup; and whether it is, at least in some sense, alive. No other characteristics of the life form in question are relevant to determining whether it is a person. Using this test, the foetus qualifies as a person, as does life after birth. The reality that the foetus is in a unique stage of human existence in which it exists entirely within the body of another human being and in which it undergoes an unparalleled transformation (facts which are also easily verified by science) are dismissed as scientifically (and hence morally and legally) irrelevant.

Which biological characteristics establish personhood, however, is hardly a scientific matter but one on which normative faculties must be brought to bear. To say that personhood should be defined based on an entity's biological humanity and genetic distinctiveness is a *normative* conclusion that these traits carry more weight than whether it exists within or outside of the body of a pregnant woman. The scientific method is incapable of dictating which particular traits form the basis of personhood since it cannot take this normative dimension into account. The limitations of science were expressed extremely eloquently by a group of 167 scientists and physicians (including 11 Nobel Laureates) who filed an *amicus* brief in *Webster*:

The scientific method depends on two essential things — a thesis or idea and a means of testing that idea. Scientists have been able to determine, for instance, that the Earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea ... [C]oncepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally. ...

[S]cience can indeed provide valuable information and can answer concrete questions regarding prenatal development by identifying, for example, the stages of fetal brain development. *But the question of when a human life truly begins calls for a conclusion as to which characteristics define the essence of human life. While science can tell us when certain biological attributes can be detected, science cannot tell us which biological attributes establish the existence of a human being.*⁷⁴

⁷⁴Brief of 167 Scientists in *Webster*, *supra* note 65 at 5-6 [emphasis added]. Although the sci-

The second assumption, that personhood is a scientific matter, is also highly problematic. Assuming for the sake of argument that science could generate a definition of personhood devoid of normative considerations and that the foetus fell within this definition, it does not follow that the foetus must also be a person in a legal sense. As the Supreme Court observed in *Daigle*, personhood in law is a normative concept. It denotes a particular legal status defined by the existence of legal rights and responsibilities. Personhood, and the rights which are the concrete expressions of this status, are the legal articulation of our society's belief in the inherent dignity and moral worth of all human persons, regardless of differences based on such factors as sex, race, religion, sexual orientation, age and disability. The notion that all human persons are born equal reflects a normative conclusion that differences among born human beings do not affect an individual's moral worth, and therefore, should not affect an individual's legal status. Thus, to say that something is a legal person is to say that it has (or should have) the same legal status as that which our society accords to all human beings after birth.⁷⁵ There must be compelling normative reasons for this conclusion, just as there are normative reasons for treating all born human beings as persons.

To the extent that anti-abortionists propose an objective, scientific definition of personhood, they attempt to avoid the normative issues at the core of the foetal rights debate. The very essence of an "objective" definition is that it is free of normative considerations, but is instead based on simple, unbiased fact. Yet, as the scientists in *Webster* and the Supreme Court in *Daigle* clearly recognize, personhood is inherently a normative, rather than a scientific, concept. Normative considerations must enter into the debate somewhere, whether it be at the point of criticizing the ability of science to produce an objective definition of personhood, or at the point of saying that, even if science could produce a non-normative concept of personhood, this definition would not suffice for legal purposes because normative concerns are integral to the legal concept of personhood.

The absence of normative reasons represents a crucial weakness in the anti-abortion argument since there must be some normative foundation for declaring the existence of foetal rights. The moral arguments anti-abortionists advance are profoundly deficient as they amount to nothing more than the assertion that *since* the foetus is as fully human as born human beings, it would be morally wrong to deprive the foetus of legal personhood. Nowhere is there any normative discussion of why the biological traits they identify as defining human life should be determinative of foetal status, the claim being simply that science says they are. Furthermore, this is not a case in which the normative arguments in favour of foetal rights are either so overwhelming or the subject of such widespread acceptance that they can be ignored or given only perfunctory consideration. The status of the foetus is a topic of enormous disagreement throughout

entists spoke in terms of identifying the beginning of human life, their submission can easily be rephrased in terms of defining whether a foetus is a person. The essence of the submission is that personhood depends on some normative notion of the essence of human life.

⁷⁵My argument here refers only to the legal classification of natural persons since the anti-abortion argument is that a foetus is a natural person. It does not refer to corporations which the law views as artificial persons but does not accord the same status as to human beings post-birth.

society. A cursory examination of the philosophical literature reveals that philosophers, often portrayed as society's morality "experts", in full appreciation of biological aspects of foetal development, are sharply divided on their moral significance.⁷⁶ The strong measure of disagreement demonstrates that the normative issues underlying the status of the foetus cannot simply be taken for granted or assumed away but must be candidly and coherently addressed.

Finally, the absence of normative reasoning also exposes the flaws in the moral arguments made by opponents of abortion. Anti-abortionists insist that recognizing the personhood of all "human beings" is morally essential in light of the historical denials of personhood to persons of African descent and to women, and in light of the spectre of future abuses of disabled persons. This argument, while powerful on an emotional level, only works if one agrees that there are no salient moral differences between foetal life and life after birth. In light of our normative commitment to the moral and legal equality of all born persons, opponents of abortion are correct in asserting that it would be morally wrong to deprive born human beings of personhood based on such arbitrary factors as race, sex or disability. However, it is morally wrong to hold that a foetus is not a person *only if* there are normative reasons for concluding that the foetus should have the same moral — and legal — status as life after birth. Without this normative foundation, the moral argument is based on a disingenuous analogy between the foetus on the one hand, and Black persons, women and disabled persons on the other.

As such, the deep flaws in the anti-abortion movement's scientific and moral claims make it virtually certain that the courts will find the anti-abortion arguments in favour of foetal rights unpersuasive. In the following section, I examine the kinds of arguments a court would usefully consider in rendering a legal decision on foetal rights.

B. Answering the Question: The Possible Approaches

Although the courts have considerable expertise in interpreting the *Charter* and have established the purposive approach as the correct framework of interpretation, the question of whether a foetus is a person under the *Charter* differs from the issues of *Charter* interpretation the courts routinely confront. Most *Charter* cases arise when an individual challenges a piece of legislation or the conduct of government actors.⁷⁷ The courts' task is to interpret the scope of the

⁷⁶Some argue that, from conception, a foetus is morally indistinguishable from a person, while others take the view that birth is an act of moral significance and that personhood arises at birth. For an exposition of the former view, see John Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson" (1973) 2 *Philosophy and Public Affairs* 117; John T. Noonan, "An Almost Absolute Value in History" in John T. Noonan, ed., *The Morality of Abortion: Legal and Historical Perspectives* (Cambridge, Mass.: Harvard University Press, 1970) 1. For a discussion of the position that personhood arises at birth, see Warren, *supra* note 64. Others believe that the foetus acquires the moral status of a person during the course of pregnancy, at the time the foetus would be viable outside the pregnant woman's body or at the time it achieves sentience. See e.g. L. Wayne Sumner, *Abortion and Moral Theory* (Princeton, N.J.: Princeton University Press, 1981).

