The Supreme Court of Canada

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The majority is generally to be applauded for recognizing the complexity of the issues dealing with state intervention in pregnancy and birth.

Cet article questionne le rôle de l'État qui intervient durant une grossesse à partir de la décision récente de la Cour suprême du Canada qui a décrété qu'une femme enceinte ne peut être détenue contre son gré et être traitée pour sa dépendance à la colle.

In October, 1997, the Supreme Court of Canada released its decision in *Winnipeg Child and Family Services (Northwest Area)* v. *G. (D.F.)* (hereafter referred to as *G.*).[1] This case centred around Ms. G., a young Aboriginal woman who was five months pregnant when Winnipeg Child and Family Services (CFS) applied for and obtained a court order which placed Ms. G. in the custody of the Director of CFS and required her to undergo treatment for her addiction to glue sniffing. The order was stayed two days later by Justice Helper, and then set aside by a majority of the Manitoba Court of Appeal. Despite the stay of the order, Ms. G. remained voluntarily at the treatment centre until she was discharged, and by the time the matter was decided by the Supreme Court of Canada, Ms. G. had given birth to an apparently health baby.

A majority of the Supreme Court of Canada held that the common law did not provide any legal basis for the order sought by CFS. The majority also declined to extend the common law so as to allow such an order. While the Supreme Court of Canada has previously decided cases which have a significant bearing on the issues of this case[1]; this was the first time that the Court had ruled on whether, under the present law, the state can detain a pregnant woman against her will, and impose treatment on her, where her conduct is perceived as harmful to the fetus.

Although there are points which I would have liked to see further developed, I will argue in this article that the approach of the majority is generally to be applauded for recognizing the complexity of the issues involved and for declining to follow the interventionist trend exhibited by a number of American cases dealing with state intervention in pregnancy and birth.[2] I will also note, however, that this decision is not a definitive statement on the power of the state to intervene, given that constitutional issues were not argued by the parties, and therefore were not addressed by the Court.

I begin by summarizing the lower courts' judgments, by way of background. I then contrast the very different views taken by the majority and dissent on the issue of whether the Supreme Court could, or should, extend the present law on torts or the *parens partraie* jurisdiction in order to allow women's behaviour to be controlled during pregnancy. In my analysis of the Supreme Court of Canada decision, I focus on a range of interrelated issues: the relationship between a pregnant woman and the fetus she carries; the extraordinarily intrusive nature of the order sought by the CFS; the potentially expansive nature of a prenatal duty of care; the fact that addictions should not be viewed as choices; the fact that even if prenatal harm could be predicted accurately (a questionable assumption), increased state surveillance might actually harm rather than enhance the well-being of fetuses; and the danger that state intervention in pregnancy and birth, if allowed, would disproportionately target women who are already disadvantaged because of race or poverty. On each of these issues, I argue that the majority decision of the Supreme Court of Canada is far more persuasive than that of the dissenting judgment and is in keeping with the preponderance of Canadian academic writing on the subject.

Facts

Ms. G. was addicted to sniffing glue.[3] This was her fourth pregnancy, and her previous three children (two of whom exhibited developmental delays thought to be attributable to solvent abuse by Ms. G.) had been made permanent wards of the state.

Ms. G. had made at least two attempts to receive treatment for her addiction. During an earlier pregnancy, Ms. G. had sought assistance from a youth services program, but was rejected as she was no longer considered a youth. During the

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present pregnancy, she had applied for acceptance to a treatment centre (the St. Norbert Foundation), but was informed that there was a long waiting list and that she should "keep in touch."[4] When CFS contacted Ms. G. in July 1996, she expressed her willingness to undergo treatment for solvent abuse at St. Norbert (which apparently was able to find a spot for her when the request came from CFS); however, when a CFS worker arrived on July 23 to accompany Ms. G. to the treatment centre, she was intoxicated and indicated that she would get treatment, but "not right now."

CFS immediately filed a notice of motion with the Court of Queen's Bench, seeking an order "committing Ms. G. to the custody of the Agency or the Director of Child and Family Services pursuant to the *Mental Health Act*" (para.1). CFS filed its statement of claim and notice of motion on Tuesday, July 30, 1996, and the motion was heard on August 3, 1996. An interim order was made on August 6, the day on which a court-ordered psychiatric assessment was filed. Written reasons were provided on August 13 (by which point the order had already been stayed).

