CANADA V. WOMEN: STATE INTERVENTION IN PREGNANCIES OF SUBSTANCE ABUSING WOMEN

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ABSTRACT

In 1997 a child and family services agency applied to the Court of Queen's Bench in Manitoba for an order forcing a pregnant addict into treatment for the duration of her pregnancy. Though the trial court granted the order, it was overturned on appeal and was ultimately appealed to the Supreme Court of Canada. The Supreme Court determined that there was no jurisdiction for a court to make an order, on behalf of a fetus, forcing a woman into drug treatment. In the course of reasoning its decision, the court addressed several major issues of consequence to women, yet failed to address others. The case is a valuable point of analysis because it highlights several factors that impede the court's ability to provide adequate and appropriate solutions to some of the unique problems that bring women before the courts. These include: the extent to which courts give preference to medical evidence over evidence provided by women themselves, the lack of an appropriate basis upon which women can claim rights, and the problems generated by dominant conceptions of autonomy. This project argues that these factors tend to leave the court with a myopic perspective on the problems women face and consequently a narrow view of appropriate solutions. Finally it is argued that while women ought not to abandon the courts as strategies for change, there are alternative solutions to the problem of substance abuse during pregnancy that the courts may not be prepared or equipped to consider.

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INTRODUCTION

> Here is a classic dilemma. An expectant mother sniffs solvent to the probable detriment of her unborn child. If nothing is done, the child when born will surely suffer.Yet, anything which can be done necessarily involves restricting the mother's freedom of choice and, if she persists in the habit, her liberty.
>
> J.A. Twaddle, Manitoba Court of Appeal[1]

This quote from the appeal court decision in *Winnipeg Child & Family Services (Northwest Area) v. G.(D.F.)*, herein referred to as *Winnipeg*, demonstrates succinctly the critical issue in the case, towards which my analysis in this project will be primarily aimed. The case, eventually heard by the Supreme Court in 1997,[2] questioned the right of pregnant addicts to make their own decisions. Because the case embodied sensational facts and a controversial outcome, it garnered much attention and continues to provoke controversy. In particular, speculation as to the decision's long-term impact made *Winnipeg* a flashpoint for academics and activists concerned with the status of women.

The facts of *Winnipeg* were gripping. A twenty-two year old aboriginal woman, pregnant for a fourth time, was addicted to sniffing glue. Unable or unwilling to stop, she continued to sniff throughout her pregnancy, despite apparently damaged children having resulted from two of her first three pregnancies. Attempts by family, social workers, and doctors, to persuade her to abstain from sniffing for the duration of her pregnancy had proven unsuccessful.

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[1] *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)* [1996] 10 W.W.R., para. 1.
[2] *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)* [1997] 3 S.C.R. 925

Since glue is not an illegal substance, the woman was not committing a crime by sniffing. However, evidence that substance abuse during pregnancy may cause fetal damage prompted Winnipeg Child and Family Services (CFS) to apply to the court for an order forcing the woman to enter a treatment facility until she gave birth. Though the evidence provided before the trial court in support of the order was compelling, in places it was incomplete or conflicting. Two social workers provided evidence on behalf of CFS. The first testified to having observed the woman "under the influence of glue".[3] The second social worker, in reference to the woman's second child, testified that "the baby exhibited symptoms associated with a mother who had ingested intoxicating substances while pregnant".[4]

Several doctors also provided evidence on behalf of CFS, cumulatively giving evidence to the effect that glue sniffing causes damage to both the sniffer and the fetus. Recognizing that damage to a fetus occurs primarily in the first trimester, one doctor stated that "these children [of women who sniff while pregnant], when born, exhibit [a list of effects]".[5] Though this testimony was presented as universal fact, no explanation was provided as to why one of the woman's children, also exposed to the effects of glue sniffing *in utero* exhibited no symptoms of damage.[6] Further, while two of the woman's children were described by the courts as displaying "signs of developmental delay, a birth defect found in children exposed *in utero* to solvents",[7] no evidence was provided regarding other possible causes for the delay, nor was any evidence adduced regarding

[3] *Winnipeg* (QB), para. 10.
[4] The social worker's basis for drawing these conclusions, and her qualifications for doing so (including whether she was present at the birth, are not mentioned. She draws similar conclusions regarding the woman's third child: Ibid., para. 11.
[5] Ibid., para. 8. Note that at twenty-two weeks, the woman was well beyond her first trimester.
[6] Ibid., para. 2. A fact also true of the subject of this litigation, a child ultimately born healthy.
[7] *Winnipeg* (SCC), para. 74.

either the frequency with which children are generally examined for delays, or the frequency with which delays are detected. No evidence of any sort was adduced by the woman. While it cannot be disputed that there does exist evidence that sniffing glue during pregnancy may cause damage to the fetus, the effect of the weaknesses in this evidence will be examined in this project.

The Manitoba Court of Queen's Bench granted the order, forcing the woman into treatment for the duration of her pregnancy. In justifying the order the court employed convoluted reasoning; reasoning that raised more questions than it answered. The decision was appealed to the Manitoba Court of Appeal, where the initial order was overturned. The basis for the appeal court's ruling was that nothing in the law gave the court the power to detain a woman for the protection of a fetus, since this would effectively mean ascribing to the fetus, rights traditionally reserved for legal persons. The appeal court decision was subsequently appealed to the Supreme Court of Canada (SCC) where the majority of the court upheld the decision of the Court of Appeal, agreeing that the law did not empower the court to detain the woman, either for her own protection or for that of her fetus.

Facts aside, the outcome of the case, and more specifically the reasoning behind it, makes *Winnipeg* worth substantial investigation. There are several reasons why the outcome of the case was significant. First, the SCC has the power to choose which cases it will hear and generally will only hear cases where the question at issue is a matter of national importance and involves a point of unsettled law. The fact, then, that *Winnipeg* was even heard by the SCC means that in the Court's mind the law relating to women's rights *vis-à-vis* a fetus was both important and unresolved. Second, the case considered

the nature of the relationship between a woman and a fetus, a consideration which demanded that the rights of each be clearly identified, and that the rights of one be effectively prioritized over the rights of the other. As such, the case focused public scrutiny on the behaviour of a pregnant woman and asked the question: could a woman's behaviour be regulated by the state when she is pregnant? In a word, the court's response to this question was 'yes'. Though the SCC determined that under the present state of Canadian law, no order could be made forcing a woman into substance abuse treatment, it left the door open for the introduction of legislation allowing state regulation of pregnancy in limited circumstances. While the decision may be viewed as a victory of sorts for women, since the effect of the decision was to maintain the priority of a woman's rights over a fetus's interests for the time being, the analysis in this project will reveal that *Winnipeg* may only represent a temporary reprieve from state intervention.

The main argument in this project is that while the outcome of the case was favourable, there are weaknesses in the reasoning of the decision from the point of view of ensuring that women's autonomy is protected. The danger these weaknesses pose is fully illuminated when *Winnipeg* is evaluated in light of certain characteristics of the legal system. An important part of this argument is that while there is a common belief that SCC decisions become enduring statements of law, the reality is sometimes quite different. In reality, SCC decisions are often ignored, modified or overruled by subsequent judicial or legislative action. The convergence of patriarchal values underlying the legal system and specific rules governing future applications of the law, make the *Winnipeg* decision susceptible to interpretations that may not protect women's autonomy.

The first task of this project is to examine pertinent legal concepts, which will provide a basis for analysis of *Winnipeg*. Next, a brief history of the case will be provided, with particular attention to the SCC's treatment of the case. Together these discussions will demonstrate that the question of fetal rights versus women's rights in Canada remains unresolved. These discussions will also begin to suggest what could or should be done in response to the outcome of *Winnipeg*, a question that will be returned to near the end of the project.

Next, this project will demonstrate why the decision is meaningful, with reference to three particular issues raised by *Winnipeg*. The first issue raised is the implication of using medical expertise as evidence in the courtroom. The value courts place on such evidence is problematic to the extent that it prioritizes knowledge provided by a patriarchal profession over knowledge provided by women themselves in determining the truth. The second issue raised relates to women's claims for legal rights, and the difficulties women encounter in attempting to claim those rights within the parameters of a legal system not especially well designed to accommodate gender difference.

These two issues highlight a third important issue: women's autonomy. Modern liberal societies highly value personal autonomy as a fundamental quality of personhood. The fact that *Winnipeg* raises issues that are relevant to women's autonomy makes it a decision of fundamental importance to women. This project will examine two different conceptions of autonomy, with a view to clarifying both the SCC's own conception of women's autonomy as pronounced in *Winnipeg*, as well as the implications of adopting a particular conception of autonomy.

Finally, germane elements of the SCC's reasoning will be analysed in the context of the forgoing discussions, an endeavour which will reveal insight not only into the value of what the SCC said in *Winnipeg*, but also what it did not say. Supported by an understanding of not only the applicable law, but also of relevant theoretical perspectives, both the promising and the disappointing elements of the decision will be evaluated. Ultimately I will contend that *Winnipeg* represents the so-called 'thin edge of the wedge' and has the potential to erode autonomy, despite the fact that it does not overtly appear to do so. Women would thus be well advised to remain attentive to future directions of the courts and the legislatures on this and other related issues for women's control over their bodies and their futures.

I. LEGALITY AND MORALITY: THE SYSTEM AND THE DECISION

The first question to ask and attempt to answer in relation to this case is: Who cares if the state forces an addict to do what most people probably agree she should do? After all, relatively speaking, very few women will be affected by such intervention, since most women who become pregnant take steps to maintain their own good health- they eat properly, exercise, and quit smoking, although the state does not demand that they do so.[8]

There are numerous reasons why incidents of substance abuse during pregnancy are morally offensive, many of which are compellingly articulated by interveners in *Winnipeg*.[9] Moral offence derives from, among other things, an apparent lack of concern on the part of the woman towards the fetus, which, doctors speculate, may suffer any number of disabilities as a result of the substance abuse. In particular prenatal substance abuse is morally offensive because science and the medical profession assert, and society believes, that substance abuse during pregnancy is harmful to the fetus.[10] That sniffing

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[8] Bonnie Steinbock, *Life Before Birth: The Moral & Legal Status of Embryos and Fetuses*. (New York: Oxford University Press, 1992),147; N.S. Gustavsson and A.E. MacEachron. "Criminalizing Women's Behaviour," *Journal of Drug Issues*, 27(3) (1997):1. While the relative numbers are low, the actual number of pregnancies involving substance abuse is nearly impossible to measure. According to Gustavsson, "Variability among estimates is influenced by the nature, location and size of the sample; the definition of drugs; and the methods used for drug identification... it [is] clear we do not know how many pregnant women are using drugs, what drugs they are using, in what quantities and with what frequency, and during which stages of pregnancy": 1-2.

[9] See factum of the interveners Evangelical Fellowship [online]

[10] Many theorists question either the integrity of scientific conclusions regarding fetal damage as a result of substance abuse, or the extrapolation of results from isolated studies to all types of substances and all patterns of use. See for example T. McCormack, "Fetal Syndromes and the Charter: The Winnipeg Glue-Sniffing Case," *Canadian Journal of Law and Society*, no.14 (1999): 85-90; Gustavsson: 1-4. While the scientific basis for assertions that substance abuse causes fetal damage has been questioned, the moral offence is in the expectation that scientifically true or not, the woman believes that damage results and still does nothing.

glue *may* cause damage to the fetus is sufficient to create moral offence. This moral judgement makes the pregnant addict one of the least sympathetic characters imaginable, and many people find it difficult to fathom the basis upon which she or her actions might be defended.

However, the leap from moral offensiveness to legal intervention in pregnancy is considerable, and the complex factors which have led to the point where legal intervention is considered an appropriate remedy for this problem must be examined. Rarely is consideration given to the possibility that it is characteristics external to the pregnant addict that ought to be morally offensive, rather than the characteristics of the woman herself. The medical profession, the legal system, and patriarchal manifestations of all types have contributed to a pattern of state imposed values that sometimes threaten women's autonomy. Challenging traditional patterns might illuminate alternative explanations as to why women abuse substances during pregnancy, and consequently might indicate alternative solutions to the problem that are not contemplated by the court in *Winnipeg*, some of which are discussed below. First, however, the legal context in which *Winnipeg* was situated needs to be explained.

1. General Legal Concepts

While the Canadian system of governance is formally divided into three distinct branches, the functions of these branches sometimes overlap. The processes by which courts operate and the influences under which they make their decisions are consequently important factors in assessing social policy.[11] In *Winnipeg*, the court's consideration of

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[11] Gerald L. Gall, *The Canadian Legal System*, 3rd ed. (Toronto: Carswell, 1990), 4.

whether to detain a pregnant addict involved questions of complex social policy involving both the rights of women and the rights of fetuses. In the process of disposing of the case the court provided reasoning based substantially on questions of social policy and as a result this case has become the centre of a highly contested debate about the extent to which the state, via the courts, should interfere with the autonomy of its citizens, and that of women in particular.

To properly address the issues in *Winnipeg* a brief background to key legal concepts is necessary. First, the principle of *stare decisis*, also referred to as precedent,[12] is relevant. *Stare decisis* is the practice of relying on past judgments to guide future decision-making, and it binds all courts in a given jurisdiction to follow precedents set by higher courts. *Stare decisis* affects the likelihood that a case will have a pervasive impact on Canadian law. The SCC, as the highest court in the land, is not bound by precedent, but its decisions are binding on all other Canadian courts. As a decision of the SCC, it is reasonable to expect that the principles in *Winnipeg* will be applied in future cases. However, while judicial decisions may be valuable indicators of future law and policy, because the SCC is not bound by its own decisions, cases cannot be interpreted as settling matters for all time.

Second, the distinction between the *ratio* and the *obiter* of a decision is relevant to understanding the decision in *Winnipeg*. Each judicial decision can effectively be 'boiled down' to a single principle of law that will bind lower courts in the future. That single

[12] While *stare decisis* is the practice of following past decisions, the term 'precedent' refers to the decision itself.

principle of law for which a case stands is the *ratio decidendi* (*ratio*).[13] The term *obiter dicta* (*obiter*) refers to the elements of the decision that do not directly support the *ratio*. Identifying the *ratio* does not mean that the rest of the decision is insignificant- extensive reasoning is typically provided in support of the *ratio* and the reasoning is also instructive. In fact some see the reasons as "more important than the outcome: the outcome affects the immediate parties in a direct way, but the reasons can ripple very wide indeed"[14] and the reasoning in *Winnipeg*, both *obiter* and *ratio*, will be given careful consideration.

Another notable feature of judicial decisions is the distinction between majority and dissenting opinions.[15] The majority opinion is that portion of a judgment that reflects the view of the majority of the court, both in terms of disposition of the case and in terms of reasoning,[16] while the dissenting opinion reflects the view of those members of the court who would dispose of the case differently than the majority. While dissents carry no precedential weight, they do "weaken the precedential value of a decision as a source of clear and dependable rules"[17] and the dissent in *Winnipeg* is treated as a key component in this analysis. In *Winnipeg* two judges concurred in dissent, and while this does not signify a dramatic division within the court, it is significant to the extent that any

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[13] There is substantial disagreement among legal scholars and practitioners alike as to what precisely constitutes *ratio*, with some taking the broader view that *ratio* includes all reasoning supporting the disposition of a case, while others argue the *ratio* is the narrow statement of law disposing of a case. In fact this is one of the tools employed by lawyers to persuade a judge to apply (or not apply) certain precedents. The narrower view of *ratio* is used here as subsequent cases show that it is generally the narrower *ratio* of *Winnipeg* that Canadian courts have applied: Gall, 38.

[14] Ian Greene, Carl Baar, Peter McCormick, George Szablowski & Martin Thomas, *Final Appeal: Decision-Making in Canadian Courts of Appeal.* (Toronto: James Lorimer & Co. Ltd., 1998), 131.

[15] This distinction does not apply at the trial court level where a single judge hears cases.

[16] Where a judge agrees with the outcome of the majority but not the reasoning for it they may issue a concurring opinion.

[17] P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions.* (Oxford: Clarendon Press, 1987),130.

dissenting opinion weakens the precedential value of a case.[18] In Canada, dissents sometimes have a way of eventually turning up as majority decisions in the future, especially if changes in the bench favour the dissenting philosophy,[19] and are often seen as indications of 'changes in the jurisprudential winds'.

A final significant feature of judicial decisions in Canada relates to the fact that the SCC is its own gatekeeper. Litigants must typically apply to the SCC for leave to appeal their case.[20] The factors that go into a decision to grant leave are complex, but mainly involve a determination as to whether the point of law at issue is one that remains unsettled in Canadian law and whether that point of law is one of national importance, such that its impact will go beyond simply resolving the dispute between the litigants themselves.[21] The fact that *Winnipeg* was heard before the SCC therefore suggests that in the courts mind the law relating to maternal versus fetal rights had not been clearly resolved and was an issue significant to Canadians generally.

2. *Substantive Legal Principles*

In addition to the broad concepts noted above, the SCC in *Winnipeg* addressed three substantive legal principles:[22]

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[18] In weighing the dissent it is important to remember that the trial judge also issued a decision allowing the order. Out of the total seventeen judges who heard this case at various levels, three allowed the order. Prior to *Winnipeg* no judge had ever allowed such an order; by the time *Winnipeg* concluded, three judges, including two SCC judges, had allowed the order; consequently it represents a departure from the *status quo* prior to *Winnipeg*.

[19] This introduces a topic that simply cannot be discussed here for reasons of time and space: individual judges philosophies and the impact of changes to the bench on the law in Canada.

[20] In certain criminal matters an automatic right to appeal to the SCC does exist: Greene, 100.

[21] The criteria for granting leave to the SCC are extremely vague and largely subjective. Some factors that have been taken to indicate 'national importance' include splits in appellate courts on the issue, the impact of the uncertainty in the law and whether the appeal presents 'the right case' to use as a vehicle to clarify and interpret the relevant law: Ibid., 109.

[22] That is, the actual content of the law, rather than the processes that help form it.

- tort liability;
- *parens patriae*;
- jurisdiction of the court to extend existing principles.