⁷⁷Because the *Charter* applies only to government actors (*supra* note 9, s. 32) the courts have sometimes had to decide whether an organization may be said to be an arm of the State, or whether

Charter rights asserted, and to determine whether the rights have been infringed. These cases proceed on the basis that the individual who has brought the claim is a holder of *Charter* rights, since all born human beings who are "physically present in Canada and by virtue of such presence amenable to Canadian law"⁷⁸ are persons for legal (and *Charter*) purposes. There is therefore no question in the vast majority of cases whether the "person" who has brought the challenge is entitled to assert *Charter* rights.⁷⁹ The issue of foetal status under the *Charter* requires the courts to address a question of a different sort, namely, to whom *Charter* rights are to apply. This might be viewed as a preliminary question to the *Charter* issues the courts ordinarily confront, and one with which the courts have considerably less expertise.

It is not entirely obvious that the purposive approach should apply to questions of this sort. As it has been articulated, the purposive approach requires the courts to interpret a right or freedom in light of the underlying values the *Charter* guarantee is meant to serve, having reference to the objects of the *Charter*, the language chosen to articulate the right, the historical origins of the concepts enshrined in the right, and to the purpose of other *Charter* protections with which it is associated.⁸⁰ Because the purposive approach has been framed as a way of interpreting specific *Charter* rights, how it will be transposed to solve preliminary questions of application is unclear. The uncertainties may be illustrated by considering how the approach would be applied to deciding the status of the foetus. The first question that arises is how widely or narrowly the approach should be drawn. In addressing the fairly broad claim made by foetal rights advocates that the foetus is a person for *Charter* purposes generally, should the courts consider the values and purposes underlying the *Charter* as a whole, or should the court select one or more rights and consider the purposes underlying only those rights? If the courts adopt the first approach, how should the purposes and values of the *Charter* as a whole be determined? Are the purposes of the *Charter* to be found within the document itself, or must the courts look also at the purpose a constitutionally entrenched charter of rights serves within our legal and political system? If the courts choose to concentrate on the purposes behind a few rights, how are those rights to be selected? Should the courts limit their focus to the rights most likely to pertain to the foetus, such as the right to life and to security of the person in section 7 and the right to equality in section 15,⁸¹ leaving other possible foetal rights claims to be decided as they

an individual is acting as a state agent. See *e.g.* *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, (1991), 2 O.R. (3d) 319n; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700; *Douglas/Kwantlen Faculty Ass'n. v. Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Lavigne v. O.P.S.E.U.*, [1992] 2 S.C.R. 211, 126 N.R. 161.

⁷⁸*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 202, 17 D.L.R. (4th) 422.

⁷⁹Challenges brought by corporations are an exception. Corporations have been recognized as legal persons since the late 1800s. However, the courts have held that not all of the rights in the *Charter* apply to corporations. See *infra* note 83 and accompanying text.

⁸⁰*Big M*, *supra* note 48.

⁸¹Opponents of abortion claim that laws permitting abortion violate the foetus' equality rights since they permit the taking of life on the basis of age. See *e.g.* *Factum of Borowski*, *supra* note 50 at 39, paras. 117-19.

arise?⁸² Does it make sense to say that the broad question of whether a foetus is a person under the *Charter* can be addressed on a "right-by-right" basis?

While there are no clear answers to these questions, there is reason to believe that the courts will adopt some form of purposive approach to resolve these background questions. Although the courts have not had to determine whether something that the law has never regarded as a person is a person under the *Charter*, the courts have considered a similar issue in cases involving the ability of corporations to assert *Charter* rights.⁸³ In the few cases in which this issue has been raised, the courts have tended to apply a purposive analysis, assessing whether the right asserted could meaningfully apply to a corporation based on "the language of the right in combination with the nature of the specific interests embodied therein."⁸⁴ The courts have adopted a purposive approach with no discussion of its applicability, and in some cases without any reference to using a purposive approach at all.⁸⁵ In part, the courts' uncritical application of the purposive approach can be explained by the fact that corporations are legal persons, and thus may be seen to have a *prima facie* claim to be able to assert *Charter* rights meant to apply to "persons". Given the corporation's legal personhood, the court must determine whether the corporation is the kind of person to which the right in question is meant to apply, based on the interests the right was meant to protect. The use of the purposive approach in this context may suggest that the courts will use the approach to resolve other questions concerning who can claim the benefit of *Charter* rights.

The approach used for corporations may not, however, be entirely akin to the method the courts adopt for determining whether a foetus has rights under the *Charter*. The fact that a corporation is recognized as a legal person under the *Charter* makes the scope of corporate rights significantly different from the issue posed by foetal rights. The general acceptance of corporate personhood makes the question of the corporation's status under the *Charter* amenable to a "right-by-right" analysis which asks whether each specific right should apply to the corporation. In contrast, since the foetus has not been recognized as a legal

⁸²Anti-abortionists have also asserted other claims on behalf of the foetus. For example, at trial, Borowski argued that abortion violated the right to be free of cruel and unusual punishment in s. 12 of the *Charter*, and the right to the assistance of an interpreter in s. 14 (*Borowski*, *supra* note 35).

⁸³See *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy*]: Corporations cannot invoke the protections of s. 7 since a plain, common sense reading of the phrase "everyone has the right to life, liberty and security of the person" indicates that s. 7 was intended to protect human persons and not corporations; *R. v. Amway Corp. of Canada*, [1989] 1 S.C.R. 21, 56 D.L.R. (4th) 309: A corporation cannot claim the protection of s. 11(c) of the *Charter* since it cannot be a witness and therefore does not fall within the right of any person charged with a criminal offence not to be compelled to be a witness in proceedings against that person; *R. v. CIP*, [1992] 1 S.C.R. 843, 71 C.C.C. (3d) 129 [hereinafter *CIP* cited to S.C.R.]: A corporation can rely on the guarantee in s. 11(b) of the *Charter* providing that any person charged with an offence has the right to be tried within a reasonable time.

The analysis emerging from these cases is that courts will decide whether a corporation can invoke *Charter* rights on a "right-by-right" basis.

⁸⁴*CIP*, *ibid.* at 852.