Decision of the Manitoba Court of Queen's Bench

The evidence before Justice Schulman consisted of the testimony of two of Ms. G's sisters,[5] evidence regarding the damage that could be caused to a fetus by solvent abuse during pregnancy, (including "a decrease in intellectual capacity," and harm to "motor co-ordination") and an affidavit of a social worker who deposed as to the seriousness of Ms. G's addiction, and stated that Ms. G. had "consistently refused all offers of services and treatment" (para. 10). No evidence was presented on Ms. G's behalf, and a pre-hearing request by Ms. G's counsel for a two-week adjournment in order to prepare the case was denied. The vital fact that Ms. G. had previously sought treatment, and that she had, when sober, been quite willing to accompany the CFS worker to St. Norbert's, did not even come out at the initial hearing.

Justice Schulman ordered a psychiatric assessment of Ms. G. According to this assessment, Ms. G. suffered from "chronic solvent and mixed personality disorder with antisocial and dependent features," and "there were many reasons to be concerned about her safety in the short and long term" (para. 16); however, the psychiatrist was of the opinion that Ms. G. was not suffering from a mental disorder as defined in the *Mental Health Act*, and that therefore there were no grounds to detain her under the *Act*.

After reviewing the evidence before him, Schulman J. stated that he was not bound by the psychiatric assessment. He concluded:

> [Ms. G.] suffers from a substantial disorder of thought, mood and perception that grossly impairs her ability to meet the ordinary demands of life. Pursuant to s. 56(a) [of] the *Mental Health Act*, I declare her to be a person who is mentally disordered. (para. 21)

Justice Schulman then made an order giving the Director of the CFS "power to have her [Ms. G.] treated at the Health Sciences Centre ... and St. Norbert Foundation." He further ordered that if Ms. G. failed to comply with treatment, the director could, without notice to Ms. G., "apply for an order committing Ms. G. for treatment." The custody order was to terminate when Ms. G. gave birth (para. 1).

Justice Schulman went on to hold that even if the *Mental Health Act* did not apply, the order could be justified under the court's *parens patriae* jurisdiction, which could "be engaged to protect an adult person who is 'incompetent' to care for his or herself" (para. 24). Citing *E. (Mrs.)* v. *Eve*, he found the court could act, "not only on the grounds that injury to a person has occurred, but also on the ground that such an injury is apprehended" (para. 25). In order to distinguish an earlier case, *Re A (in utero)*, where a Canadian court had held that the *parens patriae* jurisdiction could not be used to confine a pregnant woman in

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order to protect a fetus, Justice Schulman emphasized that "[i]n the present case, counsel for the Agency and the pleadings seek protection for Ms. G., rather than for her child to be born" (para. 34). However, he also suggested that there

> are good grounds for broadening the scope of *parens patriae* to allow the court to make an appropriate order to protect a child to be born.... Provided that the court can be satisfied by adequate means that the child will indeed be born, then I see no reason why the *parens patriae* jurisdiction should not be enlarged in relation to that child prior to birth, just as it could be employed after birth, to protect the health of the child. This, of course, can mean some interference with the freedom of the mother, but in my opinion, in appropriate circumstances that interference will be justified. (para. 43–44)

Manitoba Court of Appeal

The decision of the Manitoba Court of Appeal, which held that Justice Schulman did not have the authority to order the detention and mandatory treatment of Ms. G., revealed the shaky legal foundation on which Justice Schulman's decision was based. In reaching its conclusion, the Court considered the *Mental Health Act*, the *parens patriae* jurisdiction, tort law, and principles regarding consent to medical treatment.

By the time the matter reached the Court of Appeal, CFS was no longer basing its arguments on the *Mental Health Act*; however, Justice Twaddle, writing for the court, highlighted the inconsistency of Justice Schulman's reliance on this legislation:

> The findings of mental disorder and incompetence are suspect from the start. The agency's concern was never for 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 the child. (para. 4)

Furthermore, given the two psychiatric assessments, the trial judge's finding that Ms. G. was mentally disordered "simply [was] not supported on the evidence" (para. 8). Justice Twaddle pointed out that an order made under the *Mental Health Act* would have to be made on evidence of mental illness "sufficient to warrant the order for the mother's benefit without regard for the protection of the unborn child" (para. 11).