A. Tort Liability

Tort law governs interactions between individuals and is broadly based on the concept of a 'duty of care'- that is, a duty not to engage in an activity which one could reasonably foresee would injure the interests of another person.[23] In order for there to be tort liability creating a cause of action there has to be at least two persons. The question in *Winnipeg* was whether the woman and the fetus were two people, such that a cause of action arose. Prior to *Winnipeg* the SCC had determined that a fetus was not a person, and so where the only interest being injured was that of a fetus, there could be no cause of action.[24] In other words, the fetus could not sue the mother to prevent her from causing it harm. This principle, known as the 'born-alive rule', dictates that legal rights accrue only once a fetus is born alive and viable. With no rights to protect, the fetus can have no right to sue for protection of rights. Since the fetus did not have this right to sue, nobody, including CFS, could assert this right on its behalf.[25]

B. Parens Patriae

The second legal principle at issue was *parens patriae*, a principle that gives the court the ability to make decisions on another person's behalf where they are determined

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[23] A.L. Armitage, ed., *Clerk & Lindsell on Torts*, 12th ed. (London: Sweet & Maxwell Ltd., 1961), 1.
[24] *Tremblay c. Daigle* [1989] 2 S.C.R. 530.
[25] The fetus had been acknowledged as having some rights. A baby born alive could sue its mother for damage incurred by her actions while in the womb, but this right to sue only crystallized upon birth, a long-standing principle known as the 'born-alive rule': *Duval v. Seguin* (1972), 26 D.L.R. (3d) 418. Though well-established this rule has detractors: some fear it will encourage doctors and mothers who may have harmed a fetus to terminate it so as to avoid liability. Others, as will be discussed in more detail below, see it as an archaic principle whose distinction between the moment before birth and the moment after birth is effectively arbitrary and artificial.

to be incompetent to do so.[26] Most commonly it is used to make financial and legal decisions for the protection of the estate of minors or the mentally incompetent, and to apprehend children from the care of their parents for their protection. At the time of *Winnipeg*, *parens patriae* had never been used to permit the court to make decisions for the protection of the fetus, as it was not deemed to be a person.[27] Whether the court could employ *parens patriae* in *Winnipeg* turned on whether the fetus was a person, and so again, the status of the fetus was a question before the court.

C. Jurisdiction

The final question before the court depended on its response to the first two issues. If the SCC determined that either tort law or *parens patriae* could apply to a fetus, then the court would have proceeded to consider whether or not they would be used in this particular case. If the SCC determined that the existing principles could not apply to a fetus, the next question was whether the court had the power to extend existing legal principles so that they could apply to a fetus. This would mean that the court would be changing existing law, a task normally associated with legislatures. The court's jurisdiction to make changes in law is restricted to making incremental changes which effectively constitute extending existing principles to new situations.[28] Where a contemplated change could be considered radical, the court has no jurisdiction to make the change. The SCC therefore would have to consider whether extending existing legal principles so that they protected a fetus would constitute a radical departure from existing law, or an incremental extension of existing principles to a new situation. This brief

[26] The term actually refers to the court's ability to stand in the place of a parent, a description which is somewhat misleading, as its application extends to adults.
[27] *Re F. (in utero)* [1988] 2 All E.R. 193 (C.A.)
[28] *Watkins v. Olafson* [1989] 2 S.C.R. 750; *R. v. Salituro* [1991] 3 S.C.R. 654.

explanation of legal issues will assist the analysis of this decision, but before proceeding with the analysis, a history of the case should be reviewed.

3. Case History

A. The Manitoba Court of Queen's Bench

Winnipeg came before the Court of Queen's Bench of Manitoba in 1996 as an application by CFS for the committal of a pregnant woman addicted to glue-sniffing into a residential treatment facility for the duration of her pregnancy.[29] Included in the facts of the case and presumably considered relevant were the facts that the woman was aboriginal, that she was 22 years old and that this was her fourth pregnancy. Details of the circumstances of her previous pregnancies as well as the fact that all her children had been made permanent wards of CFS after being apprehended at birth were also included. Evidence was given that the woman was continuing to sniff glue throughout her fourth pregnancy and that she was suffering from various physical and mental effects as a result of this substance abuse, most noticeably a loss of motor skills resulting in an unstable gait.

The trial court judge recognized that he had no jurisdiction to make any ruling based on the rights of the fetus- there was nothing in the law to indicate that any court could intervene to preserve the interests of a fetus. To achieve his goal of protecting the fetus from the effects of glue-sniffing by the woman, the trial judge deemed the woman mentally incompetent and committed her to the custody of CFS so that she could be

[29] The facts as laid out here are taken directly from the written reasons of the Manitoba Court of Queen's Bench: *Winnipeg Child & Family Services (Northwest Area) v. D.F.G.* [1996] 10 W.W.R. 95.

forced to remain in a residential treatment facility.[30] The judge claimed that the order was to prevent damage being done to the mother as a result of her glue-sniffing and was for her protection, not that of the fetus. Though he maintained that the order was for the protection of the woman rather than the fetus, his true goal of protecting the fetus was evidenced in his ruling that the order for confinement expire upon the birth of the baby. In the end the trial judge gave his own prescription for the way the law should be changed: "there are... good grounds for broadening the scope of *parens patriae* to allow the court to make an order to protect the child to be born. In other words, the focus should be on the child to be born".[31] Allowing that "this approach goes beyond the present authority of the court", the judge suggested that, "legislative action may be necessary".[32] It was with this final pronouncement that the trial judge committed the woman to the custody of CFS for treatment with an order terminating upon her giving birth.[33]

B. The Manitoba Court of Appeal

The decision of the trial court was appealed to the Manitoba Court of Appeal, which found evidence of mental incompetence lacking and judged that the trial court had improperly used the Mental Health Act to activate its *parens patriae* jurisdiction. In short shrift the appeal court dismissed the trial judge's ruse of acting in the best interests of the mother:

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[30] Given the non-criminal nature of glue sniffing, the Mental Health Act of Manitoba was the only basis upon which the trial judge could legally justify the order: *Winnipeg*, para.46. The Act allows a court to determine that a person is mentally incompetent, a determination which would activate the court's *parens patriae* power to make decisions on behalf of that person.

[31] *Winnipeg* (QB), para. 43.

[32] Ibid., para. 46.

[33] Although the courts refer to her as the mother, the term 'woman' is intentionally used in this project to avoid conflating ideas of mothering a child with ideas of being pregnant with a fetus. Each are separate roles and where they are conflated it is generally to the detriment of the pregnant woman, given the relatively high standard of care the law imposes on mothers towards their children, and the similarly high standard to which society holds mothers. For a discussion of this problem see Lorna A. Turnbull, *Double Jeopardy: Mother-Work and the Law.* (Toronto: Sumach Press, 2001), 61.

> The order which he made, and which is the subject of this appeal, was made *purportedly* on the basis of the mother's mental ill health. The findings of mental disorder and incompetence are suspect from the start. The agency's [CFS] concern was never the mother's mental health, but rather the welfare of the unborn child. Moreover, an order truly made for the mother's protection would not be expressed to lapse on the birth of her child (emphasis added).[34]

Having dismissed the idea that the order sought was for the protection of the pregnant woman, the appeal court next considered whether it had jurisdiction to make an order that the woman undergo treatment for the benefit of the fetus, a jurisdiction the trial judge in his closing comments assumed he did not have (which was why he made the pretence of acting for the benefit of the woman). The appeal court did not make a clear determination as to whether there existed the authority to make an order detaining the woman for the protection of the fetus, but instead determined that:

> Considering all the ramifications of recognizing a cause of action in favour of an unborn child, I do not think it appropriate that the court should do so even if that course is open to it. That is not to say that legislative intervention is not desirable.[35]

In other words, the appeal court left a determination of the status of a fetus to the legislature. The Court of Appeal overturned the order made by the trial judge, and that decision was subsequently appealed to the SCC. It is the SCC's treatment of the issue to which we now turn.

C. The Supreme Court of Canada

The SCC granted the litigants in *Winnipeg* leave to appeal the decision of the Manitoba Court of Appeal.[36] By the time the SCC heard the case in 1997 the point was

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[34] *Winnipeg* (CA), para. 3 & 4.
[35] Ibid., para. 34.
[36] Granting of leave reported at 138 D.L.R. (4th) vii note.

moot from the perspective of resolving the dispute between the individual litigants; while the various trials of the case were taking place, the woman had remained in a treatment facility voluntarily, and had given birth to an apparently healthy child. The case continued regardless, because the issues it raised had yet to be clearly settled in Canadian law. It also continued because there is an important distinction between the role of the lower courts and the role of the SCC. While the former are concerned primarily with resolving disputes between individual litigants, the latter takes a broader view of its purpose. This highlights the first of two major differences between the lower courts and the SCC.

The SCC has a normative role not associated with the lower courts, and its decisions are key elements of social policy. Because of the principle of *stare decisis*, it is able to deal with legal issues in a fundamentally different way than any of the lower courts of Canada. As the highest court in Canada, the SCC is not bound by the decisions of any other court. This gives the SCC a leeway unavailable to lower courts to change existing laws that is considers no longer appropriate. Therefore while the preceding analysis of lower court decisions demonstrates how the law *has* developed, the SCC has the opportunity to show where the law *should* develop and analysis of its decision in *Winnipeg* therefore constitutes the essence of this analysis.

The second distinction between lower courts and the SCC is the presence of interveners- parties representing particular social interests- who are able to present facta to the court but who are not allowed to make arguments.[37] According to former SCC

[37] Facta are written briefs presented, by each party or intervener, to appeal court judges which outline the arguments being made by them and the sources upon which they rely in support of those arguments.

Justice Bertha Wilson, "the main purpose of having interveners is to broaden the context of the dispute".[38] The participation of interveners further serves to demonstrate that at the SCC level the emphasis shifts dramatically away from dispute resolution and towards the creation of social policy. In *Winnipeg* a host of interveners - seventeen in all - presented facta. Together these groups reflected the diverse and conflicting viewpoints held in Canadian society with respect to women's autonomy.

Despite the shift towards broad policy-making, constraints on the normative capabilities of the SCC exist. While appropriate normative prescriptions presumably require the court to be aware of all relevant factors, the trial process does not necessarily facilitate this. For example, it is at the trial court that decisions are made as to the inclusion or exclusion of evidence that will be available to the SCC. Although interveners in the SCC provide broad, contextual arguments, these arguments are restricted by the evidence in the case. In *Winnipeg*, little evidence was adduced at trial regarding the woman's social circumstances. Was she in a relationship? Was she educated? Why had previous treatment attempts failed? Evidence on these points was not included by the trial court, leaving the SCC to speculate as to the factors that might have contributed to both her pregnancy and her substance abuse. Consequently, the court's normative capacity is constrained by the fact that the trial judge (who is focused on the individual case and less on normative prescriptions) decides what evidence is relevant. With different goals in mind, the trial judge may exclude evidence that the SCC could have found useful.

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[38] Justice Bertha Wilson, "Will Women Judges Really Make a Difference," In *Law, Politics and the Judicial Process in Canada*, 3rd ed., ed. F.L. Morton (Calgary: University of Calgary Press, 2000), 151.

The SCC decision in *Winnipeg* consisted of a majority opinion and a dissenting opinion, concurred in by two judges.[39] The SCC considered not only whether legal principles as they existed could be applied to protect a fetus, but also whether the court had the jurisdiction to extend these principles if it was decided they did not already protect the fetus.[40] This question of whether the court *could* extend existing law, and if so whether it *should* do so, was the crux of both the majority and dissenting opinions, though the majority focussed on the first point while the dissent focussed on the second.

The majority determined that there existed no legal basis for deeming the fetus a person, so it could not be provided the relief sought. Neither tort law principles nor *parens patriae* armed the court with the power to order that the woman be detained for the benefit of her fetus. Traditional laws of standing are restricted to persons,[41] and there existed no provisions in the law that would give a fetus the right to the relief sought. The majority was therefore required to consider the third question; whether granting the order would constitute a radical or incremental change to existing law. The majority confirmed that its jurisdiction to make changes to existing law was restricted to incremental extensions of existing law.[42] Based on this assessment of its jurisdiction, the majority determined that to extend either tort law principles or *parens patriae* so as to benefit the fetus could have sweeping and unforeseeable consequences, and as such constituted a

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[39] The majority decision included support from the only two female Supreme Court Justices, a fact which one might argue lends support to past SCC Justice Bertha Wilson's comment that: "Certain areas of judge-made law reflect the gender bias of a male judiciary... women judges will bring a uniquely feminine perspective to bear on certain issues of legal interpretation" in: Morton, 81. Again, consideration of the impact of judicial makeup exceeds the scope of this project.

[40] The question of whether an order could be made restraining the mother under *The Mental Health Act*, considered by the trial judge, was not presented as an issue before the SCC.

[41] 'Standing' refers to the right to seek relief in a court of law. Corporations are an example of an entity that has been deemed a 'person' for the purposes of standing.

[42] *Winnipeg* (SCC), para. 18.

radical shift from existing law, making it a change outside the court's jurisdiction.[43] With no existing jurisdiction to make an order detaining the woman, and no power to extend existing jurisdiction, the majority refused to make the order.[44]

While the dissent agreed with the majority's statement of principles governing judicial change to law, it diverged fundamentally from the majority view by determining that extending rights to the fetus was an incremental change. The dissent allowed the order for forcible confinement, concluding that extending tort liability and *parens patriae* to benefit a fetus constituted precisely the sort of incremental policy change that was within the jurisdiction of the court. Arguing that the distinction between a child and a fetus that existed in law was archaic, the dissent concluded that in light of modern medical knowledge of the fetus the distinction between child and fetus was arbitrary and ought to be revised so that a fetus could enjoy protections under the law where its interests conflicted with those of the woman carrying it. The dissent either did not agree that such an extension would be tantamount to declaring the fetus a person, or was not as concerned by the prospect as the majority. Before proceeding to an analysis of the two opinions, some broader issues raised by them should be examined.

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[43] The majority determined the change was properly within the jurisdiction of the legislature: *Winnipeg* (SCC), para. 59.

[44] According to previous SCC decisions, the court's power to make changes to the law is restricted to changes required for the common law to remain consistent with evolving realities, but which do not themselves involve significant social or legal ramifications: *R. v. Salituro*; *Watkins v. Olafson*. This complex issue is considered in more detail below.

II. WOMEN'S LEGAL STATUS: EVIDENCE, RIGHTS AND AUTONOMY

There are a number of assumptions about women, their role in society and their status under the law, that are embedded within the strictly legal reasoning of this case. Some of these assumptions are more explicit than others, but all are indicative of gender bias in both law and policy, and are reflective of themes found by others studying legal and political discourses relating to pregnancy and motherhood in Canada.[45] Three issues raised by *Winnipeg* are the focus of this project:

- The role of evidence;
- The question of rights;
- The value of autonomy.

1. Role of Evidence

The construction of evidence in Canadian courts unfortunately exhibits a number of patriarchal influences that tend to undermine women's ability to have their version of reality legitimized by courts. Among these patriarchal influences is the reliance of the courts on medicine and science as sources of reliable evidence. In *Winnipeg* both the majority and the dissent relied on medical evidence in justifying their disposition of the case. As was detailed in the introduction to this project, the evidence provided before the trial court was at times incomplete (for example, the limited information provided regarding the incidence of developmental delay among children in the general

[45] Turnbull, 62.

population) and at times conflicting (as when testimony was accepted that sniffing glue will cause damage to a fetus, despite the healthy birth of the woman's first child). Both the majority and the dissent accepted this, and other, (questionable) medical evidence as to the effects of glue sniffing on a fetus and used this evidence as the premise on which many of their arguments were based. The dissent also relied heavily on medical evidence as justification for extending rights of the person to fetuses, accepting evidence that there is little physiological difference between a born child and a fetus. While the majority refused to give weight to medical evidence in this regard (arguing that the question of rights is a normative one), arguments based on medical evidence were featured prominently in the facta of several interveners and were clearly influential in the ultimate decision of the court.

The dissent invoked medical knowledge as support for the extension of tort and *parens patriae* principles for the benefit of a fetus. According to the dissent, the rationale for limiting these principles to born-alive children was born solely of the fact that when the principles developed, medical knowledge was simply too rudimentary to enable any rights to accrue to a fetus; medicine was unable to ascertain the point at which a fetus had died or been injured. Nor could the cause of injuries suffered *in utero* be determined using the medical technology of the day.[46] The majority did not dispute this. However, the two opinions diverged when the dissent called these principles archaic, asserting that historically it was out of evidentiary necessity, not substantive principle, that legal rights

[46] *Winnipeg* (SCC), para. 92.

such as *parens patriae* attached only to born-alive children.[47] According to the dissent, since medical knowledge of the fetus has evolved considerably, so too should the law. As medicine is now capable of understanding some causes of fetal damage and how to prevent such damage, there is no longer any legal rationale for denying to the fetus the rights which the born-alive rule dictates would accrue to it upon birth, so that it could be protected from such damage.

The role of medical knowledge as a basis for legal decisions is of particular importance to women since their experiences with the Canadian legal system are frequently a product of the state attempting to control their reproduction. Reproduction itself has increasingly become the domain of the medical profession and so some exploration of the medical profession and the role it has played in reproduction is essential to framing the issue of state intervention in pregnancy.