⁸⁵See e.g. *Irwin Toy*, *supra* note 83.

person, the courts cannot avoid examining the background question of whether the foetus is the kind of entity which should be regarded as having rights. This requires more than simply analyzing the purposes underlying a particular *Charter* right, but instead demands a normative conclusion that the foetus is the type of being to whom *Charter* rights should attach.

I would argue that a purposive approach to foetal rights would require the courts to identify the purposes or values underlying the *Charter* as a whole and then to determine whether granting the foetus the status of personhood is consistent with those values. This would involve a consideration not only of the values expressed within the *Charter*, but also of the broader reasons for having a declaration of rights embedded in the Constitution. To determine whether something that has not been viewed as a rights-holder should receive *Charter* protection, a purposive approach would arguably require the courts to examine the role of rights within our legal system and what it is that rights are meant to protect, and to consider whether there are compelling normative reasons for granting the entity in question rights against the State. In other words, the courts would decide to whom the *Charter* applies by looking at the meaning or purposes of the *Charter* in light of the philosophical, legal and political underpinnings of a constitutionally entrenched declaration of rights. Such an approach is consistent with the Supreme Court's ruling in *R. v. Big M Drug Mart* that courts should interpret the *Charter* in light of its linguistic, philosophical and historical contexts, or run the risk of "overshoot[ing] the actual purpose of the right or freedom in question."⁸⁶

This analysis suggests that the entities which are recognized as having rights under the *Charter* must be determined in light of our linguistic, historical, cultural and philosophical understandings of the kinds of beings the *Charter* is meant to protect. Accordingly, entities which have not been viewed as legal persons should not be given personhood under the *Charter* unless the courts are convinced there is a strong normative foundation on which to base this status. The courts must assess the normative arguments for and against foetal personhood, and determine whether the values underlying the treatment of all born human beings as persons also apply to the foetus.

While I believe the courts would adopt a purposive approach along these lines to address the question of foetal personhood, it is also possible that the courts might adopt a somewhat more cautious approach akin to that which the Supreme Court used in *Daigle* when deciding the status of the foetus under the Quebec *Charter*. The courts may be less comfortable expanding the accepted category of persons who can assert *Charter* rights than they are defining the content of *Charter* rights. Thus, they may insist on the need for some evidence in the *Charter* itself or in parliamentary debates at the time the *Charter* was drafted, of an intention to grant rights to the foetus. Using either an intent-based approach or the purposive approach, the foetal rights arguments that survive *Daigle* fail to establish the existence of foetal rights under the *Charter*.

⁸⁶*Supra* note 48 at 344.

1. An Intent-Based Approach to Foetal Personhood

Following the approach the Supreme Court adopted in *Daigle* to determining the status of the foetus under the Quebec *Charter*, the courts could hold that a legal approach to deciding whether a foetus is a person under the Canadian *Charter* must be based on a finding that Parliament intended to grant the foetus *Charter* rights. Since Parliament can be deemed to have intended to grant rights only to those recognized as legal persons at the time the *Charter* was drafted, and since neither the common law nor the civil law regarded the foetus as a person, evidence of an intention to view the foetus as a person would be essential for a finding of foetal personhood. Using this approach, the arguments anti-abortion groups muster in support of foetal rights are irrelevant since they are not directed to establishing the existence of an intention for the *Charter* to apply to a foetus.

There are strong justifications for limiting the courts' role to a determination of Parliament's intent in answering the question of whether something that has never been viewed as a legal person is a person under the *Charter*. Determining whether the category of rights-holders should be expanded beyond its current ambit is a highly contentious exercise, one that is arguably better suited to Parliament than to the courts. In the case of the foetus, this exercise is likely to result in profound consequences for women since foetal rights will have to be balanced with the autonomy of women to control their pregnancies. Parliament may be better placed than the courts to make a change of such magnitude since it has the institutional capacity to consider the wide-ranging implications of foetal rights and to hear representations from all of the people who will be affected. Of course, any parliamentary recognition of foetal rights would be subject to judicial scrutiny to ensure that women's rights were not unreasonably infringed.

Were the court to adopt an intent-based approach, the conclusion that the foetus is not a person for the purposes of the *Charter* would be inevitable. The text of the *Charter* displays no evidence of an intention to broaden the ordinary legal definition of personhood to include a foetus. The *Charter* does not define the word "person", nor does it define the various words it uses to refer to holders of rights such as: anyone, everyone, any person and every individual. If Parliament intended to depart from the common law and civil law definition of person, then the absence of any reference to an expanded notion of personhood is puzzling at best. In light of the background understanding that a foetus is not a bearer of rights, one can ask the same question of the Canadian *Charter* that the Supreme Court in *Daigle* asked of the Quebec *Charter*: If Parliament intended to accord *Charter* rights to the foetus, why would it leave these rights in such an uncertain state?

The conclusion that Parliament did not intend to make the foetus a rights-bearer derives support from the absence of any evidence of an intention to grant the foetus *Charter* rights within the debates of the Special Joint Committee on the Constitution of Canada when the *Charter* was drafted. On two occasions, the Special Joint Committee discussed the ramifications of the terms proposed to refer to rights-holders under the *Charter* on the issue of abortion.⁸⁷ The Govern-

⁸⁷*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the*

ment's position throughout these discussions was that there was no difference between the terms "everyone", "every person" or "every individual" and that all of these terms left the legality of abortion within Parliament's control. The Government insisted that all of these terms were neutral on the question of abortion and that none of them would give the courts the power to determine the status of abortion.⁸⁸ While this discussion was not framed in terms of deciding whether the foetus has *Charter* rights, it is reasonable to conclude from the Committee's decision that the legality of abortion should remain within Parliament's control, that the Committee did not intend to grant rights to the foetus. To ensure that the permissibility of abortion was not decided by the courts, the Committee would have had to take the position that a foetus could not invoke *Charter* rights: Foetal rights under the *Charter* would run counter to the Committee's clearly expressed intention of retaining Parliament's control over the abortion question, since they would place the question of defining the scope of the foetus' right to life, liberty and security of the person squarely in the hands of the courts. Parliament could not have intended the *Charter* to apply to the foetus if it also intended to remain the final arbiter of the abortion debate.

However, the central weakness of an intent-based approach, and the reason that courts will probably be reluctant to adopt it, is that it may too narrowly circumscribe the ability of the *Charter* to grow and respond to changing social, legal and political conditions. If the *Charter* is to survive in a meaningful way for future generations, it must be able to grow beyond the confines of the imagination of its drafters. It may be that at some future point our notions of who or what should be protected by the *Charter* may encompass things that we do not now view as legal persons. An intent-based approach might unduly tie the courts' hands in the event of changing definitions of personhood in the future.

