Philosophy 338
Philosophy of Law
2017
Note Five

RATIO OF JUSTICE WILSON IN
R. v. Morgentaler
This note is mandatory reading

We turn now to a more detailed examination of parts of the reasoning that backed the Morgentaler decision.

1. WILSON J: Dickson C. J. And Lamer J. have found that the requirements for obtaining an exception to the prohibition of abortion, as laid out in s. 250 of the 1970 CCC, discomport with the principles of fundamental justice in the procedural sense. They have also concluded that exemptions cannot be severed from conditions creating the criminal substance of that section. Therefore, all sections of s. 251 must go. In other words, these colleagues have found that notwithstanding the substantive criminal wrongfulness of abortion, any regulatory scheme for criminal relief in particular circumstances must be an offence against procedural justice. Since the right to procedural justice outweighs Parliament's right to make laws, the law in this instance must be struck down.

Wilson J accords this opinion "all due respect", but goes on to identify further considerations that would provide more telling grounds for taking all of s. 251 down.

2. JW: The structure of Dickson-Lamer reasoning is interesting. Consider a rather common case. Hospital services are widely available in Canada but rather unevenly so. In distant communities there are no hospitals, and provincial governments labour under the constitutional pressures of equal access and security of the person. No province has the resources to remove these inequalities entirely, and no court is likely to condemn them for it. After all, needs must. According to Justices Dickson and Lamer, the abortion example is similar yet strikingly different. Hospital care in general is a varyingly scarce and unevenly available utility. When the service is sought to protect applicants from criminal prosecution, the scales shift. There may be no procedural injustice in the general case, but Dickson and Lamer thought that this is precisely what happened when service-seekers were attempting to protect themselves from criminal indictment, when the abortions they sought were performed. It is a principle of long standing in law that procedural injustice overrides substantival justice. Therefore, they reasoned, section 251 had to go.

3. WILSON J: There is, however, another issue which is more central, indeed primary. If a pregnant woman cannot be compelled to take her fetus to term against her will, the question of an exception from the legal compulsion to do so doesn't arise, whether on procedural grounds or any other.

4. JW: Note the structure of the Wilson argument so far. Let ~C = "A pregnant woman cannot be compelled against her will to take the pregnancy to term" and ~E = "The question of exceptions to this compulsion doesn't arise". What we have at this point is the conditional proposition

1. ~C → ~E

Note, however, that Wilson has now changed course to what might appear to be a softer version of Dickson and Lamer. This is not in fact where she's headed.

5. WILSON J: Parliament would be wasting its time in rewriting the exceptions clause of s. 251 without some assurance of ending up with "a valid criminal offence". If abortion as such weren't a crime, then the question of exceptions could not arise.

6. JW: Here is the structure of her reasoning at this juncture. Her position takes the form of a *modus ponens* argument:

1. ~C → ~E (Wilson)
2. ~C (Wilson)
3. ~E. (1, 2 MP)

What we need now are her reasons for premiss (2) that abortion as such is not a criminal wrong.

7. WILSON J: The idea of human dignity "finds expression in almost every right and freedom guaranteed by the *Charter*". The *Charter* compels the state "to the greatest extent possible" to leave it to the individual to live her personal life as she pleases. The *Charter* is founded on a respect for human dignity, which implies in turn the assurances of liberty, which in its own turn "grants a degree of autonomy in making decisions of fundamental personal importance." Accordingly, the right to liberty contained in s. 7 guarantees to all individuals a degree of personal autonomy over important decisions intimately affecting their private lives.

8. JW: Let's pause awhile and see whether we might lend to this chain of reasoning some structural clarification, but not before mentioning in passing that the "human dignity" has no express occurrence in the *Charter.* The same is true of "autonomy". On my reading of the present argument neither of these notions is load-bearing. All that Wilson needs is a certain reading – indeed as she herself says – of *liberty*. Here is her argument restructured.

1. The state must do everything possible not to contravene a person's life to lead her personal life as she chooses. (The liberty doctrine)
2. More particularly, the state must not intrude upon a person's right to decide matters of *fundamental personal importance*. (Wilson's gloss on the doctrine)

Note that (1) imposes on the state a qualified duty to desist, whereas (2) imposes a categorical one, owing to the meaning that Wilson sees in "personal". At this stage, all we have is premisses. We now move to the critical question of "whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions". Which class? Decisions of fundamental personal importance.

9. WILSON J: The answer to this question is in the affirmative. The state has no right to transgress a woman's right to secure an abortion. Why? Because in all such cases it is a decision of fundamental personal importance.