Medicine arguably sits atop an endless list of institutions which are almost universally perceived as neutral institutions, but which actually embody and propagate patriarchal values. Historically medicine has played a fairly insignificant role in pregnancy for one of two reasons: first, for most of human existence no one really understood pregnancy and birth, and consequently no one had expertise on the matter (if anyone could be considered to have such expertise, certainly it would be the women who had themselves been involved in the process of pregnancy and birth, not removed observers such as men). Second, pregnancy was not deemed an illness, so even if there

[47] The distinction being made here is between legal rules that result from limitations on available or authoritative evidence on the one hand, and legal rules that result from a weighing of authoritative evidence to achieve what is considered to be a reasonable or fair principle on the other.

had been a medical profession, engaged as they have traditionally been in the business of healing illness, there would have been no role for them to play.[48]

All this has changed in the last century with major advances in medical technology.[49] The expansion of medical knowledge meant that more doctors were necessary, as they extended their jurisdiction over every aspect of the body. Not inconsequentially, this expansion of the medical profession occurred at a time when women were predominantly engaged in the private sphere. Doctors therefore were almost exclusively (and continue to be predominantly) male. As doctors constructed pregnancy as an 'illness', a dynamic of dependency developed wherein women deferred to doctors ('doctor' being a role strongly associated with universal, objective knowledge), giving men authority over women even in the one area of life where women most assuredly understood more than men.[50] Courts and legislatures have also exhibited deference to doctors, privileging their version of events over those provided by women themselves.[51] As pregnancy has transformed into a medical process, it is no longer within the purview of 'everyday observations' of the sort lay witnesses are qualified to testify to. Instead the opinion of medical professionals is relied upon.[52]

The medicalization of pregnancy could as well be called the masculinization of pregnancy. It represents the dawning of the imposition of men and their institutions on

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[48] Rebecca M. Albury, *The Politics of Reproduction: Beyond the Slogans.* (St. Leonard's, Australia: Allen & Unwin, 1999), 39.
[49] Lisa Maher, "Punishment and Welfare: Crack Cocaine and the Regulation of Mothering," In *The Criminalization of a Woman's Body*, ed. Clarice Feinman (Binghamton: The Haworth Press, Inc., 1992),161.
[50] Michael Thomson, *Reproducing Narrative: Gender, Reproduction and Law.* (Aldershot: Ashgate Publishing Company, 1998), 12.
[51] "In the majority of [legal] cases medicine's knowledge has been validated as superior [to women's] and the court has sanctioned the procedure to which the woman has refused consent": Ibid., 213.
[52] "More and more control is taken away from an individual's body and concentrated in the hands of 'experts'": Ibid., 154.

the bodies of women. When referred to as rape, we criminalize such an imposition; referred to as prenatal care, we have in the twentieth century glorified this imposition. It also represents a shift away from the state's prior relative indifference to the regulation of pregnancy.[53] Once a society accepts that a woman might not be the most appropriate locus of pregnancy related decision making, it is easy to accept that where a woman disagrees with or chooses not to accept a doctors 'advice' about what decisions she should make, the courts should be engaged to enforce such advice.[54]

Concurrent with the expansion of the medical profession at the turn of the century, the legal profession was also expanding its jurisdiction, and was also overwhelmingly male.[55] Not surprisingly this predominantly male legal profession was out of its element when legal questions involving pregnancy came before it. Rather than rely on the experiential knowledge of women, the law turned to the medical profession for evidence on pregnancy. This distinction between the knowledge acquired by women through experience and the knowledge acquired by doctors through education has been reinforced by technological advances that, "allow medicine to assert a knowledge which is perceived as more quantifiable, more valid, than the woman's experiential

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[53] "Reproduction was hardly regulated at all by law before the nineteenth century, and there was little overt or direct state activity of other kinds in this area": Ludmilla Jordanova, "Reproduction in the Eighteenth Century," In *Conceiving the New World Order: The Global Politics of Reproduction*, ed. Faye D. Ginsburg and Rayna Rapp (Berkeley: University of California Press, 1995), 376.

[54] This attitude is evidenced by an increase in medical understanding of fetuses in the last century and a corresponding increase in the number of cases brought before the courts in which a woman's decision with respect to her pregnancy is challenged by the medical profession: Thomson, 212-218. In particular see Thomson, 218, where it is argued that the impact of regulation is aggravated by social pressures on women to comply. In one case, a judge justified usurping a woman's decision against prenatal treatment by claiming that, "although she was not suffering from a mental disorder within the meaning of the statute, she lacked the mental competence to make a decision about treatment". The fact that she was in labour at the time she refused treatment was the judge's justification for his finding of incompetence: *Norfolk and Norwich Healthcare (NHS) Trust v. CH(A Patient)*, para. 4.

[55] This view is re-enforced by former SCC judge, Justice Bertha Wilson, who has stated that, "males judges tend to adhere to traditional values and beliefs about the 'natures' of men and women and their proper roles in society. [There is] overwhelming evidence that gender-based myths, biases and stereotypes are deeply embedded in the attitudes of many male judges as well as in the law itself": Justice Bertha Wilson, in Morton, 148.

knowledge".[56] The effect of the legal and medical professions joining forces to pronounce upon the right and wrong ways to be pregnant has constrained the choices available to women.

In this manner the male-dominated legal and medical professions assert their own choices and values in place of the woman's: "Professional dominance and maternal exclusion are 'now enshrined within language; the role of the mother has been written out of the birth process which is now projected as an interaction between doctor and fetus'".[57] The woman is effectively usurped, a reality amply demonstrated in *Winnipeg* where evidence provided by the woman herself was unavailable while testimony was provided by several doctors, including doctors who had not even examined the woman.[58] The woman's treatment as an unreliable source of evidence makes it highly unlikely that any resulting judicial decision will be responsive to her needs, including her need to be capable of making autonomous decisions.

2. *The Question of Rights*

Another factor that adversely affects women is the lack of an appropriate basis upon which they may claim legal rights. If the goal of feminism is equality, then a theoretical model for equality from which rights may be adequately drawn is necessary, one which is able to accommodate the unique characteristics of women's reality (for

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[56] Thomson, 213. Also see Michelle Stanworth, "Reproductive Technologies and the Deconstruction of Motherhood," In *Reproductive Technologies: Gender, Motherhood and* Medicine, (London: Polity Press, 1987),13: "Perhaps most significantly, new technologies help to establish that gynaecologists and obstetricians 'know more' about pregnancy and women's bodies than women do themselves".

[57] M. Jacobus, E. Fox Keller and S. Shuttleworth, *Body/Politics: Women and the Discourses of Science.* (London: Routledge, 1990), 6 as quoted in Thomson, 132.

[58] "Regrettably her own voice is missing from available records": McCormack, 79. There was no trial of this issue; the woman's request for an adjournment to prepare was denied, her cross-examination was limited and she adduced no evidence: factum of the Women's Health Rights Coalition, para. 9. The factum also refers to testimony by a social worker that indeed the woman had sought treatment voluntarily on a least two prior occasions but either did not qualify for available programs or they were full: para. 13-14.

example, the state of pregnancy) without allowing these unique characteristics to inadvertently lead to inequality. How rights are conceived can have a tremendous effect on a woman's experiences with the courts (as demonstrated by the substantial departure from previous jurisprudence when 'equality' was reconceived by the courts as demanding a model of substantive rather than formal equality). The question of 'rights' is therefore a key issue in this case.

While feminists agree the legal system is patriarchal, most nonetheless view accessing it to secure rights as a worthwhile goal. In fact, most (though not all) see the acquisition of legal rights as ideal, despite the potential pitfalls. Similarly, rather than abandon the goal of securing legal rights, this project explores ways to make the existing legal system more hospitable to the particular circumstances of women.[59]

Women's success in effectively navigating legal terrain to ensure their rights are protected is compromised to some extent by the legal creation of a person/property dichotomy that primarily recognizes rights as attaching to one of these two categories.[60] Having decided that the pursuit of rights is an appropriate goal, feminists then struggle over whether to claim the rights attaching to a person or the rights attaching to property.[61] A woman's status under the person/property distinction is fundamental because, as will

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[59] Some feminists are adamant that the very attempt to secure rights within the patriarchal legal system only makes women complicit in their own oppression, and gives legitimacy to the system. They argue that the division of all things into the person/property dichotomy is a pure construct, designed so that legal rights can be neatly assigned: Josef Kohler, *The Modern Legal Philosophy Series: Philosophy of Law.* (New York: Augustus M. Kelley Publishers, 1969), 70. The majority of feminists however do value legal rights, and believe that seeking to enhance women's rights under the law is indeed an appropriate endeavour towards equality. Those feminists who do choose to embrace legal rights as their goal are bound by the constraints of legal patriarchy, and have little choice but to frame their theories, arguments and activism within this artificial, unreflective construct: Morton, 249. It is this reality that can be blamed for the difficulties women have had in seeing a correspondence between achieving legal rights and becoming autonomous.

[60] It is not quite true that there are only two categories. A third category is the state, to which substantial powers accrue. However, this category is not relevant here because the category of the state has clear delineations which make it inappropriate as a potential category into which either women or their bodies may fall.

[61] Rosalind Pollack Petchesky, "The Body as Property," In Ginsburg and Rapp, 388.

be shown later, this status is the source of her autonomy. While both case law and theoretical literature create little doubt that a man is a legal person deserving of the full protection afforded to legal persons, the situation is different for women. For women, there does seem to be some question about the rights to which she is entitled, particularly once she is pregnant, a time when the law considers rescinding some of the rights and protections that normally accord to a person, as is amply demonstrated by *Winnipeg*.

In the process of seeking legal rights, women have had to adopt the concepts employed by the legal system, a task made difficult because of the unique situation of pregnancy. As the SCC has said of the relationship between fetus and mother, "there is no other relationship in the realm of human existence which can serve as a basis for comparison".[62] It is not surprising then that finding an appropriate basis upon which their rights can be protected has been challenging for women. The result is that a woman's right to autonomous decision-making has commonly been articulated as a property right- the right to ownership of her own body.[63] This project argues that such a tactic is flawed and that a better tactic, suggested by some of the feminist literature on autonomy, would be to reconceive the meaning of 'person' to more effectively accommodate the circumstance of pregnancy. Before engaging in a reconception of personhood though, it is important to demonstrate clearly why arguments based on property rights fail.

The feminist debate, of course, is not framed as having to choose whether a woman is *either* a legal person *or* legal property. Instead a common feminist conceptualization is of the ethereal spirit of the woman as the legal 'person' who has

[62] *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 S.C.R. 753 , para. 25.
[63] Albury, 50.

legal 'property' rights to her body: "the language of owning- which, after all, means being the author of, the authority over, the caretaker of- seems an appropriate one for signifying women's collective need to reconstitute ourselves as political actors".[64] The logic proceeds that if a woman's body is her own property then she has all the inalienable rights to it that attach to any form of property. This unfortunately betrays a woeful misunderstanding of 'property' as a legal concept. It seems that very little consideration is given to the actual rights that derive from property and very little consideration is given to the ultimate effect of separating the two categories of person and property such that a woman may 'own' her body.

Property is neither an appropriate inherent basis for rights, nor does it instrumentally accomplish feminist goals. As Jennifer Nedelsky points out: "Property... carries with it a powerful tradition of inequality which should not be incorporated into new conceptions of autonomy".[65] If the point of asserting the 'property' relationship is to achieve legal recognition of autonomy,[66] then the true legal nature of property must be examined. Property, as a legal term, has a variety of implications that perhaps mainly legal scholars are fully aware of, but which all feminists ought to be aware of. Among the misconceptions about the category of property is the common belief that the most expansive relationship to property, that of outright, unobstructed ownership, actually typically defines the property relationship. In reality most property rights involve

[64] Petcheskey, 403.
[65] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities," in *Yale Journal of Law and Feminism*, vol. 1 (1989), 32.
[66] Historically property rights have been linked to the capacity for autonomy: "Individual autonomy was conceived of as protected by a bounded sphere- defined primarily by property- into which the state could not enter": Ibid., 17.

restrictions and there are many variations on the interests one might have in property.[67] It is not uncommon in the law of property for more than one person to have simultaneous interests in property, nor is it uncommon for one person to hold property for the ultimate benefit of another. All are subject to regulation by the state:

> [P]roperty cannot exist without the state. Viewed externally, it is a coercive power of the state that creates and enforces the rights of property. Viewed internally, it is the purpose of the state with reference to the objects which it wishes to attain which leads it to create, define and enforce these rights.[68]

Forced substance abuse treatment is just one manifestation of this imposition of social sanctions. Given that the goal of the feminist making the 'my body is my property' argument is to extract herself from the authority of the state, the above statement makes it clear that claiming her body as her property has the counterproductive effect of making her body the subject of the state.

Some feminists may be reluctant to argue that the human body and human spirit are inseparable because of the potential impact such an argument could have in the context of the abortion debate.[69] If the body and spirit cannot be considered as separate beings this might complicate the feminist argument that a fetus is merely a body, not a person, which they rely on to create arguments in support of the right to legalized abortion. But this simply serves to highlight the problem in making the fetus rather than the woman the focus of rights. Acknowledging that the body and the spirit are one may

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[67] E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington, D.C.: Georgetown University Press, 1996), 3-4.
[68] A. Irving Hallowell, "The Nature and Function of Property as a Social Institution," In *Readings in Law and Society*, 8th ed., ed. Jane Banfield and Dorathy L. Moore. (York, ON: Captus Press Inc., 1999), 203.
[69] One must always be vigilant of the effect an argument in one area might inadvertently have on another. The quest for women's full autonomy must be viewed as comprehensively as possible, recognizing that victories in one area are severely undermined where they produce negative effects in another.

indeed make the idea of abortion more offensive if such acknowledgement is seen as an admission that this 'oneness' applies to the fetus. However, if the woman rather than the fetus is the focus then this 'oneness' becomes a powerful tool. According to Member of Parliament Barbara McDougall, "[a] miscarriage of an unborn child is a natural abortion. It is the body saying 'no'. Why, if the woman is a whole being, cannot her mind, her intellect, her spirit make that same decision?"[70]. It is this perspective, embodied by the statement, "selves are inseparable from bodies"[71] which might be most usefully adopted by women and courts.

Finally, the concept of property adopted by feminists is premised on the ability to alienate others from that property, but as long as there are people advocating the personhood of the fetus this is an unreliable premise. Were the courts at some point to determine that a fetus is in fact a person, presumably women would want to at least be on equal footing with that fetus. By arguing that her body is her property rather than part of what constitutes her personhood, women are not positioning themselves favourably in case of such a change in the law. Further, if her body is her property and another person is occupying it, then she has lost the power to alienate which made the property rights so appealing in the first place.

Creating a division between body and spirit is a false, and dangerous, distinction because at least for the purposes of the law, the two must be treated simultaneously. The law does not have the capacity to distinguish between the two and treat them differently. It is a troubling reasoning process also because it suggests that the woman's body is

[70] W.A. Bogart, *The Limits of Litigation and the Social and Political Life of Canada.* (Oxford: Oxford University Press, 1994), 154.
[71] Petchesky, 395.

somehow not 'her' but rather 'hers', giving her body status similar to one of her sweaters: "the term 'property' describes the legal relationship between a person and a thing".[72] It is clear that this description does not accurately represent the relationship between a woman and her body or her fetus; neither are mere 'things'.

It is ironic that the argument advanced for the ultimate freedom of the individual is articulated by some as the total possession of the individual as property - a possession somehow glorified by the fact that the woman herself is deemed the body's owner. Carol Pateman recognized this problem (although her focus was on contract rather than property law): "that individual freedom, through contract, can be exemplified in slavery should give socialists and feminists pause when they make use of the idea of contract and the individual as owner".[73] Regardless of the owner, where any part of a woman is property, she will lose the autonomy associated with personhood in relation to that part of herself. Advocating property rights in the body is a misguided effort on the part of feminists, and one that must be rectified, particularly if feminists intend to continue using the legal system as an avenue for bolstering autonomy.

When the true implications of adopting a property-like relationship to one's body are made clear, it is evident that such a relationship is quite undesirable, and may have the effect of leaving women vulnerable to the sort of interference this 'property' assertion was intended to escape. True ownership rights cannot exist in women as long as they may become pregnant and women advocating ownership only risk having their bodies

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[72] Richard A. Yates and Ruth Whidden Yates, *Canada's Legal Environment: Its History, Institutions and Principles*, (Scarborough, ON: Prentice Hall Canada Inc., 1993), 318.
[73] Carole Pateman, *The Sexual Contract*. (Cambridge: Polity Press, 1988), 15. While Pateman's focus is on the philosophy of contract in particular, the term 'property' could be substituted for the term 'contract' in the above quote.

treated not as *their* property but as that of the state, making this an inappropriate basis for rights claims. Instead, women must adopt the idea of their whole selves as persons.

However there are also problems with some of the arguments made in advancement of women's status as 'persons'. The main problem is that the category of 'person', as it currently exists, is inappropriate. The existing concept of 'person' both assumes and demands that each person be separate from all others. Since this is not always women's reality, they are frequently less than legally ideal, and are vulnerable at various points in their lives to having some of the rights of personhood revoked, as they no longer meet the characteristics of 'person' which qualified them for those rights in the first place. In *Winnipeg* it is precisely the mother's connection to another that causes the state to consider (though it does not ultimately proceed with) revoking her right to freedom, despite her having violated none of the conditions imposed upon 'persons' in exchange for their rights.[74]

Autonomy is the characteristic that makes 'person' a powerful legal category. A fully constituted legal 'person' is one who is autonomous, and the law goes to great lengths to protect that autonomy. Legal rights are indeed themselves one of the mechanisms by which persons achieve autonomy.[75] It is the quality of autonomy that makes the 'person' category valuable; however, the law has its own fairly concrete notion

[74] There are several conditions to which people 'submit' in order to acquire rights, most of which are embodied in the Criminal Code of Canada and outline acts which are considered detrimental to the freedom of others and therefore justify rescission of one's own rights if committed.

[75] Diana T. Meyers, *Self, Society and Personal Choice*, (New York: Columbia University Press, 1989), 10-12. Meyers distinguishes between what she calls 'personal' autonomy and 'legal' autonomy. She describes legal autonomy as aiming to 'shield people from unwarranted government interference'. She argues that legal autonomy is an instrument of personal autonomy but does not in itself assure personal autonomy.

of what constitutes autonomy, and it is not necessarily consistent with what many feminists argue constitutes autonomy.

The question becomes whether seeking the status of 'person' is any more beneficial or useful than seeking the status of 'property'. The answer is yes, as long as key elements of personhood are reconceived. Redefining 'person' is done most effectively by reconceiving the meaning of autonomy. One of the major insights of feminism in fact is that traditional legal and philosophical ideas of what constitutes an autonomous person provide a very narrow idea of autonomy, and that through changes to the way autonomy is construed, it can become a more inclusive concept that better accounts for the experiences of women. In order to understand how the category of 'person' can become an appropriate category of rights for women, this project now turns to a consideration of the concept of autonomy, both as it is currently employed by the courts and as feminists suggest it might be reconceived so as to provide a more appropriate basis for legal rights for women within the existing legal system.

3. The Value of Autonomy

Autonomy may be defined as the capacity "to be governed by one's own law".[76] The capacity for autonomy is a major element of personhood, and the freedom to exercise that autonomy is consequently critical in a society respectful of rights. If the claim to the body is one of property, then the claim to autonomy is weakened. If the state threatens to intrude on the freedom to exercise one's autonomy, that intrusion must be justified. The order contemplated in *Winnipeg* constitutes an intrusion onto autonomy. As such the

[76] Nedelsky, 10.

decision must be scrutinized to ensure that the intrusion is sufficiently justified such that it represents an appropriate response to the problem of substance abuse during pregnancy. Despite the simplicity of the above definition of autonomy, what precisely that capacity entails is contested, a fact which complicates the task of evaluating *Winnipeg*. This section of the project outlines some characteristics that different philosophical perspectives tend to associate with autonomy. It then evaluates Winnipeg in light of those characteristics, ultimately concluding that there is no single conception of autonomy that guarantees women's rights will be protected. Relational conceptions of autonomy, however, are more consistent with promoting the goal of both healthy women and healthy fetuses, and therefore offer the greatest value in terms of designing effective solutions to the problem of substance abuse during pregnancy.

