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The Female Body and the Law: A Feminist Critique of Recent Legal Decisions
in Canada

by

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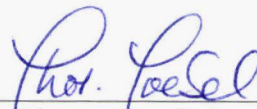
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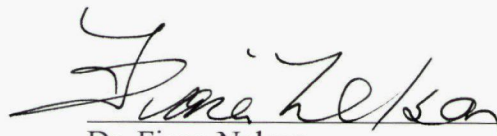
The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "The Female Body and the Law: A Feminist Critique of Recent Legal Decisions in Canada" submitted by Renée Amber Miller in partial fulfillment of the requirements for the degree of Master of Arts.



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Abstract

This thesis explores the legal judgement as literature and the impact of that literature on both the reproductive rights of women and women's equality in Canada. A "close reading" of the contemporary Canadian legal decision of *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* [1999] reveals contradictions in the outcome of the case and the legal rhetoric involved in the case. *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* is an especially potent example of the tensions between women's rights and the rhetoric of the law as it passes through three levels of Canadian judiciary including the Manitoba Court of Queen's Bench, the Manitoba Court of Appeal and finally the Supreme Court of Canada. Each level of the judiciary is considered and the evolution of women's reproductive rights and the effect of those rights on women's equality in Canada are explored. The contradictions in both law and language are poor supports for the established reproductive rights of women and express the disparity of substantive equality rights for women in Canada.

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Introduction

Biology, in itself, is neither oppressive nor liberating; biology, or nature, becomes either a source of subjugation or free creativity for women only because it has meaning within specific social relationships. (Carol Pateman 146)

The biology of the Winnipeg woman anonymously known as DFG is both a source of oppression and subjugation for her in the legal case of *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*. Two of Canada's highest courts eventually liberated DFG from the oppression and subjugation that was imposed on her in the lower level of the judiciary. However, in a case which ultimately upholds the reproductive rights of all Canadian women, DFG's biology becomes once again obscured in the oppression and subjugation of language.

I have been educated as a feminist literary critic and have used this training to investigate the intersection of women's reproductive rights and the law. Legal texts have traditionally fallen outside of the auspices of English Literature. However, these judgements as a source of literature reflect not only the equality rights of women, and women's reproductive rights in Canada, they also reflect the contemporary social context in which they are created. While the judiciary prides itself on impartiality, it is inevitably invested in the dominant culture it is appointed to represent. The resulting tension between legal impartiality and social partiality in the reproductive debate perpetuates the oppression and subordination of Canadian women.

There must, however, be continued hope that an accurate fusion of social and legal representation of women's bodies will encourage substantive equality for women. The social representation of women over the last century has not been static. Similarly, the Canadian judiciary has proven itself to be an effective vehicle of social change. For instance, in 1930 the Judicial Committee of the Privy Counsel heard the case of *Edwards v. Attorney-General of Canada*. This famous case is now commonly referred to as *The "Persons" Case* where five prominent Alberta women – "Henrietta Muir Edwards, Emily F. Murphy, Nellie L. McClung, Louise C. McKinney and Irene Parlby," – asked the Supreme Court of Canada whether "qualified persons" included women for the purposes of Senate appointments (Bickenbach 19). The Judicial Committee of the Privy Counsel asserted that women fell within the meaning of qualified persons and should be allowed to pursue senate appointments.

The judiciary has been a proponent of women's reproductive rights, legalizing the right to contraceptives in the late 1960s and finding Canada's abortion law unconstitutional in the case of *Morgentaler, Smoling et al. v. The Queen* [1988].¹ Following the de-criminalization of abortion, the question of fetal rights became the legal focus in *Tremblay v. Daigle* [1989].² The Supreme Court of Canada ruled against fetal rights in abortion, and continues to assert that fetal rights do not exist in the intersection of women's reproductive rights.

The law, as opposed to parliament, is the most instrumental political forum for the advancement of women's rights in Canada. As a Constitutional supremacy, the Canadian judiciary is the final arbiter of equality rights in Canada.³ While the law has proven to be

an effective vehicle of social change for women, it must also be recognized as a patriarchal institution which is equally capable of denying substantive equality rights to women. The legal literature is complicated not only because it is invested in the patriarchy, the law in Canada arises out of the tradition of the patriarch. Law is not only the master's house, but it is also the master's tool.

In order for the patriarchal tradition of the law to be effective in advancing the reproductive rights of women, the judiciary must be precise and impartial with their rhetoric, clarifying the language and separating the social emotional norms from the reality of the legal issue. This must occur in order to dispel the confusions and myths that continue to confound the reproductive rights of women in Canada. When the judicial system in Canada buttresses women's reproductive rights with weak rhetorical supports, justice cannot be served and women's reproductive rights in Canada become obscured.

The recent legal decision in Canada of *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)* provides an excellent opportunity to witness the intersection of social bias and legal impartiality and the resulting tension in the debate of women's reproductive rights. The Canadian judiciary is premised on conflict and does not have the legal language required to express women's reproductive rights in any other way except in the language of an adversary. Unfortunately, this language of conflict is responsible for clouding women's reproductive rights. When women's reproductive rights become obfuscated, the challenge to those rights become increasingly likely and successful.

All three levels of the judiciary deal with the same concerns in *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)* (hereinafter *DFG*),⁴ albeit to different extents and outcomes. *DFG* was brought to trial in August of 1996 at the Manitoba Court of Queen's Bench; she was addicted to solvents and pregnant with her fourth child. The Winnipeg Child and Family Services sought an application for an order committing her to the custody of the agency under the *Mental Health Act*, R.S.M. 1987, c.M110. The trial judge found *DFG* to be mentally incompetent pursuant to the act, regardless of two psychiatric doctors' opinions otherwise. The trial judge made arrangements for *DFG*'s custody until the point of the delivery of the child. Justice Schulman in his verdict states, "I was told that whoever loses these motions will appeal, and it appears that counsel for both sides intend to keep this litigation going at least until Ms. G's due date in December 1996" (*Dominion Law Reports* 251). This statement by the lower court judge draws attention to the fact that this is was contentious issue which would be pursued to the highest levels of the judiciary, and indeed it was.

Three weeks later the case was appealed to the Manitoba Court of Appeal where the order of the trial judge was set aside and the application of the agency dismissed. The Court of Appeal found that the motions judge had erred in superseding the opinion of the examining doctors. The Court of Appeal ruling was easily won on the narrow error of law that the trial judge had found *DFG* mentally incompetent, contrary to the findings of the medical community. While the trial judge sidestepped the issue of fetal rights and instead focused on mental incompetence, the Court of Appeal did not fail to take up fetal rights issues in their judgement. The Court of Appeal held that fetal rights are not

recognized under Canadian law and that the trial judge had overstepped the Court's protective jurisdiction of *parens patriae*.⁵ The case was appealed to the Supreme Court of Canada in 1997 where the Supreme Court justices concurred with the Appeal justices.

The Supreme Court of Canada heard this case after the birth of DFG's son in December of 1996. Nine Justices heard this case and a majority favoured the rights of women over any potential rights of the fetus. The Court maintained, as did the Court of Appeal, that deference must be made to the legislature on the proposed future of fetal rights. Both courts believed that the elected body of parliament was a more suitable platform to pass legislation on any potentially recognized rights of the fetus. To date, no such legislation has been implemented.

The Supreme Court of Canada decision enjoyed a 7:2 majority, which provides me with the opportunity to research the minority decision of the dissenters as well as the majority decision written by Justice McLachlin. The two dissenting Justices at the Supreme Court of Canada are Justice Major and Justice Sopinka; Justice Major writes on behalf of the dissenters. The dissenting opinion is important because, although it has no legal weight in the case at hand, it may be considered by other courts at some point in the future as legally sound.

The case of *DFG* provides an especially potent example of the reproductive rights of women, the shortcomings of legal rhetoric, and their combined impact on women's equality in Canada. DFG was a solvent addicted pregnant woman who stood trial for mental incompetence where the remedy for her incompetence was involuntary detainment. This case passes through three levels of Canadian judiciary, from the

Manitoba Court of Queen's Bench, to the Manitoba Court of Appeal and finally to the Supreme Court of Canada.

While the Supreme Court of Canada asserts the autonomy and integrity of the female body, the rhetoric of the three levels of court compromises women's reproductive rights. The courts are inevitably invested in the patriarchal rhetoric of the Canadian society they are appointed to serve. This society dictates the representations of women's bodies to the courts, the courts then deliberate on this representation and render their verdicts. These verdicts, while adapting to the changes of contemporary Canadian society, do little to redress the underlying patriarchal ideologies of the law and perpetuate the inequality of Canadian women.

To this end, the first chapter of this thesis establishes the conflation and resulting tension between "fetus" and "unborn child" and between "pregnant woman" and "mother". The conflation and opposition of these terms by all three levels of the judiciary are the foundation for interpreting the legal principles of the second chapter, and for understanding the impact of these oppositions on the reproductive rights of women. Resorting to the language of the "unborn child" in opposition to the "fetus" functions at the level of the antiabortionist debate. Fetal rights are furthered not only through separation from the pregnant woman but also through the recognized personhood rights of the "child". While the judiciary ultimately upholds the reproductive rights of women, they do so by resorting to the strategies of the antiabortionist, which necessarily complicates women's reproductive rights and women's legal right to abortion in Canada.

Furthermore, the conflation of the terms “pregnant woman” and “mother” makes it difficult for DFG to establish her human reproduction rights. The law of Canada does not recognize the legal principle of reproductive competence. Any legislation which has been proposed on the basis of eugenic principles has failed under human reproduction rights. However, the term “mother” acts to establish the image of the competent reproducer and by contrast denies DFG participation within that social ideology. An understanding of the impact of the term “mother” would be incomplete without a further understanding of the race theory which has an impact on the reproductive rights of DFG prior to this case appearing in court.

The second chapter addresses the legal principles that are presented in *DFG*. In all three levels of the judiciary mental incompetence, *parens patriae* jurisdiction and the remedy of detainment are deliberated. The subtext of mental incompetence for the judiciary is reproductive competence and is informed by the judiciary’s use of the socially partial term “mother”. Reproductive competence defines who should reproduce and defines the punishment for those deemed incompetent to reproduce. The protective jurisdiction of the court known as *parens patriae* jurisdiction is also deliberated to different ends by the three levels of court. *Parens patriae* is a traditional convention of the patriarchy where the King is appointed as “parent of the country” in order to protect those vulnerable persons who can not protect themselves. The implication of this protection in *DFG* is the protection of the fetus and the advancement of fetal rights in Canada. This protective jurisdiction is originally enacted by the lower court under the guise of protecting DFG from herself, but is ultimately recognized as the protection of the

fetus which is contrary to the legal precedent in Canada. The protection of the fetus is once again premised, and in part established, in *parens patriae* jurisdiction through the strategies of antiabortionists and fetal imagery.

Finally, the remedy proposed for both mental incompetence and *parens patriae* jurisdiction as it applies to addicted pregnant women is detainment. The remedy of detainment has traditional roots in the private sphere, and has a particularly significant history in the case of aboriginal women. The remedy itself is punitive, punishing women for reproducing and fails to recognize the larger socially systemic problems facing poor, aboriginal women who are both addicted to solvents and pregnant. DFG is unlawfully detained for two days, and is not provided with any legal remedies to redress that incursion on her body. The remedy of detainment continues to thwart women's reproductive rights because it is left to stand as a reasonable punitive measure in the event that fetal rights are established at some point in Canada's future.

My concern in seeing this project through is to contextualize the social impact of legal rhetoric on women's equality rights in Canada. A combination of accurate social representation and legal representation is needed in order to move women past subordination into self-determination. Unfortunately, the intersection of social and legal representation of women's bodies, which has the capacity to profoundly affect the status of women, has instead generated confusion in recent legal decisions in Canada. It is my intention that this thesis will contribute to the scholarship supporting the rights of women in Canada and may eventually make some small contribution to the building of women's equality in Canada.

CHAPTER ONE

Legal Impartiality v. Social Partiality

This chapter describes the tension between socially-informed rhetoric and legally impartial rhetoric. Both terms “unborn child” and “mother” carry with them emotive weight and social idealism, whereas the terms “fetus” and “pregnant woman” are less partial and not socially specific. Impartial terminology in the law is a more objective way to convey legal issues, and terminology devoid of social influence produces less confusion for women’s reproductive rights. These oppositions become the foundations of the legal principles in Chapter Two.

The Fetus v. The Unborn Child

The judiciary in *DFG* attempts to impose a distinction between the term “fetus” and the term “unborn child”. A “fetus” is not recognized as a person and has no legal rights in Canada as a result of Canada’s abortion laws.⁶ A “fetus” cannot be protected against abortion and by extension cannot be protected against the will of the woman supporting it. The problem in distinction occurs where a pregnant woman, such as *DFG*, is not willing to have an abortion and has the intention of carrying the fetus to term, at which point the “fetus” becomes an “unborn child” for the purposes of this legal debate. The Court of Queen’s Bench attempts to recognize that legal rights of personhood should accrue to the “unborn child”. As a result, the “unborn child” is given the legal right to protection which supercedes the pregnant woman’s right to freedom and autonomy.

Personhood rights could furthermore permit the fetus to sue for damages incurred in the womb.

The tension between “fetus” and “unborn child” is not new in legal rhetoric. Previously in *Tremblay v. Daigle* the court used these two terms interchangeably, presumably to confuse women’s reproductive rights and to complicate the legalization of abortion in Canada. The distinction between “fetus” and “unborn child” for the purposes of *DFG* is dependent on the intention of the pregnant woman. When a woman commits herself to the full course of pregnancy having decided to carry the “fetus” to term, the “fetus” becomes an “unborn child” and the judiciary supposedly has an interest in the health and protection of that “unborn child”.

The Supreme Court of Canada eventually reiterated that the fetus is not a person and has no rights under Canadian law, avoiding the inevitable argument of women’s stereotypical inability to make up their minds. The intention of the woman on a continuum from pregnancy to motherhood inevitably leads to the concern of when and for how long women have the moral agency to define reproduction in their own terms. Once a woman has decided to carry a fetus to term, does she automatically divest herself of the control of that pregnancy? Furthermore, are pregnant women to be prevented from the necessary contemplation involved in determining the impact of pregnancy on their own lives?

The term “fetus” does not exist within a void of cultural representation. In the absence of the term “unborn child”, the fetus is already a baby in the antiabortionist spectacle. Antiabortionists, with the advent of fetal monitors and ultrasounds, have

rendered the image of the fetus as independent from the body of the woman. More specifically, the fetus is the image of the mini-space hero, which, unfortunately, “has not supplanted the one of the fetus as a tiny, helpless, suffering creature but rather merged with it (in a way that uncomfortably reminds one of another famous immortal baby)” (Petchesky 271). The term “fetus” on its own has substantial impact on the reproductive debate, which will be discussed at length in the second chapter. In the absence of the term “unborn child,” the history of the “fetus” is equally responsible for harming the reproductive rights of women. However, in contrast with the term “unborn child,” the term “fetus” operates in a less partial manner and is a more appropriate term for the judiciary to use.