2. A Purposive Approach to Foetal Rights

A purposive approach would base an acceptance of foetal rights under the *Charter* on the existence of a persuasive normative foundation for viewing the foetus as a legal person. This approach overcomes the pitfalls of an approach rooted in parliamentary intention because it does not freeze the conception of personhood within the *Charter* to that shared by Parliamentarians in 1982. It recognizes that the understanding of legal personhood can change over time, such that things that would not be viewed as persons under the *Charter* today may in the future be recognized as having *Charter* rights. Using this approach, it would be possible to recognize the foetus as a person under the *Charter* even if the *Charter*'s drafters did not, provided that there were strong normative reasons for giving the foetus the legal status of personhood. The presence of a strong normative foundation would allow the courts to conclude that foetal personhood is consistent with Canada's linguistic, historical and philosophical tra-

House of Commons on the Constitution of Canada, No. 43 (22 January 1981) at 39-54, No. 46 (27 January 1981) at 70-71.

⁸⁸See especially the comments of Robert Kaplan, *ibid.*, No. 43 at 44, 46, and those of Jean Chrétien, *ibid.*, No. 46 at 70-71.

ditions. A number of the intervenors in *Borowski* and in *Daigle* advocated an approach of this sort.⁸⁹

Using this approach, anti-abortion arguments are largely unhelpful. Two normative claims underlie the anti-abortion argument for foetal rights: that the foetus is as fully human in all relevant senses as human beings who have been born, and that recognizing foetal rights fosters respect for human life and guards against the abuse of vulnerable or marginalized persons. Neither of these claims is developed to any meaningful extent. As I have argued in the previous section, opponents of abortion attempt to deny the normative character of the first claim on the ground that there exists an objective (and thus non-normative), scientifically generated definition of personhood. As a result, they fail to provide any normative arguments for viewing the foetus as a fully human person. While opponents of abortion address the second normative claim directly, their arguments amount to assertions that treating the foetus as a legal person will instill respect for all human beings *since* the foetus, like Black persons, women and the disabled, is a human person in all relevant senses. The success of this claim depends to a considerable degree upon the success of the first as it is premised on the belief that there are no salient normative differences between prenatal life and life after birth which might lead to a different moral or legal status for the foetus. Since the anti-abortion arguments as they now stand do not provide the normative foundation necessary to establish foetal rights, it would be extremely unlikely for the courts to hold that foetal rights exist under the Canadian *Charter*. I wish to dispute the anti-abortion movement's central claim that the foetus is like born persons in all morally salient ways. One way to examine this claim is to consider the moral significance of the fact that the foetus exists in a unique and complexly interconnected way within the pregnant woman. If there is a single factor which differentiates foetal life from life after birth, it is that the foetus exists within the body of the woman who is creating it. Although the anti-abortion argument denies that any moral significance attaches to the unique nature of foetal existence, in my view the salience of this fact is inescapable.

The moral significance of the foetus' existence within the pregnant woman can be explored by considering the impact on women of viewing the foetus as a holder of rights. If the effect of foetal rights is to deprive women of their autonomy⁹⁰ and personhood, there are strong reasons for concluding that the fact that the foetus exists within the pregnant woman matters in a morally salient way and that the foetus should not be viewed as a legal person. In suggesting that the impact of foetal rights upon women constitutes an important normative consideration in the debate over foetal rights, I am not proposing that the courts engage in what is frequently described (and dismissed) as a consequentialist analysis. I am, however, insisting the courts recognize that the status of the foe-

⁸⁹See *e.g.* Factum of the Intervenor Interfaith Coalition on the Rights and Wellbeing of Women and Children in *Borowski*; Factum of Campaign Life in *Daigle*, *supra* note 59.

⁹⁰I use autonomy not in the traditional liberal sense, but in the way proposed by Jennifer Nedelsky in "Reconceiving Autonomy" (1989) 1 Yale J. L. & Fem. 1. Nedelsky criticizes the liberal conception of autonomy which is based on the view that isolation from others protects the individual. She argues that autonomy is based not on isolation but on relationships which provide the support and guidance necessary for autonomy.

tus is inextricably intertwined with women's legal status and that the effect on women's status is not only a legitimate normative consideration, but an essential one. Though proponents of foetal rights ignore women entirely in their analysis of whether a foetus should have rights,⁹¹ I maintain that it is not possible to consider the foetus in isolation from the pregnant woman because the foetus does not exist in isolation from her.

Enumerating the consequences of foetal rights for women is a speculative endeavour. Any foetal rights recognized by the court would have to be balanced in some way with women's rights to life, liberty and security of the person, and to equality.⁹² Opponents of abortion clearly believe that, at least where abortion is concerned, foetal rights will trump women's rights since the right to life takes precedence over any less important *Charter* right or interest women might invoke. Achieving a prohibition on abortion is, after all, the very reason anti-abortion activists assert the existence of foetal rights. It is possible, however, that the balance would not tilt as far in the foetus' favour as opponents of abortion hope. Nonetheless, in canvassing the possible consequences of foetal rights, I will accept the anti-abortion assumption that granting rights to the foetus will have discernible consequences for women and begin with a description of the most obvious consequences.

Viewing the foetus as a rights-holder transforms pregnancy into a contest of competing rights in which the rights of the foetus are always in actual or potential conflict with those of the pregnant woman. The pregnant woman ceases to be an autonomous whole but comes to be two separate entities for legal purposes. It is reasonable to assume that this vision of pregnancy will give rise to two general sorts of consequences for women. First, giving legal rights to the foetus will have tangible legal ramifications in the form of restrictions on women's equality, dignity and autonomy. Second, foetal rights will have effects of a more symbolic nature, changing the way in which pregnant women, and women in general, are viewed.

I have already alluded to the probable legal consequences of recognizing foetal rights.⁹³ Foetal rights could lead to profound restrictions of women's

⁹¹Women do figure prominently in the anti-abortion argument, *but only after* foetal rights are established. At that point, women enter the picture to have their rights restricted based on the countervailing rights of the foetus.

⁹²The balancing of rights would probably occur under s. 1 of the *Charter*, with women's rights cast as a state interest in promoting the rights of women. Alternatively, the principles of fundamental justice could be interpreted to accommodate the interests of women.