Before investigating different conceptions of autonomy, the proposition that *Winnipeg* constitutes a particularly offensive threat to autonomy needs to be defended. The state intrudes upon personal autonomy fairly regularly and is not on every occasion accused of exceeding its proper powers in doing so. The state restricts our ability to exceed certain speeds and it restricts our ability to consume alcohol in public. It regulates business so that the public is less likely to suffer harm but in doing so it fetters our ability to choose between products. Such intrusions do not attract criticism from everyone or even most social critics, and they are not being criticized here. The sort of intrusion on autonomy contemplated in *Winnipeg* differs from these other, essentially unproblematic forms of restriction in two major ways.

First, it is an infringement on the autonomy of women alone. Men are at no risk from the contemplated act and it therefore becomes a concern that this action is either

overtly discriminatory or that it will have discriminatory effects. To understand how, we have to hearken back to the discussions of medical science and the debate over the status of a woman as either person or property. Both demonstrated ways that women are already uniquely disadvantaged within the legal system, and the intrusion contemplated in *Winnipeg* may only further that disadvantage by creating a scenario in which women's autonomy alone could be interfered with, by creating for the state the right to forcibly confine a woman due to the circumstance of pregnancy. Such a scenario was expressly rejected by the SCC in *Brooks v. Canada Safeway Inc.* where the court stated that discrimination on the basis of pregnancy was tantamount to discrimination based on sex and is therefore unacceptable.[77] The claim here is that despite the strong statement in *Brooks*, by subjecting a woman to special controls resulting from the unique situation of pregnancy, *Winnipeg* indeed constitutes discrimination towards women.[78] Section One of the Charter of Rights and Freedoms provides for limitations to the freedom and equality guaranteed under the Charter so this cannot be considered an absolute right not to be discriminated against, but it is argued here that section one does not justify controlling the decisions of a pregnant woman.

To justify violating a Charter right several points must be established. One is that the remedy that constitutes the Charter violation must be proportionate to the 'offence'. Several problems arise is establishing proportionality here.[79] The first is that it has not been demonstrated that the order will achieve the results sought, namely protection of the

[77] *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219.
[78] Neither *Brooks* nor Section one of the Charter are referred to in *Winnipeg*. Having determined that there was no cause of action available for the appellants there was no need for the court to consider whether making the order sought would violate the Charter and therefore it was not necessary for the court to consider whether, if it were a violation of the Charter, it was one that could be justified under s. 1. Neither the majority nor the dissent discussed constitutional questions.
[79] See Women's Health Rights Coalition factum, para. 61.

fetus. This argument is based on evidence that damage typically occurs in early stages of pregnancy as well as inadequate evidence as to the harmful effects of glue sniffing. Secondly, as one of the interveners correctly observed, "since governments have failed to provide and promote voluntary treatment approaches for women with addictions, the Agency [CFC] has not demonstrated that the resort to coercive treatment constitutes a minimal impairment of Charter rights".[80] This argument will become particularly strong once *Winnipeg* is viewed in light of relational autonomy, which places particular emphasis on the contextual nature of problems. Finally, "the Agency [CFS] has failed to demonstrate a proportionality between the deleterious effects on the autonomy rights of pregnant women and the uncertain benefits of coercive treatment".[81] The first argument in favour of treating *Winnipeg* as an unacceptable intrusion on autonomy is that it affects women exclusively in a discriminatory manner, and that this discrimination is not justified by section one of the Charter.

The second argument in favour of treating *Winnipeg* as an unacceptable intrusion on autonomy is also based on disproportionality. *Winnipeg* involves an asymmetrical combination of cause of action, standard of proof and remedy. The decision turned on a determination of whether a cause of action should or could be created by the courts. If there was a cause of action then it was civil rather than criminal (all criminal acts are statutory) and subject to the civil standard of proof which is the 'balance of probabilities'. This standard means that the state need only establish that on a balance of probabilities it is somewhat more likely that the state is correct in its position than the opposing party. It

[80] See Women's Health Rights Coalition factum, para. 61.
[81] Ibid.

is not a high standard. Once the state has, on the balance of probabilities, established its case, the remedy being sought will be awarded. In *Winnipeg* the remedy being sought was involuntary confinement, tantamount to incarceration. It is precisely this sort of remedy that the elevated criminal standard of proof of 'beyond a reasonable doubt' was designed for. In virtually all other cases where autonomy is affected, it is either a relatively minor impact with a low standard of proof or it is a major impact such as incarceration, with a high standard of proof. Only here, where no cause of action even existed, were dramatic changes to autonomy being contemplated with a low standard of proof. These are the two ways *Winnipeg* problematic, while other intrusions into autonomy are not necessarily treated as such.

Winnipeg may also signal a failure of the court to appreciate the factors conducive to women's autonomy. Questions about the autonomy of women invariably involve clashes between liberal conceptions of autonomy and a variety of feminist critiques of liberalism. Though there is no single feminist conception of autonomy, one of the most prominent is referred to as 'relational autonomy'. Relational autonomy goes beyond criticism of liberal autonomy to create a full alternative theory of autonomy. Not all feminists have adopted relational autonomy though. Martha Nussbaum in particular has attempted to demonstrate that feminist criticisms can be accommodated within liberalism negating, she implies, the need for alternative conceptions of autonomy. Feminist criticisms of liberalism are broadly divided here into the categories of individualism and

abstraction.[82] Both the criticisms and Nussbaum's defence of them must be carefully evaluated in the context of *Winnipeg*.

One of the most common criticisms feminists have made of liberalism is that it overemphasizes the individual. Reasons for this criticism vary but tend to include the argument that liberalism's focus on the individual fails to reflect the socially connected reality of most people, and particularly of women.[83] According to Alison Jaggar, liberalism expects that "logically if not empirically, human individuals could exist outside a social context", a possibility she denies.[84] This argument is furthered by the assertion that not only is the liberal view of the isolated individual unreflective of reality, but that in fact it is destructive, in that it prizes an ideal of detached personhood that women, to a greater extent than men, are unable to meet. This destructive power is coupled with the fact that liberal ideals are embodied by social institutions. According to Robin West,

> The 'connected individual' - whether she be sustained or damaged, enlarged or diminished, by those connections - is simply not the subject of modern political and legal thought any more than she is the subject of political and legal protection... it is that profoundly disconnected individual which liberal societies, liberal politics, and liberal ideologies, including legal ones, are designed to protect.[85]

The obvious implication of this accusation is that women have little chance of having their realities validated or understood by the existing legal system.

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[82] For a more detailed examination of how the categories further break down see Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self.* (New York: Oxford University Press, 2000), 5-12.
[83] Nedelsky, 7.
[84] Alison Jaggar, *Feminist Politics and Human Nature.* (Totowa, NJ: Rowman and Allanheld, 1983), 47.
[85] Robin West, *Caring For Justice.* (New York: New York University Press, 1997), 4.

Nussbaum takes on this criticism of liberal individualism. She claims that liberals' emphasis on the individual simply means that each person is fundamentally separate, not that they do not have a social component to their personhood. The problem that may arise when this argument is applied in *Winnipeg* is that it is effectively inapplicable to pregnant women, who are not necessarily 'separate' from the fetus (although again this turns on the question of whether a fetus is a 'person' or not, and for the time being they are not). To the extent that this description of 'person' fails to cover pregnant women, those women are likely to fall afoul of the protections Nussbaum suggests liberalism is uniquely suited to providing for women.

Further, Nussbaum argues that contrary to the feminist criticism, liberalism's focus on the individual is good for women.[86] She explains this by pointing out that women often suffer from being seen only as means to other ends, rather than as individual units themselves. For example, women are sometimes seen as doing well if their family is doing well, even if the woman herself has made sacrifices for the family's welfare that have been detrimental to her personal well-being. Conceiving all people, including women, as individual units precludes women being seen as instrumental and instead demands that women's own welfare constitute goals.

This is a persuasive argument, except that it is not clear that this reflects the way liberalism is being employed by the courts, because it does indeed seem as though the pregnant woman is viewed as a means to an end. This is indicated by the majority's concern that forcible detainment of pregnant addicts fails to "diminish the problem of injured infants..." and might either prevent women form seeking prenatal care or lead

[86] Martha Nussbaum, *Sex and Social Justice*. (Oxford: Oxford University Press, 1999), 63.

them to consider abortions.[87] The majority does not lack concern for the woman herself, worrying that failing to seek prenatal care may be detrimental to the health of the woman, not just the fetus. Despite this there are enough references to the goal of promoting healthy babies that this is a concern: "The proposed change to the law of tort has the potential to produce considerable uncertainty and affect many peoples' lives adversely, without any assurance of reducing the problem of damage to unborn children from substance abuse".[88]

Liberalism's insistence that each person is separate is a double-edged sword. The suggestion by Nussbaum is that liberalism allows for close and communal connections and simply reflects the reality that a person is "never fused with any other".[89] The problem that arises when this is applied to pregnant women is obvious: two are fused. Liberalism's insistence that two may never be fused may provide a philosophical basis upon which the courts may make their 'normative determination' that a fetus is not a person. To argue differently would be to undermine a fundamental aspect of liberalism; that is, that the good of individual units be maximized. Liberalism's account of the individual may be useful in denying the possibility that two persons may exist fused together, and therefore in denying that a fetus may be a person or have any interests similar to a person. However this same aspect of liberalism's valuing of the individual could serve to temporarily remove the pregnant woman from the status of 'individual' or 'person' so central to liberal ideals, since in pregnancy she no longer possesses these assumed characteristics of the individual. If this is the approach taken, then liberalism's

[87] *Winnipeg* (SCC), para. 43-44.
[88] *Winnipeg* (SCC), para. 45.
[89] Nussbaum, 62.

concern for the good of each individual as a goal unto itself - its ability to see each woman as more than a means to someone else's happiness - no longer benefits her and she becomes vulnerable to only being seen as a means to an end.

It is becoming evident that the problems for women are not elements inherent to liberal thinking, but rather the problem is that (as with all philosophies) liberalism is open to interpretation. The above discussion would seem to suggest that outright rejection of liberalism on the basis that it overemphasizes the individual is unnecessary. Rather the project for feminists is to ensure that interpretations of liberal individualism are adopted by the courts which ensure that women do not suffer from their being subject to liberal legal philosophical thinking. It seems this has been moderately successful in *Winnipeg* as the majority account of liberty and rights accords with the 'good' interpretation, although it is clear that the dissent takes the 'bad' interpretation.

A second major criticism feminists have made of liberalism is that its reliance on abstraction makes it unresponsive to the particular needs of individual women. Specifically the argument is that liberalism thinks of individuals "in ways that sever them from their history and their social context".[90] The accusation is that remaining blind to the context in which individuals exist will prevent liberals from appreciating the asymmetrical effects 'neutral' policies might have on different people as a result of their different backgrounds. The SCC cannot be accused of consistently adopting this approach as a series of cases, most importantly *Andrews v. Law Society of British Columbia*, have shown a commitment to viewing individuals from a contextual

[90] Nussbaum, 67.

perspective when making equality determinations. Despite *Andrews* and other similar cases, the court's commitment to the 'contextual' approach wavers.

In *Winnipeg*, for example, it was only in passing that the court considered the limited evidence regarding the woman's context that was available. The majority did acknowledge that factors external to the pregnant woman may have contributed to her current predicament and there was recognition that responsibility may not fall on her alone, but to some extent on society and government as well.[91] The dissent also pointed out the woman's aboriginal status, noting that Fetal Alcohol Syndrome affects a disproportionately high percentage of aboriginal children.[92] As quickly as these comments were made, though, they appear to have been forgotten, and the ultimate disposition of the case bore no reflection of contextual circumstances. The court's own interpretation of its role and jurisdiction in this case made it less amenable to considering context. While the court does recognize that the decision it reaches may be tantamount to prescribing broad social change, it does not recognize this as its primary function. As a consequence, decisions tend to have a narrow focus with little explicit instruction as to how citizens or state ought to conduct themselves in the future. This sort of ambiguity is evidenced in the decision of *Winnipeg,* where all that is really determined is that no determination can be made. While interveners were able to provide a degree of context, the court deferred to the legislature, leaving responsibility for contextual considerations there.

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[91] *Winnipeg* (SCC), para. 41.
[92] Ibid., para. 88. Note the dissent's application of evidence regarding the effects of alcohol to the case of glue-sniffing.

Further, while the interveners provide a degree of context for the court that some might see as satisfying the contextual needs of relational autonomy (thereby making the courts an appropriate place for change), in reality the information of the court is still limited by a multitude of evidentiary rules that restrict the SCC's ability to fully appreciate the circumstances of the litigants. Key among these restrictions is the fact that it is the trial judge who determines the relevance of evidence. In the Canadian judicial hierarchy findings of fact and findings of law are separated. Trial judges hear evidence and determine admissibility and the SCC, with the greater normative role, only has access to the contextual facts deemed relevant by the trial judge. The result of this division is that even the deepest conviction by the SCC that context be considered may be undermined by the trial court failing to admit evidence which would provide that context.

Evidence is introduced to the SCC only through transcripts of the trial, so SCC judges do not have an opportunity to make factual determinations for themselves: "Courts of appeal, as a general rule, decline to interfere with findings of fact by a trial judge unless they are unsupported by the evidence or based on clear error".[93] While interveners do participate at the SCC, they are restricted to argument, unable to introduce evidence or witnesses. The SCC is consequently restricted to whatever evidence the trial court deemed relevant, and the trial judge makes these determinations *without* the benefit of the context provided by interveners, as interveners do not participate at the trial level. This significantly reduces the potency of interveners as tools for enhancing judicial appreciation of the full circumstances of individual litigants. The separation of functions between the trial court and the SCC is a structural impediment to the legal system's

[93] *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199.

ability to respond to complex social and legal problems in useful and appropriate ways. If this structure is indicative of the liberal philosophical base of the legal system, it raises questions about the ability of the courts to provide useful solutions to problems like *Winnipeg*, a question which is addressed later in this project.

Responding to the criticism that liberalism's vision of the person is too abstract, Nussbaum states that, "to address it well, liberalism needs to pay close attention to history and to the narratives of people who are in situations of inequality".[94] Has the SCC done that in *Winnipeg*? Not really. The discussion relating to evidence and the courts amply demonstrated the ways in which the court failed to meet the requirements outlined by Nussbaum.

It is true that at its core liberalism prizes some essence of personhood that exists regardless of circumstance. One might expect this to serve the pregnant addict well. Often portrayed as lacking the moral characteristics that are essential to personhood, could we not expect liberalism to say 'No. She *is* a person. She deserves the same respect and support all persons deserve even if we find her actions contemptible'. Does liberalism not create a shield for the unsympathetic addict? While it would be possible to employ liberalism this way, that is not what has been done. Rather it has led to the practice of denying evidence as to economic and racial trends, denied her individual experience as symptomatic of a trend, and viewed her in isolation. Without the context provided by this contextual evidence she does appear contemptible. But this is an inaccurate picture of who she is, and if the picture is inaccurate then the solution will likely be inappropriate. While liberalism may not necessarily lead to that result, that is

[94] Nussbaum, 69.

how it has functioned in the Canadian judicial setting. An additional concern is that the pregnant addict's behaviour may be used as evidence of her lacking the moral and rational essence of a person,[95] and that in turn to deny her personhood, depriving her of the equality rights (whatever they may be) that accompany that status.

It is evident that a political theory is only as good as the use to which it is put, and so theory must be measured against reality. Some theories however are more likely to be used in beneficial ways. It has been shown that while liberalism is not necessarily antithetical to women's needs, it also does not automatically lend itself to their use. Part of the problem is that while liberal *theory* may be capable of accommodating feminist critiques, as Nussbaum suggests it is, liberal *institutions* have not generally done so. As West claims, the ethic of care (which is an ethical orientation that in many respects forms the basis of relational autonomy) is generally ignored and undervalued and does not "fit into the moral criteria by which we evaluate and then reform existing law, nor will it fit into the calculus by which we create new law or legal regimes, and nor will it figure into the criteria by which we judge the justice of a particular judicial decision".[96] The question then is this: Does relational autonomy offer insights not afforded by Nussbaum's 'feminist liberal' perspective on autonomy that might overcome some of these problems?

Several theorists have offered versions of relational autonomy in response to what they perceive as inadequacies in liberalism. These theories tend to focus on the same issues that were referred to above as criticisms of liberalism, in particular questions of

[95] Ibid., 70.
[96] West, 8.

individuality versus community. Again referring to Robin West's 'connected individual' (discussed above), this figure reveals the most valuable insight gained from relational autonomy, which is that liberalism and relational autonomy really are not inconsistent, to the extent that the broader philosophy and narrower concept of each values protecting the individual. However, most varieties of liberalism tend to have vastly different ideas of what the 'individual' is than is true of the idea of relational autonomy. This, in turn, leads each to vastly different conclusions as to the best way to protect individuals. Taking a simplistic view of liberalism, suppose liberals do see the individual's sense of herself as essentially separate from any other person or social influence (a proposition Nussbaum has persuasively denied). Where that individual's autonomy was threatened the solutions liberalism would provide to rectify that could similarly be expected to be restricted to the individual.

Relational autonomy on the other hand sees individuals as fundamentally connected to others, and sees these relationships as essential to autonomy. Nedelsky discusses the relationship between autonomy and the socially constituted nature of individuals, saying that, "there is, in an important sense, no 'person' to protect within a sphere protected from all others, for there is no pre-existing, unitary self in isolation of relationships".[97] Consequently, the solutions indicated by relational autonomy might be expected to address some of the 'external' factors that affect the individual. Relational autonomy presents a broader picture of problems, thus revealing a broader scope of solutions. Not all liberals emphasize the individual as the fundamental unit of analysis, though many feminists accuse liberalism of this. Nussbaum has successfully argued that

[97] Nedelsky, 9 (footnote #4).

while liberalism may at times be excessively individualistic, it is capable of appreciating the value of community in the lives of individuals. While this may indeed be true it is an insight drawn directly from feminist critiques of liberalism.[98]

Nedelsky, like Nussbaum, recognizes the problem of women being defined in relation to others rather than being defined as themselves.[99] However, while Nussbaum responded by arguing that liberalism is uniquely capable of avoiding that problem, Nedelsky does not look to liberalism for a solution. Instead she looks for a concept of autonomy that could value relationships, but also recognize their potential oppressiveness. She describes the task of promoting autonomy as follows: "we must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity".[100] While it is true in *Winnipeg* that the woman's addiction likely means that she is not operating autonomously, it is equally true that eliminating the addiction will do little to foster her capacity for autonomy if the causes of the addiction are not confronted. Given that it has been accepted by the majority that the proposed order may not help the fetus, it is difficult to accept that intervention is justified.

