INTRODUCTION: COMMENTS ON *WINNIPEG CHILD AND FAMILY SERVICES (NORTHWEST AREA)* v. *D.F.G.*[*]

Every now and again a case comes along that challenges our most basic assumptions about the law. *D.F.G.* is just such a case.[1] *D.F.G.* fundamentally recasts the debate over the juristic status of fetuses — from one where the fetus is merely an adjunct to the discussion about a woman's right to privacy and security of the person in the context of abortion to one where the fetus is a central player as a person-to-be. In *D.F.G.* we are forced to contemplate the state, not as a defender of a particular morality not shared by all citizens, as in the abortion cases, but as a defender of a person-to-be. In addition, *D.F.G.* raises the issue of whether the state has an interest in protecting a fetus and whether, or to what extent, a woman's autonomy can be interfered with in furtherance of that interest.

In the United States, abortion and the status of fetuses in law has been perhaps the most enduring political issue of the last thirty years. Since *Roe* v. *Wade*,[2] positions on fetal rights and abortion have been a central issue in election campaigns and have also been a factor in judicial appointments. Indeed, one's opinion on fetal rights has become the litmus test to determine whether one is a "conservative" or a "liberal." Conservative law-makers, since *Roe*, have tried to circumvent the Supreme Court ruling to impose restrictions on abortion. One such person is Charles Condon, the Republican Attorney General of South Carolina, who has made it his mission to establish that a fetus is a person in law.[3] In a case that parallels *D.F.G.*, Condon prosecuted an African-American woman for child abuse for smoking crack cocaine during her pregnancy. The defence argued that the charge was unsupportable because a fetus was not a child. The South Carolina Supreme Court, however, found that a fetus that had developed to the point where it could be viable outside the womb fit within the definition of "child" under South Carolina's *Children's Code*.[4] While this case is not representative of U.S. law on the status of fetuses generally,[5] it is indicative of an alternative direction in the fetal rights debate.

The fetal rights issue is not the political obsession in Canada it is in the United States. Even here, however, the status of fetuses in law is a question that raises passions. One need only look at the prosecution of Henry Morgentaler in the 1970s and

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1 *Winnipeg and Family Services (Northwest Area)* v. *D.F.G.*, [1997] 3 S.C.R. 925 [hereinafter *D.F.G.*].

2 410 U.S. 113 (1973).

3 S.B. Donnelly, "The Postpartum Prosecution: South Carolina is a Dangerous Place for Pregnant Women Who Abuse Drugs" *TIME* (15 December 1997) 4.

4 *Whitner* v. *State*, 492 S.E.2d 777 (S.C. 1997); 118 S.Ct. 1857 cert. denied (U.S.S.C. 1998). For a similar case in the context of the applicability of a murder charge to a person accused of causing the demise of a fetus, see *State* v. *Horne* 319 S.E.2d 703 (S.C. 1984).

5 See, for example: *Reyes* v. *Superior Court*, 75 Cal. App.3d 514 (1977); *State* v. *Ohio*, 584 N.E.2d 710 (1992); *Johnson* v. *State*, 602 So.2d 1288 (Fla. 1992).

1980s to get a sense of the significance of this issue in Canada. Just as in the United States, however, the debate in Canada has moved beyond abortion to other issues concerning the status of fetuses in law. One recent example is the well-publicized case of *R.* v. *Drummond* where a fetus was shot *in utero* with a pellet gun and subsequently born alive.[6] In that case, the Crown attempted to prosecute the mother of the child for attempted murder, but the Court held that the charge could not be supported as the fetus was not a person for the purposes of the *Criminal Code.* It is against this background of public angst over fetal rights and the increasingly frequent incidence of cases testing the boundaries of personhood that *D.F.G.* must be viewed.

The facts of *D.F.G.* make it an especially difficult case.[7] The story of Ms. G. is a tragic one; she is an aboriginal woman who has a long history of solvent abuse and involvement with Child and Family Services (C.F.S.). Two of her previous three children were born permanently disabled due to her solvent abuse during pregnancy. As a result of her chronic substance abuse, each of her first three children were placed at various times under the custody of C.F.S. In July 1996, C.F.S. became aware that Ms. G. was once again pregnant. C.F.S. attempted to get Ms. G. to enter a residential treatment program, but was unsuccessful. On 1 August 1996, C.F.S. applied before Schulman J. of the Manitoba Queen's Bench for an order forcing Ms. G. to enter a treatment centre. The order was granted and Ms. G. began treatment on 6 August 1996.[8] On 8 August 1996 the order was stayed by the Manitoba Court of Appeal and on 20 August 1996 the Court of Appeal reversed Schulman J.'s order.[9] Despite the Court of Appeal's stay and subsequent reversal of the order, Ms. G. remained in treatment until 14 August 1996. Ms. G.'s tragic story ended happily on 6 December 1996 when she gave birth to an apparently healthy child. At the time of the Supreme Court decision it was reported that she had overcome her solvent abuse problem and remains drug-free.

The Supreme Court was divided on whether a fetus was a person and, consequently, whether Schulman J.'s order was justifiable under the Court's *parens patriae* jurisdiction. Justice McLachlin, writing for the majority, held that the order was invalid and that a fetus was not a person in law. Justice Major, writing for himself and the late Sopinka J., disagreed with the majority and found that the born-alive rule is an anachronism and that the common law should be expanded so that in limited circumstances the state would be allowed to intervene on behalf of a fetus.