⁹³For other articles cataloguing the effects of foetal rights on women, see Dawn Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection" (1986) 95 *Yale L.J.* 599; Janet Gallagher, "Prenatal Invasions & Interventions: What's Wrong with Fetal Rights" (1987) 10 *Harv. Women's L.J.* 9; Nancy Rhoden, "The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans" (1986) 74 *Calif. L. Rev.* 1951; Molly McNulty, "Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses" (1987-88) 16 *N.Y.U. Rev. L. & Soc. Change* 277; Lawrence Nelson, Brian Buggy & Carol Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'" (1986) 37 *Hastings L.J.* 703; Note, "Maternal Rights and Fetal Wrongs: The Case against the Criminalization of 'Fetal Abuse'" (1988) 101 *Harv. L. Rev.* 994; Martha Field, "Controlling the Woman to Protect the Fetus" (1989) 17 *Law,*

autonomy during pregnancy if the foetus' rights to life or security of the person are seen by the courts as outweighing a woman's right to control her pregnancy. Foetal rights could, as opponents of abortion hope, severely restrict access to abortion or result in prohibiting abortion altogether on the theory that the foetus' right to life trumps any claim a woman might assert to control her body and her pregnancy. They could also prompt legislatures to pass laws permitting the State to apprehend a foetus when a woman's conduct is seen to threaten the foetus' health or security of the person, even though this may mean confining women for the duration of pregnancy or permitting doctors to dispense with women's consent to caesarean section operations. Foetal rights might provide the justification for creating criminal offences to punish women who engage in conduct that is potentially injurious to the foetus, and for viewing such conduct as prenatal child abuse.⁹⁴ They could also serve as the basis, as some foetal rights advocates suggest, for placing all pregnant women under legal duties to follow nutritional guidelines and to submit to medical procedures for the benefit of the foetus.⁹⁵ All of these actions could be justified as ensuring that the foetus' rights are protected from the harmful conduct of the pregnant woman.

On a more symbolic level, pregnant women will come to be viewed as legitimate objects of greater state regulation, and the focus of pregnancy will be the foetus, not the woman and the new life *she* is creating. In its most extreme form, this will result in viewing the pregnant woman as a passive vessel whose sole purpose is to provide a nurturing environment for the "person" inside her. The foetus, in contrast, will be viewed as the primary actor in pregnancy. Although anti-abortion factums in Canada have not expressly promoted this vision of pregnancy, many of the anti-abortion factums filed in the United States Supreme Court clearly endorse this view by describing the foetus as an agent who consciously manipulates and controls the pregnant woman. For example, in an *amicus* brief in *Webster*, Human Life International quoted Albert Liley, who described the foetus' "actions" during pregnancy in the following way:

Med. & Health Care 114; Kary Moss, "Substance Abuse during Pregnancy" (1990) 13 Harv. Women's L.J. 278; Deborah Krauss, "Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color" (1991) 26 Harv. C.R.-C.L. L. Rev. 523; Dorothy Roberts "Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy" (1991) 104 Harv. L. Rev. 1419.

⁹⁴In the United States, where legal developments often presage what is to come in Canada, theories of foetal personhood have in fact led several states to prosecute women for drug use during pregnancy under existing criminal legislation. See *e.g.* *People v. Stewart*, No. M508197 ([San Diego County] Mun. Ct. 26 February 1987); *State v. Johnson*, No. E89-890-CFA (Fla. Cir. Ct. 13 July 1989). In April 1990, the Reproductive Freedoms Project of the American Civil Liberties Union estimated that 44 criminal prosecutions had been brought against women for "prenatal" conduct in 17 different states. See Lynn Paltrow, Hilary Fox & Ellen Goetz, "Memorandum Re Case Update" (Report produced for the Reproductive Freedoms Project of the American Civil Liberties Union, 20 April 1990). For a concise overview of these prosecutions, see Moss, *ibid.* For a general discussion of the issues involved, see Clarice Feinman, ed., *The Criminalization of a Woman's Body* (New York: Haworth Press, 1992).

⁹⁵See John Robertson, "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth" (1983) 69 Virginia L. Rev. 405; Margery Shaw, "Conditional Prospective Rights of the Fetus" (1984) 5 J. of Legal Medicine 63. Shaw also advocates imposing *preconception* duties on women at high risk of having a child with genetic damage.

First, [the foetus] is entirely responsible, not only for his own development, but also for the organization of pregnancy. He has influences while still no bigger than a grain of sugar on the mother whose body weight is measured in kilograms. While this is by no means novel in biochemical or physiological circumstances, as I have said, it is an astounding feat of power amplification and demonstrates the importance of his own survival to the baby so that he does in fact take over ... direct control of the pregnancy.⁹⁶

Later in the same brief, Human Life International quoted Professor Liley as saying:

However, our new human has in hand even greater designs and undertakings than simply his own internal organization and development. He also develops his own life-support system, his placenta, and his own confines, for it is the embryo and the fetus who [develop] membranes, [form] amniotic fluid and [regulate] composition and volume. Women speak of their waters breaking and their membranes rupturing, but such expressions are so much nonsense — these structures belong to the baby. This simple point is not a play on words, but a practical reality.⁹⁷

The perceived ingenuity of the foetus in controlling the pregnant woman is perhaps best illustrated in the following quotation from testimony given by Professor Lejeune:

Q. Just coming to this question of nurture, Professor, would you describe precisely how the mother nurtures the child while the child is in the uterus?

A. It's a very complex system but the first step is not in the hand of the mother. It is in the hand of the tiny human being. At around five days after fecundation, this microscopic human being, one millimeter in diameter, sends a chemical message which forces the yellow corpus luteum inside the ovary to produce certain hormones so that the menses of the mother will be suppressed. It is in fact the baby which suppresses the menses of the mother and who takes over, if I can say, and it does to her what it likes, and you know it will do it again later. He is really capable of presiding over his own destiny. Now a little later he will bury himself inside the mucosa of the uterus and develop a kind of apparatus that I cannot better describe as a cosmonaut's suit which would make a little bulb which will have a little cord which will go to the big machine and the big machine would be able to take nutrients from the wall of the uterus through a special respiratory system. And it is the foetus which built this extra thing, this extra surrounding of him, this capsule, and the mother just provides by her blood all the nutrients which can go through the membranes so that the baby can be fed, but the whole machinery, I would say the whole space capsule he has, is built by the foetus.⁹⁸

⁹⁶Testimony given 7 May 1974 at the Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, 94th Cong., and before the Abortion Commission, New Zealand Parliament, 1975, as cited in Brief for Human-Life International as *Amicus Curiae* Supporting Appellants in *Webster* [hereinafter Brief for Human Life International in *Webster*] at 9-10. Dr. Liley is also the author of an article entitled "The Foetus in Control of His Environment" in Thomas W. Hilgers & Dennis J. Horan, eds., *Abortion and Social Justice* (New York: Sheed & Ward, 1972) at 27.