Here is what relational autonomy offers for the present analysis: the woman is a product of all the relationships she has with others; not only with her peers but also with the state and its agencies. Appreciating her personhood necessitates appreciating these influences, and protecting her personhood necessitates a solution in which all these influences are participants. Just as external influences constitute *her*, so they must

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[98] West, 6.
[99] Nedelsky, 9.
[100] Ibid., 10.

constitute the *solution*. The problem in *Winnipeg* is that the only solution contemplated by the court addresses only *her* role in who she is. Not only does it ignore the full reality of her as a person, it ignores the changes the state could make in its own practices and policies so that they more positively influence who she is as a person, reducing the chance of addiction occurring in the first place.

The difference between Nedelsky's relational autonomy and Nussbaum's liberal autonomy is simply a question of whether social relations are *necessary* for autonomy or are *accommodated* by autonomy. The first places the imperative on addressing social factors in *Winnipeg* whereas the second allows for it, but does not demand it. While relational autonomy then makes a more forceful claim for including contextual factors in assessing autonomy, it does not *necessarily* cope with the present situation better than liberal autonomy. In general though relational autonomy is more consistent with the goal of promoting both healthy women and healthy infants than are liberal conceptions of autonomy. While it is possible to apply a liberal version of autonomy that focuses exclusively on the woman, this is not possible with relational autonomy, which will demand that solutions to the problem of substance abuse accommodate both goals, recognizing the interconnectedness of the two goals.

III WINNIPEG: ANALYSIS OF THE REASONING

The following statement aptly describes the legal circumstance of Canadian women in the wake of *Winnipeg*:

> Even in situations where the courts have upheld a woman's right to bodily integrity, as the majority did in [*Winnipeg*], women's legal position remains precarious. In this case, the majority concluded that the bodily security of women is a matter properly subject to calculation and compromise, if not by the courts then by the legislature.[101]

While the decision did not directly or immediately pose a threat to women, nor did it provide them any reliable protection. The above comment suggests the reasons why *Winnipeg*, apparently supportive of women's right to autonomous decision-making, may in reality pose a threat to autonomy, and this demands an investigation and explanation.

Both the *meaning* and the *impact* of *Winnipeg* must be considered. The *meaning* of the case refers to the order a court has made and the reasons given in support of that order. The *impact* of the case refers to the position it has assumed within Canadian law and policy. Decisions are typically supported by complex reasoning processes and *Winnipeg* is typical in this regard. The reasoning provides a road-map explaining the logic employed by the court in arriving at its disposition and indicating the factors that were weighed in the court's decision. This makes it possible to appreciate the significance of what courts do, or do not, decide. The single most important task in

[101] Turnbull, 64.

interpreting the meaning of a decision then is analysing the reasoning provided to support the decision of the court, and it is to this task that we now turn.

1. Substantive Elements: The Reasoning in Winnipeg

In the context of this analysis, the germane comments by the court are those that most effectively demonstrate the issues the court grappled with, and that provide the greatest insight into the judgment of the court. Both the majority and the dissent are worth examining as they present substantially different approaches to the same problem. While the majority opinion constitutes binding law, the dissenting opinion may also have influence, and further provides insight into what the majority *could have* argued but did not. Indeed, the review of the dissenting opinion in *Winnipeg* will show that there were far more troubling approaches the majority could have reasonably taken to analyzing the issues than it ultimately did.

A The Majority

Among the issues addressed in the analysis of the majority opinion will be its determination of whether the order sought constituted a radical or an incremental change in law. Also considered will be the court's use of the 'slippery slope' argument as one of its main sources of opposition to the order sought. It will be argued that while the slippery slope argument raises some genuine concerns, the court's use of it is somewhat misguided. Finally, some promising comments by the majority will be reviewed.

i) Incremental Versus Radical

The key issue in *Winnipeg* was the court's determination of whether granting the order sought would necessitate radical or incremental changes to existing law. The

principles governing the court's jurisdiction to make changes to the common law were enunciated in the 1989 SCC case of *Watkins v. Salituro*, where four factors were identified that would help courts determine whether the change it was contemplating was within its jurisdiction.[102] Those factors are:

1) the change must be to specifically legal principles;
2) the change is to principles historically within the special competence of the judiciary;
3) the change does not involve significant social or legal ramifications;
4) the change does not involve adopting an entirely new principle.

The main concern reflected by these principles is that the court restrict itself to "those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society".[103] Of course, as McLachlin, J. (as she then was) has noted, "one person's 'sensible incremental development' is another's 'radical alteration of the law'",[104] a reality made abundantly clear by the divergent opinions of the majority and the dissent in *Winnipeg*. Despite the above-noted guidelines, it is difficult to detect patterns in judicial determinations as to what constitutes a radical change as opposed to an incremental change, making predictions as to future legal developments difficult.[105]

The *ratio* of the decision was this: "... an order detaining a pregnant woman for the purpose of protecting her fetus would require changes to the law which cannot

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[102] *Watkins v. Olafson* [1989] 2 S.C.R. 750; *R. v. Salituro* [1991] 3 S.C.R. 654.
[103] *R. v. Salituro.*
[104] Beverley McLachlin, J. in Morton: 45.
[105] For example, Iacobucci, J. determined in one case that changing the definition of 'charity' would be a radical change that should be left for the legislature, but in another case determined that extending Alberta human rights legislation to cover cases involving sexual orientation was an incremental change within the jurisdiction of the courts. See *Vancouver Society of Immigrant and Visible Minority v. Minister of National Revenue* [1999] 1 S.C.R. 10; *Vriend v. Alberta* [1998] 1 S.C.R. 493.

properly be made by the courts and should be left to the legislature".[106] In other words, the majority determined that it *could* not create a cause of action. Based entirely on a determination of lack of jurisdiction, this statement of law hardly provides much of a rallying cry for women's rights and is not particularly compelling as a source of activist rhetoric. More satisfying for feminists would have been a statement to the effect that not only *could* the court not create a cause of action as a result of lack of jurisdiction, but further that it *should* not create a cause of action because of grave concerns for the impact such a development might have on women.

Instead, the majority left it to the legislature to decide if a cause of action should be created. The court could easily have made a pronouncement that even if it were within the court's power to do so, it would not have ordered the woman into treatment. This sort of projective discourse is common in *obiter*. The fact that the court did not engage in it here has perplexed some; according to a Status of Women Canada report containing an analysis of *Winnipeg*: "... the majority decision did not state that nothing should be done about the issue of women using substances during pregnancy. Instead, it referred it to the legislature... thus, the notion that 'something should be done' is contained in both reports [the majority and the dissent]".[107] Proponents of state intervention take heart in the decision's failure to make prescriptions for what ought to happen, saying that the decision could have been much worse. The lawyer for the intervener Evangelical Fellowship, David Brown, was quoted as saying that the court, "could have ruled that the legislatures

[106] *Winnipeg* (SCC), para. 4.
[107] Rutman et. al., 44.

have no power to protect the fetus. Instead, they ... relegated the issue to Parliament and the provinces only because it's 'too complex' for the court".[108]

As these statements indicate, the court could have told the legislature that it would refuse to make orders forcing women into treatment, even if the legislature empowered courts to do so. Plausible arguments that such an order would violate the woman's Charter rights were presented in several intervener factums but were not incorporated into the reasoning for the decision. The court's failure to provide this sort of categorical closure to the issue might suggest that it would support expanding existing legal principles so that the fetus might be protected from the actions of its mother, through the force of the state if necessary.

Throughout its reasoning the court emphasized that changes to the liberty of women are properly within the purview of the legislature, leaving the impression that the court would support the legislature in making the necessary changes to allow such orders.[109] The majority actually appeared to make *obiter* statements to the effect that existing laws ought to be extended (though it did so somewhat less explicitly than did the trial judge)[110]: "should it [the legislature] choose to introduce a law permitting action to protect unborn children against substance abuse, [it] could limit the law to that precise case".[111] Again quoting lawyer David Brown, the court, "implied that they'll agree to any fetal-protection amendments to child welfare and child protection laws, providing they're

[108] David Brown as quoted by Joe Woodard in "The Chosen and the Choosers," *B.C. Report Magazine*, 1997 [online]
[109] Interpreting repeated references to legislative change within a judgment as indicative of the courts desire to involve the legislature is supported in an analysis of a SCC case looking at the definition of charity, where the analyst stated that "there are eight references in [the] judgment to statutory amendments so it is no surprise that [the judge] determines that legislation is the appropriate form for [change]": Blake Bromley, "Answering the Broadbent Question: The Case for a Common Law Definition of Charity" [online]
[110] The trial judge was explicit in *obiter*, stating that existing laws ought to be expanded by the legislature: *Winnipeg* (QB), 43.
[111] *Winnipeg* (SCC), para. 24.

protective and not punitive".[112] Viewed from this perspective the court's 'mere' jurisdictional determination may be an invitation for fetal protection legislation, turning a jurisdictional point into a normative statement.

The court's jurisdictional determination is not wholly negative though. A contrasting interpretation could be that the very fact that the court perceived the involuntary treatment of pregnant addicts as a radical change to existing law signals that it is maintaining that there exists a significant difference between a fetus and a child. The majority could have stated, as the dissent did, that there is little physical difference between a fetus and a child and that therefore there should be little legal difference between them. Distinguishing between a child and a fetus this way would allow the majority to argue that extending existing principles to a fetus would constitute only an incremental change in policy. The fact that the court did not do this suggests a distinctly feminist subtext which is not evident from a bare reading. For example, the dissent reasoned that the 'born-alive rule' that created the legal boundaries between fetus and child was no longer supported by scientific knowledge, and that the distinction between child and fetus was similarly obsolete.[113] Though the legal argument made in support of this position was sound, the majority denied that scientific knowledge was a sufficient basis for disregarding the boundary between fetus and child. Instead the majority argued that such a distinction was properly normative, and that a normative inquiry revealed that, among other things, the implications for women that would be created by such a

[112] Woodard, 1997.
[113] *Winnipeg* (SCC), para. 104-120.

determination justified treating a fetus and a child as fundamentally different even if, medically, they are not.[114]

Nonetheless, the court ultimately stated that it "would dismiss the appeal on the ground that an order detaining a pregnant woman for the purpose of protecting her fetus would require changes to the law which cannot properly be made by the courts and should be made by the legislature".[115] In other words, the majority directed its mind to what *could* be done, and avoided discussing what *should* be done. While it is disappointing that the majority did not make *obiter* comments either dissuading the legislature from acting or suggesting alternative solutions to substance abuse during pregnancy other than that contemplated by the order sought, it did, at least for the time, ensure that pregnancy could not result in forcible confinement.

ii) Slippery Slope

Another issue germane to analysis of the majority opinion was its use of the 'slippery slope' argument. The majority acknowledged that creating a cause of action for the fetus would constitute a grave infringement on the rights of a woman in favour of those of the fetus. However, this conclusion was based substantially on the slippery slope argument.[116] The majority expressed concern that if it allowed that the fetus deserved protection in this case, the state might use this precedent to intervene in other sorts of decisions made by pregnant women. This concern formed a substantial part of the majority's justification for deeming the contemplated change in law radical rather than incremental, and therefore for refusing to extend the law. The majority identified the

[114] Ibid., para. 12 & 21-26.
[115] Ibid., para. 4.
[116] Ibid., para. 39.

problem this way: "Behind the refusal of the courts and at least one legislature to permit a child to sue its mother for prenatal injuries related to her lifestyle, lies the fear that such suits would take the courts into the difficult policy issue of the extent to which a mother's lifestyle is actionable... If we permit lifestyle actions, where do we draw the line?".[117]

The slippery slope argument is persuasive here because it is indeed worrisome that a principle extended slightly in the present case might ultimately be used to dictate the food a pregnant woman must eat or the physical activity she may or may not engage in. However, the slippery slope argument does not provide an argument against extending the principle in the present case, it only worries about extending it to the present case for fear of where that will lead. As the discussion of autonomy demonstrated there were ample reasons why in the present case intrusion is problematic, and reliance on the slippery slope argument seems to have distracted the majority from concentrating on some of the more problematic aspects of allowing intervention in the present case.

The slippery slope argument is also problematic because, as the majority uses it, it suggests that drug addiction and exercise habits are 'lifestyle choices' of the same stripe. Status of Women Canada has criticized the majority for its unchallenged assumption that, "addictions are a lifestyle choice that includes a host of other choices: where to live, what to eat, wear, smoke, etc.".[118] In fact, 'lifestyle' in this case is taken to mean anything from severe addiction to "undue fondness for the golf course".[119] The result of framing state intervention in pregnancies of substance abusing women as a problem susceptible to the 'slippery slope' is that it suggests that the 'choice' of addiction is similar to the 'choice'

[117] Ibid., para. 33.
[118] Rutman et. al., 45.
[119] *Winnipeg* (SCC), para. 33.

to play golf. Not only does this minimize the incapacitating effects of addiction, but it also denies the host of external factors that cause addiction.[120] This in turn limits the court's perspective on appropriate solutions to the problem, which the slippery slope argument predisposes it to seeing as a problem of poor personal choice. In the context of this analysis, the slippery slope argument is not a sufficient objection to state intervention, and provides no defence against forcible confinement were it possible to limit it to this particular set of circumstances.

Of course, there are situations where it is justified to infringe on autonomy and it would be unreasonable to suggest that the court ought to make a declaration that under no circumstances should autonomy be constrained. While the capacity to make autonomous decisions is a fundamental characteristic to all persons that ought to be fostered by the state, there is no legal right to autonomy, and there are many situations where it is acceptable for the state to limit that capacity. Sometimes moral offence *does* translate to legal offence. The most obvious example of this is in the realm of criminal law where the capacity for autonomy is regularly constrained by the state as punishment for given acts. Other examples of constraints on autonomy include orders of mental incompetence where the capacity for autonomy is constrained because a person is not capable of using it in an appropriate manner. There is, therefore, no obligation on the courts to totally eliminate intrusions into autonomy. However, as the majority recognized:

> Principles of tort law have never been used to justify the forcible detention and mandatory treatment of a person... There exist only two ways in which the state may lawfully involuntarily confine a person: (1) by the criminal law, whose proper concern is the incarceration of those found guilty of criminal offences against society; and (2) by an order under a

[120] Rutman, 40.

provincial *Mental Health Act* that a person is not competent to manage his or her own affairs.[121]

The court made it clear that there was no issue of mental incompetence.[122] Nor was the charge against the woman criminal. Her autonomy would be constrained neither for her own best interests, nor as punishment for a criminal act. Given this reality the criteria upon which other intrusions would have to be justified are unclear. At the very least principles of natural justice would demand that the remedy be justified as proportionate to the offence. The court's failure to demonstrate proportionality makes the particular intrusion in this case unacceptable. Forced confinement to a treatment centre, the constraint on autonomy contemplated by the court, is an order that strongly resembles the criminal sanction of punishment. The incompatibility between the basis for constraining autonomy and the severe constraint that is contemplated make this particular case an unacceptable intrusion onto autonomy. This problem, and the criteria for intrusion suggested by the dissent, are explored in greater detail below in consideration of the dissent's reasoning.

iii) Promising Points

It would be misleading to refer only to problematic aspects of the decision. There are a number of promising insights within the majority as well. In particular, the majority is explicit in its opinion that science ought not to provide the basis for an argument about the personhood of the fetus. Maintaining the normative emphasis on the definition to some extent protects women from some of the worst aspects of collusion between two male-dominated professions. Of course to be a definition free of patriarchal values, the

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[121] *Winnipeg* (SCC), para. 46. The majority concluded that to create new grounds for confinement, such as was being sought here, the legislature would have to be engaged.
[122] Ibid., para. 7.

legal system and the judiciary would also have to be free from these values, and they are not. But the power medical evidence can have in the courtroom, and the devastating effect on women referred to earlier, is diluted by insisting on a normative definition of personhood.

More promising still is the court's recognition that there are factors beyond the immediate control of the individual woman that play a role in creating the problem of addiction during pregnancy. Quoting from an article, the majority states that, "treating pregnant substance abusers as fetal abusers ignores the range of conditions that contribute to problems like drug addiction and lack of nutrition, such as limited quality pre-natal care, lack of food for impoverished women, and lack of treatment for substance abusers".[123] This is an extremely valuable insight that relieves some of the pressure from the woman for being solely responsible for her circumstances. Unfortunately the quote hangs in the middle of a paragraph with no further reference to it, and no incorporation of the insights it provides into the court's own words. The credit given to the court for this insight must be tempered by its failure to connect this insight to alternative solutions that may be more effective other than forcible confinement.

Finally, from a pragmatic standpoint, the majority recognised that the suggested solution of forcible confinement was unlikely to achieve the desired results of better babies. This position was urged on the court by L.E.A.F.[124] In its factum it argued that "women will not seek medical care and the trust required in the patient-doctor

[123] Ibid., para. 41, quoting J.E. Hanigsberg, "Power and Procreation: State Interference in Pregnancy" (1991), 23 Ottawa L. Rev. 35.
[124] Women's Legal Education and Action Fund, L.E.A.F. is an advocacy group working to advance women's rights through the courts.

relationship will be undermined by inter-agency reporting".[125] Citing a host of reasons including the possibility that fear of confinement might prevent women from seeking medical attention, the majority did not seem to accept that forcible confinement would solve the problem. Again, though, the court failed to connect this to alternative solutions.