10. JW: Nowhere in the *Charter* is there any instruction about the meaning or legal significance of "personal", indeed no express occurrence of that word. The closest we get is s. 7 of the *Charter,* which guarantees the right of "security of the person". This is not, however, germane to the present point. The right to security of the person is the right to keep ourselves safe and to prevent others from endangering our safety. However, in the Wilson opinion, "personal" means "pertaining to oneself alone", and its antonym is "interpersonal". The right in question permits an individual to do to himself what might be impermissible to do to any other or even to do to himself without the permission of someone else. Let's now schematize the argument:

1. $\forall x$ (if x is a personal matter, the state should do everything in its power not to intrude upon x.) (The liberty doctrine)
2. $\forall x$ (if x is a decision of fundamental personal importance, the state has a duty not to intrude upon x). (The liberty doctrine)
3. For all x, if x is a decision whether to terminate one's own pregnancy is as such a decision of fundamental personal importance, the state has a duty not to intrude on the making of x or on x's implementation. (Conditional instantiation of (2))
4. A decision to terminate one's pregnancy is indeed, as such, a decision of fundamental personal importance. (Stated by Wilson as a fact.)
5. Therefore, the state has a duty not to criminalize abortion. 3, 4, MP

Note the redundancy of premiss (1) in this argument. The same is true of (2). The whole argument is contained in the *modus ponens* argument from (3) and (4) to (5). The premiss-conclusion reasoning looks solid. The question that remains is whether the premisses are true.

Premiss (4): This cannot be true unless abortion is in no sense an interpersonal question. It is certainly an interpersonal one if the fetus is itself a human person, albeit a not yet born one. Fetuses are members of the species *homo sapiens,* hence are biologically human. Whether they or not they are persons is a *metaphysical* question, and a deeply contested one. No one expects from Wilson the deep insights of a Leibniz or Locke. So perhaps it is understandable that she proposes no jurisprudence on the matter, indeed stands mute.

Against this it could be argued that the law has already determined at CCC s. 223 (1) that an unborn child is not a human being. It is, however, a conditional reading, having to do with the meaning of homicide in s. 221 (1). The matter is made more complicated by clause (2) of 221, which reads as follows:

> "A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being."

We have it therefore that Canadian law expressly acknowledges that a fetus is an unborn child of a human mother, and, although not a human one until birth, subject to criminal harm while in utero. We must take care to keep in mind that there are now three different questions before us:

- Is an unborn child of a human mother a human child?

- Is an unborn child, of a human mother, while capable of being criminally harmed, also susceptible to homicide?

- Is an unborn child of a human mother a person?

Another way in which premiss (4) might fail would be if the father, for example, had some proper say in the matter. Wilson does address this possibility and quickly dismisses it. Why? Because men are incapable of understanding "the subjective elements of the female psyche which are at the heart of the dilemma." Offensive on its face, I think we may take Wilson to be saying something more reasonable, but not necessarily more true. It is that because he can't himself *experience* the state his pregnant wife is in, it cannot be for him the matter of fundamental importance that it is for her. In so saying, we see the necessity of getting premiss (4) right. What it says is that *any* decision about aborting one's pregnancy is a matter of such fundamental importance as to preclude the father's full understanding of it. Accordingly, while Dad *might* have a say in the matter, mom has the greater say, because it is always a matter of fundamental importance and more fundamental to her than to him. Notice, by the way, that the argument has shifted from considerations of personalness to those of fundamental importance.

The problem with (4) is its spurious generality. Consider a case. Sally discovers that she's pregnant with child number four, and is perfectly OK with it. Chet points out that a fourth child would put an unwelcome strain on the family's finances, Sally says, "OK, hon, let's give this one a miss." What this tells us is that that Wilson's rhetoric – "powerful considerations militating in opposite directions", "dilemma", "struggle to assert their dignity" – is tailor-made for the *special* case in which a woman is in two troubled minds. In so drifting, Wilson echoes the reasoning of s. 251, which was also crafted for the special case. But s. 251 is the very statute that Wilson voted to strike down. Her reasoning about women in distress may do some helpful work for women who are indeed in distress, but lays no glove on the case in which a decision to abort is just another life style choice – or a decision to relieve *Chet*'s distress.

11. WILSON J: The manner in which s. 251 infringes upon the security of the person provision of s. 7 of the *Charter* also offends its s. 2(a), which says

> "Everyone has the following fundamental freedoms:
> (a) Freedom of conscience and religion."

Since abortion is a matter of conscience, whose conscience is to prevail in something as fundamentally personal as abortion? "Is the conscience of the woman to be paramount or the conscience of the state?"

12. JW: It is difficult to square the freedom of conscience argument with a woman's fundamental right to choose (even if s. 7 does not in fact secure her that right). If she has it, she has it. Some women exercise this right in violation of their conscience, and in so doing aren't exercising their freedom to abide it. How would s. 2(a) bear upon these cases? Either it has no relevance to them or it places some limit on the freedom to choose abortions in bad conscience.

There are also cases in which conscientiousness is no defence of actions. If an honour killing is what a father's conscience dictates, he will receive no relief from criminal prosecution in Canada whether or not he cites s. 2(a). The same has been repeatedly the case with parents who withhold their children from medically necessary blood-transfusions out of duty to the religious requirements of Jehovah's Witness' doctrine.