⁹⁷*Ibid.* at 16-17.

⁹⁸Brief of Paul Marx in *Webster* at 30-32, citing testimony given before a United States Congressional committee in 1974. See also the following quotation from Professor Liley:

Another crucial environmental problem which must be dealt with [during pregnancy] is the homograft situation — the fact that the fetus and his mother, inevitably immunological foreigners, who could not exchange skin grafts and could not be safely given a blood transfusion one from the other, yet must tolerate each other's tissues in parabiosis for nine months of pregnancy. Again it is the foetus, not the mother, who copes with these problems. And finally, it is the foetus, not the mother, who determines the

Although Canadian anti-abortion factums do not openly espouse the vision of pregnancy articulated above, there are two reasons to believe that it is implicit within the view of foetal rights promulgated in Canada as well. First, some of the factums do evoke images of the foetus as controlling the pregnancy, though in a far less extreme way than the American factums. For example, in describing the biological distinctiveness of the foetus from the pregnant woman, Borowski used language suggesting that the foetus is the primary actor in pregnancy:

[Mother and child] are separate, distinct, and unique human beings. They are connected only by the placenta which is an external organ of the child and forms a protective barrier and a means of exchange between mother and child. The placenta is the organ through which the *child en ventre sa mère* gains nourishment from the mother.⁹⁹

Second, the medical experts who in the American anti-abortion briefs describe pregnancy as within the control of the foetus are the same medical experts anti-abortion groups in Canada rely upon to lay down the scientific foundations of their argument.¹⁰⁰ Borowski, for example, relied heavily on the testimony of Dr. Liley and Dr. Lejeune to describe the course of foetal development, and more importantly, to "establish" that on objective scientific measures, the foetus is a human person.¹⁰¹ That both of these doctors are also strong proponents of the view that the foetus is the agent who controls pregnancy suggests a clear link between the two ideas.

Both the legal and symbolic consequences of foetal rights for women constitute strong normative reasons for refusing to view the foetus as a rights-holder. The stringent curtailment of women's personhood that foetal rights would require is testimony to the fact that the foetus differs from life after birth in morally significant ways and that the nature of these differences is so profound that the foetus should not be regarded as a legal person. As the foregoing analysis illustrates, to grant rights to the foetus is to seriously undermine the status of women, a consideration which, in a society committed to women's equality, must weigh heavily against viewing the foetus as a person.

duration of pregnancy, for unquestionably the onset of labour is normally the unilateral decision by the baby (Brief for Human Life International in *Webster*, *ibid.* at 19-20).

The "environmental problem" of the foetus Dr. Liley refers to is, of course, the pregnant woman. For a feminist critique of accounts of the foetus as an "autonomous, automatized mini-space hero", see Rosalind Petchesky, "Fetal Images: The Power of Visual Culture in the Politics of Reproduction" (1987) 13 *Feminist Studies* 263.

⁹⁹Factum of Borowski, *supra* note 50 at 9-10, para. 27.

¹⁰⁰Having examined anti-abortion legal submissions in both the United States and Canada, it appears that there is a small cadre of international anti-abortion medical experts which is brought to testify in judicial and legislative proceedings regarding abortion. Two of the most prolific experts are Sir William Liley of New Zealand and Dr. Jérôme Lejeune of France. Not only did they testify at the *Borowski* trial, they have also testified in the United States and in New Zealand. See Brief of Paul Marx in *Webster* at v-vi (describing Dr. Lejeune's credentials); Brief for Human Life International in *Webster*, *supra* note 96 at iii-iv (describing Dr. Liley's credentials).

¹⁰¹Borowski called nine medical witnesses to testify at trial. Of the nine, he relied most extensively on the work of Drs. Liley and Lejeune whom he described as pioneers in the area of foetal research. See Factum of Borowski, *supra* note 50 at 10, para. 28. For the medical evidence on which Borowski relied, see generally Factum of Borowski, *ibid.* at 3-10, paras. 8-28.

It is, of course, possible that my description of the consequences of foetal rights is overblown and that foetal rights would not have any of the legal or symbolic effects on women I have identified. The court could declare that a foetus has rights but hold that in situations in which foetal rights and women's rights conflict, the rights of "born" human beings take precedence over the rights of "unborn" life, at least up to a certain stage in pregnancy.¹⁰² Regarding the foetus as a person would therefore constitute a largely symbolic statement of our society's respect for human life and would not culminate in severe restrictions on women's autonomy. While it is possible that the courts might endorse an approach of this sort, in my view it is highly unlikely. A symbolic view of foetal rights would rest on the premise that the rights of some human persons — those who are born — are more important than the rights of other human persons — those who have not been born.¹⁰³ This premise gives rise to two difficulties, one practical and the other theoretical. As a practical matter, the court might be loathe to adopt an interpretation of rights which assumes that rights may mean different things for different human persons. While the court is clearly prepared to hold that the rights of corporations differ from those of natural persons, it is quite another matter to differentiate *among* human persons. In terms of theory, a symbolic view of foetal rights would need some justification for treating foetal rights as less important than the rights of born persons. The most plausible justification is that life after birth differs in morally salient ways from life before, such that weighing foetal rights differently from the rights of born persons is warranted. Yet, recognizing a moral difference between the foetus and born persons begs the question, Why grant rights to the foetus in the first place? If there is a moral difference, why should it be taken into account by interpreting foetal rights differently from the rights of born persons, rather than at the earlier stage of determining whether the foetus should have rights at all?

Advocates of a symbolic interpretation of foetal rights might respond that the value in such an approach lies in acknowledging respect for life. However,

¹⁰²One could argue that in *Morgentaler*, *supra* note 63, the Supreme Court of Canada implicitly adopted a framework of this sort. Although the Court did not consider the existence of foetal rights when it found the abortion law violated women's constitutional rights, it did consider the state interest in protecting the foetus in its analysis under s. 1 of the *Charter*. In striking down the legislation, the majority of the Court held that the state interest in foetal life could not justify the abortion law's infringement of women's rights. It is possible that even if the Court later declares a foetus to have rights, the balance between foetal rights and women's rights would not shift from the balance struck in *Morgentaler*.