While the majority included some valuable discussion of women's rights and autonomy, ultimately the decision disappoints, resting on a jurisdictional point essentially unrelated to the major social and normative questions in contention. Its determination that it lacked jurisdiction to act allowed the majority to avoid turning some of these insights into comprehensive prescriptions. While it is common for courts to provide lengthy discussions in *obiter* describing what they would have done had circumstances been different, or of how they would like to see the law evolve, the majority shied away from such an endeavour. Even when the majority suggested that the legislature would be the proper place for any change, it said that the legislature *could* limit the right to state intervention to the case of pregnancies where substance abuse is an issue; it did not say that the legislature *should* limit intervention to that case.[126]

B. The Dissent

The dissenting opinion confronted the same issues as the majority, but the reasoning and outcome were vastly different. The ability of both to provide reasoned defences of their positions shows how easily future courts could adopt either position. Of particular interest in the dissenting opinion is its reliance on medical evidence and its assessment, based on that evidence, that the change in law necessary to grant the order

[125] Factum of the intervener L.E.A.F., para. 69.
[126] See for example, *R. v. Mallott* [1998] 1 S.C.R. 123, as one of many examples of the court's propensity for making prescriptions that go beyond the present case.

was incremental. Equally interesting is the dissent's discussion of the connection between the applicable standard of proof required to grant the order sought and the remedy that order would provide. This discussion is valuable in terms of understanding how intrusions into autonomy might be justified. Contrary to the argument of this project, the dissent presents a cogent argument that the contemplated intrusion into autonomy is justified. The dissent's use of abortion rights in justifying its position will also be examined, and finally the dissent's ultimate conclusion that the order *should* be made, will be reviewed.

i) Incremental Versus Radical

The dissent concurred in the majority's determination that when it heard *Winnipeg*, no authority existed for the court to make an order on behalf of a fetus. The dissent also agreed with the majority's assertion that it could only make incremental changes to the law. Unlike the majority though, the dissent determined that extending tort law and *parens patriae* for the benefit of the fetus was only an incremental change. In order to understand how the dissent arrived at a markedly different interpretation of 'incremental' from the majority, despite applying the same legal principles, the dissent's approach to medical evidence has to be considered.

The cornerstone of the dissent's assertion that the contemplated change was incremental was its argument regarding the proper role of medical knowledge in determining the status, and accompanying rights, of a fetus. In particular, the dissent took issue with the long-standing 'born-alive rule', a legal principle which dictates that legal rights may arise prior to birth, but crystallize upon birth. The effect of this rule is that while a child, born alive and viable, may, in limited circumstances, sue for damages

incurred *in utero* it cannot sue for an injunction to prevent damage while it is still *in utero*. According to the dissent, the born-alive rule developed out of evidentiary necessity and was never a "substantive moral definition of a human being at common law".[127] In effect, the dissent argued, science has outgrown the law's distinction between born and unborn: "the rule simply persists from blind imitation of the past".[128] Seeing no scientific basis upon which to maintain the legal distinction between a fetus and a baby, it was the opinion of the dissent that extending *parens patriae* constituted exactly the sort of incremental policy change which fell squarely within the jurisdiction of the courts leaving no need to defer to the legislature.

The dissent warned against being a slave to precedent, suggesting that preserving the born-alive rule would constitute an overly rigid application of precedent. The dissent's reliance on scientific knowledge was directly related to its finding that the change in law was merely incremental, whereas the majority essentially rejected the idea of using science as a basis for determining personhood, which lead it to the opposite conclusion that the change contemplated was radical and therefore outside their jurisdiction.

In maintaining that extending *parens patriae* constituted an incremental policy change, the dissent made an interesting analogy to the famous 'persons' case,[129] in which the SCC, following precedent, ruled that women were not 'persons', only to be overruled by the Privy Council. The dissent's intent was to show that it was ridiculous to rely on precedent to deny women personhood and that it would be similarly ridiculous in this

[127] *Winnipeg* (SCC), para. 108.
[128] Ibid., para. 110.
[129] Ibid., para. 118.

case for the court to argue that a fetus is not a person. However, this is a curious argument, given that the court's jurisdiction is limited to 'incremental policy change'. Certainly it is fair to argue that women being deemed 'persons', extending legal personhood to one half of the country's population, represented more than an 'incremental' change in policy. The Chief Justice of the SCC, Beverley McLachlin, supports this view. Commenting on judicial activism, she addresses the impact of the 'persons case' stating: "the law was altered, indeed fundamentally reversed; and women were accorded vast new rights they had not enjoyed before".[130] In other words, the 'persons' case was more of an exception to the rule of incremental change than an example of it. It is therefore difficult to accept the 'persons' case as evidence that the court extending personhood to a new category of beings constitutes an incremental change. Nonetheless the dissent did so, demonstrating the extent to which supposedly objective legal interpretations are open to varying interpretations.[131]

ii) Standard of Proof

The dissent directly addressed the question of the appropriate standard of proof to which the state ought to be held before an order for forcible confinement of a woman could be made. The dissent offered criteria for confinement, including the requirement that the state be held to the civil standard of proof, establishing its case on a 'balance of probabilities'.[132] Despite the fact that the dissent referred to this standard as "high",[133] the

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[130] Beverley McLachlin, "Courts, Legislatures and Executives in the Post-Charter Era". *Policy Options*, June, 1999 [online].
[131] Once again this raises the question of the extent to which the makeup of the bench is important in predicting future directions of the court.
[132] *Winnipeg* (SCC), para. 96.
[133] "The threshold for state intervention is high": Ibid., para. 127.

reality is that it is no higher than the standard set for any other civil wrong.[134] No explanation was provided for why the civil standard ought to apply, although one can assume that it is simply because the act of sniffing glue while pregnant is not criminal, so the criminal standard of proof is not contemplated.[135]

Despite the civil nature of the claim, the contemplated remedy of forced confinement to a treatment centre more closely resembles a criminal sanction than a civil sanction. At least if she were accused of committing a crime the standard of proof to which the state would be held in proving the various elements of the crime would be the criminal standard of 'beyond a reasonable doubt' which is a standard maintained deliberately high because the penalty for crime typically involves infringing on liberty interests. If the pregnant woman sniffing glue were committing a crime by doing so, then perhaps the dissent would be correct that the intrusion into her liberty is slight. However, since it is not a crime, the standard of proof is the 'balance of probabilities', the much less onerous standard employed in civil cases where liberty is not typically at stake.[136] One theorist, who favours civil liability for certain acts damaging to a fetus, has rejected the notion of attributing criminal liability for acts damaging to the fetus on a similar basis: "The degree of culpability for criminal liability is much higher than it is for civil liability, because the penalty imposed by the criminal law (imprisonment) is so much

[134] The dissent attempts to get around this problem by asserting that, "in cases such as this any remedy of confinement must be for the purposes of treatment, not punishment": Ibid., para. 125. Simply stating this distinction, however, does not *create* the distinction, and the dissent is still advocating a civil standard of proof for a criminal sanction.
[135] While only the dissent addressed the issue of proof, there was no indication from the majority that if a cause of action existed the standard of proof should be anything other than the civil standard.
[136] The dissent identifies the balance of probabilities as the appropriate standard of proof as the second of four thresholds necessary to justify intervention: "(2) Proof must be presented to a civil standard that the abusive activity will cause serious and irreparable harm to the foetus": Ibid., para. 96.

more serious than that imposed by civil law (payment of damages)".[137] The intrusive nature of the remedy of forcible confinement ought to oblige the state to meet a higher standard in proving its case than was advocated in the dissent. The court must be careful that the damage and the remedy are proportionate.

The dissent recognized that it must demonstrate the remedy involves the minimum degree of intrusion possible.[138] It maintained that in this case, involuntary confinement was justified since there was no other effective solution. However, in arriving at this conclusion it ignored not only the conflicting evidence presented as to the expected effectiveness of late-term confinement, it also neglected completely to consider other options, such as improvements in standard of living.

The dissent argued that intervention is justified in cases like *Winnipeg*, "[w]here the harm is so great and the temporary remedy so *slight*" [emphasis added].[139] The dissent further quoted one author as saying that, "[a] state's compelling interest in potential life outweighs a mother's privacy right to conduct her life as she chooses when state intervention is *hardly intrusive*".[140] The dissent's assertion that the remedy of intervention is 'slight' is likely an effort to curb criticism that forcible confinement is a drastic remedy, and also an effort to meet the requirement that the remedy prescribed be the least intrusive option. Describing intervention as 'slight' not only deflects attention from the fact that no consideration is given to alternative remedies, it also helps justify the dissent's claim that involuntarily confinement only constitutes "bending" the

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[137] Steinbock, 105.
[138] "Before a court takes the severe step of ordering confinement, a condition precedent should be that it is certain on a balance of probabilities that no other solution is workable or effective. The least rights-diminishing option should always be sought": *Winnipeg* (SCC), para. 124.
[139] Ibid, para. 138.
[140] Ibid., para. 131.

woman's liberty interests.[141] Despite the dissent's claims, when viewed in light of the non-criminal nature of her actions, the contemplated remedy of forcible confinement is actually far from 'slight'.

The role of science is also implicated in the dissent's commentary on the appropriate balance between offence and punishment. The civil standard of proof is more likely to be susceptible to the dominating influence of medical evidence. Where the civil standard is employed and medical evidence accepted, the opportunity for women's testimony to be accepted as credible evidence is further decreased. In this case, where the medical evidence put before the trial court was in fact far from conclusive, the dissent stated that, "the damage caused to children by serious substance abuse is well documented".[142] This claim was made despite the fact that virtually all of the evidence to which the dissent refers deals specifically with the effects of alcohol.[143] The dissent acknowledged this, saying that "...most of the studies on substance abuse during pregnancy relate to alcohol abuse..." but argues that "the evidence is that compounds in other substances, such as the solvents to which [the woman] was addicted, are known to be neurotoxic to both the adult and fetal brain".[144] On this basis the dissent extrapolates evidence about the effects of alcohol to apply to the case of glue-sniffing. Where medical evidence is accepted as 'well-documented' even where contradictory evidence exists, and where it need only be established on a balance of probabilities that the evidence is true,

[141] "While the granting of this type of remedy may interfere with the mother's liberty interests, in my view, those interests must bend when faced with a situation where devastating harm and a life of suffering can so easily be prevented": Ibid., para. 93.
[142] Ibid., para. 122.
[143] Ibid., para. 88.
[144] Ibid., para. 88.

there is substantial leeway for a court that reveres the information presented by doctors.[145]

iii) Abortion as the Basis for a Duty of Care

Another point of interest in the dissent's reasoning was its apparent use of abortion rights as a basis for creating a duty of care between a woman and her fetus.[146] According to the dissent: "The mother's continuing ability to elect an abortion and end her confinement makes the intrusion of her liberty relatively modest...".[147] The logic to this assertion is questionable, given that the state does not become involved in most pregnancies until very late in the pregnancy, at which point many women would have tremendous difficulty procuring an abortion.

Further, the implication seems to be that it is not the fact of having become pregnant that creates a duty of care, but rather it is the opportunity to have the pregnancy aborted, and the decision not to avail oneself of that opportunity, that creates the woman's duty of care towards the fetus. Judith Baer refers to this proposition as the "theory of contingent personhood".[148] This theory provides that, "the status of the fetus as a person is contingent upon the woman's decision not to abort; once a woman decides to bear a child, the state has a compelling interest in protecting the unborn which justifies restrictions on its mother's freedom".[149] Though the dissent made no reference to the

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[145] See the trial and appeal court decisions for descriptions of the conflicting and incomplete medical evidence with which the court was presented.

[146] Establishing that there is a duty of care between parties is a key element to establishing tort liability. Even if the court were to accept that a fetus could sue in tort, it still must be established that the pregnant woman owes it a duty of care.

[147] *Winnipeg* (SCC), para. 133.

[148] This term was coined by John Robertson, and it is this conception of the grounds for fetal rights to which Baer responds: Judith A. Baer, *Our Lives Before the Law: Constructing a Feminist Jurisprudence.* (Princeton, NJ: Princeton University Press, 1999),165.

[149] Ibid., 165.

'theory of contingent personhood' *per se*, the argument certainly echoes it. According to the dissent, a court should be able to:

> ... exercise its *parens patriae* jurisdiction to restrain a mother's conduct when there is a reasonable probability of that conduct causing serious and irreparable harm to the foetus within her. While the granting of this type of remedy may interfere with the mother's liberty interests, in my view, those interests must bend when faced with a situation where devastating harm and a life of suffering can so easily be prevented. *In any event, this interference is always subject to the mother's right to end it by deciding to have an abortion* [emphasis added]. [150]

The dissent continued, providing a list of factors it considered relevant in determining whether the state should intervene in a woman's pregnancy. Among those factors was the following requirement: "...as a minimum to justify intervention the following thresholds have to be met: 1) The woman must have decided to carry the child to term;".[151] These comments confirm that it is not the fact of becoming pregnant, but rather the choice not to abort pregnancy, that creates a duty to the fetus which the state is justified in enforcing. As Baer points out, this is a questionable position,[152] the main problem being that it "presumes conditions that do not exist".[153] Baer identifies several barriers to the 'decision not to abort' which is purported to create the duty of care, including lack of access to abortion, fear of violence perpetrated by anti-abortion activists, and addiction. The dissent also seemed to assume automatically that no addicted woman would have any personal or moral objection to abortion.

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[150] *Winnipeg* (SCC), para. 93.
[151] Ibid., para. 96. Also at para. 116: "Where a woman has chosen to carry a foetus to term, the situation is different. Having chosen to bring a life into this world, that woman must accept some responsibility for its well-being... the law will presume that she intends to carry the child to term until such time as she indicates a desire to receive, makes arrangements for or obtains an abortion".
[152] Baer, 165-168.
[153] Ibid., 166.

The implication of adopting the dissent's position is that the right to abortion is a key element of autonomy. The dissent substantially justified infringing on the woman's liberty by invoking her right to abortion, implying that through that option she maintains some control over the extent to which she experiences her own liberty and autonomy. She is effectively making an exchange - in exchange for not electing an abortion she agrees to certain conditions being placed on her. Referring back to the discussion of different conceptions of autonomy is useful in dissecting this proposition. For example, if the reality is that for many women abortion services are not available or travel to get them is not affordable, is the choice not to have one still an autonomous choice? If she has moral objections to abortion, is abortion still really a choice? Are they her own decisions in a way that is sufficient to say that making those decisions justifies imposing court orders on her once that decision is made?

Viewed from the perspective of relational autonomy they are not, because to suggest that they are ignores all those external factors that might influence either her choice or her ability to carry out that choice. If she is not fully capable of exercising the choice of abortion, given all socio-economic factors, then in the context of relational autonomy it is not an autonomous choice, and therefore the 'choice' to abort could not possibly be used as the justification for imposing duties on her *as a result* of that choice.

Viewed from the liberal perspective of autonomy the dissent's claim that the option to abort is indicative of autonomous decision-making sufficient to create a duty of

care is viable.[154] This is the case because liberalism is less likely to inquire into the host of social factors that may impede the woman's choice. Consequently, it might be expected that a liberal orientation towards autonomy would indeed see the right to obtain an abortion as creating the opportunity wherein an autonomous decision to abort or to continue with pregnancy can be made, from which certain resultant obligations may be inferred.

From the liberal perspective then it may indeed be possible to argue that an autonomous decision has been made and that at that point imposing limitations on pregnancy is as justified as any other restriction, including criminal sanctions, that society imposes. However, as Baer notes: "The contingent personhood doctrine seeks to impose upon society a culture-specific and limited model of decision-making. It is a striking instance of the intellectual imperialism which pervades male-centred jurisprudence".[155] Relational autonomy would recognize that the concept of 'choice' to have an abortion may be misleading as to the real power a woman has in determining her fate in the face of pregnancy. At the very least relational autonomy could be expected to demand an inquiry into the circumstances of the woman relevant to her ability to choose abortion, including perhaps her own testimony as to her moral beliefs, as well as evidence regarding accessibility of abortion in her area. Neither the majority nor the dissent undertook this endeavour in the process of making their decisions regarding the fate of this woman.

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[154] It is important to note that the dissent asserts that the ability to choose abortion is a sufficient basis for a duty of care, providing no discussion of what constitutes 'choice', nor any discussion of why it creates a duty of care. Having asserted the duty of care the court proceeds to consider when the state might properly intervene. See *Winnipeg* (SCC), para. 95-96.

[155] Baer, 167.

If advocates of fetal rights had succeeded in having abortion criminalized, would these dissenting judges still agree that by becoming pregnant this woman has accepted the responsibility to care for a fetus? If the responsibility to care arises as a result of the decision not to abort, is this an admission that abortion rights are necessary for the well-being of the fetus? This would seem to be the implication of the above-noted statement by the dissent that "[t]he mother's continuing ability to elect an abortion and end her confinement makes the intrusion of her liberty relatively modest...".[156]

There are of course alternative interpretations of this reasoning, and indeed all reasoning provided in legal decisions. The task is either to employ the most plausible interpretation in assessing a case, or to highlight that there do exist alternative interpretations which are also plausible and which may make the line of reasoning prone to exploitation. In this respect, an alternative interpretation of the dissent's argument would be that where the option of abortion exists there is greater latitude for the courts to constrain her capacity for autonomous decision-making later in pregnancy, because the option to abort means that choices are always available to her and so she is always autonomous to some extent. If indeed this was the intended interpretation, the dissent failed to make it clear. Further, if this was the intended interpretation, some discussion of the effect that constraints on real access to abortion might have on the resulting duty of care would have been warranted. Absent explicit arguments to this effect, the interpretation presented here is the more plausible interpretation, and at least reveals a weakness in the dissent's reasoning process that may subject women to constraints on

[156] *Winnipeg* (SCC), para. 133.

their autonomy not justified in the ways the dissent suggests it is by invoking the abortion option.

iv) Dissent's Disposition

Having determined that the order could be made, the dissent ultimately concluded that the order forcing the woman into treatment *should* be made, stating:

> To grant the limited intervention proposed in this appeal serves the interest of:
> (a) the mother as her option for an abortion is always available;
> (b) protecting the foetus from serious and irreparable harm and permits it a reasonable chance of having a normal life after birth;
> (c) preventing unnecessary spending by Canadian governments to permanently care for the mentally disabled child born as a result of the mother's unrestricted drug addiction.[157]

This disposition contains several questionable propositions. First, with regard to the interests of 'the mother' it is unlikely that the 'limited' intervention of forced treatment truly serves all the interests outlined. As has been discussed, it is not clear by what standard intervention in the form of forcibly detaining a person who has engaged in no criminal activity and who has harmed no person might be considered 'limited'. Nor does this conclusion flow from an inquiry into the decisions made by the woman for the purposes of determining whether abortion was an option for her.[158] As Baer points out "since addiction weakens will, addicted women are not likely to behave as the model [of autonomous decision-making] describes".[159]

Second, with regard to the fetus, the dissent assumes that without detaining the woman, the fetus will not have a reasonable chance of having a normal life. It is

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[157] Ibid., para. 141.
[158] Recall that no evidence was produced by the woman herself.
[159] Baer, 167.

perplexing that the dissent is able here to recognize that the fetus will require support after birth, but is not able to recognize that that is likely to be the case regardless the mother's treatment or addiction. Without consideration of the social conditions which led the woman to come to the court's attention in the first place, it will be impossible to address the plethora or factors that lead to threats to the fetus's well-being.