Invariably, when we speak colloquially of a woman who is pregnant we say, “she is going to have a baby”. You will notice that I used “child” in two places on page 9 when the more accurate and impartial term would have been to use “fetus”. Had I substituted “fetus” for “child” the reading would have seemed fractured, and my agenda would have become immediately recognizable. Instead, I used the same emotive and socially-informed term “child” that the judiciary uses in *DFG* to the likely end that it passed completely unnoticed by my reader. Therein lies the problem; we are conditioned to accept the socially partial term of “child” when the term “fetus” is not only more relevant, but is also more accurately expressive of the reality of the legal issue.

Once the “fetus” is born alive and viable, the law of Canada recognizes personhood rights of newborns, babies, and infants. The terms “newborn”, “baby”, and “infant” may seem redundant. However, they are the socially subjective developmental

stages of young life. This young life is commonly expressed by the universal term “child”. When speaking or writing formally of pregnant women, it would be linguistically correct to say “she is pregnant with a fetus”. Socially, however, this language is contentious. The eventuality of a pregnancy is not going to yield a fetus, but rather a baby. Women do not prepare to reproduce fetuses but rather children. It is socially appropriate for women to prepare a “baby’s room” in anticipation of the arrival of their progeny. However, this anticipation is quite inappropriate for the law of Canada to express in deliberating the reproductive rights of women. For the judiciary, the anticipation of a born alive and viable child is purely hypothetical and contrary to any true sense of justice. The law does not consider the hypothetical, but rather deliberates on concrete facts.

As the case of *DFG* proceeds through the Court of Queen’s Bench, the Court of Appeal and finally the Supreme Court of Canada, each level of the judiciary intensifies the tension between the term “fetus” and “unborn child”. The original distinction between the two terms based on the pregnant woman’s intent begins to lose its sincerity and the two terms become fused and interchangeable. The judicial system in Canada should be capable of distinguishing between popular social rhetoric and legal rhetoric. However, in failing to recognize the impact of social norms on legal issues the law in Canada has inadvertently legalized the use of the term “unborn child”. The legalization of this term is detrimental to both the judiciary and the reproductive rights of women. In the first instance, the judiciary compromises its own legal precedent,⁷ that a fetus is not a person, by using the emotive term “unborn child”. Instead of effectively reiterating that a

fetus has no rights, the court substitutes the term “unborn child,” confusing non-existent fetal rights with the rights of born alive children. The legalization of the term “unborn child” is equally detrimental to women as it unnecessarily complicates their reproductive rights by perpetuating social beliefs in reproduction.

Historically, the term “unborn child” was used in reference to the mystery of what goes on inside a woman’s body. A baby or an infant was recognizable once it was born (or stillborn), so it may have seemed logical to refer to a pregnant woman as “with child”, or to refer to the potential life which kicks and moves inside the woman’s body as the “unborn child”. With the advent of fetal monitors and ultrasounds, the term “unborn child” becomes a quaint colloquialism. Contemporary Canadians have medical definitions which clarify the process of reproduction from “conceptus” to “embryo” and finally “fetus”; these stages of development are commonly referred to under the umbrella term “fetus” (Sherwin 271). Given society’s enhanced understanding of reproduction, the use of the term “unborn child” in a contemporary context is not benign.

Not only does the term “unborn child” express the tragedy of a child dead before its time, “unborn child” also suggests an inevitability of birth, together with an inevitability of separation from the body of the woman. The use of the word “child” when referring to the fetus constructs a sense of age, maturity, and independence from the body of the pregnant woman. Children do not spring forth from the loins of their mothers replete with age; time is required to move past the realm of baby into child. Nor do babies exhibit the same amount of independence which children, by right of having reached childhood, are capable of expressing.

A child is in part defined in terms of separation from the mother. The dependency exhibited by the newborn baby begins to shift during childhood. This separation of the child from the mother in the case of *DFG* is being exploited in reference to the fetus. The language of the “unborn child” predicts a separation from the mother, constructing a paradigm of separation which is purely hypothetical. This is especially true in the two lower courts, the Court of Queen’s Bench and the Manitoba Court of Appeal, as *DFG*’s son had not yet been born. The term “unborn child” takes on a different dimension in the Supreme Court of Canada. On the one hand, the term continues to complicate and confuse legal precedent. On the other hand, *DFG*’s son was born prior to the Supreme Court trial and it would seem reasonable to speak of him as an “unborn child” in the two cases leading up to the Supreme Court ruling.

“Unborn” in and of itself means “not born” and remains harmless and redundant when used in conjunction with “fetus”. However, in *DFG*, “unborn” is always used in conjunction with “child”, suggesting the inevitability of the birth of a live child.

“Unborn” is the realm of the fetus, “child” is the realm of the legal person. “Fetus” is better able to convey the true dependency of any potential or hypothetical child, and yet both Canadian society and the judicial system seem loathe to adopt this more accurate term. To speak of potential life in the medicalized and legalized sterile terms of the “fetus” seems to rob the potential for life from the developing embryo.

Antiabortionists would concur with this point; the term “fetus” is a medicalized and dehumanized version of a baby. Nevertheless, a crucial distinction must be made in law. At every level of the judiciary in the case of *DFG*, the court resorts to the language

of personhood by assigning the fetus the hypothetical role of child. The courts consistently use the term “unborn child” and interchange this term with “fetus,” failing to recognize the perilous connections being established in associating one with the other. Not only does the judiciary conflate the terms “fetus” and “unborn child”, the judiciary risks conferring reserved personhood rights on entities that are not recognized as legal agents.

The legalized use of the term “unborn child” is clear from the headings of each of the individual levels of court. These headings are used to summarize legal principles and to make the task of researching relevant case law simpler. The term “unborn child” also appears in the summary law of each of the individual cases. The summaries act in much the same way as the headings; legal researchers would not have to read the bulk of the individual judgements to come across isolated instances of this socially constructed rhetoric.

Justice Schulman in the Court of Queen’s Bench approaches the issue of fetal rights indirectly. By committing DFG to detention for her supposed mental incompetence, Justice Schulman achieves indirectly what he is incapable of doing directly: privileging the rights of the fetus over the rights of the pregnant woman. Although Justice Schulman’s judgement is largely concerned with establishing DFG’s mental incompetence, the term “unborn child” and the conflation of children with fetuses is still apparent.

DFG is five months pregnant at the time of the Court of Queen’s Bench trial. The “unborn child” in question is technically a fetus; however the trial judge continually

refers to “child” as opposed to “fetus”. Justice Schulman refers to “fetus” only once in his 15-page judgement, stating “it is self-evident that if the fetus is damaged, the child will be damaged” (*Dominion Law Reports [DLR]* 242). Here he makes the distinction between fetus and child, only to confirm their connection: the “fetus” is the “child”, the “child” is the “fetus”. In every other instance in this case where he should refer to “fetus”, Justice Schulman instead uses “unborn child” (242), or the related terms of “children, when born” (242), “child to be born” (253), or “child prior to birth” (253). The lower court here confuses and conflates the rights of the child with the absence of fetal rights. Justice Schulman realizes that the Supreme Court of Canada has ruled against fetal rights where those rights conflict with the rights of the pregnant woman. In effect, Justice Schulman uses the oppositional nature of the “unborn child” to his favour in establishing fetal protections in this case. By using “child”, instead of the more accurate term “fetus”, he falsely assigns rights and protections to an entity which has neither rights nor protections under Canadian law.

The Court of Appeal heard the case of *DFG* shortly after Justice Schulman’s ruling at the Court of Queen’s Bench. The Appeal Court overturned the judgement of the lower court, recognizing that the lower court judge was attempting to advance fetal rights under the false accusations of the pregnant woman’s mental incompetence. The Court of Appeal upholds the legal precedent in Canada that a fetus is not a person and hence has no rights at law. However, while upholding the former ruling of the Supreme Court of Canada, the Court of Appeal resorts to the same imprecise socially-informed rhetoric of the lower court.

The term “fetus” is more frequently used in the Court of Appeal ruling than was evident in the Court of Queen’s Bench decision. However, the use of the terms “unborn child” (257), “future child” (255) and “child *in utero*” (258) throughout the legal decision of the Court of Appeal stand in direct opposition to “fetus”. Justice Twaddle for the Appellate court ruling states:

It must be understood, of course, that the issue of protecting a child *in utero* only arises where the mother has chosen to carry the child to term. Abortion is not a crime in this country, whether some like that fact or not, and it is a pregnant woman’s choice whether or not to abort a foetus. (258)

A “child in utero” is understood to be a fetus, and yet the term “child in utero” confers on that fetus rights which do not belong to it. The Court of Appeal is precariously validating the rights of pregnant women while complicating the distinction between fetus and child. The Court of Appeal is complicit in using the term “unborn child”, and all of its derivations, while attempting to uphold women’s reproductive rights. These types of weak rhetorical supports which cloud the distinction between women’s reproductive rights and the rights of children cause undue stress on the reproduction rights which women currently enjoy in Canadian society.

The Supreme Court of Canada does not deviate from the lower court practices of joining popular social rhetoric with legal rhetoric. Throughout the judgements of both the majority court, represented by Justice McLachlin, and the minority court, represented by the dissenting Justice Major, the conflation of the term “unborn child” and the term “fetus” are apparent. Understandably, the dissenters, together with the motions judge in

the Court of Queen's Bench, can use the term "unborn child" to their advantage in establishing fetal rights. To not take advantage of this term, complete with all of its social meaning, would lessen the impact of the verdict these Justices are attempting to render; fetuses should have the same recognized personhood rights afforded to born alive children. Where this socially-informed term of "unborn child" should not be witnessed is in the deliberations of the majority court, who with their judgement are upholding and contributing to the rights of reproduction for women.

Justice McLachlin is presented with the opportunity to distinguish between social and legal rhetoric in her majority judgement. However, even at the final and ultimate level of the Supreme Court of Canada, Justice McLachlin resorts to the same misguided term of "unborn child", cementing the legalization of this term in the highest level of the Canadian judiciary. Justice McLachlin resorts to the socially partial term "unborn child," stating "If a pregnant woman is killed as a consequence of negligence on the highway, may a family sue not only for her death, but for that of the unborn child?" (*Supreme Court Reports [SCR]* para. 24). In substituting "unborn child" for "fetus", the rhetoric of the law is already constructing personhood rights. Children, whether in conjunction with "born" or "unborn" come under the umbrella of the persons for whom the law recognizes as having legal rights. The emotive content of the term "child" stands in direct contrast to the less emotive term "fetus". Ironically, Justice McLachlin does not recognize the socially partial rhetoric in which she is engaging and states:

the task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative

task... Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature. (para. 12)

The normative task which Justice McLachlin refers to is the continued belief of the Supreme Court of Canada that the fetus is not a person and therefore has no legal rights. However, the normative standard she expresses here, which should not involve social, political, moral or economic choices, becomes precisely that with the use of the term “unborn child”. A similar problem in discourse meets the conflation of the terms “mother” and “pregnant woman”.

Pregnant Woman v. Mother

Thou shalt obey doctor’s orders...

Thou shalt not partake of alcohol or drugs potentially harmful to the fetus...

Thou shalt do whatever the state deems necessary during pregnancy

to produce a healthy baby... Thou shalt be a Good Mother.

Lisa Ikemoto

Just as the legal system in Canada conflates the terms “unborn child” and “fetus”, so the law also conflates the socially biased term “mother” with the less partial term “pregnant woman”. The term “mother” has a specific emotive quality and a social history, similar to the “unborn child”. The effect of using the term “mother” to describe “pregnant women” entrenches patriarchal social norms as legal duties in Canadian

society. The use of the term “mother” is further complicated in *DFG* by racism, without which it is likely this case would have never come to court.

The above quote by Lisa Ikemoto recalls biblical commandments handed down from “heaven” to Moses. The Christian religion is infamously responsible for shaping the Western world’s conception of motherhood through the ideal mother herself – the Virgin Mary. The cult of patriarchy, which is legitimized in part by the religion of Christianity, invests the responsibility of motherhood with a young virgin girl. Women’s participation in reproduction is immediately vilified by sexual intercourse, and women’s “sinful nature” becomes entrenched through procreation. The only redemption for the woman who has partaken of sexual intercourse is to suffer the enormous pain of childbirth and to emulate the martyrdom of the Virgin Mother, the woman who clings to the base of her son’s cross and is ultimately cleansed of her sinful nature by the purification of his free-flowing blood.

The competing, yet ultimately symbiotic, tradition of motherhood is also informed by “science”. Women, with the unique ability to reproduce, are resigned to the biological destiny of motherhood. Women’s ability to perpetuate the human race and their ability to breastfeed their young are assigned the characteristics of nurturer, primary care-giver and are believed to be responsible for the transmission of social values. Lisa Ikemoto states:

Motherhood, as an institution, had the charge of transmitting social rules. Good mothers were responsible for conceiving, giving birth to, and raising children who would grow up to contribute to the social order and not detract from it.

Motherhood as a calling was fulfilled by individuals who were noble, benign, and self-sacrificing. (480-481)

The scientific explanation for women's biological destiny is invested with Christian ideals of motherhood. The pregnant woman, if not wealthy, is noble in her poverty, and is ultimately self sacrificing to her "unborn child". Furthermore, the most successful women in the emulation of the Virgin Mary produce sons: DFG gave birth to a healthy boy.

Unfortunately, the lack of marital status and the gender of their progeny are where the Virgin Mary and DFG's similarities end for the purposes of both religion and science. DFG was not noble in her pregnant condition; she was a poor addict and occasional prostitute. Nor was DFG benevolently self sacrificing; she refused to be involuntarily detained in a questionably isolated medical ward until the birth of her son. While the antiquated tradition of women's "scientific" biological destiny and the admittedly mythological religious tradition of the Virgin Mary may seem ridiculous in contemporary Canadian society, these combined traditions are fundamentally relevant in addressing the term "mother" as used by the judiciary.

In order for women to have true reproductive freedom, they must be free to define reproduction and "motherhood" in their own terms. In fact, it would appear that the Canadian judiciary is attempting to recognize this right. As discussed in the previous section, the distinction between the terms "fetus" and "unborn child" is dependent on the woman's intention. Logically, assigning personhood rights becomes the responsibility of the woman. A pregnant woman does not assign personhood rights to a fetus, whereas a

mother does assign personhood rights to an unborn child. The paradigm constructed by this argument is that all pregnant women are selfish abortionists, and all mothers have the intentions of the Virgin Mary. This imposed homogeneity between “pregnant women” and “mothers” fails to account for the fact that not all pregnant women abort, and not all women who continue a pregnancy to term intend to be mothers.

Zillah Eisenstein draws attention to the dilemma of equating pregnant women with mothers. She believes that:

woman is recognized as both female – as a physical creature whose sex can be biologically categorized – *and* gendered through the culture – as an individual who can be socially categorized. Instead, gender is regarded as biologically determined: the female *is* the woman; the pregnant body *is* the mother. (2)

Fundamentally, there must be a distinction between sex and gender, and between pregnant women and mothers. The social standard which applies to mothers does not belong in the judiciary when contemplating the reproductive rights of pregnant women.

The judiciary is concerned with the rhetorical distinction between “fetus” and “unborn child” based on the woman’s intention not to become a “mother” but rather to see the pregnancy to term. The Court, however, relies on the term “mother” to define the woman who continues with the pregnancy. DFG is referred to as both the “pregnant woman” and the “mother” at all three levels of the judiciary and yet not once in the space of the three judgements are DFG’s intentions to be a mother ever made clear. The reader of these judgements could easily assume that DFG neither cares for herself nor her pregnant condition. The Court of Queen’s Bench assumes that her unwillingness to have

an abortion means that DFG has the intention of both carrying the fetus to term and conferred personhood rights on her “unborn child”. These two events supposedly earn DFG the right to be called a “mother” by the Canadian judiciary. A fundamental principle of legal justice is that silence is not acquiescence. In the absence of an expressed declaration of intent, “motherhood” cannot be arbitrarily assigned; the court cannot assume from DFG’s silence that she has agreed to the role of “motherhood”.