The upshot is that in the context of a woman's freedom to decide as she pleases, s. 2(a) secures no helpful purchase. It is a distraction at best.

13. WILSON J: The question that now arises is "whether s. 251 of the *Criminal Code* can be saved under s. 1 [of the Charter]". That section provides that

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

The answer to our question is that s. 1 cannot save s. 251, whose "primary objective is the protection of the foetus", which "is a perfectly valid legislative objective." The question is "at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? The answer is that the point is triggered in the later stages of the pregnancy.

14. JW: The reasoning here pivots on a new consideration. As everyone already knows, pregnancy is a *developmental* process. There is nothing new in that. The point that matters here is Wilson's finding that the legal status of abortion varies over time and that the degree of freedom to choose as a woman wishes varies disproportionately with the degree of developmental progression. In so finding, Wilson binds herself to the position of the U of T moral philosopher, L. W. Sumner, who expressly asserts that first trimester abortions are morally safe, second trimester ones are morally riskier, and third term ones morally impermissible the later the state of the pregnancy.

Had the *Morgentaler* decision created a precedent since 1988 it would have been a matter of law that late abortions are crimes in Canada.

POSTSCRIPT: There remains the question on the law's indifference to the metaphysical status of unborn children of human mothers. If a fetus is a person it is surely protected by the security of the person provisions of s. 7 of the *Charter*. What this shows is that the personhood question is no mere academic distraction. Section 7 makes it a matter of central concern. It also seems to make of the law's indifference to it a juridical and parliamentary disgrace. For example, if unborn children of human mothers are persons and the deliberate killing of persons is murder in the *moral* sense, then abortion would be moral murder.

All the same, the personhood question doesn't at present hold out much promise of an intellectually satisfying answer for the country at large. Dismissers are onto something important when they point out that deciding the personhood question in a metaphysically correct way is not presently within their means. How can they be blamed for not doing what they don't know how to do? This is perfectly right as far as it goes. But it raises a question of its own. It prompts us to ask what are the intelligent options to a life and death matter that we're presently unable to deal with? Two options present themselves, each problematic.

> *The risk avoidance option*: If unborn children are persons and the law allows us to treat them as if they were not, then the law – whatever its good intentions – would be complicit in mass moral murder. On the other hand, if unborn children aren't persons and

the law treats them as if they were, s. 251 would have worked an unnecessary hardship on those women who would have chosen otherwise had they been able to – and, by the way, would have met with the disapproval voiced by Dickson and Lamer. Even so, mass moral murder is by far the morally worse outcome of the two of our hypothetical errors. So the more rational course is to leave s. 251 alone, or – if you hold with Dickson and Lamer – remove its exceptions clause.

The ad ignorantiam *option*: Let me now schematize what you'd find in just about any introductory logic or critical thinking textbook under the heading of "*argumentum ad ignorantiam*" or an argument from ignorance.

1. It is not known whether ghosts exist.
4. Therefore, they don't.

The argument embeds two missing premisses:

1. If ghosts existed we'd know it by now.
2. But we don't.

In computer science circles, arguments of this kind are called "autoepistemic". The meaning of this term is conveyed by premiss (2). There are plenty of cases in which arguments of this sort are perfectly reasonable, as witness:

a. If there were a morning flight to London, they would have posted it.
b. No such flight was posted.
d. So there is no such flight.

Compare this with

i. If the unborn children were persons we'd know it by now.
ii. There is of yet no such knowledge.
iv. So, unborn children aren't persons.

In neither case is the conclusion a deductively assured one. In both, the premiss-conclusion link is defeasible. Sometimes defeasible reasoning is sensible and reliable. In other cases it isn't. If the argument from (a) and (b) to (d) is reasonable, the one from (1) and (11) to (iv) assuredly isn't. The reason why is that in the first case there is another missing premiss implicitly at work, namely,

(c) Airlines authoritatively disclose what they know of their departing flights

What would such a premiss be for the fetus argument? It would be something like

(iii) Metaphysics authoritatively discloses the truth about the personhood of unborn children.

Premiss (c) can plausibly be taken as true. Premiss (iii) cannot be. The explanation lies in the already conceded intractability of that question, which positively *anchors* the law's indifference to it.

> A third position to consider is the
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> *Power to truth option*: The only objective fact about moral matters is that, beyond the one that's now being stated, there are none. Accordingly, all such matters must be dealt with politically. Since there are no moral facts for it to honour, politics can only operate on a balance of power basis. Political truth, therefore, is created by empowerment. Politics is the means whereby demands are voiced and empowerment is solicited. Without a voice, power is virtually out of reach. The voiceless therefore are incapable of producing political truth in their own behalf. Unborn children have no voice. They are powerless to enact the truth of their personhood. Unless someone else does it for them, it cannot be a truth of politics that they are persons. But, as we know, no one has been able to perform that service for some decades now.

The question that we are now left with is the key one:

- Does any of these positions pass the smell test?