Third, there is an expectation in this conclusion that the fetus, upon birth, will become a financial burden to Canadian society. However, that may be true of many children, especially children of low-income families. Social welfare is a key value to Canadian society, and is maintained out of recognition that there are members of society who require the assistance of the state. If this is no longer a Canadian value then the system of support should be altered, but the fact that a person or their offspring might be expected to access that system cannot reasonably be employed as justification for forcibly confining them. According to that logic anyone who fails to exercise or eat properly, not just pregnant women, ought to be detained for the purposes of changing their behaviour so that they will not actually use the subsidized health care system Canadians value so highly. While it is reasonable to discourage people from making choices which might lead to their dependency on some aspect of the social welfare system, it is not reasonable to enforce those standards by forcibly treating those who fail to meet them voluntarily. It is equally disturbing that the basis for an order intruding upon liberty as this one would, might be avoidance of a 'financial burden'.

Finally, the dissent assumed that the baby would be mentally disabled (despite the questionable evidence referred to in the introduction of this project), assumed that that disability would be the product of the woman's drug use (though while glue is an

intoxicant it is not an illicit drug as was implied by this comment)[160] and assumed that the baby would require the permanent care of the state once born. The use of the civil standard of proof means that this series of conclusions need only be somewhat more likely to occur than not to occur. As a result, evidence of fetal harm, for example, need not be conclusive, allowing the incomplete evidence presented in this case to constitute sufficient evidence to meet the threshold set by the civil standard of proof. These factors make for a remedy that is, despite the dissent's argument, out of proportion with the standard to which the case was established. This imbalance makes the justification for interfering in a woman's autonomy less persuasive. Though it has been acknowledged in this project that there are indeed situations where intrusions on autonomy are justified, and *might* even be justified in the present case, neither the majority nor the dissent has successfully demonstrated that it is. Only considering remedies that target individual women, holding the state to an inappropriately low standard of proof and imposing a remedy that is unlikely to solve the problem are all factors that make this intervention, intruding as it does on the woman's autonomy, unjustified.

2. *Procedural Elements: Judicial Treatment of Winnipeg*

The impact of a judicial decision is not restricted to the particular case in which the reasons were given. By becoming part of jurisprudence, decisions become tools for future judicial decision-making. The real value of *Winnipeg* can only be understood when analysis of the reasoning is synthesized with analysis of subsequent treatment of the case. Key to interpreting *Winnipeg* is distinguishing between the *ratio* and *obiter*. The majority made some valuable comments regarding the rights of women and the effect that

[160] McCormack, 81 (footnote #15).

intervention in this case would have on women's rights, as well as in regard to the proper role for scientific versus normative decision-making in matters of public policy. Unfortunately these comments likely constitute *obiter* and therefore are not binding on lower courts. The *ratio* in *Winnipeg* was purely jurisdictional. The majority discussed the status of the fetus only as part of the process of determining whether it had the jurisdiction to make the order requested, and that discussion therefore constituted *obiter*. Although *Winnipeg* is one of several cases where the SCC has refused to recognize the fetus as having a right to life, not all legal scholars consider the SCC to have delivered a definitive opinion on the issue, a conclusion which can be directly attributed to the court's failure to include absolute declarations of fetal or maternal rights as a *ratio*.[161] Without a *ratio* pronouncing the status of the fetus, the question arguably remains an unsettled point of law.

Recall that according to the principle of *stare decisis* only the *ratio* of a case is binding on lower courts and that *Winnipeg*'s *ratio* is that courts ought only to make incremental changes in the law. While this is preferable to the court deciding that the state does have the right to intervene in pregnancy, the decision is extremely disappointing in terms of the principle for which it now stands. Since the decision in *Winnipeg* was issued in 1997 there have been several subsequent cases on differing topics which have referred to *Winnipeg*.[162] Not surprisingly though, given the *ratio* of the case,

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[161] Gregory Hein, "Interest Group Litigation and Canadian Democracy", *Choices: Courts and Legislatures*, vol.6, no.2 (March, 2000): 29 (footnote #80), referring to the court's refusal to recognize a Charter right to life for the fetus: "It is worth noting that the Supreme Court has not delivered a definitive opinion on this issue". *Winnipeg* does not bring the Court any closer to delivering such an opinion.

[162] *Winnipeg* (SCC) has only been 'referred to', a term indicating use of former decisions. Several terms are used to describe how a case may be interpreted by subsequent courts:
Followed: A case is founded on a principle of law set out in the earlier case which is binding on the Court.
Applied: A case is founded on a principle of law from the earlier case which is not binding.

the vast majority refer to it in support of the principle that courts are ill-suited to make broad policy change and ought to restrict themselves to incremental developments in existing law.

Numerous cases have cited *Winnipeg* as authority on questions of the jurisdiction of courts to make changes to existing common law principles, including two cases which have been affirmed by the SCC. In *M v. H*, the SCC referred to *Winnipeg* in support of the statement that "courts are simply ill-suited to manage holistic policy reform" and in *R. v. Cuerrier*, the SCC affirmed the rule governing the court's power to make changes to existing law by referring to principles outlined in *Winnipeg*: "This Court has established a rule for when it will effect changes to the common law. It will do so only where those changes are incremental developments of existing principle and where the consequences of the change are contained and predictable".[163]

All of the discussion within the majority reasoning pertaining to the rights of women and of fetuses constitutes *obiter*. The result is that for the most part *Winnipeg* has not been interpreted in any way that is specifically relevant to women. However, there have been a handful of cases referring to *Winnipeg* as an authority for the principle that a fetus only has a right to tort remedies upon birth.[164] Two cases have referred to *Winnipeg* in support of the position that, under existing law, the fetus has no rights until born. The Alberta Court of Queen's Bench, in determining that no one could recover tort remedies

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Considered: Some consideration is given to the earlier case in the subsequent case.
Referred to: The Court in the subsequent case merely refers to the earlier case without comment.
Not Followed: The Court in the subsequent case expressly chooses not to apply the earlier case or overrules it.

[163] *M v. H* (1999), 171 D.L.R. (4th) 577; *R. v. Cuerrier*[1998] 2 S.C.R. 371; Also see *Taylor v. Scurry-Rainbow Oil (Sask) Ltd.* 2001, CarswellAlta, 728 and *Bonaparte et. al. v. Canada* (2003-03-27) ONCA C37702. Further, the report "The Fatality Inquiries Act Report by Provincial Judge on Inquest Respecting the Death of: Patrick Norman Whitehead", January 16, 2003, also supports the interpretation that *Winnipeg* stands for a jurisdictional point, and criticizes the Manitoba legislature for failing to respond to the case by enacting fetal protection legislation: 190.

[164] See for example *R. v. Demers*, 2003 BCCA, 28.

on behalf of a fetus stated: "The Supreme Court of Canada in [*Winnipeg*] determined that a foetus has no legal status until it is a child, born alive and viable".[165] The Nova Scotia Family Court resolved an application by a man requesting that, among other things, he be declared the father of a not yet born child, by stating that, "...there is no legal person 'in whose interests a court order may be made'. The court is without jurisdiction to deal with this application at this time".[166] In support of this assertion the court referred to the comment by the majority in *Winnipeg* that, "[i]f (the fetus) was not a legal person and possessed no legal rights at the time of the application, then there was no legal person in whose interests the agency could act or in whose interests a court order could be made".[167] The Nova Scotia court also noted that in *Winnipeg* the SCC, "made a point of saying that it is up to the legislatures to determine whether and to what extent a fetus may be regarded as a 'legal person'".[168] These examples demonstrate that courts are upholding the principle that a fetus has no rights until birth, and are using *Winnipeg* in support of that principle. In that respect though *Winnipeg* was only a reiteration of existing law, so its application contributes little to the jurisprudence on fetal tort remedies. Further, these are only two decisions in the past six years and they are both decisions of lower courts.

To the extent that *Winnipeg* fails to provide a resounding statement of women's right to govern themselves freely even in the face of pregnancy, it might be a good thing that the case has primarily been used as a precedent in cases concerning jurisdiction of the court, as this means that the negative elements of the case are less likely to become part of Canadian jurisprudence. However, the use to which *Winnipeg* has been put by

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[165] *Martin v. Mineral Springs* Hospital, 2001 CarswellAlta 85, para. 17.
[166] *R.D.M v. E.E.K* (2002) 207 N.S.R (2d) 104, para. 13.
[167] *Winnipeg* (SCC), para. 16 as cited in *R.D.M v. E.E.K.*, para. 12.
[168] *R.D.M v. E.E.K.*, para. 14.

courts also shows that in spite of the apparently favourable outcome it does not represent any sort of guarantee against state intervention in pregnancy in the future. Among the cases citing *Winnipeg* for jurisdictional purposes are two that have been affirmed by the SCC, whereas the two cases citing it as authority in disputes over fetal rights are trial courts, having themselves little precedential weight on other courts. If courts in subsequent decisions were referring to *Winnipeg* as authority for the principle that the fetus does not have rights that outweigh the woman's, it could be argued that *Winnipeg* had been strengthened by subsequent interpretations, but for the most part this has not happened. No court has yet applied *Winnipeg*, an act that would demonstrate which part of the decision the court felt bound by and which would provide a clearer indication of the use to which *Winnipeg* was being put by courts. It remains too early to see how *Winnipeg* will be most widely used.

IV. SOLVING THE PROBLEM OF SUBSTANCE ABUSE IN PREGNANCY

At the heart of *Winnipeg* is the question of what to do about the problem of substance abuse during pregnancy. While *Winnipeg* represents the court's attempt at resolving the problem within existing legal parameters, others are trying to change the legal parameters. The intersection between law and politics is most vivid in matters of controversial social policy such as this, and the question of whether change is best sought through the courts or the legislature is critical to attempts to shape future solutions. How might women respond to *Winnipeg* in a way that ensures the positive aspects of the decision, rather than the negative, become future law and policy? While courts are indeed useful tools for change, women must be careful not to neglect the legislatures which, I argue in this section, are institutions with qualities uniquely suited to effecting the changes necessary to properly address the problem of substance abuse during pregnancy.

Despite a traditional focus on legislatures, the Charter has made the courts an equally important focus of groups seeking to influence developing law. Several hundred women's groups presently exist in Canada, most with a feminist agenda.[169] Their resources tend to be devoted to the cause of litigation and understandably so, given substantial legal gains over the past decade. Real victories have been achieved through the courts, including the striking down of Canada's abortion law,[170] the refusal of the

[169] R.E.A.L. Women is a women's interest group devoted to advancing the cause of 'traditional' women opposed to the feminist message delivered by most Canadian women's interest groups.
[170] *R. v. Morgentaler* [1988] 1 S.C.R. 30.

courts in several instances to extend rights to a fetus,[171] and the court's preference of substantive equality over formal equality.[172] Overall though, the benefits of pursuing change through the courts are limited in comparison to changes pursued through the legislature, and women must be careful not to overemphasize legal victories. One of the weaknesses of court-made policy is that legislatures are free to enact legislation countering judicial decrees.[173] The SCC's own judgment in *Winnipeg* identified the legislature as the proper avenue through which changes to policies involving fetal rights ought to be made.

Of course courts do strive to achieve fairness, but within the confines of the rules of law and of the judges' own sense of fairness. In a court dominated by men it is surprising that women expect that the court's sense of fairness will accord with their own, or at least to any extent greater than in legislatures. The legislative process at least includes mechanisms for accountability, most notably, regular elections, and even though women do not make up half of the representatives in the legislature, they do make up half of the electorate to whom those representatives are ultimately responsible. It is peculiar, then, that this is seen as a less fruitful avenue by which to achieve results than the courts.

The process of legal reasoning is closed except to those views reflected in the positions of groups successful in achieving intervener status. The deliberations only become public once they are concluded- when written reasons are given. In the legislature the public has much more opportunity to have its views heard. This is

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[171] For example, see *R. v. Demers* or *Dobson (Litigation Guardian of) v. Dobson.*
[172] *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.
[173] Bogart, 144. This statement requires the major caveat that all legislation must be compliant with the Charter of Rights. In cases such as *Winnipeg* though, the door is open for the legislature to make the sort of radical changes the court refused to make, and without concentrating lobbying efforts in the legislature's such changes might succeed.

important in terms of trying to influence the outcome, but it is also important as an end in itself. While affecting policy outcomes is always the ultimate goal, even successfully influencing the political discourse so that an issue is being discussed using terms and language friendly to the feminist position is its own version of success because it means that the dominant discourse has been penetrated. However, the reality of a dominant discourse that tends to embody and perpetuate patriarchal values may also present an obstacle to realizing legislative success and therefore present another argument for seeking change through the courts.[174]

The problem posed by legal victory is aptly highlighted by the experience of American abortion activists, who achieved success before the courts in *Roe v. Wade* only to subsequently see the force and power of their movement dramatically reduced. One member of N.A.R.A.L.,[175] referring to the deflating effect of that success suggested: "had we made more gains through the legislative and referendum processes and taken a little longer at it, [perhaps] the public would have moved with us".[176] The failure of the public to 'come along' with the movement may have been a result of the (relatively) speedy and closed process of the courts. Though individual litigants may complain of lengthy and expensive delays in the legal process, from the perspective of public policy development the courts operate very quickly. Lack of popular support has led to the victory in *Roe v. Wade* being undermined in a number of ways, including through limited access to abortion services. This demonstrates that while the courts may be able to identify

[174] For discussions on the influence of patriarchal values on the dominant political discourse see Sandra Burt, Lorraine Code and Lindsay Dorney (ed). *Changing Patterns: Women in Canada*, 2nd ed. (Toronto: McClelland & Stewart Inc., 1993), 212 and William K. Carroll (ed.). *Organizing Dissent: Contemporary Social Movements in Theory and Practice and Practice*. (Toronto: Garamond Press, 1997), 1-11.
[175] National Abortion Rights Action League.
[176] Bogart, 151.

situations where autonomy, liberty or choice are being threatened, they are ill-equipped to make prescriptions for how those values ought best to be promoted.

The earlier discussions of the structure of the legal system and of autonomy also yield some insights into the limits of the court's power to provide effective responses to the problem of substance abuse during pregnancy. Relying on the courts rather than the legislature to determine policy means relying on a process that tends to omit the deliberative aspect of democracy. In a court decision the public's role is typically reactive in that they merely respond to the decision once it has been made and publicized. Except through the role of intervener, there is little opportunity for public participation or influence in the judicial decision-making process. In fact, it is a process designed specifically to avoid such influence. The legislature, on the other hand, tends to be more accessible to the public, at least indirectly through representation of their interests by elected officials. Relying on the courts instead of the legislature may mean that "difficult problems are not tackled to achieve more effective and lasting results".[177]

Earlier I discussed the problems involved in women's search for an appropriate basis upon which to claim rights. That discussion provides an indication as to why change through the courts may be viewed as an attractive option for women's groups. Gregory Hein has identified a number of characteristics that make an interest group more or less likely to employ litigation as a tool for change.[178] One of those characteristics is the presence of a rights-based claim, which he argues not only help build collective identities, but also have "a certain majesty [that] can turn ordinary political demands into

[177] Ibid., 144.
[178] Hein, 16-17.

principles that have to be respected".[179] In other words, the presence of rights-claims elevates women's demands above the fray of usual political squabbling over demands made by various groups, and makes them uniquely poised to achieve legal victories in recognition of those rights- victories which may not be available to groups without rights-claims. However, it is crucial that legal victories, if they are to guarantee true equality, be accompanied by popular support resulting from a broadly based cultural and philosophical shift.

Experiences in the courts may depend to some extent on the nature of the group participating. The political interest group is a major vehicle through which women currently seek political change, and among the most active is the Women's Legal Education and Action Fund (L.E.A.F.), an advocacy group and intervener in *Winnipeg*. L.E.A.F's mandate is to conduct precedent-setting interventions in the SCC for the purpose of advancing women's equality.[180] Women's groups advocating against state intervention in pregnancy, such as L.E.A.F. (and others intervening in *Winnipeg*), are in a peculiar situation. According to a study conducted by Gregory Hein, the type of state activity advocated by women's groups in *Winnipeg* is not typical of them. Hein conducted a comprehensive study of SCC cases from 1988-1998,[181] and concluded that most interveners fall into one of several categories, depending on the type of organization they represent and the goals they seek to achieve. Hein places women's groups such as L.E.A.F. and the Native Women's Association of Canada (both interveners in *Winnipeg*) in the category of Charter Canadians, primarily concerned with securing state

[179] Ibid., 18.
[180] See L.E.A.F. website for mandate and activity information at www.leaf.ca.
[181] Hein constructed a database from which many observations have been drawn, including the number of interveners involved in cases, the types of interveners involved and the reasons for involvement: Hein, 11.

intervention for the resolution of social problems.[182] He claims members of this category try to "bolster state intervention", whereas members of other categories, such as civil libertarians and social conservatives try to "block state intervention".[183] According to Hein this latter category includes the Alliance for Life and the Evangelical Fellowship of Canada, interveners in *Winnipeg* advocating in favour of state intervention in pregnancy.

According to this categorization, *Winnipeg* is an aberration in that the interveners have effectively switched roles, with women's groups advocating against state intervention and conservative groups advocating in favour of state intervention. While this may be viewed as evidence of a flaw in Hein's categorization, it may also suggest a reason why the discussion of autonomy earlier in this project was so complex. Blocking state intervention is a goal associated with conservative and traditional groups, those most likely to hold values compatible with traditional liberal values, including the value of autonomy as uninfluenced decision-making. Yet in *Winnipeg* it is those groups who advocate forms of state intervention. This may explain why, in the case of pregnant substance abusers, the liberal conception of autonomy which contends that intrusion of the state into the decisions and choices of individuals ought to be minimized, is at least as effective as relational autonomy, which focuses on relationships among individuals as the source of socially constituted autonomy, and perhaps more so. If, as Hein's categorization suggests, feminist organizations and traditional organizations have swapped roles and swapped goals so that women are uncharacteristically advocating

[182] Ibid., 7.
[183] Ibid., 12.

against state intervention, it makes sense that traditional liberal philosophies are the most useful tools in achieving those 'traditional liberal' goals.