Prior to the legalization of abortion in Canada the characteristics of fetal personhood were defined as separate from the woman’s intention, in essence outside of the woman’s body. Women did not have the legal authority to pursue an abortion, except for very limited medical health reasons. Once abortion was legalized in Canada, the definition of fetal personhood was shifted back inside women’s bodies based on the woman’s intent. In the case at hand, it is the pregnant woman who determines the *absence* of fetal rights and it is the mother who determines the *presence* of fetal rights. Unfortunately, the social bias which permeated pre-abortion legalization is now attempting to infuse post-abortion legalization with the same personhood argument; at some point in the division between pregnant woman and mother, a child is born.

The hypothetical elements of fetal rights are life and personhood. Personhood is socially and arbitrarily assigned. Prior to 1928, women were not considered persons, and after 1989, fetuses were not considered persons. Personhood is changeable and irrelevant, so it seems logical to refer back to life as the ultimate referent of legal rights. Whether or not the fetus is living has always seemed to me to be a curious argument. Everything inside a living woman’s body is alive with the exception perhaps of some

forms of food and gall stones. It is, therefore, irrelevant to speak of a fetus in terms of either a person or a life form – surely it is both.

Susan Sherwin believes that “feminists have always felt pushed to reject claims of fetal value, in order to protect women’s needs” (266). She further asserts that fetuses are significant but that their existence is “relational rather than absolute” (266). A woman’s dependence on her heart is absolute; she cannot exist without it. However, a woman’s dependence on her fetus is relational; her existence is not dependent on the fetus. The determination of a fetus’ life and death is orchestrated by the woman’s body. The fetus is either accepted by the body and ultimately rejected into existence, or the fetus is immediately rejected by the woman’s body and denied existence through either mysterious biological processes or abortion. Determining fetal value on an arbitrarily assigned continuum of social philosophy or woman’s intent is nonsense. There is only one body, the body of the woman which contains many forms of bodies including the muscular body, the skeletal body and even potentially the fetal body, all developing, maturing and dying to some indescribable rhythm.

The ideology of motherhood is not only important in terms of Western society’s history, but it is also relevant in terms of contemporary social biases which influence motherhood. Contemporary “mothers” are those women who come pre-programmed with all of the necessary information of their new vocation. Contemporary Canadian women are conditioned from birth through play and advertisements on the qualities and benefits of motherhood. However, there is a deep contradiction between the social representations of “mothers” and what “mothers” actually experience.

Naomi Wolf's *Misconceptions* addresses the realities of new mothers who are quoted as saying, "I have never felt so alone in my life," "I feel that there is an intruder in the house who is never going to go away," "Two weeks on, I wondered when I would bond with her.... No one prepared me for the fact that I would be on a forced march of exhaustion for months" (2-3). Mothers are a group of women who both anticipate the birth of their child and dread the change that will inevitably occur in their lives. Mothers are both saints and sinners. They are disproportionately responsible for the care of the new baby, and ultimately feel let down by their partners. New mothers often feel isolated from adult conversation, and express anxiety over their new role as parent and primary care-giver.

Postpartum depression is used as leverage against new mothers. Those mothers who suffer from postpartum depression are the alter image of the Virgin Mary, whereas those who do not suffer from postpartum depression (or who hide or deny postpartum depression's effects) are "noble", "benign" and "self-sacrificing". The fact is that postpartum depression is a natural, as opposed to abnormal, response to reproduction, and would have been normal even for the Virgin Mary. Wolf believes that:

The low status we assign to mothering; the high value our society places on a girlish figure; the absence of ritual that would allow the new mother to mourn her lost [prepartum] self; the trauma of cesarean section or high-intervention birth; the lack of adequate follow-up care, and the overall censorious whitewash of the whole experience. The surprise should not be how many new mothers are

depressed postpartum in our society, but rather how many, in spite of all of this, do well. (223)

Wolf's account of the social myths surrounding motherhood illuminates the contemporary meaning of the term "mother". The religious tradition of the Virgin mother, the scientific tradition of women's biological destiny, and the very real concern of contemporary motherhood all collide in the Canadian judiciary's use of the term "mother" in *DFG*.

The difference in meaning between the terms "mother" and "pregnant woman" and the impact of social norms on reproductive rights for women should be recognized by the judiciary. There is evidence that the judiciary is sensitive to socially-informed rhetoric and distinguishes this rhetoric from the impartial rhetoric of the law. The Justices at each level of the judiciary largely associate the term "mother" with the equally socially-informed term of "unborn child". Likewise, the court largely associates the less emotive and legally impartial term of "pregnant woman" with the equally less emotive and legally impartial term of "fetus". Though the judiciary understands that there is a distinction, the consequences of these distinctions are not deliberated in the judiciary and are taken for granted as relevant to the legal debate.

Justice Schulman at the Court of Queen's Bench avoids the use of the term "fetus" in his ruling, thereby avoiding the use of the term "pregnant woman". At no point in the ruling does he associate "pregnant woman" with "fetus". In fact, the term "pregnant woman" is not used in his judgement, absolving the Justice of the need to debate the contentious area of the hypothetical rights of the fetus. Justice Schulman

refuses to acknowledge the debate of fetal rights, which further absolves him of the need to refer to pregnant women in general, and DFG's pregnancy in particular. In the limited instances where Justice Schulman does discuss potential fetal rights, he follows the formula of associating "unborn child" and "mother," stating, "Dr. Chudley...deposed to the serious and harmful effects which occur to an unborn child when a mother chronically...sniffs glue while pregnant" (*DLR* 242). It is not until *DFG* arrives at the Manitoba Court of Appeal that the issue of fetal rights becomes integral.

The tension between the terms "pregnant woman" and "mother" are evident in the case headings of the Court of Appeal. Just as the term "unborn child" becomes legalized in these headings, so the social term "mother" becomes a legal duty. The case headings of the Appeal Court read as follows:

Torts – Negligence – Duty of care – Scope – *Pregnant Woman* addicted to solvents – Child welfare agency seeking order requiring *mother* to remain in treatment program during pregnancy – No duty to *unborn child* – *Unborn child* having no cause for action against *mother* – No basis for order. (emphasis mine, 254)

The missing term "fetus" may suggest the Appeal Court's reluctance to deliberate the potential rights of the fetus. However, once again, when the socially emotive term of "mother" is used, it is used in conjunction with "unborn child". In the above instance, "pregnant woman" is not associated with "fetus". However, as seen in an earlier example from this same court, "it is a pregnant woman's choice whether or not to abort a foetus. The question of child protection only arises where the mother decides to carry the child to

term” (258). The court is here expressing the quandary of distinction; the definition of the “unborn child” turns again on the pregnant woman’s intention. The same tendency exists in this court to associate similar social terms.

The appeal of *DFG* from the Queen’s Bench to the Manitoba Court of Appeal is originally made on the narrow error of the trial judge’s finding of mental incompetence, which was contrary to that of the psychiatric community. However, the distinction between “fetus” and “unborn child” is ultimately factored into the appeal process. The Manitoba Court of Appeal found that there was no conflict of distinction between “fetus” and “unborn child,” recognizing that neither term ascribes personhood rights in Canada, and neither “mothers” nor “pregnant women” can confer or deny these personhood rights. While this court upholds women’s reproductive rights, their continued conflation of not only “fetus” and “unborn child” but of “pregnant woman” and “mother” confuse this simple contention which is easily communicated through precise language. The Court of Appeal further complicates their judgement by using “mother” and “fetus” in conjunction with each other, associating all pregnant women with mothers and all mothers with the image of the Virgin Mary.

Justice Twaddle in his Court of Appeal ruling cites that “since an unborn child has, *ex hypothesi*, no existence independent of its mother, the only purpose of extending the jurisdiction to include a foetus is to enable the mother’s actions to be controlled” (qtd. in, 259). The “unborn child” is first used in conjunction with “mother”, and finally conflated with the term “foetus”. Regardless of the association of either “unborn child” or “fetus”, the term “mother” is an emotive, socially charged term which should not be

used in a court of law. The social duties which are dictated by a patriarchal society in regards to mothers are founded on inequality and subordination. DFG does not fit the judiciary's mold of a "good mother" and conflating her pregnancy with the intentions of motherhood while conflating the terms "fetus" and "unborn child" all collide to confuse the reproductive rights of women in Canada.

Dissatisfied with the judgement of the Court of Appeal, Child and Family Services appeals *DFG* to the federal court. While Justice McLachlin of the Supreme Court of Canada also conflates the terms "mother" and "pregnant woman", this Justice is the first to associate the terms "pregnant woman" and "fetus" in a more consistent manner. Even though Justice McLachlin conflates social rhetoric and legal rhetoric, her ruling proves that her more consistent use of the terms "pregnant woman" and "fetus" in association with each other can be both accurate and effective. The language of the "pregnant woman" and the "fetus" divests the judiciary of social bias, which not only contributes to an impartial ruling, but also effectively identifies the real issues presented to the court.

A full understanding of a feminist critique of the rhetoric of "pregnant women" and "mothers" must be informed by the race theory which is also crucial to this case. The woman anonymously known as DFG, in order to protect the identity of her previous children, is a 22-year-old aboriginal woman addicted to solvents and pregnant for the fourth time. The omission of DFG's aboriginal heritage white-washes and silences racial prejudices in this case. The trial judge at the Court of Queen's Bench refers to DFG's aboriginal heritage only once in his judgement, and there is no indication in the Court of

Appeal's judgement of DFG's aboriginal background. The one exception to the absence of race is the Supreme Court's Justice Major in his minority dissenting opinion.

While Justice Major recognizes that DFG's race should factor into the Supreme Court's deliberation, his tone is blameful of the aboriginal community. Justice Major equates solvent abuse with Fetal Alcohol Syndrome and Fetal Alcohol Effect, stating that these are "particularly an aboriginal problem" (88v). Statistics on the effects of solvent abuse were not available to Justice Major at the time of his opinion; however he cites what he believes to be similar statistics of Fetal Alcohol Syndrome and Fetal Alcohol Effect (FAS/E) which affect a greater proportion of aboriginal births than average provincial births. Justice Major asserts that on reserves, the FAS/E average has been estimated at 17 in 179 as opposed to the provincial average of 1 in 600 (88iv). These statistics operate to blame the aboriginal community for the tragedy of drug addiction and should be used instead to account for racial biases in Canadian society.

DFG has a long history of association with the Winnipeg Child and Family Services. She first became a client in 1990 when at the age of 16, addicted to solvents, she was pregnant with her first fetus (para. 68). DFG was placed in a residential youth treatment facility and continued to have regular visits from social workers for the following six years. In the absence of this history and her aboriginal background it is likely that this case would have never come to court.

Dorothy Roberts believes that women of colour are more likely to be reported to government authorities, "in part because of racist attitudes of health care professionals" (388). A study reported in the *New England Journal of Medicine* in 1989 demonstrated

the racial bias when reporting the use of drugs by pregnant women. The study found that:

Substance abuse by pregnant women did not correlate substantively with racial or economic categories.... Despite similar rates of substance abuse... [women of colour] were ten times more likely than whites to be reported to public health authorities for substance abuse during pregnancy. (qtd. in Roberts 388)

The prosecution of an addicted pregnant woman such as DFG diverts public attention away from the real causes for concern, issues such as poverty, racism, and biased health policies. The mothers of these addicted babies are then blamed and punished for reproducing social problems. Unfortunately the dominant culture has the privilege of washing its hands free of racial bias and poverty, which are much more complex and difficult issues to solve than simply putting a pregnant woman in detainment.

In order to be a good mother, the mother who follows doctors orders, the mother who would willingly sacrifice her life for the life of her baby, there must also be the alter-image of the bad mother. If good mothers follow the orders of the medical community, then bad mothers must be the willful women who do not seek prenatal help. Lisa Ikemoto believes that these imperatives are issued from the “Code of Perfect Pregnancy”, a code which is colour-coded, class-coded and culture-coded (479). Although this “Code” does not exist in the strictly legal sense, the ideologies of this code are apparent and legalized by the judicial system in the case of *DFG*.

No mention is made at any level of court as to DFG’s desire to be a mother and yet the continued distinction between “fetus” and “unborn child” suggests that the

distinction between “pregnant woman” and “mother” remains important. The differences between the Virgin Mary and DFG are greater than their similarities, which puts DFG at an immediate disadvantage in a white, patriarchal judicial system. Furthermore, DFG’s noble, benign and self-sacrificing nature as a “mother” stands in direct contrast to the fact that the Child and Family Services Agency has obtained guardianship of all three of her children, the second and third of which were apprehended at birth from the hospital (243).

Not once does the court permit the reader access into DFG’s own thoughts, or her feelings about her children being apprehended at birth. The ruling at the Court of Queen’s Bench provides only a one-sided sterilized version, devoid of emotional reality. DFG is supposedly a woman with no arguable attachments to her progeny and no thought or concern beyond her own personal selfishness. However, this is a convenient portrait of a woman who does not fit the dominant culture’s definition of “mother”. Lisa Ikemoto believes that:

Because racial stereotypes described [women of colour] as more like animals than rational beings, it was said that they would not feel the pain of these racially and economically forced separations as “normal” women would. They were considered “natally dead”. (Ikemoto 483)

Ikemoto is here discussing the effect of residential school separation on aboriginal mothers but her words apply in equal strength to the court’s contention that DFG had no thought or concern for the children which were apprehended from her.

The tensions between “fetus” and “unborn child” and between “pregnant woman” and “mother” become especially evident and important in the application of the law in the second chapter. These tensions are fundamental to the interpretation of each of the three legal principles that the courts deliberate. Unfortunately, the opposition between the socially partial and the legally impartial language compromises the reproductive rights of women which are ultimately upheld by both of the higher courts in *DFG*. The social and the legal terms become intertwined in the judiciary and begin to complicate the reproductive rights of women in Canada.

CHAPTER TWO

The Body of Law v. The Reproductive Rights of the Female Body

This chapter sets out the legal principles involved in *DFG* and the impact of these principles on women's reproductive rights. *DFG* appeared before Justice Schulman in Winnipeg on August 13, 1996, five months pregnant and addicted to solvents. She was charged with mental incompetence and the inability to care for herself under the *Mental Health Act* of Manitoba. Section 1 of this act defines "mental disorder" as:

a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgement, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life and except in Part I includes mental retardation.

(qtd. in *Dominion Law Reports* 245)

The Supreme Court of Canada ruled in 1989 that a fetus is not a person and has no legal rights in Canada. This ruling has the effect of binding all lower provincial courts including the Court of Queen's Bench in Manitoba where *DFG*'s trial was heard. Justice Schulman recognized that his court was bound to uphold the federal Supreme Court's legal precedent but believed that legal rights should accrue to "unborn children" when pregnant women intend to carry them to term. Essentially, Justice Schulman believed that the judiciary should have an interest in the health and protection of an "unborn child". Justice Schulman attempted to protect the fetus indirectly by declaring the pregnant woman mentally incompetent and involuntarily detaining her for medical treatment.