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6 *R.* v. *Drummond* (1996), 112 C.C.C. (3d) 481 (Ont. Ct. Prov. Div.). For a case that deals with similar theoretical questions see *R.* v. *Sullivan* (1988), 43 C.C.C. (3d) 65 (B.C.C.A.). In *Sullivan,* two midwives who caused the death of a fetus/infant in the birth canal were convicted on a charge of criminal negligence causing death. On appeal the British Columbia Court of Appeal reduced the charge to criminal negligence causing bodily harm. The court's reasoning for this change was that the fetus was at that time still a part of the mother and not yet a person. Therefore, the harm was to the mother's body and not the cause of the death of a distinct individual.

7 The facts are laid out in great detail by Major J. in *supra* note 1 at 962-71.

8 138 D.L.R. (4th) 238.

9 138 D.L.R. (4th) 254.

In the first comment in this collection "Juridical Interference with Pregnant Women in the Alleged Interest of the Fetus," Sanda Rodgers canvasses the majority decision and the dissenting reasons and points out shortcomings in both.[10] Although Rodgers agrees with much of the analysis and the conclusions of the majority, she suggests that McLachlin J.'s decision inadequately contemplates the history of judicial interference with women's reproductive capacity and the discriminatory fashion in which state interventions in pregnancy would affect aboriginal women. Her harshest analysis, however, is reserved for Major J.'s reasons which she argues are founded on erroneous assumptions about the nature of addiction, a disturbing misunderstanding of the availability of abortion, and an unjustifiable faith in science.

In his comment "The Impossibility of Fetal Rights and The Obligations of Judicial Governance," F.C. DeCoste deals exclusively with McLachlin J.'s majority decision.[11] DeCoste concurs with the result of the decision, but argues vehemently that McLachlin J.'s repeated assertions that the issue was one that was more appropriate to Parliament is an abdication of her judicial role. In DeCoste's view, the liberty of pregnant women should not be consigned to the vagaries of majoritarian politics.[12] Instead, the majority should have defended the law and asserted that the law ascribes particular significance to the events of birth and death for time-honoured reasons. These reasons are not diminished by scientific developments and should not be subjected to political compromise. In short, DeCoste sees *D.F.G.* as an example of the failure of the judiciary to fulfill its obligation to Canadian democracy.

Laura Shanner considers the ethical and philosophical significance of Major J.'s dissent in her comment "Pregnancy Intervention and Models of Maternal-Fetal Relationship: Philosophical Reflections on the *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.* Dissent."[13] Shanner argues that Major J.'s decision is consistent with a model of pregnancy she terms "pregnant embodiement." This model of pregnancy is neither woman-centred nor fetus-centred, but embraces the complexity and duality of pregnancy. Under this model, a woman can be understood to move from gradual recognition to commitment to the pregnancy. This mirrors the understanding that informs Major J.'s reasons. Shanner cautions, however, that depsite its attractiveness as a way of understanding pregnancy, pregnant embodiment is only an appropriate philosophical justification for law under ideal conditions. Unfortunately, Shanner notes, we live in a society where, for many reasons, non-abortion cannot be equated with commitment to the pregnancy.

Bruce Elman and Jill Mason support Major J.'s dissent in their comment "The Failure of Dialogue."[14] Elman and Mason contend that when Parliament fails to act in the face of genuine harm the Court is obliged to extend the common law. In their view, Major J.'s response is a cautious attempt to address a pressing crisis. While Elman and Mason

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10 (1997) 36 Alta. L. Rev. 711.
11 (1997) 36 Alta. L. Rev. 725.
12 *Ibid.* at 737.
13 (1997) 36 Alta. L. Rev. 751.
14 (1997) 36 Alta. L. Rev. 768.

consider the majority decision unsatisfactory, it is Parliament that they blame for the failure of dialogue and lack of protection for the unborn. In their conclusion, the authors point to the more nuanced treatment of pregnancy in Talmudic law and suggest that we might learn from its example.

Justice Major's decision is also the subject of Françoise Baylis' comment entitled "Dissenting with the Dissent."[15] Baylis argues that it is important to understand the difficulties with the minority decision because of its intuitive appeal. Justice Major's threshold test for intervention in pregnancy, Baylis contends, is inappropriate because it assumes that continuation of pregnancy is a choice when often it is a result of more complex factors. She also suggests that the civil standard of proof he prescribes is too low a hurdle given the incomplete scientific understanding of the effect of drugs on developing fetuses. Baylis concludes that maternal drug abuse during pregnancy is not a legal problem but a public health problem that should be addressed by increased services and support for disadvantaged women.

In the final comment on *D.F.G.*, "A Commentary on the Law, Reproductive Autonomy and the Allure of Technology,"[16] Timothy Caulfield and Erin Nelson take issue with Major J.'s unreflective faith in science. Caulfield and Nelson argue that Major J.'s dismissal of the born alive rule on the basis that technological developments have made the rule an anachronism is unsettling given previous legal and policy forays founded on supposed science. While they suggest that an analogy to the infamous Alberta sterilization program is perhaps extreme, it is instructive to note that it too was supported by the scientific knowledge of its time. Instead of faith in technology, Caulfield and Nelson call for a "reasoned and interdisciplinary approach" to forming social policy with respect to intervention in pregnancy. The need for such an approach is evident when the implications of other scientific novelties such as genetic testing and future developments yet unknown are contemplated. Caulfield and Nelson conclude that often the allure of technology must be resisted where individual rights are at stake.

The debate on fetal rights in Canada promises to continue for some time. Perhaps future cases will arise in a similar manner to *D.F.G.* or perhaps Justice McLachlin's repeated appeals to Parliament to intervene will result in legislation that in due course will find its way before the courts. In either event, the comments in this collection highlight important issues that must be considered.

Colin Feasby and Stuart Chambers
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15 (1997) 36 Alta. L. Rev. 785.
16 (1997) 36 Alta. L. Rev. 799.