As long as interveners are permitted to participate in SCC proceedings it is important that women's groups be there. Though the extent of their participation is restricted, interveners provide the court with a perspective on the broader impact that a decision in a particular dispute might have, to which the court might otherwise be oblivious. To the extent that the court does have a role in shaping public policy it is important that women avail themselves of the opportunity to intervene. Intervention is critical to successfully encouraging the courts to adopt a view of autonomy more consistent with the concept of relational autonomy which, it has been argued, may provide the philosophical grounding necessary to provide more valuable solutions to the problem of substance abuse during pregnancy.

Women may also penetrate the judicial process through the use of academic writing. Increasingly, courts are accepting academic literature as a source of reliable knowledge. In recent years judges have begun referring to academic writing, and this trend can also be seen in the facta of interveners in *Winnipeg*. This development may provide an indirect opportunity for women to penetrate the legal field to inject a method of reasoning more likely to result in favourable outcomes for them, an opportunity which also imposes an obligation on feminist theorists to use care in their writing, and to be

alert to the ways in which their arguments might be manipulated by parties before the courts.[184]

Seeking change through the legislature is not without obstacles, and these must also be recognized. One problem with democratic change is that it often reflects popular morals and beliefs and it has been granted that the pregnant addict is morally offensive. Set to unleash a 'problem' child on society, she is hardly the most sympathetic character in Canadian society. As one author notes, "pregnant drug users... are easy to want to punish".[185] This is especially so when an addicts right to autonomy is contrasted with the right of a baby to be free from damage which may be preventable and which may lead to expensive disabilities for which all Canadians will potentially be financially responsible. Of course, the dissent reveals that judges are no more immune to such concerns than legislator's might be, identifying the financial burden associated with disabled children as one of the reason's justifying state intervention in pregnancy.

While the very accountability of legislative representatives may make legislatures more prone to sway by popular opinion than courts tend to be, this is certainly not necessarily the case. Individual judge's philosophies will sometimes accord with popular opinion, while the legislature will sometimes enact unpopular legislation. It is important that this project not be interpreted as advising that women cease all litigation activity.

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[184] See for example the factum provided by the Evangelical Fellowship which includes the following quote from "Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy" in support of the argument that even commentators who generally support freedom from state intervention in pregnancy agree that it may be appropriate where substance abuse is involved: "By definition, addicted behaviour does not reflect the woman's overt consideration of potential consequences for the foetus. This distinction suggests, on one level, that substance abuse may be an appropriate situation for state regulation..." The factum omits the following statement made in the same article a few paragraphs later: "Thus, the solution to the problem of fetal addiction is not further to deny women's reproductive autonomy through regulation, but to create the conditions necessary for women to choose a healthy pregnancy". Factum available online. Article available at "Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy," (1990) 103 *Harvard Law Review*, 1325.

[185] Gustavsson, 8.

Rather I am suggesting that they be wary of the limitations on court-achieved victories, and avoid funnelling all their resources into that avenue of change, to the exclusion of electoral and legislative politics.

It may seem peculiar, in a project emphasizing the impact of one court decision, to advocate making future changes through the legislature. One may be inclined to ask, "if *Winnipeg* is as important as this project suggests, why not continue to seek change through the courts?". Or conversely, "If, as this section suggests, courts do not have much influence, why should I believe that I need to be worried about *Winnipeg*?". It is true that these seem like contradictory propositions, however they are easily reconciled. Court decisions sometimes have a substantial influence and sometimes have little influence on developing law, for reasons that have been discussed in this project. *Winnipeg* has many of the characteristics that tend to make a case influential. However, the influence is not of the same magnitude as might be achieved by legislative means. The SCC is an important instrument of public policy, in particular for rectifying government actions that contravene constitutional rights, and women would be foolish to ignore its influence. Still, it is only one instrument. The closed process, the narrow application of facts and the inability of courts to make sweeping or fundamental changes make gains through the legislature more significant. In this regard, it is noteworthy that the government of Manitoba has risen most effectively to meet the challenges posed by substance abuse during pregnancy (a point expanded upon below).

V. ALTERNATIVE SOLUTIONS

Given that the legal system and liberal autonomy share the fundamental value that decisions not be fettered by contextual details, it seems unlikely that the legal system will be innovative in the solutions it offers to substance abuse during pregnancy, as *Winnipeg* demonstrated. Valuing abstraction requires minimizing context and the relevance of individual circumstances, making courts more likely to see only a narrow range of solutions to problems presented to it. For example, the dissent in *Winnipeg* in particular, comments that the state must be able to make orders to save a fetus from its mother: "If our society is to protect the health and well-being of children, there must exist jurisdiction to order a pre-birth remedy preventing a mother from causing serious harm to her foetus".[186] In fact, this statement is far from the truth. There are myriad alternative ways our society might 'protect the health and well-being of children',[187] but none were mentioned in the dissent, and even the possibility that alternatives might exist went unspoken. The majority is equally frustrating in this respect as it simultaneously acknowledged contextual aspects of the problem of substance abuse while failing to make, or even imply, any prescriptions drawing from this insight.

One of the most valuable insights yielded by relational views of autonomy is that when a pregnant woman is viewed in light of all her circumstances, it becomes immediately apparent that not only are there solutions to the problem of substance abuse

[186] *Winnipeg* (SCC), para. 40.
[187] For discussions of some of these see Maher, 167; Steinbock, 129;148.

beyond court ordered treatment, but that these other options are more likely to effectively accomplish the goal of promoting healthy infants. Moreover, they are able to do so with substantially less intrusion into the pregnant woman's autonomy. If advocates of relational autonomy are correct, then remedies geared only towards the individual woman seem doomed to fail. Fortunately, alternative solutions exist, and relational perspectives on autonomy are good at showing where to look for these alternatives, some of which are described below.

One problem may lie in the structure of government agencies themselves. Having the same, or even affiliated, agencies responsible both for providing prenatal help to struggling mothers and responsible for apprehending children may be problematic. L.E.A.F. worries that, "women will not seek medical care and the trust required in the patient-doctor relationship will be undermined by inter-agency reporting".[188] This would undermine both the goal of healthy women and the goal of healthy fetuses, suggesting the structure of state agencies is crucial to success in solving addiction during pregnancy. Another author argues that the interests of the fetus and the rights of the woman are indeed more effectively protected when such protection does not take coercive forms, but rather takes the form of a vast network of government sanctioned social support.[189] Though not as overtly coercive as forcible confinement by court order, there are coercive aspects to many state structures. Certainly it can be expected that knowing that the agency providing advice and care to you or your family also has the power to apprehend your children will have a coercive effect on the advice you choose to follow. The

[188] L.E.A.F. factum, para. 69.
[189] Gustavsson, 9. She describes this comprehensive approach as 'ecological'.

suggestion that a network of support would provide more useful solutions to substance abuse problems is consistent with views espoused by proponents of relational autonomy. Such a network might include specifically prenatal elements such as nutritional counselling and other supports for pregnant women, as well as more general programs aimed at reducing the factors that tend to lead to substance abuse such as poverty and racism.

The government of Manitoba has been the most progressive among Canadian legislatures in terms of providing support services designed to prevent pregnancies in which substance abuse is a factor. Its "Healthy Child Manitoba" initiative includes several programs aimed at addressing many factors that are most commonly associated with both pre-natal and post-natal damage.[190] The new programs are primarily directed towards providing access to information regarding proper pre-natal care and reducing the harmful effects of poverty. The program is community-oriented, with the goal of funding local groups who design their own programs to meet each community's needs. The initiative is relatively new, and few conclusions can be drawn as to its effectiveness.[191]

While programs like Healthy Child Manitoba are important, it is also critical that this support not be provided in a paternalistic manner, imposing values and ideals alongside assistance. Such paternalism would constitute a reduction in autonomy if it meant that women's choices are reduced to those that are consistent with patriarchal notions of proper care. This would especially be the case in communities where the

[190] See Manitoba government website at www.gov.mb.ca/hcm/ The provincial initiative includes a range of programs designed to put "children and families first". While this statement lacks any specific reference to women and requires monitoring by interested groups to ensure it does not impose paternalistic values, as a whole the initiative represents what is likely to be a more effective way of ensuring health and well-being for woman and fetus alike.
[191] The Government of Nova Scotia has since implemented a similar program, and the two governments have signed a memorandum of understanding, agreeing to share results with one another.

agency charged with administering the program also has the power to apprehend children. Reporting American experiences with linked prenatal care and child apprehension agencies, Gustavsson observes that "[a]s these women [substance abusers] became identified, their children became subject to State child welfare intervention".[192] This could constitute state sanctioned reduction in autonomy based on paternalistic views of the 'right' way to raise a child. Further, it could create precisely the situation the majority in *Winnipeg* sought to avoid: discouraging women from seeking pre-natal care out of fear of being the subject of a forcible confinement order.

This problem of being identified as a 'bad mother' or 'at risk' is tied to questions about the role race and ethnicity tend to play in state intervention. Most women are extremely careful with their pregnancies and diligent in following the advice of their doctors. Even those who do not follow their doctor's advice are generally unlikely to come to the attention of the state. It is usually only when the state, through one agency or another, is already involved in a woman's life prior to pregnancy, that the state learns of behaviour it might consider destructive and worthy of intervention. For this reason it is widely argued that aboriginal women are disproportionately affected by the sort of state intervention contemplated in *Winnipeg*.[193]

Examining the effects of *Winnipeg* from a racial perspective in addition to the gender perspective would be worthwhile. Two aboriginal groups joined as interveners in the case, including in their factums arguments outlining the racial impacts of deciding to

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[192] Gustavsson, 7.
[193] McCormack, 79-81; Susan Boyd, *Mothers and Illicit Drugs: Transcending the Myths.* (Toronto: University of Toronto Press, 1999); Rutman et. al.,26.

intervene in pregnancies involving substance abuse.[194] Unfortunately the court did not refer to these arguments. The question of racist undertones to state intervention is an important issue in the context of this debate. While an examination of race exceeds the scope of the current project, suffice it to say that it might be expected, and the intervener factums provide ample evidence, that aboriginal women would disproportionately feel the effects if the order seeking forcible confinement had been granted. Alternative program solutions which have been mentioned herein must reflect awareness and sensitivity to the role race has played in constructing the problem of substance abuse during pregnancy if they are indeed to provide workable solutions to a problem that is racial in nature. Awareness of the effects of race and culture must be synthesized into any plan designed to enhance women's autonomy, a project embarked upon by Ayelet Schacar.[195] Such awareness would be useful in responding to circumstances such as those highlighted in *Winnipeg*, where aboriginal women are particularly prone to state intervention. Aspects of aboriginal culture that affect women's capacity for autonomy must be specifically confronted, and the different experiences of autonomy created by membership in different cultural groups must inform solutions to substance abuse problems. Such an approach suggests that different solutions will be appropriate for different women, and that culturally sensitive, community-based programs are likely to provide the most effective responses to substance abuse.

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[194] See factum of Women's Health Rights Coalition, a coalition including the interveners Metis Women of Manitoba Inc. and Native Women's Transition Centre Inc.

[195] Though thorough consideration of this issue is beyond the scope of this project, Schacar provides a thoughtful analysis of the effects of culture on women's autonomy and how government programs might be designed to accommodate cultural differences: Ayelet Shachar, "Church and State at the Altar," In *Citizenship In Diverse Societies*, ed. Will Kymlicka and Wayne Norman (Oxford: Oxford University Press, 2000), 218.

VI. CONCLUSIONS

This case was essentially about the rights of a fetus versus the rights of a woman. Does the fetus have a right to a reasonable chance at a healthy life such that the mother's rights are justifiably intruded upon where they conflict? It would seem that to answer this the court would necessarily have to identify the rights of a woman as well as the rights of a fetus, and that in order to do this the court would have to make a determination of their legal status, so that the rights accruing to each can be identified. The court did not really do this though. The court acknowledged rights to liberty for the woman, though without specifically discussing her personhood. It acknowledged interests for the fetus, though without specifically determining its status. Three substantive issues informed this analysis, namely the role of medical evidence, the problem of women finding an appropriate basis for claims to rights, and the question of the extent to which these two former issues impact on women's autonomy. These topics provided both context as well as theoretical insights, which helped to identify why a case where the state threatens to forcibly detain a woman for non-criminal acts requires attention.

What can be concluded from an analysis of *Winnipeg*? Virtually none of the reasoning provided by the dissent was favourable for women. A substantial portion of the majority reasoning also failed to adequately appreciate the devastating effect such an order could have on women's ability to govern themselves. Where the majority did recognize this it seemed more concerned that future extensions of the law would result in

decreased autonomy (the slippery slope) than it did with the extension of the law being considered at present. The majority ultimately failed to deliver a decision based on reasoning supporting women's right to autonomous decision-making. Rather, the court based its decision on the point that the changes contemplated were beyond its jurisdiction but suggested appropriate ways for the legislature to compensate for this. To date no legislature has responded, but the court's preference seems clear: create a limited law for the apprehension of pregnant women for the perpetration of non-criminal acts. Perhaps, six years later, it is still too early to see the full impact of *Winnipeg*, as its role in Canadian jurisprudence is still developing. Or perhaps *Winnipeg* is simply proving less significant than it appeared it would be at the outset of this project.

Canadian jurisprudence appears to be reducing *Winnipeg* to a case that clearly sets out when a court should extend an existing law to new situations and when a legislature should extend an existing law. The SCC has not dealt with a similar case since *Winnipeg*, nor are there any reported cases from Canadian lower courts dealing specifically with the issue of pregnant women who abuse substances. Parliament has not provided any response to *Winnipeg,* meaning that at present the law remains as it was in 1997, and orders for the detainment of pregnant women cannot be made for the benefit of the fetus. It is clear that the rights to which women are entitled during pregnancy remains unsettled in Canada. While there is general agreement that substance abuse during pregnancy is a serious problem, there is substantial disagreement as to what to do about it. *Winnipeg* reveals that SCC is itself conflicted. At times reflecting views consistent with feminist arguments, at times diverging significantly from feminist positions, *Winnipeg* demonstrates that the courts are still some distance from embracing a relational view of

autonomy. Together these facts may create space for women seeking to influence the direction of law. The suggestion in this project is that by arguing for the conditions that foster women's autonomy, women will present a more persuasive argument in favour of their rights to be free from state intervention, and further that this will result in solutions to the problem of substance abuse during pregnancy that more effectively target the causes of the problem. Hopefully, this will lead to solutions that promote both the physical and the emotional health of women and babies.

The fact that the courts had the opportunity to say so much more than they did suggests that *Winnipeg* really does stand for a lot. It stands for the implicit rejection of the idea that a fetus ought to have rights equal or paramount to that of a woman. While many problems have been identified with the case, both with the decision itself and with the environment in which it is situated, the fact remains that *Winnipeg* is a case in which the SCC refused to give priority to the interests of a fetus over the rights of a woman.

Whatever *Winnipeg*'s individual strengths and weaknesses may be, there remains a fundamental problem for women in Canada: the underlying liberal philosophy of the legal system remains oblivious to the kinds of solutions to substance abuse that relational autonomy suggests as ideal. As such, the system remains an environment inhospitable to fostering the capacity for autonomy that would promote not only the health and welfare or women, but also of babies and of society. It is, consequently, important that women's groups not underestimate the importance of creating a culture of respect for women's rights, and not just focus on achieving legal respect for autonomy.

A final example demonstrates this point. In Brandon, Manitoba, a judicial district just two hundred kilometres from the judicial district where *Winnipeg* originated, a woman, eight months pregnant and an alcoholic, was before the court for violation of conditions of release on fraud charges. One of the conditions of release was that she abstain from alcohol and it was argued before the court that she had failed to abstain. For breach of this condition the trial judge sentenced the woman to 5 months in jail. In making the order the judge said to the woman: "Do you know what Fetal Alcohol Syndrome is? You drink and that ends up poisoning the child. I can't see much incentive in not incarcerating you".[196] This example displays the sort of discretion available to judges to make moral judgements not even contemplated by the sentencing guidelines.

The fact that the order was not ultimately granted in *Winnipeg* clearly has not been a bar to women being detained by courts for the duration of their pregnancies where substance abuse is suspected. Many pregnant women who are abusing substances find themselves in court on unrelated criminal charges and the practice of imposing legal but unusually harsh sentences on pregnant addicts, so that they are detained for the duration of their pregnancy, is widespread.[197] While the sentence may be legal, it is unusually harsh and it is clear that the detention is intended not as punishment for the crime but as protection for the fetus. The case in Brandon is a stark reminder that even with the SCC's refusal to grant an order detaining a pregnant woman, the practice exists, supporting the

[196] "Pregnant drunk forced to sober up behind bars", *Brandon Sun*. October, 2002.
[197] While the frequency of this practice is difficult to measure because of the fact that there may be no mention in a court decision, or even in transcripts, of a woman's pregnancy that may be quite obvious to everyone in the courtroom, some researchers have estimated that the frequency of pregnancy related incarceration is high. Gustavsson, 6; Steinbock, 140.

argument that it is not the substance of the law, but rather the ethos of the legal system, that requires change.

Opportunities for further research on this topic abound. An investigation into the effect judicial makeup has on law pertaining to women and pregnancy could be extremely illuminating, particularly in attempting to predict future directions of the court and likelihood of success before a given court. Depending on the results, this investigation could affect the tactics employed by women's groups seeking legal change. Analysis of legislative decisions similar to that conducted herein would also be useful in explaining how the law is evolving and the sort of changes that might be expected in the future. Questions addressing the role race played in *Winnipeg* and similar decisions would also be useful. Finally, an evaluation of the relatively new pre-natal programs implemented in the province of Manitoba and elsewhere, described briefly above, would be highly relevant to future discussions on this topic.

While research in any of those areas would only enhance the value of the present discussion, important insights have been afforded by this analysis of *Winnipeg*. Ultimately, while the outcome of *Winnipeg* was good, it has proven much more difficult to classify the reasoning as either good or bad, promising or disappointing. Instead, it is a decision full of strengths and weaknesses. Rather than making a normatively relevant statement about the proper relationship between pregnant woman and fetus, the court retreated to a question of jurisdiction to resolve the dispute. In this sense, *Winnipeg* was a missed opportunity. But it might be an opportunity we should be glad was missed.

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