At the time of the trial, constitutional expert from the University of Manitoba Bryan Schwartz said “he was not surprised that Schulman shied away from the emotionally charged debate on fetal rights. If you’ve got three or four ways to make up your mind then it’s best to pick the one that is most likely to stand up to scrutiny” (Kuxhaus A3). Justice Schulman found DFG to be mentally incompetent to care for herself not by the authority of the psychiatric community, but in the opinion of the court. She was ordered into involuntary detainment and medical treatment for her addiction problems through the court’s *parens patriae* jurisdiction.

Parens patriae jurisdiction is Latin for “parent of the country” and comes from the tradition of the British common law where the king could act on behalf of the legally disabled, including infants (*Black’s Law Dictionary* 1114). At civil law, in the case of an adult, the establishment of mental incompetence is required to invoke the court’s *parens patriae* jurisdiction which can then order the involuntary confinement of a person found to be mentally incompetent. In retrospect, Justice Schulman chose the least likely legal option to stand up to further scrutiny on appeal. DFG’s lawyer, David Phillips, stated prior to the Appeal Court’s decision that “basically what it will come down to is: is she competent.... It doesn’t matter now if she’s pregnant or not” (Kuxhaus A3).

Justice Twaddle, at the Manitoba Court of Appeal, ruled that the lower court had inaccurately charged DFG with mental incompetence, from which the *parens patriae* jurisdiction was wrongly applied and the order for DFG’s detainment was set aside.⁸ The recognition of the fetal rights debate appeared for the first time at the Court of Appeal, even though anyone reading the Queen’s Bench judgement would have been able to

identify that the “unborn child” was code for “fetus” and that ultimately the court’s interest was in protecting the fetus and not the pregnant woman. When this case was finally appealed to the Supreme Court of Canada, the federal court upheld the Court of Appeal’s finding.

Mental (In)Competence

The application of the charge of mental incompetence under Manitoba’s *Mental Health Act* in the Court of Queen’s Bench was important for two reasons. First, it was fallacious to override the evaluation of the psychiatric community and declare DFG mentally incompetent. Secondly, it had the effect of punishing DFG for making poor reproductive choices. DFG may have shown signs of poor judgement; she was pregnant for the fourth time (her two previous children are wards of the state) and continued to battle solvent addiction. DFG also showed signs of physical disability, having difficulty walking and maintaining her balance. Medical examinations revealed that she suffered from cognitive impairment, likely resulting from her lengthy history of solvent abuse; however, two psychiatric doctors declared her mentally competent. DFG’s medical disabilities, her physical disabilities and her supposed reproductive incompetence are deemed to amount to mental incompetence for the purposes of the *Mental Health Act* in the Court of Queen’s Bench. Nowhere in the *Mental Health Act* do medical disabilities, physical disabilities or lack of reproductive competence amount to mental incompetence. Clearly, DFG’s mental incompetence was not at stake.

Finding mentally competent women guilty of reproductive incompetence was not a legal jurisdiction of the court and is evidence of gender and racial biases. Even though the Queen's Bench decision was overruled twice by two Appeal Courts, it is disturbing that such sexism and racism continues to occur in recent Canadian legal decisions. The charge of mental incompetence was a construct of the Court of Queen's Bench and is not evaluated any further by the two higher courts. However, an evaluation of reproductive competency is implicitly contained in the use of the term "mother" which the first chapter expressed as a recurrent problem at all three levels of the judiciary. A complex web of competency and incompetency begins to appear, not only in the evaluation of DFG, but in the evaluation of the medical community, the Child and Family Services and the Justices of both the low and high courts.

Justice Schulman falsely charged DFG with mental incompetence based on DFG's cognitive damage, physical disabilities and poor reproductive judgement in order that he could justify involuntarily detaining her until the birth of her child. Justice Schulman was determined to find DFG incompetent by whatever means were available to him. Control over women's reproductive ability has traditionally been a source of anxiety and power for the patriarchy. The National Film Board of Canada's documentary *The Burning Times* examines the witch hunts of Medieval Europe and suggests these hunts stem from women's control of their own reproductive abilities. Midwives in Medieval Europe were trained in both birth control and safe birthing practices. The model of reproduction used by midwives was based on a female model to serve the interests of women. This consolidated power among women proved to be problematic to

the newly developing patriarchal medical institution. Not only were midwives a challenge to the authority of male medicine, but midwives also denied these new doctors patients through birth control.

In order to rid the medical community of the substantial problem that midwives presented, midwifery became equated with witchcraft and midwives found guilty of witchcraft were burned alive at the stake. Reminiscent of the Inquisition, where women were burned alive for defining reproduction in their own terms, in the Court of Queen's Bench in Canada in 1996 a woman was involuntarily detained through any means necessary. Instead of being burned alive at the stake, DFG was burned alive in the media and was involuntarily detained and subjected to unwanted medical intervention. This unfortunately reiterates the continuing anxiety of patriarchal control of women's reproduction in recent Canadian legal decisions.

Mental incompetence can only be established through psychiatric evaluation, of which the Court of Queen's Bench had two. Both Dr. Etkin and Dr. Eleff examined DFG for the purposes of establishing her mental competence pursuant to the *Mental Health Act*. Though Dr. Etkin found a history of solvent abuse and questionable behaviour, he expressed the opinion that "there was no evidence that an acute psychiatric intervention was necessary at that time" (*DLR* 244). Dr. Eleff, the second psychiatrist, stated that "there are many reasons to be concerned about [DFG's] safety in the short term and long term, both relating to her lifestyle and her history of impulsive behaviour... [However he] expressed the view that he did not have grounds to detain Ms. G under the [*Mental Health Act*]" (245).

Justice Schulman dismissed the opinion of the psychiatric community, undermining their competency. Devoid of any context, Justice Schulman cites the list of medical conditions that DFG suffers from, including suicide attempts, self-mutilation, hanging, stabbing, cerebellar degeneration, pregnancy, chronic solvent abuse and mixed personality disorder. This list is presented as evidence of the psychiatrists' inability to apply a standard of mental competency. In spite of all these conditions, some italicized by Justice Schulman for effect, the psychiatric doctors maintained that DFG was mentally competent. What the psychiatric doctors succeeded in doing, where Justice Schulman failed, was in narrowly appraising DFG's mental competence *regardless* of her condition of pregnancy. Both the psychiatric community and the *Mental Health Act* find the condition of pregnancy irrelevant in determining mental competence.

In media coverage of the trial, Bryan Schwartz, suggesting that it was unusual for the court to go against expert medical opinions, supported the verdict writing that "a psychiatrist may know a lot about psychiatry but he is not an expert on how to apply a legal standard" (Kuxhaus A3). Popular opinion on the trial expressed similar sentiments. In the editorial page of the *Winnipeg Free Press* a supposedly "expert opinion" stated "beyond the legal and moral issues at stake, it is reassuring to know that medical experts do not have the last word on justice. On that question, many of them are not competent to decide" (A10). Judges are trained to apply the standard of law; doctors are trained to apply the standard of medicine. At no point in Canadian society are judges either trained or competent to apply the standard of medicine.

Attempting to corroborate the charge of mental incompetence, Justice Schulman cites evidence of physical disability. Justice Schulman notes in his judgement that DFG had poor motor co-ordination and had difficulty walking around the room without “clinging to desks, chairs and railings to keep her balance” (DLR 246). Dr. Hoeschen did not examine DFG but deposed at the time of trial that poor motor skill and lack of orientation can be evidence of advanced neurological damage caused by solvent abuse (241-242). DFG, however, claimed that blisters on the bottom of her feet prevented her from walking without aid (245). This medical concern was neither investigated by the examining doctors nor the judge. Physical disability at no point factors into the *Mental Health Act* and yet the trial judge was using it as evidence to promote his finding of mental incompetence. Sores on the bottom of DFG’s feet were a potentially real and treatable condition. However, as far as Justice Schulman was concerned, even if DFG’s feet had been examined, regardless of the veracity of her claims, he would have found her mentally incompetent. He states, “if Dr. Eleff placed any credence in Ms. G’s statement about why she is having trouble walking, I would discount his opinion on that ground alone, because the evidence is very clear that her brain damage is causing her to lose her balance” (246). The final disability DFG is being charged with at the Court of Queen’s Bench is reproductive incompetency.

Evidence was heard at trial that friends of DFG had found her in the streets “unable to go to the washroom” (241). Justice Schulman cited evidence of DFG prostituting herself for the purposes of buying solvents (243). The image of a woman unable to control her bodily functions, and furthermore prostituting herself for drugs is

the antithesis of the image of a competent reproducer. No mention of the father of DFG's child was made at trial, and the only mention of a sexual relationship was the evidence given of "Ms. G prostituting on Main Street" (243). The reader can easily conclude that the fetus DFG was carrying was the result of prostitution. Lisa Ikemoto states:

Social mores cast prostitutes as "fallen," weak women who in betraying the norms had placed social order in jeopardy. Prostitutes contributed to social disorder in a variety of ways, including supposedly spreading syphilis. Because prostitutes were presumed to be both morally and intellectually inferior, and because both types of inferiority were believed hereditary, prostitutes tainted the race by having substandard children. (482)

If the current fetus could be the result of the promiscuous and morally questionable activity of prostitution, then it was also possible that DFG's three previous children were as well. Justice Schulman's makes no mention of either DFG's partner, William, or the fact that the paternity of DFG's fetus was not in question, rendering the malicious referral to prostitution deliberately misleading in establishing reproductive incompetence.⁹

While Justice Schulman deliberated on everything from mental and physical disability to reproductive incompetence, he was never able to charge DFG accurately with mental incompetence for the purposes of committing her involuntarily to detainment and medical treatment. Justice Schulman furthermore challenged the psychiatric community's competency in their medical evaluations. Unfortunately, Justice Schulman did not address the competency of the Child and Family Services; this was an important omission.

DFG reportedly sought help for her addictions on previous occasions, and the government agency refused her access to their facilities, either on the basis of bed shortages and/or on the basis of her intoxication. Dorothy Roberts states that “pregnancy may be a time when women are most motivated to seek treatment for drug addiction and to make positive lifestyle changes” (393). Instead of the law profiting from DFG’s own interest in overcoming her addictive habits, the judicial system in the lower court of Canada blamed DFG for her addiction problem and punished her by ordering her detention. The court essentially made light of DFG’s addictions by not taking her own health concerns seriously.

At the Court of Queen’s Bench, the St. Norbert foundation stated they were “willing to take DFG into [their] programme immediately” (*DLR* 241), which was contradictory to DFG having been denied admittance in the past. Furthermore, Justice Major at the Supreme Court of Canada remarked that “the [social] worker’s effort [to bring DFG in for treatment] were made unsuccessful because when she arrived [DFG] was obviously intoxicated, smelled strongly of solvent and refused to attend the treatment program” (*SCR* para. 77). Sheilah Martin, professor at the University of Calgary’s Faculty of Law and intervenor to the Supreme Court of Canada for the Women’s Legal Education and Action Fund (L.E.A.F) in this case, believes that the blame should be shifted onto the social worker. Martin reasons that DFG had enough involvement with the drug withdrawal program to understand that she would not be admitted to the treatment program under the influence of solvents. When the social worker arrived unannounced and found DFG intoxicated, DFG had the wherewithal to realize that she

was intoxicated and would be denied admittance as a result, hence she refused to leave with the social worker.

To further complicate the competency of the Child and Family Services, experts in the field of drug addiction and withdrawal testified at trial that persons with a long history of substance abuse require a rehabilitation of a year or longer (241). Justice Schulman in deliberating the remedy for this case observes that “the *Mental Health Act* remains in effect until the person who is the subject of the order recovers from his or her disability.... [However] counsel for the Agency asked for a time limited-order” (251). The time-limited order requested by the Agency was the detainment of DFG for three-and-a-half months or until the birth of her child. This order, requested by the Child and Family Services and granted by the Court of Queen’s Bench, represented only a quarter of the time necessary for DFG to recover from her addictive behaviour.

Unfortunately this is the state of support for vulnerable pregnant women in Canada. Lisa C. Ikemoto believes:

The stories say little or nothing about the lack of access to prenatal care for poor women, or the dearth of addiction treatment for pregnant women, or the high miscarriage rate among imprisoned women, or the very conservative nature of the male-dominated mainstream obstetrical practice, or the religious and cultural integrity of women whose medical decisions differ from the doctor’s, or the physical and emotional impact of pregnancy on women who feel their powerlessness. (479)

Justice Schulman understood that an order made for DFG's rehabilitation would require up to a year, and was within his power to provide. However his interest in the well being of DFG, and the interest of the Child and Family Services, ended when she gave birth.

Justice Schulman's own competency as an impartial Justice was reviewed by two higher courts; both courts found that he had acted erroneously. Justice Twaddle at the Court of Appeal rejected the lower court's decision stating:

The findings of mental disorder and incompetence are suspect from the start. The agency's 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. (*DLR* 256)

The Court of Appeal and the Supreme Court of Canada did not address the charge of mental incompetence beyond asserting that it was premised on flawed legal reasoning. However, the debate of reproductive competency continues to assert itself in the higher levels of the judiciary.

The dissenting opinion of Justice Major draws attention to DFG's past, asserting that "at 16 years of age and pregnant with her first child" DFG was herself considered "a child in need of protection" (*SCR* para. 68). Justice Major notes that DFG had three subsequent children, the second and third of which "displayed signs of global developmental delay, a birth defect found in children exposed in utero to solvents." (para. 74). Justice Major directly criticizes DFG's reproductive competence using the signs of abnormal children as the tool in establishing DFG's reproductive incompetence. At no point in his dissenting opinion does Justice Major address the potential effect of faulty

sperm on the outcome of healthy children. DFG stands alone charged with reproductive incompetence, a charge which has no basis in law in Canada. While reproductive competency is directly addressed by the dissenting opinion of the federal Supreme Court, the evaluation of reproductive competence is implicitly contained in the two higher courts use of the term “mother”.

Though the charge of mental incompetence is not addressed by the majority opinion of the Supreme Court of Canada, except where it is agreed that it was fallaciously applied by the Court of Queen’s Bench, an evaluation of DFG’s reproductive competence is implicit in the majority court’s decision in the use of the term “mother”. The term “mother” not only implies the intentions of the Virgin Mary, but it also implies a level of competency expected from the “pregnant woman”. Conflating the terms of “pregnant woman” and “mother” implies that all pregnant women intend to be mothers, and that all mothers have the competency of the Virgin Mary (to bear the patriarchy). Furthermore, the term “mother,” as it participates within the dominant culture, assumes both a moral imperative and a eugenic space. Good mothers are those women who reproduce children who will participate and contribute to the genetics of the dominant culture as opposed to detracting from it with mental disabilities resulting from solvent abuse. A eugenic theory of reproduction does not value multifarious bodies on a continuum from disability to ability.

The term “mother” contrasts DFG as pregnant solvent addict with the social ideal of “mother”. Regardless of the higher court’s denial of mental incompetence, pregnant solvent addict and “mother” are in direct opposition with each other, and the relevance of

reproductive competency continues to assert itself. DFG becomes the hysterical¹⁰ madwoman in the attic of an “other” world.¹¹ On the one hand, the socially-biased term “mother” constructs DFG as the racial other who has proved herself to be unfit to contribute to the dominant culture and should be confined. On the other hand, the term “mother” has not expanded to include the vulnerable women that DFG represents. Instead, the term “mother” consolidates the dominant culture’s definition of a good “mother” and accepts that some deviations from the norm must be allowed in order to protect the rate of reproduction of women within the dominant culture. The result is that DFG is confined within the term “mother”, not because her value as a human being with agency has been accepted, but because the dominant culture’s eugenic vocabulary lacks the ability to express a diversity of reproductive options.