Similarly, Justice Twaddle held that it was well established that the inherent *parens patriae* jurisdiction of the Court could only be used where a person has been found to be incompetent, and then the jurisdiction could be used only for the protection of that person. With respect to the "much more controversial" issue of whether the court could use this jurisdiction to order Ms. G. to undergo treatment for the protection of the fetus, Justice Twaddle stated that the court's *parens partiae* power over minors "is exercisable ... only after the child is born" (para. 13). He also commented on the inadvisability of extending *parens patriae* to include protection of a fetus, suggesting that such a move might actually be counterproductive:

> [W]e may induce other expectant mothers, fearing state intervention in their conduct, to avoid detection by not seeking desirable pre-natal care. There is a public interest in having expectant mothers receive proper pre-natal care. (para. 29)

Justice Twaddle rejected tort arguments made by CFS as well, stating that "[a]bsent a cause of action until the birth of the child, there is no one at common law who may sue to restrain the mother from a course of action potentially harmful to the child" (para. 24). He was of the opinion that to allow such a suit would have the undesirable effect of "pit[ting] an unborn child's rights against those of its mother" (para. 28).

Lastly, Justice Twaddle pointed out that the order made by Justice Schulman violated the firmly established legal principle that medical treatment cannot be imposed on a mentally competent person against his or her will (para. 32).

Supreme Court of Canada

The majority decision of the Supreme Court of Canada[6] dismissed the appeal by the CFS "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 left to the legislature" (para. 5).

At the Supreme Court of Canada, discussion focused on whether either tort law or the Court's *parens patriae* powers, as currently constructed, would "permit an order detaining a pregnant women against her will in order to protect her unborn child from conduct that may harm the child" (para. 20),[7] or if not, whether the law could "properly be extended by the Court" to allow for such an order (para. 9–10).

Tort law

For the majority, Justice McLachlin wrote:

> The position is clear. Neither the common law nor the civil law of Quebec recognizes the unborn child as a legal person possessing rights. This principle applies generally, whether the case falls under the rubric of family law, succession law or tort. Any right or interest the fetus may have remains inchoate and uncomplete until the birth of the child. (para. 15)

Thus, at the time CFS made its application, "there was no legal person in whose interests the agency could act or in whose interests a court order could be made" (para. 16).

McLachlin was also of the opinion that the Court could not extend the common law to allow a pregnant woman to be sued in tort on behalf of her fetus. Quoting from previous decisions of the Supreme Court of Canada[8] Justice McLachlin took the view that courts are restricted

> to incremental change "based largely on the mechanism of extending an existing principle to new circumstances"; courts will not extend the common law "where the revision is major and its ramifications complex." (para. 18)

In Justice McLachlin's view, allowing an order such as that sought by the CFS would change the law significantly. In order to allow the appeal, the Court would have to

> [o]verturn the rule that rights accrue to a person only at birth ..., [r]ecognize a fetal right to sue the mother carrying the fetus; ... [r]ecognize a cause of action for lifestyle choices that may adversely affect others ... [and] [r]ecognize an injunctive remedy which deprives a defendant of important liberties, including her involuntary confinement. (para. 19)

Noting the "immediate and drastic impact" that such changes could have on women and men, McLachlin concluded that these changes raise "moral choices" and would lead to "complex ramifications" beyond the ability of the Court to assess (para. 20); therefore in her view, to extend the purview of tort law as requested by CFS would go beyond the appropriate role of the court.

The dissent appears to have accepted that tort law as presently formulated would not allow a fetus to sue its mother, but was of the view that the common law should be extended to allow such an action. Justice Major lauded the flexibility of the common law, and its ability to change as needed (para. 61), and he characterized the proposed expansion of tort law to allow fetal suits against a pregnant woman as simply a logical updating of present legal principles. Thus, he described the "born alive rule" in tort law (that is the principle that a child must be born alive before it can sue for prebirth harms) as " a legal anachronism based on rudimentary medical knowledge" (para. 102).

Justice Major concluded that

> where a woman has chosen to carry a fetus to term ... that woman must accept some responsibility for its well-being. In my view that responsibility entails, at least, the requirement that the pregnant woman refrain from the abuse of substances that have, on proof to the civil standard, a reasonable probability of causing serious and irreparable damage to the fetus. (para. 116)

Parens patriae

Justice McLachlin also rejected the argument that a court could use its *parens patriae* jurisdiction, that is, its "power to step into the shoes of the parent and make orders in the best interests of the child" (para. 49), to make an order detaining or imposing treatment on a pregnant woman in an attempt to protect the well-being of the fetus. Surveying a number of cases, Justice McLachlin concluded that "[t]he law in Canada, Britain, and the European community is that courts do not have *parens patriae* jurisdiction over the fetus" (para. 53). Justice McLachlin than determined that extending the *parens patriae* powers of the Court to make orders on behalf of the fetus would constitute a major change to the law:

> ... to sustain the order requested in the case at bar would interfere with the pregnant woman's abil-