¹⁰³This can be illustrated by considering the conflict of rights that arises in abortion. Depending upon the reasons a woman seeks to terminate her pregnancy, abortion pits a woman's right to life, liberty, security of the person, or equality against a foetus' right to life. If foetal rights were regarded as equal to women's rights, the foetus' right to life would outweigh all of the rights a woman could assert, except perhaps a woman's own right to life, since the foetus' right to life would trump the "less" important rights of liberty, security of the person or equality. Abortion would accordingly be justified only where necessary to protect the life of the pregnant woman, and laws which permitted abortion on a more liberal basis would be struck down for violating foetal rights. If, however, foetal rights will not result in restrictions on abortion, then women's rights to liberty, security of the person, or equality will trump the foetus' right to life, at least up to a certain stage of pregnancy. Unless a foetus' right to life is seen as being of less weight than the life of born persons, striking the balance in favour of women's rights cannot be justified.

this response is also flawed. It is highly dubious whether granting the foetus symbolic rights would be a meaningful or effective way of underscoring our society's commitment to the value and dignity of human life. There is no obvious connection between deeming a foetus to have rights which are understood as being different from and less important than those of human beings post-birth, and promoting respect for the foetus or for human life generally. A symbolic notion of foetal rights does not alter the existing understanding that the foetus is developing human life. Nor would a symbolic interpretation of foetal rights have an impact on the respect accorded to vulnerable or disempowered human persons, since the rights accorded to the foetus would be recognized as fundamentally different from the rights of people after birth. The arguments opponents of abortion advance on this point — that foetal rights will guarantee the protection of vulnerable persons by ensuring all human life is accorded equal status — are of no assistance since they are premised on the assumption that all biological "persons" have the same rights and thus cannot be used to support symbolic rights. If, as is the case with symbolic foetal rights, rights are interpreted differently based on the physical characteristics of the "person" in question, there is no basis for arguing that vulnerable groups will be assisted by a recognition of foetal rights. On the other hand, if, as opponents of abortion would have it, foetal rights are more than symbolic and provide a legal basis for restricting women's autonomy, it is difficult to see how they would be interpreted as fostering respect for life in light of the serious disregard for women's equality they would entail.

Finally, it is worth pointing out that a purely symbolic vision of foetal rights which did not result in profound restrictions on women would clearly fail to satisfy opponents of abortion since it would defeat the purpose of claiming foetal rights in the first place. All of the arguments they advance are directed to proving that the foetus is like born persons in every material respect and thus that it should have the same legal protections as born persons. It would be odd for the courts to recognize the foetus as having rights on the basis of these arguments, and yet to limit these rights to having purely symbolic status.

While there are strong normative reasons against foetal rights which diminish women's status, one is hard-pressed to come up with reasons to support conferring symbolic rights upon the foetus. The view that the foetus has rights but that its rights are different from those of born persons represents an uncomfortable compromise between the conviction that the foetus is morally indistinguishable from born persons and the belief that the foetus, as developing life, is morally distinguishable from life after birth. It is difficult to support this compromise on normative grounds. If, as I have argued above, symbolic rights will not alter the status of the foetus (and, correspondingly, women's status) and if they will not promote respect for life, there do not appear to be any reasons to support a change of this nature. If, on the other hand, symbolic rights are a prelude to greater rights for the foetus — and it is certainly possible that the very fact of viewing the foetus as a rights-holder might spark a gradual evolution of symbolic rights into rights which impair women's status — they are unacceptable for the normative reasons discussed above.

Since the arguments advanced by opponents of abortion fail to establish a normative foundation for foetal rights (whether they are interpreted as limiting women's autonomy or as symbolic), and since the normative considerations in fact militate against viewing the foetus as a rights-holder, a purposive approach to *Charter* interpretation would lead to the conclusion that a foetus does not have rights. However, it is important to point out that this conclusion does not mean that the foetus should have no legal status or protections or, as opponents of abortion often suggest, that the foetus should be relegated to the status of property.¹⁰⁴ Because it is unique among human experiences, pregnancy represents a challenge to conventional legal thought. The challenge is to construct ways of thinking about pregnancy that accurately embody its uniqueness, that recognize that despite its uniqueness, pregnancy is a normal rather than deviant state, and that acknowledge that a woman continues to be a whole person during pregnancy even though she is creating what will one day be a separate person. Throughout the recent struggles over reproductive rights in Canada and in the United States, feminist academics and legal practitioners have been striving to forge such a vision. In the course of this enterprise, feminists have discovered that our language lacks words for describing pregnancy, and that a necessary step in the feminist revisioning is to provide a vocabulary for talking about the process of creating life. L.E.A.F., for example, intervening in *Sullivan*, described the foetus as being "in and of" the pregnant woman in an attempt to capture the complexities of the intimate interconnection of woman and foetus and the foetus' complete dependence on the woman.¹⁰⁵ One purpose of these

¹⁰⁴See e.g. R.E.A.L. Women's inelephant articulation in *Daigle*:

Depending on the Court's answers to the questions raised herein 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 pieces of property prior to birth (Factum of the Intervenor R.E.A.L. Women of Canada in *Daigle*, *supra* note 10 at 3, para. 8).

Like many opponents of abortion, R.E.A.L. Women sees only two options: either a foetus is a full legal person or it is a piece of property. This quotation is particularly interesting for its suggestion that treating the foetus as a "disposable" piece of property denigrates women, the implication being that women's dignity demands that a foetus have rights:

It is respectfully submitted that historically Canada has recognized the dignity of pre-born children. This is a dignity accorded only to human beings who are persons and is associated with the dignity women themselves have as childbearers. To deny the humanity and personhood of a woman's offspring is to diminish the dignity of the woman herself (*ibid.* at 3, para. 9).

In fact, the opposite is probably true – that foetal rights are far more likely to denigrate women than a decision that a foetus is not a person. However, this conclusion does not mean that a foetus should be viewed as property. For a compelling pro-choice feminist argument against viewing reproductive material as property, see Jennifer Nedelsky, "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6 Can. J. Law & Jur. 343.

¹⁰⁵Factum of the Intervenor Women's Legal Education and Action Fund in *Sullivan*, in particular at 22-25, paras. 42-50. L.E.A.F. described the relationship between the woman and the foetus that is "in and of" her in the following way at paras. 44-47:

While in and of the pregnant woman, the foetus is not just another body part, as the Appellants characterize the Court of Appeal decision. ... The intimate and complex connections between the pregnant woman and her foetus are unique, and feature many ways in which the foetus is quite unlike a body part. The foetus is ordinarily created through intercourse, a social relation which has impregnation as a consequence. During preg-

feminist efforts to find ways to conceive of pregnancy that accurately reflect women's experiences¹⁰⁶ and that affirm women's autonomy and dignity is to produce an analysis of pregnancy firmly centred on the woman and the life she is creating. This analysis can then form the basis of legal regulation of pregnancy. Nothing in this endeavour is inconsistent with recognizing the value of the foetus as developing life, or of acknowledging that, as early human life, the foetus merits some form of legal recognition. The issue for feminist theory is how to fashion this recognition while asserting women's role as the creators and bearers of life and as full human persons.