The confinement of DFG for two days, and her ultimate confinement within the term “mother” is perceived as required in order to hide the untreatable condition of a poor aboriginal woman who is addicted to solvents and is pregnant for the fourth time. Locking these women in isolation both physically and rhetorically is what drives them mad, and it is no remedy for a larger social problem. The original charge of mental incompetence by the lower court, and DFG’s appropriation within the term “mother” masks the very real concern of the historical and contemporary racial discrimination of aboriginal communities by the dominant Canadian culture.¹² Charging DFG with mental incompetence and appropriating her within the definition of the dominant culture’s term “mother” absolves Canadian society of a much larger responsibility to the aboriginal communities.

Parens Patriae

Once the mental incompetence of an adult person has been established, the Court of Queen's Bench can then activate its *parens patriae* jurisdiction. This protective parental jurisdiction comes from the Latin for "parent of the country" and only comes into effect with legal persons. The importance of the *parens patriae* jurisdiction is the evolution of this legal concept from the original supposed protection of DFG in the lower court to the protection of her fetus in both higher courts. Furthermore, the legal principle of *parens patriae* has developed out of a patriarchal legal tradition. Unfortunately, this tradition of gender bias is modernized by the courts through the reiteration of gender biased legal doctrines and through gender biased language.

Justice Schulman at the Court of Queen's Bench realized that a fetus is not recognized as a legal person in Canada, and *parens patriae* jurisdiction cannot apply in its protection. However, since the trial court finds DFG to be mentally incompetent, "*parens patriae* jurisdiction can be engaged to protect an adult person who is 'incompetent' to care for his or herself" (*DLR* 247). Originally, the court's parental jurisdiction was enacted to protect DFG from herself. In an attempt to recognize the controversial terrain in which he had found himself, Justice Schulman asserts, "I am not aware of any previous case in Canada in which a court has made an order which has the effect of requiring an adult who has cognitive and cerebellar damage to enter a residential treatment programme to address his or her addiction problem" (250). Nor would Justice

Schulman have enacted the court's *parens patriae* jurisdiction on behalf of DFG were she not pregnant.

The Court of Appeal concluded there was no basis for mental incompetence and hence no appropriate use of *parens patriae* jurisdiction. Justice Twaddle for the Court of Appeal states, "I am unaware... of any case in which the Public Trustee has been appointed solely for the coercive purpose of requiring an incapacitated person to enter a treatment facility or submit to unwanted medical treatment" (256). Justice Twaddle notes that *parens patriae* jurisdiction can only be used in a finding of mental incompetence "and then only for the purposes of benefiting the patient" (258). The Court of Appeal recognizes that the only "patient" likely to benefit from detainment would be the fetus – and this is unacceptable under Canadian law.

The Court of Appeal goes one step further than the Court of Queen's Bench in addressing fetal rights. Justice Schulman avoids addressing the impact to women's equality rights from extending *parens patriae* protection to the fetus. The Court of Appeal, on the other hand, recognizes that an adversarial conflict develops between the "pregnant woman" and the "fetus" once *parens patriae* jurisdiction comes into question. The court expressed concern over the hypothetical scenario where it was appointed to safeguard the life of a fetus; "taking it to the extreme were the court to be faced with saving the [foetus'] life or the life of the mother's, it would surely have to protect the [foetus']" (qtd. in 259).¹³ This quotation is again repeated by the Supreme Court of Canada in the majority opinion, expressing both higher courts' concerns about turning the fetal debate into a maternal-fetal adversarial conflict. Once fetal rights are determined to

conflict with women's rights, the judiciary is put in the awkward and undesirable position of evaluating competing interests. Ultimately, hypothesizing the outcome of such an evaluation, the court fears that it would be forced to protect the fetus over protecting the woman. The Manitoba Court of Appeal unanimously concurred that a "foetus is not a person" (259), upholding the legal precedent of Canada. The Appeal Court also concluded that the issue of extending *parens patriae* jurisdiction to the fetus would be best left to the legislature.

The majority opinion of the Supreme Court of Canada upheld the Court of Appeal decision, reiterating that the *parens patriae* jurisdiction of the court had nothing to do with the protection of DFG and should not be extended to include the protection of the fetus in this case. Justice McLachlin of the Supreme Court emphasizes that "in Canada, all courts which have considered the issue, save for the trial judge in this case, ... have rejected the proposition that *parens patriae* jurisdiction of the court extends to unborn children" (SCR para. 51). While the Supreme Court closed the door on fetal rights in this case, it maintained an open window on the potential future *parens patriae* protection of the fetus, either through the legislature or a future legal case.

The patriarchal tradition of *parens patriae* jurisdiction cannot be overlooked in exploring the impact of this protective jurisdiction on the reproductive rights of women in Canada. The *parens patriae* jurisdiction which the court refers to is defined in terms of the male child. The Manitoba Court of Appeal draws on the *Declaration of the Rights of the Child* adopted by the United Nations in 1959 and ratified by Canada. This declaration asserts "the child, by reason of his physical and mental immaturity, needs special

safeguards and care, including legal protection before as well as after birth” (262). While this declaration, agreed to by the Canadian legislature and reiterated by the Appeal Court, appears to support the idea of protective jurisdiction, the Court of Appeal ruled that *parens patriae* jurisdiction could not be extended to the “unborn”. Regardless, the obvious gender bias written into the declaration is male. Furthermore, *The Dictionary of Canadian Law* corroborates the protection of the male gender in the precedent of *parens patriae*’s application in Canada, stating:

No one would... suggest that the power ever extended to the disruption of that [family unit] by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. (862-863)

Parens patriae jurisdiction is based on the tradition of patriarchal power which becomes obvious in the singular gendered references made throughout *parens patriae*’s legal tradition. The king, the original claimant to the power of the “parent of the country,” acted on behalf of male citizens in order to secure their protection, which is not to say that female citizens were not also covered by the universal gender of male. However, this “coverture” is itself problematic.

William Blackstone, an important eighteenth-century justice, summarized the essence of the wife’s position at English common law as follows:

By Marriage the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing,

protection, and cover she performs everything: and is therefore called in our law... a femme-covert... or under the protection and influence of her husband, baron, or lord; and her condition during her marriage is called her coverture. (qtd. in Manchester 368)

The law imagined the husband and wife functioning as one being, an idealized united person. The truth is that the suspension of a woman's "being" and "legal existence" through "coverture" led to her legal invisibility and ultimate silence. The idealistic term a "mothering wing" which Blackstone refers to not only infantilizes a woman's condition but also smothers her identity. With no visible identity and no voice, women of the Eighteenth century were hard pressed to claim individual rights at law. Unfortunately, the person they were most likely in need of protection from was the (s)mothering wing of their husbands.¹⁴ This same antiquated legal principle of "coverture" continues to affect Canadian law.

The gender biased source of *parens patriae* jurisdiction implies that the masculine covers the feminine. This is complicated for two reasons. First, the implication that the masculine origins of *parens patriae* jurisdiction covers the female is similar to the antiquated legal construction of the femme-covert of the eighteenth-century. However, when women's genders are covered by men's genders there exists a trans-gendered tension at law. Sex is biologically determined, while gender is socially determined. The gender of the male implies social superiority, privilege and recognition. The gender of the female on the other hand implies social inferiority, subordination and invisibility. It is precisely this social inferiority, subordination and invisibility which is covered (-up) by

the universal gender male. Women in essence become comically trans-gendered as a result of this gender privileged legal construction. Not only are women denied access to the superiority of the male gender which is meant to be representative, but women are also equated with a male superiority that does not recognize their own experience of social inferiority.¹⁵

The Justices of the three levels of the judiciary in *DFG*, when referring to the fetus or child, addresses that fetus or child as “it”, or in the privileged ordering of “his or her”. It is the convention of the court to place “his” first and “her” second without interchanging the two pronouns. This hierarchical and unchanging gender construction is where the law’s application to women is called into question. Lucinda Finley believes that “the gendered nature of legal language is what makes it powerful and limited” (176). Women covered by the supposedly universal gender of the male continue to be oppressed and silent. This silence facilitates the dominant language of the oppressor and it is for this reason that the presumed universality of the gendered nature of law should be viewed as fundamentally limited. The same male privilege of “his or her” is not only evidence of superiority, in the absence of gender, “it” carries with it the dominant default gender of male: in law male is the norm while female is the deviation from the norm.

Justice McLachlin draws attention to the gender exclusivity and “coverture” of female judges in Canada when she states, “it would be intolerable to place a judge in the position of having to make such a decision without any guidance as to the principles on which his decision should be based” (para. 53). Justice McLachlin begins in this instance with the gender neutral reference to “a judge” and ultimately expresses the state of gender

privilege and patriarchy in Canada's legal system, ending her statement with "his decision". Justice McLachlin here draws attention to the fact that Justices in Canada are male Justices unless expressly stated otherwise.

Unfortunately, women's lack of equal representation in the judiciary means that women in policy making positions are not able to exercise enough influence over these various and multiple forms of gender biased language. The Supreme Court of Canada is composed of nine Justices, only two of whom are women. It is the male Justices who are the chief adjudicators deliberating the reproductive rights of women in Canada; the male body of the law covers the female reproductive body in law.

Female policy makers' influence is integral in overcoming the many forms of inequality faced by women in society. Women's involvement in the upper levels of government, representing women's issues on a national, international, and global basis is integral to the advancement of women's rights and the dissolution of inequities. In an ambitious study involving 22 nations over a 35-year time period, Valerie O' Regan researched women's involvement in the political spheres of industrialized nations and the relationship between female policymakers and policy outcome. O' Regan's research shows a positive correlation between the increased presence of female policymakers and the promotion of policies of special interest to women (1).

Integral to her research is the fact that there is such a thing as an identifiable woman's interest that is separate from a man's interest. Secondly, women are not only better able to represent women's interests, but also play a crucial role in the preliminary identification of these interests. In 1982, Prime Minister Trudeau appointed the first

female justice to the Supreme Court of Canada only after considerable lobbying from the National Action Committee on the Status of Women. This committee lobbied for a female justice “acceptable to our purposes” and received Justice Bertha Wilson for their efforts (Morton 78). When she retired, Prime Minister Jean Chretien replaced her with a male Justice. The appointment of Justice Bertha Wilson to the Supreme Court of Canada was a step forward for women. Justice Bertha Wilson’s replacement with a man who is neither well suited to identifying women’s interests, nor better able to represent women’s interests is a regression of equality for women in Canada. This regression is not only a the regression in judicial equality for women, but also represents a regression in substantive social equality for women in Canada.

Parens patriae jurisdiction as it applies to the reproductive debate in *DFG* is the protection of the fetus at the expense of the pregnant woman. The deliberation of the court’s *parens patriae* jurisdiction and the benefits and disadvantages of extending this protective jurisdiction to the fetus comprise a great deal of the court’s time in all three levels of the judiciary. Regardless of the outcome of *DFG*, the majority male bench of the Supreme Court of Canada maintains that *parens patriae* jurisdiction falls within their legal powers, and it is their responsibility to deliberate on its application, thereby denying women the agency to define reproduction in their own terms.

Fetal imagery has also been responsible for defining the terms of reproduction for women. In the absence of fetal imagery and ultrasound, the maternal-fetal conflict which comes into question with *parens patriae* jurisdiction in the reproductive debate is non-existent. Unfortunately, the Canadian legal system is an adversarial system and lacks the

vocabulary to express the reproductive debates in any language other than the language of conflict. The oppositions between “fetus” and “unborn child” and “pregnant woman” and “mother” culminate in the ultimate opposition between “abortion” and “pronatalism” which owe their inception to the advent of fetal imagery.

Pronatalism is an ideology that encourages population growth through reproduction and privileges children, whether born or unborn, over the pregnant woman. At its extreme, pronatalism becomes almost indistinguishable from an antiabortionist ideology. A key element in pronatalist thought is:

the age-old idea that women’s role must involve maternity, that woman’s destiny and fulfillment are closely wedded to the *natal*, or birth, experience. At its extreme, such thinking results in a view of woman as essentially a reproducing machine. One physician, in fact, has publicly suggested that woman be thought of as “a uterus surrounded by a supporting organism and a directing personality”.

(*Pronatalism* 1-2)

Unfortunately, this biased pronatalist view of a “woman as a uterus surrounded by a supporting organism” gives a better idea of the female body’s involvement in reproduction than the view provided in fetal imagery where the woman does not exist.

The question, “at what point does a fetus become an unborn child?” is paralleled by the similar questions “at what point does a pregnant woman become a mother?” and “where does the right to abortion end and pronatalism begin?” Pronatalism is the antithesis of abortion and abortion is the antithesis of fetal rights. All of these tensions occur under *parens patriae* jurisdiction in *DFG* because of fetal imagery.

Pronatalist ideologies parallel antiabortionist ideologies and are evident in the Court of Queen's Bench's application of the *parens patriae* jurisdiction which aimed to protect the fetus under the guise of poorly protecting DFG. This first court sets the stage for the tension between the "unborn child," "mother" and pronatalism. These same tensions progress through each level of the judiciary adding to their force the "fetus," the "pregnant woman," and "abortion". Unfortunately, the term "fetus" does not compliment the abortion debate in the same way that the "unborn child" compliments the pronatalist debate. The term "fetus" is more appropriately used in terms of the antiabortionist debate which leaves the pregnant woman in the middle, her reproductive rights compromised not only by pronatalism but further complicated by antiabortionist tactics which obscure women's legal right to abortion in Canada. While all of these tensions are displayed in each level of the judiciary, the Supreme Court of Canada's is the longest judgement of the three and provides the best opportunity to see these tensions in operation.

At the Supreme Court of Canada both the majority opinion and the dissenting opinion express pronatalist/antiabortionist values. Justice McLachlin for the majority states, "the proposed changes to the law have complex ramifications impossible for the Court to fully assess, giving rise to the danger that the proposed order might impede the goal of healthy infants more than it would promote it" (*SCR* para. 20). The court here expresses the benefit of prenatal care for pregnant women and hypothesizes the risk to both the fetus and a pronatalist society if women were to avoid prenatal care. Justice McLachlin's statement also expresses the anxiety that women of privilege might avoid

prenatal care for fear of either drug detection or lifestyle prevention resulting in a decrease of infants healthy or otherwise.

Justice McLachlin also addresses the Court's concern of the risk of abortion rights superceding pronatalism when she writes, "changing the law of torts as advocated by the [Child and Family Services] might persuade women who would otherwise choose to continue their pregnancies to undergo an abortion" (para. 40).¹⁶ Women of privilege, comprehending the full implications of a change in the law, would either have an abortion, thereby impeding "the goal of healthy infants" or could potentially refuse to procreate until the law became amenable.

Justice McLachlin believes that "if it could be predicted with some certainty that... extending tort liability to the lifestyle choices of pregnant women would in fact diminish the problem of injured infants, the change might nevertheless be arguably justified. But the evidence before this Court fails to establish this" (para. 43). With this statement, not only are fetal rights left open to future debate, but Justice McLachlin also draws attention to the inherent tension between pronatalism and abortion under *parens patriae* jurisdiction. Even stronger pronatalist ideologies assert themselves in the dissenting opinion of Justice Major.

