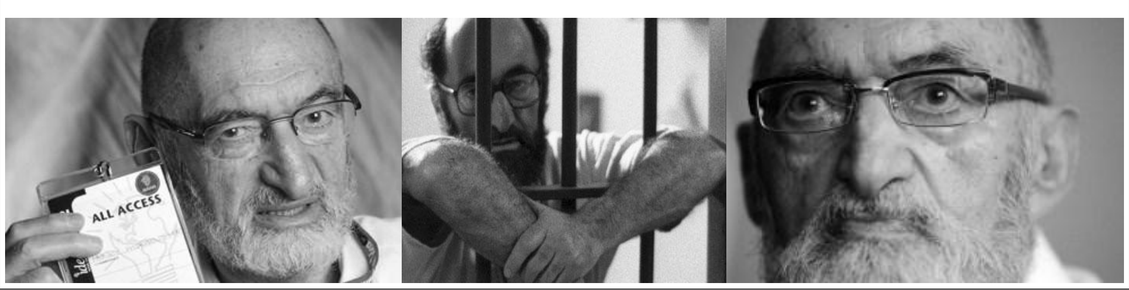
The Need for Equality in Reproductive Contexts

Jen Rinaldi, York University

Morgentaler : Section 7 & Reproductive Autonomy

In *R. v. Morgentaler* (1988), Dr. Henry Morgentaler (along with two other physicians) was charged with illegally inducing miscarriages in his clinic in Toronto, under section 251 of the *Criminal Code* (which criminalized non-therapeutic abortion). The Supreme Court of Canada ruled 5 to 2 that s. 251 violated section 7 right to security of the person in the *Canadian Charter of Rights and Freedoms.*

Respect for security of the person in the Canadian *Charter* "relates to the concept of physical control, ...protecting the individual's interest in...her bodily integrity" (*R. v. Morgentaler*, 1988). This right is related to autonomy to the extent that security of the person involves having control over one's body and decisions regarding one's body, without state interference. Chief Justice Dickson ruled that the criminalization of abortion ran contrary to women's priorities and aspirations. In so doing he acknowledged that in reproductive matters, control over one's body free from interference involves a degree of self-direction, of acting in accordance with one's own values. Therefore, the right to security of the person is framed with autonomy-based language, such as the language found in Beauchamp and Childress: "The autonomous individual acts freely in accordance with a self-chosen plan" (2001).



Coming up against Barriers

Government-sponsored reports studied abortion access: The Badgley Report (1977) and the Powell Report (Ontario), commissioned before *Morgentaler*; as well as reports from Ontario (1992), the Northwest Territories (1992), and British Columbia (1994), published long after *Morgentaler*. The Badgley Report identified social barriers that particularly had an impact on "socially vulnerable women – the young, less well educated and newcomers to Canada".

Rodgers (2009) argues that long after *Morgentaler*, discrimination persists: "Thirty years after Badgley and twenty years after *Morgentaler*, ineffective and insufficient provision of abortion services continues to violate women's Charter equality protections".

"There is documentation of racist delivery of abortion and reproductive health care services and of imposed contraception and sterilization. The young, the poor, women with disabilities and aboriginal women, refugees and women of colour were noted as being particularly mistreated. There was documented evidence of pressure to terminate a pregnancy or to use permanent forms of contraception such as sterilization or Depo-Provera for some women".

Making a Case for Reproductive Equality

In *Doe et al. v. The Government of Manitoba* (2004), denied or limited access to safe and timely abortions was found to violate s. 7 liberty and security of the person, s. 15 equality, and s. 2(a) freedom of conscience, though this judgment has been set aside and the decision has not served as a precedent for subsequent cases pertaining to reproductive rights. Morgentaler argues in his most recent case (*Morgentaler v. New Brunswick*, 2008) that New Brunswick's *Medical Services Payment Act* violates s. 7 and s. 15 by excluding abortions performed in clinics from its definition of entitled services, but the case has not yet proceeded.

Though Canadian law has not yet established the connection between equality and reproduction, feminist scholarship holds it should: "the language of the *Morgentaler* judgments of the majority was a ringing restatement of an individual right. [This] has not been the characterization of Canadian pro-choice and feminist activists, who have consistently framed abortion as an issue of equality and access" (Gavigan, 1992).

Reproduction has been for so long considered an equality matter because women's reproductive capacities have been treated as grounds for socially imposed subordination: "It is because women are saddled with virtually all of the expenses of pregnancy and childbirth, as well as the costs of childcare, that we must insist that women be allowed to choose the conditions under which they become pregnant" (Colker, 1992).

As Rodgers notes, women with intersecting identity traits are especially likely to face barriers to reproductive services. Hughes (1999) characterizes s. 15 substantive equality as "a form of equality which is satisfied only if policy or law is made meaningful for all members of society, including those who have been racialized or systemically defined by gender, sexuality, or disability or similar characteristics, as well as intersecting identities".

The *Charter's* s. 15 right to equality has the power to produce state obligations to regulate abortion provisions. Instead of merely protecting women's reproductive decisions from state interference, from overt legal coercion - as s. 7's right to security of the person can guarantee - s. 15 includes the obligation to provide services and programs which would aim to correct historical disadvantage and achieve equality.