Valerie Palmer, "El Nino," oil on linen, 40" x 49.5", 1992.
Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

ity to choose where to live and what medical treatment to undergo. The *parens patriae* jurisdiction has never been used to permit a court to make such decisions for competent women, whether pregnant or not. Such a change would not be an incremental change ... but a generic change of major impact and consequence. It would seriously intrude on the rights of women. If anything is to be done, the legislature is in a much better position to weigh the competing interests and arrive at a solution that is principled and minimally intrusive to pregnant women. (para. 56)

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Justice Major, on the other hand, interpreted the *parens patriae* powers of the Court more broadly, stating

> the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts are available to protect children from injury whenever they properly can is no modern development. (para. 99)

For Justice Major, apparently, it was self-evident that this protection of children includes protection of the fetus. In his view, the *parens patriae* jurisdiction would enable courts to act on behalf of those who cannot help themselves, and "[a] feotus suffering from its mother's abusive behaviour is particularly within this class and deserves protection" (para. 91).

Commentary: previous case law

Although this is the first time that the Supreme Court of Canada has ruled on the issues raised by this case, applications for state intervention in pregnancy or at birth have been decided by a number of lower courts in Canada. While I do not intend to describe each case in detail,[9] it is relevant, I think, to provide a brief overview of what Canadian case law there is in the area, to set the context for the decision in *G.* In one 1987 Ontario case, a judge ordered a psychiatric assessment of a pregnant woman to determine whether she was suffering from a mental disorder that might result in harm to her fetus, and made the fetus a ward of the Children's Aid Society (see *C.A.S. Belleville* v. *T.(L.)*). In an unreported decision referred to in *Proceed with Care: Report of the Royal Commission of New Reproductive Technologies*, a pregnant woman convicted of a soliciting charge was sentenced to a 60-day jail term on the grounds that "... the only way to protect this child is to have this child born in custody...."[10] In a case decided in New Brunswick, where the *Family Services Act* includes "unborn child" in its definition of "child," the court granted a six-month supervisory order over a pregnant woman and her fetus (see *Minister of Health and Community Services* v. *A.D.*).[11] In British Columbia, where the child welfare legislation does not define "child" as including a fetus, the Court of Appeal refused to grant the Superintendent of Family and Services the power to consent to a caesarian section over the objections of the pregnant woman or to make a fetus "subject to the supervision" of a Children's Aid Society (see *Re Baby R*).[12] This case also considered whether such an order could be made under its *parens patriae* powers, and concluded that it could not be. In a case involving the Yukon child welfare legislation, a court held that a provision which allowed orders for support or counseling to be imposed on pregnant women where the fetus was thought to be at risk of fetal alcohol syndrome violated section 7 of the *Charter* on the grounds of vagueness (see *Joe* v. *Director of Family and Children's Services*).

Academic and other writing

The issue of state intervention in pregnancy and birth has also been the subject of academic writing in Canada. I think it accurate to say that the outcome of the *G.* case is in keeping with the preponderance of this writing. True, one author has advocated placing a legal duty of "adequate or reasonable"[13] prenatal care on pregnant women (see Keyserlingk 1982), another has contended that "the mother's insistence on her right to autonomy is indefensible" in the face of fetal rights (see Kluge qtd. in Grant 219), and a third has argued that "invasions of pregnant women's constitutional rights will ... be justified" (Dorczak 134) to protect fetuses from prenatal substance abuse. However, most of the writing on this subject has concluded that present Canadian law does not give the state the right of coercive interference in pregnancy or at birth and has argued against any attempt to create such a right. This approach is reflected in the *Report of the Royal Commission on New Reproductive Technologies*, which recommended strongly against the "use of legislation and court decisions to control a pregnant woman's behaviour in situations where a fetus is thought to be at risk"[14] (949); specifically, the Commission concluded that neither criminal law nor child welfare or other legislation should ever be used "to control a woman's behaviour during pregnancy or birth," (945) and that

civil liability should "never be imposed upon a woman for harm done to her fetus during pregnancy" (964).

Analysis of the *G.* decision

Before discussing specific issues raised by the Supreme Court decision, it is relevant to note more generally how very differently the majority and the dissent characterized the issues at stake. Clearly, Justice McLachlin and Justice Major's conclusions were influenced not only by different perspectives on the appropriate approach to judicial law making, but by very different perspectives on the desirability of forcing detention and treatment on pregnant women "for the good of the fetus." Thus, Justice McLachlin speaks of the "prosaic but all too common story of people struggling to do their best in the face of inadequate facilities and the ravages of addiction" (para. 5), while Justice Major asks whether the state should stand "idly by and watch the birth of a permanently handicapped child who has no future other than as a permanent ward of the state" (para. 63). These very different concerns are reflected throughout the judgments generally, as well as in the specific issues which I am about to highlight.

