Philosophy 338
Philosophy of Law
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Note Six

A BRIEF FOLLOW-UP ON THE WILSON RATIO IN MORGENTALER

1. As we saw yesterday (January 26th), the SSC's own *ratio* in Morgentaler was more than internally incoherent. It was actually inconsistent. It was so in at least the following respects:

- According to Wilson J, s. 7 (security of the person) grounds the proposition that abortion is criminal in no respect and cannot in constitutionally allowed ways ever be criminalized. This flatly contradicts the *ratio* of Dickson and Lamer JJ at the point at which it preserves the doctrine that abortion is inherently criminal.

- Wilson J also asserts that abortion is protected from the state's interference by 2(a), which guarantees the freedom of religion and conscience. The only way we could get from 2(a) to the uncriminality of abortion would be by reasoning that if a woman seeking an abortion thinks that her abortion is entirely conscionable, the state has no claim against it. But, by that same reasoning, a woman with whose conscience abortion would be in conflict would not be free in law to proceed. But that contradicts Wilson's s. 7 argument that the state has no role in abortion ever.

- In a further part of her *ratio*, Wilson J adopts the developmentalist position of L. W. Sumner, having been moved by s.1's override provisions, according to which a constitutionally protected right can be abrogated by the state if it can be demonstrated as justified in a free and democratic society. Why is she making this move? Why isn't it enough to have shown (as she herself supposes) that s.7 constitutionally protects a woman's unconditional right to abortion? The answer is that s.1 allows for the state to violate a constitutionally assured right if there are sufficiently compelling reasons to do so.

  What might those reasons be in the present case? One example is a developmental one. It could be argued that since there is no developmental difference at all between a human being one day before its birth and one day after, it is unintelligible that killing it the day before would be legally permissible and an indictable offence the day after. It appears that Wilson J may have been sufficiently worried about this to buy into Sumner. Why? Because the developmental criticism might be re-purposed as a *sorites argument*: If there is no relevant difference between the day before and the day after, then (the argument goes), since it is impermissible that day after, it is impermissible the day before. If impermissible then, then impermissible the day before then, and therefore the day before that, and so on and so on until we get to the position that abortion is impermissible at no stage. Of course, the sorites argument might well be defeatable. If so, perhaps Wilson J would have been better served in seeking the advice of a logician. It doesn't matter. She relied on Sumner's position, which makes abortion permissible in the first trimester, impermissible in the third, and is somewhat equivocal about the second. In siding with Sumner, Wilson J contradicted her finding of s.7 and did the same with

respect to s. 2(a), and in each of those three instances contradicted a part of the Dickson-Lamer *ratio.*

2. Just to be clear, the critique of note #5 and of this one too, is confined to the question of derivational security and makes no claim about the accuracy or otherwise of Madame Justice Wilson's premisses or conclusions, except when they themselves have been produced by faulty reasoning. Likewise, the critique is wholly unconcerned with the moral status of abortion or anything else. From beginning to end, the focus has been on matters of law and nothing else. Of course, this was not the position of Wilson J. She makes ample use of moral premisses in the course of her reasoning, especially in her reliance on Sumner's theory. Sumner is not a lawyer. He is a moral philosopher. His book is a contribution to ethics, and has nothing to say about law.

3. Finally, if the critique passes muster, the Morgentaler decision was simply bad law, made so in large measure by the legal inadequacies of the Wilson *ratio*. It is, even so, both possible and likely that some judges would disagree with this claim. Activist judges and others who support judicial activism could insist that judges do not have the duty to settle things solely by the devices of case law in the traditional manner, when it is open to them to repair the inadequacies of law for the greater good of society. I have no doubt that precisely this was what motivated the Wilson *ratio.*