Contrary to the majority opinion, Justice Major in his dissenting opinion advocates the expansion of the court's *parens patriae* jurisdiction in order to protect the fetus and detain the pregnant woman. Justice Major agrees with the order made by Justice Schulman and believes that he "was within the court's inherent jurisdiction in wardship matters" (para. 97). Justice Major is of the opinion that "the *parens patriae*

jurisdiction of the superior courts is of undefined and undefinable breadth” and should be used in *DFG* to promote a pronatalist agenda (para. 91).

Justice Major asserts that the court’s parental jurisdiction turns on the antiquated legal principle of the “born alive” rule which states:

a foetus acquires no actionable rights in our law until it is born alive. In my view, the “born alive” rule, as it is known, is a common law evidentiary presumption rooted in rudimentary medical knowledge that has long since been overtaken by modern science and should be set aside for the purposes of this appeal. (para. 92)

The modern medical progress which has antiquated the legal term “born alive” for Justice Major is “the use of ultrasound and other advanced techniques, [where] the sex and health of a fetus can be determined and monitored from a short time after conception” (para. 67). Justice Major has here privileged the sex of the fetus over health in the same way that “his or her” resides in privileged relation one to the other, and has also confused the relational existence of the fetus with the reproductive rights of women.

As expressed earlier, the issue should not be whether the fetus is living or not living; everything inside a living woman’s body is living. Instead, Justice Major is arguing for fetal autonomy, failing to recognize the relational existence of the fetus to the pregnant woman. This argument for fetal autonomy and the extension of the court’s *parens patriae* jurisdiction relies on fetal imagery. Justice Major does not take into account that ultrasounds and other advanced (invasive) medical techniques have been single-handedly responsible for removing the body of the woman from the body of both the social and legal debate.

Ultrasounds have lent false independence to fetuses, and are the instigators of false identities to which the Supreme Court of Canada now has reference. Rosalind Petchesky believes that the drop in reproduction rates which corresponds to the end of the baby boom generation propelled “obstetrician-gynecologists into new areas of discovery and fortune, a new ‘patient population’ to look at and treat” (272). Ultrasound, developed for military submarine warfare, was introduced into obstetrics in the 1960s providing the new “patient population” of the “fetus”. Fetal imagery is neither benign nor objective. The effects of fetal imagery on women are drastic and will be discussed presently; however, the supposed objectivity of a highly constructed photograph must be accounted for in the debate of the presumed autonomy of the fetus.

Petchesky believes that “fetal imagery epitomizes the distortion inherent in all photographic images: their tendency to slice up reality into tiny bits wrenched out of real space and time” (268). Photographs appear to capture reality, yet, “the fetus... could not possibly experience itself as if dangling in space, without a woman’s uterus and body and bloodstream to support it (Petchesky 269).¹⁷ Such images blur the line between the “fetus” and the (unborn) “child”. Not only is the female body non-existent, but the “fetus” also becomes an independent gendered identity. Petchesky believes that:

“the fetal form” itself has, within the larger culture, acquired a symbolic import that condenses within it a series of losses – from sexual innocence to compliant woman to American imperial might. It is not the image of a baby at all, but of a tiny man, a homunculus. (268)

The fetal form has morphed into both baby and tiny man in the same way that the “fetus” through the inconsistent language of the judiciary has, through rhetorical birth, become a child.

The “patienthood” which the medical profession has conferred on the fetus has lent credence to fetal autonomy and “personhood” (271). Furthermore, the judiciary’s treatment of the fetus as separate from the body of the pregnant woman also complicates the fallacy of fetal autonomy. Justice McLachlin in her majority opinion in *DFG* draws attention to the inherent dilemma of deliberating the rights of the fetus as separate from the rights of the pregnant woman. She believes that “the relationship between a woman and her fetus (assuming for the purposes of argument that they can be treated as separate legal entities) is sufficiently close that in the reasonable contemplation of the woman, carelessness on her part might cause damage to the fetus” (para. 36). Regrettably, Justice McLachlin’s statement becomes a self-fulfilling prophecy. When the “fetus” becomes an entity for the sake of argument, a public identity is forged. The identity of the fetus is created out of subjective photography from which developed the language to define it. The imaginary origin of the “fetus” is responsible for the very real increased harms to pregnant women which Justice Major does not recognize in his dissenting opinion.

Petchesky contends that there is growing controversy over the potentially adverse effects of ultrasounds on both pregnant women and fetuses (273). One verifiably adverse effect of ultrasounds and fetal monitors is “the threefold rise in the cesarean section rate in the last fifteen years” (274). These invasive medical techniques serve the economic interest of the (patriarchal) medical institution, coercing women into expensive and risky

open uterine surgeries.¹⁸ Naomi Wolf's research indicates that "if the 50% of unnecessary C-sections were avoided hospitals would lose \$1.1 billion in revenue a year" (178).¹⁹ The invasive and supposedly advanced medical surgery of cesarean sections result in complications which are "five to ten times those of vaginal births, and C-sections are also two to four times more likely to be fatal to the mother" (Wolf 176).²⁰ The increased harms that women face both during and after such open body surgeries is not taken into account by Justice Major.

Justice Major is arguing for the assault of women's bodies in medicine through cesarean sections when he argues that "I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person" (*SCR* para. 100). He implies that the fetus as an alleged person should have recourse to any surgical operation necessary, invasive or otherwise, in order to protect the health of a (male) fetus. Justice Major attempts to qualify his previous statement with the statement that "the mother remains free to reject all suggested medical treatment [while detained]" (para. 125). Clearly, he has not come to terms with the maternal-fetal conflict he is perpetuating by extending *parens patriae* jurisdiction to the fetus. Justice Major is operating under the false pretense that a pregnant woman detained on the premise of his dissenting opinion would have any recourse against medical interventions which could potentially save her "unborn child".

Unfortunately, cesarean sections are only one kind of assault against pregnant women that Justice Major envisions. He further adds, "in any event, this [detainment] is always subject to the mother's right to end [the pregnancy] by deciding to have an

abortion” (para. 93). If the pregnant woman refuses to be detained, abortion no longer operates as a right, but rather as an imperative. Giving women the choice between detainment or abortion is similar to providing them the choice between imprisonment or rape; either way, the pregnant woman loses.

Determined to be an acceptable loss, Justice Major believes it is the Court’s responsibility to “protect a person who cannot protect himself” (para. 100).

Unfortunately, Justice Major believes that the (male) fetus should be protected from the pregnant woman, regardless of the harms to her involved in the surgery necessary to impose this protection. Prior to this trial in the Supreme Court of Canada, DFG gave birth to a son. Although the dissenting Justice’s referral to the singular gender in this statement can be made in good conscience, it continues to be gender biased in legal posterity.

Parens patriae jurisdiction expresses the traditional anxiety over women defining reproduction in their own terms, and displays the “ancient masculine impulse ‘to confine and limit and curb the creativity and potentially polluting power of female procreation’” (Petchesky 278). The influence of pronatalism and antiabortion sentiment in *DFG* attempts to limit reproduction and is another instance in which society impacts the impartiality of the judiciary.

The *parens patriae* jurisdiction intended for the protection of DFG’s fetus is complicated by the history of neglect and abuse of Canadian aboriginal children in residential schools. The harms experienced by these children in Canada’s recent past casts doubt on the sincerity of the judiciary’s professed concern and protection of DFG’s

fetus. The protection of DFG's progeny should not occur in the Child and Family Services. In order for *parens patriae* jurisdiction to be truly protective, the Court of Queen's Bench should have recognized that in order to protect and treat the fetus the pregnant woman must also be protected and treated. This protection and treatment does not amount to three and a half months in medical detention; rather, effective protection and treatment involves the amelioration of the status of women in Canada, the eradication of poverty in Canada, and necessarily involves education reforms that recognize and value diversity in cultural education.

As a result of this case, *parens patriae* jurisdiction protects a patriarchal hold on the reproductive rights of women in Canada, especially those women who participate within the dominant culture. The higher courts had to rule against extending *parens patriae* jurisdiction to the fetus in order to protect women from reproductive coercion. However, in doing so the court accepts that vulnerable women in Canadian society will slip through the cracks. It is likely that a minority of fetuses will continue to be harmed as a result of this ruling, and the unfortunate effect is that the dominant culture is now exonerated from protecting vulnerable women through the implementation of broad social changes. These social changes are still necessary in order to reduce the number of both pregnant women and fetuses harmed by a complex web of addiction and social deprivation.

The injustice of *parens patriae* jurisdiction in *DFG* is not that a fetus can be born to a drug addicted woman, but rather that a drug addicted woman can be completely overlooked and the harms she has suffered dismissed. The multiple harms that DFG has

experienced as a poor aboriginal woman do not factor into the *parens patriae* protection of the court, and she is the most deserving of that idealistic protection. Just as fetal imagery obfuscates the body of the pregnant woman from the reproductive debate, so this case has obfuscated the body of DFG. At the Supreme Court of Canada, DFG and her specific individual concerns are no longer the focus of the debate; rather, DFG becomes the generic body of the dominant culture representing the dominant culture's democratic interests.

The Remedy of Detainment

There is no right without a remedy. Rights are meaningless without remedies to reinforce them. The remedy for the Child and Family Services at the Court of Queen's Bench is the punitive detention of DFG until the birth of her fetus. DFG was ordered into treatment by the Court of Queen's Bench on August 6, 1996. Her case was immediately appealed to the Manitoba Court of Appeal where the remedy of detention was stayed on August 8, 1996 pending the court's decision, and was ultimately set aside on September 12, 1996. DFG was free to leave the hospital after two days in detainment but stayed voluntarily until the worst of her withdrawal symptoms had subsided and checked out on August 14, 1996 (Paul A4). By the time DFG's case was heard on the final appeal to the Supreme Court of Canada, the order for her detention could no longer be made as she had given birth to and was raising an apparently healthy son, solvent free. Child and Family Services, however, was looking to the Supreme Court for validation that they could act to detain addicted pregnant women in the future. The Supreme Court ruled that no such

validation would be forthcoming, ruling against the detention of pregnant addicted women. The only two Justices to enforce the remedy of detention were Justice Schulman in the Court of Queen's Bench and Justice Major in his dissenting opinion at the Supreme Court of Canada.

Although Justice Schulman's ruling was set aside in short order and although Justice Major's dissenting opinion has no legal force or effect in the present case, the proposed remedy for any pregnant woman remains unchallenged. Similar cases have arisen in the United States where cocaine addicted mothers are charged with a criminal offense and incarcerated (Roberts 384). Though DFG was not criminalized for her solvent abuse – she was brought to court under civil law as opposed to criminal law – the remedy of detention carries with it similar weight as the American remedy of incarceration.

Dorothy Roberts believes that “the government may choose either to help women have healthy pregnancies or to punish women for their prenatal conduct” (384). Unfortunately, women are not simply punished for their prenatal conduct, they are made examples of by the judiciary. For instance, in the United States, women convicted of abusing their fetus by using drugs “receive harsher sentences than do drug-addicted men and women who are not pregnant” (392). Clearly, punishing women for their poor reproductive choices establishes the law of reproductive incompetence. Roberts believes that incarcerating pregnant women and providing health support, similar to the remedy made by the Court of Queen's Bench, are ultimately irreconcilable responses to the problem of drug addicted pregnant woman.

Both detainment and/or incarceration, combined with health support, deter prenatal care and blind “the public to the possibility of nonpunitive solutions and to the inadequacy of the nonpunitive solutions that are currently available” (Roberts 384). The nonpunitive support DFG received from Child and Family Services was poorly timed and ultimately ineffectual. The punitive “support” which was ordered by the Court of Queen’s Bench did not allow for the rehabilitation of DFG, only for the hypothetical protection of the fetus, and it “exposes the way in which the prosecutions deny poor [women of colour] a facet of their humanity by punishing their reproductive choices” (385). Roberts points to the “high miscarriage rate among imprisoned women” (479), which questions the supposedly positive effect of detention. Similarly, Naomi Wolf writes that women who feel threatened by their surroundings suffer increased stress during pregnancy and “arrested delivery” (162).

Justice McLachlin believes that the potential remedy for the detention of the pregnant woman would most adversely affect “those in lower socio-economic groups [such as] minority women, illiterate women and women of limited education,” all of whom have a higher risk of falling “afoul” of the law (*SCR* para. 40). Furthermore, Justice McLachlin acknowledges the “slippery slope” argument of holding women liable for lifestyle decisions such as “immoderate exercise,” “sexual intercourse,” even “using a general anesthetic or drugs to induce rapid labour during delivery” (para. 39). All of these choices, including the list of currently fetal damaging activities such as smoking and imbibing alcohol, become open to legal challenge for the coercive purpose of compelling pregnant women into detainment.

The majority of the Supreme Court admits that the detainment of pregnant women may at one point in the future be justifiable, which leaves the fetal rights debate open to further deliberation (para. 43). Whereas the majority of the Supreme Court hypothesizes the future of fetal rights, the dissenters argue the justification of immediate detention. Justice Major states, “when confinement 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). Justice McLachlin challenges the order for detention as remedied by the Court of Queen’s Bench, upbraiding the lower court Justice for his “unprecedented” behaviour and lack of understanding for the complex ramifications his order would effect (para. 46). By extension, this upbraiding also applies to the dissenting opinion of the Supreme Court of Canada.

Justice McLachlin, however, falls short of criticizing the detention as an appropriate remedy, leaving that remedy available for the future. The Supreme Court has established that solvent abuse in the case of pregnant women is not sufficient for a charge of mental incompetence pursuant to the *Mental Health Act*, and cannot be used to justify involuntary confinement. There remains, however, one final lawful involuntary confinement option. This option exists in criminal law where those found guilty are incarcerated for their crimes and has been used in the prosecution of crack addicted pregnant women in the United States.²¹ Unfortunately, the remedy of detention continues to exist as a legal possibility in Canada.

The problem with the remedy of detainment is not only its punitive nature, although the impact of that alone is enough to question its usefulness, but also that detainment has a specific history in relation to women in general and aboriginal women in particular. The isolation of women in the private sphere, through domestication and motherhood, perpetuates social inequalities and a variety of abuses. The isolation of aboriginal women is all the more distressing, witnessed in their detention away from their community and heritage in the residential schools of Canada's very recent past.

In his verdict at the Court of Queen's Bench, Justice Schulman orders DFG into a "residential treatment programme", a programme which has a "strong cultural content for aboriginal persons" (*DLR* 241). The other residential programmes which had a strong dominant cultural content for aboriginal persons were the residential schools, which forced young children away from the cultural influence of their parents, especially their mothers (Ikemoto 483). Residential schools for aboriginal children were considered to be "places of safety". Away from their parents and the influence of their community, children could be "safely" educated in the language of the dominant culture, and the dominant culture could be "safely" rid of the challenge of opposing ethnic backgrounds.

In these residential schools, which were only "places of safety" for the dominant culture, children were both physically, sexually and mentally abused. The term "a place of safety" is the same term used by the judiciary at all three levels in order to describe and refer to DFG's proposed involuntary detention in the Chemical Withdrawal Unit of the hospital. This term is not only patronizing and subversive, it also fails to address the impact of this punitive remedy and fails to account for the potential abuse of public

sphere power in the private sphere. The proposed detainment of the pregnant body in this case has the same effect as the residential schools. Isolating a pregnant aboriginal woman away from the public and imposing unwanted medical treatment on her is as equally abusive as that which took place in residential schools.