It is also worth pointing out that feminists share some of the goals of opponents of abortion, though they would seek to reach them in different ways. Like anti-abortionists, pro-choice feminists¹⁰⁷ hope to minimize the number of women seeking abortion, but unlike anti-abortionists, they would not attempt to accomplish this by prohibiting abortion, a measure which experience in Canada and the United States has shown us only harms women by driving abortion underground and into unsafe back-alleys.¹⁰⁸ Instead of penalizing women by

nancy, a woman experiences wide-ranging physiological changes that only pregnancy initiates; without the foetus they will not occur ... Yet the foetus is deep within the body of a pregnant woman, connected to many of her body's systems. The two are jointly nourished. There is no access to the foetus except through the pregnant woman; whatever happens to the foetus happens to the pregnant woman but not always in the same way, and whatever happens to the pregnant woman happens to the foetus but not always in the same way. Through her body, the pregnant woman perceives and experiences the foetus in ways no one else can duplicate; she alone can witness the foetus and its development through her own senses without the intermediation of technology. Viewing the foetus, either as a person or as a person-like separate entity, or alternatively as just another body part of the pregnant woman, does not capture the unique reality of pregnancy.

See also Donna Greschner, "Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle*" (1990) 35 McGill L.J. 633.

¹⁰⁶Women's experiences of pregnancy differ along a number of variables, including whether the pregnancy was desired or not. Jennifer Nedelsky provides a powerful description of the difference between a wanted and unwanted pregnancy:

Carrying a baby is perhaps the most intimate physical-emotional relationship there is. Unless the relationship is desired, it does violence not only to her bodily integrity and autonomy, but to her capacity for intimacy. Sexual intercourse is a good analogy. When this relationship is desired, it offers unrivalled pleasure, fulfillment, and connection. When sexual intercourse is coerced, it is one of the most horrible forms of violation. No woman should be *forced* to undergo the nine-month relationship of pregnancy (*supra* note 104 at 364).

¹⁰⁷I have used the term "pro-choice feminists" here to recognize that some feminists oppose abortion and consider themselves anti-choice. See e.g. Brief of Feminists for Life of America in *Webster*; Gail Sweet, ed., *Pro-Life Feminism: Different Voices* (Toronto: Life Cycle Books, 1985). For a discussion of this position, see Ruth Colker, "Feminist Litigation: An Oxymoron? - A Study of the Briefs Filed in *William L. Webster v. Reproductive Health Services*" (1990) 13 Harv. Women's L.J. 137. However, many feminists who oppose abortion would disagree with the anti-abortion movement's ideology and tactics but would instead favour policies to reduce the incidence of unwanted pregnancies as well as policies designed to make carrying a pregnancy to term and raising a child a more feasible option for women.

¹⁰⁸The legal prohibition on abortion which existed in Canada until 1969 and in various American states until the 1973 decision in *Roe*, *supra* note 35, did not result in the absence of abortion. Women always sought out the procedure at great risk to their lives and health. R.E.A.L. Women themselves concede that prohibiting abortion will not bring the abortion rate to zero. In their esti-

putting their lives at risk, feminists advocate steps to reduce the incidence of unwanted pregnancy and to make childrearing less onerous for women both in economic terms and in terms of women's educational, occupational and personal aspirations. Measures on the feminist agenda include providing sex education courses in school curricula (which would not only address the biology of human reproduction but would also cover the conditions for informed and uncoerced sexuality), producing reliable and safe contraception and ensuring it is readily available, making sure that all women have the financial resources to be able to keep themselves and their children out of poverty, providing affordable, good quality day care, and reforming the workplace to remove barriers to job security and promotion that women with children continue to face. More radical restructuring of the workplace to accommodate the demands of raising a family would be required before women achieve equality in the labour force. Greater equality would also decrease the number of unwanted pregnancies since the personal and economic costs of raising children would no longer fall predominantly on women. Admittedly, these programs will not end abortion altogether as women will still decide to terminate pregnancies for legitimate reasons. However, rendering abortion illegal will also fail to stop abortion, and any decrease in the abortion rate would come at a tremendous cost to women. The feminist proposals, in contrast, promise to lessen the abortion rate in a way that is humane and respectful of women.

Pro-choice feminists are also strongly committed to fostering respect for human life. However, unlike opponents of abortion, feminists tend to advocate social and economic measures that would do far more to promote human life than changing the status of the foetus. Many feminists endorse improving the quality of life by eradicating the conditions of poverty, unemployment and violence in which many Canadians live. Ensuring that people within Canada can meet their basic human needs is a far better way of demonstrating a genuine commitment to the value of human life than declaring the foetus to be a person, a gesture that will do nothing to ameliorate the living conditions in which people live and into which foetuses will ultimately be born.

Although I am of the view that a purposive approach to foetal rights would center on the normative reasons for and against foetal rights, the courts might also consider the more pragmatic issue of whether recognizing foetal rights will bring about the benefits opponents of abortion claim. On this score, the courts might acknowledge the inability of foetal rights either to end abortion completely or to promote human life. The courts might also weigh the feminist alternatives to foetal rights as preferable ways of attaining the stated objectives of the anti-abortion movement.

Conclusion

In this paper I have argued against recognizing foetal rights under the *Charter*. I have attempted to show that establishing the existence of foetal rights

mation, 11 percent of pregnant women will resort to illegal abortion. See Factum of R.E.A.L. Women in *Borowski*, *supra* note 10 at 17, para. 83. This is not much lower than the latest statistics on the abortion rate which show 17.5 abortions per 100 live births (Canadian Centre for Health Information, *Therapeutic Abortions* (Ottawa: Statistics Canada, 1991)).

requires normative reasons justifying treating the foetus as a person, and that the arguments submitted to the courts to date fail to supply these reasons. I have also tried to show that the status of the foetus is inextricably bound up with the status of women, and that recognizing foetal rights can only diminish women's status. In urging the courts to refrain from granting foetal rights, I am not suggesting that the legal system should ignore prenatal life, or that conflicts between women's autonomy and the birth of a healthy child will never arise. I am, however, encouraging the courts to think creatively about pregnancy and to make the pregnant woman and the life she is creating the focus of legal analysis, rather than to bypass the woman, focusing only on the developing life within her. Feminist scholarship, although still at a very preliminary stage, offers a promising avenue for this inquiry.