Woman and fetus or woman versus fetus? One's response to the use of state coercion to control the behaviour of a pregnant woman is probably largely predicated on one's view of the relationship between a pregnant woman and the fetus she carries. Are they ultimately one being, such that protecting the well-being of the fetus is best achieved by protecting the interests of the pregnant woman, or are they two separate entities, potentially locked in a conflict of mutually exclusive rights? In keeping with most feminist writing on this issue, Justice McLachlin recognized the unity of a pregnant woman and her fetus. Not only did Justice McLachlin point out that the law has always treated a pregnant woman and the fetus she carries as a single entity, but she was of the opinion that changing the law to allow an action to be brought against the woman on behalf of the fetus would lead to "the anomaly of one part of a legal and physical entity suing itself" (para. 27). Justice Major does not address this issue explicitly; however, his language throughout is much more in keeping with the paradigm of maternal-fetal conflict. I have argued elsewhere, and do so again, that "the interests of women and the fetuses they carry are rarely opposed" and that

> where women do engage in self-destructive behaviour that will harm the fetus (for instance, substance abuse during pregnancy), it is still not a case of the woman's best interests conflicting with the best interests of the fetus. Instead it is a case of the woman needing help. Providing that help is also the most effective way of protecting the fetus. (Ginn 45)

Intrusive nature of the order sought by the CFS. A consistent theme throughout the literature opposed to the detention and non-consensual treatment of pregnant women is the extraordinary intrusiveness of such coercion, both in physical terms, and in terms of a pregnant woman's legal rights. Certainly, as the Manitoba Court of Appeal recognized in this case, using the legal system to impose treatment on a pregnant woman who is mentally competent to make her own decisions violates well-established principles relating to consent to treatment. At the Supreme Court of Canada, Justice McLachlin recognized that the rights of pregnant women would be seriously compromised if the appeal were allowed. She noted that the order sought by CFS would deprive a woman of "important liberties" (para. 19), that presently, a person can be legally detained against their will only in accordance with the criminal law or under mental health legislation, and that "the principles of tort law have never been used to justify the forcible detention and mandatory treatment of a person" (para. 46). On the other hand, comments by Justice Major minimized the degree of state control to which women could be subjected if the appeal were allowed. For instance, he stated: "When detention is determined to be the only solution that will work in the circumstances, this type of imposition on the mother is fairly modest when balanced against the devastating harm substance abuse will potentially inflict on her child" (para. 132), and he was of the opinion that a pregnant woman's liberty interests "must bend when faced with a situation where devastating harm and a life of suffering can so easily be prevented" (para. 93). Nowhere in his decision does he appear to wrestle with the fact that his approach could, logically, be used to confine a woman for all or most of her pregnancy, thus granting the state far greater coercive power over pregnant woman than it possesses over others.[15]

The potentially expansive nature of a prenatal duty of care. Related to the above argument is the concern that intervention "for the good of the fetus" could come to be seen as justified in an ever-growing range of circumstances. While I do not think that one should automatically move

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to "slippery slope" arguments, I cannot help but be alarmed by the scope of one author's proposed prenatal duty of care (see Keyserlingk 1982, 1983). Unwilling to limit this duty to encompass only the avoidance of positive acts of negligence, Keyserlingk has stated:

> ... we include a far wider range of injuries and dangers within the range of what a right to prenatal care should protect from and allow actions for. On the level of negligent omissions there is for example neglect to provide the unborn with an adequate and proper nutrition or diet, giving rise to serious growth and development problems in the fetus and child. Another negligent ... omission might be that of not having adequate prenatal medical checkups, particularly in the case of high risk pregnancies. And on the level of positive acts of negligence to be avoided, this right would include ... for example excessive maternal smoking. Consumption of alcohol or use of non-medical or non-prescription drugs, all of which are now known to cause or seriously risk grave and sometimes permanent injury to the unborn. Still another potentially negligent act is the careless exposure of the unborn to infectious diseases. (1982, 12)

In the *G.* case, Justice McLachlin recognized the problem of expansiveness. She rejected the argument that the new tort proposed by CFS could be narrowly defined, to ensure that the autonomy rights of pregnant women would be limited as little as possible. As Justice McLachlin pointed out, "No bright lines emerge to distinguish tortious behaviour from non-tortious behaviour once the door is opened to suing a pregnant woman for lifestyle choices adversely affecting the fetus" (para. 39). In another passage, she pointed out that allowing a cause of action based on "lifestyle choices that may adversely affect others" could indeed open the floodgates, and that such actions could go far beyond harmful prenatal behaviour. Justice McLachlin asked:

> Are children to be permitted to sue their parents for second hand smoke inhaled around the family dinner table? Could any cohabitant bring such an action? Are children to be permitted to sue their parents for spanking causing psychological trauma or poor grades due to alcoholism or a parent's undue fondness for the office or the golf course? If we permit lifestyle actions, where do we draw the line? (para. 33)

Addictions should not be viewed as choices. Not only would a prenatal duty of care be difficult to limit in any logical way, but it is based on false premises: that a pregnant woman who does not act in the best interests of her fetus is simply making selfish choices, determined to place her rights or chosen lifestyle above the well-being of the fetus, and that this selfish behaviour could be curbed through imposing tort liability. Obviously an addiction, or the effects of poverty, are not hedonistic choices, easily altered when the threat of a tort action looms.

Although Justice McLachlin uses the language of "lifestyle choice" throughout the decision, she does at one point acknowledge that this is sometimes a misnomer, in that drug or alcohol abuse "may be the product of circumstance and illness rather than of free choice capable of effective deterrent by the legal sanction of tort" (para. 57). I would have liked to see this point emphasized more strongly, but I applaud the majority for resisting the temptation to individualize this problem as simply that of a bad mother who resisted treatment and thus must be coerced into acting responsibly. In contrast, the concept of choice runs strongly through the judgement of Justice Major, and at no point did he address the issue of whether addiction and lack of access to assistance should be labeled as "choices." For instance, he stated that Ms. G. "on becoming pregnant for the fourth time, made the decision not to have an abortion. She chose to remain pregnant, deliver the child, and continue her substance abuse" (para. 65). Justice Major's stance reflects stereotypes about women;[16] allows the state to appear to care for fetuses, by initiating dramatic intervention in a few individual cases; and fails to place responsibility where it belongs—on the state's failure to provide adequate resources for addiction treatment and the alleviation of poverty. If, when Ms. G. contacted St. Norbert herself, there had been the resources to admit her for treatment immediately, it is quite likely that this case would never have arisen.

Difficulties in applying a duty of prenatal care. Even if the concept of "saving" fetuses from their irresponsible mothers were justified in theory, there are a number of other factors to be considered. For instance, presumably a duty of prenatal care would be breached or a court would step into the shoes of a parent only if it could be predicted with accuracy what behaviour would cause "grave and irreparable harm" to the fetus. While acknowledging that harm to a fetus could result from the mother's addiction to solvents, Justice Mclachlin noted that medical science was not yet able to predict with accuracy when a particular child would be born with disabilities resulting from prenatal behaviour of the mother (para. 40). (For instance, Ms. G's fourth child appears to have been born healthy, despite her addiction, and despite presumably dire predictions from CFS.) Justice Major, however, seemed far more willing to accept that the medical profession would be able to predict prenatal harm accurately. Justice McLachlin also noted that if harm did occur, this was most likely to happen in the

early stages of a pregnancy, perhaps even before a woman would know that she was pregnant.

Fetal harm arising from increased state surveillance. Thus far, my arguments against creating a right of state intervention in pregnancy have focused on the impact on pregnant women. Others have noted, and I would agree, that such intervention is also highly unlikely, on average, to enhance fetal well-being. Justice McLachlin warned that imposing a duty of prenatal care might actually have a detrimental affect on fetal health, in that women fearing detention or non-consensual treatment might avoid prenatal care, or choose to have an abortion (para. 44). Justice Major did not respond to that warning, and in fact, he presented the possibility that state intervention might cause a woman to have an abortion as proof that she can still exercise autonomy: "this [state] interference is always subject to the mother's right to end it by deciding to have an abortion" (para. 93).

Disadvantaging the already disadvantaged. I have argued above that using the notion of "the good of the fetus" to allow the state to detain pregnant women or force medical treatment upon them would egregiously diminish women's rights, and would be highly unlikely to improve the lot of fetuses generally. An equally telling argument, I believe, is that detention and forced treatment would probably not fall on all pregnant women equally; instead, the coercive power of the state to intervene would probably be used against those already disadvantaged by society on other grounds. In my view, it was no coincidence that the *G.* case involved a woman who was young, poor, and, above all, Aboriginal.