The history of separation of the private and public spheres is informed by many different sources. Lisa Ikemoto believes that the private sphere was deemed responsible for the transmission of social mores. Women were deemed best suited to that task and hence isolated in that sphere (480). Science also had a hand in proclaiming women as both intellectually and physically inferior to men, an inferiority which was better suited to the inactive realm of the private sphere as opposed to the challenging realm of the public sphere. Private sphere detainment was premised, among other things, on both frailty and reproductive ability, attributes which were supposedly inseparable.

Colette Dowling traces the roots of the myth of both mental and physical frailty to early medical communities that feared women would become reproductively sterile through physical exertion.²² Dowling states “women could not be allowed to follow their own pursuits – physical or mental – because every ounce of energy they could generate was needed for maintaining their reproductive processes” (4). The cult of Invalidism, as Dowling calls it, claimed the motor ability of thousands of women and the rest cure prescribed by doctors required women’s confinement and immobility at the cost of their sanity and vitality.

Betty Friedan believes that the private sphere developed into a lucrative economy in the early to mid 1900s. World War II required women to leave the private sphere in

order to support the public sphere war effort. Once the men returned from the war, women were compelled out of the work force and back into the homes. However, in order to contain the liberating effect of women having been recently involved in the public sphere, the private sphere became “liberating” through domesticity and coercive advertising strategies (Friedan 207). The coercive economy perpetuating the private sphere has also been linked to beauty ideals.

Like Betty Friedan, Naomi Wolf believes the impact of the first World War on the independence of women was profound. Where Betty Friedan argues that subversive domestic economies evolved to take the place of women’s newfound independence in the war effort, Wolf believes that domesticity was replaced by subversive beauty ideals where mental isolationary techniques developed in order to take the place of pure physical isolation in the home. The challenge of maintaining beauty together with feminine ideals rose in order to detain women’s minds and bodies and cosmetic industries became devoted to robbing from women their newfound incomes.²³

Written in 1990, *The Beauty Myth* by Naomi Wolf challenges the stereotypical passivity of the private sphere, citing statistics from the Humphrey Institute of Public Affairs which states that “women represent 50 percent of the world population, they perform nearly two-thirds of all working hours, receive one-tenth of the world income and own less than 1 percent of world property” (23). The dependency of the dominant culture on the cheap or voluntary labour of women in the private sphere including child care and house care is such that:

the economies of industrialized countries would collapse if women didn't do the work they do for free: According to Marilyn Waring, throughout the West it generates between 25 and 40 percent of the gross national product. (Wolf 23)

The detention of women away from the public sphere is an important economic resource. The detention of women as economic resources makes the involuntary detention of DFG in a medical treatment facility all the more appropriate and all the less questionable in light of the historical background and significance of the private sphere. The isolation of women in the private sphere may not originally have been economically driven; however coercive economies soon developed to keep women in their place. There are many concerns expressed in DFG to justify the detainment of a pregnant woman against her will; unfortunately economic concerns are among the most prevalent.

There is a tremendous amount of concern expressed regarding the exponential cost of raising severely brain damaged children. In Manitoba, the estimated amount of births from alcohol addicted mothers is approximately 40 babies per year, with a projected amount of \$1 million dollars needed to support each child born with severe brain damage over the course of her or his lifetime (Cole B2). There is a further debt owing to society in the event that the child turns to socially reprehensible crimes such as prostitution and/or crime.

In his dissenting opinion at the Supreme Court, Justice Major highlights this social concern of children born to addicted mothers. Justice Major does not have any statistics to resort to for babies born to solvent abusers, so he relies on the statistics which exist for Fetal Alcohol Syndrome which assert that "it is estimated world wide, 2 of every

1,000 babies born are affected by FAS” with the “highest incidence being among First Nations children, where as many as 20% may be affected” (*SCR* para. 88ii). Justice Major further adds that Fetal Alcohol Syndrome children “have special problems anticipating the consequences of their actions.... Their personalities often lead them into situations where they are exploited sexually” (para. 88i). The lack of statistics to support the effects of solvent abuse on the fetus is indication that the abuser population is small enough as to not warrant a lengthy and expensive research study. Furthermore, glue sniffing is the addiction of the poor who cannot afford the drugs which are legitimized through government taxes, such as alcohol or tobacco.

There are many forms of detrimental addiction which lead to serious physical and mental disabilities. One such legalized form of addiction is tobacco. The physical dependency on tobacco and smoking leads to many forms of cancer, including gum and lung cancer. Emphysema and a host of other respiratory problems also result from a history of tobacco abuse. The physical dependency on tobacco leads to mental disabilities, such as cognitive impairment during withdrawal and the inability to concentrate.

The percentage of the population in Manitoba in 1998/1999 who smoke daily is 21% or 893,577 persons (Statistics Canada Percentage). 21% of the population engaging in highly detrimental health activities represents a greater economic burden on the health care system than the small percentage of babies born per year with severe brain damage (40 babies per year are born to alcohol addicted women; however not all of those babies are born with severe brain damage). Furthermore, the extended social effect of 21% of

the population smoking is an incalculable social burden. Smokers have an exponential capacity to harm others around them, especially the families residing in the same home as the smoker, with second hand smoke. This second hand smoke will adversely affect a large proportion of humanity, and yet such indulgent and addicted persons are neither ordered into treatment programmes on the basis of their financial strain on the health care system, nor on the extenuating circumstances of causing irreparable harm to others. Instead, strides are taken to reform people prior to engaging in dangerous smoking behaviour. Restrictions on the media and in advertising attempt to influence current smokers and deter new smokers. Education is used as a tool to effect a different outcome with tobacco abusers, and financial sanctions are placed on tobacco in the form of tax.

Tobacco abusers are not being charged with mental incompetence and forced into treatment for their harmful and irrational behaviour. However, the detainment of DFG is implemented by the Court of Queen's Bench and approved by the dissenters at the Supreme Court of Canada. No consideration is given to the prospect of long term medical help or the larger social influences which have an impact on the addictive behaviour of solvent abuse. Justice Schulman recognizes that at no point in the history of the Canadian judiciary has an adult person been involuntarily confined in order to address her or his addiction problems (*DLR 250*). However, in this case Justice Schulman orders DFG into medical treatment to the applause of the dissenters in the Supreme Court of Canada. The argument that she will cause irreparable economic damage to herself and to society is ludicrous in relation to the economic impact of legalized addictions such as tobacco.

The remedy of detainment is complicated for one final reason. DFG was unlawfully detained for two days. Neither the Court of Appeal nor the Supreme Court of Canada make any motions to recognize this fact, or to remedy the false detainment for DFG in the form of compensation. The fact that the unlawful detainment was allowed to stand provides greater force to that remedy, and legitimizes its use in the event of any future fetal rights.

CONCLUSION

Human Reproduction Rights v. Women's Equality Rights

The oppositions which I have established in this thesis continue to assert themselves in the final opposition of human reproduction rights versus women's equality rights. I have argued that DFG became the generic body of the dominant culture, representing the interests of a majority of Canadian women. While this representation of the majority is necessary, the individual and/or minority should not be subsumed. The broad social changes which are required to liberate DFG and other similarly situated women, so as not to be subsumed by the dominant culture, fades into theory. The human reproduction rights which DFG acted as a catalyst for, overwhelmed her individual equality rights. While justice was served to a majority of Canadian women, and while DFG will not be the target of coercive reproductive laws, her own individual equality rights are left unspoken, and unremedied.

The impact of the language of the "unborn child" as opposed to the "fetus" on DFG's human reproduction rights confuses women's reproductive rights. The judiciary assumes the rhetoric of the antiabortionist, constructing a sense of separation of the "unborn child" from the pregnant woman. The socially partial term "unborn child" has an emotive effect which further complicates women's reproductive rights as they participate within human reproduction rights in Canada.

Similarly, the rhetoric of the "mother" makes it more difficult for DFG to claim reproduction rights for herself, regardless of her past, and furthermore complicates her

own value as an individual. Not all women are mothers. Assuming that they are imposes a restrictive homogeneity on all women and holds them to the dominant culture's standard of reproduction. Human reproduction rights assume a homogeneous characteristic through the language of the "mother," denying individual women diversity. Where the oppositions between "unborn child", "fetus", "pregnant woman" and "mother" begin to effect women's individual equality rights are where these terms collide with the rhetoric of the law.

DFG's mental incompetence is not established by the judiciary, but her reproductive competence stands in for her absence of mental incompetence. Accusing DFG of incompetency, whether mental or otherwise, is not a legitimate function of the court. Similarly, the deliberation of DFG's reproductive competency, implicitly contained in her deviation from the dominant cultural norm of "mother," is not a legitimate function of the court. The false accusations of mental incompetence deprive DFG of her own humanity.

The *parens patriae* jurisdiction, which is deliberated to the protection of her fetus, excludes DFG from protection and benefit. While the higher courts ruled that this parental protection cannot be extended to the fetus, fetal imagery has fundamentally changed the reproductive debate into a maternal-fetal conflict which may at some point in the future deny women's reproductive rights, and by extension limit their own equality rights.²⁴

The final legal principle, the remedy of detainment, is the ultimate detraction of the pregnant woman from the legal debate over her body. The fact that DFG was

detained for two days in order to benefit her fetus, and the fact that detainment remains the legal remedy for a conflict of interest between a pregnant woman and a fetus, together with the fact that DFG was not herself remedied for unlawful confinement are indications of a fundamental flaw in the law. While DFG was brought to court under civil law, understanding that her legal rights guaranteed by section seven of the *Charter of Rights and Freedoms* has been infringed upon is an important issue.

Section seven of the Charter guarantees everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” (qtd. in Manfredi 219). DFG was deprived of both her liberty and security of her person, which was not in accordance with any principles of fundamental justice. Justice Schulman in the Court of Queen’s Bench arrived at the remedy of detainment through the erroneous charge of mental incompetence and the misapplication of the court’s *parens patriae* jurisdiction. As a result, DFG was detained unlawfully, which is a fundamental injustice.

A further injustice to women is not recognizing the deliniation between their human reproduction rights and their individual equality rights. While DFG’s human reproduction rights were deliberated by each level of the judiciary, neither the Court of Appeal nor the Supreme Court of Canada recognized that DFG’s individual equality rights, her rights to liberty and security of her person, were denied. Human reproduction rights have been secured for the majority of Canadian women as a result of *DFG*, and yet the equality rights of DFG herself were taken advantage of and not remedied by the judiciary.

Human reproduction rights necessarily involve women's reproductive rights but should not be the sum of women's equality rights. While women's equality rights necessarily involve reproduction rights (in a way which men's equality rights do not), they should not be limited to reproduction rights. DFG and all other Canadian women's reproductive rights were upheld by the Supreme Court of Canada. DFG's equality rights, however, are made invisible as a result of the reproductive debate. This is important for two reasons: first it imposes a non-existent homogeneity on women which denies them equality rights; secondly it renders the male contribution in reproduction invisible, which also has the effect of denying women equality rights.

The majority of women's equality rights cases in Canada are cases involving reproductive rights. In the case of women's rights in equality of employment in Canada, *Brooks v. Canada Safeway LTD.* [1989] addressed the company's disability plan which excluded pregnant women from coverage for a 17-week period (Bickenbach 121).²⁵ Similarly, the reproductive debate meets women's equality rights in tax legislation in the case of *Thibaudeau v. Canada* [1995]. In this case, a divorced wife refused to include her alimony payments for child support in her income tax reports because this tax reduces the amount of money divorced wives receive to sustain their children. Men, on the other hand, are allowed to deduct their child support payments from their income tax.²⁶

Furthermore, women's equality rights in lifestyle decisions intersect with human reproduction rights in *DFG*. When a woman can be detained as a result of her solvent abuse, this opens the floodgates for women being charged and/or detained on the premise of their alcohol abuse, smoking abuse, their participation in sexual intercourse and

perhaps even their employment in a hazardous waste company prior to conception, which could eventually effect the health of the fetus. Women are greater than the sum of their reproductive parts, and yet when women's equality rights in Canada are bound to their reproductive rights in law, women are reduced to their wombs. In the hypothetical case of the woman employed in the hazardous waste company, her equality right to employment becomes subsumed by her reasonable apprehension of becoming pregnant because she is a woman.

Women's diversity in such areas as sexual orientation or intent to reproduce are subsumed by the belief that women's rights are reproductive rights and any woman who deviates from reproduction is a deviation from the norm.²⁷ Not all women reproduce, and yet Canada's equality rights for women are, by and large, reproductive rights – which perpetuates the ideology that all women are pregnant women, and that all pregnant women are mothers.

It is essential for the judiciary not only to understand the impact of socially partial rhetoric on women's reproductive rights, but also to understand the separation between human reproduction rights and the right to equality. DFG's right to reproduction becomes more important than her right to legal equality not to be detained unjustly. DFG is recognized as a reproducer with human reproduction rights, but not as a woman with equality rights. Without the separation between human reproduction rights and women's equality rights not only are women reduced to their wombs, they are also disproportionately targeted by reproduction rights and blamed for a pregnancy gone wrong.

DFG stood alone before three levels of the judiciary, the catalyst of a reproductive debate for which she was only partly responsible. The judiciary not once mentions DFG's partner, William. The only potential male contribution to DFG's pregnancy is made by the Queen's Bench in reference to DFG's presumed prostitution. This invisibility of the male contribution to DFG's condition of pregnancy is where Peggy Phelan draws attention to the fact that the invisibility of paternity is a position of power. Phelan begins by referring to the Freudian definition of paternity, which is "an hypothesis based on an inference and a premise" (qtd. in 138). Phelan then asserts:

Since maternity is visible and... paternity is an hypothesis based on an inference and a premise, the authority of the patriarchy depends on a hierarchical relationship between the visible and the invisible, with the invisible (paternity and an invisible God) being the ascendant term in the pair.... Law's abstractions, until recently, have proven to be patriarchy's best friend in the establishment and maintenance of this superiority. (139)

With the current technological ability to prove paternity, the invisibility which both paternity and patriarchy depend on to maintain their power, begin to crumble. Phelan argues that "by making paternity visible civilization robs it of its complicity with the law. The new visibility of paternity feminizes it and submits it to the decisions and mediations of the law" (139). Rendering the male contribution to reproduction visible removes women as the sole focus in the reproductive debate, restoring their rights to both human reproduction and equality. Male visibility and the restoration of women's rights are

especially necessary given the broader social and environmental implications of reproduction.

Global population statistics continue to show the planet as swelling beyond reasonably sustainable means. While developing nations' reproduction rates continue to grow, it is the industrialized nations' reproduction rates which are more detrimental to the future of the planet. The impact of population growth on society is already being experienced in places around the world, such as in China with its one-child-per-family laws. When women's equality rights are tied to their reproduction rights, women become disproportionately affected by population containment legislation. Reproduction rights are human reproduction rights, which equally involve both men and women. The impact of reproduction on women is only greater because the male contribution is made miniscule, and while men remain invisible, women will bear the brunt of the harm, which entails increased harm to their equality rights.