As noted in the factum of the Women's Legal Education and Action Fund (LEAF), which was granted intervener status before the Supreme Court of Canada:

> The significant feature of the case at bar ... is that not only has a pregnant woman been subjected to an unprecedented, expansive court order to control her behaviour during pregnancy. It is also that an Aboriginal woman has once again been objectified by a state intent on achieving its professed goals at the expense of her health, personal integrity and dignity. (para. 8)
>
> Aboriginal women have been stereotyped as "bad mothers" according to Western social constructions and norms. This has led to their punishment, including the loss of their children to welfare agencies. (para. 11)

American studies indicate that coercive intervention during pregnancy is far more frequent where women are already vulnerable because of race, ethnic origin, or poverty. Such women are disproportionately reported to authorities for drug use during pregnancy,[17] and are more frequently the focus of state intervention during pregnancy and birth:

> American studies ... show that caesarean sections performed pursuant to court order are disproportionately directed to low-income and minority women. One study indicated that eighty-eight per cent of cases in which court-ordered obstetrical procedures were sought involved Black, Hispanic, or Asian women. Forty-four per cent were unmarried, and twenty-four percent did not speak English as their primary language. All the women were treated in a teaching hospital clinic or were receiving public assistance. (Martin and Coleman 966)

Although there have been far fewer reported cases of legal intervention in Canada, the Royal Commission on New Reproductive technologies has pointed out that

> [a]n examination of the cases that have been reported shows that the women most likely to be subjected to judicial intervention are disproportionately poor, Aboriginal, or members of a racial or ethnic minority.[18] (953)

This danger was not lost on Justice McLachlin in the *G.* case; she noted that if the common law were expanded to allow the type of order sought by the CFS, "[m]inority women, illiterate women, and women of limited education will be the most likely to fall afoul of the law and the new duty it imposes ..." (para. 40). Justice Major simply does not address this point. I would contend that this is a crucial issue, and that even if state intervention in pregnancy and birth were otherwise justified (which of course I have argued is not the case), its use could not be sustained where the impact would fall disproportionately on the already vulnerable.

Constitutional issues

Discussion regarding the appropriate role of judges, as opposed to that of the legislature, played a significant role in the majority judgment in the *G.* case. Justice McLachlin held that judges can only make incremental changes to the common law, and that the established principles of tort law and *parens patriae* jurisdiction could not be extended by the court to encompass the type of order sought by the CFS. Constitutional issues were not addressed in either the majority or the dissenting opinions. The Women's Legal Education and Action Fund had argued, as interveners, that imposing treatment on a pregnant woman or detaining her in order to control her behaviour during pregnancy would violate section 7 (security of the person) and section 15 (equality provisions) of the *Canadian Charter of Rights and Freedoms* and, furthermore, that such intervention could

not be justified under section 1 of the *Charter*. McLachlin J. did not comment on these submissions, other than to note that

> [t]he parties did not put the constitutionality of the order in issue; although some intervenors raised constitutional concerns. In view of my conclusion that the common law of tort and *parens patriae* provide no support for the order at issue, the question of the constitutionally of the order and procedures which gave rise to it do not arise. (para. 58)

Before reading the Supreme Court of Canada decision in the *G.* case, I had assumed, as had many others, I think, that *Charter* issues would play a significant role in the judges' reasoning. Therefore, I was at first somewhat disappointed to find that the Court had not gone beyond the issue of whether allowing an intervention order fell within the parameters established generally for judicial development of the common law. I had hoped for an indication that, all other issues of judicial law making aside, the majority at least would see the courts' duty to apply "*Charter* values"[19] as precluding a development of the common law which allowed the state to interfere so significantly with women's rights. On further readings of the case, however, I have become less critical of the Court's decision not to address this issue; given that it was not argued by the parties, any comments would have been *obiter* only, and the important task of denying the order in this case, and informing lower court judges that they cannot use their common law powers to grant such an order in the future, was accomplished through an examination of tort and *parens patriae* law.

My concern now is that legislatures should not decide to "fill the gap" with legislation which permits non-consensual intervention in pregnancy and birth.[20] Understandably, the issue of whether such intervention could be permitted through statute was not addressed in the *G.* case, given that the Court could hardly be expected to make pronouncements of this nature in a vacuum, without specific legislation to review.[21] It is to be hoped, however, that the majority's comments on the significant implications for autonomy, the writings of various authors who have addressed the *Charter* issues in some detail (see Grant; Martin and Coleman), and a realization that interventionist legislation is unlikely to benefit even the fetus, would keep legislatures from introducing such legislation.

Conclusion

The issues raised by the *G.* case are of great significance. Those of us who are concerned with preserving women's autonomy from coercive state action (particularly when the burden of such coercion would fall most frequently on those already disadvantaged by society) and who remain unconvinced that non-consensual state intervention in pregnancy and birth will benefit anyone, even the fetus, can breathe a sigh of relief on reading the majority decision in the *G.* case.