David Suzuki explains that the impact of the rate of consumption of industrialized nations and the overall impact of industrialized nations in general far exceed the detriment of population growth in less developed nations (20).²⁸ However, experts in the field of population growth believe that:

zero population growth globally must be achieved within the next generation's lifetime. Such a rapid and massive reduction in fertility rates cannot be accomplished by simply distributing contraceptives. There must be a broad strategy for raising the quality of human life, the key to which is in improving the social and economic status of women. (21)

Suzuki notes that the current worldwide average of children per female is 3.3 (19). He believes that if this average cannot be brought within the sustainable limits of less than 2 children per female, the exponential population growth of the planet will put an inestimable burden on the life support of the environment (19).

Given the harm of population growth, it would be inappropriate to encourage women to reproduce three and four children, as in the case of DFG. Limiting population growth, however, does not mean limiting the reproduction of poor, women of colour who may or may not be addicted to solvents. Dorothy Roberts states:

Despite federal and state regulations intended to prevent involuntary sterilization, physicians and other health care providers continue to urge women of colour to consent to sterilization because they view these women's family sizes as excessive and believe these women are incapable of effectively using other methods of birth control. (391)

It is disturbing to know that had the remedy for DFG's detainment been upheld, not only could she have been subjected to any invasive medical procedures necessary to protect the fetus, but she may have also been encouraged by the physician to be sterilized. Only DFG herself knows if this took place. Once again the intersection of women's equality rights and women's reproductive rights become confused and inseparable, where a desperate distinction is necessary to ensure and prevent harms to both women's equality rights and women's reproductive rights. Furthermore, curbing population growth cannot act eugenically and does not mean that legislation should target women. In order to effectively address the problem of population growth, not only must the social and

economic position of women be improved by means of their equality rights, but men must also be implicated in the birth control education of human reproduction rights.

Implicit in the judicial argument at the Court of Queen's Bench of whether DFG should be allowed to reproduce four children with varying degrees of disability is the argument of whether DFG should be allowed to reproduce four children at all. When women are viewed as the only problem in reproduction, not only are their equality rights taken for granted, but the male contribution to human reproduction is overlooked. The reproduction rate in the Western world must be considered in terms of environmental impact of the life support systems of the planet. However, in order to properly address the environmental impact of reproducing four children, the male contribution to reproduction must be made visible.

Motherhood is the primary cause of women living below the low-income line in Canada. Women continue to make up the large majority of lone parents in Canada and in 1997 "56% of lone-parent families headed by women had incomes below the low income cut-off"(Statistics Canada Women).²⁹ Statistics Canada for the year 2000 shows a decrease in reproduction rates for women; unfortunately, this does not seem to correlate with women's improved economic equality. According to Statistics Canada "in 1997, there were just 44 births for every 1,000 women in Canada aged 15-49, less than half the figure in 1959, when there were 116 births per 1,000 women in this age range" (Statistics Canada Women). Yet "the majority of employed women continue to work in occupations in which women have traditionally been concentrated.... [and continue] to make up a disproportionate share of the population in Canada with low incomes"

(Statistics Canada Women). Unfortunately, while women are producing fewer children, this has not had an impact on their access to higher paying jobs, or a better quality of life.

I believe that Canadian women are better off today than in our mothers' time; however, the journey to equality is still centuries away, at least in employment. Susan Estrich in her book *Sex & Power* addresses employment equity stating, "it will be another 270 years before women achieve parity as top managers in corporations and 500 years before we achieve equality in Congress. Why in the world would we want to go at that rate?" (28). Employment equity and women's reproductive rights are joined to such a degree as to prevent any women from a diversity of backgrounds and aspirations to be considered as anything other than future mothers. While women will not be discriminated against for their motherhood choices, women with no such intentions will be discriminated against by not pursuing motherhood as a vocation.

I believe the judiciary had the opportunity to alter the quality of DFG's individual life, if not by implementing broad social changes themselves, then at least in reference to them. DFG's integrity as an individual woman with both human reproduction rights and equality rights was overlooked by the judiciary. DFG was considered on the basis of her reproductive ability alone and not on the basis of her importance as an individual woman with equality rights. The rights of Canadian women, some mothers and some not, are all persons about whom society should be emotional. Unfortunately, the emotive language used by the judiciary neither serves women's interests, nor benefits their rights in Canada.

Endnotes

¹ Until 1969 it was a criminal offense to advertise and sell contraceptives in Canada. See Criminal Code, S.C. 1953-54, c.51, section 156(2)(c).

² The Canadian right to abortion was legalized 15 years after the case of *Roe v. Wade*, 410 U.S. 113 (1973) which recognized the right to abortion in the United States.

³ The reason behind this assertion is the constitutional entrenchment of the *Charter of Rights and Freedoms* in 1982. At this point in Canadian history Canada became a Constitutional supremacy, as opposed to the former Parliamentary supremacy. As a Constitutional supremacy, the Canadian system of government was fundamentally altered and the power of the judiciary was broadened. The Supreme Court of Canada became the ultimate arbiter of equality rights in Canada with section 33 of the Charter, the “notwithstanding clause”, enacted to prevent a judicial oligarchy and maintain the pretense of an elected Parliamentary supremacy. There is a continuing debate on the fundamental value of a Constitutional supremacy where an appointed judiciary is given the power of social reform and an elected and supposedly representational parliamentary government is not. There are important issues on each side. On the one hand, the judiciary is appointed to be an impartial body free of the political concerns of re-election. On the other hand, because parliament is elected by Canadian citizens, it may be better able to represent the interests of the electorate regardless of parliament’s short four year terms in power. *DFG* is not a Charter case, but rather a civil law suit. For further

discussion see Christopher P. Manfredi *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993).

⁴The long form of this case is referred to in italics as *DFG*. However, DFG is also the proper anonymous name of the woman whom I will be referring to throughout this thesis, and will appear unitalicized when I am discussing her directly.

⁵*Parens patriae* comes from the latin meaning “parent of the country” which will be discussed in more detail in Chapter Two.

⁶To further complicate the issue of potential fetal rights, the law in Canada does recognize limited fetal rights in respect of third parties, a right which does not accrue until the fetus is “born alive”. See *Montreal Tramways Co. v. Leveille* [1993] S.C.R. 456.

⁷The Supreme Court of Canada ruled in *Tremblay v. Daigle* [1989] 2 S.C.R. 530 that a fetus is not a person and has no legal rights in Canada; this is considered legal precedent. Legal precedent is considered to be sound reasoning until otherwise disproved by a subsequent case.

⁸After the Queen’s Bench ruling was delivered, DFG was immediately ordered into treatment. Once DFG’s lawyer filed for an appeal, he also filed a “stay” on the lower court’s order for detainment until the verdict of the Manitoba Court of Appeal was delivered. This process took two days, during which time DFG was involuntarily detained for medical treatment.

⁹The media state that William initially supported Child and Family Services’ order for DFG’s detention and treatment. After the Queen’s Bench trial however,

William believed DFG no longer needed treatment, saying to reporters that DFG “doesn’t want to sniff.... She’s through with that” (Paul A4). While evidence suggests that William may not have been active in the initial trial, he tried and was denied intervenor status at the appellate court level. William’s lawyer stated to the press, “the Court of Appeal ordinarily doesn’t let people intervene when they haven’t been involved with the proceedings up until then” (Canadian Press A2).

¹⁰ The etymology of hysteria comes from “a functional disturbance of the nervous system ... attended with... enfeeblement or perversion of the moral and intellectual faculties” and was originally thought “to be due to a disturbance of the uterus and its functions” (Oxford English Dictionary). The trial judge in asserting DFG’s mental incompetence, is invoking the tradition of the word “hysteria”.

¹¹ Bertha Rochester is a fictional character from Charlotte Bronte’s novel *Jane Eyre*. She is the mad wife of Edward Rochester who is secretly isolated in the attic at Thornfield Hall. When “the mad woman in the attic” racial bias is rewritten by Jean Rhys in her work of fiction *Wide Sargasso Sea*, Bertha (now Antoinette Cosway)’s alienation in a foreign country and her isolation in the attic drive her to hysteria and eventually lead her to commit suicide.

¹² The evidence for racial discrimination is in part supported by the extraordinarily high rates of suicide in aboriginal communities. Statistics Canada’s suicide rate per 100,000 persons is 148.9 for both sexes in the Quebec region of Nunavik. This rate is

close to four times the rate of suicide in any other region in Quebec (Statistics Canada Suicide).

¹³ The court at this point is arguing the hypothetical protection of fetal rights; however, as I have argued previously, the court unnecessarily confuses baby (in this instance) with fetus stating, “it would mean for example, that the mother would be unable to leave the jurisdiction without the court’s consent. The court being charged to protect the foetus’ welfare would surely have to order the mother to stop smoking, imbibing alcohol and indeed any activity which could be hazardous to the child. Taking it to the extreme were the court to be faced with saving the baby’s life or the mother’s, it would surely have to protect the baby’s” (*Dominion Law Reports* 259).

¹⁴ This antiquated legal precedent persisted in Canada through the marital rape-shield laws. The law of Canada did not recognize the rape of wives by their husbands because traditionally both husband and wife were considered to be one person, and a husband could not rape himself. The marital rape-shield law was finally repealed in 1982. For further discussion see Sheilah Martin, “The Control of Women through Gender-Biased Laws on Human Reproduction,” *Feminist Legal Theory*, ed. Richard S. Devlin (Toronto: Edmond Montgomery, 1991) 40.

¹⁵ This same problem arises with the standard of the “reasonable man” at law. A reasonable man in a fight meets force with like force. However, the “reasonable man” standard is fundamentally flawed when applied to women. Not only can the “reasonable man” standard not apply to women for obvious gender reasons, women, especially in

domestic abuse situations, have a different apprehension of force and the force necessary to deflect force. The law attempts to establish equality with the equal application of the “standard of the reasonable man” to both men and women, failing to recognize the inherent flaw in doing so.

¹⁶ A “tort” is a civil wrong as opposed to a “crime” which is a criminal wrong. Tort liability is the liability of a civil wrong, whereas criminal liability is the liability for a criminal wrong.

¹⁷Rosalind Petchesky notes that the French word for the lens of a camera is “l’objectif” (269).

¹⁸ Naomi Wolf believes that “a bedrock truth of fetal monitors is that if the monitor says the baby is fine, the baby is almost certainly fine, but if the monitor says the baby is not fine – that is, that she has nonreassuring heart rate patterns – the baby is also probably fine” (156). Wolf further adds, “[fetal monitors] are proven effective in one particular way: they do reliably promote an increased rate of C-sections (which are coincidentally more convenient for doctors and hospitals than are long, slow, vaginal births)” (157).

¹⁹The medical community also promotes the use of the “bikini cut” in reference to C-sections and what is more accurately called open uterine surgery. The “bikini cut” crosses the abdomen as opposed to the original lengthwise incision. Referring to such open body surgery in quaint and body conscious vocabulary has the same reductive effect as the term “female circumcision” as opposed to the reality of the issue of “female genital

mutilation”. Women are more likely to realize complications and death after undergoing open uterine surgery than they would with a vaginal birth. The term “bikini cut” masks the real harms to women of increasing C-Section rates in North America. (Perhaps after having a bikini cut C-Section, women will finally and miraculously fit the ideal bikini body form?)

²⁰If the C-section rate were cut back by only 5% in the United States it “would wipe out \$175 million a year in personal income for obstetricians alone, for whom the C-section boom means shorter hours and increased pay. Interestingly, C-section rates spike upward just before weekends and holidays – which suggests that doctors unconsciously interpret a given medical situation in a way that is more likely to get them to the gym on Saturday, or home in time for Thanksgiving” (Wolf 178).

²¹See Dorothy Roberts, “Punishing Drug Addicts Who Have Babies: Women of Colour, Equality, and the Right to Privacy,” *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Pellor, Kendall Thomas (NY: Penguin, 1995) 384, 406, for a list of cases in the United States.

²²There is no evidence that the female body is more susceptible to harm than the male body. Medical research, in fact, has now discovered that “sperm count was lowered in men following long-distance racing,” suggesting that men’s reproductive ability and not women’s should be the focus of the frailty debate (Dowling 215).

²³See Naomi Wolf, *The Beauty Myth* (Toronto: Vintage Canada, 1990) for her research on the impact of beauty ideals on women’s equality rights.

²⁴ Shulamith Firestone was a radical voice of feminism in the 1970s. In *The Dialectic of Sex* she argued that women were oppressed by the biological function of reproduction, and could only be free of reproductive tyranny in the form of medical technology. Medical technology was meant to remove the oppressive site of reproduction from women, freed from their biology, women would then be in a position to realize their own equality. Unfortunately, the medical institution, as Firestone imagined it, is not the institution to liberate women from their inequality, as was seen in the argument of the impact of fetal imagery on women's reproductive rights.

²⁵The Supreme Court of Canada ruled that Safeway's disability plan was discrimination on the basis of sex, and contrary to anti-discrimination provisions of the provincial Human Rights Code.

²⁶The majority of the Supreme Court of Canada found that including alimony for child support in income tax reports does not infringe on women's equality rights as guaranteed under the *Charter of Rights and Freedoms*. Interestingly, the two dissenting justices are the two Madame Justices on the bench, Justice McLachlin and Justice L'Heureux-Dubé.

²⁷ The case of *Suite v. Cooke* [1995] involves a failed tubal ligation. The doctor cut a vein instead of the left ovarian tube and failed to warn the appellant of her ability to reproduce. Ms. Suite discovered she was pregnant with her fourth child. Justice Chamberland at the Court of Appeal in Quebec qualifies his judgement with the following statement: "Take the example of three women: the first one, who is a law

student, living alone and looking after herself, does not want a child before finishing her degree; the second one, who is just married to a colleague in the business world, does not want a child before completing a two-year trip around the world; the third one, recently laid off and married to a seasonal worker, does not want a fifth child for financial reasons. It is probable that the measure of damages will be different in each of these three cases” (qtd in. Langevin 74). In the case of the last woman who has fulfilled her reproductive/biological destiny, the harms of childbirth and economic burden potentially outweigh the benefit of the child. The other women have not yet succumbed to a restrictive reproductive coercion and have not yet realized the reproductive imperatives compelling/threatening them. The failure to adequately compensate women for unwanted pregnancy is evidence of antiquated patriarchal ideologies of women’s worth. Ms. Suite asked for damages in the amount of \$226, 294.00 (Langevin 68). The Ministry of Agriculture of Manitoba estimates the amount to raise a child to the age of majority at \$150,000.00 (73), and Justice Chamberland awards Ms. Suite \$46, 500.00 which represents the exact value of motherhood to the Canadian judiciary (69).

²⁸ Only within the last 30 years has the government of Canada quit issuing “baby bonus” cheques to Canadian families. Canada’s recent history was a struggle to populate enough of this country in order to prevent the United States from moving in on our territory. Our per capita population is one of the lowest in the world but our aggregate impact on the environment is catastrophic; “Canadians have the ecological impact of up to ...3 Billion Somalians” (Suzuki 20).

²⁹Virginia Woolf in the late 1920s identified that in order for women to write, they must be in possession of two things: money and a room of their own. Woolf comments on the reproductive fecundity of women's bodies and the non-existent network of women's intellectual support writing, "for [women] to endow a college would necessitate the suppression of families all together. Making a fortune and bearing thirteen children – no human being could stand it" (22). Reproduction necessarily complicates women's ability to acquire money and education, both of which are required in order for women to overcome the inequality between the sexes.

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