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[1]For instance, *R.* v. *Morgentaler*; *R.* v. *Sullivan*; *Tremblay* v. *Daigle*.

[2]For instance, see Dawson; Ginn; Grant; Hanigsberg; Jackman; Martin and Coleman; Oliver.

[3]An affadavit from a social worker stated that Ms. G. was "a chronic abuser of solvents" that she sometimes resorted to prostitution to finance her addiction."

[4]*Winnipeg Child and Family Services (Northwest Area)* v. *G.(D.F.)*, [1997] (Intervener's factum, Women's Legal Education and Action Fund).

[5]Both sisters gave evidence as to the seriousness of Ms. G's addiction, and apparently supported the application by CFS.

[6]The decision was written by Justice McLachlin for herself, Chief Justice Lamer, and Justices La Forest, L'Heureux-Dube, Gonthier, Cory, and Iacobucci. Justice Major and Justice Sopinka would have allowed the appeal.

[7]Arguments based on the *Mental Health Act* were not raised by the CFS. While the CFS also dropped its request for an order for mandatory treatment, asking instead for an order of detention, Justice McLachlin noted "Without mandatory treatment, the order for detention would lack any foundation. Thus the question of whether a judge may order detention of a pregnant woman at the request of the state encompasses the issue of whether a judge may make an order for mandatory treatment" (para. 10).

[8]*Watkins* v. *Olafson* (760—61) and *R.* v.*Salituro* (668–69).

[9]For further discussion on these cases, see Jackman; Ginn; Royal Commission on New Reproductive Technologies.

[10]*R.* v. *McKenzie* [unreported] qtd. in Royal Commission on New Reproductive Technologies 953; also see reference to this case in Jackman.

[11]The judge noted that this was an "extraordinary remedy" and that the definition of child had not been challenged under the *Charter*.

[12]Note however, that the application was successful at trial ((1988), 53 D.L.R. (4th) 69)), with the B.C.S.C. granting the Superintendent an order of permanent custody and guardianship of the fetus. In two related cases, *Re Children's Aid for District of Kenora and J.L.* and *Re Superintendent of Family and Child Services and McDonald*, in finding infants in need of protection under child welfare legislation, one factor considered by the courts was the mothers' prenatal "abuse" of the fetus through alcohol or drug use.

[13]The qualifier "reasonable or adequate" is added in an second article by Keyserlingk (1983), written in response to criticisms of the scope of his original description of this duty of care.

[14]One member of the Commission, Suzanne Scorcese dissented from this recommendation, arguing that there are situations where such intervention is in the best interests of the fetus, and perhaps even of the pregnant woman.

[15]This obliviousness to the intrusive nature of his order is also apparent in Justice Schulman's decision; thus, he comments "This, of course, can mean some interference with the freedom of the mother, but in my opinion, in appropriate circumstances that interference will be justified," (para. 44).

[16]I will argue later that these stereotypes are particularly likely to be applied to Aboriginal women. I think it is also worth noting how the media dealt with this case. Even though the Supreme Court of Canada accepted that Ms. G., had voluntarily (although unsuccessfully) sought treatment herself, I do not recall this being reported in any of the news coverage that I read and heard on the case. I find it extraordinarily revealing that there was such willingness to accept the initial inaccurate characterization of Ms. G. as a stereotypically recalcitrant mother, resisting all offers of assistance. A more rigourous examination of the facts would have revealed that Ms. G. was indeed willing to accept treatment, but that lack of resources had prevented her from getting the help she sought.

[17]"One 1990 study of pregnant women in Pinellas County, Florida, found that although white women and black women were equally likely to use illegal drugs or alcohol during pregnancy, black women were almost ten times as likely to be reported to the authorities for drug use" (Daniels 127).

[18]The Commission goes on to note: "Whether overt discrimination is at work here or whether the life circumstances of these women are such that their behaviour during pregnancy is more likely to come under scrutiny is difficult to untangle" (953).

[19]See *Hill* v. *Church of Scientology of Toronto.*

[20]As noted above, New Brunswick has had such legislation in place for some years. It is unfortunate that constitutional issues were not raised in the one reported case under this legislation; but I would argue that a statute which allows the granting of a supervisory order over a pregnant women, in order to "protect" her fetus would violate the *Charter.*

[21]On several occasions, Justice McLachlin commented that if such a significant change were to be made in the law, this could only be done by the legislature. She did go on to say "Of course, in the event that the legislature chooses to address this problem, its legislation in substance and procedure would fall to be assessed against the provisions of the *Charter* (para. 58).

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